

DIRECTOR DECISION 2012-38

of 22 November 2012

**on the adoption of the Policy and Procedure for Management of Sensitive
Functions**

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing a European Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 17(5) thereof;

HAVING REGARD to Decision AB No 22/2011 of 22 September 2011 on the adoption of the Financial Regulation of the Agency for the Cooperation of Energy Regulators and, in particular, Article 38(4) thereof;

HAVING REGARD to Decision AB No 10/2012 of 20 June 2012 on the adoption of Internal Control Standards (hereafter referred to as 'ICS'), and in particular Internal Control Standard No 7: Operational Structure,

WHEREAS:

- 1) Internal Control Standard No 7 requires that the Agency's sensitive functions are clearly defined, recorded and kept up to date; a policy on the sensitive functions is developed and risks associated with the Agency's sensitive functions are managed through mitigating controls and specific ex-post controls.
- 2) It is important that a formal procedure for the identification and effective management of sensitive functions is put in place in order to ensure compliance with the ICS requirements concerning sensitivity of posts. Such policy should be in line with the Commission Guidance on sensitive functions as of 19 December 2007²,

THE DIRECTOR HAS DECIDED:

Article 1

The policy and procedure for management of sensitive functions as listed in Annex I to this Decision is hereby adopted.

¹ OJ L 211, 14.8.2009, p.1

² SEC(2008)77

Article 2

This Decision shall enter into force on the day following that of its adoption.

Done at Ljubljana on 22 November 2012.


Alberto Pototschnig
Director

Annex I

Policy and procedure for management of sensitive functions (Implementation of Internal Control Standard No 7)

1. Definition and responsibilities

Management of sensitive functions is a standard element in the internal control, which aims to reduce or control to an acceptable level the risk of misuse of powers³. In line with the requirements of the Internal Control Standards, the risk associated with each sensitive function needs to be analysed and managed properly.

Sensitive functions are those where there is a risk that the jobholders deliberately use their decision-making power or influence with a view to gain personal advantage (financial or non-financial). The identification of sensitive functions does not question the integrity of specific staff members – thus the identification and risk assessment of sensitive functions shall only concern the function itself and the controls surrounding it.

The overall responsibility for the management of sensitive functions in the Agency for the Cooperation of Energy Regulators (*the Agency*, hereafter) lies with the Director. The Director, in particular, is responsible for:

- Establishing a list of sensitive functions within the Agency;
- Ensuring that adequate and proportional mitigating measures are in place;
- Ensuring monitoring of the residual risk level accepted by the Agency.

2. Legal basis and objectives

Article 38(4) of the Agency's Financial Regulation⁴ (FR) requires that the Authorising Officer puts in place the organisational structure and the internal management and control systems and procedures suited to the performance of his/her duties, including, where appropriate, ex-post verifications. These have to be in compliance with the minimum standards established by the Administrative Board⁵ (Internal Control Standards, or ICS) on the basis of equivalent standards laid down by the European Commission for its own departments, and having due regards to the risks associated with the management environment and the nature of the action financed.

³ Risk is defined as a combination of probability of an event and the severity of its consequences.

⁴ Decision AB No 22/2011 of 22 September 2011 on the adoption of the Financial Regulation of the Agency for the Cooperation of Energy Regulators.

⁵ Decision AB No 10/2012 of 20 June 2012 on the adoption of Internal Control Standards and repealing Decision AB No 08/2011.

Further to this requirement, and as part of the Internal Control Standards (ICS) adopted by the Agency, **Internal Control Standard No 7 (ICS7)** requires that the Agency introduces effective controls and operational structure that supports effective decision-making by suitable delegation of powers; that risks associated with the sensitive functions within the Agency are managed through mitigating controls; and that adequate IT governance structures are in place.

More specifically, ICS7 addresses the question of sensitive functions through the requirement that the sensitive functions within the Agency are clearly defined, recorded and kept up to date. For each sensitive function a risk assessment is carried out and relevant mitigating controls are established.

In this respect, the present policy aims to establish the procedures for identification, risk assessment and management of sensitive functions within the Agency. The overall purpose of defining sensitive functions and introducing mitigating controls shall be to prevent irregularities, fraud and corruption.

The identification of positions holding sensitive functions shall also serve as a management tool in order to raise awareness among management and staff of the potential risks, associated with the exercise of certain powers and rights, and of the potential need for risk control activities, related to those powers.

Sensitive functions within the Agency shall be identified at least every five years. This identification shall be reviewed whenever necessary and, as a rule, any time a major change in the Agency's structure and responsibilities occurs. This period could be changed by a motivated decision of the Director, if needed.

3. Management of sensitive functions

3.1. Criteria for defining sensitive functions

In general a function can be characterised as being sensitive:

- a) **By the nature of the activities performed:** This could be the case for all activities where a high degree of personal judgement is involved when taking decisions, e.g. staff members taking decisions in the area of financial management, procurement or contracts, with regard to policy-making and negotiations or in areas where there is a relatively high degree of freedom to act independently/or where supervision levels might be low.
- b) **By the context in which the activities performed are carried out:** this could apply to functions dealing with policy-making issues, where staff members might be subject

to pressure to disclose sensitive information and where disclosure might harm the interests of the Agency, or by the way in which policy decisions are taken.

In order to determine whether or not a position involves sensitive functions, the risk factors and the fields of activity, which might be considered as sensitive, shall be identified.

Factors contributing to the sensitivity:

- Decision-making capacity
- Capacity to influence decisions
- Regular access to sensitive information
- Recurrent contacts outside the Agency (suppliers, private sector, etc.)
- High level of specialised expertise, etc.

For these and any other criteria used, risks should be evaluated in relation to the field of activity and the job context.

Potentially sensitive fields of activity:

- Regulatory matters: decision-making powers and capacity to influence the decisions and acts of the Agency.
- Financial matters: budgetary and financial management, budget execution, contract management, management of calls for tenders, accounting issues, acting Authorising Officers (AO) or AOs by delegation/sub-delegation (or AOD/AOSD).
- Recruitment and staff management: activities with human resources implications, e.g. recruitment, appointment to a job position, performance appraisal, personnel policy, etc.
- Project management: management of the Agency's projects and activities through all the stages.
- Security considerations: the security level associated with the activity concerned - confidentiality of activities, access to sensitive information/secure offices, etc.
- Legal framework: jobs involving decisions having legal implications or linked to procedures defined by Community legislation.
- Negotiation and representation: activities on behalf of the Agency involving a wide range of discretion/margin of manoeuvre.

The assessment of potentially sensitive functions shall be driven by the following *considerations*:

- In any organisation, certain staff are required to perform functions involving significant autonomy or executive power, implying a risk that such powers may be misused for personal gain.
- It is impossible in most circumstances to achieve "zero risk", particularly in a cost-benefit and proportionality perspective.
- Managers must take decisions, across all their activities, on the level of risk they accept and that the Agency can tolerate.
- The degree of personal judgement in decision-making processes within the Agency is limited. The Agency is implementing and executing tasks from a pre-defined

framework, either on the basis of EU legislation or on the basis of its Work Programme adopted by the Administrative Board.

- Most acts of the Agency in the regulatory area are non-binding. Also, the process of adoption of these acts typically combines the proposal from the Director and a formal opinion by the Board of Regulators. Therefore, although the proposal from the Director is influential, the Agency's acts require in most cases formal endorsement by the Board of Regulators.
- Acts of the agency mandated by Regulation (EU) No 1227/2011 (REMIT) are adopted by the Director, with a consultative role by the Board of Regulators, but typically they do not bind third parties.
- For most internal decisions, proper measures are put in place and decisions are never taken by one individual:
 - The 'four eyes principle' is strictly respected by the Agency's staff.
 - In recruitment, selection committees are appointed with the purpose of proposing a reserve list to the Appointing Authority. The most suitable candidate from such a list receives a job offer from the Appointing Authority.
 - In procurement, work is carried out by appointed evaluation committees with staff members from different sections. Decisions are made by the Authorising Officer or by the responsible delegated Authorising Officer.

Considering the importance of identification and management of the sensitive functions within the different job roles, the Agency has made a preliminary assessment of positions holding sensitive functions prior to the adoption of the current policy.

An inventory of the identified job positions holding potentially sensitive functions is attached as **Annex I**. The main criteria used for the establishment of the list include job roles holding an Authorisation function (AO and AOs by (sub) delegation) and having a significant decision-making capacity. The Agency's job positions shall be re-assessed according to the criteria set above. *Positions holding both Authorising and decision-making capacity shall as a rule be classified as holding sensitive functions.*

An essential control element of the organisational approach is the identification of sensitive functions within the Agency's *job descriptions* framework to ensure that every jobholder responsible for those functions is aware of the level of sensitivity. The sensitivity of functions is identified for every single position and added to the related job description by the HR.

3.2. Ways of mitigating the identified sensitive functions

1) Through mitigating controls, including:

- **Preventive** – aiming to prevent or reduce the risk of the jobholder in a sensitive function from misusing his/her powers. This includes segregation of duties, declaration of non-conflict of interest, awareness-raising actions on ethical conduct and other measures.

- **Detective** – the various checks and verifications performed to detect any issues related to sensitive functions. This includes management supervision, independent audits, ex-post controls and reporting, etc.
- 2) In cases where the residual risk is considered as significant, **additional mitigating controls, independent audits and specific ex-post controls shall be applied.**

Regular reassessment of the controls in place shall be conducted in line with the current policy, in order to ensure that the residual risk of irregularities is reduced to an acceptable level.

3.3. Managing the Agency's sensitive functions

The management of sensitive functions shall be a constant process. The list of the identified positions holding such functions shall be subject to a regular review, in line with the current policy.

More specifically, the review shall cover the inventory of sensitive and non-sensitive functions, revision of the classification of these functions, the identification and assessment of mitigating measures (covering both preventive and detective measures).

A template **Evaluation sheet for positions holding sensitive functions** is attached as **Annex II** and shall be used for conducting the assessment exercise.

The following steps shall be followed in the assessment of sensitive functions:

1st step ► Identification of risk factors contributing to the sensitivity:

As a first step, the specific risk factors that contribute to the sensitivity of a position have to be listed and assessed. A position might be considered to be affected, or to be subject to a limited influence of the listed factors. The identification of these factors will be important for the definition of appropriate mitigating measures and controls.

2nd step ► Identification of mitigating measures already in place:

The measures that are already in place to the risks related to the performance of the sensitive functions shall be identified under this step. The identification of measures shall include both preventive and detective measures, as described under point 3.2.

3rd step ► Assessment of existing mitigating measures:

Once the existing measures have been identified, the assessment of their adequacy and proportionality based on likelihood and impact of the risks of fraud and corruption shall be carried out. The possible outcomes have been listed in the Evaluation sheet template (Annex II).

4th step ► Remaining risk level assessment:

Based on the results from the previous steps, the residual risk (considering all existing and proposed measures) has to be assessed. This will be used to establish positions for which additional controls and audits are necessary.

5th step ► Finalisation of the process

The results of the process shall be submitted to the Appointing Authority for opinion and approval.

The results of each risk assessment exercise, carried out by the Agency, shall be summarised and presented in an annex to this policy and shall be revised as necessary.

Annex I. List of positions holding sensitive functions

Based on the criteria as described in point 3.1 above, and through matching fields of activities with risk factors, the following positions have been identified as holding potentially sensitive functions:

Positions identified as potentially sensitive:

- **Director:** Sensitive function by nature as legal representative of the Agency, having decision-making powers, acting as Authorising Officer and Appointing Authority for staff of the Agency.
- **Accountant:** sensitive by nature, having a decision-making capacity and holding a financial management function.
- **Heads of Departments:** sensitive by nature in view of their capacity to influence and/or take decisions, in particular when they also act as delegated Authorising Officers.

Positions identified as potentially non-sensitive:

- **Senior Officers/Officers:** non-sensitive, no decision-making capacity and limited capacity to influence decisions.
- **Assistants/Secretaries:** non-sensitive, no decision-making capacity or no capacity to influence decisions.
- **Legal, procurement and finance officers and assistants:** non-sensitive, no decision-making capacity or limited capacity to influence decisions.
- **Data Protection Officer:** non-sensitive, regular access to sensitive information, but no capacity to influence or make decisions.
- **IT staff:** non-sensitive, regular access to sensitive information, but no capacity to influence or make decisions.
- **HR staff:** non-sensitive, regular access to sensitive information, but no capacity to influence or make decisions.

The potentially non-sensitive functions/positions shall also be revised regularly in order to be classified as potentially sensitive in cases of major changes in responsibilities, the nature and field of activities carried out, and the context in which they are performed.

This list has to be updated together with the revision of the policy, in order to ensure that positions newly classified as 'potentially sensitive' are included, and that positions that are no longer of a sensitive nature are re-classified.

Annex II. Evaluation sheet for positions holding sensitive functions

Title of the job position:	
Job holder (name, surname):	
Department:	
Grade:	Since:
Date of last evaluation:	
1. Risk factors, contributing to the sensitivity of the position:	
Decision-making capacity	Yes / No / Limited
Capacity to influence decisions	Yes / No / Limited
Regular access to sensitive information	Yes / No / Limited
Recurrent contacts outside the Agency (Member States, Community Institutions, suppliers, private sector, etc.)	Yes / No / Limited
High level of specialised expertise	Yes / No / Limited
Overall appraisal of sensitivity	Yes / No / Limited
2. Identification of mitigating measures already in place:	
3. Assessment of existing mitigating measures (mark the appropriate): <input type="checkbox"/> The mitigating measures are more than adequate (excessive) => to be reduced for the sake of efficiency and proportionality. <i>Add short explanation to which areas:</i> <input type="checkbox"/> The mitigating measures are adequate => to be maintained and periodically reviewed. <input type="checkbox"/> The mitigating measures are insufficient and residual risks are identified: => additional measures to be adopted, where appropriate, <u>OR</u> => justified acceptance of the residual risks.	

<i>Description of proposed measures and/or justification of the acceptance of residual risk:</i>	
4. Remaining risk level assessment	<input type="checkbox"/> <u>Acceptable risk level:</u> No further action. <input type="checkbox"/> <u>Residual risks:</u> Specific ex-post controls and focused audits shall be performed.
Appointing Authority /signature/:	Job holder /signature/:
/name, surname, function/	/name, surname/
Date:	Date: