

Cinneadh i gcás OI/3/2021/KR maidir leis an gcaoi ar dhéileáil an Ghníomhaireacht Eorpach um Chosaint le hiarratais óna hiar-Phríomhfheidhmeannach maidir le glacadh le poist shinsearacha le Airbus

Cinneadh

Cás OI/3/2021/KR - Tosaithe an 22/02/2021 - Moladh faoi 01/02/2022 - Cinneadh an 28/01/2022 - Institiúid ábhartha An Ghníomhaireacht Eorpach um Chosaint (Dréachtmholadh glactha ag an institiúid) |

Bhain an cás le cinneadh na Gníomhaireachta Eorpaí um Chosaint (GEC) dhá phost a bhí beartaithe dá hiar-Phríomhfheidhmeannach a cheadú, is é sin le rá mar cheannaire gnóthaí poiblí Airbus na Spáinne agus mar chomhairleoir straitéiseach do Airbus Defense and Space.

D'aimsigh an tOmbudsman dhá chás drochriaracháin agus rinne sí trí mholadh chun a sheachaint go dtiocfadh saincheistanna den chineál céanna chun cinn amach anseo.

Ar an gcéad dul síos, mhol an tOmbudsman gur cheart do GEC amach anseo cosc ar chur ar a foireann shinsearach dul i mbun post i ndiaidh a dtéarma oifige a bheith críochnaithe i gcás ina dtiocfaidh coinbheacht leasa shoiléir chun cinn le leasanna dlisteanacha GEC.

Ar an dara dul síos, mhol an tOmbudsman gur cheart do GEC na critéir i dtaobh aistrithe den sórt sin a chosc a leagan amach ionas go mbeidh tuiscint shoiléir ag an bhfoireann shinsearach ina leith sin. Ba cheart iarratasóirí ar phoist shinsearacha le GEC a chur ar an eolas faoi na critéir sin.

Ina theannta sin, mhol an tOmbudsman gur cheart don GEC a chinntiú go ndréchtaítear an fhoirm shonrach dóibh siúd a dhéanann iarratas ar údarú do phoist bheartaithe ar bhealach go gcuirfeadh (iar)-chomhaltaí foirne an fhaisnéis ábhartha ar fáil chun go bhféadfaidh an GEC measúnú bríoch a dhéanamh ón tús.

D'aontaigh an GEC go bunúsach na moltaí a chur i bhfeidhm sa mhéid go bhféadfaí cosc a chur ar bhaill foirne poist áirithe a ghlacadh agus treoirilínte a chur ar fáil don fhoireann maidir le conas a chuirfeadh sé beart den sórt sin i bhfeidhm. Chuir sé in iúl go raibh tús curtha aige le bearta a ghlacadh chun na moltaí a chur i bhfeidhm. Ag an am céanna, d'ardaigh an GEC roinnt ceistanna faoi chinntí an Ombudsman, ar thug an tOmbudsman aghaidh orthu sa chinneadh seo.



Iarrann an tOmbudsman ar an GEC í a chur ar an eolas faoi aon ghníomhartha a dhéanfaidh sé amach anseo maidir lena moltaí, go háirithe maidir le critéir an EDA chun cosc a chur ar phoist bheartaithe as a n-eascaíonn coinbhleachtaí leasa soiléire.

Background to the complaint

1. In February 2021, the Ombudsman opened an inquiry on her own initiative into the decision of the European Defence Authority (EDA) to allow its former chief executive to take up two senior jobs with Airbus, an aerospace company.
2. The Ombudsman conducted an inquiry [1] , which included the inspection of relevant EDA documents.
3. In the course of her inquiry, the Ombudsman found that the EDA had not assessed the risks associated with the former chief executive's requests with the requisite thoroughness that could be reasonably expected from it.
4. Concretely, the Ombudsman found two instances of maladministration. First, the EDA did not impose sufficiently effective restrictions to mitigate against the risks of real and perceived conflicts of interest identified by the EDA. [2] Second, the job of strategic advisor for Airbus Defence and Space should have been prohibited, because of its nature and the risk it posed in terms of conflicting with the EDA's legitimate interest.

The Ombudsman's recommendations and suggestion for improvement

5. In July 2021, the Ombudsman made two recommendations to avoid similar issues to those found in this inquiry from arising in future [3] , saying the EDA should:
 - (i) Where necessary in future, forbid its senior staff from taking up certain positions after their term of office. Any such prohibition should be time-limited, for example, for two years, and
 - (ii) To give clarity to its senior staff, set out criteria on when it will forbid such moves. Applicants for senior EDA posts should be informed of the criteria when they apply.
6. Furthermore, the Ombudsman also made one suggestion for improvement, namely that:
"[t]he EDA should ensure that the specific form for those applying for authorisation for intended jobs is drafted in such a way that (former) staff members provide the relevant information to enable the EDA to perform a meaningful assessment from the outset."



7. In October 2021, the EDA sent its reply to the Ombudsman. The EDA accepted the Ombudsman's recommendations and adopted measures to implement them. [4]

8. In relation to the Ombudsman's first recommendation, the EDA said that, when assessing requests from staff for taking up post-employment activities after they leave the service, it always considers all options at its disposal under the EDA Staff Regulations. It had also done so in the case at hand, it said.

9. Following up on the Ombudsman second recommendation, the EDA conducted a substantive review of its internal rules, guidance material, and templates. In this context, the EDA said it is reflecting on:

- Guidelines on post-employment restrictions, which will be implemented as soon as they are approved by the EDA's management.
- An updated vacancy notice that includes language on possible post-employment restrictions and/or prohibitions. For example, it highlights the requirements of staff to seek the prior approval of the Agency in due time and before starting the new position and that this approval may be refused or granted subject to conditions. Furthermore, it sets out the prohibition period for lobbying for senior staff posts after leaving the service of the Agency.
- Possible new internal procedures restricting access to confidential information for staff members that are still in service when they notify the EDA of an intended new job. However, the EDA said this depends on practical feasibility. The EDA said it was reflecting on this with the chief information security officer and IT staff.
- The possibility of appointing an EDA Ethics Officer. However, this requires additional resources, which the EDA said it currently lacks.

10. The EDA agreed to the Ombudsman's suggestion for improvement, and revised the form provided to (former) staff members to apply for authorisation for an intended job.

11. The EDA did not agree with the Ombudsman's observation that it had not assessed the risks associated with the former chief executive's requests with the requisite thoroughness that could be reasonably expected from a public authority. The EDA thus stated that it did not fully agree with the Ombudsman's findings of maladministration.

12. While the EDA acknowledged the points the Ombudsman had made and the conclusions she had reached in her inquiry, it said that it would welcome a more substantiated and specific reasoning with regard to the definition of the threshold for imposing a temporary ban on taking up a prospective job.

13. The EDA also said that it would welcome practical advice on (i) what an effective monitoring and enforcement system would entail in concrete terms, taking account of the EDA's resources and, for example, the fact that the EDA cannot impose the sanction of reducing pension rights, and (ii) how a lobbying ban could also include staff of other EU institutions, as suggested by the Ombudsman in her recommendation (see footnote 2), which are separate legal entities.



The Ombudsman's assessment after the recommendation

14. The Ombudsman welcomes the EDA's follow-up to her recommendations. As not all of the announced actions were completed at the time of the EDA's reply, the Ombudsman invites the EDA to inform her of any future actions it takes in relation to her recommendations, and in particular as regards the EDA's guidelines on post-employment restrictions.

15. The Ombudsman notes that, despite its constructive follow-up to her recommendations, the EDA questions her findings of maladministration and some of the arguments underpinning her recommendation.

16. The first finding of maladministration was based on a detailed assessment of the restrictions that the EDA imposed. Based on that assessment, the Ombudsman considered that some restrictions were not sufficient to mitigate the risk of the former chief executive engaging in direct or indirect lobbying and advocacy vis-à-vis EDA staff and staff of other EU institutions on matters that he had dealt with during his last three years of service. The Ombudsman also questioned the EDA's ability to monitor and enforce some of the restrictions it applied.

17. The second finding of maladministration, namely that the insufficiently mitigated risks were particularly problematic for the role as strategic advisor to Airbus Defence and Space, was based on the description of that job, which involved “ *[contributing] experience to the analysis and definition of guidelines of action for the strategy [...] worldwide as well as NATO, EU or individual countries in Europe or beyond* ”.

18. The Ombudsman maintains her view that the EDA committed maladministration by not imposing sufficiently effective restrictions to mitigate against the risks of real and perceived conflicts of interest and by not prohibiting the job of strategic advisor for Airbus Defence and Space.

As regards the threshold for forbidding an intended job

19. The EDA expressed the view that the Ombudsman's recommendation lacked “ *a more substantiated and specific reasoning with regards to the definition of the threshold* ” for (temporarily) forbidding this job. While the Ombudsman maintains that her recommendation was sufficiently reasoned, she will take this opportunity to share the following reflections.

20. Article 18 of the EDA Staff Regulation foresees that, when a job relates to the matters worked on by the (former) official requesting authorisation and there is a risk of a conflict of interest, the EDA has wide discretion to decide to forbid that job or give its approval subject to any restrictions that it thinks fit.

21. The EU Courts have provided useful elements as regards the conflicts of interest assessment that an appointing authority should carry out based on Article 16 of the EU Staff Regulations [5] (Article 18 of the EDA Staff Regulations is similar). The EU courts have ruled



that the power of the appointing authority to prevent a (former) official from exercising a post-employment activity within two years of leaving, whether gainful or not, from performing that activity is subject to two separate conditions: (i) that the proposed activity is related *in any way* to the activity of the official during his last three years of service, and (ii) that the proposed activity could lead to a conflict with the legitimate interests of the institution [6] . The EU Courts have clarified that it is sufficient that the activity envisaged is liable *to be perceived* as giving rise to a (risk of) conflict of interest. [7] The EU Courts recognise that the institutions have wide discretion in this regard.

22. In the Ombudsman's view, maintaining public trust in the EDA is an important interest of the EDA, and, by extension, of the EU. The EDA should make sure that this legitimate interest, among others, should be protected when it considers intended jobs of former staff members.

23. When former staff members notify the EDA of their intention to start a new job, the EDA should do a risk assessment of that new job in the context of the former staff member's tasks and responsibility while in the service of the EDA. This assessment should take account of risks:

- (i) of a conflict with the legitimate interests of the EU;
- (ii) that information that is not public may be disclosed or misused; and
- (iii) that former staff members may try to influence ex-colleagues.

In case of former senior staff members such risks may be particularly high, as was the case in this inquiry that concerned the EDA's highest ranking staff member.

24. The Ombudsman recognises that each request for authorisation of a post-employment activity should be assessed on its own merits, taking into account, among other matters, the individual's fundamental right to engage in work. Any restrictions on the rights of former EU staff to work in the private sector must be necessary for the purposes of achieving a legitimate public interest, and must be proportionate. [8]

25. The Ombudsman takes the view that when an intended job of a former senior staff member is related to the matters worked on during that person's last three years of service and could lead to a conflict with the legitimate interests of the EDA, and when the authorisation of such an activity cannot be made subject to conditions that **adequately** mitigate the risks and that can be **credibly** monitored and enforced, then the EDA should use its discretionary power to forbid (temporarily) the intended job in the public interest.

Most appropriate measure to monitor and enforce the decision

26. When the conditions imposed concern activities of which the EDA can be aware, either because they happen in public or *vis-à-vis* the EDA, the Ombudsman agrees with the EDA that it is important to inform relevant staff members of the conditions that it applies to former staff



members.

27. Aside from this, the Ombudsman is of the view that external scrutiny by other institutions, the public, and third parties, such as news media and civil society organisations, could help the EDA in its efforts. To enable this external scrutiny, the Ombudsman suggests that the EDA makes available the information concerning occupational activities of senior officials after leaving the service in a timely manner.

Lobbying risk

28. With regard to the risk of lobbying by the former chief executive in relation to other EU institutions, the Ombudsman is of the opinion that the EDA could simply have sent its decision to the Commission and Council. For example, it could have informed them about the restrictions it had deemed necessary in light of the risks it had identified, and invited them to adopt whatever measures they deemed appropriate. Doing so would have shown that the EDA was aware that this issue was not a purely internal matter with implications only for the EDA.

Conclusion

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

The EDA has accepted the Ombudsman's recommendations .

The Ombudsman invites the EDA to share with her its guidelines on post-employment restrictions once they are approved by the EDA's management.

The European Defence Agency will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 28/01/2022

[1] See the Ombudsman's opening letter with detailed questions:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/138504> [Nasc].

[2] The EDA's restrictions included that the former chief executive could not have contacts with EDA staff for the purpose of lobbying or advocacy on matters for which he had been responsible as chief executive, for the first twelve months after leaving office. The Ombudsman had taken issue with the duration of this restriction, which was notably shorter than other



restrictions that were aimed at preventing the former chief executive from being involved in lobbying. The Ombudsman also questioned the scope of this restriction, which included staff at the EDA only. This is because the former chief executive had dealt with matters during his last three years of service that concerned other EU institutions. In the Ombudsman's view, the EDA should therefore have taken this into account by stipulating that this restriction applied also to staff of other institutions working on matters that the former chief executive had dealt with.

[3] See the Ombudsman's recommendation:

<https://www.ombudsman.europa.eu/en/recommendation/en/144268> [Nasc].

[4] See the EDA's reasoned opinion:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/148334>

[5] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, see:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501> [Nasc].

[6] See Judgement of the EU Civil Service Tribunal of 15 October 2014 in case F 86/13, Van de Water v Parliament, paragraphs 46, 48 and 51. Available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=158611&pageIndex=0&doclang=EN&mode=lst&d>
[Nasc].

[7] See paragraph 51:

<https://curia.europa.eu/juris/document/document.jsf?sessionId=6C1D5AEBC52907DAE330A0EFB649D561?text=&>
[Nasc].

[8] See Article 15 Charter of Fundamental Rights of the European Union.