

Decision 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'

Decision

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) |

The EU Treaties require Commissioners to act with integrity and discretion even after their mandates as Commissioners end. The Commission's Code of Conduct for Commissioners seeks to ensure that Commissioners and former Commissioners comply with this duty. It states that, for a specified period of time after they have left office, former Commissioners should not lobby members of the Commission, or their staff, on matters for which they were previously responsible. Former Commissioners are also required, during that same period, to inform the Commission if they intend to accept a new job offer. The Commission then, after consulting a three-person Ethics Committee, decides whether the proposed job is compatible with the duty to act with integrity and discretion.

In 2017, the Ombudsman received three complaints about how the Commission reacted when informed that a former Commission President was employed by Goldman Sachs International. The Commission consulted the Ethics Committee, which concluded that there were not sufficient grounds to establish a violation of the former Commission President's 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 of behalf of Goldman Sachs and that he did not intend to do so.

The Commission did not follow-up on this opinion by taking a formal decision on the matter.

The Ombudsman inquired into the matter and found that the Commission should have taken a



formal reasoned decision, based on a careful assessment of the opinion of the Ethics Committee. Its failure to do so constituted maladministration.

The Ombudsman also noted that the former Commission President had met with a current Commission Vice President in 2017. This meeting was registered as a meeting with Goldman Sachs. The content of the meeting also led to the conclusion that the meeting covered, at least in part, trade and defence matters. The Ombudsman noted that the Ethics Committee had, when adopting its opinion on the employment of the former Commission President, put special emphasis on his commitment not to lobby the Commission. In this context, the Ombudsman recommended that the Commission should refer the case back to the Ethics Committee for a new opinion. The Ombudsman also recommended that the Commission should consider formally requiring its former President to abstain from lobbying the Commission for an additional number of years.

The Ombudsman also found that while the present Commission had made real progress in improving the Code of Conduct, this case raised a number of outstanding systemic issues. In order for the Commission to further strengthen its procedures, the Ombudsman made a number of suggestions for improvement.

The Commission's reply to the Ombudsman's recommendations and suggestions for improvement was not satisfactory. The Ombudsman therefore closes her inquiry by confirming her finding of maladministration, her recommendations and her suggestions for improvement.

Decision 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]

Background to the inquiry

[2]

1. The European Commission is required to ensure that Commissioners comply with their duty, under Article 245 of the Treaty on the Functioning of the European Union ('TFEU'), to act with integrity and discretion both during their mandates and after their mandates end. This duty is not time limited. In this context, the Commission must check if post-mandate employment of former Commissioners is compatible with their duty always to act with integrity and discretion.

2. With a view to ensuring compliance with Article 245 TFEU, the Commission adopted a Code of Conduct for Commissioners ('Code of Conduct'). This Code provides that, whenever former Commissioners intend to accept a new job during a certain period ('notification period') after they have ceased to hold office, they shall inform the Commission. The Code also prohibits a former Commissioner from lobbying the Commission, on behalf of an employer or client, on matters for which the former Commissioner had a responsibility while serving as a Commissioner. This prohibition on lobbying applies for the duration of the notification period. Under the Code of Conduct that was applicable until 31 January 2018, (when the Commission



adopted a new Code of Conduct), this 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 focuses in particular on the former Commission President who held his post from November 2004 until October 2014. In July 2016, after the expiry of the notification period then applicable, the former Commission President was appointed to a senior position with Goldman Sachs International, an international investment bank.

4. In September 2016, the Commission decided to consult the Ethics Committee on the matter. The Ethics Committee provided its opinion to the Commission on 26 October 2016. The Ethics Committee commented that, by taking up employment with Goldman Sachs, the former Commission President had not shown “ *the considerate judgment one may expect from someone having held the high office he occupied for so many years* ”. It concluded however 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 expressly noted that it took account of the statement made by the former Commission President, in a letter to Commission President Juncker, that he had “ *not been engaged to lobby on behalf of Goldman Sachs* ” and that he did “ *not intend to do so* ”. In particular, the Ethics Committee concluded that this statement “ *responds to the duty of integrity and discretion imposed by the Treaty* ”. [5]

5. Three complaints were then submitted to the Ombudsman by, respectively, a group of former and current EU staff members [6] , two law professors, and a civil society group. [7]

The inquiry

6. In February 2017, the Ombudsman opened her inquiry and in April 2017 the Ombudsman's inquiry team inspected the Commission's files relating to the matter. [8] The files inspected included the Ethics Committee's opinion on the former Commission President's new job, as well as the files relating to six other recent opinions given by the Committee.

7. In July 2017, the Ombudsman wrote to the Commission, asking it to reply to questions about how it deals with the post-mandate activities of former Commissioners and about the role of the Ethics Committee. [9]

8. In mid-September 2017, President Juncker announced that the Commission planned to revise the Code of Conduct. The revised Code of Conduct ('new Code of Conduct') entered into force on 1 February 2018. [10] Under the revised Code, the prohibition on lobbying the Commission, and the notification period, were extended to two years; and, in the case of a former Commission President, the period was extended to three years.



9. 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.

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

11. On 6 March 2018, the Ombudsman concluded her inquiry with a finding of maladministration and made two recommendations to the Commission. She also asked the Commission to reply to a set of suggestions for improvement. [11]

The Ombudsman's finding of maladministration and recommendations

12. The Ombudsman noted that the former Commission President took up his new post within weeks of the expiry of the 18-month notification and lobby-ban period then applicable. The Commission's Code of Conduct therefore did not oblige him to notify the Commission of this new job. In view of this, the Ombudsman particularly welcomed the Commission's decision to ask the former Commission President for further details and to request an opinion from the Ethics Committee. The Ombudsman said that, generally, in case of doubts regarding the compliance of a proposed new job with Article 245 TFEU, former Commissioners should notify the Commission, even after the notification period has expired. The Ombudsman suggested that, similarly, whenever the Commission becomes aware, from any source, of concerns in relation to a job taken up by a former Commissioner, it should seek further information from him/her and, in case of any doubt, seek the opinion of the Ethics Committee. Where the Commission decides not to consult the Ethics Committee in such cases, it should explain why it takes that decision.

13. Regarding the investigation carried out by the Ethics Committee on the specific case, the Ombudsman noted that the Committee relied solely on the former Commission President's written statement. This included his description of his new role and, specifically, his commitment that he would not lobby on behalf of Goldman Sachs. The Ombudsman had no evidence that the Ethics Committee deliberately refrained from seeking other specific information that might have been relevant to its assessment, but considered it unrealistic for the Ethics 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 might entail.

14. Regarding the Ethics Committee's assessment, the Ombudsman agreed with the Committee that respecting the notification period prescribed in the Code of Conduct “ *neither puts an end to the obligations of Art. 245 nor does it imply that they have been complied with* ”.



The Ombudsman found that the Ethics Committee correctly observed that the obligations of Article 245 TFEU are not time-limited; they do not cease to exist following the end of the notification period.

15. However, the Ombudsman noted that in examining whether the former Commission President had violated his duties under Article 245 TFEU, the Ethics Committee dismissed certain objections by referring to “ *the function of the cooling-off period as provided for by the Code of Conduct* ”. The Ombudsman considered the use of the term ‘ *cooling-off period* ’ to be unhelpful and potentially misleading and found more appropriate the use of the term ‘ *notification period* ’. The Ombudsman expressed her strong view that, although the risk of incompatibility diminishes over time, 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.

16. The Ombudsman also noted the Ethics Committee’s comment 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* ”. In the Ombudsman’s view, if this meant that the Ethics Committee believed it could not make judgments on these notions – in at least some cases – in the absence of a court clarification, then that would appear significantly to undermine its role as commonly understood. Furthermore, the Ombudsman noted the Ethics Committee’s statement that it was required to base its opinion on the Code of Conduct as it then stood, and that it was not for it to comment on whether or not the Code was “ *sufficiently strict* ”.

17. The Ombudsman stressed that the Code of Conduct is not legislation. It simply provides a framework, established by the Commission itself, within which the Commission can assess, case by case, whether the actions of a (former) Commissioner are compatible with the duties of that (former) Commissioner under Article 245 TFEU. The Ombudsman added that 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. In such cases, it would be necessary to look beyond the Code.

18. As a general principle, the Ombudsman considered that a (former) Commissioner’s duty to behave with integrity under Article 245 TFEU 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.

19. With regards to a (former) Commissioner’s duty to act with discretion under Article 245 TFEU, the Ombudsman considered that this encompasses a 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 offence.

20. In the specific context of this case, the Ombudsman considered that it was entirely predictable that a former Commission President taking up a post with Goldman Sachs was likely



to raise 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.

21. The Ombudsman found 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. In this regard, the Ombudsman highlighted that **the Ethics Committee had not expressed the positive conclusion that the former Commission President's new employment was in compliance with his duty under Article 245 TFEU**. What the Ethics Committee did say was nuanced, namely, that there were "*not sufficient grounds to establish a violation of the duty [...] imposed by Article 245 [2] TFEU [...]*" The Ombudsman also noted the comments of the Ethics Committee in relation to the Code of Conduct. The Ombudsman considered that these comments should have alerted the Commission to the possibility that the Ethics Committee actually regarded the Code of Conduct as providing an inadequate framework within which to deal with this particular case. The comments also prompted 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.

22. The Ombudsman expressed specific concerns about how the Commission dealt with the possibility of lobbying by the former Commission President. She stressed that the Commission did not set out, in any formal document, precisely how it should deal with approaches from the former Commission President. The Ombudsman found that particularly worrying since the commitment by the former Commission President, not to lobby on behalf of Goldman Sachs, was apparently central to the conclusion reached by the Ethics Committee.

23. The Ombudsman added that subsequent events had 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. In fact, the Ombudsman took note of the former Commission President's meeting with a current Commission Vice-President on 25 October 2017. Although the Commission Vice-President stated that the meeting was of a personal nature, it was nevertheless recorded as a meeting with a representative from Goldman Sachs on "*trade and defence policy*", which gave it the appearance of lobbying. The Ombudsman observed that, in the absence of any records of this meeting, it was impossible for the public to determine its exact nature.

24. On the basis of the analysis summarised above, the Ombudsman therefore **recommended** that:

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.

25. In addition, while taking due account of the welcome improvements already made in the new Code of Conduct, the Ombudsman made a number of suggestions to the Commission on how to improve its handling of former Commissioners' post-mandate activities. The suggestions touched upon different issues, such as the powers and composition of the Ethics Committee, transparency, the prevention of conflicts of interest, and the extension of the notification period.

26. In particular, the Ombudsman **suggested** that:

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's reply to the Ombudsman's recommendations and suggestions for improvement

27. On 7 May 2018, the Commission sent its reply to the Ombudsman's recommendations.

28. The Commission disagreed with the Ombudsman's **finding of maladministration** regarding the failure to adopt a formal decision on its former President's employment with Goldman Sachs. The Commission considered that there was no need for such a decision, given that the Ethics Committee's opinion stated that there were not sufficient grounds to establish a violation of the duties of integrity and discretion imposed by Article 245 TFEU. The Commission also noted that it subsequently took the political decision to extend the notification period for former Commission Presidents from eighteen months to three years.



29. Concerning the Ombudsman's **first recommendation**, on the referral of the former Commission President's case back to the Ethics Committee following his meeting with a Vice-President of the Commission, the Commission referred to the Vice-President's statements at the European Parliament on 28 February 2018. According to the Vice-President, the meeting took place on the basis of his personal friendship with the former Commission President and was of a private nature.

30. The Commission further argued that the publication of the meeting was in line with the policy set out in President Juncker's letter to the Ombudsman of 9 September 2016. [12] According to that letter, the former Commission President would be received in the Commission as an "interest representative" and Commissioners and Commission staff, when meeting him, would have to comply with the existing rules on transparency and contacts with interest representatives. In the Commission's view, this means that any meeting with the former Commission President, irrespective of the capacity in which he acted and irrespective of a possibly private or social character, should be published as a meeting with an interest representative. In this regard, the Commission pointed to the fact that the record referred to a meeting with "Goldman Sachs" because the Commission rules provide for the publication of names of organisations only, and not of individuals representing those organisations. It noted that the related publication tool is technically designed in this manner.

31. The Commission also considered that the meeting in question was not covered by the prohibition on lobbying provided for in Article 11(4) of the new Code of Conduct, given that, according to the Commission Vice-President, it had not concerned activities "*carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions*". [13]

32. Regarding the **second recommendation**, that the Commission should consider whether it is appropriate to require the former Commission President to abstain from lobbying the Commission and/or its services for a certain further number of years, the Commission referred to the former Commission President's letter of 13 September 2016, in which he stated that he had not been engaged to lobby on behalf of Goldman Sachs and that he did not intend to do so. The Commission also argued that it considered the extension of the prohibition on lobbying for former Commission Presidents in the new Code of Conduct from 18 months to three years to be sufficiently proportionate, and that in any event the former Commission President had left office in October 2014.

33. The Commission also expressed its intention not to follow the Ombudsman's five **suggestions** for improvements aimed at strengthening the Commission's procedures.

34. As regards the **first suggestion**, that the Commission should grant the Ethics Committee the authority to act on its own initiative whenever it considers this appropriate, the Commission stated its reservations. Given that the Commission bears ultimate responsibility under Article 245 TFEU and is accountable to other independent institutions, it wished to keep the nature of the Ethics Committee as an advisory body which provides independent advice when requested



to do so.

35. Concerning the **second suggestion**, that the Commission should proactively publish all opinions provided by the Ethics Committee (besides those regarding former Commissioners' post-mandate activities notified to the Commission) and its own related decisions, the Commission said that it prefers to refrain from publishing the Ethics Committee's opinions on individual questions or general matters, based on considerations of a legal, political or institutional nature.

36. In reply to the **third suggestion**, that the Commission should take the appropriate measures so that, in the future, Special Advisers to the Commission are not eligible to be members of the Ethics Committee, the Commission did not consider such measures to be necessary. The Commission argued that the new Code of Conduct provides that members of the Ethics Committee shall sign a declaration on the absence of conflicts of interests. Moreover, the Commission ensures the necessary transparency about the Ethics Committee and its members. The Commission added that if a case of conflict of interest should occur, the member in question would have to withdraw from the case.

37. Neither did the Commission accept the **fourth suggestion**, to increase the number of members of the Ethics Committee, stating that it did not see a correlation between the number of members and the quality of the advice.

38. Lastly, the Commission rejected the Ombudsman's **fifth suggestion**, to extend the 'notification period' in the Code of Conduct to several years so as to ensure that it is at least notified of all new roles of former Commissioners, to which it can then react if necessary. The Commission argued that this would be a further extension of the period which had already been extended. It noted that the duties contained in Article 245 TFEU, notably the duty to behave with integrity and discretion, applied without any limit in time. It also pointed to the fact that the new 'notification period' is in line with the maximum period for which the transitional allowance (under Council Regulation 2016/300) may be paid; and it goes beyond this period for former Commission Presidents. The Commission therefore considered its current approach as proportionate and as striking the correct balance between the public interest and the individual rights of persons who have engaged in public office at EU level for a certain period of their career.

The complainants' comments

39. In June 2018, following the Commission's reply, the Ombudsman received comments from two of the complainants. As a general comment, both complainants expressed their disappointment with the Commission's rejection of the Ombudsman's recommendations and suggestions.

40. One complainant contributed the following additional comments to the inquiry:



41. The complainant found it frustrating that, according to the published agendas and meeting minutes since March 2018, it appears that there has not been any discussion of the Ombudsman's recommendations at the College of Commissioners.

42. The complainant added that while the Commission states that the reform of the Code of Conduct “*incorporates several suggestions made notably by the European Parliament and the European Ombudsman*”, when it comes to the issue of post-mandate employment of former Commissioners, this is not the case. For example, while the European Parliament asked the Commission to extend the notification period to three years for all Commissioners, to upgrade the legal status of the Code of Conduct, and to enhance the independence of the Ethics Committee, none of these proposals was taken into account in the new Code of Conduct. [14] Moreover, the Commission's reform was implemented before the conclusion of the Ombudsman's inquiry, not allowing for the Ombudsman's conclusions to be taken into consideration.

43. The complainant argued that the Commission's lack of action following the Ethics Committee's opinion in the case of the former Commission President led to a “*patchwork application of ethics rules*”. For example, while President Juncker, in his letter to the Ombudsman, provided some guidance as regards the Commission's interaction with the former Commission President, it is unclear whether this guidance was communicated to all Commissioners and Commission staff. The complainant added that the guidance, that the former Commission President was to be treated as a lobbyist, seems to merely imply that meetings with him are to be logged but there is apparently no monitoring of how this is implemented in practice.

44. The complainant also argued that the Commission takes a limited interpretation of what constitutes ‘lobbying’ and that interpretations of intent are not a consideration in the list of activities covered by the EU Transparency Register.

45. The complainant further noted that the Commission's reply seems to consider the former Commission President's commitment, not to lobby on behalf of Goldman Sachs, as sufficient. The complainant observed that it is still not clear what activities are covered by the former Commission President's commitment not to lobby. The complainant added that such a commitment is valid only if there is actual follow-up to any reasonable claims that the commitment has been broken.

46. Finally, the complainant commented that providing the Ethics Committee with own initiative power would be a step in the right direction as it would help ensure that assessments on ethics are conducted when needed, it would accelerate the process, and it would guarantee a cohesive ethics framework.

The Ombudsman's assessment after the recommendations



Finding of maladministration

47. The Ombudsman is not convinced by the Commission's reasons for rejecting her finding of maladministration arising from the Commission's failure to take an individual decision in the case of the former Commission President.

48. As a starting point, the Ombudsman notes that the fact that the Ethics Committee may conclude, in any given case, that the actions of a (former) Commissioner are in accordance [15] with Article 245 TFEU does not mean that the Commission does not need to do a follow-up in the form of a formal decision. As stated in the Commission's reply, the Ethics Committee is an advisory body and the Commission bears the ultimate responsibility for deciding whether (former) Commissioners have or have not complied with their duties of integrity and discretion under the Treaty.

49. Also, the Commission's practice has been to issue a decision after it receives an opinion from the Ethics Committee. On the basis of the files inspected, the Commission issued decisions in cases where the Ethics Committee concluded that a former Commissioner's actions were in accordance with Article 245 TFEU.

50. The Ombudsman further highlights the specific circumstances of this case. The Ethics Committee commented that, by taking up employment with Goldman Sachs, the former Commission President had **not** shown "*the considerate judgment one may expect from someone having held the high office he occupied for so many years*". It concluded that there were "*not sufficient grounds*" to establish a violation of the duties imposed by Article 245 TFEU. This was clearly not an endorsement of the position of the former Commission President. The Ethics Committee did not state that the former Commission President's action was "*in accordance with*" Article 245 TFEU, as it did in other cases examined by the Ombudsman.

51. Finally, the Ethics Committee concluded that the former Commission President's commitment "*not to lobby on behalf of Goldman Sachs responds to the duty of integrity and discretion imposed by the Treaty*". This commitment was thus apparently central to the conclusion reached by the Ethics Committee. The Ombudsman reiterates her understanding 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. The Ombudsman considers that a decision setting out the appropriate safeguards would enable the Commission to implement the statement made by the Ethics Committee.

52. The above considerations should have been taken into account by the Commission and should have alerted it to the importance of issuing its own assessment in this case. In light of these considerations, the Ombudsman considers that, following the Ethics Committee's opinion, the Commission should have adopted a formal decision in the case of the former Commission President. The Ombudsman therefore maintains her finding of maladministration.



First recommendation

53. The Ombudsman does not accept the Commission's reasons for not referring the case of the former Commission President back to the Ethics Committee for an opinion.

54. The Commission essentially argues that such action is not warranted since, according to the Commission Vice-President who met with the former Commission President, the meeting was based on their personal friendship and was of private nature. The Commission states that the registration of the meeting as a meeting with Goldman Sachs was due to President Juncker's guidance that, for transparency reasons, meetings with the former Commission President would be automatically registered as meetings with an interest representative, irrespective of the actual nature of the meeting. The Commission further states that the meeting was registered as being with 'Goldman Sachs' because the relevant Commission decision allows for the publication of the names of organisations only and that the publication tool is technically designed in this manner.

55. However, the Ombudsman notes, the information available about the **content** of the meeting shows that the meeting was not of a purely personal nature. The meeting was registered in the online list of the Vice-President's meetings as relating to the subject of "*trade and defence policy*". Moreover, the Commission Vice-President has clarified that "*trade and defence matters*" were mostly discussed during this meeting. [16] Trade is declared by Goldman Sachs as a field of interest in the Transparency Register. [17] One of the complainants notes that the bank also invests in the area of defence and provides investment banking expertise to the "*aerospace and defence*" industry. [18] As such, the matters discussed during this meeting are of interest to the former Commission President's present employer, Goldman Sachs. There are thus questions as to whether the nature of the meeting can be validly classified as being of a personal nature only. Rather, it has the appearance of being, at least in part, "lobbying".

56. The Ombudsman notes that the rules relating to the Transparency Register state that activities covered by it include "*contacting Members and their assistants, officials or other staff of the EU institutions*" [19], as well as activities relating to "providing expertise on or research on EU activities and policies, involving regular contact with the EU institutions and feeding into the EU policymaking process", and "monitoring, intelligence gathering, policy analysis and advice" [20], if linked to a wider public affairs agenda.

57. In any event, the Ombudsman reminds the Commission that, aside from the question of whether or not the former Commission President engaged in lobbying during the meeting, at issue is the fact that the meeting nevertheless - and foreseeably - created a perception, in the eyes of the public, of lobbying. This perception damages trust in the Commission and, by extension, in the EU. It cannot be ignored by a Commission which considers itself to be politically aware and politically responsible.

58. In view of these considerations, the Ombudsman remains of the view that the issue should be re-examined by the Ethics Committee. The Ombudsman thus reiterates her finding and



confirms her first recommendation.

Second recommendation

59. The Commission considered it is unnecessary, in the case of the former Commission President, to require him to abstain from lobbying Commissioners and/or Commission staff for some additional years, as he had committed not to engage in lobbying on behalf of Goldman Sachs. The Commission noted that the prohibition on lobbying for former Commission Presidents had been extended to three years in the new Code of Conduct and noted that the former Commission President's mandate ended in October 2014. The Ombudsman understands the Commission's comment as implying that the former Commission President is no longer bound by this prohibition.

60. The Ombudsman does not consider that the former Commission President's statement (that he does not intend to lobby on behalf of Goldman Sachs) constitutes, especially in the light of developments, a sufficient safeguard against this eventuality. The fact that there are legitimate questions as to whether the former Commission President acted in accordance with that commitment supports this view. In this context, it is appropriate to incorporate this commitment into a formal decision which would establish the appropriate safeguards.

61. The Ombudsman has welcomed the extension of the prohibition on lobbying the Commission (to two years for former Commissioners and to three years for former Commission Presidents).

62. The Ombudsman however makes the general point that, especially in the case of former Commission Presidents, it may well be appropriate to extend the prohibition on lobbying by a further number of years. The Ombudsman notes that the former head of an institution should always be treated with appropriate respect by the institution he or she served. As a result, such persons will always be in a privileged position as regards contacts with the institution and its staff, no matter how much time has elapsed since the end of his/her mandate. The appropriate safeguards should be in place to ensure that this privileged status is not abused. This suggests that both the notification period, and the lobby-ban period, should be extended beyond the present three years in the case of a former Commission President.

63. In the case of the former Commission President, the Ethics Committee took into account the former Commission President's statement that he did not lobby on behalf of Goldman Sachs and that he did not intend to do so. This means that the Ethics Committee took into account a commitment that was not limited in time.

64. The Ombudsman therefore remains of the view that the Commission should consider whether it is appropriate to set the lobby-ban period at just three years in the case of the former Commission President. The Ombudsman thus reiterates her finding and confirms her second recommendation.



Suggestions for improvement

65. The Ombudsman notes with disappointment that the Commission has decided not to follow any of her suggestions for improvement.

66. The Commission rejects the suggestion that the Ethics Committee should be able to adopt opinions on its own initiative, on the grounds that the Commission bears the ultimate responsibility under Article 245 TFEU and that it is accountable to other institutions.

67. The Ombudsman considers that these arguments have no bearing on the suggestion, as granting own initiative powers to the Ethics Committee would change nothing in terms of its advisory nature. It would merely enable it to identify and examine potential issues as regards (former) Commissioners' compliance with their duties under Article 245 TFEU, without needing a prior request from the Commission. It would also help accelerate the relevant procedures in certain cases. Following the Ethics Committee's opinion, the Commission would still be in a position to make its own assessment on what follow-up - if any - is needed.

68. With regards to the proactive publication of **all** Ethics Committee's opinions and the relevant Commission decisions, the Commission considered that automatic publication would be undesirable in the case of opinions on individual or general matters, for reasons of a legal, political or institutional nature.

69. The Ombudsman welcomed the Commission's decision to adopt a proactive transparency policy under the new Code of Conduct. However, she noted that this policy covered only the Ethics Committee's opinions and the Commission's decisions **on post-mandate activities of former Commissioners notified within the prescribed notification period**. As the Ethics Committee may adopt opinions on further issues under its consultative competence, the Ombudsman was of the view that there is no valid reason why the proactive transparency regime should not extend to **all** opinions from the Ethics Committee and the relevant decisions by the Commission.

70. The Ombudsman considers that the arguments for refusing proactive publication of all opinions, put forward by the Commission, are vague. It is unclear why the Commission cannot adopt a policy to proactively publish all the Ethics Committee's opinions and its own decisions 'by default', with appropriate redactions of personal data, if justified.

71. The Commission also considers that there is no need to prevent Special Advisers from being members of the Ethics Committee or to increase the number of its members. It contends that the requirement for the Ethics Committee's members to sign a declaration on the absence of conflicts of interest under the new Code of Conduct, and the transparency measures taken by the Commission, are sufficient to ensure the absence of risks. The Commission further argues that increasing the number of members would not improve the quality of the advice provided.

72. The Ombudsman is not convinced by these arguments. The Ombudsman considers that



Special Advisers - as providers of direct assistance to individual Commissioners - pose a particular risk in terms of conflict of interest with regards to the very specific work of the Ethics Committee. The main remit of the Ethics Committee is to examine if Commissioners and former Commissioners are complying with their Treaty obligations. If Special Advisers are eligible to be members of the Ethics Committee, it could be the case that they are asked to examine the actions of a Commissioner for whom they worked or with whom they may still work. In such a case, the mitigation measure suggested by the Commission, that the member concerned would withdraw from the case, appears impracticable, given that the Ethics Committee has just three members and no alternate members.

73. The Ombudsman notes there are further reasons why a member of the Ethics Committee could be in a situation of a conflict of interest in a specific case. The member concerned would then also have to withdraw from the case. Increasing the number of members of the Ethics Committee, or at the very least providing for alternates to replace conflicted members, would help to address such issues and would facilitate the adoption of opinions by the Ethics Committee in case of dissenting views. The Ombudsman further considers that a broadened composition, including members with different backgrounds and experience, would contribute to improving the quality of advice. The Ombudsman believes that the Ethics Committee should be of a sufficient size that it can carry out its important activities effectively and in a timely manner, without being so large that the decision-making process becomes too difficult or time-consuming.

74. Concerning the extension of the notification period in the Code of Conduct to several years, the Commission again points to the fact that this period was already extended in the new Code of Conduct, and that, in any event, former Commissioners remain indefinitely bound by their duties to act with integrity and discretion under Article 245 TFEU. The Commission essentially argues that a further extension of this period would be disproportionate.

75. While welcoming the improvements made in this regard in the revised Code of Conduct, the Ombudsman disagrees that an extension of the notification period for several years would be unduly burdensome.

76. In her recommendations, the Ombudsman also found the Ethics Committee's use of the term '*cooling-off period*' to be unhelpful and potentially misleading. The Ombudsman adds that this period should also not be perceived as such. It is not a period during which former Commissioners are not allowed to take over a new job. It is rather a period during which former Commissioners are obliged to notify the Commission of a proposed new job. This is why the Ombudsman suggested as more appropriate the use of the term '*notification period*'.

Conclusion:

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman confirms her finding of maladministration, her recommendations, and



her suggestions for improvement to the Commission, as detailed in her Recommendations dated 6 March 2018.

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

The European Parliament will also be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 20/07/2018

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

[2] For greater detail about the 'Background' and the 'Inquiry', please see the relevant sections in the Ombudsman's recommendations, available at:

<https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/90956/html.bookmark>
[Link]

All inquiry-related documents are available at:

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

[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] 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]

[6] The group launched an online petition, asking for Commission action to be taken against the decision of the former Commission President to join Goldman Sachs. The petition was signed by more than 150 000 persons.

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

[8] The inspection report is available at:

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

[9] 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]

[10] 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]

[11] The Ombudsman's recommendations to the Commission are available at:

<https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/90956/html.bookmark> [Link]

[12] 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]

[13] Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, 19.9.2014, OJ L 277/11, para 7.

[14] The complainant refers to the minutes of the ordinary meeting of 11 January 2018 of the Conference of Presidents. As regards the proposal for the extension of the notification period to three years for all Commissioners, the complainant further refers to the European Parliament resolution of 1 December 2016 on Commissioners' declarations of interests – guidelines



(2016/2080(INI)) and to the European Parliament report of 30 March 2017 on transparency, accountability and integrity in the EU institutions (2015/2041(INI)).

[15] The Ethics Committee did not make this positive assessment in the case of the former Commission President.

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

[17]
<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=701266814986-18>
[Link]

[18] <http://www.ethicalconsumer.org/companystories.aspx?CompanyId=17473&CategoryId=192>
[Link]

<http://www.goldmansachs.com/what-we-do/investment-banking/industry-sectors/industrial.html>
[Link]

[19] See footnote above, Agreement between the European Parliament and the European Commission on the transparency register, para 7.

[20] Transparency Register Implementing Guidelines of 5 October 2015.