

Comments of the European Commission on a closing decision from the European Ombudsman

- Strategic inquiry OI/1/2021/KR on how the European Commission manages ‘revolving door’ moves of its staff members

I. BACKGROUND / SUMMARY OF THE FACTS / HISTORY

In February 2021, the European Ombudsman opened an inquiry on how the European Commission manages ‘revolving doors’ of its current and former staff members, following up on her two previous inquiries on the same topic opened in 2012¹ and in 2017². No single case of maladministration was found in any of those 3 inquiries.

As part of the present inquiry, the European Commission met twice with the European Ombudsman team³. It transmitted to them a sample of 100 decisions taken by the Institution in 2019, 2020 and 2021. Those decisions were as follows:

- 80 decisions concerning former Commission staff members’ requests for authorization to engage in post-service occupational activities,
- 20 decisions relating to Commission staff members’ request to carry out outside activities while on unpaid leave on personal grounds.

The Commission also provided statistics and its internal guidance on the application of the Staff Regulations and extensively informed the European Ombudsman inquiry team of how it had implemented the suggestions stemming from the previous inquiry⁴.

II. EUROPEAN OMBUDSMAN’S INQUIRY

In the present case, the European Commission notes with satisfaction that the European Ombudsman has not found any instance of maladministration in the 100 Commission decisions her team examined. It also notes that the European Ombudsman welcomed the improvements made by the European Commission since her last inquiry on the issue.

Although the Ombudsman had not identified any case of maladministration among the 100 files examined, the Ombudsman concluded that the Commission should apply a more robust approach when managing ‘revolving doors’ moves of its most senior current and former staff members. This notably applies to senior staff leaving to work in the private sector and on matters on which they were responsible when in active service.

In the absence of any finding of maladministration, the Ombudsman made nevertheless three suggestions for improvement. First, she suggested that the Commission should forbid (at least

¹ Joint complaints 2077/2012/TN and 1853/2013/TN.

² Own initiative OI/3/2017/AB-NF.

³ The meeting report: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/152861>

⁴ The reply from the European Commission on implementation of the European Ombudsman’s suggestions resulting from the own-initiative inquiry on the revolving doors phenomenon OI/3/2017/NF is available at <https://www.ombudsman.europa.eu/en/doc/correspondence/en/152862>.

temporarily) current or former staff members from engaging in problematic activities whose risks cannot be adequately mitigated by restrictions or when restrictions cannot be effectively monitored. Secondly, she recommended the Commission to further explore the range of mitigating measures available to it when approving an activity. The Ombudsman notably recommended to ask former or current staff members to submit evidence that the restrictions imposed have been shared with their new employer. Finally, the Ombudsman suggested that all decisions on post-service occupational activities of former senior staff members should be made public.

The Ombudsman invited the Commission to inform her, within six months, of any action taken in relation to her suggestions.

III. THE REPLY OF THE EUROPEAN COMMISSION

The European Commission has taken note of the European Ombudsman's closing decision of 16 May 2022 on her inquiry on "how the European Commission manages 'revolving door' moves of its staff members".

The Commission takes note that no single instance of maladministration was found in any of the 100 cases examined by the Ombudsman's inquiry team. The Ombudsman closed her inquiry without recommendations. This in itself confirms that the Commission's approach has been robust, in line with the rules and does not require systemic improvements.

Moreover, the Commission has also taken note that the Ombudsman acknowledged genuine improvements since she had last examined the issue in 2019.

These improvements build on the previous suggestions of the Ombudsman and on best practices from other EU and national administrations. More importantly, the improvements result from the Commission's constant risk assessment, which led, where justified, to a stricter interpretation of rules and stricter restrictions with regard to staff members' envisaged activities either after the service or during a leave on personal grounds. The Commission notes that the Ombudsman welcomes this more restrictive approach.

With respect to the European Ombudsman's conclusion of the inquiry, the Commission wishes to stress that it does implement the applicable rules in an effective, robust, and proportionate manner for all categories of staff, including senior managers. Every single declaration is assessed thoroughly and based on its particular circumstances. Where necessary, and in line with the principle of proportionality, the Commission imposes strict mitigating measures to envisaged activities of senior managers and, in certain cases, forbids them, to ensure that there is no real, potential or even apparent conflict of interest. Where staff members face the risk of a prohibition, they usually do not submit any declaration formally after receiving guidance from the ethics service or they may withdraw their request before a decision is formally taken. The Commission's practice is in line with the requirements of safeguarding the general interest and preserving the rights of staff members as set out in the Staff Regulations⁵ – the rules under which the EU institutions manage their human resources.

⁵ Regulation No 31 (EEC), 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 (the Staff Regulations).

The Commission is fully committed to driving the highest ethical standards and maintaining public trust in the integrity and transparency of its decision-making and the integrity of its staff. In this context, it is willing to consider the feasibility of the Ombudsman's suggestions within the applicable legal framework.

Against this background, the Commission would like to make the following comments on the suggestions made by the Ombudsman as part of her closing decision:

- 1. Where the Commission considers that a request to take up an activity poses risks that cannot be adequately mitigated by restrictions or when restrictions cannot be effectively monitored or enforced, it should (temporarily) forbid (former) staff members from taking up such positions or activities after their departure or when on leave on personal grounds.*

Commission reply

- As regards occupational activities after leaving the service, the Commission uses the full range of restrictions and conditions available to it to safeguard its legitimate interests, in line with primary law, the provisions of Staff Regulations and of the Commission decision on outside activities and assignments and on occupational activities after leaving the Service⁶. The Commission is of the view that, as a result, its current practice is both proportionate and robust.
- The Commission wishes to underline that it has to define an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions and the need to respect the former staff member's fundamental right to engage in work and to pursue a freely chosen or accepted occupation. The Commission has to take into consideration the potential legal risks deriving from prohibiting an activity, as this could result in hindering fundamental rights of former staff members. This is why the Commission has to make sure that any prohibition and/or restriction remain both well-reasoned and in line with the principle of proportionality. Any decision of the Commission on post-service activities has to withstand judicial scrutiny; the assessment is thus made on a case-by-case basis.
- As acknowledged by the Ombudsman, the Commission has already become more restrictive in its approach to requests for post-service occupational activities. For instance, when necessary, it forbids envisaged activities fully. In other cases, notably concerning former senior managers, it imposes severer restrictions in terms of duration (i.e. for the full length of 2 years allowed by the rules), or new types of restrictions (e.g. refusal to take as clients stakeholders of the former DG, which reflects the approach followed for former Commissioners).
- Requests for post-service activities are refused only if any potential risk cannot be appropriately mitigated by temporary restrictions. The Commission considers that it would not be necessary to prohibit an activity if the restrictions imposed are reliable and effective, i.e. these would allow the former staff member to respect them when performing the activity, thus avoiding any risk for the institution.
- In line with the provisions of the Staff Regulations, requests for activities that would consist in lobbying the EU institutions on matters for which former senior managers were responsible in the last 3 years of service are systematically refused. In addition, when the envisaged activity would result in working on a specific file, or project (for instance a grant or a tender), on which the former staff member worked while in the service, it is also systematically refused. No restriction in such cases could prevent a situation of conflict of interests and a reputational damage for the institution. It is again to be noted that, where staff members face the risk of a prohibition, they usually do not submit any declaration formally after receiving guidance from the ethics service or they may withdraw their request before a decision is formally taken. .

⁶ C(2018) 4048 final.

- The Commission, as reported during the inquiry, had used the option of forbidding certain activities, where necessary. In the timeframe subject of the inquiry (2019-2021), the Commission refused 10 requests to perform post-service activities, including for senior management.
- Although the Commission considers the mere ratio of approved and refused activities of former staff members as interesting from a statistical point of view, it would like to stress that such a ratio is of little relevance for the assessment of the manner in which it manages former staff members' moves. To rely only on such statistics is misleading.
- The vast majority of requests for post-service activities lodged by former staff do not raise issues of conflict of interests at all. Typical examples of post-service activities relate to academia, public international and national administrations, speaking engagements, NGOs, foundations and think tanks, etc. Where any of these activities represent risks for the institution, the Appointing Authority systematically puts in place appropriate restrictions.
- In addition, most of the decisions on post-service occupational activities are taken at the request of former temporary and contract agents who, after providing a valuable time-limited contribution to the administration and to the general interest of the Union, face the need to find a new employment. Undertaking a post-service activity in the same generic domain that the work carried out at the Commission, does not automatically result in a situation of conflict of interests. Assuming the contrary would not withstand judicial scrutiny.
- The administration engages in a dialogue with its staff members and it happens that following initial discussions on whether to lodge a request or not and after a preliminary assessment of risks, potentially problematic requests are not put forward. Furthermore, the Commission makes use, or informs its former staff members of its intention to make use of the possibility provided for in Article 16 of the Staff Regulations to forbid a job move, whenever it deems it necessary to protect its interests and reputation.
- In terms of monitoring the respect of obligations, trust is the underlining principle in the relations between the Commission and its current and former staff. The Commission would find it regrettable and unjustified to assume that staff members who have loyally fulfilled their duties towards the Union for years would be ready to deliberately breach their ongoing obligations after the end of their service for the Commission and to take this assumption as basis of the policy in this area.
- Nonetheless, the Commission services observe publicly available information, notably in media, and immediately ask former staff members for more information or clarifications, where necessary. External scrutiny and oversight are intrinsic part of the ethics and integrity system. In case of complaints or notifications from third parties, the Commission thoroughly follows up on them and, if needed, further clarifies the restrictions with the former staff member in question. In addition, where relevant, restrictions imposed on former staff members are communicated on a need-to-know basis to the former service in order to ensure proper enforcement. This measure represents an effective means of control, for instance, in case of a ban on professional contacts or on lobbying vis-à-vis the former Directorate-General or the Institution.
- At the same time, the Commission does not have and cannot afford an in-house system to police systematically compliance with all restrictions imposed in relation to post-service

activities of former staff members. In this respect, the Commission shares the view of the European Court of Auditors in its 2019 Special Report on the audit on the Ethical framework of EU institutions, namely, that “the level of control should reflect the level of risks and take into account the administrative burden created by such controls”⁷.

- When the Commission becomes aware of potential breaches of the conditions or restrictions imposed in an Appointing Authority’s decision on occupational activities after leaving the service, the Investigation and Disciplinary Office of the Commission (IDOC) or the European Anti-Fraud Office (OLAF) have the power to investigate, which may lead the Appointing Authority to impose appropriate and dissuasive disciplinary sanctions, where appropriate, as provided for in Article 9 of Annex IX to the Staff Regulations.
- As regards outside activities during leave on personal grounds, as explained to the Ombudsman’s team during the inspection, since 2021, the Commission has been implementing a more restrictive approach thereto, compliant with the provisions of the Staff Regulations. Namely, the Appointing Authority in principle forbids outside activities the aim of which is to represent private interests before the Commission, notably when undertaken by law firms, consultancies and public affairs departments of organisations. This is all the more relevant if the envisaged activity takes place in the same area of expertise as the one in which the staff member works at the Commission or where the Commission acts as an enforcer or regulator in the field. This more restrictive policy has led to several prohibitions and some complaints lodged under Article 90 of the Staff Regulations by the staff members concerned.

2. The Commission should explore the full range of measures available to it when approving an activity with mitigating measures. For instance, the Commission could make its approval of a new job conditional upon the (former) staff member obtaining a commitment from the new employer that the restrictions imposed by the Commission (for example the limits of what the (former) staff member can deal with) are made public in a prominent way, for example alongside the (former) staff member’s profile, on the new employer’s website. As a minimum, the Commission should require the (former) staff member to submit evidence that the restrictions imposed were shared with the new employer.

Commission reply

- As already stated to the Ombudsman in the context of the previous (2017-2019) inquiry on the ‘revolving door’ moves of staff, the Commission is bound to act in the legal framework that defines its relationship with its former staff members. The relationship between a new employer and its former staff is in principle a bilateral one and the Commission cannot interfere in it.
- Therefore, from a legal point of view, conditioning the authorisation of an activity upon a commitment from the new employer that the restrictions imposed on the (former) staff member are made public in a prominent way, can be legally challenged (in terms of imposing an obligation on a third party). As such it would be difficult to enforce it in case of non-compliance.

⁷ European Court of Auditors, Special report no 13/2019, point 40.

- Nonetheless, in most exposed cases, following a careful risk assessment, the Commission already explicitly requests (former) staff members to share, where necessary, imposed restrictions with a new employer and/or clients.
 - Moreover, former staff members are duly reminded also about their ongoing duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits. This duty also covers, to the extent possible, any public communication or announcement on a new employment.
 - However, requiring the evidence of the communication of restrictions would in certain cases raise some legal difficulties, notably for professions that are in contact with clients (such as lawyers or consultants). Their relations are often of a confidential nature, including clients' names and matters covered. A condition requiring breaching deontological or contractual confidentiality would most likely not withstand judicial scrutiny. Moreover, monitoring the respect of such a condition at large scale would impose a significant workload on the Commission's limited human resources.
 - Nevertheless, in order to enhance the accountability of former staff members as regards respect of imposed restrictions, the Commission is willing to explore further measures. Notably, as part of possible conditions that the Appointing Authority may impose in line with Article 16 of Staff Regulations, the Commission may consider, in certain cases, where the Commission's reputation is more exposed, the possibility to impose on former staff members a condition of a periodical reporting on the compliance with restrictions imposed on their activities.
- 3. *The Commission should make public the information on post-service occupational activities of former senior staff members shortly after it adopts a decision to authorise such activities.***

Commission reply

- As already stated to the Ombudsman in the context of the previous inquiry on the same matter, the Commission strictly follows the provisions of Article 16(4) of the Staff Regulations as regards information on post-service occupational activities of former senior staff members. These rules provide for the publication of an annual report on former senior managers' cases involving lobbying or advocacy vis-à-vis their former institution on matters for which they were responsible during their last 3 years in the service.
- For any other publication on post-service occupational activities of former senior staff members, the Commission is bound to respect the applicable rules on personal data protection.
- Building on its practice established in 2022, the Commission commits to publishing the report in the first part of the year to enable a more effective public scrutiny of the decisions taken in application of Article 16(3) of Staff Regulations, including a list of the cases assessed.
- Furthermore, with a view to protecting public trust in the public administration even more vigorously and respond to legitimate questions of public interest, the Commission considers possible legal options for disclosing certain elements of authorisations of post-service activities of its former senior staff members (especially restrictions imposed on

authorised occupational post-service activities) in specific circumstances (e.g. following public questions with regard to a specific case and the adequate protection of the general interest), in a proportionate fashion and in compliance with the personal data protection rules.

- The Commission wishes to underline that any future legal basis for personal data disclosure must not be perceived as circumventing the obligation for a yearly publication set out Article 16(4) of the Staff Regulations. Its only purpose would be to enable the Commission to disclose information on post-service occupational activities of former senior staff members in limited circumstances prior to the publication of the annual report.

IV. CONCLUSION

The Commission is fully committed to driving the highest ethical standards and maintaining public trust in the integrity and transparency of its decision-making and the integrity of its staff.

The Commission takes note that no single instance of maladministration was found in any of the 100 cases examined by the Ombudsman's inquiry team as part of the Strategic inquiry OI/1/2021/KR. The Ombudsman closed her inquiry without recommendations. This confirms that the Commission's approach is robust, in line with the rules and does not require systemic improvements.

To protect the public interest and its reputation even more vigorously, the Commission will examine further measures aimed, on the one hand, at enhancing the accountability of former staff members as regards respect of imposed restrictions and, on the other hand, at timely disclosing relevant information on its former senior staff members' post-service occupational activities in specific circumstances, in a proportionate fashion and in compliance with the personal data protection rules.

For the Commission

Johannes HAHN

Member of the Commission