

Decision of the European Ombudsman closing her inquiry into complaint 297/2013/(RA)FOR against the European Commission

Decision

Case 297/2013/FOR - **Opened on** 12/03/2013 - **Decision on** 19/12/2013 - **Institutions concerned** European Commission (Settled by the institution) | European Commission (No further inquiries justified) |

The complaint concerns the reappointment of the Chairman of the Commission's Ad hoc Ethical Committee. This Committee comprises three individuals not currently employed by the Commission. Its role is to advise the Commission on ethical issues arising in the implementation of the Commission's Code of Conduct for Commissioners. In particular, the Committee advises on ethical issues when a former Commissioner wishes to take up employment.

The Ombudsman noted that the Chairman was in a conflict of interests given that he also worked as a lawyer representing the interests of private sector clients before the Commission. She found that the Commission's reappointment of the Chairman created a situation where the Chairman would, in effect, be adjudicating on the future employment prospects of Commissioners who, on the basis of their current positions, had huge influence on matters of great consequence for the private clients of the Chairman.

Accordingly, the Ombudsman found that the private interests of the Chairman were such that they could impact negatively on the manner in which he exercised his role as Chairman of the Committee.

It was unnecessary for the Ombudsman to make any recommendation to the Commission as the Commission replaced the Chairman prior to the completion of the Ombudsman's inquiry.

The background to the complaint

1. The European Commission is guardian of the Treaties. But who guards the guardian? Certainly, the EU courts and the Ombudsman do. The Commission has also set up its own mechanisms of checks and balances. One such mechanism is the Commission's Ad Hoc Ethical Committee [1] . The Ad Hoc Ethical Committee, which is composed of three persons who do not currently work in the Commission, delivers opinions to the Commission on general



ethical questions that arise in relation to the interpretation of the Commission's Code of Conduct for Commissioners [2] . The Ad Hoc Ethical Committee also has the specific task of providing the Commission with an opinion on ethical issues that may arise when a Commissioner wishes to take up a job after leaving the Commission. The Commission decides, taking into account the findings of its Ad Hoc Ethical Committee, whether the planned job might undermine the integrity of the Commission. [3]

2. On 8 February 2013, the complainants, three NGOs known as LobbyControl, Corporate Europe Observatory and Corporate Accountability International, complained to the Ombudsman about the reappointment of one of the three members of the Ad Hoc Ethical Committee [4] . They explained to the Ombudsman that they had, on 14 January 2013, contacted the Commission to voice their concerns about the reappointment of that member of the Ad Hoc Ethical Committee (while the complainant has identified this person in its public statements on this matter, the Ombudsman will simply refer to this person as Member A). The complainants pointed out to the Commission that Article 4 of the Commission decision establishing the Ad Hoc Ethical Committee states that members of the Ad Hoc Ethical Committee must demonstrate "*independence, an impeccable record of professional behaviour, as well as sound knowledge of the existing legal framework and working methods of the Commission*". The complainants noted that Member A, a retired high-ranking Commission official, currently works for a major law firm that offers lobbying services to its clients on EU issues. It added that the law firm had not signed up to the Commission-Parliament Transparency Register. The complainants thus questioned the independence and professional behaviour of Member A and asked the Commission to reconsider its decision to reappoint Member A as a member of its Ad Hoc Ethical Committee. When the Commission refused, the complainants turned to the Ombudsman.

The subject matter of the inquiry

3. The complainants allege that:

- The Commission's decision to reappoint one of the members of its Ad Hoc Ethical Committee breaches Article 4 of the 2003 Commission decision establishing the Ad hoc Ethical Committee.
- The activities of the Ad Hoc Ethical Committee are not sufficiently transparent.

4. The complainants claim that:

- The Commission should revoke the said re-appointment and appoint a replacement who meets, and appears to meet, the requirement for independence.
- The Commission should introduce a pro-active transparency policy of (a) publishing the CVs and Declarations of Interest of the members of the ad hoc Ethical Committee online, as is the case for Commission Special Advisers; (b) improving online transparency regarding both the members of the Ad Hoc Ethical Committee and its decisions.
- In order to ensure that decisions about Commissioners' ethics are truly independent, the Commission should, in the longer term, set up an independent ethics committee, with a broader and better defined mandate than the existing Committee, which deals primarily with post-employment issues. This committee should be fully independent and composed of experts on public administration ethics.



The inquiry

5. The complainants submitted the complaint to the Ombudsman on 8 February 2013. The Ombudsman requested the Commission to submit an opinion on the complaint by 30 June 2012. In his letter opening the inquiry, the Ombudsman asked the Commission to comment on the following questions:

1) Whether Member A fulfils the necessary criteria of Article 4 of the 2003 Commission decision establishing the Ad hoc Ethical Committee, which states that the appointment of members requires their "independence, an impeccable record of professional behaviour, as well as sound knowledge of the existing legal framework and working methods of the Commission". In particular, the Ombudsman asked the Commission to consider:

a) the need to consider the possible appearance of conflicts of interests as regards this member of the Ad Hoc Ethical Committee;

b) the fact that the law-firm for which he works has not signed up to the Transparency Register;

c) his independence when assessing potential conflicts of interests involving former Commissioners;

d) the Commission's lack of information regarding the identity of the clients of the above referred law firm.

2) Whether the activities of the Ad Hoc Ethical Committee, and the interests of its members, are sufficiently transparent.

3) Whether the Commission should establish an independent ethics committee, with a broader and better defined mandate than the existing committee, which deals primarily with post-employment issues.

6. On 8 May 2013, the complainants contacted the Ombudsman to raise two additional issues related to the inquiry, namely:

1) The role Member A allegedly played in an OLAF investigation which led to Commissioner Dalli's resignation from the Commission;

2) The complainant also stated that it had learnt that Member A provides advice, as a lawyer, to the tobacco industry. The complainants state that this is a violation of the implementation guidelines of Article 5.3 of the WHO Framework Convention on Tobacco Control.

7. The Ombudsman then brought these additional issues to the attention of the Commission and asked it to deal with them in its opinion.



8. On 23 July 2013, the Commission submitted its opinion to the Ombudsman. The Ombudsman forwarded the opinion of the Commission to the complainants. They submitted observations on this opinion to the Ombudsman on 15 September 2013.
9. On 26 November 2013, the Ombudsman sent a letter to Vice- President Šefčovič of the Commission outlining the reasoning that could support a possible future draft recommendation to the Commission asking for the replacement of Member A.
10. On 18 December 2013, the Commission, in its midday press briefing, stated that it had decided to replace Member A as a member of the Ad Hoc Ethical Committee.

The Ombudsman's analysis and conclusions

A. Allegation and related claim concerning the reappointment of Member A to the Ad Hoc Ethical Committee

Arguments presented to the Ombudsman

11. The complainants argued, in their complaint to the Ombudsman, that the Commission's decision to reappoint Member A to the Ad Hoc Ethical Committee breached Article 4 of the 2003 Commission decision establishing the Ad Hoc Ethical Committee, which states that the appointment of members shall require "independence, an impeccable record of professional behaviour, as well as sound knowledge of the existing legal framework and working methods of the Commission". The complainants argued that Member A possesses neither the level of independence nor the impeccable record of professional behaviour necessary to fulfil these criteria.
12. The complainants noted that Member A is currently a corporate lawyer/lobbyist in a major multinational law firm. They added that the website of the law firm in which he works informs potential clients that the law firm offers a "blend of legal and political expertise" and that the law firm can assist in "approaching government or the EU institutions... advising on the parliamentary and political process, and drafting and tabling amendments to proposed legislation". The website of the law firm also described Member A as specialising in European Commission policies, community law and competition law, trade, banking, taxation and government relations and public policy. The complainant argued that the terms "government relations and public policy" are synonyms for lobbying services.
13. The complainants added that when, in 2007, Member A left his post at the Commission to work for the law firm, the Commission granted approval for his move to the law firm on condition that he would not lobby former colleagues or deal with cases involving his previous department



for one year. The complainants also noted that the law firm in which Member A works has not registered in the EU's voluntary Transparency Register, despite the fact that it offers lobbying services. This means, according to the complainants, that it is impossible to see for which clients Member A and his colleagues are working. The complainants then concluded that the fact that Member A works for a law firm that offers lobbying services, but which has not signed up to the Transparency Register, calls into question whether Member A has an "impeccable record of professional behaviour" in relation to ethics and lobbying.

14. The complainants gave examples of Member A meeting with officials in the Commission's Legal Service in September 2011 and September 2012 in order to represent the interests of a tobacco company. The complainants informed the Ombudsman that the Commission had written to the complainants insisting that Member A's contacts with the Commission's Legal Service were limited to legal issues relating to the "Tobacco Directive", and that, as a result, these contacts did not constitute "lobbying". The complainants noted, in this respect, that legal expertise is required and used in lobbying all the time, and using legal language or arguing about the interpretation of legal text is a common lobbying strategy.

15. The complainants argued that Member A's role representing a tobacco company (and other corporate clients) raises doubts about his independence and his ability to rigorously assess potential conflicts of interest and judge whether ex-Commissioners moving into private sector lobby jobs are appropriate or not, whether conditions and restrictions should be imposed and, if so, which ones. The complainants maintained that, concerning a role in an ethical advisory body, whose integrity and transparency are paramount to public trust in the European Commission, it is the appearance of conflicts of interest that is particularly important. It is common sense, the complainant's stated, to consider it "highly remarkable", that Member A can switch roles, from his role on the Ad Hoc Ethical Committee, to his role representing private clients in relation to EU matters. It most certainly raises questions, they argue, about Member A's independence as the "EU's top ethics advisor".

16. The complainants stated that since it is not conceivable that there is no other figure, with the relevant expertise, but without such contested independence and professional behaviour, who could be on the Ad Hoc Ethical Committee, it was not defensible to reappoint Member A to this position.

17. The complainants then stated that although the Ad Hoc Ethical Committee may not yet have been asked to assess ethical issues other than the issue of the post-term employment of Commissioners, this does not mean that it does not have the potential to do so. They stated that, for example, had the issues that led to the resignation of Commissioner Dalli been transferred to the Ad Hoc Ethical Committee, rather than to OLAF, Member A, a person who represents a tobacco company, would have been evaluating a case that centres around what the complainant refers to as a "tobacco industry lobbying scandal". They stated that, in any case, if the Commission chooses to make use of the possibility to ask the Ad Hoc Ethical Committee for advice on wider ethics issues (namely, cases that are not only about post-employment conflicts of interest), then Member A's independence would immediately become an issue, especially as long as it remains unclear who the clients of Member A and the



law firm for which he works are.

18. The complainants then insisted that the Commission should have assessed Member A for potential conflicts of interest. Without knowing whose interests Member A represents, as a lawyer or lobbyist, it is not clear how the Commission could have done this.

19. The complainants also noted that the Commission responded to their concerns by stating the following

“Member A's activity as a legal counsel with [], a law firm providing services inter alia in the field of European Law, does not affect his independence as a member of the Ad hoc Ethical Committee. The fact that [a major tobacco company] is one among a large number of [name of law firm] clients and that [Member A] has provided legal advice to this company does not affect the independence of the Ad hoc Ethical Committee nor that of [Member A] in exercising his mandate as a member of this Committee. In providing legal advice to companies, [Member A] is bound by the applicable rules that apply to the legal profession. When acting as a member of the Committee, and contributing with the other members to opinions to be delivered to the Commission, he acts in full independence. The members of the Committee had their mandates extended because of their in-depth knowledge of the EU institutions, and their previous demonstration of independence in that role. The Commission is confident that, should any member of the Committee be confronted with a risk of conflict of interests impairing his independence in exercising his mandate, this member would immediately inform the other members of the Committee and the Commission in order to protect the Committee's impartiality and independence.”

20. The complainants argued that this response shows that the Commission relies entirely on the "presumed integrity" of the members of the Ad hoc Ethical Committee, which is precisely what is under question. They argued that they do not therefore believe this response to be adequate.

21. In addition, in relation to the statement in the response of the Commission as regards the “previous demonstration of independence” by members of the Ad hoc Ethical Committee, the complainants pointed out that the Ad hoc Ethical Committee, under the chairmanship of Member A, had not, over the previous three year term, taken the kind of strict approach towards regulating revolving door cases that would justify a claim like of this nature.

22. In addition, in relation to the statement in the response of the Commission, that members of the Ad hoc Ethical Committee “would immediately inform the other members of the Committee and the Commission, if they were confronted with a risk of conflict of interest”, the complainants stated that it is not clear if this is just an optimistic assumption or whether there are internal rules that stipulate when and how members have to do this. The complainants stated that it is not clear whether this has ever happened, in the nine years since the Ad hoc Ethical Committee was set up. If not, they stated, the Commission's statement is far from reassuring. They added that relying on the voluntary initiative of the members of the Ad hoc Ethical Committee is certainly insufficient to avoid the risk of conflicts of interest and to secure the independence of



members of the Ad hoc Ethical Committee.

23. The complainants also referred to a question they had posed to the Commission regarding whether Member A, in his role as a member of the Ad hoc Ethical Committee, has advised on any decisions relating to ex-Commissioners who moved to companies that were clients of the law firm in which Member A worked. This would, the complainant argued, constitute a clear conflict of interest for Member A. However, they noted, the Commission stated that it “has no information concerning the identity of any law firm providing advice to companies who may employ former Commissioners”. They also noted the Commission stated that “the fact that one of the private entities for which a former Commissioner currently works might be a client of one or another law firm does not entail any risk of conflict of interests or incompatibility with regard to the obligations of the Treaty or the Code of Conduct for Commissioners.” The complainants stated that they do not believe that this is a satisfactory response. It is fairly self-evident, they stated, that if a Commissioner wishes to move to a company that is a private client of the firm for which Member A works, there is a *prima facie* risk of a conflict of interest.

24. On 8 May 2013, the complainants contacted the Ombudsman to raise additional issues related to the Ombudsman's inquiry. The Ombudsman then brought these additional issues to the attention of the Commission and asked it to deal with them in its opinion. In sum, the complainants informed the Ombudsman that further evidence had emerged, from a leaked OLAF report on the issues which led up to the resignation of former Commissioner Dalli, which added to their concerns that Member A's membership of the Ad hoc Ethical Committee was politically untenable and morally unacceptable. They stated that the OLAF report reveals that it was a tobacco company that submitted the complaint to the European Commission that sparked the OLAF investigation, and that this tobacco company was assisted by Member A (who established contact with a very senior official of the Commission in this context). The complainants thus argue that Member A played a pivotal role in the events that led to the resignation of former Commissioner Dalli. This role illustrates, they stated, an unacceptable conflict of interest in the following ways.

25. The complainants noted that the tobacco company contacted Member A for advice on how to deal with the matter since it was a client of Member A. On their behalf, Member A then contacted a very senior official, who in turn passed the complaint to OLAF. Throughout this time, Member A sat on the Ad hoc Ethical Committee, which is tasked not only with advising on Commissioners taking up job offers when they leave the Commission, but may also be requested by the President of the Commission to deliver opinions on any general ethical question concerning the interpretation of the Code of Conduct for Commissioners. It is therefore conceivable, the complainants argued, that the Commission President could have referred the complaint by the tobacco company to the Ad hoc Ethical Committee. This would have put Member A in an absurd conflict of interest.

26. The complainants argued that information about Member A's role in (what the complainants call) the “Dalli affair”, revealed in the leaked OLAF report, highlights the complainants' initial concern that when it comes to an ethical advisory body, whose integrity and transparency are paramount to public trust in the Commission, it is the appearance of conflicts of interest that is



particularly important. They added that as Member A works for a lobby/law-firm, with undisclosed corporate clients, his independence is fundamentally questionable, as is his ability to adequately advise the Commission on conflicts of interest in revolving door cases and on any general ethical question concerning the interpretation of the Code of Conduct for Commissioners. In this context, the complainants again demanded that the Commission revoke Member A's reappointment to the Ad hoc Ethical Committee.

27. When the complainants brought the concerns emerging from the leaked OLAF report to the attention of the Commission, the Commission responded to the complainants directly on 19 June 2013. The complainants provided the Ombudsman with a copy of the Commission's letter, which was added to the Ombudsman's case file. In that letter the Commission stated that Member A played "no role" in the OLAF investigation relating to former Commissioner Dalli. The Commission stated that Member A contacted a senior Commission official in May 2012 to ask how the tobacco company could officially inform the Commission about their concerns. From then on, the Commission states, Member A had no involvement in the matter. There was, the Commission stated, no impact on nor link with his role as a member of the Ad Hoc Ethical Committee and there was no reason not to reappoint him. The Commission went on to state that the Ad Hoc Ethical Committee has a specific role, which is to advise on employment taken up by Commissioners for a certain period after they leave the Commission and on general ethical issues related to the Code of Conduct of Commissioners. It then stated that when a tobacco company's complaint was received by the Commission, it was sent to OLAF, which was the appropriate body to handle such complaints. Such matters would never, the Commission argued, be referred to the Ad Hoc Ethical Committee. The issue of possible conflict of interest thus never arose. The Commission concluded by stating that it does not intend to revoke Member A's appointment to the Ad Hoc Ethical Committee.

28. In its opinion sent to the Ombudsman, the Commission first confirmed all the points made by the Commission's Secretary General in her reply to one of the complainants on 28 January 2013. It then developed a certain number of points, as requested by the European Ombudsman.

29. As regards the Commission's position on the need to avoid the appearance of conflicts of interest relating to Member A, the Commission stated that it is committed to fostering ethics and transparency. It added that it has put in place a policy to manage effectively the issue of conflicts of interest and to prevent the appearance of conflicts of interest. However, the Commission does not share the complainant's concern with regard to the possible appearance of conflicts of interest involving any of the three members of the Ad hoc Ethical Committee.

30. The Commission noted that the complainants consider that the Ad hoc Ethical Committee does not appear to meet the independence requirements needed. However, the Commission insisted, the complainants do not provide any precise fact supporting their assessment/suspicion. In order to make the case of an appearance of a conflict of interest, the Commission argued, it would be necessary to indicate in which situation and to which extent such an appearance of conflict of interest would exist. The complainant has not provided, it argued, any factual element to substantiate a real or apparent conflict of interest with regard to



the situations assessed by the Ad hoc Ethical Committee and to its opinions concerning former Commissioners' post-office activities.

31. In addition, it stated, the career and profile of the three personalities chosen as members of the Ad hoc Ethical Committee are above any suspicion. The Commission stated that it cannot accept the complainants' view, which is to question the integrity of the members of the Ad hoc Ethical Committee [5] and which invokes the appearance of a conflict of interest, without providing substantiating argument. The Commission thus rejects what it calls the confusion made by the complainant between the integrity of a member of the Ad hoc Ethical Committee and the fact that he may provide legal advice to certain clients.

32. As regards the Commission's position regarding the fact that the law firm for which Member A works has not signed up to the Transparency Register, the Commission stated that both the Commission and the European Parliament encourage those who wish to be involved in the European decision-making process to register on a voluntary basis in the Transparency Register. However, registration in the Transparency Register is not compulsory. Therefore, the fact that a law firm has not registered cannot be considered, per se, as casting a doubt on the independence and integrity of the lawyers working for these law firms.

33. As regards the Commission's position regarding Member A's independence when assessing potential conflicts of interest involving former Commissioners, the Commission stated that the Ad hoc Ethical Committee is a three-member body which works in a collegiate fashion, whose remit is essentially to assess the compatibility with the Treaty and with the Code of Conduct for Commissioners of former Commissioners' envisaged post-office activities. In the Commission's view, no substantiating elements have been provided (by the complainants) to uphold the existence of real or apparent conflicts of interest with regard to the situations assessed by the Ad hoc Ethical Committee and its opinions concerning former Commissioners' post-office activities.

34. The Commission then stated that members of the Ad hoc Ethical Committee act with full independence, and contribute to the Ad hoc Ethical Committee's analysis and opinions having only in mind the Ad hoc Ethical Committee's remit and the necessity to assess the compatibility of former Commissioners' post-office activities with the Treaties and the Code of Conduct for Commissioners. There is no connection, nor interference between the Ad hoc Ethical Committee's proceedings and any professional activity providing legal advice, as a lawyer, to the clients of a law firm.

35. As regards the complainants' argument that the Commission lacked information about the identity of the clients of the law firm in which Member A worked, the Commission stated that it does not see any reason for concern linked to the fact that it is not informed about the identity of the clients of the said law firm. It stated that, as already explained by the Commission to the complainant, the risks of conflicts of interest, which must be ruled out as regards Commissioners' post-office activities, relate to the Commissioners' former portfolios. The fact that one of the private entities for which a former Commissioner currently works might be a client of one or another law firm does not entail any risk of conflicts of interest or incompatibility



with regard to the obligations of the Treaty or the Code of Conduct for Commissioners. Furthermore, the complainants make this allegation as a hypothetical possibility, without furnishing any concrete element which could show a concrete conflict as regards this member of the Ad hoc Ethical Committee.

36. In their observations on the Commission's opinion, the complainants first reiterated that their complaint primarily concerns the requirement that members of the Ad hoc Ethical Committee be independent and have an impeccable record of professional behaviour. The complainant's believe the reappointment of Member A breached this requirement.

37. The complainant then clarified that their complaint is concerned with only one member of the committee, Member A, not the Ad hoc Ethical Committee as a whole [6] .

38. The complainant's then pointed out that, in accordance with the OECD's definition of a 'conflict of interest' [7] , it is the risk of conflicts of interest that should be addressed. In that context, it is not a relevant question to require proof that some form of abuse has actually occurred. In other words, a precautionary approach to conflicts of interest is appropriate. For a body such as the Ad hoc Ethical Committee, the Commission should take a particularly low-risk precautionary approach to conflicts of interest.

39. The complainants then stated that Member A's professional role is incompatible with his role on the Ad hoc Ethical Committee. They insisted that an inherent risk of conflict of interest occurs when Member A exercises both these roles. Member A is therefore not a suitable candidate for membership of the Ad hoc Ethical Committee.

40. The complainants stated that they have not attempted to provide, nor do they believe it is necessary to provide, any precise fact demonstrating a specific instance of a conflict of interest with regard to the situations Member A has assessed or the opinions given, whilst part of the Ad hoc Ethical Committee. The point of the complaint is, the complainants insisted, that an inherent risk of conflicts of interests arises when Member A, who works in a law firm specialising in 'government relations', and who represents the interests of corporate clients to his former colleagues in the Commission, is also charged with assessing the risk of conflicts of interest when Commissioners move into industry or lobby jobs.

41. Furthermore, the complainants stated, the Commission presents the view that, in the absence of demonstrated facts showing an actual conflict of interest, the appearance of one cannot exist. The complainants insist that this is an unduly restrictive burden of proof. From the viewpoint of the public press and EU citizens alike, who have expressed their incredulity at Member A's reappointment, there appears to be a quite obvious risk of a conflict of interest when a corporate lawyer/lobbyist, who is known to meet his former Commission colleagues on behalf of clients, is appointed to an ethical committee tasked with judging the ethical implications of revolving door cases (and beyond).

42. A legal perspective would also seem to lead, the complainants stated, to this conclusion. In 2008, the Commission imposed, under Article 16 of the Staff Regulations on preventing



post-employment conflicts of interest, certain restrictions on Member A's job move to a major law firm, namely, not to intervene in any affair or dossier that was dealt with by Member A's service at the Commission while Member A was in charge of that service, and to abstain from any professional contact with former colleagues, for a one year period. Evidently, according to the complainants, these restrictions were imposed because the Commission recognised that there was a risk that his new job with the major law firm would create a conflict with the legitimate interests of the Commission.

43. As regards the Commission's remark that "... the career and profile of the three personalities chosen as members of the Ad hoc Ethical Committee are above any suspicion and the Commission cannot accept the complainant's stance to question their integrity...", the complainants stated that they find the notion that the Ad hoc Ethical Committee's members are somehow 'above any suspicion', extremely surprising and difficult to defend. If the Commission could simply rely on the moral unimpeachability of an individual, that is that it possible for a person to be 'above any suspicion', then there would be no need for any rules or guidelines for membership of the ethical committee. The complainants then insisted that their complaint is about the appropriateness of Mr Member A's reappointment to the Ad hoc Ethical Committee, and the Commission breaking the Ad hoc Ethical Committee's membership rules in doing so." Their complaint is not, they insisted, about Member A's personal ethical credentials.

44. As regards the Commission's views that the Ad hoc Ethical Committee's members act with full independence, and contribute to the Ad hoc Ethical Committee's analysis and opinions having only in mind the Ad hoc Ethical Committee's remit and the necessity to assess the compatibility of former Commissioners' post-office activities with the Treaties and the Code of Conduct for Commissioners, and that there is no connection, nor interference between the Ad hoc Ethical Committee's proceedings and any professional activity providing legal advice, as a lawyer, to the clients of a law firm, the complainants noted that these views once again appear to be premised on the belief that Member A is a morally unimpeachable individual. The Commission simply asserts that Member A acts in a fully independent way, with no other interests in mind. The complainants asked, on what basis can the Commission be certain of this? Has, the complainants asked, the Commission investigated each of the Ad hoc Ethical Committee's opinions in detail, and cross- referenced them with a full client list of Member A's law firm, in order to determine no overlap?

45. The complainants also noted that the Commission itself revealed that Member A twice met with the Legal Service to present legal views on the proposed Tobacco Products Directive, whilst having a tobacco firm as a client. In doing so, Member A was, the complainants stated, presenting a legal view about a particular proposed law to a public policy-making body on behalf of a client with deep commercial interests in the content of that particular directive. The complainants then insisted that any lawyer, or person familiar with the legal system or policy-making world, knows that both treaty and case law are open to different and often contradictory legal interpretations. And part of what Member A's law firm does is to offer and provide these kinds of lobbying services to clients, referring to these services as 'government relations' and 'public policy' (which Member A specialises in) . These services include offering to represent a legal interpretation of an existing or proposed law to public officials, which is



favourable to the interests of a corporate client. The law firm in question advertises this kind of service on its website's 'political advocacy strategy' page, which tells potential clients "you may be faced with the prospect of a regulatory development or policy decision that threatens the very nature of your business" and that the law firm in question can assist in "shaping law and policy as it evolves" by "approaching government or the EU institutions".

46. The complainants also commented on the Commission's view that Member A played no role in the launch of an investigation by OLAF relating to former Commissioner Dalli. The complainants noted that, according to the OLAF report, the tobacco company that informed the Commission of its concerns relating to former Commissioner Dalli testified that they "contacted Member A at (name of law firm) to receive advice. At our request he contacted (a senior Commission official) and we submitted a written report of the matter." This indicates that the tobacco company contacted Member A in his capacity as a lawyer/lobbyist. They stated that they make this inference on the grounds that it is not customary for a large corporation to receive free advice from multinational law firms; it is usually as a client that such a corporation would seek and receive such advice.

47. In summing up their position, the complainants stated that they do not believe the Commission's opinion has rebuked the points and arguments in their complaint. In their view, their complaint stands in its entirety. They insisted that it is not appropriate that a former Commission official who now represents the interests of corporate clients, should advise on the ethical implications of the post-office activities of Commissioners. Given his competing roles, they insisted that Member A's membership of the Ad hoc Ethical Committee presents an inherent risk of a conflict of interest.

The Ombudsman's assessment

48. The Ombudsman first notes that the complainant does not question Member A's personal ethical credentials (see paragraph 43 above). The Ombudsman also insists that her inquiry does not concern Member A's personal ethical credentials. Indeed, as will be evident from the analysis below, the personal ethical credentials of Member A are irrelevant to the analysis of this issue.

49. Article 4 of the Commission decision establishing the Ad hoc Ethical Committee states that the appointment of members of the Ad hoc Ethical Committee requires their "*independence, an impeccable record of professional behaviour, as well as sound knowledge of the existing legal framework and working methods of the Commission*". [8] It is the obligation of the Commission to ensure that all members of the Ad Hoc Ethical Committee fulfil these criteria.

50. The concept of independence, as it is used in the Commission decision establishing the Ad hoc Ethical Committee, encompasses the need to ensure that all members of the Ad Hoc Ethical Committee do not find themselves in a conflict of interests.

51. The OECD has defined a conflict of interests as "*a conflict between the public duties and*



private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities .”

The Ombudsman considers this definition to be appropriate for the purposes of the present inquiry. She notes that the term “public official” should be understood as applying to members of the Ad hoc Ethical Committee when they perform their role as members of the Ad hoc Ethical Committee.

52. The Ombudsman notes that the Commission argued (see paragraph 30 above) that in order for the allegation of the complainant to be sustained, it would be necessary to indicate in "which situation" and to "which extent" such a conflict of interest would exist. It then added that the complainant had not provided any factual element to substantiate a real or apparent conflict of interest.

53. The Ombudsman first of all emphasises that a conflict of interest involving a member of the Ad hoc Ethical Committee would be problematic irrespective of its extent.

54. As regards the situations in which such a conflict of interest would exist, the Ombudsman notes that the complainant argues that Member A, in his capacity as a lawyer for a major law firm, acts as a "lobbyist". The Commission disputes this description of Member A's work. The Ombudsman notes, however, that irrespective of whether the term "lobbyist" can be used to describe the work of Member A, it is not disputed that Member A represents private interests in when contacting the Commission. The Ombudsman notes that the complainants gave examples of Member A meeting with officials in the Commission's Legal Service in September 2011 and September 2012 representing the interests of a tobacco company. The Commission does not dispute this factual assertion, but simply insists that Member A's contacts with the Commission's Legal Service were limited to legal issues relating to the "Tobacco Directive", and that, as a result, these contacts did not constitute "lobbying". In sum, it is not disputed that Member A has contacted the Commission's services "representing" the interests of private parties before the Commission.

55. Even if such (legal) representative work by Member A is not called lobbying, it is problematic for following reasons.

56. The Ombudsman notes again that an actual conflict of interest exists when there is *“a conflict between the public duties and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities”* (emphasis added). Whether a public official actually modifies his or her behaviour as a result of a conflict of interest is irrelevant as regards determining whether a conflict of interests exists, between the public official's private interests and public interests, which *could* improperly influence the performance of that person's official duties and responsibilities. It is the prospect, or even the likelihood, that behaviour of a public official *could* be influenced by private interests, which is central to determining whether a conflict of interests exists. While any concrete example of a conflict of interests actually altering the behaviour of a public official would be very serious indeed, the fact that no such example has been shown to exist is irrelevant as regards whether there is or whether there is not a situation of a conflict of



interests.

57. As such, it is irrelevant for the Commission to suggest to the complainants that they have not provided any factual element to substantiate a real or apparent conflict of interest with regard to the situations (already) assessed by the Ad hoc Ethical Committee (see paragraph 30 above). It could well be the case, the Ombudsman notes, that all such situations were correctly assessed.

58. Rather, it is relevant to ask whether the nature of the private interests represented by Member A *could* influence a decision taken in the context of his role on the Ad hoc Ethical Committee.

59. As regards the specific nature of Member A's role in the private sector, the Ombudsman understands the representative legal work of Member A to range from simply gathering information from Commission officials on behalf of a client to seeking to convince Commission officials of a legal argument on behalf of a client. In order to successfully carry out his work representing clients' (legal) interests before the Commission, Member A first needs access to Commission staff. Indeed, Member A has sought and obtained such access in the past and is likely to continue doing so. While, certainly, any member of the public should be allowed to ask Commission staff for meetings, it is reasonable to consider that the **level** of access that a person has *could* be improperly influenced by the fact that the person has significant influence over the post-term employment prospects of Commissioners. In sum, the fact that Member A will participate in determining the post term of employment prospects of Commissioners puts a significant burden on Commission staff who encounter Member A in his private capacity as a lawyer representing clients.

60. It is, in sum, conceivable that certain members of staff could be unwilling to refuse a meeting with Member A, given his continuing role in the Ad hoc Ethical Committee.

61. Likewise, it could not be excluded that, on concrete issues, members of staff might be less willing to dismiss the arguments put forward by Member A when he is carrying out his work representing clients' (legal) interests before the Commission.

62. Likewise, members of staff may be less willing not to provide, if asked by Member A, helpful information and insights on the Commission's work.

63. In sum, again, the fact that Member A will participate in determining the post term of employment prospects of Commissioners puts a significant burden on Commission staff who encounter Member A in his private capacity as a lawyer representing clients.

64. The mere fact that such *risks* exist is problematic. It is not sufficient to state that the above potential scenarios have not (yet) occurred. Rather, it is sufficient to note that it is reasonable to fear that they *could* occur given the nature of role of Member A representing private interests and the nature of his role on the Ad hoc Ethical Committee.



65. The above potential scenarios have a direct impact on the determination of whether Member A is, himself, in a conflict of interests. By appointing Member A to the Ad hoc Ethical Committee, the Commission puts Member A himself in the situation of adjudicating on the post-term employment prospects of persons who may have had a direct bearing on Member A's success or failure representing the legal interests of his clients before the Commission. Irrespective of the personal ethical credentials of any member of the Ad hoc Ethical Committee, it cannot be guaranteed that any such member could not be inadvertently swayed to leniency towards those that favoured his private interests, and vice versa.

66. The Ombudsman underlines, in this respect, that the concept of a conflict of interests seeks to ensure that no situation arises where a person *could* be influenced by private interests when carrying out a public function. It is the mere possibility of such influence occurring which the concept of a conflict of interest seeks to address. As such, if a person has a role representing private interests that *could* influence the manner in which he exercises his role on the Ad hoc Ethical Committee, that person should not be appointed to the Ad hoc Ethical Committee.

67. The Ombudsman considers, in light of the analysis set out above, that Member A has a role representing private interests that could impact negatively on the manner in which he exercises his role on the Ad hoc Ethical Committee.

68. In reaching this conclusion, the Ombudsman has also carefully examined all the arguments put forward by the complainant and the Commission as regards the fact that the law firm of Member A is not on the Transparency Register. The Ombudsman notes that if the law firm in question had decided to join the Transparency Register, this would not in any way diminish the problems identified by the Ombudsman above. As such, the Ombudsman does not consider the fact that Member A's law firm is not on the Transparency Register is in any way determinative to the finding set out in the preceding paragraph.

69. As regards the detailed arguments made by the complainants and the Commission in relation to the role of Member A in bringing concerns regarding former Commissioner Dalli to the attention of the Commission, the Ombudsman only considers relevant to note the following. The Ombudsman notes that, according to the complainants (see paragraph 46 above), the tobacco company testified that it contacted Member A at his law firm "to receive advice" (about how to deal with its concerns regarding the alleged actions of former Commissioner Dalli). The tobacco company went on to state that, at its request, Member A contacted a senior Commission official in relation to the concerns of the tobacco company. This indicates, the Ombudsman notes, that the tobacco company contacted Member A in his capacity as a lawyer. The Ombudsman therefore finds the Commission's view that Member A then contacted the Commission in his capacity as a former official both inconceivable and naïve

70. As regards the detailed arguments made by the complainants regarding the impossibility of identifying the clients of Member A and his law firm, it suffices to note that even one example of Member A contacting the Commission in his role representing private interests would be problematic. As she noted above in paragraph 53, the extent of any such conflict of interests is irrelevant. No conflicts of interests involving members of the Ad hoc Ethical Committee should



be tolerated. In this respect, there is no dispute between the Commission and the complainants about the fact that Member A twice met with the Legal Service of the Commission to present legal views on the proposed Tobacco Products Directive, whilst having a tobacco firm as a client. As such, the Ombudsman does not consider it determinative, in order to reach a conclusion on the present allegation, to explore further this issue.

71. On 26 November 2013 the Ombudsman sent a letter to Vice- President Šefčovič of the Commission outlining the above reasoning and noting that this reasoning could support a possible future draft recommendation to the Commission asking for the revocation of the appointment of Member A to the Ad hoc Ethical Committee.

72. On 18 December 2013, the Commission, in its midday press briefing, stated that it had decided to replace Member A as a member of the Ad Hoc Ethical Committee. It added that Member A had recently informed the Commission that he wished to resign as a member of the Ad Hoc Ethical Committee. The President of the Commission thanked Member A for his important role in providing independent and impartial advice over a period of four years. The Commission also confirmed its appreciation of the work of the other two members of the Ad Hoc Ethical Committee, who, it stated, had agreed to continue to serve as members of the Ad Hoc Ethical Committee.

73. The Ombudsman, also on 18 December 2013, issued a press release welcoming the Commission's decision to appoint a new head of its Ad Hoc Ethical Committee. She stated: "The credibility of the Commission's Ad hoc Ethical Committee was at stake. I am glad that the Commission has followed my advice to appoint a new head. It was difficult to argue that the client-related activities of the previous head did not constitute a potential conflict of interest. It is important that the European public's suspicions can now be dispelled."

74. The complainants, also on 18 December 2013, issued a press release welcoming the decision of the Commission to follow the Ombudsman's advice by replacing Member A as chair of the Commission's Ad hoc Ethical Committee. They added that Member A should never have been appointed in 2009, let alone re-appointed in 2012. They stated that it is shocking that the Commission was so oblivious to the risk of conflicts of interest in this case, even when the complainants expressed their concerns. They added that this "sorry saga" should provoke a wholesale review of the way in which the Commission handles conflicts of interest issues.

75. In light of the decisive actions of the Commission to deal with the allegation of the complainants concerning the reappointment of Member A to the Ad hoc Ethical Committee, the Ombudsman finds that the Commission has settled this aspect of the complaint.

B. Allegation and related claim that the Ad Hoc Ethical Committee are not sufficiently transparent

76. The complainant argued that the activities of the Ad Hoc Ethical Committee are not sufficiently transparent. They insisted that the Commission should adopt a pro-active



transparency policy consisting of (a) publishing the CVs and Declarations of Interest of the members of the Ad hoc Ethical Committee online, as is the case for Commission Special Advisers; (b) improving online transparency regarding both the members of the Ad Hoc Ethical Committee and its decisions.

77. In its opinion sent to the Ombudsman, the Commission indicated that it will devote a specific page on its EUROPA website to the Ad Hoc Ethical Committee, on which it will publish the Commission decision creating the Ad hoc Ethical Committee and the decisions appointing the members of Ad hoc Ethical Committee. It will also include their CVs, as well as a declaration on their honour attesting the absence of conflicts of interest between their function as member of the Ad Hoc Ethical Committee, and their other activities or interests. The Commission stated that it is also considering publishing an extract from the Ad Hoc Ethical Committee's formal opinions (while protecting personal data).

78. In its observations on the opinion of the Commission, the complainants welcomed the proposed efforts to increase the transparency of the Ad Hoc Ethical Committee. However, they noted that publishing declarations stating that no conflicts of interest exist on such a webpage is not a substitute for ensuring that the Ad hoc Ethical Committee members are not, in fact, subject to the risk of conflicts of interest. Furthermore, they stated that as the clients of an Ad Hoc Ethical Committee member are highly relevant in determining potential conflicts of interest, such a webpage would have to include a full declaration of a member's clients. The complainants suggested that the creation of this webpage should be part of the process of clarifying what constitutes a risk of conflict of interest, and part of a broader commitment to a more robust approach which should include setting out the processes that the Commission will follow in order to assess and prevent such a risk.

The Ombudsman's assessment

79. The Ombudsman notes the Commission's commitment to devote a specific page on its EUROPA website to the Ad Hoc Ethical Committee, publishing the relevant Commission decisions creating the Ad hoc Ethical Committee and appointing its members, their CVs, as well as a declaration on their honour attesting the absence of conflicts of interest between their function as a member of the Ad Hoc Ethical Committee, and their other activities or interests. The Commission stated that it is also considering publishing an extract from the Ad Hoc Ethical Committee's formal opinions (while protecting personal data). The Ombudsman considers that if implemented, this commitment may serve to improve significantly the transparency regarding both the members of the Ad Hoc Ethical Committee and the decisions of the Ad hoc Ethical Committee. In this regard, while the Ombudsman considers that no further inquiries are necessary as regards this aspect of the complaint, the Ombudsman considers it appropriate to issue a further remark.

C. The claim that the Commission should establish an independent ethics committee



80. The complainants consider that the Commission should, in the longer term, set up an independent ethics committee, with a broader and better defined mandate than the existing Ad hoc Ethical Committee, which deals primarily with post-employment issues. They state that this committee should be fully independent and composed of experts on public administration ethics.

81. In its opinion sent to the Ombudsman, the Commission explained that it had previously proposed establishing an Inter-institutional Advisory Group on Standards in Public Life, [9] with the remit of providing advice on general principles of professional ethics applicable to the Institution, whilst excluding the possibility of monitoring individual cases. [10] This project did not receive support from the Council and the European Parliament. Thus, on 21 October 2003, the Commission decided to set up its own Ad Hoc Ethical Committee instead. The remit of this committee was broadened in 2011, with the adoption by the Commission of its new Code of Conduct for Commissioners, currently encompassing a consultative competence as regards the compatibility of former Commissioners' post-office activities and cooling-off period, as appropriate, as well as the possibility to deliver opinions at the request of the President on any general ethical question regarding the interpretation of the Code of Conduct for Commissioners. The Commission considers therefore that it has a strong Code in place and that its current rules and procedures ensure that high ethical standards are applied.

82. In its observations on the opinion of the Commission, the complainants noted that the fact that Council and Parliament did not agree to an inter-institutional ethical body in 2000-2003, does not prevent the Commission from establishing a properly independent ethical committee for the Commission, in lieu of the existing Ad Hoc Ethical Committee.

83. The complainants, in their press release of 18 December 2013 reacting to the replacement of Member A, demanded that the Commission's Ad hoc Ethical Committee be replaced with a fully independent ethics committee, where the members are drawn from experts in national ethics administration. Such persons should not have, they added, a history in the Commission.

The Ombudsman's assessment

84. The Ombudsman considers it premature to take a view on this claim in light of the very recent developments regarding the replacement of Member A. She will consider whether it is appropriate to examine this issue in light of future developments relating to the functioning of the reconstituted Ad Hoc Ethical Committee. No further inquiries are therefore justified at this time in relation to the third claim.

D. Conclusions

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



By replacing Member A as a member of the Ad Hoc Ethical Committee, the Commission has taken the necessary steps to settle the first allegation concerning the reappointment of Member A to the Ad Hoc Ethical Committee.

No further inquiries are necessary as regards the second allegation and the second and third claim.

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

Further remark

The Commission should comply with its commitment to create a specific page on its EUROPA website relating to the Ad Hoc Ethical Committee and its work.

Emily O'Reilly

Done in Strasbourg on 19 December 2013

[1] The Ad Hoc Ethical Committee was established by Commission Decision C(2003) 3750 of 21 October 2003.

[2] Available at http://ec.europa.eu/commission_2010-2014/pdf/code_conduct_en.pdf [Link]

[3] Any such Commission decision would be based on Article 245 Treaty on the Functioning of the European Union (TFEU) Article 245 TFEU states that Commissioners shall refrain from any action incompatible with their duties. It adds that when they join the Commission they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may be asked to rule that the Commissioner concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits.

[4] The three members of the Ad Hoc Ethical Committee had their mandates renewed in December 2012 for a second three year term.

[5] In light of the wording of the Commission's opinion, which refers to all members of the Ad hoc Ethical Committee, the Ombudsman considers it necessary to underline, here, that while the complainants do raise concerns about Member A's membership of the Ad hoc Ethical Committee, they raise no concerns as regards the other two members of the Ad hoc Ethical Committee.

[6] See footnote 5 above.

[7] The OECD's definition of a 'conflict of interest' is: "a conflict between the public duty and private interests of a public official, in which the public official has private interests which could



improperly influence the performance of their official duties and responsibilities”.

[8] Commission Decision C(2003) 3750 of 21 October 2003

[9] Commission [COM(2000) 200 final].

[10] [COM(2000) 200 final and SEC(2000) 2077 final].