

The European Commission's response to the Ombudsman's draft recommendation in the inquiry based on complaints 2077/2012/TN and 1853/2013/TN

Correspondence - 30/01/2015

Case 2077/2012/TN - **Opened on** 01/02/2013 - **Recommendation on** 22/09/2014 - **Decision on** 09/09/2016 - **Institution concerned** European Commission (Recommendation partly agreed by the institution) |

FINAL

Opinion on the Commission on the European Ombudsman's draft recommendation - Two joined complaints by Corporate Europe Observatory, Greenpeace EU Unit, LobbyControl and Spinwatch (ref. 2077/2012/TN) and Friends of the Earth Europe (ref. 1853/2013/TN)

BACKGROUND/SUMMARY OF THE FACTS/ HISTORY

In 2012 and 2013, Corporate Europe Observatory, Greenpeace EU Unit, LobbyControl, Spinwatch and Friends of the Earth submitted complaints to the Ombudsman relating to the "the revolving doors phenomenon". In response to those complaints, the Ombudsman (EO) decided on 1 February 2013 to open an own-initiative inquiry seeking to clarify, from a systemic perspective, how the European Commission deals with conflicts that may arise when staff leave or join its services.

THE INQUIRY

In this inquiry the EO seeks to identify systemic problems and systemic solutions to those problems. The EO underlines that her inquiry does not focus on the Commission's handling of the individual cases referred to by the complainants, but on such overall systemic issues.

During the course of the inquiry, the EO's services carried out in-depth inspections of the Commission's files with a view to detecting systemic issues. The inspections covered the Commission's files relating to the 11 individual cases identified by the complainants in their complaints to the EO, 27 files proposed by the Commission relating to 27 other members of staff and 16 files chosen by the EO's services.



On 28 November 2013 the EO asked the Commission to submit an opinion to her on the allegations and claims put forward by the complainants. She also asked the Commission to respond, in its opinion, to a series of detailed questions posed by her.

The Commission submitted its response to the EO on 29 April 2014. The EO sent the Commission's response to the complainants, who submitted their observations to the EO.

On 22 September 2014 the EO sent her draft recommendation to the Commission and the complainants and invited the Commission to submit its detailed opinion to the EO by 31 December 2014. The Commission requested an extension of the deadline until 31 January 2015, duly granted by the EO.

INTRODUCTORY COMMENTS BY THE COMMISSION

The Commission welcomes the draft recommendation of the EO as a valuable contribution to the overall discussion on avoiding conflict of interest. In particular the Commission welcomes the confirmation that, in accordance with the Commission's assessment, there was no conflict of interest in the overwhelming majority of cases examined. The EO also commends the Commission on numerous occasions on its successful efforts in continuously improving its ethics system.

The European Union is a Union of law and the Commission, as all other European institutions and bodies, is bound to respect the law. The Commission considers that the key principles at stake in relation to the issue of "*staff leaving the institutions to take up positions in the private sector*" are notably: Transparency and accountability, the rule of law, the right to work, the right to protection of personal data and finally, the principle of proportionality.

There could potentially be some tension between these principles in relation to the situation of "*staff leaving the institutions to take up positions in the private sector*": for example between the requirement for transparency versus the requirement to protect personal data, or the right to work versus the protection of the legitimate interest of the Institution. It is the obligation of the institutions to weigh up these principles carefully. To do this, we must apply the fundamental principle of proportionality to come to fair and just results which accommodate all interests at stake to the extent possible.

The report of the EO clearly shows that alleged deficiencies have only been found in a few cases. The Commission therefore questions whether it is correct to speak of 'systemic maladministration'. Furthermore, the Commission would note that its practice is fully compliant with the legal framework it has to apply.

Nevertheless, the Commission remains open to discuss how the matter of "*staff leaving the institutions to take up positions in the private sector*" can be best dealt with, and is willing to consider taking on board suggestions on how to further improve its system.

THE DRAFT RECOMMENDATION



The Ombudsman finds that the Commission should:

(a) Analyse fully each individual application to work outside the Commission and set out that analysis in well-reasoned and well-documented decisions

The EO acknowledges in her draft recommendation (hereafter the EO Report) that "*the Commission normally sets out extensive reasoning in a decision refusing a request to undertake an outside activity and in decisions approving such requests subject to conditions*" [1] .

Her recommendation relates to the need for the Commission to set out "*clearly and fully the grounds for positive decisions, namely decisions which authorise, without any conditions, an official to take up a job outside the institution .*" Although, the EO accepts that the Commission is correct in stating that it has no legal obligation to provide reasons for such positive decisions , she nonetheless insists that "*it is clearly good administrative practice and in the interest of all citizens that such decisions are fully and well-reasoned.*"

As the Commission has already set out in its response of 29 April 2014, it is open to giving further explanations in these cases (positive decisions). The form and content of such reasoning will take into account the nature of the envisaged activity, on a case-by-case basis.

(b) Properly record that it has analysed whether the information provided by the official regarding the proposed outside work is sufficiently detailed to allow the Commission to carry out a full analysis of that outside work

This recommendation is based on point 23 of the EO Report: "*... that the Commission should mention explicitly, in the file, that the information provided by the applicant regarding his or her job outside the Commission is sufficient to allow it to carry out a thorough analysis of the case. The Ombudsman is of the view that the need, imposed on the service analysing the file, to make such an explicit statement, leads to a situation where the service can reflect more carefully on the issue. If the analysis leads to the conclusion that the information provided is not sufficient, the Commission should ask the applicant to provide additional information.*"

The Commission would like to underline that when it finds it does not have sufficient information at its disposal, it requests the provision of additional elements from the applicant and/or the relevant Commission services if appropriate. These requests are duly recorded in the file.

However the Commission agrees to include an additional statement, in the form of a check-list to be completed and included in the file, that the information provided by the applicant is sufficient to allow for a thorough analysis of the file.

(c) Properly record and analyse comments made by other Commission services, particularly when the eventual position of the Commission deviates from those comments



The Commission welcomes that the EO noted a clear improvement in the Commission's efforts to document its decision, from the inspection of recently completed files.

The Commission considers that it can be seen in its files that it thoroughly analyses all relevant comments and even whenever necessary requires more and extensive reasoning from associated services, as evidenced by internal exchanges which are properly recorded in the file. However, the Commission will again take this opportunity to further reflect on whether further improvements are possible.

(d) Take all the necessary steps to ensure that the Commission applies the rules on conflicts of interests consistently across the Commission, including by alerting DGs whenever inconsistencies as regards the imposition of conditions are identified

This recommendation is based on point 31 of the EO Report: "*However, the Ombudsman's inspection of files has led her to conclude that such consistency has not always been the rule.*" In the following point 32 the EO also announces that "*The Ombudsman also intends to follow up on this commitment through inspection of the Commission's files when evaluating the implementation of the new conflict of interest provisions in the Staff Regulations.*"

In all Article 16 cases, DG HR consults the Secretariat General and the Legal Service in order to ensure that a legally sound, consistent and coherent approach is applied across Commission services. Should some divergence be identified, the services concerned are requested to check whether this is justified and if found to be so, this justification forms a central part of the file. The fact that the Director-General of DG HR is the Appointing Authority for decisions under Article 16 contributes also to ensuring an equal treatment for all former staff regardless of their DG of origin.

In addition, coherence is also ensured through the ethics correspondents' network which meets on a regular basis and discusses those issues.

The Commission has already taken steps to improve consistency in the implementation of the ethical provisions in the new Staff Regulations, in particular through the network of ethical correspondents and through the Ethics collaborative website launched in October 2014 and will also consider whether developing guidelines for services could improve consistency further.

(e) Ensure that the assessment of applications is carried out by staff who have not had any direct professional connections with the official concerned. It is particularly important to pay close attention to this requirement as regards senior officials

In point 42 of the EO Report: "*The Ombudsman maintains that the greatest care possible should be taken to ensure that the assessment of all applications is carried out by persons not having had any direct professional connections with the applicant. The Ombudsman also acknowledges, however, that in respect of senior officials, this may be difficult to achieve.*"

As the Commission already pointed out in its earlier reply, the views of the DG of origin are but



one of the elements that are taken into account by the Appointing Authority in its final decision. Opinions are also provided by unconnected services, namely the Secretariat General and the Legal Service. In addition, the Joint Committee is consulted in the process.

The views of the DG of origin are provided in order to assess any possible links between the new activity and work undertaken in the DG in the last three years of service. A full and proper analysis of the work performed in the service and of the related risks is best performed by the Directorate General/Service which has the most relevant expertise. With regard to former senior managers, an additional check is made with the Cabinet of the Commissioner in charge of the service concerned.

As the EO team will have seen in the files, complicated issues identified during this process are discussed at length notably with the Secretariat General and the Legal Service – which are consulted on every file related to an Article 16 request. In this context, the investigation team will have noted that it is by no means the case that the views of the DG of origin are always followed.

The Commission finally recalls that the EO has found that in the overwhelming majority of the cases that her services inspected there was no evidence of conflict of interest.

(f) Inform staff that they remain bound always to behave with integrity and discretion as regards the acceptance of certain appointments or benefits, remind them that this obligation is not limited in time, and take all possible measures vis-à-vis any former staff who ignore this obligation by accepting any problematic employment offer

The Commission reminds staff regularly about their obligations. All staff leaving the service are similarly reminded of their obligations in a specific leaving document. The Appointing Authority decisions remind former staff members of the Staff Regulations Articles to which they are bound after leaving the service i.e. Articles 16, 17 and 19, as well as Article 339 of the Treaty on the Functioning of the European Union.

All those who have retired on pension are also reminded of their obligations deriving from Article 16 of the Staff Regulations through periodic messages.

In its earlier reply, the Commission has already concurred with the EO on the duration of the obligations set out notably in Article 16(1) of the Staff Regulations. The Commission has indicated that where a former staff member takes up an activity even more than 2 years of leaving the service and where this is in breach of his duty to behave with integrity and discretion under Article 16 (1), this may lead to disciplinary measures.

Guidelines for further improvements

The Commission understands that the following recommendation is made by the EO in a spirit of cooperation and helpfulness with the aim of further improving the solid system in place.



The Ombudsman suggests that the Commission:

(g) Identify those DGs that should have codes on ethics and integrity and make sure that such codes are put in place

Many DGs and services have specific guidelines in the domain of professional ethics. The Commission agrees that such guidelines play a useful additional *illustrative* role in particular sectors of activity in that they can help staff to better understand what their obligations are and what can be difficult situations in a given sector of activity. However, they are designed to give guidance on the basis of the rules adopted by the legislative authorities and cannot in any event impose any further-reaching obligations on staff. The Commission considers that it is appropriate to leave the development of such specific codes on ethics and integrity to the discretion of the DGs which are best placed to judge the need and content of such codes. The consistency of the codes is ensured by the requirement that they are approved by DG HR, the Secretariat General and the Legal Service.

(h) Where applicable, also analyse applications to work outside the Commission on the basis of DG-specific Codes of ethics and integrity

This suggestion is based on point 19 of the EO Report: *"If a request to be allowed take up a job is made by an official who used to work in a DG with a DG-specific Code of ethics and integrity (see further below and the guidance in point (h) below), the decision on the application should state whether the Code in question sets out more detailed and relevant rules and analyse the application on the basis of these rules also."*

Please see the reply to suggestion (g) above.

(i) Improve the Ethics and conduct website of the Commission

The Commission is continuously updating and improving its Ethics and conduct website on Europa and will intensify these efforts (see also answer to point d).

(j) Publish online DG-specific codes or guidelines

The Commission will consider how to give appropriate publicity to these internal codes and guidelines but is still examining the ways in which this can be done, with the aim of ensuring greater transparency through adequate publication on the Europa website.

(k) Publish online, in respect of decisions to approve requests to work outside the Commission from senior officials, (i) the name of the senior official concerned, (ii) details of the duties carried out in the Commission by that senior official, (iii) details of the duties to be carried out in the new activities, and (iv) the Commission's detailed assessment and conclusions (including any conditions) in respect of any potential conflict of interest



The Commission is currently in the process of reflecting on the appropriate format, scope and content to be given to the annual information to be contained in the publication which is foreseen under Article 16 (4) of the Staff Regulations. To this end the Commission has taken contact with the other institutions concerned. The Commission therefore takes note of the EO's views and will consider them when developing the format of the annual publication but cannot at this stage undertake any specific commitment. In this context, data protection issues will have to be fully taken into account.

Once the Commission system is in force, the Commission will be happy to provide the Ombudsman with further details.

(l) Inform the Ombudsman of each case where exceptional and compelling privacy reasons prevent the publication referred to in point (k) above. The Ombudsman will then inspect and assess the file on the decision taken to allow that senior official to work outside the Commission

The Commission takes note of the position of the Ombudsman and will consider the feasibility of this when designing its system for publishing information.

The Commission has wide discretion to make the assessments and take decisions in this field. However, the EO is naturally entitled to carry out inquiries where she finds that there are reasons to suspect possible instances of maladministration. The Commission will fully cooperate whenever the Ombudsman decides to examine a file in the context of an inquiry.

(m) Put in place a centralised register of staff applications to work outside the Commission and for conflict of interest assessments of incoming staff

As the EO is aware, the Commission has a central internal tool which allows for the processing of the assessments of ethics requests and the subsequent decisions which are to be placed in the personal file of the applicant. This central processing tool is gradually being expanded to embrace all ethics requests and can be considered equivalent to a register. Further developments are foreseen in the context of increasing transparency and accountability.

In this respect the Commission notes that the EO does not intend that such a register be public and that the EO considers that data protection rules are to be respected.

(n) Use the Ombudsman's recommendation set out in points (a) to (f) as guidelines when assessing possible conflicts of interest of incoming staff

Article 11, third and fourth subparagraphs, of the Staff Regulations already implement those recommendations of the EO concerning the need and the way to assess possible conflict of interests for the recruitment of incoming staff and even for return from leave on personal grounds. For all the Commission staff, training and awareness raising activities reminds staff regularly about their obligations.



(o) Use the Ombudsman's recommendation set out in points (a) to (f) above when analysing whether the prohibition on senior staff leaving the Commission from engaging in lobbying or advocacy vis-à-vis the Commission is complied with

The Commission will in a positive spirit further explore the feasibility of the Ombudsman's recommendation when assessing the cases concerning the prohibition of senior officials from engaging in lobbying activities. It will take into account the principles outlined in the points (a) to (f) above in these cases.

(p) Take the necessary steps to ensure that all future cases reflect the policy that commitments offered by the officials, aimed at eliminating conflicts of interest, are expressly referred to and analysed in the file

The Commission has already stated in its earlier response that the commitments offered by its former staff members will be referred to in the decisions of the Appointing Authority.

CONCLUSIONS

The Commission welcomes the EO's draft recommendation as a valuable contribution to the discussion on conflict of interest and related awareness-raising. Commission decisions are well-reasoned and well-documented. At the same time, it will strive to improve its system in particular to ensure that the public is properly informed about the rules and procedures and how they are applied by the Commission with due respect to the data protection requirements.

[1] EO Report, point 20