

## **Decision of the European Ombudsman closing her own-initiative inquiry into the European Commission's handling of a former Commissioner's occupational activities after leaving office (OI/2/2014/PD)**

Decision

**Case** OI/2/2014/PD - **Opened on** 10/04/2014 - **Decision on** 30/06/2016 - **Institution concerned** European Commission ( Critical remark ) |

Former Commissioners are required, for a period after leaving office, to inform the European Commission in advance of any occupational activity they intend to take up. The Commission must then check whether the proposed activity gives rise to a conflict of interest in relation to the former role as a European Commissioner. In carrying out this examination, the Commission may take advice from its Ad Hoc Ethical Committee made up of three independent experts.

In May 2013 the Ombudsman was made aware, by way of an anonymous communication, that a former Commissioner had taken up a remunerated position with a company without, apparently, having informed the Barroso Commission. Following contact from the Ombudsman, the Commission sought the advice of its Ad Hoc Ethical Committee.

The Committee advised that, if it had been consulted on the matter in advance, it would have taken the view that the contract (a copy of which had been sent to the Ombudsman) did not offer sufficient guarantees that the former Commissioner's activity would comply with Article 245 of the Treaty on the Functioning of the European Union (TFEU). This requires that Commissioners behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. The Committee added that it would have advised the Commission to require further commitments from the former Commissioner, in particular in relation to the scope of the work envisaged for the company.

The Barroso Commission then requested a statement from the former Commissioner who replied that the contract allowed for the refusal of tasks that would be in breach of the former Commissioner's obligations under Article 245 TFEU. The company concerned provided a statement to the same effect. Subsequently, on the basis of these statements, the Barroso Commission took the retrospective decision that, while the former Commissioner should have informed it in advance of the proposed contract, that contract could nevertheless "be considered as compatible with Article 245(2) of the TFEU".

The Ombudsman decided to inquire into this situation on her own initiative. The Ombudsman



considers that the steps taken by the Barroso Commission were insufficient. In particular, the Ombudsman believes that the actions of the Commission failed to reflect the seriousness of the breach by the former Commissioner of the duty to inform the Commission in advance of the occupational activity. This failure creates the risk that ordinary citizens of the EU will feel that, when it came to its former colleagues, the Barroso Commission was unduly lenient. Ordinary citizens could feel that the Barroso Commission did not take sufficiently seriously the need to ensure that former Commissioners met their obligations and that, in effect, they could behave with impunity. This can erode trust in the EU institutions generally. Accordingly, the Ombudsman finds that the Barroso Commission's handling of this matter amounted to maladministration. The Ombudsman finds also that the retrospective decision of the Barroso Commission, regarding the compatibility of the contract with Article 245 TFEU, was based on an inadequate investigation of the facts and thus that it amounted to maladministration. Finally, the Ombudsman suggests to the Juncker Commission that it should revise its Code of Conduct for Commissioners in order to make its rules more explicit and more easily implemented.

## Background

1. On 6 May 2013 the Ombudsman received, from an anonymous source, an envelope containing a copy of a contract for the supply of professional services, agreed between a private company and a former European Commissioner ("the former Commissioner"). The contract, which provided for remuneration for the former Commissioner, was agreed in February 2010 and was to run for a period of four years. The contract did not contain any mitigation provisions dealing with possible conflicts of interest in relation to the portfolio of the former Commissioner.
2. On 4 July 2013, the Ombudsman sent a copy of the contract to the Commission and asked it to report on any follow-up action it might take in relation to that contract. On 19 July 2013 the Commission informed the Ombudsman (a) that the former Commissioner had never notified this contract to the Commission and (b) that the Commission had now written to the former Commissioner "to request information about the document". The Commission had received from the former Commissioner advance notifications regarding other proposed occupational activities.
3. On 25 February 2014, the Commission informed the Ombudsman that it had inquired into the matter of the former Commissioner's contract and had reached a conclusion on that matter. In the course of its inquiry, the Commission had sought an opinion from the Ad Hoc Ethical Committee [1] and had been in communication with the former Commissioner and with the company in question. The Barroso Commission's overall conclusion was that no further action was necessary on its part. The main points of its detailed letter are set out below.
4. Once it had been confirmed that the document provided to the Ombudsman was a true copy of a contract between the former Commissioner and the company in question, the Commission asked its Ad Hoc Ethical Committee for an opinion. That Committee provided its opinion on 1 October 2013. The Ad Hoc Ethical Committee took the view that the contract should have been



notified to the Commission "in good time". On the question of whether the activities covered in the contract were compatible with the former Commissioner's Treaty obligations, the Committee considered that some of those activities "could be difficult to reconcile with Article 245(2) TFEU". In particular, the Committee would be concerned should the former Commissioner's consultancy role have involved more than strategic and general advice. The Committee said that, had it been consulted in advance, it would have advised the Commission to require "further commitments" [2] from the former Commissioner before approving the proposed activity.

5. The Commission then sought additional information, both from the former Commissioner and from the company concerned. The former Commissioner at that stage informed the Commission that the contract had been terminated in February 2012. (The contract actually ended on 27 February 2013. [3] ) Furthermore, the former Commissioner sought to assure the Commission that the contract was in line with the Code of Conduct for Commissioners (the Code) and that the former Commissioner had sought to act under the contract in a manner which respected the compatibility clause in that Code. The company concerned wrote separately to the Commission to support the account given by the former Commissioner. The Commission then concluded that there was no need for any further action in relation to this matter. The Commission explained that it had regard to the following in reaching this decision. First, the former Commissioner should have notified the contract in question in good time, as required by the Code. Second, in view of the clarifications provided by the former Commissioner and the company concerned, the contract could be "considered as compatible with Article 245(2) of the TFEU". Third, the contract had in the meantime been terminated. This decision of the Barroso Commission was made public in the normal way through the minutes of the Commission meeting.

6. After a careful examination of this reply, the Ombudsman decided, on 10 April 2014, to open an own-initiative inquiry into the Commission's handling of the post-office activities of the former Commissioner based on the contract in question.

## The inquiry

7. The Ombudsman inspected the Commission's confidential file on the matter, including the Ad Hoc Ethical Committee's opinion and the correspondence exchanged with the former Commissioner and the company concerned. Following this inspection, the Ombudsman asked the Commission for its opinion. That opinion was received on 8 July 2015; in it, the Commission contended that it had handled the matter diligently. The Ombudsman also invited the former Commissioner to provide observations in relation to the inquiry and received these observations on 13 April 2016. In inviting observations from the former Commissioner, the Ombudsman made it very clear that the actions into which she was inquiring were the actions of the Commission and not the actions of the former Commissioner.

8. The former Commissioner complained [4] to the European Data Protection Supervisor (EDPS) regarding the processing of personal data by the Ombudsman in the course of the Ombudsman's inquiry. In his decision, the EDPS set out the kind of identifying information which should not be contained in any publication of the Ombudsman's decision; the EDPS set out



also the type of secondary information which could legitimately be included in any publication of the Ombudsman's decision. The former Commissioner sought a review by the EDPS of his decision. That review upheld the original EDPS decision. The former Commissioner then commenced court proceedings against the EDPS and those proceedings have not yet been concluded. In these circumstances, the Ombudsman has decided not to follow the decision of the EDPS regarding the kind of information which could legitimately be included in the publication of this decision. The Ombudsman has decided that the decision, including in its published form, should not unfairly disclose any identifying personal data of the former Commissioner. In order to ensure the protection of the personal data of the former Commissioner, certain relevant details are not dealt with explicitly in this inquiry decision. The Ombudsman's inquiry, however, is informed by a fuller knowledge of the facts than is apparent from this published decision.

## The Ombudsman's assessment

9. Article 245 TFEU imposes on Members of the Commission " *the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits* ". A breach of this duty may have serious consequences. Article 245 TFEU provides that, " *in the event of any breach of these obligations, the Court of Justice may, on application by the Council ... or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired ... or deprived of his right to a pension or other benefits in its stead* ".

10. The Code of Conduct for Commissioners [5] is intended to give procedural effect to the Article 245 obligations. In relation to former Commissioners, the Code provides as follows: " *Whenever Commissioners intend to engage in an occupation during the year after they have ceased to hold office, whether this be at the end of their term or upon resignation, they shall inform the Commission in good time. The Commission shall examine the nature of the planned occupation. If it is related to the content of the portfolio of the Commissioner during his/her full term of office, the Commission shall seek the opinion of an ad hoc ethical committee. In the light of the committee's findings it will decide whether the planned occupation is compatible with the last paragraph of Article [245] of the Treaty.* " It is clear from this provision, and from the Code more generally, that the Treaty obligation to behave with integrity and discretion concerns in particular the need to avoid a situation of conflict of interest.

11. In order to maintain EU citizens' trust in the Commission, and in the EU as a whole, it is crucial for the Commission to ensure that the procedure set out above is respected. An absolutely critical feature is that the Commission's assessment is completed in advance of a former Commissioner taking up an occupational activity. It must, through this procedure, diligently establish the facts, so as to enable a thorough assessment in each individual case. It must then carefully assess these facts, with the assistance of the Ad Hoc Ethical Committee. The role of the Committee is important. The fact that it is made up of three independent experts helps ensure that the assessment is objective and independent. Once this assessment has been completed, the Commission must draw the necessary conclusions and take whatever



measures are appropriate to ensure that the former Commissioner will meet his or her Treaty obligations. In this context, appropriate measures could include requesting the former Commissioner not to take up the activity at all; requesting that some aspects of the proposed activity be excluded; or requesting the former Commissioner to accept the imposition of certain conditions on how the contract (or aspects of it) is implemented. Should a former Commissioner decline to act on such a request, the Commission would have to decide if the case warranted a referral to the Court of Justice.

**12.** Once the Commission became aware of the existence of the contract in this case, it took steps to establish the facts. Once the facts had been established, the matter first facing the Commission was that of the former Commissioner's failure to inform it in advance (or at all) of this particular contract. In addition, and despite the fact that it was already too late to take any preventative action, the Commission also sought to assess whether the contract, or any aspect of it, was incompatible with the former Commissioner's Treaty obligation to "behave with integrity and discretion" after leaving office as a European Commissioner. If the Commission were to conclude that the contract gave rise to a breach of the former Commissioner's obligations under Article 245 TFEU, it would have been open to it to refer the matter to the Court of Justice seeking the imposition of a sanction.

## Failure to Inform the Commission

**13.** It is a fact that the former Commissioner failed to notify the Commission, either in advance of entering into it or during its course, of the contract in question. It seems very probable that the Commission would never have been informed of the contract had the Ombudsman (on the basis of a copy of the contract provided anonymously) not alerted it to the matter. The Commission accepts that the former Commissioner should have informed it of the contract and that the failure to do so was a breach of the Code. In reply to the Commission's inquiries, the former Commissioner is reported to have accepted that the contract should probably have been notified to the Commission. In fact, the former Commissioner is reported by the Commission as having expressed regret for the "awkward situation" which arose because of this failure. Having established that the former Commissioner had breached this specific obligation, the question arises of how the Commission should have dealt with this breach. This question is relevant irrespective of whether the contract itself was, or was not, compatible with the former Commissioner's Treaty obligations.

**14.** In reply to a specific question from the Ombudsman, the Commission agreed that "[any] failure to notify a post-mandate activity is a breach of the obligations set out in the Code of Conduct for Commissioners (CCC) and that any such failure should be subject to appropriate follow-up in order to preserve the '*effet utile*' of the system." In this case, the follow-up undertaken by the Commission focused on a retrospective assessment of whether or not the contract was compatible with the former Commissioner's Treaty obligations to behave "with integrity and discretion as regards the acceptance ... of certain appointments or benefits". The Ombudsman takes the view that, in its own right and irrespective of the compatibility of the contract with the Treaty obligations, the failure to notify the Commission of the contract was a



serious matter. In the Ombudsman's view, the Commission was obliged to consider whether a sanction was warranted. There is no evidence that the Commission looked seriously at the breach of the obligation to notify it of the contract and that it considered whether it would be appropriate to seek to impose some sanction in that regard.

**15.** The Ombudsman accepts that, in considering how to deal with the former Commissioner's failure to notify it of the contract, the Commission was required to allow the former Commissioner the opportunity to explain this failure. The Commission gave the former Commissioner this opportunity and the Ombudsman has heard the case made by the former Commissioner for the failure to notify the contract in question. In the event, the former Commissioner ultimately accepted that the Commission should have been informed of the contract and offered the opportunity, in advance, to decide whether the contract was compatible with the Treaty obligations on former Commissioners. However, the former Commissioner put forward various reasons for the failure to inform the Commission of the contract. The Ombudsman is fully informed of the reasons put forward by the former Commissioner [6] but fails to understand why the Commission did not find it necessary to interrogate these reasons more closely. Paragraph 1.1.1 of the Code is clear and unambiguous; details of a proposed occupational activity must be notified to the Commission "(w)henever Commissioners intend to engage in an occupation during the year after they have ceased to hold office ...". It is not plausible that this could be misread as anything other than a mandatory requirement.

**16.** Where a former Commissioner fails to inform the Commission in advance of a proposed occupational activity, the Commission is deprived of the opportunity to ensure that the former Commissioner will, in fact, "behave with integrity and discretion" in taking up that occupational activity. In this case, four years after the contract had been agreed and one year after the contract had ended, the Barroso Commission found itself deciding on a retrospective basis whether the terms of the contract in question were compatible with the former Commissioner's Treaty obligations. Clearly, this was a very unsatisfactory situation for the Commission. If it found that the contract terms (or some of them) were not compatible with the former Commissioner's obligations, it was already too late to seek to prevent behaviour which would have the effect of undermining a fundamental Treaty value. Even if it found that the contract terms were not problematic, and that they were compatible with the duties of a Commissioner, this outcome would have been a matter of chance or good fortune rather than the result of the Commission's Code of Conduct having operated correctly.

**17 .** Citizens' trust in the EU, and specifically in the European Commission, depends upon being satisfied that all those who achieve very high office will behave impeccably both while in office and subsequently. European Commissioners, in particular, have onerous duties for which they are well remunerated. Having left office, former Commissioners have attractive pension and benefits packages which compensate them for any temporary restrictions on their occupational activities. EU citizens are entitled to expect that all former Commissioners will behave properly in this regard and that, if not, the current Commission will act with the wider interests of the EU as its priority. Above all, the Barroso Commission should have been aware of the great risk that any failure in this regard on its part was likely to be perceived negatively by EU citizens, thereby eroding trust in the EU institutions. The risk, in particular, was of a





perception by ordinary citizens that former Commissioners enjoy privileged treatment, that a lesser standard of compliance with their obligations was expected of them than would be the case generally. The Ombudsman has no particular insight into the motivation of the anonymous person who provided a copy of the former Commissioner's contract. However, it is reasonable to assume that that person was aware of the former Commissioner's obligations on leaving office and was concerned that the former Commissioner had not met those obligations.

**18 .** Based on the facts of this case, it would be reasonable for the ordinary citizen to conclude that the Barroso Commission failed to deal adequately with the former Commissioner's breach of an obligation. It would be reasonable for the ordinary citizen to conclude that future similar breaches of obligation may be dealt with similarly. The sanctions provided for in Article 245 TFEU, in the case of a breach of that Article, are expressed in broad terms. This Treaty provision is given procedural effect by way of the Code of Conduct for Commissioners. The Ombudsman is aware of the view that the present Code is inadequate and lacks a coherent set of arrangements for its implementation. [7] The Ombudsman believes that the rules in the Code should be revised to make them more explicit and to improve implementation. For example, a revised Code could include a non-exhaustive list of the types of circumstances or of actions which would be likely to lead to a referral to the Court of Justice or to some lesser sanction at an administrative level.

**19 .** While the Code should be revised for the future, this does not imply that the Code as it existed at the relevant time, or in its present form, precluded appropriate action by the Commission arising from the former Commissioner's breach of the Code. If the will to take appropriate action were there, the Ombudsman believes that the Commission could have found an appropriate way in which to deal with the situation.

**20.** Having considered the matter carefully, and in the absence of evidence suggesting otherwise, the Ombudsman finds that the Barroso Commission failed adequately to deal with the former Commissioner's breach of paragraph 1.1.1 of the Code. This constituted maladministration by the Barroso Commission.

## Compatibility of the Contract with Treaty

**21.** Given that the contract had already ended some months before it even became aware of its existence, any consideration of the contract's terms by the Commission had to be a retrospective exercise. This retrospective exercise would inform the Commission as to what action it should take in relation to the breach of obligation under the Code, that is, the failure to notify the Commission of the contract in advance. It was not at that late stage open to the Commission to refuse permission for the activity, or for parts of it, or to seek to impose any conditions. However, it would have been open to the Commission to refer the case to the Court of Justice if it took the view that the former Commissioner's occupational activities, under the contract, breached the obligations under Article 245 TFEU.

**22 .** It is relevant that that the Ad Hoc Ethical Committee, from its retrospective assessment,



concluded that, if the contract had been notified to it in time, it would have taken the view that it did not offer sufficient guarantees as to its compatibility with Article 245 TFEU. The Committee was concerned in particular regarding the scope of the services that the former Commissioner would provide to the company . The opinion of the Ad Hoc Ethical Committee is both reasonable and convincing. The obvious conclusion is that, if the contract had been notified to it before the former Commissioner had accepted the job offer, the Commission should have asked the former Commissioner to limit the scope of the activities covered by the contract. This would have limited the risk that some of the former Commissioner's activities under the contract would have infringed Article 245 TFEU.

**23 .** In the light of the views expressed by the Ad Hoc Ethical Committee, in November 2013 the Commission wrote to the former Commissioner seeking further information on the issue of the compatibility of the contract's terms with Article 245 TFEU. In reply, the former Commissioner stated that the contract contained a clause reflecting the need to avoid a conflict of interest and that the former Commissioner had interpreted this in the spirit of Article 245. On this basis, it was open to the former Commissioner to refuse a task or mission which was incompatible with the obligations under Article 245 TFEU. This view was expressed also by the company concerned in a letter of the same date (18 December 2013) to the Commission. On that basis, and apparently without further information, the Commission decided that the scope of the former Commissioner's contract with the company concerned "can be considered as compatible with Article 245(2)". The Commission told the Ombudsman that it "was precisely on the basis of the clarifications received from the former Commissioner and [the company] that the Commission was able to conclude that the scope of the service contract was compatible with Article 245(2) TFEU, in particular taking into account the way in which it was actually implemented".

**24.** The advice of the Ad Hoc Ethical Committee was stated in terms of what it would have recommended had it been consulted in advance . At the point when it was actually consulted, it was already too late for the Commission to take appropriate mitigation measures; but it was not too late to refer the matter to the Court of Justice or to impose some administrative sanction. The position of the Ad Hoc Ethical Committee was that the contract was problematic in terms of compliance with Article 245 TFEU yet the Commission, in its retrospective decision, found that the contract was compatible with the Treaty. On the face of it, the Commission decision is at odds with the advice of the Committee. The Ombudsman accepts that the Commission was not bound by the advice of the Committee. But if the Commission chooses to depart from that advice, it must be able to justify that decision. In this case, the Ombudsman is not satisfied that the Commission has justified its decision to take a contrary position.

**25.** In fact, it appears that the Barroso Commission had a rather limited engagement with the former Commissioner on the compatibility issue. The Commission did not seek detailed information regarding the specific tasks undertaken under the contract, with a view to determining if those specific tasks were in compliance with Article 245 TFEU. Rather, it limited itself to requesting the former Commissioner to submit written confirmations that the contract allowed the former Commissioner to refuse, on a case-by-case basis, to undertake a specific task or mission that would be incompatible with the integrity and discretion required by Article





245 TFEU. Such a step does not, in the Ombudsman's view, satisfy the Commission's duty of diligence. The position adopted by the Commission implies that it was for the former Commissioner to self-assess whether or not there was a conflict of interest as regards a specific task or mission undertaken by the former Commissioner. If the Commission wished to establish whether the contract tasks were in all cases compatible with Article 245, the Commission should have sought much more detailed information regarding the tasks actually undertaken and then conducted its own analysis of their compatibility with Article 245. In particular, the Ombudsman believes the Commission should have considered very carefully an apparent contradiction between one clause in the written contract and the explanation given to the Commission by the former Commissioner (supported by the company) as to how the contract operated in practice. In one of the contract clauses, the former Commissioner provides an assurance that there is nothing to prevent the former Commissioner from carrying out the required duties. However, in replying to the Commission's request for information, the former Commissioner referred to an understanding which allowed the former Commissioner to refuse duties if they gave rise to a conflict with Article 245 TFEU.

**26.** The Ombudsman finds that the steps taken by the Barroso Commission in this regard were insufficient and unsatisfactory. On the basis of the limited information it received regarding the tasks performed by the former Commissioner, the Commission did not have enough information to take a view one way or the other. Reaching a decision on the basis of a limited engagement with the former Commissioner was not justified. This is even more the case where the former Commissioner was almost put in the position of doing a self-assessment. In all the circumstances the Ombudsman finds that the Barroso Commission's decision, regarding the compatibility of the contract with Article 245 TFEU, was not based on an adequate investigation of the facts and that it thus amounted to maladministration.

## Conclusion

On the basis of the inquiry, the Ombudsman makes the following findings and suggestions:

**(1) The Ombudsman finds that the Barroso Commission failed adequately to deal with the former Commissioner's breach of paragraph 1.1.1 of the 2004 Code of Conduct for Commissioners. This constituted maladministration by the Commission.**

**(2) The Ombudsman finds that the Barroso Commission's decision, regarding the compatibility of the former Commissioner's contract with Article 245 TFEU, was not based on an adequate investigation of the facts and thus amounted to maladministration.**

The Ombudsman suggests that where, in the future, the Commission must deal with the failure of a former Commissioner to inform it, in good time, of an occupational activity it should ensure that its actions in relation to that former Commissioner reflect the gravity of the failure in question. In particular, it should ensure that its actions will re-assure EU citizens that the Commission is prepared to take all appropriate steps to uphold Article 245 TFEU.



**The Ombudsman suggests to the Commission that it should revise its Code of Conduct for Commissioners with a view to making the rules more explicit. In order to improve implementation, a revised Code could include a range of sanctions to be imposed, at the administrative level, where there has been a breach of obligations either by a serving or a former Commissioner. A revised Code could also clarify the type of circumstances in which the Commission will apply those sanctions.**

The European Commission will be informed of this decision.

Strasbourg, 30/06/2016

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[1] The Ad Hoc Ethical Committee[1] is made up of three independent experts who advise the Commission on ethical matters, especially about the compatibility with the Treaties of former Commissioners' envisaged post-office activities.

See

[http://ec.europa.eu/transparency/ethics-for-commissioners/ad-hoc-ethical-committee\\_en.htm](http://ec.europa.eu/transparency/ethics-for-commissioners/ad-hoc-ethical-committee_en.htm)

[2] This appears to be a reference to a clause in the contract in which the former Commissioner provided an assurance that there was nothing to prevent the former Commissioner from carrying out the required duties. The Committee, had it been consulted in advance, would have advised the Commission to seek further commitments including a narrower definition of the scope of the tasks to be undertaken (see Paragraph 25 below).

[3] The Ombudsman queried this with the Commission and, in reply to a question from the Commission, the former Commissioner corrected the matter.

[4] Under Article 46(a) of Regulation (EC) 45/2001.

[5] Decision SEC(2004)1487/2, which has since been replaced by decision C(2011)2904.

[6] The Ombudsman has decided not to publish details of the reasons given by the former Commissioner - see Paragraph 8 above.

[7] See, for example, the European Parliament's 2014 study available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/490697/IPOL\\_STU%282014%29490697\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/490697/IPOL_STU%282014%29490697_EN.pdf)



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Strasbourg, 13/05/2015

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