FINAL

Comments of the Commission on a request for information from the European Ombudsman
- Strategic inquiry concerning the European Commission's rules and practices to prevent conflicts of interest of Special Advisers, ref. OI/6/2016/AB

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 25 May 2016, the European Ombudsman opened an own-initiative inquiry into the Commission's rules and practices to prevent conflicts of interest of Special Advisers. This inquiry covers the extent of the examination conducted by the Commission before the appointment of Special Advisers, the assessment of conflict of interest issues during their mandate as well as public access to documents and information about the appointment procedure.

The inquiry team carried out an inspection of documents as part of this inquiry. The inspection took place on 7 and 8 July 2016 in the premises of the Commission.

On 21 December 2016, the Ombudsman addressed to the Commission a request for information. The Commission is asked to respond to the questions on (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.

II. THE REPLY OF THE COMMISSION TO THE QUESTIONS ASKED

The Commission would like to thank the Ombudsman for the remarks on the significant progress made on certain aspects of the procedure. The replies of the Commission to the detailed questions asked are the following:

Question 1:

Firstly, the fact that the statement of assurance was sometimes signed on the same day as the declaration of activities or only a few days after does not in the Commission's view call into question the extent of the examination that has taken place. The Commissioners and Members of Cabinet concerned are in contact with the prospective Special Adviser well before the formal submission of the declaration of activities. Therefore, at the date of reception of this declaration, they normally already have sufficient background information on matters that are relevant for the assessment of the conflict of interest issue.

Secondly, the Commission notes that the Ombudsman would recommend that the statement of assurance be signed only after DG HR communicates its conclusions to Commissioners' Cabinets. The Commission would like to point out that, in accordance with point 5 of the Rules of 19 December 2007 on Special Advisers to the Commission (C(2007) 6655, as amended by Commission Decision C(2014) 541 of 6 February 2014), the assessment of possible conflicts of interest is an integral part of the appointment procedure, right from its start. Indeed, the Member of the Commission or Head of Cabinet responsible must establish that there is no conflict of interest by providing the statement of assurance in the first place and DG HR then also checks that there is no conflict of interest and passes this information to the Member of the Commission or Head of Cabinet to assist them in making a final decision on their appointment request.

Of course, the Commissioners and Cabinets may and do request the specific expertise of DG HR in these matters early on if needed. The examination of possible conflicts of interest is the responsibility of all actors involved in the procedure. The Commission therefore considers that the existing procedure already provides for different actors and stages where a possible conflict of interest is indeed checked. Thus a modification of the procedure which could give the impression that it is the sole responsibility of DG HR to deal with these questions would actually result into weakening the actual system of control put in place. The Commission would therefore prefer to maintain the current practice.

Question 2:

Where further information seems necessary or appropriate, DG HR carries out additional research on the activities and background of prospective Special Advisers. It is however clear that this research can only be based on publicly accessible information sources.

Question 3:

The statement of assurance with the mitigating measures is not to be **approved** by the Special Adviser.

The Member of the Commission or Head of Cabinet who has to sign the statement of assurance works directly with the Special Adviser concerned and he/she certainly takes account of the necessity to inform the Special Adviser about the content of the statement and the consequences for the exercise of the mandate.

The Commission is nevertheless willing to change its practice and to send a copy of the statement of assurance to the Special Advisers concerned in all cases where this statement includes restrictions or mitigating measures.

Question 4:

The Commission notes the Ombudsman's opinion that it would be preferable to delete the terms "*notwithstanding the declaration of activities and the sworn statement declaring that there is no conflict of interest presented by …"* in part B of the statement of assurance.

The Commission will take this into account in monitoring the effective implementation of its Rules on Special Advisers, and will pay particular attention to ensuring the correct choice between the two alternative formulations is made when the statements of assurance are completed.

Question 5:

Article 5 of the Conditions of Employment of Other Servants of the European Union (CEOS) defines "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*". The contracts of Special Advisers are also governed by Articles 123 and 124 of the CEOS and by the Rules on Special Advisers to the Commission. Article 124 of the CEOS explicitly refers *inter alia* to Article 11a of the Staff Regulations, applicable by analogy to Special

Advisers, which provides that *"1. An official shall not, in the performance of his duties (...) deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests. 2. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure and may in particular relieve the official from responsibility in the matter (...)".*

It needs to be recalled that a conflict of interest could arise in *"any circumstance which the official who is called upon to decide on a matter must reasonably understand as being such as to be seen by third parties as a possible source of impairment of his independence in that matter"* (Judgment of 11 September 2002, *Willeme/Commission*, T-89/01, Rec, EU:T:2002:212, point 47).

The relevant legal framework provides safeguards to ensure that there is no conflict of interest between the duties carried out by the Special Adviser and any outside activities he/she might have. In particular, in accordance with point 5 of the Rules on Special Advisers, when appointing a Special Adviser, each Member of the Commission must ensure that there is no conflict of interest. These rules also underline that when checking that there is no conflict of interest on the basis of Article 11a of the Staff Regulations, the proportionality principle must be observed and that account must be taken of the fact that Special Advisers are appointed by the Commission specifically because of their expertise.

Special Advisers are appointed (in either a paid or unpaid capacity) because they have special qualifications. They may engage in other gainful activities, as is expressly allowed by Article 5 of the CEOS. It would in many instances become extremely difficult to offer a position of Special Adviser to a person with the relevant expertise if a pure theoretical link between the mandate and another activity were in itself considered as giving rise to a conflict of interest.

An example to illustrate the distinction between a "theoretical link" and a "specific link" is the following: a Special Adviser has the mandate of giving advice to the Commission in fiscal matters. He/she is a member of the supervisory board of a private company active in the food industry. If that Adviser has to advise the Member of the Commission on the simplification of rules in fiscal matters, the fact that his/her company would probably be concerned by the discussed simplification would not be considered sufficient as to exclude that he/she can take up the activity as an Adviser, as the link can be considered as theoretical. On the contrary, if his/her activity as Adviser would consist in advising on simplification of VAT-rate for the food companies, the issue of conflict of interest would need to be addressed.

Question 6:

The Commission notes the Ombudsman's view that the formulation of the statement of assurance appeared to be too vague in a limited number of cases. The Commission considers however that in certain cases only a broad statement is an adequate way of covering all possible situations of conflicts of interest. In any case, as recalled in reply to Question 5, the relevant framework provides adequate safeguards to ensure that any possible situation of conflict of interest would be addressed.

Question 7:

The only other contractual link that a Special Adviser may have with the Commission is another contract as Special Adviser.

It is not excluded for a Special Adviser to carry out different tasks for the Commission provided that these tasks are compatible with the function of Special Adviser. The exercise of such functions will in all instances be subject to the relevant legal framework as recalled in reply to Question 5 and to a specific assessment on a case-by-case basis.

Concerning specifically the question of whether Special Advisers can carry out other advisory functions for the Commission, an example of an advisory function which a Special Adviser can exercise is the membership in the Ad Hoc Ethical Committee established by Commission Decision C(2003) 3750 of 21 October 2003. The Ad Hoc Ethical Committee is an independent body of a consultative nature, whose opinion is requested by the Commission and whose members are not remunerated. Should a situation of risk of conflict of interests arise in the exercise of the mandate of the Ad Hoc Ethical Committee, the member of the Committee concerned should immediately inform the Commission and the other members of the Committee about this situation, so that mitigating measures may be taken, including relieving the Adviser of his/her responsibilities in a given matter.

Question 8:

As pointed out by the Ombudsman, the obligation to inform the Commission on any change in the other activities is laid down in the contract between the Commission and the Special Adviser. It is also highlighted in the declaration of activities itself.

As a rule, the Special Adviser contracts of the Commission run for a period of one year. When they are renewed, the Special Advisers must submit a new declaration (or, alternatively, confirm that there has been no change in the other activities).

In addition to these existing safeguards, the Commission is willing to follow the recommendation of the Ombudsman and to contact the Special Advisers every six months to remind them of their obligation to update their declaration of activities if there have been any changes.

Question 9:

The Commission confirms that, when a Special Adviser declares a new activity, a new conflict of interest assessment is automatically carried out.

Question 10:

The aforementioned Rules on Special Advisers state that, in view of the varied nature of the advice that Members of the Commission may require, Special Advisers may be paid or unpaid. These Rules also provide that former Commission officials appointed as Special Advisers are not remunerated.

The Commission considers that the question of whether Special Advisers are paid or unpaid is not a relevant element for the assessment of possible conflicts of interest, nor is the number of working days. The assessment of whether or not there is a conflict of interest is to be carried out upstream at the moment before the contract is signed and the number of days worked or whether the activity is paid or unpaid has no bearing on that assessment. The Commission consequently carries out its examination of possible conflicts of interest in all cases on the same basis, as explained in reply to question n° 5, without taking account of these elements. Thus the Commission does not consider that the publication of such additional information would be an element relevant for assessing how the Commission applies the proportionality principle in evaluating the conflict of interest. For the application of that principle the Commission refers to its reply to question 5.

Question 11:

Non-institutional Special Advisers are to provide direct assistance to Members of the Commission. It follows from the advisory character of their mandate that they do not have any decision-making power and that they cannot give instructions to DGs or services of the Commission. Special Advisers may not represent the Commissioner or take positions on his/her behalf.

As a specific category of statutory staff, subject to the same obligation of confidentiality as other staff categories, Special Advisers may have access to Commission-internal documents. As regards EU classified information, Special Advisers, as all other categories of staff, might be granted access only on a strict "need-to-know" basis and, for information classified CONFIDENTIEL UE/EU CONFIDENTIAL or above, after a formal security authorisation procedure (see for the details Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information). Due to the specific mandate of non-institutional Special Advisers the Commission considers that the general information already provided is sufficient.

Question 12:

The Commission takes note of the Ombudsman's suggestion to proactively publish the declarations of activities and the statements of assurance.

As recognised by the Ombudsman in question 10, the Commission already provides a substantial amount of information concerning Special Advisers, including in response to access to document requests. It publishes on the Europa website the names and mandates of the Special Advisers, their CVs and their sworn statements (declarations on honour). The Commission takes the view that this information already provides the relevant elements to ensure transparency and citizens' trust. The Commission will continue to monitor the effective implementation and adequacy of its Rules on Special Advisers.