

Comments of the Commission on a request for information from the European Ombudsman

- Joint Inquiry into the Commission's handling of post-mandate employment of former Commissioners, a former Commission President and the role of the Ad Hoc Ethical Committee (Complaints 194/2017/EA, 334/2017/EA and 543/2017/EA)

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The European Ombudsman decided to jointly inquire into three complaints, namely 194/2017/EA, 334/2017/EA and 543/2017/EA, with regard to the Commission's handling of issues relating to the post-mandate activities of former Commissioners, of the former Commission President and the role of the Ad Hoc Ethical Committee.

On 4 April 2017, the European Ombudsman's services carried out an inspection of documents in the premises of the Commission. This included the Commission file relating to the Ad Hoc Ethical Committee's opinion in the case of the former Commission President's appointment to Goldman Sachs and the files relating to the six most recent opinions given by the Committee.

Following the publication of the inspection report on the European Ombudsman's website, the European Ombudsman wrote to the President of the Commission on 10 July 2017, asking the Commission to reply to nine questions and comments grouped under three headings.

On 12 September 2017, the Commission adopted in principle a new Code of Conduct for the Members of the European Commission which aims at significantly reinforcing the provisions of the existing Code. The new draft Code incorporates several suggestions made notably by the European Parliament and the European Ombudsman. According to the Framework Agreement on relations between the European Parliament and the Commission, the President of the Commission wrote to the President of the European Parliament on 13 September 2017, seeking the European Parliament's opinion on the new Code.

The reinforcements foreseen in the new Code encompass inter alia the subject of the European Ombudsman's present inquiry, namely the Commission's handling of former Commissioners' post-mandate activities and the role of the Ad Hoc Ethical Committee which will be replaced by the Independent Ethical Committee.

The post-mandate activities of the former members of the Barroso II Commission were assessed under the provisions of the current Code of Conduct for Commissioners, adopted by the Commission on 20 April 2011. The replies below are thus given against the framework of the current rules. However, where appropriate, the replies indicate how Commission rules will develop with the new Code.

II. COMMISSION'S REPLIES TO THE QUESTIONS ASKED

The replies of the Commission to the detailed questions asked are the following:

i) The functioning of the Ad hoc Ethical Committee

Question 1:

Under the current rules, following the notification of an envisaged post-mandate activity, the Commission assesses if the activity is related to the content of the portfolio of the former Member. If such is the case, the Commission requests the Ad Hoc Ethical Committee's opinion. When the information provided is considered insufficient by the Commission, it requests on its own initiative additional information from the former Member in order to complete the information to be forwarded to the Ad Hoc Ethical Committee. The Committee is independent from the Commission. Each time the Ad Hoc Ethical Committee deems it necessary, it requests additional information. The Commission always forwards such requests to the former Member with a view to providing the Ad Hoc Ethical Committee with the necessary information for its assessment.

The support of the Commission to the new Independent Ethical Committee will however be strengthened by the new Code. It is now explicitly foreseen in Article 12 (8) that the Committee can rely upon the secretarial support of the Commission. In this regard, it will be made sure that all necessary elements, notably the nature, scope and context of an activity will be systematically brought to the attention of the Committee as part of the consultation. The needs for possible additional information will have to be defined by the Committee itself. The new Code provides explicitly that former Members shall co-operate fully with the Committee, in particular by providing all the relevant additional information requested.

Question 2:

Commission Decision C(2003) 3750 establishing the Ad Hoc Ethical Committee has been integrated into the new Code of Conduct which strengthens and clarifies the Committee's role. Article 12(3) of the new Code foresees a duty of full co-operation of former Members with the Independent Ethical Committee like in the past, but it makes also clear that they have a right to be heard by the Committee if the latter considers issuing a negative opinion. Beyond this requirement, the Commission does not intend to issue guidance to the members of the Committee on how to request further information or how to handle cases given their independence and high professional qualities. Indeed, the Committee is independent to determine its approach in this regard and can rely on the secretarial support of the Commission to assist it in developing such approaches.

Finally, Article 11 (7) of the new Code will enhance the Committee's transparency as it stipulates that its opinions on former Members' post-mandate activities will be published, with due consideration to the protection of personal data.

Question 3:

In the case of former President Barroso, according to the rules in force, the Ad Hoc Ethical Committee did not have to be consulted given that the post-mandate activity started twenty months after the President's term of office, i.e. two months beyond the eighteen-month "cooling-off" period stipulated in the current Code. However, in view of the high level of public attention for this matter and the sensitivity linked to the position of a former President of the Commission, President Juncker exceptionally decided, although not required to do so under the current Code, to consult the Committee on the respect of the principles of integrity and discretion enshrined in Article 245(2) of the TFEU.

The new Code of Conduct extends the former Presidents' cooling-off period from eighteen months to three years. Moreover, it provides the Independent Ethical Committee with a broader mandate which is related to any ethical question related to the Code independently of the notification period under Article 11 (2). The Commission bears the responsibility for decisions to be taken under the Treaty and the Code, and is accountable to the European Parliament and the public in general. Therefore, the Independent Ethical Committee will continue to have an advisory role and act upon request of the President of the Commission.

Question 4:

Article 11 (7) of the new Code of Conduct provides that the decisions of the Commission and the related opinions of the Independent Ethical Committee on former Members' post-mandate activities will henceforth be made public with due consideration to the protection of personal data.

ii) The Commission's handling of former Commissioners' cases under Article 245 TFEU, the Code of Conduct and the principles of good administration

Question 5:

The new Code provides examples of activities which do not need to be notified, examples of post-mandate activities which need to be notified but which do not require an opinion of the Independent Ethical Committee and explicitly prohibits a specific type of activities under the conditions of Article 11 (4) (i.e. lobbying Members of the Commission or their staff on matters for which former Members were responsible within their portfolio, for a period of two years). All other activities are considered potentially sensitive and need to be analysed based on the merit of each case.

The role of the Independent Ethical Committee is to advise and support the Commission in this analysis of whether or not an activity is compliant with the principles of the Treaty and the new Code of Conduct.

Question 6:

The Commission is responsible for taking a position on the compatibility of former Members' envisaged activities with Article 245 of the TFEU, following the delivery of the Independent Ethical Committee's opinion. The time which is necessary to prepare the relevant decision and submit it to the adoption of the Commission depends on the level of complexity of the matter at stake, on necessary internal

consultations and necessary deliberations. All Commission decisions have been adopted in a reasonable time period following receipt of the opinion: two weeks as an average and never more than one month.

The new Code provides that former Members shall inform the Commission with a minimum of two months' notice of their intention to engage in a professional activity.

So far, the Commission has not taken any decision authorising an activity on which the Ad Hoc Ethical Committee had delivered a negative opinion. Where the Ad Hoc Ethical Committee concluded on the incompatibility of a specific activity under Article 245 of the Treaty (TFEU), the Commission informed the former Member and, so far, all former Members faced with such a situation withdrew their notification and renounced to the activity in question: this demonstrates the effectiveness of the system in place.

Furthermore, it happened that, following the Ad Hoc Ethical Committee's opinion, the Commission imposed restrictions which the Ad Hoc Ethical Committee had not suggested. The Committee is a consultative body and the responsibility to take the decision lies with the Commission.

In the future, Commission decisions in such cases and the related opinions of the Independent Ethical Committee will be made public which will allow a better understanding of the handling of such cases.

Question 7:

Internal Commission procedures cater for the possibility to adopt decisions on a breach of a Commissioner's obligations under Article 245 TFEU. This was done in the past when the Commission decided to seize the Court of Justice in the case of a former Commissioner (Case C-432/04, Commission vs Cresson).

In addition, the new Code specifically mentions the possibility for the Commission, taking into account the Independent Ethical Committee's opinion and on proposal of the President, to express a "reprimand" and, where appropriate, make it public, in case of an infringement of the Code which does not warrant a referral to the Court of Justice in accordance with Articles 245 or 247 of the TFEU (Article 13 (3) of the new Code).

iii) The Commission's handling of the case of its former President's post-mandate activity

Question 8:

The provision contained in section 2.3 of the current Code of Conduct was an amendment inserted in the context of its revision in 2011. It enables the President of the Commission to request the Ad Hoc Ethical Committee's opinion on "*any general ethical question concerning the interpretation of the Code of Conduct*", without encompassing the possibility to request the Committee's opinion on a post-mandate activity after the end of the "cooling-off period". This did not prevent the President from requesting the Ad Hoc Ethical Committee's opinion on the former President's appointment with Goldman Sachs.

The new Code of Conduct broadens the scope of the Committee's consultative competence. The Committee's consultative remit will henceforth cover "*any ethical*

question related to the Code", independently of the notification period and without distinction between general questions of interpretation or questions relating to specific situations.

As from the entry into force of the new Code, the President of the Commission may thus use his prerogative and consult the Independent Ethical Committee on any situation when he considers it necessary.

Question 9:

Following the Ad Hoc Ethical Committee's opinion on the case of the former Vice-President for the Digital Agenda, the Commission considered that a formal decision was necessary to ensure an adequate follow-up and clarify the precise extent of the former Vice-President's duties with regard to the situations assessed.

As regards the former Commission President, the Commission took note of the Ad Hoc Ethical Committee's view that there had been no violation of the principles of integrity and discretion enshrined in Article 245 of the TFEU. Notwithstanding this, as a follow-up to this case, the President decided to discuss within the College the opportunity to propose a modification of the Code of Conduct extending the length of the obligatory notification period. Following the Commission's discussion of this case, the President of the Commission wrote to the President of the European Parliament, on 23 November 2016, informing the Parliament on the Commission's intention to amend the Code of Conduct and to extend the "cooling-off period". No additional individual decision was needed following the Ad Hoc Ethical Committee's opinion.

The Commission's commitment, as announced by the President with his letter of 23 November 2016 to the President of the European Parliament, has been implemented in the new Code of Conduct adopted in principle on 12 September 2017.