

European Ombudsman Staff Working Paper on the revision of the ECB's Ethics Framework

Letter - 20/08/2014

Staff Working Paper

ECB Ethics Framework: input from the European Ombudsman's Office

This working paper contains three sections. Section I briefly outlines the ECB's new banking supervisory functions and the Ombudsman's involvement in this area to date, Section II describes the ECB's current and draft new Ethics Framework, and Section III contains comments on the draft new Ethics Framework [1].

I The context

A The ECB's new supervisory functions

The European Central Bank (ECB) is preparing to take on new banking supervision tasks from 4 November 2014. Under the new system, the ECB will directly supervise about 130 "significant" credit institutions, representing almost 85% of total banking assets in the euro area, and will work closely with national competent authorities to supervise the other 6 000 or so credit institutions. The aim of the so-called Single Supervisory Mechanism (SSM) is to help ensure a safe banking sector at the service of the European economy and its citizens.

A financial supervisor has the power to significantly affect the interests of individual financial institutions, consumers, and even countries. The ECB will decide, among other things, whether a bank should be shut down, whether it needs to hold more capital or divest activities that pose excessive risks, whether it can distribute profits to shareholders, and whether it needs a change of management. The ECB will, moreover, have the power to impose fines of up to 10% of annual turnover for breaches of directly applicable Union law. To effectively perform these tasks, the ECB will have extensive investigatory powers, including the possibility to carry out on-site inspections, to require that all necessary information be provided to it and to conduct investigations.

Having already earned a reputation as one of the most independent central banks in the world,



the ECB will become an exceptionally powerful institution when it takes on these additional supervisory tasks. While effective banking supervision requires independence and a high degree of confidentiality, the credibility of the system also requires strong mechanisms to ensure accountability and integrity. This is all the more so given the nature of the ECB's new tasks and the extent to which the performance of these tasks may impact on the ECB's sound monetary policy reputation. The accountability framework must therefore be commensurate with the nature and extent of the ECB's new tasks, powers and responsibilities.

The [SSM Regulation \[Link\]](#) provides for various channels of political accountability, with the ECB reporting to the European Parliament and the Council, as well as to national parliaments. In addition, the ECB has certain reporting obligations to the European Commission. The Regulation also foresees the establishment of an Administrative Board of Review (ABR) to deal, internally, with requests for review of the ECB's decisions in this new field [2] .

To ensure public accountability, transparency obligations will have to be fully embedded into the ECB's institutional framework. In the field of banking supervision, a high degree of confidentiality is essential in order to guarantee that price sensitive information is not misused for personal gain and that information is not disclosed which could pose a threat to the stability of legitimate commercial interests and/or the public interest in the stability of the financial system. At the same time, while confidentiality is essential, so is transparency: the ECB will need to be as open as possible about the supervisory decisions it makes and the reasons behind those decisions. Moreover, the ECB's rules on public access to documents will need to be revised to take account of its new tasks, since Article 15 TFEU appears to leave it to the ECB itself to find a convincing balance between the general principle of transparency and the need for confidentiality in relation to its core functions [3] . The Ombudsman may decide to look into these issues in greater detail in the coming months.

Beyond that, the ECB needs to ensure and demonstrate that its staff discharge their functions with the highest degree of professionalism and integrity. The ECB's rules and policies in areas such as ethics and whistleblowing deserve particular attention in this regard.

B The Ombudsman's involvement

The Ombudsman and the President of the ECB met on 6 May 2014. During their discussions, the President mentioned that the ECB is in the process of revising its Ethics Framework. The Ombudsman offered to make the resources of her Office available to assist the Bank in rulemaking on subjects where the Ombudsman has relevant experience and expertise. The Ombudsman reiterated this offer in a letter dated 26 May 2014. The President accepted that offer by letter dated 18 June 2014.

As foreseen in the President's letter, the co-operation between the ECB and Ombudsman on this matter is at the level of the services. This has been confirmed by an exchange of e-mails between the services. The Ombudsman's letter of 26 May 2014 , the President's letter of 18 June 2014 and an exchange of e-mails between services are directly available on the



Ombudsman's public register. The note of the meeting that took place between the services on 23 July 2014, as well as this working paper, which constitute the record of the discussion between the services on this issue, will also be made available on the public register.

On our side, work on this subject is coordinated by RA in the Secretariat-General.

The ECB services sent us two ECB-Restricted files, namely: (i) a draft 6-page Decision of the European Central Bank of DD/MM/2014 amending the Conditions of Employment for Staff of the European Central Bank and the Conditions of Short-Term Employment as regards the ethics framework (ECB/2014/NPX) [4] ; (ii) a draft 21-page Decision of the European Central Bank of DD/MM/2014 amending the European Central Bank Staff Rules as regards the ethics framework (ECB/2014/NPX).

While both decisions are to be signed by the ECB President, document (i) will be adopted by the ECB's ultimate decision-making body, the Governing Council, while document (ii) will be adopted by the ECB's Executive Board (see further below, Section III.B 'Procedure'). Most of the comments below pertain to document (ii) which is, in effect, the ECB's Ethics Framework.

II The ECB's Ethics Framework

A. The current Ethics Framework

The current Ethics Framework [5] is referred to as Part 0 of the ECB Staff Rules. The 5-page document, dating from 2010, contains the following Articles:

0.1 General Provisions

0.2 Ethics Officer

0.3 Professional Secrecy

0.4 In-house relations

0.5 Use of the ECB's resources

0.6 Dignity at work

0.7 Obligation to report breaches of professional duty [6]

0.8 Conflicts of interest - general rule

0.9 Gainful employment of a spouse or recognised partner



0.10 Giving and accepting gifts

0.11 External activities performed in the course of professional duties

0.12 Private activities

0.13 Procurement

0.14 Negotiating prospective employment

0.15 Awards, honours and decorations

0.16 Relations with external parties

0.17 Insider trading

B. The draft new Ethics Framework

The draft Decision containing the new Ethics Framework is structured as follows:

0.1 General provisions and principles

0.2 Independence

Conflicts of interest

Gifts and hospitality

Procurement

Awards, honours and decorations

Prohibition of payment from third parties for the performance of professional duties

External activities

Gainful occupation of a spouse or recognised partner

Post-employment restrictions (covering negotiating prospective occupational activities, notification obligations, cooling-off periods)

0.3 Professional Standards

Professional secrecy



Relations with external parties

In-house relations

Respect of the principle of separation between supervisory and monetary policy functions

0.4 Private financial transactions

General principles

Categories of private financial transactions (namely, exempt, prohibited, subject to prior authorisation, subject to ex-post reporting, existing assets resulting from prohibited transactions, request for authorisation, discretionary asset management by a third party)

Compliance monitoring

0.5 Dignity at work (covering issues such as discrimination and harassment)

0.6 Use of ECB resources

0.7 Implementation

C. The Ethics Framework and the ECB's Code(s) of Conduct

According to Article 19(3) of the SSM Regulation (under the title 'Independence'), *"following an examination of the need for a Code of Conduct by the Supervisory Board, the Governing Council shall establish and publish a Code of Conduct for the ECB staff and management involved in banking supervision concerning in particular conflicts of interest"*. Recital (8) of the draft Decision amending the Ethics Framework reads as follows: *"The Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of tasks conferred on the ECB within the framework of the Single Supervisory Mechanism provides that 'the Code of Conduct shall address matters of conflict of interest and ensure the respect of the rules on separation between supervisory and monetary policy functions'."*

The ECB services confirmed (phone contact, 4 July 2014) that the draft new Ethics Framework is, in effect, the abovementioned *"Code of Conduct for the ECB staff and management involved in banking supervision"* [7].

III Comments on the draft new Ethics Framework



A. Introduction

As outlined in the Introduction to the Ombudsman's Public Service Principles for EU civil servants [8] , rules, however carefully they may be drafted, do not remove the need to also focus on high-level ethical principles. Rules do not interpret and apply themselves. To know what they mean in concrete situations often requires the exercise of judgment. Moreover, it is not possible to frame rules that cover everything.

Against this background, it would be useful to invite the ECB to draw its staff's attention to the Public Service Principles drawn up by the Ombudsman. These principles constitute a high-level distillation of the ethical standards for EU civil servants. Bearing the principles in mind can help civil servants to understand and apply rules correctly, and guide them towards the right decision in situations where they should exercise judgment.

Point discussed at the meeting held between the services on 23 July 2014: The ECB endeavours to draw its staff's attention to the Ombudsman's Public Service Principles during training sessions.

B. Procedure for adopting the draft new Ethics Framework

The draft new Ethics Framework will be subject to two rounds of ECB internal staff consultations [9] . In line with the Interinstitutional Agreement between the European Parliament and the ECB, the latter will inform Parliament about the main elements of the new Ethics Framework before it is adopted. The new Framework will also be submitted to the ECB's Supervisory Board, the High Level Audit Committee and the ECB's decision-making bodies.

We are not aware of any plans for public consultation, nor is there any legal obligation on the ECB to conduct such a consultation. Furthermore, our key point of reference on rulemaking is not intended to apply to strictly internal rules [10] . It could, however, be useful to draw attention to the possibility to invite comments from one or more key civil society organisations (e.g., Transparency International) before the final adoption of the new Ethics Framework and to make the draft text available online at the same time.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives mentioned that there are currently a number of public consultations ongoing/planned in relation to the Bank's new supervisory functions. They underlined that extensive consultation had already been conducted in relation to the draft new Ethics Framework (see section C on 'Benchmarking' below) and further referred to the fact that the draft new Ethics Framework will be transmitted to the European Parliament, which should lead to a public debate.



C. Benchmarking

In terms of relying on best practice from the EU level, the Member States and organisations such as the OECD, the following material is relevant.

EU level : While the EU Staff Regulations (SR) do not apply to the ECB [11] , the principles underlying the relevant SR provisions (notably Articles 11, 11a, 12, 12a, 12b, 13, 15, 16, 17, 17a, 19, 21, 21a, 22, 22a, 22b, 22c) could provide a useful source of inspiration to the Bank in drawing up its revised Ethics Framework. Further inspiration could be found in the Code on Ethics and Integrity applied by the Commission's DG Competition. RA has already suggested to the ECB services that it could be useful for them to look at DG Competition's Code.

The Ombudsman is currently conducting an inquiry into the implementation of the rules governing conflicts of interest in respect of staff and former staff of the European Commission. A list of the issues the Ombudsman is examining, which includes the possibility of introducing an independent assessment for 'revolving doors' cases and questions about sanctions, can be found on the Ombudsman's website [12] . The Ombudsman expects to take the next step in this important case in the autumn and will inform the ECB so that it can draw inspiration from the Ombudsman's work in this area.

Member States : In light of the fact that (i) banking supervision has, to date, been carried out at the level of the Member States and (ii) staff from the ECB and national competent authorities will work together in Joint Supervisory Teams [13] , the ECB could also examine the relevant rules at the Member State level in order to ensure that its Ethics Framework demonstrably enshrines the highest standards.

OECD: Relevant OECD material includes the Guidelines for Managing Conflict of Interest in the Public Service [14] , *'Post-Public Employment - Good Practices for preventing conflict of interests'* [15] and *'Revolving Doors, Accountability and Transparency - Emerging Regulatory Concerns and Policy Solutions in the Financial Crisis'* [16] .

The ECB services informed RA that, in drawing up the rules, in particular on private financial transactions and conflicts of interest, the ECB had already carried out extensive benchmarking, notably in relation to the other EU institutions, comparable financial institutions, such as the Bank of England and the US Federal Reserve, as well as the national rules of the Eurosystem central banks, and the European Bank for Reconstruction and Development.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives clarified at the meeting that the ECB had drawn on a very wide range of relevant material in revising the Ethics Framework, including material from the OECD.

D. Personal scope of application of the draft new Ethics Framework



Staff members from the ECB and from national competent authorities (NCAs) will work together in joint supervisory teams (JSTs). However, the ECB's Ethics Framework is not intended to apply to individuals from the NCAs [17]. The ECB services informed RA that the ECB would work towards common standards for staff within the SSM with a view to harmonising to the greatest extent possible the standards in this area.

The ECB will need to ensure that staff in the JSTs can work effectively together, despite the fact that the written guidance they follow on ethical matters may be different, even if the underlying principles are the same. Without a common Ethical Framework, there could be a high risk of misunderstanding or divergence when complex issues arise in practice, especially if rapid action is required. In particular, ECB staff working in JSTs may need further guidance in relation to the following provisions in the draft Ethics Framework::

Article 0.3.1 on 'Professional secrecy': *"Members of staff shall (...) seek authorisation to make disclosure of information within and outside the ECB, where necessary."*

Article 0.3.2.1 under 'Relations with external parties': *"(...), members of staff shall neither seek nor take instructions from any (...) person outside the ECB."* [18]

Article 0.3.2.2 provides that *"Members of staff shall conduct their relations with their colleagues in the (...) national competent authorities which participate in the single supervisory mechanism (SSM) in a spirit of close mutual cooperation, bearing in mind their obligations towards the ECB and the impartial role of the ECB within the ESCB"*.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives explained that ECB and national staff have already worked together in areas such as inspections of banknotes and that this has been unproblematic to date. In terms of ECB staff potentially having to follow instructions given by an NCA sub-coordinator, for example, the ECB representatives explained that ECB staff would not work under the direction of an NCA sub-coordinator. The ECB representatives further explained that additional guidelines will be issued covering the interpretation and application of certain provisions in the Ethics Framework, including in relation to some of the aforementioned areas.

E. Content of the draft new Ethics Framework

This section examines the aspects of the draft new Ethics Framework, with which the Ombudsman's Office has had most experience, namely (i) conflicts of interest, (ii) obligations of professional secrecy, (iii) private financial transactions, and (iv) whistleblowing.

(i) Conflicts of interest

Conflicts of interest are covered in various Articles in the draft new Ethics Framework, notably Article 0.2.1 entitled 'Conflicts of interest', as well as Article 0.2.8 entitled 'Post-employment restrictions', which covers notification obligations and cooling-off periods.



(a) Definition

The ECB refers, at different points in the draft new Ethics Framework, to actual, potential and perceived conflicts of interest. It would be helpful to include an explanation of these concepts, possibly by referring to the OECD definitions, which are as follows:

"A 'conflict of interest' involves a conflict between the public duty 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." [19]

"An apparent conflict of interest can be said to exist where it appears that a public

official's private interests could improperly influence the performance of their duties but this is not in fact the case."

"A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future."

With regard to the concepts of apparent and potential conflicts of interest, it might furthermore be useful to draw the ECB services' attention to the following paragraphs from the Ombudsman's decision in case 297/2013/FOR [20] :

"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 (...)" (Paragraph 56)

"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." (Paragraph 66)

It is not, in fact, clear whether perceived conflicts of interest are really covered by the ECB's draft rules. The ECB services could be invited to revisit this important point.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives sought clarification on the concept of "apparent/perceived" conflict of interest. Some concrete examples from the Ombudsman's work would be helpful.



(b) Use of the term "conflicts of interest"

Recital (6) of the draft Decision amending the ECB's Ethics Framework reads as follows: *"Based on Council Regulation (EU) No 1024/2013, in addition to its monetary policy functions with a view to maintaining price stability, the ECB will be entrusted with the exercise of supervisory tasks with the objective to protect the safety and soundness of credit institutions and the stability of the financial system. **These tasks should be carried out in separation, in order to avoid conflicts of interests** and to ensure that each function is exercised in accordance with the applicable objectives"* . (emphasis added)

The OECD definition of a conflict of interest refers to *"a conflict between the **public duty** and **private interests** of a public official (...)"* (emphasis added). The conflict referred to in Recital (6) does not fall under such a definition, given that it relates to a potential conflict between two aspects of an official's "public duty". It could be useful to suggest that the term *"conflicts of interest"* not be used in the context of the separation of monetary policy and supervisory tasks, for fear of confusion. The ECB should, rather, continue to refer to the notion of 'separation'.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives referred to Recital 65 of the SSM Regulation, which refers to "conflicts of interest" in this context and from which Recital 6 of their draft new Ethics Framework comes. They mentioned that "conflict of functions" might be a more appropriate term.

(c) Cooling-off periods

Article 31(3) of the SSM Regulation provides as follows:

*"The ECB shall establish and maintain **comprehensive and formal procedures** including ethics procedures and proportionate periods to **assess in advance** and prevent possible conflicts of interest resulting from subsequent employment within two years of members of the Supervisory Board and ECB staff members engaged in supervisory activities, and shall provide for appropriate disclosures subject to applicable data protection rules.*

(...)

For the ECB staff members engaged in supervisory activities, those procedures shall determine categories of positions to which such assessment applies, as well as periods that are proportionate to the functions of those staff members in the supervisory activities during their employment at the ECB. " (emphasis added)

The new draft Ethics Framework contains, by way of example, the following provision:

Article 0.2.8.3 (a) *"members of staff who were during their employment with the ECB involved in supervisory activities for at least six months **may only start working for** : (1) a credit institution in the supervision of which they were directly involved **after the expiry of (i) two years** if they are at salary band I or above; (ii) one year if they are at salary band F/G to H [21] from the date*



on which their direct involvement in the supervision of the credit institution ceased." (emphasis added)

Article 0.2.8.3 (a) also refers to the prospect of going to work for a direct competitor of such a credit institution, in which case the relevant periods are (i) one year and (ii) six months respectively. These periods should not, however, be shorter than those provided for in the preceding paragraph, given that a former staff member can bring equally (if not more) valuable information to a competitor as he/she can to the credit institution he/she supervised.

One might also ask why this important provision on cooling-off periods is limited to working for a *"credit institution in the supervision of which they were directly involved"* or a *"direct competitor"* of such a credit institution. This would enable the persons concerned to join other sorts of undertaking (such as consultancy firms) without any cooling-off period.

According to Article 0.2.8.6, *"the Executive Board may waive or reduce the cooling-off periods (...) if there are particular circumstances that exclude possible conflicts of interest resulting from subsequent occupational activities"*.

Unlike Article 16 of the EU Staff Regulations [22], the rule of thumb for ECB staff involved in supervisory tasks is that a move to certain entities within the private sector is prohibited for a certain period of time, unless the Executive Board decides otherwise. It can be argued that, given the nature of the tasks of supervisory staff, this is the more appropriate approach. Where the Executive Board indeed waives or reduces the cooling-off period, such an exception should be duly reasoned and published (see section (g) on 'Transparency' below).

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives recalled that the right to engage in work is a fundamental right and that any limitation of this right must comply with the principle of proportionality. They explained that they had undertaken extensive consultation and sought to strike the right balance between the employee's fundamental right and the need to protect the public interest. They pointed out that some contracts within the ECB are short, fixed-term contracts and that the ECB needs to ensure that it can attract individuals with the experience and expertise commensurate to the tasks the Bank is being called upon to perform. The ECB representatives further underscored the importance of the obligation of professional secrecy and recalled that any move to the private sector took place under the proviso of professional secrecy obligations being respected.

There is provision for transitional allowances to be paid to members of staff who, following the end of their employment with the ECB, are prohibited from taking up a specific occupational activity, cannot find a suitable alternative and are, as a result, unemployed for a period of more than six months. These allowances may appear to the public to be generous (80% of the last basic salary for the first six months, 60% for the year thereafter) and it would be useful for the ECB to provide additional explanations. The ECB services could be invited to reflect on whether they are satisfied that a reasonable balance has been struck between the individual right to engage in work and the public interest.



Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives pointed out that there are very strict conditions applying in this area in order to qualify for the allowance in question. They further pointed out that they had carried out extensive benchmarking in relation to this question. They noted, for example, that the unemployment benefits available to former EU staff are higher than those available to former ECB staff.

(d) Lobbying former colleagues

With regard to a prohibition on lobbying former colleagues, the ECB timelines are shorter than those provided for in Article 16 of the EU Staff Regulations (six months for ECB senior officials compared to 12 months for senior staff covered by the EU Staff Regulations). This should be revisited.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives mentioned that the ECB – given its specific responsibilities – is rarely the object of lobbying. The Ombudsman's representatives pointed out that there should also be a duty on current employees to avoid preferential treatment of former colleagues.

(e) Declarations of interest and declarations of conflicts of interest [23]

The ECB could usefully refer to the Commission's Guidelines on the prevention and management of conflicts of interest in EU decentralised agencies [24]. These Guidelines refer, for example, to declarations in relation to financial interests and to spouse's/partner's/dependent family members' [25] current activity and financial interests that might entail a risk of conflict of interest. According to the Guidelines, depending on the degree of exposure to the risk of conflicts of interest, Dols may need to be submitted at least annually in writing and updated. Dols should be available for public scrutiny, with due respect for EU rules on protection of personal data (see section (g) on 'Transparency' below).

Point discussed at the meeting held between the services on 23 July 2014: The Ombudsman's representatives pointed out that it is preferable for employees and former employees to have to sign, on an annual basis, a declaration confirming that they are in compliance with their professional obligations vis-à-vis the ECB. As such, the onus is on them rather than on the ECB to ensure compliance. The ECB representatives explained that the draft Ethics Framework includes reporting obligations, in particular as regards conflicts of interests. In addition, an annual declaration of compliance will be considered. As regards 'dependent family members', the draft Ethics Framework requires ECB staff to report, in particular, conflicts of interest arising from occupational activities of spouses or partners. In the absence of an appropriate legal basis it would, however, be difficult to create reporting obligations of spouses or family members. .

(f) Compliance Unit

A Compliance Unit will be established to replace the Ethics Officer, provided for under the



current Framework. According to Recital (14) in the Preamble, this dedicated Unit will be established to *"enhance the prevention of non-compliance incidents and to increase the response-ability of the ECB in case such incidents occur."* The Compliance Unit will, inter alia, provide advice to ECB staff on the interpretation and application of the Ethics Framework. This is most welcome. It would be useful for the ECB services, if they have not already done so, to take contact the US Federal Office of Government Ethics [26] , which has long experience in this field.

Besides the provision of advice, the Compliance Unit will be required in certain cases to grant authorisations (e.g. Article 0.2.4 provides that members of staff shall obtain authorisation from the Compliance Unit before accepting awards, honours or decorations and Article 0.4.2.3 provides that staff members shall request authorisation before making certain financial transactions). Similarly, the Compliance Unit may request staff members to dispose of certain assets, if such disposal is necessary to avoid a conflict of interest (Article 0.4.2.5). Article 0.4.1.2 further provides that the Compliance Unit may issue binding guidelines for the interpretation and application of Article 0.4 on private financial transactions. Finally, where evidence giving rise to a suspicion of breach of professional duties is identified, the Compliance Unit shall assess the potential breach and, if substantiated, report it to the competent body for further investigation or disciplinary follow-up.

The Compliance Unit will clearly play a critical role in ensuring that ECB staff respect their obligations under the new Ethics Framework. It would be useful to know what resources the ECB will devote to this Unit.

Point discussed at the meeting held between the services on 23 July 2014: The Ombudsman's representatives pointed to the importance of a credible Compliance Unit, in order to promote an organisational culture that is understood not to tolerate conflicts of interest, insider trading and other breaches of the Ethics Framework. The ECB representatives acknowledged the important role to be played by this Unit.

(g) Transparency

In line with Article 31(3) of the SSM Regulation (*"(the ECB) shall provide for appropriate disclosures subject to applicable data protection rules"*), the ECB should reflect on whether it will proactively publish information in relation to cooling-off periods and the prohibition on lobbying. (Article 16, fourth indent, of the new EU Staff Regulations, states that *"each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed"* .) We would strongly suggest that it does, for example, via a dedicated section on the ECB website. In doing so, the ECB may also wish to take account of the EDPS' forthcoming guidelines in relation to conflicts of interest.

Point discussed at the meeting held between the services on 23 July 2014: The Ombudsman's representatives pointed out that transparency can also serve the interests of ECB employees and former employees by protecting them and upholding their integrity. By proactively publishing information in relation to moves through the revolving door, the ECB can



help manage apparent conflicts of interest. The Ombudsman's representatives drew attention, in this regard, to the recently launched Corporate Europe Observatory, [RevolvingDoorWatch \[Link\]](#).

(h) Gifts and hospitality

The provisions on gifts and hospitality are worded rather vaguely. For example, Article 0.2.2.3(c) of the draft new Ethics Framework provides that the following may be accepted by ECB staff: *"advantages offered in specific circumstances in which their rejection would have caused an offence or put the professional relationship at serious risk"*. The risk of causing offence is a highly subjective element.

The draft rules provide that such advantages must be registered with the Compliance Unit without undue delay. It could be useful to add that if such advantages take the form of physical gifts, they should normally become the property of the ECB.

Point discussed at the meeting held between the services on 23 July 2014: The ECB representatives stated that the rules are, in their view, sufficiently clear but will be further specified by guidelines for the interpretation and application of the rules. Moreover, they explained that it is customary to donate gifts to charity.

(i) Sanctions and remedial action

The draft new Ethics Framework does not seem to include any provision for sanctions in case of breaches (for example, failure to declare an actual or potential conflict of interest). It is understood that the relevant rules on administrative inquiries and disciplinary procedures would apply although it might be helpful to specify this. It should also be noted that it is difficult to apply or impose traditional disciplinary sanctions in this area, notably when the individual in question has already left the institution. Moreover, if the concerned person was involved in a decision-making procedure without having declared an interest, the ECB may wish to undertake remedial action, in particular to review or cancel that decision if seriously affected by the conflict of interest.

(ii) Obligation of professional secrecy

Article 37 of the Statute of the European System of Central Banks and of the European Central Bank provides for the obligation of professional secrecy, even after leaving the service. The SSM Regulation further provides that *"the provisions of Union law relevant in respect of the treatment of information, which has been found to be confidential, in particular Articles 53 to 62 of Directive 2013/36/EU of the European Parliament and of the Council impose strict obligations of professional secrecy on the competent authorities and their staff for the supervision of credit institutions"*.

The ECB has made clear that staff moving from the monetary policy side to the supervisory side of the ECB or vice versa will have to respect the principle of separation and be bound by



secrecy and confidentiality obligations. On the other hand, in response to MEPs' questions, the ECB has said that internal mobility is considered crucial in fostering a common corporate culture, avoiding silo mentalities, and delivering a flexible organisation with adaptable human resources. It may be difficult for ECB staff to determine when they are entitled to share information with colleagues and when they are legally prohibited from doing so. The separation between supervisory and monetary policy functions is dealt with only in passing in the draft new Ethics Framework [27]. This is despite the fact that the aforementioned Interinstitutional Agreement between the European Parliament and the European Central Bank provides that *'the Code of Conduct shall address matters of conflict of interest and ensure the respect of the rules on separation between supervisory and monetary policy functions'*. (emphasis added)

It would be wise to clarify the extent of the duty of professional secrecy in those cases of mobility of Bank officials between the Bank's monetary policy sectors and supervisory sectors. It would also be useful if the ECB services could clarify whether the role of the Compliance Unit includes provision of advice to staff on this issue and, if not, where staff could turn for advice.

Point raised after [28] the meeting held between the services on 23 July 2014: The ECB representatives pointed out that a separate set of rules will be prepared to implement the separation principle including the professional secrecy requirements.

(iii) Private financial transactions

The draft Decision amending the Ethics Framework provides in Recital (9) that *"The current rules on private financial activities need to be adjusted to better ensure that staff do not undertake private financial transactions that are or may be perceived as being based on privileged information obtained by staff in the context of the exercise of their professional duties with the ECB."*

It should be recalled that the relevant section in the current rules refers to 'Insider trading' (section 0.17 of the current Ethics Framework). Similarly, section 0.4 of the draft new Ethics Framework, entitled 'Private financial transactions', seems to be inspired more by the need to avoid insider trading than addressing the issue of conflicts of interest.

Point raised after the meeting held between the services on 23 July 2014: The ECB representatives explained that the rules on private financial transactions aim at avoiding insider trading but also conflicts of interest. Reference was made to Articles 0.4.1.1, 0.4.2.2 and 0.4.2.5 of the draft Ethics Framework.

Specifically with regard to the issue of conflicts of interest, Article 11a(3) of the EU Staff Regulations requires that *"[a]n official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties."* It would be useful, in this regard, to draw the ECB services' attention to the Ombudsman's decision in case 642/2012/TN [29], in which the



Ombudsman found that:

- an EMA staff member who owns, or is the beneficial owner of, shares in a pharmaceutical company will be in a conflict of interests if he or she works on procedures or duties related to that company, given that the holding of shares in the company (including the beneficial ownership of such shares) can result in a loss of objectivity by that staff member. It may even be the case that a conflict of interests could arise where the EMA staff member concerned would work on issues relating to pharmaceutical companies that compete with the company whose shares are owned, directly or indirectly, by the EMA staff member;
- shareholdings in pharmaceutical companies may also be problematic even where the EMA staff member concerned does not and will not work directly on procedures or duties related to those pharmaceutical companies. EMA staff members may, through their work at the EMA, become aware of sensitive non-public information that relates to the commercial prospects of pharmaceutical companies (such as the status of a marketing authorisation procedure relating to a company's products or the products of a competing company). It is important that the public be reassured that there is not even the possibility that any choices of staff as regards their share portfolios [30] are even inadvertently related to the information the person concerned may have obtained in the context of his or her work at the EMA. The Ombudsman noted, in this respect, that the EMA operates an open access IT system. All EMA staff therefore have access to confidential information regarding the marketing authorisation applications made by the pharmaceutical industry, including the current status of these applications;
- it is proper that the EMA instructs all staff not to purchase any shares in any pharmaceutical company. EMA should also instruct staff being recruited by it that they should dispose of any significant shareholdings in pharmaceutical companies they may already hold, either directly or indirectly [31], before taking up employment in the EMA;
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- if a staff member were to hold only an insignificant shareholding in a relevant company, it is not likely that his or her independence might be impaired by the shareholding concerned.

Potential shareholdings in the banks to be supervised by the ECB should therefore be addressed explicitly in the new Ethical Framework.

Point raised after the meeting held between the services on 23 July 2014: The ECB representatives pointed out that, according to the new Ethics Framework, all ECB staff will be prohibited from trading shares and bonds issued by financial corporations (including credit institutions) and related derivative instruments (Article 0.4.2.2 of the draft new Ethics Framework). Moreover, the ECB may request staff to sell existing assets if that is necessary to avoid a conflict of interest (see the final section of Article 0.4.2.5 of the draft new Ethics Framework).

Article 0.4.1.1 of the ECB's draft new Ethics Framework permits members of staff to engage in 'private financial transactions' also 'for the account of a third party'. The ECB services may wish to revisit this provision or, at least, define the terms 'private' and 'third party' more clearly.

(iv) Whistleblowing



The draft new Ethics Framework does not contain any substantive provisions on whistleblowing, an issue now dealt with separately. It could, however, be useful for the ECB services to take into account the Ombudsman's own-initiative inquiry on whistleblowing. The Ombudsman's Office will send the relevant documents to the ECB, for information [32] .

In particular, in light of Article 23 of the SSM Regulation which provides, under the heading 'Reporting of violations' that *"the ECB shall ensure that effective mechanisms are put in place for reporting of breaches by credit institutions, financial holding companies or mixed financial holding companies or competent authorities in the participating Member States of the legal acts referred to in Article 4(3), including specific procedures for the receipt of reports of breaches and their follow-up. Such procedures shall be consistent with relevant Union legislation and shall ensure that the following principles are applied: appropriate protection for persons who report breaches, protection of personal data, and appropriate protection for the accused person"*, the ECB may wish to reflect on how it intends to protect third parties in this context.

Finally, on this issue, the ECB proposes the following wording of Article 3(d) of the Conditions of Employment:

"(...) Members of staff shall comply with the provisions of the ECB's ethics framework and in particular:

(...)

*(d) adhere to the highest standards of professional ethics and **act with loyalty to the ECB ;***

(...)"

(emphasis added)

Members of staff may find themselves in a situation of having to report serious irregularities outside the ECB, for example to the Ombudsman or to OLAF. The above wording could therefore be revised to refer to *"loyalty to the Union"* , a concept provided for in Article 11 of the EU Staff Regulations and in the Ombudsman's Public Service Principles.

Similarly, Recital (3) of the draft Decision amending the Conditions of Employment refers to the fact that staff must *"at all times act solely in the interest of the Union and the ECB (...)"* It is not inconceivable that these interests will not always coincide. The words *"(...) and the ECB"* could therefore be removed. The same comment can be made in relation to Recital (3) of the draft Decision amending the ethics framework which states that *"(staff) must at all times act solely in the interest of the Union and the ECB (...)"*

Point raised after the meeting held between the services on 23 July 2014: The ECB representatives pointed out that the ECB is the only individual EU institution to have legal personality and that this is reflected above.



[1] Our comments do not pertain to each and every aspect of the draft new Ethics Framework but rather to those aspects that the Ombudsman has had most experience dealing with.

[2] The relationship between the work of the ABR in dealing with requests for review and the Ombudsman's work in dealing with complaints should be considered by the Office at some stage. However, this matter falls outside the scope of the present working paper.

[3] It should be noted that Recital (59) of the SSM Regulation provides that: *"the regulation referred to in Article 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU"*.

[4] Decision ECB/1998/4 of 9 June 1998 on the adoption of the conditions of employment of staff of the European Central Bank, as amended on 31 March 1999, contains rules governing the employment relations between the ECB and its staff.

[5] Available at: https://www.ecb.europa.eu/ecb/legal/pdf/c_10420100423en00030007.pdf

[6] These whistleblowing provisions are no longer included in the draft new Ethics Framework, as the ECB now has in place a dedicated procedure for the protection of staff reporting breaches of professional duties.

[7] A separate Code of Conduct will be drawn up for Members of the ECB's new Supervisory Board, while the ECB already has in place a Code of Conduct for its Governing Council, as well as a Supplementary Code of Ethics Criteria for the members of its Executive Board. Subject to the rules laid down in the Supplementary Code, the members of the Executive Board are expected to comply with the principles laid down in the Ethics Framework for members of staff and the rules laid down in the Code of Conduct for members of the Governing Council.

[8] The principles are available on the Ombudsman's website at:

<http://www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces>

[9] It is currently subject to a first round of staff consultations.

[10] ReNEUAL's Book II on Administrative Rulemaking, which encourages public consultation, is not intended to cover internal rules.

[11] The Statute of the European System of Central Banks and of the European Central Bank provides (Article 36.1) for the Governing Council to lay down the conditions of employment of the staff of the ECB.

[12]



<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/52714/html.bookmark>

[13] According to Article 3(1) of the [SSM Framework Regulation \[Link\]](#), *"A joint supervisory team shall be established for the supervision of each significant supervised entity or significant supervised group in participating Member States. Each joint supervisory team shall be composed of staff members from the ECB and from the NCAs appointed in accordance with Article 4 and working under the coordination of a designated ECB staff member (hereinafter the 'JST coordinator') and one or more NCA sub-coordinators, as further laid down in Article 6."*

[14] Available at: <http://www.oecd.org/dataoecd/13/22/2957360.pdf>

[15] Available at:

http://www.oecd-ilibrary.org/governance/post-public-employment_9789264056701-en

[16] Available at:

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH\(2009\)2&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH(2009)2&docLanguage=En)

[17] Unless, of course, the latter are seconded to the ECB. See Article 0.1.2 of the draft new Ethics Framework.

[18] Article 3(1) of the SSM Framework Regulation provides that *"staff members from the ECB (...) **working under** the coordination of a designated ECB staff member (hereinafter the 'JST coordinator') and **one or more NCA sub-coordinators (...)**" (emphasis added)*

[19] Where there is, in fact, an unacceptable possibility of conflict between a public official's interests as a private citizen (private-capacity interests) and their duty as a public or civil servant (official duty), a "conflict of interest" can be said to exist.

[20] Available at:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/52934/html.bookmark>

[21] Salary band I or above relates to junior management/advisors and above, while salary bank F/G to H equates to expert.

[22] Article 16 SR reads as follows: *"Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof using a specific form. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the appointing authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit."*

[23] Declarations of interest are not required under the Staff Regulations. Nevertheless, some Commission DGs, taking into account their specific tasks, have specific rules on declaration of **conflicts of** interest (art. 11a of the SR).



[24] Available at:
http://europa.eu/agencies/documents/2013-12-10_guidelines_on_conflict_of_interests_en.pdf

[25] Dependent family members are not currently covered in the draft new Ethics Framework.

[26] See www.oge.gov

[27] See Article 0.3.4 of the draft new Ethics Framework entitled 'Respect of the principle of separation between supervisory and monetary policy functions' which reads as follows:
"Members of staff shall respect the principle of separation between supervisory and monetary policy functions as specified in the rules implementing this principle" .

[28] As it was not possible to address all points during the meeting held on 23 July 2014, some points were communicated after the meeting.

[29] Available at:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/53111/html.bookmark> [Link] See, in particular, paragraphs 46-55.

[30] Such choices include "buy decisions", "sell decisions" or "hold decisions".

[31] Indirect ownership could include beneficial ownership through trusts. Although the EMA suggested in this case that the complainant could have put her shares in a trust, the Ombudsman considered that the use of trusts by EMA staff to hold shares in pharmaceutical companies may also be problematic unless strict conditions are complied with.

[32] This was done by email on 28 July 2014.