

Decision in case 1408/2015/OV on the European Commission's compliance with its Rules on Special Advisers

Decision

Case 1408/2015/OV - Opened on 15/09/2015 - Decision on 26/05/2016 - Institution concerned European Commission (Critical remark) |

The issue in this complaint is the alleged failure of the European Commission, in appointing a Special Adviser, to abide by its own rules on preventing conflicts of interest.

In September 2015, two NGOs complained to the Ombudsman that the Commission had failed to comply with its Rules when it appointed a Special Adviser to assist the Commission President. The Commission issued a press release on 18 December 2014 announcing the appointment of Mr Edmund Stoiber as a Special Adviser to the Commission President. This announcement was made three months before Mr Stoiber was officially appointed on 4 March 2015, without any disclaimer about the pending administrative requirements still to be fulfilled. The complainants argued that this premature announcement compromised the Commission's capacity to conduct an unbiased and critical assessment of whether the person in question had any conflicts of interest. They complained also that the Commission's "statement of assurance", an essential part of the appointment process, failed to mention the positions the Special Adviser held with Nürnberger, a large insurance group.

The Ombudsman inquired into the issue and found that the Commission's press release was incorrect and misleading. The Ombudsman also found that the premature announcement of the appointment, without any disclaimer, raised legitimate doubts for the interested public as to whether an unbiased and critical examination of the conflict of interest question had been carried out following the announcement. The Ombudsman found maladministration by the Commission on both counts. The Ombudsman also found that the Commission had failed to explain why the positions of the appointed Special Adviser in the insurance group were omitted from the "statement of assurance". She found that this also amounted to maladministration.

▪ Background

1. On 18 December 2014, the Commission published a press release stating that " [t] oday , the President of the European Commission, Jean-Claude Juncker, **appointed Dr Edmund**



Stoiber as Special Adviser on Better Regulation " [1] (hereafter either "the Special Adviser [2] " or "the person in question"). On the same day, the person in question had a meeting with Commission President Juncker and Vice-President Timmermans, which was the subject of a short video-clip uploaded on the Commission's website [3] .

2. On the same day, the complainants, Friends of the Earth Europe (FoEE) and Corporate Europe Observatory (CEO) requested public access to i) the Special Adviser's sworn statement that he had no conflicts of interest, ii) his declaration of activities and iii) President Juncker's "statement of assurance" that the Special Adviser had no conflicts of interest. Under the Commission's Rules (outlined below) these three documents must be submitted along with the request for the appointment of a Special Adviser. The complainants also asked whether the Special Adviser was paid, and which measures had been taken to ensure that he did not have a conflict of interest, in particular in relation to his functions as Chair of the Advisory Boards of two large companies.

3. On 7 January 2015, the Special Adviser signed a " *Declaration on the honour of no conflict of interest between the duties of Special adviser to the Commission and other activities* " (Annex 1 to the Commission's Rules), as well as a " *Declaration of activities in view of applying to the function of Special Adviser to the European Commission* " (Annex 2 to the Commission's Rules). In the latter Declaration the Special Adviser mentioned his positions as Chair of the Advisory Boards of two companies, as well as his position as a member of the Supervisory Boards of four entities controlled by Nürnberger, a large insurance group (hereafter the insurance group), and also several other positions held in his native country.

4. On 2 February 2015, the Special Adviser updated his declaration of activities to mention his position as chair of the Advisory Board of a bank.

5. On 9 February 2015, a " *Statement of Assurance from President Jean-Claude Juncker of non-conflict of interest with a view to the appointment of Dr Edmund Stoiber as a Special Adviser to the European Commission* " was completed. This was option B of the standard template (Annex 4 to the Commission's Rules) and it acknowledged " *that there may be a potential risk for the Commission's good name because of Dr Stoiber's activities for (name of companies)*". The statement of Assurance added: " *The risk may be sufficiently reduced by ensuring that Dr Stoiber does not, in his capacity as Special Adviser, deal with any matters concerning [the relevant companies]*" .

6. On 11 February 2015 , in reply to the complainants' request for public access, the Commission released all four of the above-mentioned documents to the complainants.

7. On 16 February 2015, the Commission informed the complainants that the Special Adviser would not be paid. On the matter of avoiding any risk of a conflict of interest, the Commission referred to the statement of assurance of 9 February 2015, and stated that it would ensure that the Special Adviser would not deal with any matters concerning the relevant companies when working with the Commission. The Commission also said that the Special Adviser did not have operational or managerial functions with these companies.



8. On 4 March 2015, the College of Commissioners appointed the person in question and several other persons as Special Advisers [4] (from 5 March 2015 to 31 March 2016).

9. On 25 May 2015, the complainants wrote to the Commission alleging that, contrary to the applicable rules, the four documents regarding the Special Adviser's appointment had been drawn up and signed **after** he had been appointed. The complainants asked why the Commission had waited, until **after** the public announcement of the appointment, to check on the position regarding possible conflicts of interest. They argued that the prior announcement prevented the Commission from carrying out an unbiased and critical assessment. The complainants also asked the Commission to reconsider its assessment as to whether the Special Adviser had a conflict of interest.

10. On 12 June 2015, the Commission's Secretary-General replied to the complainants that, although the Special Adviser's appointment was announced on 18 December 2014, it was not until 4 March 2015 that the administrative procedure was completed by a decision of the College of Commissioners. The Secretary-General stated that the four documents in question had thus been drawn up before the College decision on the appointment of the Special Advisers.

11. On 3 September 2015, the complainants turned to the Ombudsman.

▪ The relevant legal rules

12. Points 5 and 6 of the Commission's [5] " *Rules on Special Advisers to the Commission* " [6] (the Commission's Rules) provide the following:

" 5. *Selection and Designation of Special Advisers*

*Each Member of the Commission who wishes to engage a special adviser must notify DG ADMIN [now DG Human Resources and Security - DG HR] in writing by the deadline set (January of each year), with an indication of the tasks to be carried out, the expected number of days' work and an estimate of mission appropriations, ... Furthermore, when appointing an adviser, **each Member of the Commission must ensure that there is no conflict of interest between the future duties of his or her special adviser and any outside activities they may have. Each request for the appointment of a special adviser made to DG ADMIN must therefore be accompanied by the following three documents :***

- *sworn statements and declarations of activities by the special adviser (forms attached in annex): prospective special advisers must sign a **declaration on their honour** (sworn statement) stating that they are aware of the relevant Articles of the Staff Regulations (Articles 11 and 11a) and that there is no conflict of interest with the duties they are about to undertake. They must also fill in and sign a **declaration of activities** , which DG ADMIN will check on behalf of the authority empowered to conclude contracts of employment (AECC), before they take up*



their duties, in order to ensure that there is no conflict of interest;

• **statement of assurance** *by the Member of the Commission (model attached in annex): on the basis of the declarations received, the Members of the Commission responsible must establish that there is no conflict of interest regarding the special advisers they have chosen and must confirm their appointment requests.*

*DG ADMIN then checks that there is no conflict of interest between the special adviser's future duties and any outside activities **on the basis of the documents provided by the Members of the Commission** . The special advisers may be asked to provide further information for this purpose. This information is passed to the Members of the Commission concerned to assist them in making a final decision on their appointment request. DG ADMIN notifies the Member of the Commission with responsibility for Personnel and Administration of the outcome of this check. (...)* "

6. Designation and appointment of Special Advisers

*" Having consulted the Legal Service and DG BUDG , and having duly informed the budgetary authority, the Commission, on a proposal from the Vice-President responsible for Personnel and Administration, in agreement with the President, **appoints at the beginning of each year (at the end of March)** paid and unpaid special advisers by oral procedure (Administrative and Budgetary Matters) and instructs DG ADMIN to proceed with their appointment. ...*

*Once the special advisers have been designated, DG ADMIN draws up a draft contract (standard contract) for each special adviser ... **Performance of the contracts cannot begin until they have been signed by the AECC** .*

Once their appointment has been approved, a list of the special advisers, together with their sworn statements and curriculum vitae (which must not contain information of a private nature, such as family situation, private address, etc.), are posted on the Commission's Europa website " (emphasis added) .

▪ **The inquiry**

13. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claims:

Allegation:

The Commission failed to comply with its Rules on Special Advisers (in particular points 5 and 6) when appointing the person in question as Special Adviser to the Commission's President.

Claims:



1) The Commission should acknowledge that its inactions amounted to maladministration and put measures in place to ensure that breaches of its Rules on Special Advisers do not occur again.

2) The Commission should clarify how it will minimise any possible conflict of interest arising from the Special Adviser's current positions in an insurance company.

14. On 21 October 2015, the Ombudsman inspected the Commission's file on the appointment of the Special Adviser, including in particular the documents on the assessment of the Special Adviser's file by DG HR. On 1 December 2015, the Ombudsman asked the Commission to respond to the complaint and, in particular, to deal with the following three points:

i) first, since the decision on the appointment of the Special Adviser was taken on 4 March 2015 by the College of Commissioner, could the Commission reconcile that decision with its press release of 18 December 2014 in which it was stated that "[t] oday , the President of the European Commission, Jean-Claude Juncker, **appointed Dr Edmund Stoiber as Special Adviser on Better Regulation** "?

ii) second, the Special Adviser's declaration of activities of 7 January 2015 mentioned that he was a member of the Supervisory Boards of four separate entities controlled by the insurance group. In view of the fact that it is essential to avoid any conflict *or the appearance thereof* , the Commission was invited to explain why it did not consider that there could be a potential risk for the Commission's good name given the activities of the person in question for that insurance group.

iii) third, on the issue of minimising any possible conflict of interest arising from the Special Adviser's positions with the insurance group, the Ombudsman asked whether the Commission was prepared to reconsider its position and to amend the statement of assurance by deciding that the person in question should not deal, in his capacity as Special Adviser, with matters concerning that insurance group.

15. On 21 March 2016, the Ombudsman received the opinion of the Commission on the complaint and, on 27 April 2016, the comments of the complainants in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

▪ Preliminary remarks

16. The inquiry deals solely with the allegation that **the Commission** failed to comply with its Rules on Special Advisers when appointing the person in question as a Special Adviser. This inquiry does not deal with any actions of the person in question.

17. The fact that the person in question stepped down as a Special Adviser when his mandate came to an end in March 2016 does not affect this inquiry, which concerns the Commission's



behaviour when appointing Special Advisers.

18. Following on from a number of other complaints [7] relating to the appointment of Special Advisers to the Commission, the Ombudsman will very shortly open a strategic inquiry concerning compliance with the Commission's Rules in the appointment of Special Advisers and whether it may be necessary to amend these Rules.

▪ **Alleged failure to comply with the Rules on Special Advisers**

▪ Arguments presented to the Ombudsman

19. The complainants argue that, by issuing the press release of 18 December 2014, the Commission created the perception that the person in question had already been appointed as a Special Adviser. As proof of this, the complainants stated that at least one interest group approached the Special Adviser in February 2015 [8] , before his actual appointment, to discuss issues of better regulation.

20. In response, the Commission confirmed that the decision to appoint the person in question as Special Adviser was taken by the College of Commissioners on 4 March 2015. To prepare this decision, the Commission services concerned complied fully with the procedure laid down in the relevant Rules. This procedure comprised, in particular, the notification of the budgetary authority, the establishment of the necessary declarations and statements, consultation with the Legal Service and DG Budget and the assessment of possible conflicts of interest. The screening procedure was carried out and was not influenced by what was stated in the press release of 18 December 2014.

21. The Commission stated that the press release of 18 December 2014 reflected the great importance which the Commission attaches to Better Regulation, described the "*future role of the Special Adviser*" and announced the "*envisaged role*" of the person in question as Special Adviser on Better Regulation. The references to a future role for a Special Adviser - intended to convey the political determination to take action - did not in any way impede the lawful selection process of the future holder of the function. Press releases are announcements, not legal documents, and the wordings used in this case had no bearing on the appointment procedure.

22. On the question of whether the Commission properly verified if the Special Adviser was in fact in a conflict of interest situation, the complainants noted that the Commission, in the statement of assurance made by President Juncker, had referred to the Special Adviser's work with other companies. However, his positions with the insurance group were not mentioned as constituting a potential risk in terms of a conflict of interest. The complainants then stated that it was unclear why references to these positions were omitted, since that insurance group was one of Germany's largest insurance companies and could be affected by the Better Regulation initiative.



23. In reply, the Commission stated that Article 5 of the Conditions of Employment of Other Servants of the European Union (CEOS) defines "Special Adviser" as a person " *who, by reason of his special qualifications and notwithstanding gainful employment in some other capacity, is engaged to assist one of the institutions of the Union* ". Other gainful activities are thus expressly allowed by the CEOS. A purely theoretical link between another activity and the mandate – which could be established in practically all cases where the mandate is very broadly formulated – is not in itself sufficient to exclude the appointment of the Special Adviser or to raise a presumption of a conflict of interest. This is also clear from point 5 of the Commission's Rules, according to which the principle of proportionality must be observed in considering possible conflicts of interest. It is in fact necessary to avoid a situation where individuals with appropriate backgrounds could not be offered Special Adviser positions due to their experience or other activities.

24. The Commission stated that an assessment of whether or not there is a conflict of interest must have regard to the tasks to be performed for the Commission. The mandate of the Special Adviser was extremely broad and general and focuses on advice on several aspects of Better Regulation. The person in question, in his capacity of Special Adviser, was not requested to deal with any matters concerning the companies mentioned in his declaration of activities. In response to the complainants' argument that the Commission's statement of assurance of 9 February 2015 did not refer to all the activities mentioned by the Special Adviser in his declaration of activities, the Commission stated that the statement of assurance and the declaration of activities have different purposes: The aim of the statement of assurance is to confirm, on the basis of the declaration of activities, that, with regard to the tasks to be performed, there is no conflict of interest between the future duties as Special Adviser and the ongoing outside activities. In that sense, the statement of assurance does not duplicate the declaration of activities, but focuses **only on those activities relevant in the context of a risk of potential or real conflict of interest**.

25. The Commission stated that the fact that the activities of the person in question for the insurance group were not expressly mentioned in the statement of assurance does not mean that he could, in his capacity as Special Adviser, deal with matters specifically concerning that company. In fact, according to the Commission, the Special Adviser did not deal with such matters during his assignment (from 5 March 2015 until 31 March 2016 [9]). He remained, in any case, subject to the provisions on conflicts of interest in Article 124 CEOS (in particular, Articles 11 and 11a of the Staff Regulations). It added that the Special Adviser explicitly confirmed, in his declaration on the honour of 7 January 2015, that he was aware of these obligations.

26. In their observations, **the complainants** pointed out that, as well as issuing a press release on 18 December 2014 announcing the appointment of the Special Adviser, the Commission President and Vice-President, on the same day, also welcomed him to his new role, presenting it as an accomplished fact. It would therefore have caused significant political embarrassment for the Commission had the Special Adviser finally not been appointed. While the press release may not be a legally binding document, it certainly created a strong public perception that the



appointment procedure had been concluded. The complainants therefore maintained that the conflict of interest assessment had been prejudiced by the Commission's public announcement of 18 December 2014.

▪ The Ombudsman's assessment

i) The argument that the Commission's press release of 18 December 2014 prejudiced the Commission's assessment of conflict of interest

27. It is clear from points 5 and 6 of the Commission's Rules that a Special Adviser can be appointed only **after** the assessment that there is no conflict of interest has been completed. The chronological steps in this procedure are the following. The Commissioner seeking to engage a Special Adviser notifies DG HR and submits to DG HR the three requested documents, namely 1) the sworn statement, 2) the declaration of activities and 3) the statement of assurance. On the basis of these documents, DG HR checks that there is no conflict of interest. The Commission's Legal Service and DG Budget are then consulted. Finally, the Commission appoints the Special Adviser. The Commission then has also the option of issuing a press release to inform the public of its decision.

28. In the present case, however, and before any of these steps were taken, the Commission first issued a press release, on 18 December 2014, in which it announced that the Special Adviser had been appointed on that day. It was only two weeks after this announcement that the Special Adviser submitted his sworn statement and declaration of activities (on 7 January 2015) which were used to assess whether the Special Adviser had any conflicts of interest. The procedure culminated in the formal appointment of the Special Adviser on 4 March 2015, by decision of the Commission.

29. The Ombudsman notes that the clear wording of the press release leaves no doubt – at least in the eyes of the public - that the Special Adviser had in fact been appointed on 18 December 2014. Moreover, next to the press release, the Commission made available on its website a short video-clip of the meeting on 18 December 2014 between the Special Adviser and the Commission President and Vice-President. The text of that video-clip mentions that the Commission President and Vice-President "*meet with Edmund Stoiber, Special Adviser of the EC on Better Regulation*". The message under the clip mentions again that "the latter had been appointed Special Adviser *of the EC on Better Regulation by Jean-Claude Juncker* on the same day" (emphasis added). These statements and references leave no ambiguity from the public's perspective but that the person in question had indeed been appointed on 18 December 2014.

30. The Commission has argued that its press release in fact referred to the "*future*" and "*envisaged*" role of the Special Adviser. However, these two words do not appear in the press release, which simply says that the person in question **has been appointed** on 18 December 2014. The Ombudsman agrees with the Commission that press releases are not formal legal documents. However, press releases are issued to inform the public. Principles of good



administration require that they be as accurate as possible. This cannot be said of a press release which states that a person was appointed on 18 December 2014, whereas, in fact, that person was not appointed legally until a much later stage, on 4 March 2015 [10] . The Commission's press release is therefore incorrect and misleading. This, in the Ombudsman's view, constitutes maladministration. If in exceptional circumstances a provisional announcement must be made on senior appointments, they should include a clear and strong disclaimer about pending administrative requirements still to be fulfilled.

ii) The Commission's failure to mention in the statement of assurance the positions of the person in question in the insurance group

31. Article 11a of the Staff Regulations provides that " An official shall not , *in the performance of his duties and save as hereinafter provided*, deal with a matter in which , *directly or indirectly*, he has any personal interest *such as to impair his independence, and, in particular, family and financial interests* " (emphasis added). Article 124 of the CEOS on Special Advisers provides that Article 11a of the Staff Regulations shall apply by analogy to Special Advisers.

32. The Commission's Rules on Special Advisers also set out detailed procedural rules to avoid conflict of interest situations. The Commission itself, in its note of 18 November 2014 launching the 2015 exercise of designations of Special Advisers, underlined, in reference to an earlier Ombudsman's decision, that it is essential **to avoid any conflict of interest or appearance thereof** .

33. The Commission has not provided a convincing explanation for its failure to include, in the statement of assurance, the positions of the person in question in the insurance group in question. The Commission merely explained the difference between the purpose of the declaration of interest and the statement of assurance. However, this explanation does not clarify why, in comparison with the positions of the person in question in the three other companies (which in the Commission's view could constitute a potential risk), his positions in the insurance group could not constitute a risk.

34. The Ombudsman notes that, whereas in the other companies, the person in question was the Chair (" *Leiter/Leitung* ") of the Advisory Board of the company, he was a member of the Supervisory Board of the four entities controlled by the insurance group. It is not clear whether this was the reason for the Commission to treat these positions differently. However, in view of the fact that it is essential **to avoid any conflict of interest or appearance thereof** in the public's perception, it should make no difference if a person is a leading member/chair or just a member of a Supervisory Board/Advisory Board of a company, since in both cases the person will share at least some interests with that company, including financial interests

35. The Ombudsman notes that the Commission has explicitly stated that the person in question never dealt with matters concerning the particular insurance group while he was a Special Adviser. The Ombudsman finds no reason to question this. However this does not take from the fact that such an assurance should have been given **before** the person in question took up his role as Special Adviser. In the Ombudsman's view, the failure of the Commission to



give such assurances in good time constituted maladministration.

36. More generally, according to the complainants, the issuing of the press release prevented the Commission from carrying out an unbiased and critical examination of the conflict of interest question.

37. The Ombudsman's inspection of the file of the appointment procedure showed that the Commission's services did indeed carry out a detailed examination of the conflict of interest question. In doing so, it took account of the questions raised by the complainants. As a result of this examination, and of further suggestions made by DG HR, the statement of assurance was amended twice in order to include a reference to potential risks because of the work of the person in question for certain companies, as well as add a requirement that he should not, in his capacity as Special Adviser, deal with any matters concerning these companies.

38. However, despite the detailed assessment of the Special Adviser's conflict of interest carried out by DG HR, the Ombudsman considers that the inaccurate and misleading press release of 18 December 2014 could nevertheless cause members of the public to have serious doubts about the integrity of that assessment. Members of the public could validly wonder how the Commission could possibly come to a different conclusion given that the very wording of the press release of 18 December 2014 presented them with a *fait accompli* as regards the appointment of the person in question as a Special Adviser by the Commission President.

Conclusions

On the basis of her inquiry into this complaint, the Ombudsman makes the following two critical remarks:

The Commission's press release of 18 December 2014, according to which the person in question had been appointed Special Adviser on that same day, whereas in fact he was not appointed until 4 March 2015, was incorrect and misleading for the public. The press release also raised doubts - in the eyes of the public - on whether, in line with the Commission's Rules, the Commission had carried out an unbiased and critical examination of the conflict of interest question. This constituted maladministration.

The Commission failed to issue a complete Statement of Assurance relating to the work of a Special Adviser in good time. This also constituted maladministration.

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

Emily O'Reilly

Strasbourg, 26/05/2016



[1] http://europa.eu/rapid/press-release_IP-14-2761_en.htm [Link]. From 2007 to 2014, Mr Stoiber, former Minister-President of Bavaria, had already been the Chairman of the High Level Group on Administrative Burdens which advised the Commission.

[2] For easy reference - and apart from some references in quotations to the person by name - "Special Adviser" is used throughout the text to refer to the person in question, even if formally, he was appointed Special Adviser only on 4 March 2015. However, sometimes the wording "person in question" is used in order to avoid confusion.

[3] <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I096993> [Link].

[4] Minutes of the 2118th meeting of the Commission (PV (2015) 2118 final, page 12): <http://ec.europa.eu/transparency/regdoc/rep/10061/2015/EN/10061-2015-2118-EN-F1-1.PDF> [Link]

[5] Special Advisers are subject to Articles 123 and 124 of the Conditions of Employment of Other Servants of the European Union (CEOS), and Article 124 of the CEOS enumerates several articles of the Staff Regulations which apply by analogy.

[6] Commission Decision C(2007) 6655 of 19 December 2007 (http://ec.europa.eu/civil_service/docs/special_advisers/comm_c_2007_6655_1_en.pdf [Link]), as amended by Commission Decision C(2014) 541 final of 6 February 2014 amending the Rules on special advisers to the Commission (C(2007) 6655) (http://ec.europa.eu/civil_service/docs/special_advisers/c_2014_541_commission_decision_741786_en.pdf [Link]).

[7] These other complaints do not concern the person in question in this present inquiry.

[8] The relevant link provided by the complainants (to the website www.apotheke-adhoc.de) does not work. However, the following article on the same website (<http://www.apotheke-adhoc.de/nachrichten/markt/nachricht-detail-markt/temperaturfuehrung-apotheker-hermann-vo> [Link]) refers to a pharmacist approaching the person in question and states that the latter was appointed in December 2014 as Special Adviser.

[9] The Commission, in its opinion of 21 March 2016, stated that the Special Adviser did not deal with matters concerning that company and would not deal with such matters for the remaining short period until 31 March 2016.

[10] In her letter of 1 December 2015 to the Commission, the Ombudsman noted that in the course of the inspection of the relevant Commission documents, her services did not have access to relevant documents from DG Communication nor from the President's Cabinet in relation to the press release of 18 December 2014. She therefore asked the Commission to include with its opinion any relevant information or copies of documents. However, no further documents were received.

