Brussels, 26 June 2014

Ms Emily O'Reilly
European ombudsman
I, avenue du Président Robert Schuman
B. P. 403
F-67001 STRASBOURG Cedex

Re: 2077/2012/TN

Dear Ms O'Reilly,

Further to the letter dated 21 May 2014 from Fergal O'Regan, I am pleased to provide substantive comments on the exchange of correspondence which you have had with the European commission on our complaint: 2077/2012/TN. I write on behalf of all four complainants in this case: Corporate Europe Observatory, Greenpeace European Unit, LobbyControl and Spinwatch.

Our comments are structured as follows:

A. The commission's understanding of conflicts of interest
B. Additional cases
C. Our comments on your 16 points
D. Conclusion

A. The commission's understanding of conflicts of interest

We can agree with the commission that we have a different understanding of how to interpret conflicts of interest. Our major concern continues to reside with what we consider to be the commission's overly narrow view of the risks of potential conflicts of interest resulting from revolving door cases and its duty to prevent them from occurring wherever possible.

The commission appears to characterise our concerns about the risk of conflicts of interest arising from revolving door moves as “abstract allegations, personal views, innuendo or disagreement with policy orientations of the institutions in certain policy areas...” (page 2).

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Yet in the 20 plus pages of its response to your letter of 28 November 2013, the commission fails to recognise the problem of policy capture that might arise from revolving doors moves. As we phrased it in our initial submission to your office:

"...policy capture can be so subtle that it is not easy to prove in a factual way. It can take place via the sharing of: confidential information (which is separately regulated under the Staff Regulations); crucial insider know-how about how internal policy-making systems and processes work; useful contacts and networks which enable lobbying to take place on the basis of pre-existing relationships and knowledge; pre-existing sympathy for, and insights into, a particular organisation's or sector's interests; using previous status or authority to unduly influence their former staff and / or colleagues on behalf of their new employer or clients. These are all ways in which the revolving door can benefit a specific interest, company or sector over and above other companies, industries or interests, including the public interest."

As you have publicly said, this can be "damaging to the public trust and potentially to the public purse [when], poor supervision of potential conflicts can lead to the abuse of information by senior officials whose networks and insider knowledge of the key commercially sensitive areas of EU work are highly valued by private commercial firms."[i]

In our view the commission has yet to fully recognise the risks associated with this aspect of the revolving door, as the series of additional cases below indicate.

As a related point, we think that the commission does not take enough account of the potential of indirect lobbying when it considers specific revolving door cases. Sometimes the commission might ban a former official from having direct contact with his former DG, or from working on dossiers or even policy areas for which he had previous responsibility, for a limited period of time. But when that former official is working for a lobby consultancy, or in a role closely related to EU affairs, and has many years (even decades) of experience behind him, the commission seems to ignore the probability that the former official would be left free to advise employers or clients on how best to make contact with his own ex-colleagues or how to influence dossier X or issue Y, or to abuse his insider information, networks and know-how in other ways.

Of course, it would not be easy to regulate indirect lobbying, but by ignoring its potential, the commission allows a major loophole in its revolving doors policy and practice. The difficulty in regulating this area in an effective way is one of the reasons why we advocate that cooling-off periods or bans on undertaking lobby jobs (rather than trying to restrict the kinds of activities that can be done within lobby jobs) are so important. A cooling-off period or ban on former officials taking these very specific kinds of jobs would provide a far more robust defense against the risk of conflicts of interest.

Furthermore, we continue to think that the commission is too focused on actual or concrete conflicts of interest rather than the risks which could arise from a possible revolving door move. We notice that the commission references the OECD guidelines on conflicts of interest and argues that its own approach is fully compliant with this, but we continue to question whether this is so. We note that the OECD requires a precautionary approach to be taken and that no proof of an actual conflict of interest is required for action to take place.

We find the ombudsman's ruling in the case 0297/2013/(RA)FOR to be particularly relevant here. We note that the ombudsman said:

“It is the prospect, or even the likelihood, that behaviour of a public official could be influenced by private interests, which is central to determining whether a conflict of interests exists. While any concrete example of a conflict of interests actually altering the behaviour of a public official would be very serious indeed, the fact that no such example has been shown to exist is irrelevant as regards whether there is or whether there is not a situation of a conflict of interests.” (para 56)

“As such, it is irrelevant for the Commission to suggest to the complainants that they have not provided any factual element to substantiate a real or apparent conflict of interest … Rather, it is relevant to ask whether the nature of the private interests represented by Member A could influence a decision taken in the context of his role on the Ad hoc Ethical Committee. (para 57-58)

“The mere fact that such risks exist is problematic. It is not sufficient to state that the above potential scenarios have not (yet) occurred. Rather, it is sufficient to note that it is reasonable to fear that they could occur given the nature of role of …” (para 64)

We are well aware that the conflicts of interest situation that the ombudsman assessed in relation to case 0297/2013/(RA)FOR is not identical to the revolving door cases with which we are concerned here. However, we think the ombudsman's view is an important indication of the approach that the commission should take when assessing all conflicts of interest scenarios. This is that institutions should act to limit the risk or potential of a conflict of interest from occurring. The commission should not be naïve about how contacts between current and former members of staff can take place and how seniority and status of ex-officials can be a factor in how public officials respond to their approach. The commission should adopt the precautionary principle when it comes to managing the risk of conflicts of interest, whilst being proactive and probing when faced with applications for authorisation.

We note that on 21 January 2014 in a written answer to the European parliament's budgetary control committee, the commission told the parliament that “The Commission does not share the assessment made by the European Ombudsman concerning the potential risks of conflict of interest deriving from Mr [redacted]'s other activities”, referring to case 0297/2013/(RA)FOR. This would indicate that the commission has not yet updated its understanding of conflicts of interest in the light of your recent ruling. In our view this complaint offers you the opportunity to make further comments in this regard.

B. Specific cases

As the commission has not entered into any detail on the specific revolving door cases involving commission staff that we had provided in our original response, we will not comment further on these. Nonetheless, we stand by these cases and what they illustrate about the way in which the commission implements, or fails to implement, the revolving door rules. We

are aware that these cases are now several years old and we note that in its response the commission appears to admit that during 2010-12 the "full procedures were not followed" in several cases and that procedures have since been tightened.

Below we provide summaries of six additional and far more recent revolving door cases which further illustrate our contention that there remains a systemic and ongoing problem within the commission when it comes to the assessment of conflicts of interest relating to the revolving door.

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

C. Our comments on your 16 points

We are pleased to set out below our responses to the 16 points which you put to the commission.

1) The procedures
2) Documentation of steps followed

Since our initial complaint was made to you in October 2012, the commission appears to have revised some of its internal guidance and training. We are not in a position to evaluate the effectiveness of these revisions, but improvements are clearly to be welcomed, such as a new system to repeatedly remind retired officials of their ongoing Article 16 duties. However, there is no room for complacency as the specific cases detailed above illustrate, and the commission's renewed activity does not replace the need for an overhaul of the way in which the commission views and assesses the risks of conflicts of interest.

We further note that the commission does not mention the monitoring of revolving door cases. We think this is an important area which the commission should develop. Particularly when conditions are applied to authorisations for departing staff, how are these monitored: is the commission pro-active in this regard, especially for the most senior ex-officials? Can former officials be reminded of their obligations and conditions at regular intervals? If conditions are applied which relate to an official's former DG, is the DG regularly reminded of these? How are current staff (including those who joined the commission prior to January 2014) reminded to regularly review and declare any risks of conflicts of interest? How are staff with declared risks monitored to ensure that these risks are not affecting the official's work? These are some of the questions which we think the commission could usefully answer.

3) Centralised register

A recent access to document request revealed that the commission continues to fail to maintain a central database of revolving door requests and thus is unable to provide information on how many requests have been received and how many have been approved; rejected; or approved either partially or conditionally.[ii] This makes external monitoring of this area very difficult and the commission's failure to maintain such a list creates the impression with us that it chooses not to do so in order to prevent external oversight and transparency in this area.

We therefore strongly agree with you that there should be a centralised register of all incoming and outgoing cases. As we set out in our initial complaint, this would allow the identification of revolving door trends, would aide monitoring and compliance, and would promote a consistency of approach. Such a register should also be checked during the recruitment process of new staff, to ensure that during any previous employment in the commission, the revolving door rules were correctly followed. The commission's arguments against the central register (namely that the parliament has not demanded it and that no member state has such a register) are not good enough reasons to oppose it.

4) Reasoning of approvals

We agree that positive decisions should be accompanied by an explanatory reasoning (in the way that negative decisions are) and that DG HR (as the 'appointing authority') should give an explicit explanation if it chooses not to follow advice received. In our view, this would help to ensure that the commission is accountable for its decisions in these important matters. This information should be stored in the centralised register referred to above.

5) Clarifications from applicants
We agree that decisions should be made based on the fullest information and that all information gathered should form part of the official file for each case. Whilst clarifications should be sought where necessary from applicants, we remain of the view that it is also reasonable to expect the commission to undertake its own research to support the assessment of a case: looking at employers' websites; looking at entries on the EU's transparency register; where appropriate, asking for lists of clients etc. As clearly stated in our original complaint, we think that the commission should be far more proactive and probing when it receives a request for authorisation, to ensure that it has the fullest possible picture before it takes decisions. All of this information should ultimately form part of the case file.

6) "Self-imposed" conditions
We agree that self-imposed conditions should always be incorporated into the formal decision by the commission, otherwise there will be a risk that they are 'fine words' aimed at securing an authorisation for a role but which are not followed in practice. However, we also consider that the commission should look very critically at self-imposed conditions and should always ensure that they do not involve loopholes or gaps ie. such as the differentiation between direct and indirect lobbying mentioned above. If they do, the commission should impose additional conditions to close the loopholes.

7) Time limit for imposing conditions or forbidding an activity
We agree with the ombudsman's view that the first paragraph of article 16 of the staff regulations is not time-bound in requiring former staff members to act with integrity. As a result, the commission has the power to prohibit or impose conditions on activities beyond the initial two years, provided there is good reason to do so. With the [redacted] case, the commission refused authorisation during the first two year period and then gave a conditional authorisation after that. We consider that in this case the commission could and should have maintained its refusal to authorise this role after the two years because of the high risk of conflicts of interest. In our view, the requirement to tackle the risk of conflicts of interest and to implement the initial paragraph of article 16 are paramount. Assuming that this view is accepted, questions of how the commission can implement this and monitor relevant cases beyond two years will need tackling.

8) Independence of assessment
We strongly agree that there should be an independent, external assessment of cases, especially those involving senior staff. The commission's argument that it now seeks the views of the commissioner's cabinet in the DG concerned does not address this point and the commission's system still relies entirely upon colleagues forming a 'judgment' on each other. Under the current system, it would be surprising if officials were not at least aware that the views they express on particular cases could limit their own future post-commission career options. Independence of assessment (and by that we mean real independence and not simply the views of former insiders and ex-officials) is a crucial issue. We would propose that an independent committee of administration experts from the member states is formed to oversee the assessment of revolving door cases and to make decisions.

9) Asymmetry in substantive assessment of cases - conditions
We agree that there is an asymmetry across cases which should be tackled. In our view a centralised register would aide the task of consistency, notwithstanding the fact that all applications should be assessed on a case by case basis.

10) Code(s) on ethics and integrity
We agree that the DG competition code on ethics is the strongest that we have come across. We have also seen the updated "Practical Guide to Staff Ethics and Conduct" produced by DG HR. While we understand that this is a sign-posting document aimed at summarising all staff obligations, we continue to think that for commission staff to really get to grips with their responsibilities regarding conflicts of interest, that far more explanation is required as well as realistic revolving door case studies which can help staff to really understand what is and is not appropriate.

11) When learning about a new occupational activity from a source other than the official concerned
It is good to know that the commission now considers disciplinary procedures in every case where there is a failure to notify the commission about a new external activity in advance. It is clear that this was not the case in the past. However, we continue to have some reservations about how proactive the commission is in following-up on external information about possible revolving door cases.

In October 2013, investigative journalists at the New York Times alleged that a US law firm with an office in Brussels (Covington & Burling) had recently "expanded [the] lobbying team there [and] have delivered at least four senior European Union policy makers to the firm's doorstep in recent months, including a top energy official, who arrived in September with a copy of a draft fracking plan that has yet to be made public".[iii] Via access to documents and correspondence, Corporate Europe Observatory sought clarity from the commission on the extent to which it had followed-up on these allegations. Ultimately, Catherine Day told us that "DG HR colleagues have followed up to the extent of checking whether any former Commission official is listed as working for Covington and Burling but no such name could be found".[iv] This was a welcome step, although it is not clear if this happened proactively as part of a recognised commission procedure or whether it only occurred as a result of several requests from CEO. But it would also have been a reasonable step for the commission to contact Covington & Burling directly to discuss the allegations, to ask for the names of the individuals referred to and to investigate the situation accordingly, particularly in relation to the (then) unpublished document on fracking. It appears that this did not happen.

12) Changes to the Staff Regulations and incoming staff
Since our complaint to you in Autumn 2012, the staff regulations and specifically the articles covering the revolving door have been revised and updated practices are in place. It is too early to assess the impact of these. However, it is worth noting that the commission did not

choose to revise the rules in this area itself; the changes made were introduced by the European parliament. The changes are imperfect and while they represent a small step forward in the regulation of the risk of conflicts of interest, we consider that they represent a minimum baseline. Best practice would indicate that the commission could and should go further.

In relation to incoming staff, it appears that there is now a more systematic assessment of possible conflicts of interest which applies to all incoming staff and staff returning from sabbatical. This is to be welcomed and we look forward to your assessment of the new procedure. It will be important that such a process is applied when staff change roles within the commission too. Additionally, we consider that in guidance to staff on this matter, the commission should make explicitly clear that when article 11a (1) of the staff regulations refers to “any personal interest ... and, in particular, family and financial interests” that this should include previous employers and / or clients where relevant. This clarification would be important for both staff completing the form and for those who have to assess it.

13) Transparency

It remains the case that it is not easy to get information from the commission about its handling of revolving door cases; see the [redacted] case in particular. As stated above, we consider that the staff regulations represent a minimum baseline, and particularly in the area of transparency, the commission could pro-actively go much further. We agree with the ombudsman that information should be published regularly (not just once a year), and that all applications (either for sabbaticals or for new activities) should be covered, and for all senior officials. We note that there is precedent for this in that the UK government publishes a list of revolving doors cases involving former senior officials and ministers.[v]

We have noticed that requests for authorisation to undertake a sabbatical only receive commission approval on condition of “the official's consent to the Commission making his name, position in the undertaking, and the name of the undertaking for which he intends to work, publicly available”.[vi] We suggest that such a rule is adopted for all senior revolving door authorisations and that all of this information, alongside the detail of the authorisation (and any conditions applied), is proactively published on the commission's website.

14) Contract staff with access to sensitive information

We know that a significant proportion of commission staff are contract staff and thus are not automatically covered by the revolving door rules. This remains a major loophole in the commission's revolving door policy and practice, as indicated in the case of [redacted] mentioned earlier, where no conflicts of interest assessment took place on a potentially serious revolving door move. We continue to argue that the commission does not have an adequate definition of “sensitive information” and we consider that it should be interpreted to at least cover all contract staff involved in decision-making, policy-making or legislative processes. The commission argues that “the majority of contract agents work in support functions”. But even assuming that this is true, the sheer numbers of contract agents will still mean that a significant number work in non-support and potentially influential roles.

Furthermore, we consider that the approach that the commission has set out in its response to you reveals a flaw in the way that it handles this issue. In the absence of any information about the future work of the contract agent outside of the commission, it seeks to make an assessment as to 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 our view it would be impossible to fully assess the risk of future conflicts of interest without knowing about the contract agent's future work.

To sum up, we consider that a far broader definition of “sensitive information” is required and that such an assessment should take place within the context of information about a contract agent's future work plans.

15) Penalties

We agree with you when you told the parliament's budgetary control committee that the commission has a “reluctance to impose sanctions” for breaches of the revolving door rules. In our initial submission to you we indicated a range of cases where breaches of the rules had occurred with little or no penalty. The commission implies it takes a more rigorous approach now; we have several comments to make on this.

Firstly, we note that the ultimate sanction (affecting pension rights) has not been used by the commission in this area. For confidentiality reasons regarding these cases, we are unable to comment on whether this has been the correct approach or not, but we would advocate its use when there has been a significant and conscious breach of the rules.

Secondly, one of the purposes of sanctioning officials who have broken the rules would be to deter others from doing likewise. The commission should think through how it can promote its tougher approach, as well as how it can highlight cases where sanctions have been applied, as a way to boost compliance.

Thirdly, a number of cases that we identified in our original complaint involved officials who had started new work (including consultancy or lobby work where there was a risk of conflicts of interest) without seeking authorisation. Nonetheless, these officials went on to receive authorisation for the work; in the future, the commission should not be afraid of applying the rules in these circumstances. It should refuse authorisation in revolving door cases where there is a significant risk of conflicts of interest, even if the official has already commenced the work.

16) Measures and penalties for temporary agents and contractual agents

In the absence of the ability to formally sanction these kinds of staff who have left the commission and breached the revolving door rules, the commission should think through how reputational risk can be used as a deterrent. It mentions that such individuals could suffer reputational risk internally within the commission; serious cases could also be published externally as part of the commission's approach to transparency and deterrence.

D. Conclusion

Overall, we can say that we were rather disappointed to read the commission's response to your letter and our complaint. In a number of places, the commission rejects our points without providing the necessary justification, mis-represents our concerns or provides information which is not directly relevant. It seems clear that while some processes within the commission have recently improved, and the revised staff regulations are now in place, the commission has not adequately addressed some fundamental matters regarding the revolving door and conflicts of interest. The recent cases which we have presented here provide strong evidence that there are ongoing problems with the commission's handling of the revolving door.

As top priorities for this complaint we consider that the commission should:

- Overhaul its thinking and assessment of conflicts of interest, including the need to fully reflect upon potential conflicts, the risks of direct and indirect lobbying, and the threat of policy capture
- Introduce independent assessment of conflicts of interest. We would propose a fully independent and empowered revolving door review committee is set up, but in the interim, an independent advisory committee could do the work
- Introduce a central register and pro-active transparency around incoming and outgoing revolving door cases
- Develop a far more comprehensive way to assess the revolving door moves of contract staff

We also consider that the staff regulations require further revision, to introduce a mandatory cooling-off period of at least two years for all EU institution staff members (and three years for the most senior officials) entering new posts which involve lobbying (or other jobs which provoke the risk of a conflict of interest) and a rule change to ensure that the rules explicitly cover staff working as temporary or contract agents.

As a final note, we would like to take this opportunity to welcome the pro-activity, openness and enthusiasm with which you have treated our complaint in this area. We share your view that this is “a year of major changeover in the EU” and that these are issues not just of ethics but also of public trust. We look forward to hearing from you on your next steps on these important issues.

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Please do not hesitate to contact us if you require any additional information.

Yours sincerely,

Olivier Hoedeman
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Corporate Europe Observatory

On behalf of Corporate Europe Observatory, Greenpeace European Unit, LobbyControl and Spinwatch

i http://www.ombudsman.europa.eu/en/activities/speech.faces/en/53848/html.bookmark
ii Access to document request 2014/1680: http://www.asktheeu.org/en/request/article_16_staff_regulations_app#incoming-4783
iii http://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html?_r=2&
iv Information from letter from Catherine Day to Corporate Europe Observatory dated 1 April 2014.
v http://acoba.independent.gov.uk/former_crown_servants/former_crown_servants_appointments_2012.aspx
vi Commission decision c(2013) 9037 of 16.12.2013 on outside activities and assignments