



Follow-up response from the Ombudsman to the former Commission President's reply concerning her Recommendations

Correspondence - 13/03/2018

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)

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Mr José Manuel Durão Barroso

Strasbourg, 13/03/2018

Subject of case: Recommendations of the European Ombudsman in joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA

Dear Mr Barroso,

Thank you for your letter of 12 March 2018 in which you have taken the opportunity to comment on the Recommendations I have made to the European Commission following my inquiry into the three complaints referred to above.

I have read your letter with great care. Some of the points you make regarding the inquiry, and regarding the document with my Recommendations, are not correct and I take this opportunity to explain why they are incorrect:

1) You contend that I appear “ to have taken no account ” of your letter of 1 February 2018 (which included a copy of legal advice provided to you). I can assure you that I considered your letter (with the legal advice) very carefully before making my Recommendations to the Commission. I make this point explicitly at Paragraph 15 of the Recommendations.

In that letter you say that it is not within my mandate “ to reach legal conclusions about my behaviour as an EU citizen ”. I agree. My Recommendations to the European Commission do not reach any legal conclusions regarding your behaviour as an EU citizen. What I have done is to take a view on the actions (or inactions) of the European Commission in response to issues arising from your employment with Goldman Sachs.



You will note that in my Recommendations I express no view, as Ombudsman, on whether your acceptance of employment with Goldman Sachs complied with your obligation, under Article 245 TFEU, to act with discretion. In this regard, and having considered your letter of 1 February 2018, I decided not to accept the proposal from my inquiry team as set out in my letter to you of 22 January 2018. Instead, my Recommendations are based solely on the actions (and inactions) of the Commission.

You say that your employment has been the subject of scrutiny by the Ethics Committee and by OLAF and you imply that further scrutiny by the Ombudsman is unwarranted. I will comment below on the relevance of the Ethics Committee. As regards whatever OLAF investigation may have taken place, I note that you have not provided any information on that. OLAF's mandate is quite different to my own; it investigates fraud, corruption and any other illegal activity affecting the financial interests of the EU. In any case, my inquiry is concerned with the actions (or inactions) of the Commission and not with your actions.

2) You make a number of references to the specific " legal framework " which applies in the case of former Commissioners taking up employment. As I understand it, the legal framework to which you refer is the Code of Conduct for Commissioners. Your point appears to be that any assessment by the Commission (and this is not for the Ombudsman to assess) of a post-mandate employment of a former Commissioner, must be conducted solely within the confines of this "framework". I do not accept that this position is correct. At Paragraph 34 of my Recommendations, I point out that the Code of Conduct is not legislation; rather, it is simply 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* ". My inquiry and Recommendations took account of this broader legal framework

3) You say that the Ethics Committee reached the conclusion that " there was, in my case, no violation of the legal obligations laid down in Article 245 of the TFEU ". I do not agree that this is a correct characterisation of the conclusion of the Ethics Committee. At Paragraph 49 of my Recommendations, I 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. "

4) You contend that I considered myself " free to contradict the conclusions reached by the independent AHEC ... ". This is incorrect. I have not contradicted the conclusions of the Ethics Committee; but I have analysed carefully what it actually said. I would comment also that it is not accurate to describe the Ethics Committee as "independent" in the sense of having statutory authority, having the freedom to arrange its own conduct of business, and in the sense that its members are appointed independently of the body the actions of whose members (and former members) it is set up to inquire into.

5) You refer to my characterisation of your meeting with Vice President Katainen and you appear to believe that I have concluded that you engaged in lobbying at this



meeting. This not correct. In my Recommendations, I reflect that there are two contradictory accounts of this meeting, one of which appears to describe a lobbying situation and the other describes a purely personal and private meeting. Insofar as I express any conclusion on this, this is set out at Paragraph 63 of my Recommendations where I state that "*the exact nature of the meeting is not clear*". I also point out, in Paragraph 64, that "*whatever the precise nature and content of the meeting [...] there are understandable concerns about the incident*". The fact that your meeting with Vice President Katainen has the appearance of having been a lobbying situation is based on the description of the meeting as set out in the public record (see, in particular Paragraphs 58 and 61 of my Recommendations).

6) You suggest that the approach set out in my Recommendations " would mean that it would be virtually impossible for me to meet on a private basis with any of my friends and former colleagues of ten years at the Commission for an undetermined period. " This is incorrect. I recognise explicitly, at Paragraph 63 of my Recommendations, that "*meetings of "a purely private or social character" are not covered by the relevant rules governing meetings with interest representatives . . ."*. However, it is relevant to note again that the public record creates the appearance that the meeting in question was not of a purely private or social character.

7) You raise the question of whether my Recommendations " involve any legal assessment of [your] actions ... " I believe that it is quite clear that my Recommendations do not involve any "legal assessment" of your actions. The actions (and inactions) dealt with in my Recommendations are those of the Commission in its handling of the situation arising from your having taken up employment. My clear assessment in that regard is (a) that the Commission failed to take any decision on whether or not your actions violated your obligations under Article 245 TFEU and (b) that were good reasons as to why the Commission should have considered carefully the Opinion of the Ethics Committee and then taken its own decision on the matter of your employment.

8) You ask me to specify the legal remedies that are open to you. This is primarily a matter for your legal advisors. The Recommendations I have made to the Commission do not constitute a binding act and do not, in any case, constitute an act adversely affecting you. However, it is settled case law that actions for damages can be brought against the Ombudsman. While such an action is pending, the applicant may ask for interim measures, for instance an injunction against the publication of the recommendations.

Finally, I am particularly concerned with your claim that my Recommendations constitute a "political attack" on you. I have conducted my inquiry in this case, like all cases, in complete independence and solely within the mandate conferred on my Office by Article 228 TFEU and the provisions of the Ombudsman Statute. [1]

I am satisfied that the procedural steps taken in the course of my inquiry were sufficient and properly respectful of your rights as a person whose interests might be affected, indirectly, by my inquiry.



I will be happy, if you so wish, to publish on my website all of the correspondence with you. Please let me know if this is your wish.

Yours sincerely,

Emily O'Reilly

European Ombudsman

cc President Jean - Claude Juncker, European Commission

[1] 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.