CLEARY GOTTLIEB STEEN & HAMILTON LLP

BRUSSELS

May 11, 2011

Re: Submission to the European Ombudsman - Ethical Principles for EU civil servants

Introduction

This submission is made in response to the Ombudsman's invitation for public consultation on ethical principles for EU officials.

It is understood that the Ombudsman has in mind ethical principles that would supplement existing legal rules, and would not be legally binding. However, some of the suggestions made here would undoubtedly be better if they were incorporated in legal rules, and they are suggested here as a possible first step. The Ombudsman's suggestion that ethical rules should not be drafted in such a way that they could be made legally binding in future is regretted, and it is respectfully suggested that it would be unfortunate, and that no such preconceived view should be adopted. The need to improve the working of the Institutions is so clear and so great that it should not be assumed that no legal changes are needed, as well as improvements that could be made, or could only be made, by Codes of Conduct or of ethical principles.

The suggestions below do not distinguish formally between the duties of officials to the institution where they work and their duties to citizens, since these duties overlap, as the Ombudsman has said.

What is suggested here is in some respects an elaboration of the principles of good administration, already recognised in general terms by the European Courts, but which it would certainly be desirable to make more precise and explicit, and to bring formally and regularly to the attention of officials.

The principles discussed here are interrelated, but it seems convenient to distinguish between them.

The need for improved Codes of Conduct for officials

Most of these principles are now more important and more necessary than they used to be. This is partly because the turnover of individuals joining the Institutions and leaving again later is much greater than it was. It is also important because a larger proportion of officials are on temporary contracts or on secondment from national administrations. A third reason why these principles are more necessary than ever before is the growth of lobbying. A fourth reason, which is broader than the subject of officials' behaviour, is that the Institutions are not as well-respected by the public as they used to be. Members of the public should be given no unnecessary reasons for disliking or resenting the Institutions, and it should be recognised as part of the duties of officials to explain the policies and decisions of the Institutions whenever appropriate. A fifth reason is that ethical standards and traditions of officials in the twenty-seven Member States are not the same, and it is important to have clearer statements of the minimum ethical standards to be respected by all EU officials. Not all Member States have equally long or good traditions of public service. In some Member States it is common for public officials to use their positions to benefit their friends and families, or their previous employers. It is therefore essential to make it clear that this is not permissible in the European Institutions; and to avoid all situations in which it might occur.

The need to avoid conflicts of interest

The need to avoid conflicts of interest is clear, and already recognised in principle by the Staff Regulations and by e.g. the Code on Ethics and Integrity of DG Competition Staff. However, several questions arise, and the Regulations and the Code do not seem to be sufficient, in several respects.

First, it would be interesting to know how many cases have arisen in which an official brought a case of possible conflict of interest to his or her superiors. If there have not been many cases, it seems probable that the rules are inadequately enforced, and need to be complemented by better enforcement mechanisms. In particular, it would be useful to know how many cases have arisen involving officials in Cabinets of Commissioners, or otherwise working temporarily for the Institutions, since conflicts of interest are particularly likely to arise for such individuals, and how the recorded cases were resolved. It seems clear that in this respect at least the Regulations are not sufficiently enforced. For example, it does not appear that any effort is made, even in DG Competition, to ensure that officials and their families do not hold shares in companies that may be affected by the policies or cases being considered by the Commission. Mechanisms, which do not now exist, are needed.

Second, it is striking that although the Staff Regulations are very broadly and imprecisely worded on conflict of interest questions, DG Competition is the only DG that has so far thought it necessary to supplement the Regulations. The DG Competition Code is not legally binding. That in itself is probably unfortunate, but it means that there is no reason why the Commission could not adopt similar Codes for all the other DGs, in particular those which deal with individual cases such as antidumping matters, or applications for EU funds, or cases in which it is said that Member States are failing to fulfil their obligations under EU law. Such Codes should be adapted to the special circumstances of each DG. It is regrettable that, as far as is known, even the DG Competition Code was adopted for the first time only in 2008, and then apparently only as a reaction to a specific incident that gave rise to serious concern. The contrast with the elaborate rules in the USA is striking.

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Third, the existing rules do not deal with conflicts between the official's duties and the interests of members of the official's family. This is clearly a serious omission, which should be dealt with even if it is not easy to do so effectively.

A number of the suggestions below are also related to the consequences of conflicts of interests.

Objectivity

It is easy to pay lip service to the need for objectivity, and it is not always obvious when it is lacking. However, from time to time identified individuals in the Commission, in DG Competition and elsewhere, have made statements in public that were clearly biased, immoderate, and that should not have been made. As far as is known, the individuals concerned were not reprimanded.

As far as is known, Commission officials receive no training in objectivity, of the kind that is normally given to trainee judges in Member States where judges are trained. In States where judges are drawn from practising lawyers, by the time they become lawyers they are accustomed to advising clients on different sides, and so have enough experience to be reasonably objective. But few young lawyers (and no young economists) joining the Institutions have training as judges, and almost none of them have enough experience to make them see both sides of any question. Nor have they experience or training in assessing evidence. Officials need to be reminded that their duty is to advise as objectively as possible, and that they are not doing their duty if they merely try to develop arguments for views suggested to them by their hierarchical superiors. Unfortunately, this occurs.

All this is particularly important because in the procedure of DG Competition and of DG Trade the same officials write both the arguments against the companies (the statement of objections in competition cases) and the final decision of the Commission (or final proposal, in trade cases). Objectivity is therefore particularly necessary, and particularly difficult for the individuals concerned. It is well recognized that everyone is subject, to a greater or lesser extent, to "confirmation bias", the tendency to give greater weight to evidence or arguments that are consistent with views already provisionally reached, and to disregard or minimize the significance of evidence and arguments that seem inconsistent with those views. The risk of confirmation bias is particularly great in the Directorates General in the Commission, in particular DG Competition, in which the same officials act as "prosecutors and judges". Many lawyers, economists and companies dealing with officials in DG Competition have often been given very clear impressions that the officials have already made up their minds on certain issues even before they heard what was said to them. This impression is clearly very serious, even if it is not always justified, and it is difficult to believe that the impressions that have so often been given are never correct.

Training

There is surprisingly little training of officials after they join the Institutions. This no doubt explains the inadequate level of officials' knowledge of the EU and its policies, and of the reasons for them. It explains the fact that officials do not seem well prepared to explain EU policies and principles. Such training should be planned so as to increase both

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officials' knowledge and their standards of behaviour, objectivity, and integrity, with which the Ombudsman's present consultation is primarily concerned. In particular, officials should receive training if their duties bring them into regular contact with the public, or with visitors to the Institutions.

The need to ensure that influence is not used to favour interests for which the official previously worked.

It is obviously essential to ensure that when officials join an Institution, they should not be allowed to have any opportunities to use their influence in favour of interests for which they previously worked, and it should be made clear that they must have no such opportunities. This is a broader issue than conflicts of interests in the normal sense, and the existing rules do not deal with it adequately. The Code for DG Competition provides (para.56) that "As a basic ethical rule staff should not deal with pending cases where it has been involved in for a previous employer" (sic). However, this fails to deal with several issues. First, the concept of "pending cases" is less clear and less obviously relevant in other DGs, and the Code does not apply outside DG Competition. Secondly,it would obviously be improper for a new official to exercise influence in any way on any matter of policy in favour of the interests for which he or she previously worked, even if individual "pending cases" were not involved. Third, even the DG Competition Code does nothing to prevent the official from developing policy or giving policy advice on matters of direct interest or relevance to previous employers, even if the official avoids dealing directly with "pending cases". It is not difficult to imagine situations in which a new official has been employed by an Institution, temporarily or permanently, on the basis of previous experience or expertise, and therefore gets opportunities to influence policy in favour of former employers. In one known case, for example, an official was not involved in "pending cases" involving his former client, but continued to write papers and give advice to the Commission and to his colleagues that was directly relevant to cases that were pending, and on lines favourable to his previous employers. That is just as improper as being involved in "pending cases" directly.

The Institutions should be more aware of the possibility that new officials may have been encouraged by former employers to join the Institution precisely in order to exercise influence in their favour. This would not be surprising: it is widely believed that officials have been sent by national administrations to particular parts of the Institutions primarily to influence EU policy in the directions wished by the Member State in question. This problem ought to be frankly recognised, and dealt with fully.

This means, among other things, that an individual with a conflict of interest should not be placed in a position in which he will supervise officials who are dealing with policies or cases in which he should not be involved. In such situations it is natural for the junior officials to conform to their supervisor's known views, so as to receive positive assessments. This may make it essential to have separate teams with separate supervisors.

Another consequence is that submissions made by the individual before he joined the Commission, when he represented specific private interests, should be removed

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from the Commission's files when he is appointed to a senior position such as Director or Director General, in which the views he expressed previously will get additional weight.

The existing rules on conflict of interests do not deal with situations of these kinds, and they need to be dealt with comprehensively.

When officials leave the Institutions

A similar problem arises when an official leaves an Institution, and works for interests with which the former officials were previously concerned or for which they were responsible. On paper this is regulated, but it would be useful to know in how many cases the rules were applied. It seems clear that the rules are seriously under-enforced. For example, the number of cases in which a former Commissioner was prevented from working for companies for which he had previously been responsible seems remarkably small. If the rules are not applied to Commissioners, it seems unlikely that they are applied adequately or consistently to former officials.

Measures should be taken to ensure that officials, after they have left the Institutions, do not use their knowledge to obtain benefits for those for whom they work which they could not properly have provided while in the Institutions. For example, ex-officials should not be allowed to represent their new employers in dealing with their former colleagues in the Institution in which they worked, and they should be obliged to disclose, to the Institution, when they are working on submissions or applications to the Institution.

The need to prevent use of official positions to give undue preferences

Particularly in DGs responsible for dealing with individual cases or for granting funds, it is essential to ensure that no officials use their positions to give priority, favourable treatment, or preferences to their friends or the regions from which they come. There have been many occasions in which it was thought by observers that officials had used their powers in this way. It is important to understand clearly that this is improper even if no bribe has been paid. It is also important to accept that it may be genuinely difficult to distinguish between legitimate use of specialised contacts or knowledge and improper preference. But the fact that it is difficult does not mean that it should continue to be largely ignored.

Lobbying

There seems to be surprisingly little advice or instruction given to officials about how to deal with lobbying and lobbyists. In particular, there seems to be little or no instruction given to officials to ensure that they check on the correctness of what they are told by lobbyists, and how to ensure that they are not influenced by lobbyists offering them favours or privileges. Officials, and even Commissioners, are insufficiently aware of the need to avoid, and in particular to be seen to avoid, accepting significant hospitality, travel, entertainment, and other gifts and favours from lobbyists or the interests which they represent. The rules which officials are expected to follow are not clear, and they are not strict enough. It is obvious that they are not followed uniformly throughout the Institutions, or even in different parts of the same Institution. It is not suggested that e.g. invitations to lunch

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or dinner should be prohibited, but there should be some publicly known limit, uniformly applied and enforced.

This problem is certainly not adequately dealt with by obliging lobbyists to disclose the fact that they are lobbying on behalf of identified interests. It is essential for officials to know how and to what extent they should be free to have informal contacts with lobbyists. Officials should be instructed to record and report all contacts, formal or informal, during which they are given information or views that are or may be thought relevant to their work. These reports and records should be open to inspection by the public under Regulation 1049/2001. Failure to record and report lobbying activities should be regarded as a breach of the duties of officials.

Measures are needed to ensure, as far as possible, that Commissioners and the members of their Cabinets are not unduly influenced by lobbying. Members of Cabinets should be required to record and report promptly all contacts relevant to their work, and these reports should also be open to inspection by the public. Each Institution should prepare and publish an annual report giving statistics of the number of lobbying contacts at each level, and the precise subject of the lobbying.

This disclosure of lobbying activities is particularly important in situations in which the Commission is acting in a "quasi-judicial" capacity. For example, in the case of Commission competition decisions, it seems clear that there is no safeguard to ensure that written submissions made to Commissioners or their Cabinets are disclosed to the Hearing Officer, or that companies with opposing interests are made aware of the submissions, and given an opportunity to answer them. It is known that sometimes substantial changes are made in draft Commission decisions as a result of discussions of Commissioners and their Cabinets, and such changes are almost certain to be the result of lobbying, whether at the last minute or earlier. It might be important for e.g. the Competition Commissioner to know that other Commissioners had been extensively lobbied on behalf of companies involved in particular cases. Similar considerations apply in e.g. anti-dumping cases and State aid cases.

It would be useful for the Ombudsman to see what instructions are given to newly appointed Commissioners on the subject of lobbying. If, as seems likely, the instructions are not clear enough or not strict enough, the Ombudsman should point that out.

The need to ensure confidentiality

The need to keep information confidential is recognised by the Staff Regulations. However, there have been well-publicised cases in which what was undeniably confidential information which could only have come from someone working in the Commission was leaked to journalists, and no disciplinary action was ever taken. Indeed, it is not even clear that investigations were carried out. For example, in several competition cases in recent years the amounts of the fines that the Commissioner for Competition intended to suggest to the college of Commissioners were disclosed by journalists several days before the Commissioners' meeting. The suggestion that these leaks came from national competition authorities does not seem likely, and is not widely accepted.

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The Commission is open to serious criticism also because decisions that are likely to be price-sensitive are often made known during hours of trading of stock exchanges where the companies' shares are quoted. Insofar as the Commission takes precautions to prevent this, they seem to be applied only intermittently, and inadequately.

It would be particularly important to have clear and strict principles about confidentiality applying to members of Cabinets of Commissioners. They are informed about all important decisions, and they have many contacts outside the Commission. Many of them have not been Commission officials, and they may not be fully aware of the obligations of officials in the Institutions. Some "leaks" to the press on policy matters may have a useful role in debates and negotiations, but they should never be tolerated in any competition policy cases or any case that is sub judice. It does not seem that all Cabinet officials understand this difference.

<u>The need to ensure that officials give priority to EU objectives over the short term interests and convenience of the Institutions for which they work</u>

It is a permanent temptation for bureaucracies and administrative bodies of all kinds to protect the convenience and reputation of the body in question, even when that means that it is not fully carrying out its mission and its obligations. In the European Institutions, many examples of this kind of conduct could be given, some more serious than others. The most obvious, and most important, kind of conduct involves unwillingness to admit that mistakes have been made by or on behalf of the Institution, instead of admitting the mistake, and ensuring that it is corrected and not repeated. A common indication of the wish to cover up mistakes or merely to avoid administrative inconvenience is the argument, made unduly often in cases before the European Courts, that applications are inadmissible for technical reasons. The Institutions should not be obviously hiding behind technicalities. A specific example, fortunately not arising very often but striking because the conduct is plainly contrary to the Staff Regulations, is the Commission's practice of looking only at a former official's financial position when it is required to provide assistance on the basis of "medical and social circumstances". The explanation for this clearly illegal policy is purely administrative convenience.

A better known, and unfortunately more widespread, example of this kind of conduct is the reluctance of the Institutions to carry out their obligations under Regulation 1049/2001. Official believe that their lives and work would be easier and less troublesome if they were not required to disclose official documents and papers. The effect is to bring the Institutions into disrepute.

Officials who put their own convenience before the objectives of the EU and of the Institution in which they work are behaving unethically, and this needs to be clearly recognised.

<u>The need to ensure that officials explain the principles on which the EU is based</u>

It may thought curious to suggest that this is an ethical obligation of officials. However, there is no doubt that one of the principal reasons why the Institutions in general and the European Commission in particular are less highly regarded and less well respected than they were is that officials no longer routinely explain the institutional structure of the EU as they did in the first decades after it was set up. The results are widespread ignorance of the raison d'etre of the Institutions, and attitudes that, at least in some Member States, must be described as distrust and suspicion. Temporary officials are likely to be unaware that their duties include the responsibility of explaining EU policy, since national administrations do not need to explain their policies to the same extent.

The most obvious example of this concerns the fundamental principle of the EU Institutions, the "Community Method". This is based on the need to make qualified majority voting acceptable to Member States that may, on occasion, be outvoted. So as to achieve this as far as possible, the only proposals for EU measures that may be officially discussed are those prepared and proposed by the Commission, a body that is intended to be representative of the EU as a whole and equally independent of all Member States. Its proposals are intended to reconcile all the interests of Member States as far as possible, and to be in the interests of the Union as a whole. They may be adopted by a majority vote, but they may be amended only by unanimity. The point being made here is that the "Community Method" is now so rarely mentioned or discussed that it is obvious that many Members of the European Parliament, for example, are not aware of it, or unaware of the reasons for it.

It should be one of the duties of all officials in the Institutions to understand and explain the reasons for the basic principles on which the Institutions are based. The need for democratic control by the European Parliament and for judicial review by the Court of Justice should not need explanation, but the Community Method certainly does. It is not enough that officials should not openly criticise their Institutions. It is clear that many of them should do much more to explain the Institutions, the principles on which they are based, and the policies that they have adopted. The EU is complicated, and journalists do not do a very good job of explaining it.

<u>The need for sympathetic and courteous treatment of vulnerable individuals</u>

The Staff Regulations deal with two broad types of situations, which require very different treatment. Many Staff Regulation cases involve claims by officials working in the Institutions for expenses or promotion. It is perhaps understandable that the officials dealing with such claims may become unhelpful and unsympathetic. However, the Staff Regulations also apply to claims for e.g. medical expenses by the families of officials, including old, sick, very young, ill-informed or vulnerable individuals, who certainly should be treated sympathetically, with politeness and consideration, and without hostility. Unfortunately this does not always happen, although the objective of the Staff Regulations, as far as former officials and their families are concerned, should be to ensure that they do not suffer any unnecessary hardship, and that what is essentially social assistance should always be given where possible. A change of attitude is undoubtedly required. Courtesy and sympathy are particularly necessary when the official is not in a position to do what has been requested.

All officials should be regularly reminded that standards of politeness are not the same throughout Europe, and what may seem to individuals of one nationality to be a businesslike and efficient response may seem impolite and offensive to individuals of another

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nationality. It should also be said that the tradition, standard and style of politeness in different national administrations is not the same, and that all EU officials should be obliged to follow the highest standards, and not merely the standards to which they may be accustomed.

Under-enforcement of Staff Regulations: the need for statistics.

In general, it is the strong and general impression of almost everyone who has worked in the Commission or who deals with Commission officials that the Staff Regulations are inadequately applied and enforced. This is separate from the fact that the Regulations need to be strengthened or supplemented, on the issues raised here, and no doubt on other issues also. Very mild sanctions have been imposed in the past for very clear dishonesty. Officials now assure us that discipline is now stricter that it was. That is difficult for outsiders to judge, but it is very clear that the Ombudsman's office should ask as many questions as possible to obtain facts and statistics about complaints, disciplinary actions, breaches of confidentiality penalties imposed, and recorded cases where officials asked to be excused from dealing with individual cases due to conflicts of interests. It is not easy to ensure correct behaviour in a multinational organisation, but precisely for that reason greater efforts need to be made. The idealism that influenced and motivated the first generation of officials is now past, and better management, better training, and better discipline are clearly needed. The Ombudsman should ask how often officials are given training or instruction on ethical issues, and what questions, if any, are asked about ethical issues when candidates are interviewed for promotion or transfer to other DGs. This is particularly important because the numbers of officials entering and leaving the Institutions is now much greater than it was. A high turnover of officials increases the likelihood of conflict of interests, and it also means that many more officials regard work in the Institutions as merely a stage in their careers, and so one that involves no special or additional ethical obligations.

Officials on secondment from national administrations.

The numbers of officials seconded from national administrations is now higher than ever, and it is unlikely to fall. It should be frankly recognised that this causes difficulties. Officials who will return to their national administrations are not likely to be wholly objective or independent when dealing with the Member State from which they came and to which they will return. This is so in particular if few of their colleagues in the Institution where they work can speak or read the national language in question, and can supervise them adequately. Everyone who deals with the Commission has anecdotal evidence of seconded officials who appeared inappropriately to defend or promote the interests of the Member State that they come from. It is not easy to find a satisfactory solution for this problem, but it is serious, and it should be recognised and admitted. The problem is greater than the already significant problems of individuals joining the Institutions on relatively short term contracts, but not coming from national administrations, since they are rather less likely to be biased than individuals coming from and returning to national authorities.

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