

Commission reply to the recommendations and suggestions of the European Ombudsman in relation to the Ombudsman's 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

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. The Commission replied to these questions on 20 November 2017.

On 31 January 2018, the Commission adopted, after consultation of the European Parliament and in line with the Framework Agreement on relations between the European Parliament and the European Commission, a new Code of Conduct for the Members of the European Commission. The new Code aims at significantly reinforcing the provisions of the existing Code and incorporates several suggestions made notably by the European Parliament and the European Ombudsman. 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handling of former Commissioners' post-mandate activities and the role of the Ad Hoc Ethical Committee which has been replaced by the Independent Ethical Committee.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 former Code of Conduct for Commissioners, adopted by the Commission on 20 April 2011.

On 6 March 2018 the European Ombudsman concluded her inquiry with a finding of maladministration and submitted her recommendations and suggestions to the Commission.

II. The COMMISSION'S REPLY

On the Ombudsman's finding of "maladministration"

Paragraphs 53 and 65 of the European Ombudsman's report concludes with a finding of 'maladministration' for the fact that the Commission did not adopt a formal decision on former President Barroso's assignment with Goldman Sachs, following the Ad hoc Ethical Committee's opinion of 26 October 2016. The Commission explained its position in its response to the European Ombudsman of 20 November 2017. The former President was not required to notify his assignment with Goldman Sachs under the Code of Conduct for Commissioners of 20 April 2011. 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 to consult the Ad Hoc Ethical Committee. The Committee found that there were not sufficient grounds to establish a violation of the duties of integrity and discretion imposed by Article 245 of the Treaty on the Functioning of the European Union. On the basis of the Committee's opinion, the Commission considered that no formal decision on the former President's assignment had to be taken. However, the Commission took the political decision to extend the notification period for former Presidents from eighteen months to three years.

On the Ombudsman's recommendations to the Commission

i) The recommendation that the Commission should request a second opinion from the Independent Ethical Committee

The Ombudsman recommends the Commission to request a second opinion from the Independent Ethical Committee (which succeeded to the Ad Hoc Ethical Committee) on former President Barroso's assignment with Goldman Sachs. The recommendation is based on former President Barroso's recent meeting with a Vice-President of the Commission.

The Commission notes that this situation has already been explained in the plenary of the European Parliament on 28 February 2018 by the Vice-President concerned himself. The Commission recalls that the Vice-President accepted to meet Mr Barroso on the basis of their long-established personal friendship and in view of the expected private nature of their encounter.

The Vice-President's decision to publish this meeting was in line with the policy set out in President Juncker's letter to the Ombudsman of 9 September 2016. The letter stated that *As of taking up his employment, Mr. Barroso will be received in the Commission not as a former President but as an interest representative and will be submitted to the same rules as all other interest representatives as regards the Transparency Register; the Members of the Commission and all Commission staff, when meeting with Mr. Barroso, will have to comply with the existing rules as regards transparency and contacts with the representatives of interest groups.* This means that any meeting with Mr. Barroso, independently of the capacity in which Mr. Barroso acts and independently of the possibly private or social character, shall be published as a meeting with an interest representative. This is to ensure greatest possible transparency and avoid any doubt with regard to alleged secret meetings. It is therefore unfortunate that the Commission's particularly strict approach is interpreted now as implying that every meeting with Mr. Barroso has a purpose of lobbying.

The fact of referring to a meeting with "Goldman Sachs" is due to the fact that the Commission decision of 25 November 2014 provides for the publication of the names of

the organisation, not of the names of individual persons representing the organisation, and the related publication tool is technically conceived in this manner. This is handled in the same way for all interest representatives.

The prohibition to "lobby" foreseen in Article 11(4) of the new Code of Conduct explicitly refers to activities falling under the scope of the Transparency Register, i.e. Section III of the Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation of 16 April 2014. It aims namely at activities *carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions.*

The Vice-President of the Commission concerned has made it very clear that such an activity was not carried out by Mr. Barroso at the meeting. Therefore, there is no reason either to request a second opinion from the Independent Ethical Committee or for the Commission to take a new decision.

ii) The recommendation that the Commission should consider whether it is appropriate to require former President Barroso to abstain from lobbying the Commission and/or its services for a certain further number of years

The Commission would like to underline that, in his letter to President Juncker dated 13 September 2016, former President Barroso clearly stated that he had not been engaged to lobby on behalf of Goldman Sachs and that he did not intend to do so. Mr Barroso did not specify any duration for his commitment. The new Code of Conduct for the Members of the Commission adopted on 31 January 2018 extends the prohibition for former Commission Presidents to lobby the Members of the Commission or their staff from eighteen months to three years. The Commission considers this period to be proportionate and sufficient, also in the present case. Mr. Barroso's mandate in the Commission ended in October 2014.

On the Ombudsman's suggestions to the Commission

The Commission has taken note of the Ombudsman's suggestions related to future amendments of the Code of Conduct. These suggestions have been part of the public discussion on the Commission's Code in the past. The Commission concluded its reflection by the adoption of a new Code of Conduct on 31 January 2018 after consultation of the European Parliament in line with the Framework Agreement on relations between the European Parliament and the European Commission.

With regard to the individual suggestions the Commission would like to make the following observations:

(i) The suggestion that the Commission should grant the Ethics Committee the authority to act on its own initiative whenever it considers this appropriate

The Commission bears responsibility under Article 245 of the Treaty on the Functioning of the European Union. Therefore, it decided to create a body which provides it with independent analysis and opinions. The new Code of Conduct for the Members of the Commission reinforced the independence of the Committee, as well as its remit and powers as reflected in the Ombudsman's assessment. The members of the Independent Ethical Committee are selected for their competence, experience, independence and professional qualities and the Commission ensures full transparency on their backgrounds

and qualities. However, given the ultimate responsibility of the Commission and in light of the control of the Commission by other independent institutions, the Commission wishes to keep the nature of the Independent Ethical Committee as an advisory body which provides independent advice when requested to do so by the Commission.

(ii) The suggestion that the Commission should proactively publish all opinions provided by the Ethics Committee, as well as its own decisions related to those opinions

The Commission will ensure automatic transparency of decisions and related opinions on former Commissioners' post mandate activities as provided for in Article 11(7) of the new Code. By contrast, the Commission may prefer to refrain from making public the Committee's opinions on individual questions or general matters, for considerations of legal, political or institutional nature. This is why no automatic publication is foreseen.

(iii) The suggestion that the Commission should take the appropriate measures so that, in the future, persons serving as Special Advisers to the Commission are not eligible to be members of the Ethics Committee

Under Article 5 of the Conditions of Employment of Other Servants, special advisers are persons who are engaged to assist one of the institutions of the Union either regularly or for a specified period. The Commission does not consider that the fact of being a special adviser should automatically exclude eligibility for an appointment as member of the Independent Ethical Committee. The new Code of Conduct for the Members of the Commission provides that the members of the Committee shall sign a declaration on the absence of conflicts of interests and the Commission ensures the necessary transparency about the Committee and its members. If a case of conflict of interest should occur, the member in question would have to withdraw from the case.

(iv) The suggestion that the Commission should increase the number of members of the Ethics Committee

The Commission notes that it decided to maintain the number of three members of the Independent Ethical Committee for operational reasons, and does not see a correlation between the number of members and the quality of the advice.

(v) The suggestion that the Commission should extend the 'notification period' in the Code of Conduct to several years to make sure it is at least notified of all new roles of former Commissioners, to which it can then react if necessary

The Commission considers that an extension of the notification period for former Commissioners to several years would be a further extension of the period which has just been extended by the new Code from 18 months to two years for former Commissioners and to three years for former Presidents. It should also be underlined that this procedural provision is without prejudice to the fact that former Members of the Commission remain bound, without any limit in time, by Article 245 of the Treaty on the Functioning of the European Union, notably as regards their duty to behave with integrity and discretion. Article 245 of the Treaty and the new Code of Conduct also provide for appropriate sanctions, should a former Member of the Commission fail to comply with the duty to behave with integrity and discretion. This period is in line with the maximum period foreseen for the payment of the transitional allowance under Council Regulation 2016/300 and goes even beyond it for former Presidents. The Commission considers it therefore as a proportionate approach which strikes the balance between the public

interest and the individual rights of persons who have engaged in public office at EU level for a certain period of their career.