

European Commission replaces head of ethics committee following ombudsman inquiry

Correspondence - 14/01/2014

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) |

Summary of case 297/2013/(RA)FOR

On 18 December 2013 the European Commission announced that it had decided to replace the Chairman of its Ad Hoc Ethical Committee. This announcement came three weeks after the European Ombudsman, Emily O'Reilly, informed the Commission that she would be likely to make a formal recommendation following her inquiry into a complaint which questioned the appropriateness of the Chairman's appointment. The Ombudsman has now completed her inquiry and has found that the Commission's decision to appoint the Chairman was unsound. The Ombudsman concluded that the private interests of the Chairman, arising from his employment with a major law firm, **could** be seen as being at odds with his role with the Committee and that, therefore, the potential for a conflict of interests existed.

The complaint

On 8 February 2013 three NGOs [1] complained to the Ombudsman regarding the re-appointment (in December 2012) by the European Commission of the Chairman [2] of its Ad Hoc Ethical Committee [3]. The complainants' view was that the Chairman's position on the Committee was untenable because of his current employment with a major multinational law firm. The complainants felt that the independence of the Chairman was compromised because of the potential for a conflict of interests arising from his role in advising private clients while, at the same time, advising the Commission on issues which might affect his private clients. However, the complaint did not involve any allegation in relation to the personal integrity of the Chairman.

By way of background, it is relevant to know that up to 2007 the Chairman had been employed as a high ranking official of the Commission. He then took up employment with a law firm which offers lobbying services to its clients on EU issues. On leaving, he was required by the Commission to refrain for one year from lobbying former colleagues and from dealing with cases



involving his previous Commission department.

In technical terms, the complainants argued that the re-appointment of the Chairman breached Article 4 of the Commission's own 2003 Decision [4] establishing the Committee. Under Article 4, a Committee member 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 did not accept that the Chairman had demonstrated either independence or an impeccable record of professional behaviour to a level which would support his appointment.

The complainants pointed out that the Chairman is employed as a lawyer/lobbyist in a major multinational law firm. This firm, according to its website, offers its clients a "*blend of legal and political expertise*" and says that it can assist in "*approaching government or the EU institutions ... [including] drafting and tabling amendments to proposed legislation*". The Chairman himself is described on the firm's website as specialising in European Commission policies, various areas of Community law and in "government relations and public policy". According to the complainants, the terms "*government relations and public policy*" are synonyms for lobbying services.

The complainants drew attention also to the fact that the law firm which employs the Chairman has failed to register with the EU's voluntary Transparency Register despite the fact that it is engaged in lobbying. Accordingly, it is difficult for the Commission to know which clients the Chairman and his firm represent and thus difficult to know which issues coming before the Committee might potentially give rise to a conflict of interest.

However, the complainants were able to point to the fact (as disclosed by the Commission itself) that the Chairman, acting on behalf of a tobacco company client, had twice met with the Commission's Legal Service in relation to the proposed Tobacco Products Directive.

The complainants pointed also to the fact that, again acting on behalf of a tobacco company client, the Chairman was involved in contacts with the Commission which led ultimately to the OLAF investigation into what the complainants refer to as the "Dalli Affair" [5]. The complainants contended that this intervention by the Chairman constituted lobbying on behalf of a client on an issue of major commercial and public health significance. Furthermore, the complainants contended that issues relating to the resignation of Commissioner Dalli were of a kind which might well have been referred to the Committee; and had this happened, the Chairman would have been in the position of advising the Commission on issues relating to an apparent scandal in the tobacco industry at a time when he himself (in his private professional capacity) was acting on behalf of a tobacco company.

A main plank in the position of the Commission (outlined below) was that it had no information to suggest any conflict of interest in the case of the Chairman and, furthermore, that it had no reason to doubt his integrity and independence. The complainants, on the other hand, pointed out that the Commission was not in any position to assess the real likelihood of a conflict of interests on the part of the Chairman given that it had no information on which clients he was



representing. For example, the complainants had queried whether the Chairman's firm was acting on behalf of a company which employed a former Commissioner and, if so, whether this might be problematical. The fact that the Commission had no information on this, one way or the other, was seen by the complainants as unsatisfactory as, in their view, such a situation would, on the face of it, create a conflict of interests.

The commission's position

The Commission's main argument was that it had no reason to believe that the Chairman's work on the Committee had been in any way affected by his work as a corporate lawyer whose clients include a major tobacco company. It did not agree that the work of the Chairman, in his private professional capacity, included lobbying. Its position was that all three members of the Committee had always acted with integrity, commenting: *"... 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 complainants' stance to question their integrity ..."*. [6]

The Commission added that the three Committee members, including the Chairman, had been re-appointed because of their in-depth knowledge and because of their previous demonstration of independence and integrity. Furthermore, the Commission was satisfied, should any situation involving a conflict of interest arise, that the Chairman (or any of the other members) would immediately inform the Committee and the Commission *"in order to protect the Committee's impartiality and independence"*.

The Commission relied heavily on the fact that the complainants had not provided any substantive facts or arguments to support its negative assessment of the Chairman. It noted that the complainants had not pointed to any specific instance in which there was a real, or even an apparent, conflict of interests. The Commission took the view that the complainants' case was too vague and intangible to require any action on its part.

As regards the involvement of the Chairman in contacting the Commission in relation to the "Dalli Affair", the Commission denied that this was of any significance and suggested that this intervention should not be seen as an action taken on behalf of a client. Rather, it was the response of a former official contacting his former employer. Similarly, the Commission did not see any cause for concern should it be the case that a company, employing a former Commissioner, was a client of the Chairman and his firm.

The ombudsman's conclusions

The Ombudsman makes it very clear that her inquiry is not concerned with the personal ethical credentials of the Chairman. The issue, rather, is whether the re-appointment of the Chairman could give rise to a risk of a conflict of interests. If so, such a conflict of interests would be likely to undermine that independence which is a prerequisite in the appointment of any member to the Committee [7] .



The Ombudsman accepts the argument of the complainants regarding the relevance of the OECD approach to conflict of interest situations. 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 .”*

It is a fact that the Chairman, in his private professional capacity, has had dealings with the Commission on behalf of private clients. The particular example cited by the complainants related to a tobacco company. As regards the Chairman's contacts with the Commission in relation to the so-called “Dalli Affair”, the Ombudsman is clear that this was done in the Chairman's capacity as a lawyer acting for a private client. The Ombudsman finds the Commission's characterisation of this as the action of a former official to be “inconceivable and naive”.

Whether or not one uses the term “lobbying”, the work of the Chairman representing his clients' interests is problematical. The issue here is not whether the person concerned (who has both public and private interests) modifies his behaviour as a result of a conflict of interests. Rather, following the OECD definition, the test is whether the behaviour of the individual, acting in his public capacity, **could** be influenced by his private interests. In this case, and contrary to the position adopted by the Commission, it is not necessary to point in a factual way to specific situations in which the behaviour of the Chairman was altered by the conflict of interest.

The Commission's re-appointment of the Chairman placed him in a difficult position. As Chairman of the Committee he was put in a situation where he would, in effect, be adjudicating on the future employment prospects of individuals who, on the basis of their current positions, had huge influence in relation to 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. In the event, it was unnecessary for the Ombudsman to make any recommendation to the Commission as it had decided to replace the Chairman prior to the completion of the Ombudsman's inquiry [8] .

[1] The three NGOs are LobbyControl, Corporate Europe Observatory and Corporate Accountability International.

[2] The Ombudsman does not normally identify individuals to whom a complaint relates but, in this instance, the former Chairman of the Committee has identified himself and commented publicly on the circumstances leading to his departure from the Committee.

[3] 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.

[4] Decision C(2003) 3750 of 21 October 2003

[5] This is a reference to allegations of attempted extortion of money from the tobacco company.

[6] The complainants have always made it clear that they were not alleging any lack of integrity on the part of the Chairman.

[7] Article 4 of Commission Decision C(2003) 3750 of 21 October 2003 requires that all members of the Committee must demonstrate “ *independence, [and] an impeccable record of professional behaviour* ”.

[8] But the Commission was aware of the conclusions likely to emerge from the Ombudsman’s inquiry.