European Ombudsman

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Mr Jean-Claude Juncker
President
European Commission

Strasbourg, 21/12/2016

Strategic inquiry OI/6/2016/AB concerning the European Commission's rules and practices to prevent conflicts of interest of Special Advisers

Dear Mr President,

On 25 May 2016, I opened a strategic inquiry into the European Commission's rules and practices to prevent conflicts of interest of Special Advisers. The inquiry covers the extent of the examination conducted by the Commission before Special Advisers are appointed, how conflict of interest issues are assessed during their mandate, as well as public access to documents and information about the appointment procedure.

On 7 and 8 July 2016, my inquiry team carried out an inspection of documents as part of this inquiry and I would like to thank the Commission for its cooperation during the inspection. The inspection report has been published on my website[1].

The inspection showed that significant progress has been made by the Commission on certain aspects of the procedure, in particular between 2015 and 2016. Notably, the department of the Commission responsible for assessing whether Special Advisers risk being in a conflict of interest situation have become more prudent in their formulation of Special Advisers' mandates and in drawing up the measures that need to be taken to mitigate risks. I would like to commend the Commission on this improvement, which was partially in response to inquiries by my Office.

I continue to believe, however — after a careful analysis of the inspected documents — that further improvements are necessary. I would therefore appreciate it if the Commission could respond to the following questions on

[1] http://www.ombudsman.europa.eu/fr/cases/correspondence.faces/fr/72884/html.bookmark

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(i) how the procedure for appointing Special Advisers is organised, (ii) the Commission's conflict of interest assessment before the appointment, (iii) the duty to declare new activities after the appointment and (iv) publication of information.

<u>I. Organisation of the procedure for appointing Special Advisers</u>

1 - During the inspection, my inquiry team noted that the timing of the steps within the overall process has improved. I especially welcome the fact that, in 2016, the recommendations of the Commission concerning mitigating measures in the so-called statements of assurance were generally communicated to Commissioners' Cabinets before Special Advisers were appointed. This was not always the case in 2015.

I understand that, according to the Rules on Special Advisers to the Commission[2], "[e]*ach request for the appointment of a special adviser made to DG ADMIN must [...] be accompanied by the following three documents: sworn statements and declarations of activities by the special adviser [...] statement of assurance by the Member of the Commission"*. However, during the inspection my inquiry team noted that the statement of assurance was sometimes signed on the same day as the declaration of activities, or only a few days after, which raises a question about the extent of the examination Commissioners' Cabinets are expected to undertake before the statement of assurance is signed. Indeed, a number of statements of assurance were later amended to take account of the outcome of the conflict of interest assessment carried out by the Directorate-General Human Resources and Security (DG HR, which replaced DG ADMIN).

It would arguably be appropriate to review this procedure so that the statement of assurance is signed only after DG HR communicates its conclusions to Commissioners' Cabinets. This would enable Cabinets to take DG HR's expertise into account and would prevent later changes to the statement of assurance. I would appreciate it if the Commission could respond to this possibility.

<u>II. The Commission's conflict of interest assessment before the appointment</u>

2 - My inquiry team found that the content of the statements of assurance improved significantly between 2015 and 2016 and that the recommendations issued by DG HR to Cabinets had generally been followed in 2016. DG HR also made useful suggestions concerning the scope of the prospective Adviser's mandate. However it seems that, during the appointment procedure, the Commission does not carry out additional independent research beyond what appears in the prospective Special Adviser's CV and declaration of activities.

How does the Commission address the risk of receiving an incomplete declaration?

3 - The files inspected contain just one case in which there is evidence that the prospective Special Adviser was made aware of the wording of the mitigation measures in the statement of assurance before it was signed.

[2] http://ec.europa.eu/civil_service/docs/special_advisers/comm_c_2007_6655_1_en.pdf

Are prospective Special Advisers systematically made aware and asked to approve the statement of assurance and the mitigation measures potentially contained therein before their appointment? If not, would the Commission consider doing so to ensure that Special Advisers are aware of their responsibilities?

4 - My inquiry team also noted that, in some cases, Commissioners' Cabinets initially preferred to use the "A option"[3] in the statement of assurance while adding some mitigation measures. This may be due to the potentially problematic formulation of the "B option", which states that "*notwithstanding the declaration of activities and the sworn statement declaring that there is no conflict of interest, there may be a potential risk for the Commission's good name [...]*".

It is arguably more appropriate to review the current formulation of the "B option" than to continue to accept the incorrect use of the "A option". I would appreciate receiving the Commission's view on this matter.

5 - On several occasions, the Commission used a "B option" in the statement of assurance but did not take into account certain activities considering that "*a purely theoretical link between another activity and the mandate - which could be established in practically all cases where the mandate is very broadly formulated - is not in itself sufficient to exclude the appointment of the Special Adviser or to raise a presumption of conflict of interest*"[4].

It would be useful if the Commission could elaborate on this argument, providing detailed examples of what constitutes a "theoretical link" between the mandate of Special Adviser and an outside activity and what can be regarded as a "specific link".

6 - In a limited number of cases, my inquiry team found that the mitigation measures appeared to be too vague to address effectively a potential overlap between the Special Adviser's mandate and his/her outside activities. For example when a statement of assurance provides that "X *in [his/her] capacity as Special Adviser will not deal with matters linked to [his/her] gainful activities*" or that " *X has agreed not to have any influence on any decisions or matters where a potential conflict of interest might arise. Further, X will abstain, in [his/her] capacity as Special Adviser, from dealing with any issues which have a link with any other assignments [he/she] might be undertaking*."

Could the Commission please comment on this matter?

7 - The Rules on Special Advisers set out that "*throughout the period of their appointment,* [Special Advisers] *may not have direct or indirect contractual links with the Commission other than those arising from their appointment as special advisers*."

Could the Commission give detailed examples of possible links which would be compatible with the function of Special Adviser? In particular, can Special Advisers carry out other advisory functions for the Commission? If so, which ones?

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[3] The statement of assurance includes an "A option" in which the Commissioner confirms that there is no conflict of interest and a "B option" in which the responsible Commissioner declares that "there may be a potential risk for the Commission's good name" but that he/she "is willing to accept this potential risk and also considers it to be acceptable for the Commission as a whole", through mitigation measures.

[4] Commission's reply to letters sent by Corporate Europe Observatory, Ref. Ares(2015)4825607 - 04/11/2015 and Ref. Ares(2015)5066951 - 13/11/2015.

III. Duty to declare new activities during the mandate

8 - The contract signed between the Commission and the Special Adviser obliges the Adviser to inform the Commission of any relevant changes in his/her activities. However, during the inspection, my inquiry team found that the declarations of activity had not been regularly updated in some cases.

The fact that the function of Special Adviser is limited in terms of remuneration and time may arguably have an impact on an individual's diligence in updating their declarations. The Commission could consider reviewing the Rules of Procedure on Special Advisers or their contracts to include the obligation to declare any new position within a **fixed deadline**. Another possible solution would be to send collective emails reminding Special Advisers of their duty to update their declarations of activities each year (calculated from the date of the commencement as Special Advisers).

Could the Commission please comment on how it can ensure that Special Advisers fulfil their obligation to declare any new activity during the course of their mandate?

9 **- When a Special Adviser declares a new activity, does the Commission automatically carry out a new conflict of interest assessment? If not, in which cases does the Commission consider it unnecessary and who takes this decision?**

IV. Proactive publication of information on Special Advisers

10 - The Commission already provides a substantial amount of information concerning Special Advisers, including their CVs, on its website. However, during the inspection, my inquiry team found significant differences in the nature of the Special Advisers' operational situations, from unpaid Special Advisers who work four days per year to remunerated Special Advisers whose tasks can require more than 50 working days per year. In my view, information of this kind in each case would help the general public understand the application of the 'proportionality principle' when assessing potential conflicts of interest.

With this in mind, I would encourage the Commission to include, in the information on Special Advisers it publishes every year, additional information on the number of working days provided for in the contract and whether a Special Adviser is paid or unpaid. Would the Commission agree to do so? If not, please explain why not?

11 - Article 5 of the Conditions of Employment of Other Servants of the European Union (CEOS) defines a Special Adviser as "*a person who, by reason of his special qualifications and notwithstanding gainful employment in some other capacity,* ***is engaged to assist one of the institutions of the Union*** *either regularly or for a specified period [...]*". There is however little information available on the specific tasks non-institutional Special Advisers can be asked to perform (in terms of chairing meetings, representing the Commissioner or interacting with Commission departments for example) nor on the extent of their access to confidential documents. Publishing more detailed information could reassure the general public as regards the nature of their mandates.

I would therefore encourage the Commission to publish information on the range of tasks Special Advisers can be asked to perform and the rules which govern their access to confidential documents. Could the Commission please reply on this matter?

12 - **Finally, with a view to improving the transparency of the process, as well as public trust in the independence of Special Advisers, would the Commission consider proactively publishing the declaration of activities and the statement of assurance of Special Advisers, after obtaining their consent (for example, in the contract signed by the Special Advisers), taking into account that the Commission has always granted full access to these documents in response to access to documents requests?**

We would be grateful to receive your reply to these questions and queries by 31 March 2017.

Should your staff have any queries concerning this inquiry, they may contact Ms Alice Bossière (+ 32 2 283 34 01), strategic inquiries officer at the Ombudsman's office.

Yours sincerely,

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European Ombudsman