*José Manuel Barroso*
*President of the European Commission*

*Brussels,* 29 AVR. 2014

***Subject:*** ***Joined complaints ref. 2077/2012/TN and 1853/2013/TN***

*Dear Ms O'Reilly,*

*Thank you for the letter of 28 November 2013 regarding the above-mentioned case.*

*I am pleased to enclose the comments of the Commission on this complaint.*

*Naturally, the Commission remains at your disposal for any further information you may require.*

*Yours sincerely,*

*José Manuel BARROSO*

*Enclosures*

*Ms Emily O'REILLY*
*European Ombudsman*
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**FINAL**

**Comments of the Commission on a request for information from the European Ombudsman**
**- Two joined Complaints by Corporate Europe Observatory, Greenpeace EU Unit, LobbyControl and Spinwatch (ref. 2077/2012/TN) and Friends of the Earth Europe (ref. 1853/2013/TN)**

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## PREFACE

The Commission wishes to preface its comments on the two complaints and the 16 points of the Ombudsman with the following considerations:

The Staff Regulations ("SR") impose on a staff member in active service the duty to immediately inform the Appointing Authority when he is called upon, in the performance of his duties to deal with a matter in which, directly or indirectly, he has a personal interest such as to impair his independence or about his intention to engage in an occupational activity (Article 11(a) SR). The obligation to behave with integrity and discretion as regards the acceptance of certain appointments or benefits as well as the obligation to inform the Appointing Authority about proposed occupational activities continue to apply to former staff, the first one without any time limit and the second one within two years after leaving the service (Article 16 SR). The Commission has developed, over the years, an active policy of awareness-raising which aims to ensure that officials/agents are equipped to be conscious of all their obligations related to professional ethics.

The Commission is always seeking to improve procedures and its decision-making process. Ethical issues are of the utmost importance to the Commission, and this particular area has been continuously reinforced over the years. Since 2009 several important initiatives were developed, in particular the creation of the ethics correspondents' network, pre-retirement training on ethics, "leaving forms", "entry forms", the adoption of the Guidelines on Gifts and Hospitality and on Whistleblowing, as well as multiple awareness-raising actions, including the publication of a new Practical Guide on Ethics. More recently, as from 2013, the Commission has begun sending retired officials regular reminders of their obligations after retirement.

Finally, the new ethics provisions in the revised SR which entered into force on 1 January 2014 are now being implemented.

The Commission has always been very cooperative and transparent with the complainants providing them with extensive information and documents following their numerous requests for access to documents and complaints. However, it is clear that the complainants have a different concept of conflict of interest and of the rights of staff, which the Commission does not share. In the Commission's view, their alternative view has no basis in the SR, and would, if put into effect, infringe the fundamental rights of staff and former staff. It would also seriously harm the institutions' prospects of recruiting competent and properly-qualified staff, who may be discouraged by the expectation that, if recruited, the institutions would interfere with their future professional prospects, even years after they have left the service, in a manner that would be disproportionate and unrelated to risks of conflicts with the legitimate interests of the institution.

The latter point is of particular importance given the increasing proportion of temporary and contract staff, who may only be in the institutions for a short period, and thereafter need to find other employment. They cannot be obstructed in their legitimate and essential concern to find employment, except for objective and compelling reasons.

The SR require a case-by-case approach based on a careful and objective analysis of the risk of conflict of interest (as defined by the SR) with the legitimate interests of the institution. The specific public interest which needs to be protected must be identified. Abstract allegations, personal views, innuendo or disagreement with policy orientations of the institutions in certain policy areas are not a justification for restricting the right to work.

If there are legitimate interests of the institution which need to be protected, any restriction of the right to work must be based on the principle of proportionality which means that the least intrusive measure must be taken.

Article 15 paragraph 1 of the Charter provides that:

*"1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation."* Any restriction on this right must therefore be duly motivated, necessary and proportionate to the risks under consideration, see Article 52, paragraph 1, of the Charter. Any such provision – and Article 16 SR is a clear example – has to be interpreted restrictively.

The Commission considers that its internal system is solid and that it assesses all cases with due consideration for the legitimate interests of the institution, which includes also the consideration of public perceptions and the rights of the person. The Commission is confident that it has a comprehensive set of rules that are correctly implemented and constantly being monitored for possible improvement. In addition, awareness-raising and guidance to its staff are being continuously further developed. The Commission is also confident that its system and the way it is implemented meet the highest ethical standards, notably the OECD Recommendations.

Finally, Commission decisions in this domain are fully in line with the general principles of good administration, lawfulness, proportionality, non-discrimination and equal treatment, and consistency.

The Commission is of the view that its practice goes well beyond the practices in many other comparable bodies, institutions, organisations or administrations. The Commission is also open to suggestions for possible further improvements that would be in line with the legitimate interests of the institution, without however increasing unnecessarily the administrative burden, in particular in comparison to other comparable organisations.

## I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

- On 1 February 2013 the European Ombudsman (EO) opened an inquiry (complaint 2077/2012) to assess the way the European Commission is dealing with conflicts of interest with a clear focus on Article 16 SR.

- The EO inspection took place on 18, 21, 26 and 27 June 2013.

- On 8 July 2013 the EO sent a report on this inspection.

- On 28 November 2013 the EO sent a new complaint to the President of the Commission and announced that she had decided to merge the previous complaint 2077/2012 and the new one, 1853/2013, as they raise similar issues.

- An inspection relating to complaint 1853/2013 took place on 14 February 2014. On 26 March 2013, the EO sent a report on this inspection.

## II. THE JOINED COMPLAINTS 2077/2012-1853/2013

### A. The content

- As for **complaint 2077/2012:**

  Background:

  - The complaint invokes 10 cases relating to post-service activities and to outside activities during leave on personal grounds which are supposed to underpin the complainant's allegation.

  - Allegation: "*The EU Commission fails to implement adequately the rules applicable to the "revolving door phenomenon" and thereby allows apparent and potential conflicts of interest to occur."*

  - Claims: It entails nine claims referring to nine examples of alleged Commission failures to act.

  The Commission should:

  (1) Develop proactive procedures to inform staff about their obligations.

  (2) Define properly the terminology it uses.

  (3) Improve its scrutiny and decision making in respect of relevant authorisations.

  (4) Take action when the Joint Committee, referred to in Article 16 of the SR raises concerns.

(5) Make better use of sanctions and referrals to IDOC in cases of clear breach of the rules.

(6) Keep full and proper records of conflicts of interest and revolving door cases, including a central register.

(7) Be proactively transparent about revolving door cases and sabbaticals involving new activities.

(8) Draw inspiration from UK parliamentary recommendations to overhaul the revolving doors rules.

(9) Allow for greater transparency in its dealing with requests for public access in this area.

- As for **complaint 1853/2013:**

  - Background:

a) On 16 January 2013, Friends of the Earth Europe ("FoEE") lodged a complaint with Ms Day, Secretary-General of the Commission concerning the approval of the post-employment activities of Mr [redacted] a former member of the Commission temporary staff.

b) The complaint was lodged following a request from the complainant for access to the documents linked to the post-employment activities of Mr [redacted] (in two phases including in both a confirmatory step).

c) The complaint to Ms Day raised two different orders of concerns: the first was linked to the process of approval of post-employment activities and the second referred to the substance of the decision taken by the Commission in the specific case.

d) On 5 March 2013 an extensive answer was sent to the applicant and full access to available documents related to the authorisation was granted based on a request for access pursuant to Regulation 1049/2001.

e) On 19 March 2013 the answer to the complaint was sent. After a systematic analysis of the arguments put forward by the complainant, the Commission in its answer concluded that *"the allegations of maladministration were not substantiated neither as regards the late notification by Mr* [redacted] *nor as regards the compatibility of his new activity with the legitimate interest of the institution"*.

f) FoEE then had the choice whether to accept the answer, to appeal to the Secretary-General of the Commission within one month (19 April 2013) or lodge a complaint directly with the EO under Article 228 of TFUE. It chose the third option.

g) On 27 September 2013, the complaint was lodged with the EO under the number 1853/2013. It rejects the position taken by the Commission on its first complaint and brings it again in the same terms but this time to the EO.

➢ The concrete case:

The case is limited to a single file:

a) *Generalities*: See above points a) and b).

b) *Claim:* The complainant considers that Mr [redacted] engaged in a paid activity two months after he left the Commission without having presented a prior request for authorisation. He was engaged in an activity in a sector and a company that dealt with the same domain as the one he was working on while in service at the Commission.

c) *Facts*: Based on a late request for authorisation and on the basis of the information he gave, Mr [redacted] a former temporary agent in the AST function group (executive, technical and clerical duties), was allowed to proceed without specific restrictions, as the link between the two activities did not appear to entail a risk for the interests of the institution. FoEE claims that it is in possession of information which would lead to an opposite conclusion and criticises the Commission for not having considered the case in the light of this supplementary information. It maintains in particular that:

- Both Mr [redacted] and the Commission would bear the responsibility for not respecting the rules of information/request for prior authorisation.

- The apparent risk of conflict of interest was sufficiently evident and FoEE would not need to prove the link between the past and the future activity in the light of an existing conflict; it considers the mere existence of a link as sufficient.

d) *Remark:* FoEE claims a right to trigger Commission action and to take into account in its decision evidence that FoEE has, as an external body, collected. It makes such a claim despite the wording of Article 16 SR which provides that it is up to the Commission to decide on the cases, applying the conditions "it thinks fit".

➢ Allegations in complaint 1853/2013:

*"The Commission failed:*
- *To ensure that staff leaving its services apply for authorisation to engage in a new occupational activity, and*
- *To impose restrictions on a particular staff member leaving the Commission to engage in a new occupational activity."*

➢ Claims in complaint 1853/2013:

Three claims are formulated, regarding the perceived necessity for the Commission:

- To recognise that Article 16 SR was not properly implemented in respect of the former staff member concerned.

- To take measures to ensure that there is no conflict of interest between his new position and his responsibilities while he was employed by the Commission.

- To introduce restrictions to prevent him from using his contacts and insider knowledge at the Commission in the context of his new employment and for the benefit of his new employer.

**B. Allegations and claims by the complainant**

The allegation made by the complainant is that *"the Commission fails to implement adequately the rules applicable to the "revolving doors phenomenon" and thereby allows real, apparent and potential conflicts of interest to occur".* In this respect the complainant lists nine claims, and underpins some of them with alleged failures of the Commission, whereas it also puts forward further alleged failures (complaint 2077/2012).

The complainant further claims that the Commission in respect of one former staff member did not properly implement Article 16 SR and should take concrete measures to remedy this situation. They allege that the Commission has failed to ensure that staff leaving the service apply for authorisation to engage in a new occupational activity and to impose restrictions on a particular staff member leaving the Commission to engage in new occupational activity (complaint 1835/2013).

This reply will deal one by one with the points raised, linking where appropriate each claim and the connected relevant alleged failure(s). Concerning complaint 1835/2013, the Commission considers that the issues raised therein are to the largest extent covered by the responses to complaint 2077/2012. To the extent there is a separate issue, this will be covered separately.

In general terms, the Commission would underline that it has already provided the complainant with replies to all their allegations, and notes that the complainant does not appear to have taken account of the explanations given.

## III. THE COMMISSION'S COMMENTS ON THE COMPLAINANT'S ARGUMENTS: Complaint 2077/2012

**Claim (1) and point (1) of the alleged failures of the Commission**

***The complainant alleges that the Commission does not properly inform staff of their obligations and claims that the Commission should develop pro-active procedures***

The Commission considers that rules are essential, but not sufficient: they must be known and respected. This approach has been explained by the Commission on various occasions notably in discharge proceedings before the European Parliament, in replies to Parliamentary Questions, in the hearing of the Budget Committee on conflicts of interest, but also to the complainant.

Therefore, even if the responsibility for complying with the rules lies with the Commission staff, the Commission continuously aims to increase and improve awareness-raising activities, by monitoring and upgrading its training efforts and by introducing further reminders to staff on the appropriate occasions.

*Training*

Staff members are regularly reminded of their ethics obligations at different points of their career.

Upon entry into service, staff members receive documentation informing them about their ethical obligations. They are informed of the mandatory training path which comprises the 'Ethics and Integrity' course. All new staff members, including managers, are obliged to follow this specific, one day training.

The course 'Ethics and Integrity' addresses 'Title II: Rights and Obligations of officials' of the SR and draws attention to various documents pertaining to ethics in the Commission e.g. Internal Control Standards, the Communication of 5 March 2008 on the promotion of professional ethics in the Commission, the Practical Guide on staff Ethics and Conduct, the Code of good administrative behaviour, Guidelines on gifts and hospitality, Guidelines on the use of social media and Guidelines on Whistleblowing, the Decision on outside activities.

This course focuses on issues such as: the principles of professional ethics at the Commission, conflicts of interest, outside activities, freedom of expression and discretion, gifts and interest groups, proper conduct internally and externally, relations with the public, obligations after leaving the service, procurement and financial liability. Special emphasis is put on Article 22a of Title II (whistleblowing and the corresponding Guidelines), which is referred to several times in the course as well as discussed more in depth as one of the specific relevant issues.

Ethical behaviour, including whistleblowing and conflicts of interest, is also discussed and explained in financial training including courses on the expenditure lifecycle, procurement and grants. These courses are followed by around 2500 participants per year.

According to Internal Control Standard Number 2 'Ethical and Organisational Values' of Commission "Internal Control Standards for Effective Management", all management and staff should be aware of and share appropriate ethical and organisational values and uphold these through their own behaviour and decision-making. An integrated effort of all of the main stakeholders dealing with ethics is constantly underway to reinforce awareness of the importance of ethical behaviour for all staff members. In addition to central services dealing with ethics, a network of ethics correspondents from each Directorate-General has been put in place to ensure a consistent approach to ethical issues throughout the Commission. During meetings of this network issues related to professional ethics are discussed in order to share experiences, answer questions and develop a common understanding and a solid ethical culture throughout the Commission services. The European Ombudsman participated in a meeting of this network on 7 March 2013 which was very much appreciated by its members.

Regular meetings are held between the different Commission services and coordinators concerned. These meetings ensure continuous information-exchange and an update of the course content with current issues identified by the services involved.

In addition to the above, individual Directorates-General and Agencies organise 'Ethics and Integrity' courses for their personnel, should they consider that a more tailor-made equivalent or supplement is necessary.

The Commission has also developed ethics management workshops, aimed specifically at managers. They address similar issues as the 'Ethics and Integrity' course, i.e. Title II of the SR, and also draw particular attention to Article 22a on whistleblowing. Future management training will focus on all middle and senior managers in a DG and be organised at Directorate-General level.

A dedicated internal website provides easy access for all staff to all the information regarding professional ethics. This website covers most of the areas addressed in the training sessions and is a comprehensive source of information with links to the most important documents, examples of ethical dilemmas and useful contact points.

Every year the Commission also organises 'ethics master classes', one session open to all staff and another one restricted to managers. The speakers are widely known experts in the ethics field. The master classes in 2011 and 2012 were followed by around 150 staff members and over 70 managers. They were also web-streamed to all Commission computers.

It is worth mentioning that an "ethics week" was organised in 2013, with a large number of central and de-centralised events. During this week various activities followed by large parts of staff were organised in over 35 Directorates-General, including a dedicated website for that week and a special meeting of the ethics correspondents. In 2013, the Commission also updated its "Practical Guide to Ethics", which is available on the internal website, and 9000 paper copies of this Guide were distributed to staff during the "ethics week".

*Awareness-raising*

These events complement various awareness-raising activities undertaken by different Commission services. The Commission continuously aims to improve and modernise its training and awareness-raising activities, including the use of Intranet and discussion groups on internal platforms, or the creation of e-learning courses.

In regard to staff members leaving the service, the rules and procedures concerning the obligation to declare occupational activities within two years after leaving the service (Article 16 SR) are explained to the members of staff during the compulsory "Preparation for retirement" seminars. Attention is also drawn to the continuing obligation of confidentiality (Art 339 of TFEU, Article 17 SR). In addition and since 2013, reminders in regard to Article 16 SR are sent twice a year to pensioners.

With regard to temporary and contract staff, they receive written information on Article 16 before leaving the service since 2011 and dedicated information on their responsibilities through an e-learning presentation. Commission Decision C(2013)9037 of 16.12.2013, which replaces Commission Decision C(2004)1597 of 28.04.2004 on Outside Activities and Assignments, states that contract agents must be informed whether they have had access to confidential information (see below). Additionally, special Article 16 presentations were made in 2014 to departing members of Commissioners' cabinets.

As of 1 January 2014, staff members need to fill in forms, as required by the new SR, concerning any possible conflict of interest both upon entry into the Commission's service and upon reintegration into the Commission's service after a period of leave on personal grounds. As mentioned above, after entry into service, staff members receive a newcomer ethics training which allows for a comprehensive understanding of their different obligations. This

will as from now on also include the dimension of leave on personal grounds and the return therefrom.

Therefore, the Commission does not share the complainants' opinion that it does not properly inform staff of their obligations. It remains all the more committed to continue its efforts for improvement as appropriate.

**Claim (2) and point (9) of the alleged failures of the Commission**

***The complainant claims that the Commission "should define properly the terminology it uses" and alleges that the Commission does not have an adequate definition to determine when contract agents should be covered by these rules (Article 16 SR)***

As mentioned above, Commission Decision C(2013)9037 of 16.12.2013 on Outside Activities and Assignments provides, in its Article 22(1), second sub-paragraph, that contract staff who have had access to sensitive information are subject to the rules of Article 16 SR. It should be underlined that the majority of contract agents work in support functions where they would not have access to such information. The question whether the contract agent has had access to sensitive information is evaluated by the Directorate-General in which the contract agent has worked, which is best placed to assess the nature of the information to which he had access. In this respect the Commission refers to the explanations already given to the complainants, notably in the letter addressed to Alter EU dated 14 December 2011 (Annex 1).

The Commission understands that reference is also made to a note submitted by Corporate Europe Observatory (CEO) dated 1 August 2012. In this note CEO highlights certain parts of the SR where they consider definitions are needed, notably "family and financial interests (Article 11(a) SR)", "legitimate interests of the Institution" (Article 16 SR). They also quote an OECD definition of conflict of interest. The OECD's work is indeed useful reference material and the Commission participates in the meetings of the Public Sector Integrity Network of the OECD**.** However the generic definition referred to by the complainants would not bring additional guidance in this context in view of the very clear wording of Article 11(a) SR and Article 16 SR. Conflicting interests can be numerous and every attempt at a detailed definition will unavoidably miss some of them, thereby depriving the institution of the possibility to act.

**Claim (3) and points (4), (5) and (6) of the alleged failures of the Commission**

***The complainant alleges several shortcomings in the Commission's procedures and claim that the Commission should improve its scrutiny and decision-making in respect of relevant authorisations***

As a general comment, the Commission considers that there is always room for improvement and has continuously consolidated and improved its procedures whenever necessary. However, it is for the Commission to assess the legitimate interest of the institution and to identify possible risks of conflicts of interest, on a case by case basis. In line with the OECD Recommendations, the Commission must also bear in mind, in the area of Article 16 of the SR that a careful balance needs to be struck between the legitimate interests of the institution, on the one hand, and the fundamental right to work of former staff, on the other hand. The complainant considers that taking up work after leaving the Commission service, in the area in which the staff member in question has expertise, leads *per se* to a situation of conflict of

interest, without specifying the actual interest of the institution which would be harmed. This approach means that while the Commission might recruit a staff member for his expertise, this staff member, particularly if hired on a temporary basis, would face unemployment or severe restrictions at the end of his temporary posting at the institution.

The Commission, in scrutinising the cases that come up for authorisation, and contrary to what is alleged by the complainant, gathers all relevant information when assessing cases (alleged failure (4)). The complainant's allegation is unfounded, as several Directorate(s)-General, the Legal Service and the Secretariat-General give input before submitting a draft decision to the Appointing Authority. Whenever necessary, the Commission also requests supplementary information from applicants to enable a decision to be taken in due knowledge of all facts.

In relation to the alleged failure (5), the Commission underlines again that any decision under Article 16 SR is made in line with the procedure outlined in the preceding paragraph. It appears that what the complainant sees as an alleged failure is in fact a difference of understanding between the complainant and the Commission on the notion of conflict of interest. The notions of conflict of interest and of "revolving doors" are used by the complainant without any evaluation of the actual or potential risk of conflict with the legitimate interests of the institution. Referring again to the OECD definitions, a distinction has to be made between those notions. The OECD describes the revolving door phenomenon as the movement of staff between the public and the private sector. It also underlines that this movement can be positive and can contribute to the development of personnel and to an increase of organisational competencies. What constitutes a risk is the improper use of the revolving door phenomenon. According to the OECD it is more relevant to address those risks rather than the phenomenon as such. Among those risks, the OECD identifies conflict of interest issues. The Commission's rules and procedures are designed to avoid possible conflicts of interest and to protect the legitimate interests of the institution.

In doing so, the Commission applies a case by case approach leading to a thorough examination of the concrete elements of each case with a view to defining a solution adapted to the protection of the interests of the institution while respecting the principle of proportionality as to the obligations imposed on the former staff member. It is interesting, in that regard, to note that in his Decision on Case 476/2010/ANA, the European Ombudsman stresses in paragraph 92 that *"The standard of conflict of interest control is subject to proportionality […] understood as the rigour the Commission is expected to exercise when determining whether an outside activity could give rise to an actual, potential or apparent conflict of interest".* In the same way, in paragraph 99 the European Ombudsman emphasises *"that the scope of the term 'policy field' alone does not suffice to establish the presence or absence of a conflict of interest. In this regard, it should be pointed out that an overlap between a Special Adviser's tasks and his or her outside activities does not automatically imply a conflict of interest. At the same time, the absence of an overlap between the respective activities does not necessarily establish an absence of conflicts of interest either."* As a result (paragraph 100) it is the Commission's responsibility to undertake a thorough examination of the merits to determine whether there is a conflict of interest or not.

In relation to the alleged failure (6), notably DG COMP has already in the past ensured that incoming staff are not employed in a function which will place them in a conflict of interest, be it in relation to their former employment or other considerations. In this respect and

considering the revised SR that have come into force on 1 January 2014, every new recruit to the Commission will henceforth be obliged to fill out a form on conflict of interest.

In relation to current staff, Article 11 SR foresees an obligation to inform the Appointing Authority when, in the performance of their duties, staff members are dealing with a matter in which, directly or indirectly, they have any personal interest such as to impair their independence, and, in particular, family and financial interests. This obligation, together with appropriate training and awareness-raising actions, allows for a strong protection against possible risks of conflict of interest. It must nevertheless place the responsibility on staff to identify specific situations of potential risk. Bearing in mind the variety of files officials deal with in the course of their career, this obligation remains an essential complement to the newly introduced system of *ex-ante* declarations which help to prevent situations of conflicts of interest from the outset. This is perfectly in line with the recommendations of the OECD which state that public officials must be held personally responsible for the identification of and solutions to situations at risk while the task of public institutions is to provide practical frameworks for action or, in other words, to fix executive norms and to put in place efficient management systems (OECD 2006 "Managing conflict of interest in the public sector").

In particularly sensitive sectors Commission staff members are requested to make specific declarations of possible conflicts of interest targeted to their specific areas of responsibilities. This is the case, for example, in DG COMP.

**Claim (4)**
***The Commission should take action when the Joint Committee referred to under Article 16 SR raises concerns***

The Joint Committee under Article 16 SR contributes to the process at hand with its views and is systematically invited to express its opinion, as foreseen by the SR. In taking any final decision, the Appointing Authority is held to take this into consideration, even if it decides under its own responsibility. Where the Joint Committee (as opposed to observations of individual members which are not taken up by the whole Committee) raises concerns, these are taken very seriously and factored into the final decision.

**Claim (5) and points (2) and (3) of the alleged failures of the Commission**
***The complainant alleges that the Commission does not ensure that staff comply with their obligations and does not impose sanctions in case of serious breaches of rules and claims that the Commission make better use of sanctions and referrals to IDOC***

The recent years have seen an evolution in the way the Commission has streamlined its administrative procedures. By giving clear and timely information to staff who are about to leave the service, the Commission enables the respective persons to better comply with their obligations under the SR, notably Article 16.

Self-compliance by (former) staff members is thus an important building block of the Commission policy towards enforcing Article 16 SR. This approach is complemented by an appropriate follow-up of cases where (former) staff members have failed to comply with their obligations.

Both aspects, i.e. the facilitation of self-compliance *ex ante* and the follow-up in case of non-compliance *ex post*, are interlinked. Put differently, complete and timely information given to a staff member about his obligations upon leaving the service may directly influence the appreciation of any future possible non-compliance.

When shaping its approach to particular cases of non-compliance *ex post,* the Appointing Authority has taken into account those elements.

Regarding 'purely formal breaches' (e.g. late applications), in a first period, until around 2011, the Commission has dealt with those cases on an administrative level, addressing letters to the persons demanding better compliance in the future. As from 2012 onwards, the Commission follows up formal breaches whenever it could be established that the person concerned had received sufficient and timely information about his or her compliance obligations. Examples of such breaches have so far been treated through the means of moral sanctions (written warning and reprimand).

Regarding 'material breaches' (e.g. conflicts of interest and/or possible breaches of confidentiality), the Commission considers that such a situation – if established – is to be treated in a similar way to a situation occurring during active employment. As with all disciplinary cases, each case would have to be considered on the basis of its individual merits. The Commission underlines that a breach of the obligation to notify envisaged post-service activities is not acceptable, because it exposes the institution to the serious reputational risk of not preventing potential conflicts of interest, and because it calls into doubt the Commission's determination to ensure that its (former) staff's integrity (and thus the integrity of the Commission) is beyond any doubt. However, an assessment of the nature of the post-service activity is still required to assess its compatibility with the legitimate interests of the Commission.

**Claim (6) and point (7) of the alleged failures of the Commission**

***The complainant alleges that the Commission does not keep adequate records of assessed cases and claims that the Commission should keep full and proper records of conflict of interest and revolving door cases, including through a central register***

The Commission does not agree with the complainant's allegation and notes that the alleged failure is not based on any relevant facts as the Commission adequately *records assessed cases*. All requests for access to documents have received a reply, and the files clearly show that the procedures to assess the relevant activities are such that they allow the Appointing Authority to take well-based decisions, in conformity with the SR.

The complainant claims that the Commission should ensure the keeping of proper records "including through a central register". The Commission assumes that the complainant refers to an annual report or list as referred to in its note of 1 August 2012. By letter of 21 February 2012 the Head of Cabinet of Vice President Šefčovič had replied questioning the practical use of such a list (Annex 2).

The Commission underlines that it has the obligation to apply the legislation in force. In this context the Commission refers to the entry into force, on 1 January 2014, of the revised SR. Even though the legislator had the opportunity to do so, it did not decide to create such a

central register as suggested by the complainant. The Commission is not aware of any such central register being kept by other institutions.

However, the new SR now contain the revised Article 16, fourth indent, which states that *each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed.* This third paragraph concerns the prohibition for senior officials from engaging in lobbying or advocacy vis-à-vis staff of their former institution. The Commission will implement this obligation as well as its obligation to publish a list of the cases concerned, in full compliance with Regulation 45/2001.

The revised version of Article 16 SR does not provide for the publication of a list of *all* cases of activities after leaving the service.

The Commission has always applied the legislation in force which foresees that it is for the institution concerned to appreciate the risk of conflict with the legitimate interests of the institution.

The Commission shares nevertheless the conviction that there is a need to have a systematic approach on post-office activities. It is continuously improving its communication, training and awareness-raising activities for its staff, notably through its Practical Guide for Staff on Ethics, and the network of ethics correspondents in order to ensure coherence and good implementation both by the services and by staff.

The Human Resources services of the respective Directorates-General concerned are consulted on post-office activities relating to their former staff in order to assess the possible risks of conflicts of interest and are informed about the final decision of the Appointing Authority.

**Claim (7) and point (8) of the alleged failures of the Commission**

***The complainant alleges that the Commission does not implement properly the rules regarding sabbaticals and claims that the Commission should be proactively transparent about revolving doors' cases and sabbaticals involving new activities***

As regards the complainant's further allegations concerning "revolving doors" cases, and proactive transparency in relation to leave on personal grounds, the Commission underlines that it actively informs staff of their obligations when joining the Commission or upon taking leave on personal grounds and, if appropriate, in cases of internal job changes, especially through the dedicated ethics website and the work of the ethics correspondents.

As already outlined, in relation to existing staff, Article 11a SR foresees an obligation to inform the Appointing Authority when, in the performance of their duties, staff are dealing with a matter in which, directly or indirectly, they have any personal interest such as to impair their independence, and, in particular, family and financial interests. This statutory obligation, together with appropriate training and awareness raising actions, allows for appropriate protection against possible risks of conflict of interest. Bearing in mind the variety of files officials deal with in the course of their career, this essential obligation is now completed by a newly introduced system of *ex-ante* declarations of conflict of interest to be made by candidates in the course of the recruitment procedure, and by those returning from leave on personal grounds. In particularly sensitive sectors, as indicated above, Commission staff

members are also requested to make specific declarations of individual possible conflict of interest targeted to their specific areas of responsibilities.

In relation to the publication of professional activities of staff members taking leave on personal grounds, the Commission recalls that according to Article 40 SR, staff may be granted unpaid leave on personal grounds. If staff intend to engage in a professional activity while on leave on personal grounds, they must apply for permission beforehand from the Appointing Authority, providing specific details of what they intend to do, as set out in Article 16 of Commission Decision C(2013)9037 of 16.12.2013 on Outside Activities and Assignments. Permission will not be granted, where the assignment or activity might give rise to a conflict of interests or be detrimental to the interests of the EU. The leave on personal ground coupled with such request(s) will only be granted once the activity is approved.

As regards the publication of a list, the Commission would refer the European Ombudsman to the reply above relating to Claim (6).

**Claim (8)**

***The complainant claims that the Commission should draw inspiration from UK parliamentary recommendations to overhaul the revolving door rules***

The Commission has already put in place clear and comprehensive guidance on procedures and timescales creating a level playing field among its internal actors. The Commission is under the obligation to implement the SR and to apply the same rules and principles to its entire staff. By its very nature, being an administration that gathers together 28 nationalities and 28 different cultures under a single body of rules, it strives to develop a common understanding and a strong ethical culture by training and awareness raising actions, prevention being of utmost importance. The Commission draws inspiration from Member States and international organisations' systems while necessarily adapting them to its particular context.

The Commission is aware of the UK parliamentary recommendations, which are a very valuable contribution and which represent one of the numerous, different and interesting systems that exist in the Member States of the European Union. The Commission is open to embracing any interesting new features to the extent that they fit its legal framework and its own administrative structure and would bring improvement to the system.

As for the revolving door phenomenon, namely the movement of staff between the public and private sectors, the Commission attaches the greatest importance to ensuring that it is not triggering situations of conflict of interest, while nevertheless respecting its obligations in relation to personal data protection. The policy it has put in place in the matter of relations with lobbies and other organisations trying to influence the decision making process as well as the creation of and continuing work on the joint Commission – EP Transparency Register are proof of the importance which the Commission attaches to this issue. Coming to the UK example quoted in the question, the Commission has also taken note of the observation made by the OECD in its Report [GOV/PGC (2013) 16 dated 12-13 November 2013] on progress made in implementing the recommendations on principles for transparency and integrity in lobbying. It has particularly taken note (paragraph 21) that the majority of OECD countries have not regulated lobbying and that the United Kingdom is in the process of introducing

legislation on lobbying (paragraph 17). The Commission will continue to follow accurately the progress of all national systems in this domain to enrich its own experience and practice.

**Claim (9)**

***The complainant claims that the Commission should allow for greater transparency in its dealing with requests for public access in this area***

As can be seen from the documentation attached to the complaint, the Commission follows a policy of openness and full transparency in this area, limited only by the exceptions foreseen in Regulation 1049/2001, and in Regulation 45/2001 relating to the need to ensure the protection of personal data. The complainant on the other hand, given that some individuals concerned have refused to release the paperwork to them, claims that the Commission should recognise the public interest in this issue and release more information than is currently the case.

The Commission is committed in its adherence to and fully embraces the principle of transparency. However, there are certain exceptions in which only partial or no access to documents can be granted. The Commission recalls that in its *TGI* and *Bavarian Lager* judgments[1] the Court of Justice ruled, on the one hand, that administrative activities are to be clearly distinguished from legislative procedures, for which the Court has acknowledged the existence of wider openness. On the other hand, the application of Regulation 1049/2001 cannot have the effect of rendering the provisions of another Regulation over which it does not have primacy, ineffective. The Commission recalls that the exception pertaining to the privacy and integrity of the individual and the protection of personal data – laid down in Article 4(1)(b) of Regulation 1049/2001 – is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

This means that as a matter of principle, even if the complainant claims there is a public interest, this cannot be a justification for releasing documents causing damage to the reputation and the integrity of a (former) staff member. Therefore the Commission reiterates that while it fully supports transparency, it must be remembered that transparency is not unconditional and must respect certain limits laid down by Regulation 1049/2001 and the assessment required in Regulation 45/2001.

## IV. THE COMMISSION'S COMMENTS ON THE COMPLAINANT'S ARGUMENTS - Complaint 1835/2013 (separate issues not comprised in the reply above)

In relation to this complaint, the Commission refers to the extensive correspondence with the complainant and the explanations given. The Commission therefore cannot accept that, on the basis of the claims and allegations of the complainant, there has been maladministration. The Commission remains open to presenting its files for inspection by the Ombudsman.

[1] Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission* v *Technische Glaswerke Ilmenau Gmbh*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63.

## V. THE COMMISSION'S COMMENTS ON THE 16 POINTS OF THE OMBUDSMAN

### 1) The procedures

a) In the case of outward movement of staff (leaving the Commission's service on retirement or upon end of contract/assignment), staff are invited to take part in the pre-retirement or "end of contract" training course where they receive explanations about their rights and obligations after leaving the service. When leaving the service they receive – and sign that they have received – documentation (inter alia) on their continuing obligations under Articles 16, 17 and 19 SR. When they intend to take up an occupational activity after leaving the service, they need to notify the Commission by filling out the form foreseen to this effect and submit it to the competent service. It should be noted that often, before filling in the form, the person concerned requests the opinion of their local ethics correspondent or DG HR on what can be considered acceptable. After submission of the notification, the Commission then has 30 working days to decide whether to prohibit the activity, to allow it or to allow it subject to restrictions. If the Commission has not reacted during the 30 working days, this is deemed to constitute implicit approval. In practice, the Commission endeavours to respect the deadline, and indeed and only in very rare cases have implicit approvals taken place in the past.

Upon receipt of the notification under Article 16, DG HR immediately consults the Directorate-General within which the staff member has served during the last three years of his service, as Article 16 clearly refers to the matters the staff member has been dealing with during the last three years of service. The Directorate-General delivers its response within five working days. To be noted that in the case of high-level officials, the Commission has now introduced the practice to also request the views of the cabinet of the Commissioner responsible to ensure a common understanding of the legitimate interests of the institution and potential risks of conflicts.

Pursuant to the views obtained from the above-mentioned Directorates-General, a draft decision is sent to the Secretariat-General and the Legal Service, on which each has a time period of five working days to react. Once the views are collected, the Commission sends the proposal to the Joint Committee which has again five working days to deliver its opinion. Once the opinion of the Joint Committee is available, the Appointing Authority takes its decision, on the basis of all the elements of the file. If the Commission considers at any time during the proceedings that it needs further information, including from the applicant, it requests such information and informs the different actors involved in the procedure.

This procedure has been in force since the reform in 2004. Over the last three years, with the designation of ethics correspondents and awareness-raising activities for Commission staff, there is an increased sensitivity towards the risks related to post-service activities.

b) As to incoming staff, the Commission has already in the past ensured that they are not employed in a function which will place them in a conflict of interest, be it in relation to their former employment or on the basis of other considerations. With the revised SR before recruiting an official, the Appointing Authority is obliged to examine the issue of possible conflicts of interest, on the basis of a specific form which the candidate must fill in.

Additionally, when the new staff member starts working, and if a particular situation involving directly or indirectly any personal interest arises, he needs to fill in a declaration under Article 11a SR.

c) As to staff moving within the Commission, Article 11a SR foresees an obligation to inform the Appointing Authority when, in the performance of their duties, staff are dealing with a matter in which, directly or indirectly, they have a personal interest such as to impair their independence, and, in particular, family and financial interests. This obligation applies at any time in the staff member's career, including in the case of change of jobs within the institution. Together with appropriate training and awareness-raising actions, Article 11a SR allows for a solid protection against possible risks of conflict of interest. As already mentioned, in particularly sensitive sectors Commission staff are requested to make specific declarations of individual possible conflicts of interest targeted to their specific areas of responsibilities. This is particularly the case in the Directorate-General for Competition.

d) Staff members returning from leave on personal grounds (CCP) have since 1 January 2014 to complete a form allowing the Commission to examine whether there can be any conflict of interest arising from the CCP activity and the post now being offered. If necessary the Appointing Authority shall take any appropriate measure, in particular it may relieve the official from responsibility in the matter likely to constitute a conflict of interest (Article 11 fourth indent).

**2) Documentation of steps followed**

The Commission considers that, as a rule, all relevant steps are followed and documented in an appropriate manner. While not excluding that clerical errors may exceptionally occur in the actual photocopying and filing as can arise in any public administration, the Commission considers that, apart from such exceptional minor clerical errors, its administrative files are complete and in line with administrative requirements. In the two or three cases (in the period 2010-2012) where the "full procedures were not followed", this appears to relate to cases in which, for example, the applicant did not reply to additional questions and thus the procedure was not concluded. In such a situation given that the Commission due to the lack of sufficient information could not proceed with the assessment, the envisaged activity would remain prohibited and the applicant thus informed.

As to the verification of steps followed, it should be noted that the Appointing Authority, when taking its decision, will do so on the basis of a full file containing the consultations and responses received. This in itself provides for a reliable assessment. The files are in practice verified on a day-to-day basis when cross-checking references in dealing with new files by the case-handlers in charge. Based on the findings made by the Ombudsman team and this day-to-day practice, the Commission considers that introducing additional checks would not add any real value to the system currently in place.

**3) Centralised register**

As already mentioned, a first clarification concerns the fact that the legislator, despite having had the opportunity to do so, decided not to impose the establishment of a central register, and has limited in very precise terms the reporting obligation. As from 1 January 2014, the revised SR, and in particular the revised Article 16, fourth indent, state that "*each institution shall publish annually information on the implementation of the third paragraph, including a list of*

*the cases assessed."* That provision envisages the annual publication of a set of ring-fenced information limited to lobbying or advocacy activities by former senior officials during the 12 months after leaving the service (see also supra sub claim 6, p.16-p.17).

The Commission also draws attention to the fact that to its knowledge, such a centralised register does not exist in any institution or in any Member State administration comparable to the Commission in size, counting more than 30 000 staff. It also raises questions in respect of the protection of personal data and proportionality.

The will of the legislator as expressed in the reform of the SR respects the obligation of proportionality between all the interests, considerations and preferences in evidence.

**4) Reasoning of approvals**

The Commission understands that the Ombudsman suggests that approvals should be as extensively reasoned as refusals, in fact going even further in referencing all the internal opinions received during the course of the consultations.

In this respect, the Commission would like to recall that in line with Article 16 SR the Commission may only impose restrictions or a prohibition if and when the envisaged activity is contrary to the legitimate interests of the institution. Prohibitions or restrictions must therefore be well-reasoned and proportionate. The Commission is therefore not under any legal obligation to motivate approvals as extensively – or even more extensively – as restrictions or prohibitions. This follows from Article 25, second indent SR which stipulates that any decision adversely affecting an official shall state the grounds on which it is based. In fact, this is also concurrent with the general principles by which any administration must function: refusals are extensively reasoned but permissions are not.

This however does not mean that the assessment of the compatibility with the legitimate interest of the Institution is not correctly examined when an unconditional approval is given. The Commission is therefore open to consider giving further explanations in these cases.

However, the Commission considers that to follow the suggestion to explain, in the final decision of the Appointing Authority, the different views held by the different services involved, would not be appropriate, as the Appointing Authority is empowered to take such decisions on behalf of the Commission as an institution.

**5) Clarifications from applicants**

The Commission agrees with the Ombudsman that where it requests and receives additional information from the applicant, this should be part of the relevant file. Indeed, this is the Commission's constant practice. Where the Commission has not considered it necessary to obtain supplementary information, the Ombudsman now suggests this should be explained in the authorisation decision with a view to showing why the Commission considers that the decision is nevertheless well-founded.

The Commission fully embraces its obligation to give reasons for its decisions, and any decision is the result of a check that is referred to in the letter addressed to the applicant to justify the unconditional authorisations. Indeed, the extensive consultation process (and the

corresponding opportunity to ask for further information at any time) gives a good assurance that all services concerned have all the information they need for a final assessment.

**6) "Self-imposed" conditions**

The Commission agrees with the suggestion by the Ombudsman to include systematically the "self-imposed" restrictions in the authorisation decision, thus demonstrating the Commission staff members' commitment to avoid any inappropriate situations or not to deal with certain matters or certain files.

**7) Time limit for imposing conditions or forbidding an activity**

The Ombudsman queries whether Article 16 must be interpreted in a way whereby it is only during the two-year period of Article 16, second indent, SR that the Commission can prohibit or restrict any activity, underlining that the obligation under Article 16, first indent, is not limited in time. The Ombudsman requests the Commission's views on this, including addressing the changes that have come into force with the revised SR in Article 16, third indent, in particular the 12 months period during which lobbying or advocacy activities by former senior officials are in principle prohibited.

Article 16, first indent, SR foresees that after leaving the service, a former staff member continues to be bound by the duty to behave with integrity and discretion. Article 16, second indent, SR aims at ensuring that the institution can assess the compatibility of envisaged post-service activities with the legitimate interests of the institution, during a period of two years after leaving the service, before the activity is taken up. Paragraph 2 is more restrictive in this regard than paragraph 1 because it subjects the right to work to an *ex-ante* notification procedure.

Only in cases where the activity envisaged is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the service, the Commission may, having regard to the interests of the service, impose conditions or even forbid the activity. It follows that any interpretation of Article 16 must be restrictive when it comes to limiting or prohibiting an envisaged activity.

The two years' period in Article 16, second indent is based on the understanding that after a lapse of two years, any detailed insider information that a former staff member may have had is outdated by the course of time and thus no longer valuable or "harmful". To be noted that even in highly specialised private sector jobs, any "non-competition clause" upon leaving this job is rarely extended beyond one year.

If a former staff member takes up an activity after two years which is in breach of Article 16 (1), this can still lead to disciplinary sanctions *ex-post*.

In addition, former staff members continue to be bound by the obligation of Article 17, first paragraph, SR to refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public, and by Article 339 TFEU.

A 12 months period prohibiting "lobbying/advocacy" for senior managers is now enshrined in the new Article 16, third indent, SR. Indeed, within one year many changes can occur, and

after one year, attempts to "call in favours" from former colleagues will be less likely to occur, *inter alia* due to staff mobility in the institutions. In addition, in accordance with the Code of good administrative behaviour, Commission staff members have an obligation to respect the principles of non-discrimination and equal treatment which forbid giving any preferential treatment to former colleagues, including former senior management.

**8) Independence of assessment**

The Ombudsman queries the independence of assessment for senior staff which could be put in doubt because at present there does not appear to be a system for ensuring that the assessment of senior staff files is carried out by services unconnected with the Directorate-General concerned. The Commission recalls that it is not only the Directorate-General concerned which assesses the compatibility of post-service activities of senior staff, but also unconnected central services, namely DG HR, the Secretariat-General and the Legal Service.

However the Commission recognises the validity of the Ombudsman's concerns as regards the Directorate-General of a high ranking staff member. It is for this reason that while it has already been done in the past in relevant cases, DG HR is now requesting a written confirmation of the views of the Commissioner's cabinet responsible for the Directorate-General concerned.

In view of this additional consultation, and of its overall comprehensive assessment of any file, the Commission sees no need to create a supplementary external Committee to deal with applications from high-ranking civil servants.

**9) Asymmetry in substantive assessment of cases - conditions**

Various Directorates-General have developed certain "policies" over time in relation to post-service activities. Work in some services is indeed focussed on cases, in others on policy issues, in yet others on purely internal support functions. The final decision under Article 16 is taken by DG HR empowered to this effect, in close cooperation with the Secretariat-General and the Legal Service which thus play an important role in ensuring global coherence and a consistency of approach. This is done with due respect for the expertise of the other services involved.

DG HR is conscious of the above-mentioned developments and, in close and reinforced contact with the ethics correspondents, is fostering coherence in the treatment of similar cases throughout the Commission. This subject was also raised and discussed during the recent ethics week.

**10) Code(s) on ethics and integrity**

The Ombudsman refers to the Code on Ethics and Integrity that has been produced by DG COMP for its staff and wonders if other codes exist or if the DG COMP Code could serve as a benchmark.

The Commission recalls that DG HR has recently published its new Practical Guide on Ethics and Integrity. This Practical Guide provides for a general overview of the rules and practices related to ethics provisions and what staff should observe. At the same time, having regard to their particular situation, Directorates-General may and even should where appropriate lay

down clearer guidance for their staff in relation to their specific environments. Some Directorates-General have indeed elaborated such codes. In order to ensure coherence throughout the Commission's services, these Directorate-General-specific codes/guidelines must be approved by DG HR, the Secretariat-General and the Legal Service before their adoption by the relevant Directorate-General.

The Code elaborated by DG COMP is indeed a very good one, well adapted to the needs of a Directorate-General which is characterised by individual cases involving extremely sensitive and confidential business information whose inappropriate divulgation would have far-reaching financial and social consequences. Other Directorates-General which have a similar type of individual case work have also elaborated codes based on the same principles. In some other Directorates-General, due to the nature of their work, such rules cannot be set up or would make no operative sense. Examples could be the work in human resources, where by definition there are no individual business-related cases such as in DG COMP. Another example would be that of a staff member dealing with the Commission's internal IT infrastructure, someone responsible for horizontal coordination and so on. Clearly, in such cases which are numerous, other parameters will need to come into play. Although the Code elaborated by DG COMP is excellent, by the very nature of that Directorate-General's specific activities, it cannot be applied across the Commission.

In addition, the Commission recalls Internal Control Standard No 2 "Management and Staff are aware of and share appropriate ethical and organisational values and uphold these through their own behaviour and decision making". This requires that the Directorates-General have procedures in place – including updates and yearly reminders – to ensure that all staff are aware of relevant ethical and organisational values, in particular ethical conduct, avoidance of conflict of interest, fraud prevention and reporting irregularities – having regard to the DGs specific activities and risks. Directorates-General have been encouraged to include training on ethics in their annual learning and development plans.

**11) When learning about a new occupational activity from a source other than the official concerned**

Currently, when the Commission receives such information, it firstly verifies the situation of the former staff member: the date of leaving the service, status (for example former official, or contract agent having had access to sensitive information – which would make that contract agent fall under the obligations contained in Article 16 SR), and the starting date of the activity in question. Based on this information, the Commission contacts the former staff member inviting him to notify his activity. In the past, when the activity in question was found to be compatible with the rules on the substance of the case, after having gone through the procedure under Article 16, an authorisation was granted. In recent years, while still inviting the former staff member concerned to notify his activity, and deciding on the merits, the file is also submitted to the service in charge of possible disciplinary follow-up in view of the violation by the former staff member of his statutory obligation to inform the Appointing Authority of his new activity *before* engaging in it. This disciplinary follow-up is now ensured in each and every case and the former staff member is informed that an authorisation with effect for the future is without prejudice to a possible disciplinary follow-up.

## 12) Changes to the SR

The legislator has not changed the rules already in force, but has complemented them with new elements that enhance the existing set of rules.

As before, the declaration form filled in by the former staff member concerned will be assessed in the way and in the procedure detailed above. Particular attention will be paid to the nature of the activity – as a rule, senior management will be subject to the specific "cooling off" provisions newly introduced in Article 16, third indent, of the SR.

As regards the declaration form to be filled out by a new recruit, this is firstly assessed by the recruiting service. If an actual or potential conflict of interest is identified, the recruiting service has to motivate this opinion. The recruiting service may also describe the measures which could be taken to mitigate the negative effects of the actual or potential conflict of interest and explain how the measures proposed are proportionate to the scope of the actual or potential conflict of interest. In the next step, the Appointing Authority (DG HR as a rule) performs a similar assessment. If the Appointing Authority considers that there is indeed a risk of conflict of interest, it consults the appropriate specialised services in DG HR for their opinion. If there is a real or possible conflict of interest, the Appointing Authority must explain this in a duly reasoned opinion and decide on the appropriate measures, such as envisaging another post for the candidate.

## 13) Transparency

The revised Article 16, fourth indent, of the SR states that *each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed.* That provision envisages the annual publication of *information on the implementation of the third paragraph, including a list of the cases assessed.* Such information and list will disclose summarised information, having due regard to the legislation on the protection of personal data. This obligation applies to all European institutions and agencies.

## 14) Contract staff with access to sensitive information

In accordance with Article 22(1), second sub-paragraph, of Commission Decision C(2013)9037 of 16.12.2013 on Outside Activities and Assignments which replaces Commission Decision C(2004)1597 of 28.4.2004, only those contract staff who have had access to sensitive information shall be subject to the obligation of notifying an activity under Article 19 of that Decision. Such access is to be assessed by the relevant service, as they are the best placed to evaluate the situation. The service in which the contract agent was employed is therefore called upon to determine whether the work in which he has been involved at the Commission could lead to a conflict with the legitimate interests of the institution, given the nature of the information to which that agent had access during the term of the contract.

In order to ensure the protection of the institution's interests, this exercise must be carried out on a case-by-case basis, taking into account the exact responsibilities of the contract agent in question and the interests of the institution in the domain in which the contract agent was working. In this context it should be underlined that the majority of contract agents work in support functions where they would not have access to sensitive information.

**15) Penalties**

As a preliminary comment, the Commission would underline that the number of penalties imposed is not a relevant indicator of the level of ethical standards in the Commission. A high number of sanctions could not be seen as a reliable indicator of high ethical standards, since it would rather show that many breaches of the rules have occurred. Conversely, a low number of sanctions could mean either that there are only a few breaches or that breaches are not sanctioned. The only meaningful indicator is whether breaches that have occurred are identified, assessed and sanctioned appropriately.

Sanctions have to be proportionate and must be based on the merits of individual cases.

In 2010, one disciplinary case involving an activity during CCP was opened. This case was closed in 2011 with the disciplinary penalty of a reprimand.

In 2012, one disciplinary case was opened and closed involving a failure to comply with the formal requirements as set out in Article 16 SR, leading to the disciplinary sanction of a reprimand. Since 2013, two other cases have been closed with a disciplinary penalty of a written warning and a reprimand, respectively.

**16) Temporary agents and contractual agents**

Pensions can be reduced for all former staff, officials, temporary agents and contract agents if they receive a pension.

If a person has left the institution and there are no longer any links between the institution and the person, such a possibility does indeed not exist, but such a possibility does not exist in any other public or private organisation either unless the activity is prohibited by general law.

Nevertheless, there are certain other options that will have a deterrent effect. In this context, it should be noted that even a moral sanction (written warning or reprimand) does have a strong incentivising effect to comply with the rules, as this sanction is communicated to the former Directorate-General of the person concerned and therefore may entail a reputational risk for that person. Penalties can also have an impact on future recruitment possibilities in the institution.

## VI. CONCLUSION

The Commission considers that the complainant's allegations of maladministration are unfounded. Ethical issues are of the utmost importance to the Commission, and this particular area has been continuously reinforced over the years with several significant initiatives having been taken in the last five years. The Commission is confident that it has a comprehensive set of rules that is correctly implemented, and these rules are constantly being monitored for possible improvement. In addition, awareness-raising and guidance to staff are continuously being further developed. The Commission finds that all it does goes well beyond the practices in many other comparable bodies, institutions, organisation or administrations. The Commission of course remains open to discuss further improvements if and when needed.

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
HUMAN RESOURCES AND SECURITY
Directorate HR.B - HR Core Processes 1: Career
**Ethics, Rights and Obligations**
**The Head of Unit**

Brussels, 14 DEC. 2011
HR.B.1/mms D(2011)

**ALTER-EU**
**Alliance for Lobbying**
**Transparency and Ethics**
**Regulation**
rue d'Edimbourg 26
1050 BRUXELLES

Ref.: Your letters dated 25 October and 24 November 2011

Dear Mr. Hoedeman,

Thank you for your letters dated 25 October (ref: Ares(2011)1180905) and 24 November 2011 (ref: Ares(2011)1273562), to Ms Day, Secretary-General of the European Commission. I am pleased to reply on her behalf.

Your letters concern Mr [redacted] who has been working as a contract agent at DG ENTR until 30/09/2010, and who was recruited on 1/09/2011 as an official at DG ENER.

Initially, your requests were registered as a complaint under the Code of good administrative behaviour (JO L 308, 8.12.2000). After further examination, we have concluded, in agreement with the Secretariat General, that your letters should be treated as normal correspondence and receive appropriate treatment, in accordance with the rules set up by the Code. If you are not satisfied that the present answer complies with the Code, you are of course free to make a complaint under the Code.

Your first letter seems to raise two points:

1) a general question as to why the Commission supposedly did not ensure that contract agents are covered by the provisions of Article 16 of the Staff Regulations and as to the alleged absence of a clear and sensible definition of *'sensitive information'* in Commission Decision C(2004) 1597;

2) a more specific question about how the Commission dealt with the case of Mr [redacted] (i.e. the fact that because it considered that Mr [redacted] did not have access to sensitive information while working for the Commission, it did not consider it necessary that Mr [redacted] seek permission to take up professional activities after leaving the Commission).

./.

Concerning the first point, please note that Article 16 of the Staff Regulations applies to contract agents as well as to officials and temporary agents: see Articles 11 and 81 of the Conditions of Employment of Other Servants.

However, for contract agents, Article 21 of the Commission Decision on outside activities and mandates C (2004)1597 provides that:

*"Only those contract staff who have had access to sensitive information shall be subject to the obligations laid down in Article 18 (2)[1]. Contract staff shall be informed by their service whether Article 18 (2) is applicable on leaving the service."*

When a contract agent leaves, the service in which he has worked informs the agent whether his activities in the Commission are likely to mean that he is subject to the prior notification procedure under the second paragraph of Article 16 of the Staff Regulations.

The service where the contract agent was employed is therefore called upon to determine whether the work in which (s)he has been involved at the Commission could lead to a conflict with the legitimate interests of the institution, given the nature of the information to which that agent had access during the term of the contract. In order to ensure the protection of the institution's interests, this exercise must be carried out on a case-by-case basis, taking into account the exact responsibilities of the contract agent in question and the interests of the institution in the domain in which the contract agent was working.

It is worth noting that Article 339 of the Treaty (TFEU) and Article 17 of the Staff Regulations relate to professional secrecy, even after leaving the service. Although there is no exhaustive definition of 'sensitive information', it can be said that information which is already public or accessible to the public cannot be considered as sensitive information and that information which is not or not already accessible to the public is, in any case, subject to professional secrecy, in particular information about undertakings, their business relations or their cost components.

As such, and to answer your second point, the opinion of DG ENTR was requested as to whether Mr [redacted] had had access to sensitive information in his professional activities in this DG.

DG ENTR examined Mr. [redacted] situation in depth by consulting his (former) hierarchy and concluded that:

- Mr [redacted] first worked in the automotive sector and then on space research.
- The work in these two units was highly technical. Mr [redacted] new functions at Business Europe were of a different nature and did not imply a risk of conflict of interest with his former duties.

./.

[1] Article 18(2) Commission Decision on outside activities and mandates provides that : "For a period of 2 years after leaving the Commission, a former official wishing to take up an assignment or outside activity shall inform the appointing authority. The former official shall in particular provide:

- a description of his activity during his last three years of active service at the Commission;
- a description of the activity that he wishes to take up including information on the position he is to occupy and the expected duration of the activity;
- the name, address and telephone number of the potential employer;
- the employer's fields of activity;
- the links with his former functions in the Commission, if any.

To this end the former official will fill in and file with the Commission the application form provided by the Appointing Authority.

- In addition, neither of the two units has been involved in granting subsidies to Business Europe and, in any case, Mr [redacted] was never involved in decisions on allocation of funds.
- Mr [redacted] has been transparent about his intention to work for Business Europe after leaving the Commission. He informed his superiors (his Head of Unit and Director) before accepting the job offer from Business Europe. The hierarchy therefore had all the elements to assess whether or not Mr [redacted] needed to apply for permission to exercise a professional activity after leaving the service, in accordance with the provisions of Article 21 of the Commission Decision on outside activities and mandates mentioned above.

In view of this, the former hierarchy of Mr [redacted] considered that his activities after leaving the Commission did not create any conflict of interest with the Commission. This view remains unchanged.
Article 16 of the Staff Regulations and Article 21 of the Commission Decision on outside activities and mandates, as correctly interpreted, have been fully complied with.

Concerning your further inquiry dated 24 November 2011, please note that Mr [redacted] went through the standard recruitment process. After successfully passing a selection procedure he was interviewed by a selection panel and was offered a position in DG ENER on the basis of his education and professional experience.

Like any other official or agent, Mr [redacted] is bound by the Staff Regulations, including the provisions in Title II "Rights and obligations of officials". The fact that he worked for Business Europe before joining the Commission does not in itself constitute a conflict of interest and I note that you do not suggest any way in which that mere fact could amount to a conflict of interest. After his entry into service, he no longer had any contractual obligations towards that organisation and the assumption that Mr [redacted] might have some "personal interest" which could impair his independence in the performance of his duties, is gratuitous and unfounded. I note that you suggest no reason for thinking this, beyond the mere fact of the previous employment itself.

Should Mr [redacted] in the course of his professional duties, be faced with a potential conflict of interests or a risk of conflict of interests, or any similar situation, like any other former official or agent, he has an obligation to inform the Appointing Authority which will consider whether any steps needed to be taken pursuant to Article 11a of the Staff Regulations.

I hope that this information answers your concerns in relation to this matter,

Yours sincerely

[redacted]

Thinam JAKOB

cc: Donatienne Claeys Boùùaert, SG B 4

EUROPEAN COMMISSION

Cabinet of Vice-President Maroš Šefčovič
Head of Cabinet

Brussels, 21 FEV. 2012
CL/gs ARES (2012) 196143

**Subject: The Staff Regulations and post-public sector employment**

Dear Mr Hoedeman,

Thank you for your letters dated 24 November 2011 and 17 January 2012. As suggested in the latter, the Commissioner has asked me to reply on his behalf to both letters.

Let me address the different points raised in your letter of 24 November, taking them one by one. When necessary I have added additional information related to your second letter.

## 1. ARGUMENTS RAISED IN YOUR LETTER

- The Commission does not agree that the rules imposed by the Staff Regulations (SR) are "weak". They are fully effective and correspond to the current practice in Member States and international organisations. The Commission applies the same approach as recommended in the recent publication of the OECD from 2010[1] concerning the "cooling-off" period where it is clearly stated that the "cooling-off period" should be "proportionate to the gravity of the post-public employment conflict of interests threat that officials pose". In the light of the principle of proportionality, the Commission considers that the case by case analysis of any possible conflict of interest as far as the requests under Art 16 of the SR are concerned is the most appropriate.

ALTER-EU
The Alliance for Lobbying Transparency and Ethics Regulation
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[1] "Post-Public Employment – Good Practices for preventing conflict of interests", OECD, 2010

As far as monitoring is concerned, the Commission finds that the principle of proportionality should also be applied to this issue. If a breach of the rules occurs, appropriate disciplinary measures can be applied ex post, which will surely have a deterrent effect on others. The Commission also favours and promotes individual staff responsibility.

- It is not true that the SR rules concerning obligations and particularly Article 16 do not cover staff members on temporary contracts. Analogous rules apply to temporary and contract agents[2]. However, a distinction is made in practice between the two groups: For temporary agents the obligations stay the same as for officials. As for contract agents the Commission considers that in general they do not participate in decision-making or have access to sensitive data. As a consequence a specific provision takes account of that. Due to the principle of proportionality and according to the Commission decision on outside activities[3], only those contract agents who exceptionally have access to sensitive data are submitted to the obligations of Art. 16 of the SR.

- Likewise, in regard to the issue of scrutinising all staff joining the EU institutions for potential conflict of interests, please note that your concern is already covered by Art. 11a of the SR which provides appropriate rules to deal with "potential conflict of interests between their old job and their new EU role" and foresees the possibility to relieve an official from his/her responsibility in the case of conflict of interests. In addition, the submission of a CV is part of the recruitment procedure and I fail to see what else an institution could do to "scrutinise" staff apart from requesting a CV and the character references required by Article 28 of the Staff Regulations.

- In the same vein, it is out of the question to publish on line a list of cases under Art 16: the majority of cases analysed under Art 16 of the SR do not raise a "revolving doors" issue and you have provided no reason whatever for thinking otherwise. A former official, and especially a former contract agent or temporary agent unquestionably has in principle the same right as any other citizen to pursue a professional activity of his or her choice after leaving the service when the envisaged activity does not lead to a conflict with the legitimate interest of the institution. Any restrictions on that fundamental right have to be strictly limited in time and nature, pursuant to the principle of proportionality and have to be based on demonstrable concerns credibly linked to the person's previous role in the institution. Furthermore, this kind of publication would be manifestly contrary to the relevant data protection rules.

- With regard to Commission staff, I have to reject your suggesting that some former EU staff may be using their time in the office to negotiate future private sector roles and may be in situations of conflict of interest. You provide no evidence whatever for this vague and unsubstantiated allegation. The Commission firmly believes that its staff is fully committed to its work while in the office and perfectly aware of its obligations with regard to conflicts of interst. If you have

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[2] Article 11 and 81 of Conditions of Employment of Other Servants of the European Union

[3] Commission Decision on outside activities and assignments C(2004)1597 dated 28/04/2004

any actual evidence of wrongdoing, I would invite you to provide it to me; if you do not, you should refrain from making generalising comments of this kind. With regard to evidence concerning staff of other institutions, I would urge you to do the same and contact these institutions so that they are able to examine the allegations and take appropriate measures if necessary.

- When analysing requests of its staff under Art 16 of the SR, the Commission applies an appropriate assessment of any potential, apparent or real conflict of interests. The requests are submitted to the relevant services in order to assess in the broadest possible manner any possible conflict of interests from different points of view.

- As regards the allegation that decisions are taken on the basis of incomplete information, the Commission underlines that it is a legal obligation of every former staff member to provide sufficient information in their declaration. Should the Commission have any doubts, it can ask additional questions and even open an enquiry if needed.

- The rules are mandatory. The Commission organises training on ethics issues (obligatory for newly recruited staff, presentations of Art 16 for retiring staff, etc), has a dedicated website and undertakes different awareness raising actions. Any breach of rules may result in disciplinary sanctions, even for former members of staff.

  The relevant disciplinary procedures are handled by the Investigation and Disciplinary Office of the Commission (IDOC). The available sanctions are set out in Annex IX to the Staff Regulations and, specifically for former members of staff, they include the possibility of reducing the pension rights of the person concerned for a given period. To date, no cases of breaches of Article 16 have been referred to IDOC that would warrant a disciplinary sanction of this severity.

  Should facts be relevant under criminal law, national law enforcement authorities can investigate the case.

- Taking into account the specific situation/environment of each EU institution, it is absolutely logical that each EU institution/body has its own implementing rules concerning Art 16.

Evidently, in a changing environment, any rule can be subject to modification and as mentioned in our letter of 20 December, in the light of ongoing experience internal procedures are regularly under revision. Nevertheless, taking account of the above and conscious that the current rules correspond to the recommendations of OECD in this respect, the Commission considers that the rules provided in the SR are sufficient to cover the risk of conflict of interests and provide all institutions with sufficient tools to defend their interests. Therefore, the Commission does not see a need to revie the SR on this issue.

## 2. INDIVIDUAL CASES

Furthermore, with respect to the individual cases mentioned in your report, I would like to share with you a few additional remarks. Given the restrictive nature of Article 16, every measure needs to be justified on a case-by-case basis and by analysing which

specific interest of the institution is concerned. The mere fact that someone leaves an institution to work for another employer in his or her field of expertise does not qualify as a conflict of interest as such.

From our point of view it should be taken into account that in many cases there is no need to impose a cooling off-period as the new tasks have no link with the previous assignments of the former staff member in the Commission. It should also be observed that some deontological rules of private professions, for instance lawyers, are similar to those laid down in the Staff Regulations. It is hard to imagine how a situation of conflict of interests could arise, without breaching the core of both deontological orders. Very often the simple respect of basic rules is sufficient to avoid any conflict of interests. This is what happens all the time in the private sector when persons change jobs while remaining in their field of expertise. You also seem to disregard the fact that members of staff who are on temporary contracts are, by definition, recruited because of their professional competencies and should be able to work in the same domain after leaving the Commission – which means that the measures taken to ensure the absence of a conflict of interests must be proportionate to the aim they seek to achieve.

## 4. ACCESS TO DOCUMENTS

Regarding the possibility for any citizen to request access to documents under Regulation (EC) No 1049/2001, you claim that the Commission's approach in releasing documents related to the application of Article 16 SR is inconsistent.

Documents in this area contain by definition personal data in the meaning of Article 2(a) of the Data Protection Regulation[4]. According to Article 4(1) (b) of Regulation 1049/2001, access to documents is refused where disclosure would undermine the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. In its judgment in the Bavarian Lager case, the Court of Justice has ruled that, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. This means that, unless the person concerned has given his or her unambiguous consent to disclosure of his or her personal data, the necessity of disclosing these data must be established without there being a reason to assume that the legitimate rights of the person concerned may be prejudiced.

Since, in accordance with Regulation 1049/2001, each request for access is assessed individually on its own merits, the assessment on disclosure may lead to a different result in each case.

[redacted]
Juraj Nociar

[4] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8 of 12.1.2001, p. 1