

**086 – OFFSHORE NORGE
RECOMMENDED GUIDELINES
FOR
ASSESSMENT OF
CONFLICT OF INTEREST -
COMMITTEE REPRESENTATIVES**

1. Background and issues

In relation to some types of enterprises Offshore Norge functions as an approval body on the basis of criteria stipulated by Offshore Norge. The approval arrangements also function as authorization arrangements in order to deliver specific goods or services or to perform specific tasks.

Representatives in the approving bodies may experience conflicts of interest in connection with exercising approval powers. One example is that they may have interests in or other affiliation with enterprises seeking approval, or in enterprises that compete with enterprises seeking approval. Another example is that an approval may have significance for Offshore Norge' member companies, companies the representatives in the approval bodies may be employed by.

On this basis Associate Professor, *dr.juris* Olav Kolstad of the Department of Private Law, University of Oslo, was asked to make an assessment of the rules of law that apply and should apply to company representatives who participate in approval bodies within Offshore Norge who become involved in conflicts of interest when exercising approval powers. A proposal for such guidelines was considered by the Resource Group for Legal Framework Conditions' meeting on 18 September 2003 and approved by Offshore Norge' board on 2 October 2003.

2. The legal starting point

The relevant approval bodies derive their powers from governing bodies in Offshore Norge. The approval activities can be characterized as an internal control the members have entrusted to Offshore Norge for implementation. Offshore Norge' internal control can in several areas, particularly in the areas of health, safety and the environment, be seen in the context of the public law control of the oil activities laid down in statutes and regulations. Offshore Norge has nevertheless not been granted powers, neither in statutes nor regulations, to exercise any form of public law tasks, which could lead to administrative law rules on conflict of interest being significant for performance of the relevant tasks. As the approval powers have been conferred on Offshore Norge by the member companies, conflicts of interest as described above must be resolved on the basis of the rules on impartiality that apply to members of boards and committees within Offshore Norge.

No rules on conflict of interest regarding representatives in decision-making bodies have been adopted within Offshore Norge, neither in the form of by-laws or guidelines prepared on the basis of the assignment of powers in the by-laws. Nor is there any permanent and generally accepted practice in Offshore Norge' governing bodies that can provide guidelines concerning the assessment of potential conflict of interest regarding members or

representatives. The organization's norm basis must then be supplemented by general principles on conflict of interest in the area of association law. Association law concerns those rules of law that apply to various types of associations and special-interest organizations, and are virtually in all essentials non-statutory. Association law principles are unwritten and generally accepted guidelines that may be significant for resolving association law issues.

It is assumed in theory that certain basic impartiality rules for board members must be incorporated in association matters, and which state a minimum requirement for impartiality (see Woxholt: "Foreningsrett" (Association Law) (1999) page 267. The non-statutory principles state stipulate restrictions in powers that apply to the governing bodies' decision-making authority in associations and organizations. The same principles will initially apply to all bodies within Offshore Norge with decision-making powers, so that for example the same principles for conflict of interest regarding resolutions in the branch boards will apply to resolutions in the various approval bodies. As conflict of interest rules for the individual bodies in Offshore Norge must be derived from the general rules or guidelines for conflict of interest that apply within the organization, the assessment of the rules on conflict of interest will be more wide-ranging so as to cover all boards and committees with decision-making powers within Offshore Norge. To the extent there are special circumstances applicable to the approval bodies in Offshore Norge, this will be specified.

If one is to specify the rules governing powers that will apply within Offshore Norge, one must accordingly seek guidance in general association law principles. Given the lack of case law regarding conflict of interest in association law, one can find guidance in the general conflict of interest principle that applies to partnership and company law, which is based on many of the basic principles for association law and, together with this, creates the legal area of society law. The general conflict of interest principle in partnership and company law is stated in Section 6-27 of the (Norwegian) Private Limited Companies Act, the same provision is Section 6-27 of the (Norwegian) Public Limited Companies Act and Section 2-17 of the (Norwegian) Partnership Act. The provisions have a general wording and are well suited for analog application within association law to an industry organization such as Offshore Norge.

3. Circumstances that may lead to conflict of interest

In accordance with the rules of partnership and company law, conflict of interest may occur when an issue is of "particular importance" for a board member or "someone close" to him/her, which leads one "having to assume that the member has a prominent personal or financial special interest in the case". Persons close to someone are primarily persons the representative has a close relationship with, for example spouse, children, mother or father. Close financial relations may also lead to body corporates being considered as parties close to a person. This will be the case if a representative owns more than 50% of a company/partnership. In such a case there will be such a close connection between the

company's/partnership's financial position and the representative's financial position that circumstances of significance for the company's/partnership's operations may lead to the representative having a conflict of interest. A company/partnership in which the representative is employed will on the other hand not be deemed to be part of the circle of parties "close" to him/her.

A basic condition for the existence of conflict of interest is that there is a "special interest" for the board member. A conflict of interest will not exist if the board member has an interest in the case that is shared with a large group of persons, for example where one particular solution is chosen is of significance for either all the oil companies or all the supplier companies. A conflict of interest will exist if the board member's interest is special in the sense that fulfillment of the interest will exclude other interested parties from the benefit.

It is not a criterion that the representative can achieve a gain in order for a special interest to exist. Preventing a party from obtaining a gain, i.e. treating someone less favorably, can also be deemed to be a special interest.

Where a case is of particular significance for a "close party", it is not crucial for a conflict of interest that the close party has a special interest. The representative must have a special interest in the close party's interest being fulfilled in the specific case in order for the matter to lead to a conflict of interest.

What qualifies as a special interest must be decided on the basis of the objects Offshore Norge is to promote as a special-interest organization. Primarily, interests that are inconsistent with or not in accordance with the purpose of the association will be special interests that may lead to a conflict of interest. If special objects or considerations for the approval bodies are involved, these will be relevant in assessing conflict of interest regarding the representatives in these bodies.

Offshore Norge' objects are described in Article 2 of the by-laws. The objects provision shows that Offshore Norge' primary task is to be a professional body for the oil industry in relation to important public institutions and players. By accepting a position in Offshore Norge, the representative has accepted being an "ombudsman" for the special-interest organization and the objects it is to promote. In connection with the performance of an office in Offshore Norge, it is thus the entire industry's interests that are to be promoted. The fact that the way the office is exercised may be significant for individual members, individual persons or some companies is in principle not relevant for the decisions made by the representative in connection with the exercising of the powers conferred by holding an office in Offshore Norge' decision-making bodies can consider cases and make decisions that are of particular significance for individual members. If a representative is employed by a member company that has a special interest in the outcome of a case the representative takes part in considering, the employment relationship is in principle not sufficient in itself to regard

the representative having a conflict of interest in the case. The employee must have a personal special interest in the case having a specific outcome for the employer in order for the representative to have a conflict of interest. This could be the case if the matter has direct significance for the areas of responsibility or work assigned to the representative within the company, and the outcome of the case will be of significance for the representative in his/her employment relationship. The representative may then, due to the significance of the outcome for him/her, have a special interest in the case which means that he/she must be deemed to have a conflict of interest. On the other hand, a conflict of interest will normally not exist if one cannot assume that the representative's work situation in any way will be affected by the decision.

If a representative has a benefit, whether personal or financial, from a decision within Offshore Norge, promoting this interest will quite clearly conflict with Offshore Norge' objects and represent a conflict of interest. An example of this is if a representative in an approval body has a majority share in a company which is one of several alternative suppliers of specific goods or services that require approval by Offshore Norge in order for the products to be offered to members of Offshore Norge.

Also minor ownership interests may lead to a representative being regarded as having a conflict of interest in cases of significance for the companies this person has ownership interests in. This must be decided on the basis of a specific assessment of the ownership interest's financial significance for the representative, and the significance of the case for the relevant company's operations. If the value of an investment is significant and the outcome of a case may be expected to have appreciable significance for the company's earning ability, one must assume that there is a conflict of interest. If the investment is so small that even a case which has substantial significance for the value of the company will only have a modest affect on the value of the representative's investment, the representative will on the other hand probably not have a conflict of interest.

The representative may have relations with companies other than through employment or ownership interests. An important, practical example is where representatives in Offshore Norge' approval bodies have board appointments in companies seeking approval. As a member of the board of a company it is assumed that one looks after its interests that do not automatically coincide with the exercising of an office in Offshore Norge. Board appointments or other offices in a company do not automatically lead to a representative in relation to his/her office in Offshore Norge having to be deemed having a conflict of interest. It is crucial whether the conflict with the special interest the person concerned represents leads to a conflict of a more personal nature arising for the representative, for example if the outcome of the case can have personal consequences for the person concerned in the short term or long term. In cases where it may be relevant to award a company something which may be regarded as a benefit, for example granting an approval, a conflict of interest may quickly be perceived to have personal consequences for the representative in connection with the performance of an office as a board member in the relevant company. In such case, the relationship must be deemed to be a conflict of interest.

Representatives in Offshore Norge may be affiliated with other special-interest organizations, they may for example be representatives in a trade union. The fact that representatives in Offshore Norge also are representatives in other special-interest organizations does not in itself lead to a conflict of interest in Offshore Norge in cases that also involve the other special-interest organization. This applies even if Offshore Norge and the special-interest organization have conflicting interests. The representative will not be disqualified until there is a conflict of interest that is significant for the representative's performance of his/her office in the other special-interest organization. In such case the conflict of interest may have personal significance for the representative.

Other forms of affiliation with special-interest organizations than positions of trust may after a specific assessment lead to a conflict of interest when considering cases within Offshore Norge. Nevertheless, it still takes quite a lot before the performance of somewhat more limited tasks for another special-interest organization can be said to have the necessary personal significance for the representative so as to lead to a conflict of interest within Offshore Norge. An example to illustrate this is where a representative in Offshore Norge on one occasion has given advice to an employee organization about a specific issue and the employee organization comes into conflict with Offshore Norge regarding the same issue. In this case the representative may have a conflict of interest when considering the issue within Offshore Norge, if the disagreement directly involves the issue the person concerned was involved in vis-à-vis the other organization. It is nevertheless a prerequisite that the outcome of the case has personal significance for the person concerned, for example for assessing the work the person concerned performed for the other organization. If the conflict concerns other issues than those the person concerned was involved in, the representative is as a main rule not disqualified within Offshore Norge, unless the person concerned has a strong personal commitment in the case.

4. The special interest must be prominent

It is not sufficient that a special interest exists in order for this to lead to a conflict of interest. This entails that the special interest must be so prominent that it is natural to assume that the special interest has a decisive effect on the representative's assessment and point of view in the case.

Whether the special interest is prominent will inter alia depend on how much conflict there is between the individual representative's interests and the organization's interests. In cases where the special interest contradicts the organization's objects, it is easier to conclude that there is a conflict of interest than in cases where there is no great deviation between the interests of the organization and the representative. Where a special interest is of a purely personal nature, it does not take much before it opposes the considerations Offshore Norge wishes to promote.

The approval bodies in Offshore Norge are to assess whether objective requirements for defined types of activities have been fulfilled. The requirements shall i.a. look after considerations regarding health, safety and the environment. In the exercising of approval arrangements that safeguard essential considerations within the relevant activities, stringent requirements must be stipulated for objectivity among the representatives who administer an approval arrangement. Any form of affiliation with a company applying for approval may raise questions in relation to the conflict of interest rules. If the affiliation can give rise to a conflict of interest, a stringent norm should be the basis for the assessment of whether the special interest is so prominent that it leads to a conflict of interest.

5. Consideration of conflict of interest cases

If a question is raised as to whether a representative has a conflict of interest, the person concerned shall not participate in the discussion or talks on whether the person concerned must withdraw from the relevant case. The representative should nevertheless be given the opportunity to explain about the relevant issues to the extent this is necessary for consideration of the case. If the body finds that the representative has a conflict of interest, it will adopt a resolution to the effect that the representative must withdraw during consideration of the case. The representative shall then not participate at any stage of the consideration of the case.

A representative can choose to withdraw from the consideration of a case of his/her own accord. In such case it is not necessary to subject the conflict of interest issue to a formal decision by the body. It is incumbent on the individual representative to state whether there are circumstances that may lead to the person concerned having a conflict of interest.

6. The effect of a conflict of interest

The legal effects of a breach of powers must be assessed on the basis of the relevant foundation of the powers that has been exceeded. In principle, exceeding one's powers will lead to invalidity if the breach of powers can be assumed to have had an effect on the result of the decision made. The conditions for a conflict of interest dictate that if the representative has a prominent special interest in the relevant case, this may clearly affect the representative's voting and thus the result of the case. The main rule must therefore be assumed to be that decisions encumbered by deficient powers due to a conflict of interest are invalid. In this connection no requirement can be stipulated to the effect that the disqualified representative's vote was decisive for the result. By participating in the consideration and voting, the disqualified representative has been able to influence the consideration in the board or committee, so that the conflict of interest has had effects beyond the relevant representative's point of view.

If a decision is invalid due to a conflict of interest this can in principle be ratified, i.e. the decision can be maintained despite the original error. It is assumed that such ratification can be made by the body that made the original decision, in that the board or committee is summoned again and disqualified representatives withdraw from the new consideration. In this connection the fact that a representative has participated in considering a case before does not lead to a conflict of interest. In order to avoid doubt as to whether a representative in a "new" board is impartial, it may be appropriate in some cases that any ratification takes place through a decision by a superior body that confirms the subordinate body's original decision, particularly in cases of substantial significance.

An invalid decision that contains prohibitions or orders must be regarded as a nullity. The decision is then deemed to be non-existing and cannot be implemented vis-à-vis those it concerns. If there is invalidity concerning a decision which entails that Offshore Norge gives a promise to a third party, for example signs a contract for the delivery of goods or services, the invalidity cannot be invoked vis-à-vis a bona fide third party. Where an approval is granted, a deficiency in powers due to a conflict of interest regarding the decision cannot be invoked vis-à-vis a bona fide third party to which the approval is granted. If the representative has a central position in the company Offshore Norge is contracting with, it may nevertheless be deemed that the company in some cases must be identified with the representative, something which will deprive the company of its good faith in relation to the exceeding of powers in Offshore Norge.

7. Practical guidelines for assessing conflicts of interest regarding Norwegian Oil and Gas representatives

Part of the assignment has been to frame practical guidelines for representatives on how they should act if a conflict of interest is possible or probable. As mentioned above, Offshore Norge has no provisions on conflict of interest in its by-laws. As rules governing conflict of interest may be crucial to the validity of decisions made by Offshore Norge' bodies, it may be expedient to formally base any guidelines on Offshore Norge' regulatory requirements. An expedient alternative could be that Offshore Norge' supreme body adopts a resolution on guidelines for assessing conflicts of interest which is to apply to boards and committees within Offshore Norge. To clarify the normative basis of the conflict of interest rules it could be expedient to include provisions on conflict of interest in Offshore Norge' by-laws. By-law provisions on conflicts of interest can indicate a more general or fundamental starting point, and leave it to the Board to stipulate more detailed guidelines for the assessment. Appendix 1 contains guidelines based in non-statutory principles regarding conflicts of interest we assume apply within Offshore Norge.

The rules of law regarding conflicts of interest as described above state the legal limits for powers of representatives in decision-making bodies in Offshore Norge. It is not given that the limits for invalidity should govern the framing of rules on conflicts of interest regarding representatives. Ethical assessments and consideration for confidence in the

decisions made in an organization could dictate that representatives withdraw from the consideration of a case when there is a conflict of interest, even though the conflict of interest in a legal assessment will not lead to there being deficient powers in the decision made. If Offshore Norge finds it expedient, Offshore Norge can adopt guidelines for when representatives shall withdraw from the consideration of cases due to conflicts that are more stringent than those that follow from the non-statutory principles regarding conflicts of interest. Whether ethical assessments dictate that guidelines for conflicts of interest within Offshore Norge should be more stringent than what follows from non-statutory, association law principles is a policy assessment that Offshore Norge must make.

APPENDIX 1

Practical guidelines for assessment of conflicts of interest regarding Norwegian Oil and Gas representatives

- ◆ Representatives in Offshore Norge are to be deemed to having a conflict of interest in the consideration of cases they or any parties close to them have a special interest in, if the special interest is suited to impair confidence in the representative's impartiality.
- ◆ A special interest that can lead to a conflict of interest may be the result of (list not exhaustive):
 - ◇ The representative having a personal or financial interest in the case.
 - ◇ The representative's employer within the representative's areas of responsibility and work having a special interest in a case.
 - ◇ Board appointments or offices held in companies or organizations that have a special interest in the outcome of a particular case.
- ◆ It is incumbent on the individual to assess whether there are circumstances that are suited to impair confidence in the representative's impartiality. If there are such circumstances the representative shall inform the body in which the representative is a member of the circumstances.
- ◆ The relevant body shall consider the question of conflict of interest immediately after it has been informed that there may be grounds for a conflict of interest regarding one or more representatives, or becomes aware of this due to its own findings. The representative(s) involved shall not participate in the consideration of their own disqualification. The representatives shall nevertheless have the opportunity to give an account of significant circumstances to the extent this is necessary in order for the body to have sufficient information about the case so that it can make a decision regarding the question of a conflict of interest.
- ◆ If the body finds that one or more representatives have a conflict of interest, the body shall adopt a resolution to the effect that the representative(s) must withdraw from the consideration of the cases involved. Representatives that withdraw due to a conflict of interest shall not participate in any part of the consideration.
- ◆ The representative can choose to withdraw due to a conflict of interest. In such case the body shall take this under advisement and ensure that consideration of and voting in the relevant case is implemented without the disqualified representative being present.
- ◆ If one or more representatives withdraw due to a conflict of interest, it is incumbent on the body to ensure that there is a quorum.
- ◆ The consequence of a conflict of interest is that a decision will be invalid.