Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/6/2016/AB on the Commission's Special Advisers

Decision
Case OI/6/2016/AB - **Opened on** 26/05/2016 - **Decision on** 16/06/2017 - **Institutions concerned** European Commission (No maladministration found) | European Commission (Suggestion(s) accepted by the institution) |

This strategic inquiry looks into the European Commission's rules and practices for ensuring that its Special Advisers do not have conflicts of interest.

The Commission appoints Special Advisers to give policy advice to Commissioners on a part-time basis. As many Special Advisers will continue to work outside the Commission during their term as Special Advisers, robust rules and practices are necessary to ensure that no conflicts of interest arise between these outside activities and their work as Special Advisers. This is all the more important given the high-level access and influence enjoyed by Special Advisers.

The Ombudsman commends the Commission on the procedural improvements the Commission has itself made to deal with certain issues. She is also pleased that the Commission has replied positively to a number of suggestions made by the Ombudsman during her inquiry. In closing this inquiry, the Ombudsman concludes that the Commission could further strengthen its practices in a number of respects. These include: adopting a more proactive approach to its assessment of conflicts of interest; using more effective 'mitigating measures' to address risks that arise; and enhancing citizens' access to information on Special Advisers.

The Ombudsman closes her inquiry by making 10 suggestions to the Commission.

The background
1. The EU institutions employ various categories of staff to meet their diverse staffing needs, such as permanent "officials", "temporary agents", "contract agents", "local staff" (who are employed in EU Delegations outside the EU) and (for the European Parliament) "parliamentary assistants". " **Special Advisers** " are another category of staff. EU staff rules define a " **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] *, either regularly or for a specified period* " [1] .

2. The European Commission has, at any one time, approximately 50 Special Advisers. Each

Special Adviser is normally appointed for one year (their contracts can, however, be for up to two years and they can be renewed any number of times) and usually works for the Commission for between 10 and 40 days per year [2] . Special Advisers can be "Institutional Special Advisers", who assist specific committees and services (such as the Commission's Audit Progress Committee [3] or the Structural Reform Support Service [4]) or "non-institutional Special Advisers", who provide direct assistance to individual Commissioners on issues that fall within the competence of the particular Commissioner [5] . This inquiry focuses on the latter group (see paragraph 7 below). Special Advisers can be paid or unpaid (unpaid Special Advisers are usually retired senior Commission officials or retired politicians). As Special Advisers work only part-time for the Commission, they often continue to work outside the Commission (for example, in companies, consultancies, law firms, universities, national civil services or as "freelancers") during the period when they are Special Advisers.

3. The EU Staff Regulations' provisions on "conflicts of interest" also apply to Special Advisers [6] . The Commission must thus verify that Special Advisers have no conflicts of interest, particularly as regards the work the Special Advisers may have outside the Commission during the period when they are Special Advisers.

4. According to the Commission's procedures, a Commissioner can ask for a Special Adviser to be appointed to assist him or her. His or her Cabinet will, in that context, submit the following documents to the Commission's Directorate-General for Human Resources and Security (DG HR): (i) a **sworn statement** ("declaration on the honour") signed by the prospective Special Adviser stating that there is no conflict between his or her future duties and any of his or her outside activities, (ii) the Special Adviser's " **declaration of activities** " and (iii) a " **statement of assurance** " that there is no conflict of interest, which is signed by the responsible Commissioner or the Head of Cabinet. DG HR then checks on the basis of the documents provided that there is no conflict of interest. Special Advisers may be asked to provide further information if DG HR considers it necessary . DG HR then communicates the outcome of its assessment to the College of Commissioners, which takes a final decision on the appointment.

The strategic inquiry

5. The Ombudsman has completed inquiries into two individual complaints concerning Special Advisers. In both cases the Ombudsman made findings of maladministration [7] . Having received a further complaint on the subject of Special Advisers from a non-governmental organisation that campaigns against excessive or unfair lobbying, the Ombudsman decided in 2016 to open a strategic inquiry to look into the systemic issues arising from that complaint.

6. This inquiry was launched on 25 May 2016 and covers three **systemic** issues: (i) scrutiny of Commissioners' requests to appoint Special Advisers, (ii) the Commission's "conflict of interest" assessments during the period when Special Advisers work for the Commission, and (iii) public access to documents and to information about Special Advisers and about the appointment procedure. This inquiry does not concern any specific individual cases.

7. The Ombudsman inspected all Commission files on the appointment of Special Advisers in

2015 and 2016. The Ombudsman's inquiry team also held meetings with the Commission to obtain further information and clarifications. Following the inspection of the files, the Ombudsman decided to focus her attention on "non-institutional" Special Advisers only (see paragraph 2 above). The Ombudsman then asked the Commission to provide information on (a) precisely how the procedure for appointing such Special Advisers is organised, (b) the conflict of interest assessments the Commission carries out before appointing Special Advisers, (c) measures aimed at mitigating the risks arising from possible conflicts of interest, (d) the duty of Special Advisers to declare new activities after their appointment and (e) the publication of information about Special Advisers.

The Ombudsman's assessment Introduction

8. As is the case for all EU staff members, "Special Advisers" have a legal obligation (under the EU Staff Regulations and the Conditions of Employment that apply to them) to carry out their duties impartially and objectively, guided solely by the interests of the Union. The Commission, as such, specifically expects its Special Advisers to give **independent advice** to Commissioners. Given that they have direct access to Commissioners, this advice can be expected to be particularly influential.

9. It must also be born in mind that—in order to carry out their work properly—the Commission's Special Advisers, like other Commission staff members, may have access to internal Commission documents and information, including confidential documents and information.

10. In this context, the Commission faces an important, yet difficult and delicate challenge. As the Special Advisers are very likely also to work outside the Commission [8] , the risk that they will have **professional interests** that conflict with their role as "public servants" is greater than is the case with full-time officials.

11. The advice provided to the Commission by its Special Advisers must, if it is to be truly "independent", be free from any undue outside interests. Since the Special Advisers work for the Commission on a part-time basis only, they may have significant professional interests outside the Commission, very often in the very areas on which they are advising the Commission. In this context, it is quite possible that conflicts of interest may arise between their outside interests and their work for the Commission [9] .

12. The advice provided by a Special Adviser cannot be deemed to be "independent" if that advice relates to a matter in which the Special Adviser has a direct interest in the course of his or her external activities. For example, Special Advisers should not advise the Commission on matters in which the Special Advisers, the Special Advisers' clients, or the Special Advisers' outside employers, have an interest. The Commission recognises this; the Ombudsman has seen, in the inspection of the Commission's files, examples of the Commission not appointing prospective Special Advisers following the conflict of interest assessment.

13. However, many other cases are not clear cut. In some cases the overlaps, between the Special Adviser's external activities and the topics on which he or she is expected to provide advice, may be quite limited. In these cases, the Commission should take all necessary

measures to ensure that the Special Adviser does not, when working as a Special Adviser, deal with those topics where he or she has outside interests. The Commission should identify clearly those topics where the Special Adviser has an external interest and put appropriate ' *mitigating measures'* in place in order to ensure that the Adviser is not required to advise the Commission on these same topics.

14. When employing Special Advisers, the Commission must therefore ensure that three steps are taken. First, the Commission must have in place procedures to identify possible conflicts of interest. Second, it must identify and apply the necessary mitigating measures to deal with possible conflicts of interest, such as excluding the Special Advisers from advising on the specific issues where a conflict might arise and ensuring that the Special Advisers do not have access to confidential information relating to these issues. Finally, the Commission must reassure the public that it has taken steps to deal with the matter by making available adequate information regarding how it has dealt with the first two issues set out above.

15. The Ombudsman emphasises that robust rules and practices for Special Advisers serve not only to protect the Commission and its reputation, they also serve to protect the reputations of the Special Advisers themselves.

A.The conflict of interest assessment

16. The Ombudsman is mindful that conflicts of interest do not arise only in relation to the **outside activities** of a staff member. They may also arise, for example, because of **family connections** between a staff member and a third party that might benefit from the actions of that staff member. They may also arise, for example, because the staff member has **financial interests** (such as shares in companies) which might be affected by the actions of the staff member. Such risks are covered by the declaration “on the honour” which Special Advisers (and all EU staff members) must sign before being appointed. That declaration includes the obligation " *not to deal with any matter in which, directly or indirectly, he/she has any personal interest such as to impair his/her independence, in particular* **family and financial interests** [...] *".*

17. However, the **present inquiry** focuses only on risks arising from Special Advisers' **outside activities** . The focus of the inquiry is particularly justified since, unlike other members of staff, Special Advisers at the Commission very often work outside the Commission also. Thus, it is appropriate that the Commission makes special arrangements to prevent risks arising from these outside activities.

The need for a proactive approach

18. The Ombudsman is strongly of the view that EU institutions should not limit themselves to reacting to situations that have already developed. Rather, they should be proactive in identifying and managing risks before they develop into real problems.

19. The Ombudsman is also of the view that the EU institutions should be as transparent as possible regarding their efforts to ensure that members of staff do not have conflicts of interest. This is so because, in the absence of adequate information about such efforts, members of the public may have reasonable doubts as to whether a member of staff is or is not in a conflict of interest situation (that is, there may be at least an "appearance" of conflicts of interest [10]). Even appearances of conflicts of interest are damaging to the EU institutions as they serve to diminish the public's trust in the institutions.

20. It is also in the interest of the staff members concerned, especially as regards their professional reputation and standing, that any "appearance" of a conflict of interest is resolved. It is thus very important that the Commission determine whether there is a conflict of interest, or an "appearance" of conflict of interest, that could prevent the Special Adviser from being appointed. It is also important to identify if mitigating measures are necessary.

21. It is very important, both for the Commission and for the Special Advisers themselves, that the Commission does not simply rely on a judgement call by a given Special Adviser as regards whether that Special Adviser's situation gives rise to a conflict of interest (or an "appearance" of a conflict of interest). While the self-assessment by a Special Adviser is one important element which it can take into account, the Commission should always ensure that **it is the Commission** which re-examines carefully **all** the relevant factual aspects in order to establish **its own view** as to whether or not there is a conflict of interest or an "appearance" of a conflict of interest. The position of the Commission should **not** be based solely on the "self-assessment" by a Special Adviser.

22. In order to assess whether a conflict of interest exists, **the Commission** must thus closely re-examine and compare, before appointing a Special Adviser, the prospective Special Adviser's **mandate** (that is, the areas on which or the issues on which he or she will give advice) and all of his or her **outside activitie s** [11] .

23. This assessment is more complicated than would be the case for other EU staff. Unlike its other staff members, Special Advisers usually continue to work (sometimes in full-time jobs) outside the Commission during their tenure as Special Advisers. This work is often in the same area(s)—their area(s) of expertise—as the area(s) on which they advise Commissioners.

24. However, the fact that a person works in the same general area as the area on which he or she advises Commissioners does not necessarily mean that he or she is conflicted. Simplistic assumptions should be avoided. For example, a person who is an expert in a particular field, but who has very limited professional relationships with any commercial companies active in that field, is unlikely to be conflicted when giving advice to a Commissioner (this might be the case for academics who provide limited consultancy services in a given area). Likewise, even if the Special Adviser works for a company active in a relevant field, the specific advice the Special Adviser may be asked to give a Commissioner might not relate directly to any specific commercial interests of that specific company.

25. When carrying out a conflict of interest assessment, it should also be borne in mind that Special Advisers simply provide **advice** to Commissioners. Unlike some other EU staff

members, they do not have any **decision-making powers** .

The conflict of interest assessment in practice

26. The Commission should first seek to identify **all** possible overlaps between the Special Adviser's outside activities and the advice he or she is asked to provide to a Commissioner.

27. Second, the Commission must keep in mind that **there may be a need for robust and effective measures aimed at mitigating and addressing any potential conflicts of interests or appearances of conflicts of interest** .

28. During the course of her inquiry, the Ombudsman verified that the Commission carried out a detailed examination for each Special Adviser appointed in 2016. She also noted that the Commissioners' Cabinets took measures to improve the formulation of Special Advisers' mandates and to draw up measures to mitigate risks. The Ombudsman also notes that one appointment request was cancelled because the Commission concluded that it could create an appearance of a conflict of interest. **In general, the Ombudsman welcomes these efforts** .

29. The Ombudsman notes that, when assessing conflicts of interest for Special Advisers, the Commission uses the notions of "theoretical link" and "specific link". The Commission considers that a purely "theoretical link", between the Special Adviser's mandate and an outside activity, could exist where the Special Adviser's mandate is very broadly formulated. It suggests that such (purely) "theoretical links" are not, in themselves, sufficient to prevent a Special Adviser being appointed. As an example, the Commission described the case of a Special Adviser who is " *a member of the supervisory board of a private company active in the food industry. If that Adviser has to advise the Member of the Commission on the simplification of rules in fiscal matters, the fact that his/her company would probably be concerned by the discussed simplification* **would not be considered sufficient as to exclude that he/she can take up the activity as an Adviser** *, as the link can be considered as theoretical. On the contrary, if his/her activity as Adviser would consist in* **advising on simplification of VAT-rate for the food companies,** *the issue of conflict of interest would need to be addressed* " [12] (emphasis added).

30. The Ombudsman agrees with the approach outlined by the Commission in the example above. Drawing general conclusions therefrom, the Ombudsman considers that it would be an unwarranted assumption, it would be formalistic, and it would be disproportionate, to prevent a Special Adviser from being appointed where the advice being sought is general in nature. Nevertheless, the Special Adviser's statement of assurance should provide for mitigating measures aimed at reassuring the public and eliminating any possible "appearances" of conflicts of interests. In the Commission's example, that means that the statement of assurance should **expressly** state that the Special Adviser should not advise on VAT-rate related questions specifically relevant for food companies.

31. However, the Ombudsman observes from her inspection of the relevant files that the

Commission did not always provide a convincing explanation for not including an outside activity among the potential risks. For example, the Commission was not able to explain whether or not it considers that being a *member* and *chairing* a Supervisory/Advisory Board of a company active in the same policy area as the one covered by the Special Adviser's mandate implies a similar risk of conflict of interest [13] . In other cases brought to the Ombudsman's attention, it was not obvious how the Commission arrived at its decision to include or exclude an outside activity from the list of overlaps to be addressed through mitigating measures.

32. The Ombudsman considers that systemic steps should be taken to ensure that very careful thought be given to assessing such issues.

33. The Ombudsman thus suggests that **the Commission develop a non-exhaustive table of examples of situations that could prevent a prospective Special Adviser from being appointed or would, at least, require mitigating measures. This would help to better structure the Commission's reasoning, enable a more consistent assessment and provide convincing justification for its decisions.**

34. As the risk of conflicts of interest arising also depends on the **precise definition and scope of the Special Adviser's mandate** , the Commission must possess and set out in its analysis sufficiently detailed information on the tasks being proposed for the Special Adviser.

35. In this context, it is particularly difficult to carry out a meaningful assessment if the mandate of the Special Adviser is formulated very vaguely. While it might be tempting to formulate a Special Adviser's mandate very vaguely, to maximise flexibility and to adapt to changing needs, to do so would be problematic and unwise. The identification of possible risks for conflicts, between the Special Adviser's private interests and the Special Adviser's duty to give the Commission truly independent advice, could be made more difficult, if not impossible, by an overly vague formulation of a Special Adviser's mandate.

36. The Ombudsman suggests that **the Commissioners' Cabinets endeavour to be as specific as possible concerning the prospective Special Adviser's future duties. The Commission should support the Cabinets in this regard.**

37. The Ombudsman stresses that this suggestion does not prevent, if the need arises, an amendment of the mandate of a Special Adviser during the course of the mandate. Any such amendment should be accompanied by a new conflict of interest assessment.

38. Apart from information on the prospective Special Adviser's future duties, it is also important for the Commission to obtain complete and clear information on a Special Adviser's outside activities. Therefore, the Special Adviser's contract stipulates that his or her **declaration of activities** should provide " *a sufficiently detailed description of the other assignments of the Special Adviser* ". The Ombudsman's inspection of the Commission's files revealed that most declarations of activities consist of a list of posts held by the individuals in question. The Commission stated that, where obtaining further information seems necessary or appropriate, DG HR carries out additional research on the activities and background of

prospective Special Advisers, on the basis of publicly accessible information sources.

39. The Ombudsman suggests that, **whenever necessary, the Commission should clarify a prospective Special Adviser's outside activities, including by asking him or her to provide further information or documents (for example, employment contracts or lists of important clients)** .

Incompatibility of functions

40. The Rules on Special Advisers set out that " *throughout the period of their appointment,* [Special Advisers] *may not have direct or indirect contractual links with the Commission other than those arising from their appointment as special advisers* ." The only other *contractual link* that a Special Adviser may have with the Commission is another contract as a Special Adviser.

41. Concerning *non-contractual links* , the Commission stated that a Special Adviser may carry out additional tasks for the Commission, provided that these tasks are compatible with the function of Special Adviser. A recent complaint lodged with the Ombudsman challenges the appropriateness of being at the same time a Special Adviser and a member of the Commission's Ad Hoc Ethical Committee [14] . The Ombudsman will analyse this question in the context of the individual complaint.

B. Organisation of the appointment procedure

42. The assessment of possible conflicts of interest of Special Advisers is particularly important given that they are appointed at the individual request of the highest-level decision-makers in the Commission (namely, the Commissioners) and given that they will have very privileged and regular access, throughout their mandate, to these decision-makers. Thus, in organising the appointment procedure, the Commission must ensure that its administration has enough resources and time to undertake an effective conflict of interest assessment. In addition, the public must be reassured that the appointment of a Special Adviser has not already been decided upon regardless of the outcome of that assessment (the administration should never simply "rubberstamp" the proposal of a Commissioner to appoint a Special Adviser).

43. The Ombudsman notes that, in March and September 2015, the Commission appointed Special Advisers **before** DG HR had communicated to the relevant Cabinets its recommendations on which measures should be included in the statement of assurance to mitigate risks of conflicts of interest. The Ombudsman considers that this practice did not comply with the applicable rules. Even more importantly, it casts a serious doubt on the effectiveness of the process. In addition, although it concerned a **very limited** number of cases, the Ombudsman considers that it was very damaging that the Commission issued press releases announcing these appointments **before** the assessment process was over. It is not surprising that such practices raise serious doubts as to whether an unbiased and

critical examination of the conflict of interest question was in fact carried out in those cases [15] .

44. The Ombudsman has, however, verified that the Commission modified its practices in 2016. DG HR now sends its recommendations concerning the drafting of the statement of assurance **before** the individuals concerned are appointed. **The Ombudsman welcomes the Commission's improvements in this area and encourages it to adhere closely to the procedure set out in the Rules on Special Advisers, in particular when appointing Special Advisers on an** *ad hoc* **basis in the course of the year.**

C.Application of mitigating measures

45. It is the purpose of the statement of assurance to determine whether any activities declared by the prospective Special Adviser could constitute a risk of a conflict of interest, and thus need to be addressed through measures aimed at mitigating that risk. The statement of assurance includes an "A option", in which the relevant Commissioner confirms that there is "no conflict of interest", and a "B option", in which the relevant Commissioner declares that "there may be a potential risk for the Commission's good name", but that he/she "is willing to accept this potential risk and also considers it to be acceptable for the Commission as a whole", on the basis of mitigating measures.

46. For example, there will typically be no risks of conflicts of interests (the "A option") when the Special Adviser is a retired Commission official and has no other related outside activities.

47. The Ombudsman observes, from her inspection of the relevant files, that the content of the statements of assurance improved significantly between 2015 and 2016. Moreover, she notes that the Cabinets generally followed DG HR's recommendations in 2016 concerning the wording of the statements. However, the Ombudsman notes that, in some cases, Commissioners' Cabinets initially preferred to use the "A option" in the statement of assurance, whilst, nevertheless, adding some mitigating measures. This practice is confusing.

48. The Ombudsman suggested that **the Commission redraft the statement of assurance in a way that would encourage Cabinets to choose the A option** only **where it is appropriate to choose that option. The Commission said it was willing to follow this suggestion. It confirmed that it would pay particular attention to ensuring that the correct choice between the two alternative formulations is made when the statements of assurance are completed.**

49. After analysing the content of the statements of assurance for all Special Advisers appointed in 2015 and 2016, the Ombudsman also found that in some cases, the **mitigating measures appeared to be too vague** to address effectively a potential overlap between the Special Adviser's mandate and his/her outside activities. This concerns mitigating measures such as: "X *in* [his/her] *capacity as Special Adviser will not deal with matters linked to* [his/her] *gainful activities* " or that " X *has agreed not to have any influence on any decisions or matters*

where a potential conflict of interest might arise. Further, X *will abstain, in* [his/her] *capacity as Special Adviser, from dealing with any issues which have a link with any other assignments* [he/she] *might be undertaking* ."

50. The Commission considers that in certain cases, only a broad statement is an adequate way of covering all possible situations of conflicts of interest.

51. The Ombudsman notes that it can also be argued that such broad statements are often vague. They are so open to interpretation that they have little practical value. Such statements are often not "mitigating measures", but a simple reaffirmation of the conflict of interest rules already contained in the institutions' rules on conflicts of interest [16] .

52. It is not possible for the Commission or outside observers to monitor the effective application of excessively broad and vague mitigating measures. Furthermore, such broad and vague formulations provide little guidance to Commissioners as to how to avoid conflicts of interest from arising when they seek advice from Special Advisers.

53. The Ombudsman thus suggests that **the Commission take steps to ensure that the mitigating measures proposed in the Special Adviser's statement of assurance are clear and specific to each individual case. The Commission should also provide concrete guidance to the Commissioner concerned and to the Special Adviser on how to avoid potential conflicts of interest from arising.**

54. It is also important that the mitigating measures are **realistic and applicable** .

55. One example relates to the need to ensure that Special Advisers treat with due care any confidential information obtained when working as Special Advisers. The Ombudsman's inspection confirms that some statements of assurance rightly remind Special Advisers of their duty, under the EU Staff Regulations, not to reveal to third parties any confidential information they have obtained while working for the Commission [17] . However, preventing a Special Adviser from revealing information to third parties may not adequately deal with the need to protect confidential information. Special Advisers may themselves work outside the Commission. It remains the case that, without ever having to reveal confidential information to a third party, a Special Adviser could, himself or herself, make direct use of confidential information in his or her work (without any need to transfer that information to a third party). The only way to prevent this occurring is to ensure that, when working for the Commission, Special Advisers never obtain confidential information of specific use to them in their outside work (be that work for an outside employer or a client).

56. In this context, the Ombudsman suggests that, **where necessary, the Commission consider including measures to ensure that Special Advisers do not have access to** confidential information **that they could use in the context of their work outside the Commission.**

57. Finally, it is clear that the Special Advisers concerned should be made aware of the statement of assurance signed by the Commissioner and the mitigating measures (if any)

contained therein. The Ombudsman notes that the statement of assurance may contain measures that fall within the responsibility of the Commissioner [18] , but also measures which directly concern the Special Adviser, such as avoiding advocacy or lobbying, or having contacts with certain units or sections in the Commission.

58. The Ombudsman therefore suggested that **the Commission make sure that each Special Advisers is aware of the content and implications of the mitigating measures contained in the statements of assurance relating to that Adviser** .

59. The Commission agreed **to change its practice and to send a copy of the statement of assurance to the particular Special Adviser in all cases where this statement includes restrictions or mitigating measures** .

60. The Ombudsman notes that this might also prove to be a good opportunity to have constructive exchanges with the Special Adviser regarding conflict of interest issues.

D. Duty to notify changes of activities

61. Special Advisers are generally free to undertake new activities during their mandate. However, the contract between the Commission and the Special Adviser obliges the Special Adviser to " *inform on his/her own initiative the Commission of any* **relevant** *change in his/her other activities* " (emphasis added).

62. The Commission's duty to prevent any risk of a conflict of interest has thus to be understood as an ongoing process. The Commission has previously committed to automatically carry out a new conflict of interest assessment whenever a Special Adviser declares a new activity [19] .

63. The Ombudsman welcomes this approach, but considers that the wording of the contract may be slightly misleading. The Ombudsman considers that Special Advisers should inform the Commission about **any change in their activities** , and not only the ones the Special Advisers deem **"relevant"** . Similarly, prospective Special Advisers should be required to declare **all** recent activities in their declaration of activities. Such a practice would correspond to the Ombudsman's view that it is for the Commission, and not for the Special Advisers themselves, to determine whether an outside activity is or is not relevant in the context of the assessment of possible conflicts of interest.

64. Thus, the Ombudsman considers that **the Commission should set out more explicit requirements for Special Advisers to inform it of any change in the nature of their** existing **activities.**

65. More generally, the Ombudsman observes that the contract between the Special Adviser and the Commission does not specify any time-limit for informing the Commission on changes to the Special Adviser's activities. The Ombudsman considers that there is a substantial need for improvement in this area. She has found, for example, cases where the

declarations of activities were updated belatedly, or only after the Commission received comments and concerns from civil society. The Ombudsman is cognisant of the fact that the function of Special Adviser is often unpaid and is limited in time. Arguably, this may have an impact on an individual's diligence in quickly updating his or her declaration. The Commission's action is also hampered by the absence of possible sanctions other than the termination of the contract. Improvements can, however, be made, by finding pragmatic and helpful solutions.

66. A practical solution would be **to contact the Special Advisers every six months to remind them of their obligation to update their declaration of activities. The Commission has already agreed to implement this practice in response to this suggestion from the Ombudsman.**

67. The Ombudsman suggests that the Commission also **review the Special Advisers' standard contract to include the obligation to declare any new activity within two months.**

E. Making information available to citizens

68. The Commission already makes public substantial information concerning Special Advisers. Once the appointment has been approved, the Commission publishes, on its website, the Special Adviser's name, duties, curriculum vitae and declaration on the honour, as well as the name of the Commissioner to whom the Special Adviser will give advice [20] .

69. The rules do not provide for the publication of the Special Advisers' declarations of activities and the statements of assurance. However, the Commission usually grants full public access to these documents in response to requests for public access to documents. In this context, it does not seem to face difficulties in obtaining authorisation from the Special Advisers concerned to disclose their personal data. In the Ombudsman's view, proactively publishing the declaration of activities and, in particular, the statement of assurance would enhance public scrutiny of the risk of conflicts of interest and the corresponding mitigating measures. It would also help the public understand how the Commission effectively addresses risks of conflicts of interest, fostering trust in the important work of Special Advisers. It would also give citizens and civil society organisations an opportunity to provide the Commission with additional information, which would reduce the risk of receiving incomplete declarations or of missing important changes in the Special Advisers' activities.

70. The Ombudsman thus suggests that, for the future, **the Commission proactively publish the Special Advisers' declarations of activities and statements of assurance, after obtaining their consent (for example, in the contract signed by the Special Advisers).**

71. Finally the Ombudsman notes that the information published on the Commission's website on Special Advisers may be difficult for many citizens to understand and to put in context. The information is not very "citizen-friendly". Publishing more detailed background

information, for example, could help citizens understand better the role of, and the important work done by, Special Advisers.

72. The Ombudsman thus encourages the Commission **to make available, on its website, more background information on the general role of Special Advisers, the range of tasks they are usually expected to perform and the limits of their mandate.**

73. Finally, the Ombudsman notes that the Commission does not publish certain information, such as whether a Special Adviser is paid or unpaid, or the maximum number of working days provided for in the contract (the number of working days greatly varies depending on the Special Adviser, from 4 to 60 days per year).

74. The Commission considers that this information is not relevant for the assessment of possible conflicts of interest. The Ombudsman agrees. She points out however that the Special Advisers' degree of influence on the Commission decision-making process is presumably not the same when the advice in question represents 4 days of work as against 60 days of work, that is, almost 25% of a full-time job. The same applies to public expectations regarding the outcomes of the Special Advisers' work, whose function is financed by the EU budget [21] . It is thus useful background information for citizens [22] .

75. The Ombudsman thus encourages the Commission **to publish information on the paid/unpaid nature of the Special Adviser's function and the number of working days involved.**

Conclusion

The Ombudsman considers that the rules and contractual provisions for Special Advisers represent a broadly satisfactory basis for managing potential conflicts of interest, as long as they are properly implemented. While Special Advisers have a valuable role in the Commission's work, it is important that all actors in the process are aware of, and committed to address, the risks of relying on advice from individuals who may have conflicting interests. Furthermore, it is important to bear in mind that appearances of conflicts of interest can arise and persist in the absence of real transparency. The Commission should deal with this risk pre-emptively.

In 2016, significant improvements were made to certain aspects of the procedure for appointing Special Advisers. The Commission has become more prudent in drawing up Special Advisers' mandates and setting out the measures that need to be taken to mitigate risks. The overall process is also more coherent and in line with the rules. The Ombudsman commends the Commission on these improvements, which were partially in response to inquiries by her Office and to concerns raised by civil society.

The Ombudsman considers, however, that the Commission can further strengthen its procedures in a number of ways. This would include adopting a more proactive approach to the conflict of interest assessment and proposing more effective mitigating measures. The Commission could also enhance the transparency of, and the trust in, the process by proactively publishing more information on its website. The Ombudsman therefore closes her inquiry with 10 suggestions to the Commission.

Suggestions for improvement

In closing her inquiry, the Ombudsman makes the following suggestions to the Commission [23] :

The conflict of interest assessment

1. Develop a non-exhaustive table of examples of situations that could prevent a prospective Special Adviser from being appointed or would, at least, require mitigating measures.

2. Endeavour to be as specific as possible concerning the prospective Special Adviser's future duties.

3. W henever necessary, clarify a prospective Special Adviser's outside activities, including by asking him or her to provide further information or documents (for example, employment contracts or lists of important clients) .

Application of mitigating measures

4. E nsure that the mitigating measures proposed in the Special Adviser's statement of assurance are clear and specific to each individual case and provide concrete guidance to the Commissioner concerned and to the Special Adviser as to how to avoid potential conflicts of interest from arising.

5. Where necessary, include measures to ensure that Special Advisers do not have access to confidential information that they could use in the context of their work outside the Commission.

Duty to notify changes of activities

6. Set out more explicit requirements for Special Advisers to inform the Commission of any change in the nature of their existing activities .

7. Review the Special Advisers' standard contract to include the obligation to declare any new activity within two months.

Making information available to citizens

8. Proactively publish Special Advisers' declarations of activities and statements of assurance, after obtaining their consent.

9. Make available , on the Commission website, more background information on the general role of Special Advisers, the range of tasks they are usually expected to perform and the limits of their mandate.

10. Publish information on the paid/unpaid nature of the Special Adviser's function

and the number of working days involved.

Emily O' Reilly European Ombudsman

Strasbourg, 16/06/2017

[1] See Article 5 of the Conditions of Employment of Other Servants of the European Union (CEOS, consolidated version available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01962R0031-20160101). The employment of Special Advisers is governed by Articles 123 and 124 of the CEOS and by the Rules on Special Advisers to the Commission, available at: http://ec.europa.eu/civil_service/docs/special_advisers/comm_c_2007_6655_1_en.pdf

[2] Special Advisers are normally appointed each March for a period of one year. A second wave of appointments takes place in September. Exceptionally, the Commission appoints a few individuals in the course of the year.

[3] https://ec.europa.eu/info/sites/info/files/apc_charter_en.pdf

[4] https://ec.europa.eu/info/departments/structural-reform-support-service_en

[5] Examples from 2017 include " *To advise on the relations with the European and National Parliaments, as well as budget revenue* ", " *To advise in the field of cultural heritage* " and " *To provide legal advice on judicial cooperation in criminal matters including access to e-evidence* " (http://ec.europa.eu/civil_service/about/who/sa_en.htm).

[6] Article 11(a) of the EU Staff Regulations (link to the full text available in footnote 1) provides that "[*a]n 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* ". Article 11 provides that " [b] *efore recruiting an official, the appointing authority shall examine whether the candidate has any personal interest such as to impair his independence or any other conflict of interest* ."

[7] See decisions closing the Ombudsman's inquiries on complaints 476/2010/ANA and 1408/2015/OV:

http://www.ombudsman.europa.eu/en/cases/decision.faces/en/10719/html.bookmark

https://www.ombudsman.europa.eu/en/cases/decision.faces/en/67701/html.bookmark

[8] It is also possible for other types of EU staff members (such as officials or temporary agents) to work outside their institutions. A typical example would be an official who also teaches at a university. Such work is, however, sporadic (normally, it does not extend beyond 2 hours per week, on average). Staff members have to obtain the permission of their institution to engage in any new outside activity in accordance with Article 12b of the EU Staff Regulations, which also states that " [P] *ermission shall be refused only if the activity or assignment in question is such as to interfere with the performance of the official's duties or is incompatible with the interests of the institution* ."

[9] It is important to stress that this does not concern activities in the private sector only. A role in the public sphere at national level can also create a conflict of interest. For example, the interests of a Special Adviser who is working simultaneously for the government of a Member State can equally conflict with his or her role with the Commission (for example, if the advice sought related to infringement procedures concerning that Member State).

[10] An "appearance of a conflict of interest" exists when members of the public have, on the basis of the (potentially limited) information available about the Special Adviser's mandate and outside activities, reasonable doubts about whether a Special Adviser's advice could be influenced by their private interests.

[11] Decision of the European Ombudsman closing his inquiry into complaint 476/2010/ANA against the European Commission, paragraph 101 (link to the full text available in footnote 7).

[12]
https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/78708/html.bookmark

[13] See Decision in case 1408/2015/OV on the European Commission's compliance with its Rules on Special Advisers, paragraph 34 (link to the full text available in footnote 7).

[14] The Ad Hoc Ethical Committee advises the Commission on whether the planned activities of Commissioners after leaving office are compatible with the treaties:
https://ec.europa.eu/info/about-european-union/principles-and-values/ethics-and-integrity/ethics-and-ir

[15] This issue was raised in complaint 1408/2015/OV concerning one Special Adviser (link to the full text available in footnote 7). During the inspection in the present case, two other cases were identified where the Commission published a press release announcing a Special Adviser's appointment before the statement of assurance and the employment contract had been signed.

[16] Article 11a of the Staff Regulations.

[17] Article 17(1) of the Staff Regulations provides that " [a] *n official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has*

already been made public or is accessible to the public ."

[18] Such as " *X, in his/her capacity of Special Adviser, will not deal with any issues that have a link with his/her activities of* [...] *in* [name of the organisation/Member State...] " or *"X will not have any influence on the conclusion of contracts between the Commission and* [name of the organisation] ."

[19] Following the suggestion made by the Ombudsman in closing case 476/2010/ANA (link to the full text available in footnote 7).

[20] http://ec.europa.eu/civil_service/about/who/sa_en.htm

[21] Paid Special Advisers receive a fee for each day worked. Unpaid Special Advisers are entitled to reimbursement of their mission expenses. The Special Adviser contract does not include specific deliverables, although it stipulates that the Commission can ask them to produce a report on their activities at the end of their mandate.

[22] The appointment of Special Advisers, and issues relating to the terms of their contracts, are overseen by the EU's budgetary authority.

[23] The Ombudsman suggests that these suggestions should, as far as possible, be applied not simply for the future but also in relation to all current Special Advisers.