

Recommendations of the European Ombudsman in the joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA on the European Commission's handling of post-mandate employment of former Commissioners, a former Commission President and the role of its 'Ethics Committee'

Recommendation

Case 194/2017/EA - Opened on 24/02/2017 - Recommendation on 06/03/2018 - Decision on 20/07/2018 - Institution concerned European Commission (Maladministration found) |

Case 334/2017/EA - Opened on 20/03/2017 - Recommendation on 06/03/2018 - Decision on 20/07/2018 - Institution concerned European Commission (Maladministration found) |

Case 543/2017/EA - Opened on 10/07/2017 - Recommendation on 06/03/2018 - Decision on 20/07/2018 - Institution concerned European Commission (Maladministration found) |

Recommendations of the European Ombudsman in the joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA on the European Commission's handling of post-mandate employment of former Commissioners, a former Commission President and the role of its 'Ethics Committee' [1]

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [2]

The European Commission is required to ensure that Commissioners comply with their duty to act with integrity and discretion under Article 245 of the Treaty on the Functioning of the European Union ('TFEU'), including after their mandates as Commissioners end. These duties are not time limited.

In this context, the Code of Conduct for Commissioners states that former Commissioners should inform the Commission if they intend to accept a new job offer during a certain period of time after they have left office. The Commission then, after consulting a three-person Ethics Committee, decides whether the proposed job is compatible with Article 245 TFEU.

The complaints arose from the alleged inadequate handling of the decision by a former Commission President to work for Goldman Sachs International. The Commission was slow to react but eventually consulted the Ethics Committee, which concluded that there were not



sufficient grounds to establish a violation of the legal obligations. When arriving at this conclusion, the Ethics Committee took into account the former Commission President's written statement that he had not been engaged to lobby on behalf of Goldman Sachs and that he did not intend to do so.

The Ombudsman considers that while progress has been made in improving the Code of Conduct for Commissioners, this case raises systemic issues as regards how the Commission handles such cases and the role of the Ethics Committee.

Following a one-year inquiry, and in the light of a recent meeting between the former Commission President and a current Commission Vice President, registered as an official meeting with Goldman Sachs, the Ombudsman recommends that the case is referred back to the Commission's Ethics Committee. The Committee can then re-assess whether the former Commission President's employment with Goldman Sachs complies with his duties under Article 245 TFEU. The Commission should also consider requiring its former President to abstain from lobbying the Commission for a certain further number of years.

1. Background to the inquiry

1. The European Commission is required to ensure that Commissioners comply with their duty to act with integrity and discretion under Article 245 of the Treaty on the Functioning of the European Union ('TFEU') both during their mandates and after their mandates end. These duties are not time limited. The public's trust in the Commission, and by extension in the EU project as a whole, risks being undermined if the Commission does not take all the necessary measures to ensure that Commissioners comply, and are seen to comply, with this duty.

2. Former Commissioners have a right to take up employment opportunities after leaving the Commission. However, when exercising this right, they must bear in mind their duty to act always with integrity and discretion. The Commission, in this context, must check if such employment is indeed compatible with the duty to act always with integrity and discretion. In 1999, the Commission adopted a Code of Conduct for Commissioners, which provides that, whenever former Commissioners intend to accept a new job during a certain period after they have ceased to hold office, they shall inform the Commission. Under the Code of Conduct that was applicable until 31 January 2018, (when the Commission adopted a new Code of Conduct), that notification period was 18 months. [3] Once notified of a proposed new job, the Commission must ask its advisory 'Ethics Committee' for its opinion on the proposed new job where that job is "related to the content of the portfolio of the (former) Commissioner". The Ethics Committee consists of three members appointed by the Commission for a term of three years. [4] Once it obtains the opinion of the Ethics Committee, the Commission must decide whether the new job is compatible with Article 245 TFEU.

3. This Ombudsman inquiry relates to the former Commission President who held his post from November 2004 until October 2014. In July 2016, he was appointed to a senior position with Goldman Sachs International, an international investment bank.



4. After this appointment was made public by Goldman Sachs on 8 July 2016 [5] , the Ombudsman issued a statement outlining her concerns and called for a revised Code of Conduct. [6] In addition to concerns expressed by several MEPs and civil society groups, a group of former and current EU staff members launched an online petition protesting against the situation and asking the Commission to take action. More than 150 000 people signed the petition, before it was forwarded to the Commission.

5. In September 2016, in reply to a follow-up letter from the Ombudsman [7] , President Juncker stated that the former Commission President would be *“received in the Commission not as a former President but as an interest representative”* and would be *“submitted to the same rules as all other interest representatives as regards the Transparency Register”* .

6. At the same time, the Commission decided to consult the Ethics Committee on the matter. The Commission wrote to the former Commission President asking him to provide it with information about his new job. The Commission then forwarded his reply to the Ethics Committee. The Ethics Committee provided its opinion to the Commission on 26 October 2016. It concluded that there were not sufficient grounds to find that the former Commission President had breached his duty to act with integrity and discretion, as set out under Article 245 TFEU. In arriving at this conclusion, the Ethics Committee took account of the commitment made by the former Commission President, in a letter to Commission President Juncker, not to lobby the Commission on behalf of Goldman Sachs. The Ethics Committee concluded that this commitment of the former Commission President *“ not to lobby on behalf of Goldman Sachs responds to the duty of integrity and discretion imposed by the Treaty ”* . [8]

7. From the public record, there was no evidence of the Ethics Committee having spoken directly or written to the former Commission President in order to seek or secure details of his employment obligations to Goldman Sachs.

8. Three complaints were then submitted to the Ombudsman by, respectively, the group of former and current EU staff members mentioned above, two law professors, and a civil society group. [9]

2. The inquiry

9. In February 2017, the Ombudsman opened her inquiry and in April 2017 [10] inspected the Commission’s files relating to the matter. These included the Ethics Committee’s opinion on the former Commission President’s new job, as well as six other recent opinions regarding other former Commissioners.

10. Following this, in July 2017, the Ombudsman wrote to the Commission, asking it to reply to questions about how the Commission deals with the post-mandate activities of former Commissioners and about the role of the Ethics Committee. [11] The Ombudsman asked the Commission to respond by the end of September 2017.



11. In mid-September 2017, President Juncker announced, in his annual ‘*State of the Union*’ speech in the European Parliament, that the Commission planned to revise the Code of Conduct. This revision would seek to strengthen the integrity requirements for Commissioners both during and after their mandates. The Ombudsman publicly welcomed this progress announced by President Juncker. [12] The Commission subsequently published its proposal for the revision of the Code of Conduct. The revised Code of Conduct (‘new Code of Conduct’) entered into force on 1 February 2018. [13]

12. In the context of the inquiry, the Ombudsman received the reply of the Commission on 20 November 2017 and, subsequently, comments of the complainants in response to the Commission's reply.

13. In January 2018, the Ombudsman wrote to the former Commission President to inform him that her inquiry team had made a proposal to her on how to proceed in the case. The former Commission President gave his views to the Ombudsman in February 2018.

14. In February 2018, a letter from the Commission was published which established that a meeting took place on 25 October 2017 between a Vice-President of the Commission and the former Commission President, now a Goldman Sachs employee. That letter stated that the Vice-President and the former Commission President “*mostly discussed trade and defence matters*” in that meeting.

15. The Ombudsman's decision takes into account the arguments and views put forward by the complainants and the Commission, and the arguments and views put forward by the former Commission President.

3. Preliminary observations

16. The Ombudsman notes the comment made by the Ethics Committee that, by taking up employment with Goldman Sachs, the former Commission President has not shown “*the considerate judgment one may expect from someone having held the high office he occupied for so many years*”. She also takes note of President Juncker's statement that he does not have a problem with the former Commission President working for a private bank, “*but maybe not this bank*”. [14]

17. The Ombudsman shares these sentiments. As noted by the Ethics Committee in its opinion, Goldman Sachs International has been “*more particularly criticised because of its role in triggering the financial crisis (subprime mortgages) and for advising on financial constructs enabling to occult the reality of the debt position of Greece*”. It is therefore understandable that there was public concern at the decision of the former Commission President to take up a position at this investment bank.



4. The Ombudsman's assessment

A. The work of the Ethics Committee

i) Consulting the Ethics Committee

18. The Code of Conduct requires former Commissioners to inform the Commission if they intend, within a certain time period after leaving the Commission, to take up a new job. Under the Code of Conduct in force until 31 January 2018, this notification period was limited to 18 months. Once notified of a proposed job, the Commission was required to consult the Ethics Committee if the job in question “*related to the content of the portfolio of the (former) Commissioner*”. The Commission was then required “*[i]n the light of the Committee’s findings*” to “*decide whether the planned occupation is compatible with Article 245 of the Treaty (TFEU)*”. The new Code of Conduct contains a similar provision.

19. As a general proposition it is true that, with the passage of time, the likelihood diminishes that a new job being taken up by a former Commissioner will give rise to concerns about the duty to act with integrity and discretion. In this context, it may be proportionate to limit in time the duty to **notify** new jobs. However, the fact that it might be proportionate to limit in time the duty to **notify** proposed new jobs does not imply that any job taken up by a former Commissioner will, once that time period expires, not give rise to concerns about the duty to act with integrity and discretion. In this context, the Ombudsman agrees with the Ethics Committee that respecting the notification period “*neither puts an end to the obligations of Art. 245 nor does it imply that they have been complied with*”. The Ombudsman believes that certain activities undertaken by former Commissioners can give rise to serious and legitimate public concerns, and constitute a breach of the duty under Article 245 TFEU, even after the notification period provided for in the Code of Conduct has expired.

20. Former Commissioners should thus use good sense and judgement when accepting job offers, even after the notification period expires. Acting reasonably, if they have any doubts as to whether a proposed job might give rise to reasonable concerns as regards compliance with Article 245 TFEU, they should notify the Commission of the proposed job. The Commission can then decide whether it is necessary to seek the opinion of the Ethics Committee. Similarly, whenever the Commission becomes aware, from any source, of concerns in relation to a job taken up by a former Commissioner, it should contact the former Commissioner concerned to obtain further information. It should then, if concerns remain, seek the opinion of the Ethics Committee. If it decides not to consult the Ethics Committee, it should explain why it takes that view.

21. The former Commission President took up his new post within weeks of the expiry of the 18-month notification period and he was no longer obliged, under the provisions of the Code, to notify the Commission of this. In the event, the former Commission President chose not to inform the Commission about his new job. The Commission became aware of this new job,



apparently through press reports. In light of the extensive concerns raised at the time by the Ombudsman, MEPs and wider civil society, the Commission decided to ask the former Commission President for details of the new job and to request an opinion from the Ethics Committee. The Ombudsman welcomed the decision at the time. [15]

ii) The Ethics Committee's investigation

22. The complainants argued that the Ethics Committee should have sought more evidence about the former Commission President's duties at his new job.

23. In the course of the inspection, the Ombudsman found that the Ethics Committee's investigation focused only on the information provided to it by the Commission when it requested its opinion. The information provided to the Ethics Committee included the former Commission President's letter to President Juncker in which he provided some information on his new job. [16]

24. The Ombudsman notes that (former) Commissioners concerned by an investigation are obliged to cooperate fully with the Ethics Committee, in particular by providing **all** the relevant additional information requested from them. [17]

25. If the information provided by the former Commissioner is considered insufficient, the Commission should, on its own initiative, seek additional information from the former Commissioner, before requesting an opinion from the Ethics Committee. While this is not provided for explicitly in the Code, it is reasonable to expect that the Ethics Committee is entitled, where necessary, to request additional information from the former Commissioner on his/her new job (it is the Commission, which formally sends such requests). It is reasonable also to expect that the Ethics Committee is entitled to have regard to other information which is in the public domain or to other relevant information that it may request from the Commission.

26. The Ombudsman believes that the Ethics Committee should decide, on a case-by-case basis, what information it needs in order to carry out its assessment. The Ombudsman inspected files from cases in which the Ethics Committee did ask for and was provided with additional information. In one of those cases, the Ethics Committee asked the former Commissioner to provide it with the text of the contract clause defining the issues to be covered by the envisaged job. This shows that the Ethics Committee is aware of its prerogatives and exercises them when it considers it necessary to do so.

27. In the case of the former Commission President, the Ethics Committee relied on his written statements in which he described his role at Goldman Sachs. Specifically, the former Commission President stated that he would not lobby on behalf of Goldman Sachs. The Ombudsman has no evidence that the Ethics Committee deliberately refrained from seeking other specific information, that might have been relevant to its assessment, but considers it unrealistic for the Committee to attempt to assess the compatibility with Article 245 TFEU of a particular job in the absence of clear information as to what that job will or may entail.



28. The Ombudsman welcomes the fact that Article 12(3) of the new Code of Conduct provides explicitly for the conduct of interviews with (former) Commissioners where the Ethics Committee is considering “ *issuing a negative opinion* ”. [18] However, she stresses that the revised rules should not be interpreted narrowly. The power to interview (former) Commissioners should apply to all cases and not only to cases where the Ethics Committee is considering issuing a negative opinion. The right of a (former) Commissioner to be given an opportunity to present his/her case, where a negative opinion is being contemplated, should not be interpreted to mean that the Ethics Committee is prevented from taking whatever measures it considers justified in order to fully investigate each case. It should therefore be possible for the Ethics Committee to conduct interviews with (former) Commissioners in any case it deems fit.

iii) The Ethics Committee’s assessment

29. In its opinion on the case, the Ethics Committee expressed certain concerns about the good judgement of the former Commission President when he took up his position with Goldman Sachs. It stated that he “ *should have been aware and appraised (sic) that by doing so [taking up a position with Goldman Sachs] he would give rise to criticism and risk to cause reputational damage to the Commission and the Union more generally* ”. It noted that “ *this damage has now been done* ”. It stated that the former Commission President “ *has not shown the considerate judgment one may expect from someone having held the high office he occupied for so many years ...* ”. The Ombudsman agrees with these assessments.

30. Notwithstanding the above, the Ethics Committee concluded, “ *there are not sufficient grounds* ” to establish a violation by the former Commission President of the duty to behave with integrity and discretion, as set out in Article 245 TFEU. In reaching this conclusion, it took particular note of the fact that the former Commission President had made a commitment not to lobby on behalf of Goldman Sachs.

31. The Ethics Committee noted that the “ *precise scope and contents of the notions of integrity and more particularly that of discretion, which would appear to be the most relevant for the case submitted, are unclear* ”. [19] *They are vague notions, the interpretation of which the Court of Justice has as yet not had the occasion to fully clarify* ”.

32. It is true that the Court of Justice has not yet had occasion to clarify these notions. However, in such circumstances, it is all the more important that services such as the Ethics Committee, and an independent body such as the European Ombudsman, seek to have these concepts clarified so that they are properly and fully applied by the Commission. If it is the case that the Ethics Committee statement, as quoted above, means that it believes it cannot make these judgements - in at least some cases – in the absence of a court clarification, then that would appear significantly to undermine its role as commonly understood.

33. The Ethics Committee stated that it was required to base its opinion on the Code of Conduct as it stood at the time. It added that it was not for the Ethics Committee to answer “ *whether the* ”



Code is sufficiently strict”.

34. While the Ethics Committee does not consider it has the mandate to comment on whether the Code of Conduct is fit for purpose, the Ombudsman is free to do so. She notes that the Code of Conduct is not legislation. The Code simply provides a framework within which to assess, case by case, whether the actions of a (former) Commissioner are compatible with the duty of that (former) Commissioner under Article 245 TFEU. The Code does not in any way limit or restrict the existing Treaty provisions. While the Code can be expected to provide helpful assistance in the task of assessing compliance by (former) Commissioners with their Treaty obligations, it does not obviate the need for the Commission to look also, and more widely, at the Treaty provisions themselves. This need to look beyond the Code may not be necessary in many cases. But in some cases, and the present case is one of these, the provisions of the Code by themselves may not provide a sufficient basis on which to reach a proper conclusion on whether or not there has been a breach of a (former) Commissioner's Treaty obligations.

35. As regards the specific assessment at issue, the Ethics Committee noted that the former Commission President had no obligation, under the rules applicable at the time, to inform the Commission of his intention to take up the new job. This was because he took up the position after the expiry of the 18-month notification period set out in the previous Code of Conduct. However, as the Ethics Committee correctly observed, the obligations of Article 245 TFEU **do not cease to exist following the end of the notification period**. Therefore, the Ethics Committee proceeded to examine whether there was a breach of the former Commission President's duty to behave with integrity and discretion.

36. The Ethics Committee identified three objections to the former Commission President's new employment that it had to examine in order to assess whether he had violated his duties under Article 245 TFEU. These objections related to (1) Goldman Sachs' role in the financial crisis, (2) the former Commission President's possible advisory role on Brexit issues, and, (3) more generally, the issue of moving from high public office to the private sector ("revolving doors").

37. Regarding the issue of the former President having joined Goldman Sachs, the Ethics Committee acknowledged the damage this had done. However, it noted that more than 18 months had elapsed since leaving the Commission and that, under the Code, it was no longer mandatory for the former Commission President to notify the Commission of his new employment. In its view, the purpose of this period is to strike a balance between the different interests at stake, notably the public interest and the legitimate interest of former Commissioners to be employed after leaving office. The Ethics Committee referred to the 18-month period as a "cooling off" period in the sense of a period during which a former Commissioner cannot take up new employment without the consent of the Commission. It then expresses the view that, once this "cooling off" period has expired, it is reasonable to conclude that a former Commissioner is entitled to take up new employment without notifying the Commission. [20]

38. The Ombudsman finds the use of the term "cooling off" period to be unhelpful and potentially misleading. It is not a term used in the Code. The 18-month period can more



appropriately be described as a “notification period” during which there was an obligation to notify the Commission of any new employment. The Ombudsman suggests to the Commission in future revisions of the Code to extend this notification period to a far longer period than was set in the revised Code of Conduct. This period is separate from the two-year ‘lobby ban’ provided for in Article 11(4) of the revised Code of Conduct.

39. The Ombudsman is strongly of the view that there are certain post-mandate activities of former Commissioners that could raise issues of compatibility with Article 245 TFEU irrespective of the length of the notification period set out in the Code of Conduct. However, the Ombudsman recognises that the risk of an incompatibility diminishes over time.

40. In the case of the other two objections which the Ethics Committee had identified (possible Brexit adviser and the “revolving doors” issue), it dismissed these objections for the same reason as it dismissed the Goldman Sachs issue. The Ethics Committee referred again to “ *the function of the cooling-off period as provided for by the Code of Conduct* ”.

41. As a general principle, the Ombudsman considers that a (former) Commissioner’s duty to behave with integrity includes the obligation to behave in a manner consistent with the nature of his/her functions as a public servant, with a view to ensuring that his/her actions do not undermine the public’s trust and confidence in the Commission and the EU .

42. The Ombudsman considers that a (former) Commissioner’s duty to behave with discretion should be understood as having two components. Understood narrowly, it implies a duty not to reveal confidential information. Understood broadly, it also encompasses a general duty to act in a way, which, in light of the senior public position held by the person concerned, is not likely to generate serious public disquiet, concern or offense. The Ombudsman considers that an action, which is likely to generate a significant degree of public disquiet among European citizens, is likely not to comply with the duty to act with discretion.

43. The Ombudsman notes that the Ethics Committee concluded that there were not “ *sufficient grounds to establish a violation of the duty to act with integrity and discretion, as imposed by Article 245 TFEU. ..*” It noted, when arriving at this conclusion, that Goldman Sachs lawfully operates on the EU internal market and that it was not against the law to accept a position at that Bank.

44. Certainly, taking up a position with a company that does not operate lawfully would be a **serious breach of discretion** . However, the mere fact that a company may act within the law does not imply that employment with that company cannot give rise to a breach of the duty to act with discretion.

45. The Ombudsman notes that the former Commission President’s actions did indeed generate significant public disquiet across Europe, which negatively affected public trust in the Commission and the EU. The Ombudsman notes that, during his mandate (2004-2014), the Commission, headed by the former Commission President, had to deal with the global financial crisis. That crisis had a huge and negative impact on millions of European citizens. During that



period, Goldman Sachs was strongly criticised for its role in the crisis. In April 2016, it was announced that there had been a settlement of 5.1bn dollars between Goldman Sachs and the US authorities over mortgage-backed securities. [21] As noted by the Ethics Committee, Goldman Sachs is seen by members of the public as “ *the exponent of aggressive investment banking, more particularly criticized because of its role in triggering the financial crisis (subprime mortgages) and for advising on financial constructs enabling to occult the reality of the debt position of Greece* ”. The Ethics Committee noted that the appointment of the former Commission President to Goldman Sachs in July 2016 is seen as “ *associating the Commission and the Union with the negative image of the financial greed ascribed to [Goldman Sachs]* ”. Another example of the extent of this negative impact is clear from the fact that the online petition of one of the complainants, asking for Commission action to be taken against the decision of the former Commission President to join Goldman Sachs, was signed by more than 150 000 persons. [22]

46. The Ombudsman thus considers that, in this specific context, it was entirely predictable that a former Commission President taking up a post with Goldman Sachs was likely to raise these serious public concerns, even where he did not take up the post until 18 months after leaving office. There were always likely to be public concerns where the person taking up employment with Goldman Sachs had dealt prominently, in a very senior public role, and on behalf of EU citizens, with the financial crisis in Europe.

B. Follow-up by the Commission

47. It is relevant to note that the extent of the role of the Ethics Committee is to give an opinion to the Commission on whether or not, in the particular case, the new employment of the (former) Commissioner is compatible with Article 245 TFEU. The decision on this issue is solely one for the Commission itself - though it must have regard to the findings of the Ethics Committee. The complainants argue that the Commission did nothing after the Ethics Committee issued its opinion. They contend that the Commission should have referred the case to the European Court of Justice.

48. The Commission says that it “took note” of the Ethics Committee's opinion. The Commission considers that it did follow-up on the issues raised in this case by proposing to extend the 18-month notification period in the new Code of Conduct. According to the Commission, no additional individual decision was necessary in order to follow-up on the Ethics Committee's opinion.

49. The Ombudsman does not accept that it was unnecessary for the Commission to issue an individual decision in this case. In fact, there were aspects of the opinion of the Ethics Committee which should have alerted the Commission to the need to consider that opinion very carefully. It is relevant to note that the Ethics Committee did not express the positive conclusion that the former Commission President's new employment was actually in compliance with his duty under Article 245 TFEU. What the Ethics Committee did say is that there were “ *not sufficient grounds to establish a violation of the duty [...] imposed by Article 245 [2] TFEU ...* ”.



This was not an endorsement of the position of the former Commission President. It is relevant also to note the comments of the Ethics Committee regarding the Code. The Ethics Committee makes clear that it based its opinion solely on the Code of Conduct as it then stood while, at the same time, observing that it was not for it to comment on whether or not the Code was “*sufficiently strict*”. These comments should have alerted the Commission to the possibility that the Ethics Committee actually regarded the Code as providing an inadequate framework within which to deal with this particular case. The comments also prompt the question of whether the Ethics Committee would have given a different opinion if it had felt free to conduct its assessment within a wider framework.

50. Article 245 TFEU states that “*[i]n the event of any breach of [the obligations under Article 245 TFEU], the Court of Justice may [...] 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*”. The wording of Article 245 TFEU clearly implies that the Court of Justice has a degree of discretion, when examining a breach of Article 245 TFEU, as to whether the specific breach is **sufficiently serious as to justify financial sanctions**. The fact that a particular breach of the duty to act with integrity and discretion might not be so serious as to justify the imposition of a financial sanction by the Court of Justice does not, however, imply that such a breach should be tolerated by the Commission.

51. The Ombudsman believes that the Commission has a range of possible responses to situations in which it finds that a (former) Commissioner has breached his/her Treaty obligations. An application to the Court of Justice for the imposition of financial penalties is at one end of this range of responses. Other possible responses include the issuing of a public reprimand or (in the case of a former Commissioner) the imposition of restrictions on interactions with the Commission and with Commissioners.

52. The Ombudsman welcomes that the option of issuing a reprimand is now **expressly** included in the new Code of Conduct in force since 1 February 2018. However, the fact that such a possibility was not expressly noted in the previous Code of Conduct does not imply that issuing a reprimand was not an option for the Commission at the time. Indeed, from her inspections of the Commission’s files, the Ombudsman is aware of at least one case where such a reprimand was imposed on a former Commissioner.

53. The Ombudsman finds that the Commission’s failure to take a specific decision in the case of the former Commission President, based on a careful assessment of the opinion of the Ethics Committee, constituted maladministration.

54. The Ombudsman has some specific concerns about how the Commission dealt with the possibility that the former Commission President might lobby the Commission.

55. The Ombudsman has examined files relating to a number of former Commissioners. She notes that in those other cases where the Ethics Committee raised the need for former Commissioners to abstain from lobbying the Commission and/or its services, the Commission expressly accepted that view in its relevant decisions. According to its reply to the Ombudsman,



in some cases the Commission has imposed specific restrictions even where the Ethics Committee had not suggested such restrictions.

56. In the case of the former Commission President, however, the Commission took no decision on his case. It did not incorporate into a formal decision the former Commission President's commitment not to lobby on behalf of Goldman Sachs. It did not set out, in any formal document, precisely how the Commission should deal with approaches from the former Commission President. This is particularly worrying since that commitment by the former Commission President was, apparently, central to the conclusion reached by the Ethics Committee.

57. Subsequent events have shown that the Commission's failure to take a formal decision, in which it could have referenced the former Commission President's commitment not to lobby the Commission, was not without consequences.

58. In a letter of 31 January 2018 [23], one of the Commission Vice-Presidents confirmed that, on 25 October 2017, he met the former Commission President in a hotel in Brussels, where they discussed trade and defence matters. The Vice-President says that the meeting was arranged over the phone by his office, after a request for a meeting came from the now Goldman Sachs employee. The Vice-President confirms that he met the former Commission President alone, and that there are no documents regarding this event. The meeting was then included, in the online list of the Vice-President's meetings, as a meeting with "The Goldman Sachs Group, Inc. (GS)" on "trade and defence policy".

59. The Ombudsman notes that in his letter of 13 September 2016 to the Commission President, the former Commission President stated the following: "*I have not been engaged to lobby on behalf of Goldman Sachs and I do not intend to do so*". [24] In its opinion of 26 October 2016 concerning the appointment of the former Commission President at Goldman Sachs, the Ethics Committee took note of the above statement. In its conclusion, the Ethics Committee considered that the commitment of the former Commission President "*not to lobby on behalf of Goldman Sachs responds to the duty of integrity and discretion imposed by the Treaty*".

60. The Ombudsman infers from this that the Ethics Committee was of the view that *should* the former Commission President lobby the Commission on behalf of Goldman Sachs, this would be a breach of his duty to act with integrity and discretion.

61. The Ombudsman notes that the public record indicates that the former Commission President took part in the meeting with the Vice-President **as a representative of Goldman Sachs**. The Ombudsman also notes that the matters discussed in that meeting, **trade and defence policy**, may be of interest to an investment bank such as Goldman Sachs. Even if it were argued that most of the information exchanged on those matters during the meeting emanated from the Vice-President, [25] this would not alter the nature of the meeting. After all, one of key objectives of a lobbyist is to meet with public officials and to obtain from them information which may be useful to the company they represent.



62. The Ombudsman also notes that the responsibilities of the particular Commission Vice-President are certainly of interest to an investment bank such as Goldman Sachs, as he is responsible for Jobs, Growth, Investment and Competitiveness.

63. Furthermore, the Ombudsman notes that in an interview published on 20 February 2018, the Vice-President in question now says that the meeting with the former Commission President was of a personal nature. In the absence of a proper record of the content of the meeting [26], the accuracy of Vice-President's later statement cannot now be confirmed. The Ombudsman notes that meetings of a "purely private or social character" are not covered by the relevant rules governing meetings with interest representatives (Article 2(a)) [27]; and yet details of this particular meeting were published describing it as a meeting with an interest representative organisation registered on the EU Transparency Register. Thus, the exact nature of the meeting is not clear.

64. Whatever the precise nature and content of the meeting with the former Commission President, there are understandable concerns about this incident, specifically that the former Commission President is using his previous status and his contacts with former colleagues, to open doors, to influence, and to obtain information.

65. The Ombudsman has already found that the Commission's failure to take a specific decision in the case of the former Commission President constituted maladministration. This failure was compounded by the loss of the opportunity, in a formal decision, to require the former Commission President to refrain from lobbying the Commission and/or its services on behalf of his new employer. Such a decision could also have prompted the Commission to impose the necessary safeguards to prevent such lobbying.

66. The Ombudsman believes that the Commission should ensure that the lessons learnt from this experience are appropriately reflected in future practice and in revisions to the Codes of Conduct. She will therefore make suggestions for improvement to this end. These suggestions will take due account of the welcome improvements already made by the Commission in its updated Code of Conduct of February 2018.

Membership of the Ethics Committee

67. The Ombudsman notes that two members of the Ethics Committee were 'Special Advisers' to the Commission at the time of their appointment to the Committee.

68. A Special Adviser may provide direct assistance to individual Commissioners on issues that fall within their competence. The members of the Ethics Committee are required to assess possible breaches of (former) Commissioners' obligations. It can thus be concluded that there is a risk of conflicts of interest resulting from Special Advisers' close working relationships with specific Commissioners, when they also serve as members of the Ethics Committee, and have a duty to assess the behaviour of the same Commissioners. The Ombudsman believes that holding the post of a Special Adviser, while at the same time being a member of the Ethics



Committee, may not be appropriate in some situations.

69. The mitigating measures described by the Commission - such as replacing the Special Adviser for specific cases where a possible conflict of interest may exist - cannot be considered to be practicable, given there are only three members of the Ethics Committee and there are no alternate members.

70. The Ombudsman therefore considers that it is neither advisable nor practicable for the Ethics Committee to have, as members, persons serving as Special Advisers to the Commission. She also considers that the Ethics Committee should be composed of a larger number of members (at least five). Increasing the number of members of the Ethics Committee would lead to a broadened composition. This would reinforce its independent character and ensure its smooth functioning.

Recommendations

On the basis of the joint inquiry into these complaints, the Ombudsman makes the following recommendations to the Commission:

1) The Commission should, in the light of recent apparent lobbying of a Commissioner by the former Commission President now working for Goldman Sachs, and in the light of the importance attaching to the Ethics Committee's acceptance of the former Commission President's commitment not to lobby, refer the case of the former Commission President back for an opinion by the Ethics Committee. The Commission should then assess, and take a formal decision on, whether the former Commission President's employment with Goldman Sachs complies with his duty under Article 245 TFEU.

2) The Commission should also consider whether it is appropriate to require its former President to abstain from lobbying the Commission and/or its services for a certain further number of years. Such a decision should detail the necessary safeguards aimed at giving effect to that requirement.

Suggestions for improvement

The Ombudsman welcomes the revised Code of Conduct, however she considers that the Commission can further strengthen its procedures in a number of ways. The Ombudsman therefore makes the following suggestions to the Commission:

1. The Commission should grant the Ethics Committee the authority to act on its own initiative whenever it considers this appropriate.

2. The Commission should proactively publish all opinions provided by the Ethics



Committee, as well as its own decisions related to those opinions.

3. The Commission should take the appropriate measures so that, in the future, persons serving as Special Advisers to the Commission are not eligible to be members of the Ethics Committee.

4. The Commission should increase the number of members of the Ethics Committee.

5. The Commission should extend the ‘notification period’ in the Code of Conduct to several years to make sure it is at least notified of all new roles of former Commissioners, to which it can then react if necessary.

The Commission and the complainants will be informed of these recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 6 June 2018.

Emily O'Reilly

European Ombudsman

Strasbourg, 06/03/2018

[1] The previous rules contained the term ‘Ad Hoc Ethical Committee’. In the current rules, the term ‘Independent Ethical Committee’ is used. In text of this decision, the term ‘Ethics Committee’ is used.

[2] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[3] The Code of Conduct for Commissioners of 20 April 2011, C(2011) 2904 final, is available at: https://ec.europa.eu/info/sites/info/files/code-of-conduct-for-commissioners_april2011_en.pdf [Link]

See in particular para 1.2., ‘Post term-of-office activities’.

[4] The committee was established by the Commission decision of 21 October 2003 establishing the Ad Hoc Ethical Committee provided for in the Code of Conduct for Commissioners, available at: https://ec.europa.eu/info/sites/info/files/decision-adhoc-committee_21october2003_en.pdf [Link]



[5]

<http://www.goldmansachs.com/media-relations/press-releases/current/jose-manuel-barroso-appointed.html>
[Link]

[6] <https://www.ombudsman.europa.eu/en/press/release.faces/en/69172/html.bookmark> [Link]

[7] The related correspondence between the Ombudsman and President Juncker in September 2016 is available at:

<https://www.ombudsman.europa.eu/en/activities/strategicinitiative.faces/en/48644/html.bookmark>
[Link]

[8] Opinion of the Ethics Committee delivered on 26 October 2016 concerning the new responsibilities of former Commission President, available at:

https://ec.europa.eu/info/sites/info/files/opinion-comite-adhoc-2016-10-26_en.pdf [Link]

[9] Alliance for Lobbying Transparency and Ethics Regulation (ALTER^{EU})

[10] All documents related to the inquiry are available at:

<https://www.ombudsman.europa.eu/en/cases/case.faces/en/49443/html.bookmark> [Link]

[11] The request for a reply sent to the Commission is available at:

<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/81348/html.bookmark>
[Link]

[12] <https://www.ombudsman.europa.eu/en/press/release.faces/en/83557/html.bookmark> [Link]

[13] Commission decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission which repeals and replaces the Code of Conduct of 20 April 2011 and the Commission decision establishing the Ad Hoc Ethical Committee of 21 October 2003. It is available at:

https://ec.europa.eu/info/sites/info/files/code-of-conduct-for-commissioners-2018_en_0.pdf
[Link]

[14]

<https://www.theguardian.com/business/2016/sep/15/jean-claude-juncker-jose-manuel-barroso-decision-to-join-goldman>
[Link]

[15] <https://www.ombudsman.europa.eu/en/press/release.faces/en/71040/html.bookmark> [Link]

[16] See the inspection report for the list of documents included in the file, available at:

<https://www.ombudsman.europa.eu/cases/correspondence.faces/en/80345/html.bookmark>
[Link]

[17] The (former) Commissioners' duty to fully co-operate with the Ethics Committee is now provided for in Article 12 (3) of the new Code of Conduct. Under the previous rules, it was



provided for in Article 3 of the Commission decision establishing the Ad Hoc Ethical Committee (see above).

[18] The Ombudsman takes note of a case in early 2017 concerning a former Commissioner, who was interviewed by the Ethics Committee at his own request.

[19] Emphasis added by the Ombudsman.

[20] Though it is proper to note that the Ethics Committee acknowledged that there may be a question as to whether the Code is “sufficiently strict” in this regard.

[21] See the press releases of 11 April 2016 issued by the New York State Office of the Attorney General and the United States Department of Justice, Office of Public Affairs, available at:

<https://ag.ny.gov/press-release/ag-schneiderman-led-state-federal-working-group-announces-5-billion-settlement-g>

[Link]

<https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-b>

[Link]

[22] Along with this petition, a second similar online petition, set up by Transparency International EU, ALTER-EU and the European campaigning organisation WeMove.EU, was handed in to the Commission in October 2016. It was reported to have raised around 60 000 signatures by that date.

[23] <https://www.alter-eu.org/sites/default/files/documents/Letter%20to%20Ms%20Silva.pdf>

[Link]

[24] The former President’s letter to Mr Juncker is available at:

https://www.lopinion.fr/sites/nb.com/files/2016/09/letter_to_juncker_13sept2016.pdf [Link]

[25] I note the interview published on 20 February 2017 in which Vice-President states that this was the case. See <https://euobserver.com/institutional/141044> [Link]

[26] According to the Commission’s Practical Guide to Staff Ethics and Conduct where meetings with interest group representatives are considered appropriate, the meetings should be held in a professionally correct manner. The Guide states that, if possible, the meetings should take place on Commission premises (which was not the case here). The Guide states that, if possible, the meetings should take place in the presence of another colleague (which was not the case here). The Guide provides that a written record of such meetings should be ensured where these contain *important information* or may involve action by the Commission, and that such reports should be registered and filed. The Commission’s Vice-President has confirmed that trade and defence policy were discussed. These topics can certainly be classed as important. The Commission’s Practical Guide to Staff Ethics and Conduct is available at:

<https://www.asktheeu.org/en/request/5092/response/16072/attach/3/Practical%20Guide%20to%20Staff%20Ethics%20>

[Link]



[27]

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.343.01.0022.01.ENG

[Link]