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Strasbourg, 11 -07- 2011

Decision of the European Ombudsman closing his inquiry into complaint
476/2010/ANA against the European Commission

Dear Mr Vassalos,

On 19 February 2010, acting on behalf of the Corporate Europe Observatory (CEO), you submitted a complaint to the European Ombudsman against the Commission concerning its handling of the appointment of Mr Pat Cox as a Special Adviser to Commissioner Kuneva.

After a careful analysis of all the information submitted to me, I have decided to close my inquiry with the following critical remarks:

1) In 2007, the Commission failed to obtain a declaration on the absence of a conflict of interest before nominating Mr Cox as a Special Adviser.

2) In 2009, the Commission failed to obtain Mr Cox's Sworn Statement and Declaration of Activities before providing a Declaration of Assurance.

3) In 2007, 2008, and 2009, the Commission failed adequately to examine the issue of a potential conflict of interest in the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva.

The above constituted instances of maladministration by the European Commission and the Ombudsman therefore makes corresponding critical remarks.

I have also made the following further remarks:



1) It would be good administrative practice to ensure that, when a Special Adviser makes a substantial change to his/her Declaration of Activities, a new Declaration of Assurance be submitted by the responsible Commissioner.

2) The Commission could consider modifying the Declaration of Activities of a prospective Special Adviser to obtain sufficient information about the Special Adviser's outside activities to enable it to examine any potential conflict of interest between the Special Adviser's tasks and his/her outside activities. In addition, the Commission could require the prospective Special Adviser to certify that the Declaration is complete and that, as far as he/she is aware, there is no conflict of interest with his/her prospective functions as a Special Adviser.

In line with standard practice, I have asked the Commission to inform me of any action that it may be taking in response to these critical and further remarks. I have asked it to inform me of any such action no later than 31 January 2012.

Please find enclosed my decision on your complaint.

Yours sincerely,

P. Nikiforos Diamandouros

Enclosure:

- Decision on complaint 476/2010/ANA



Decision

of the European Ombudsman closing his inquiry into complaint 476/2010/ANA against the European Commission

The background to the complaint

1. The present complaint is about the Commission's procedures and practices in relation to conflicts of interest applicable to Special Advisers to the Commission's President and Members. The complaint originates in the Commission's handling of the appointment in 2007 and reappointment in 2008 and 2009 of Mr Pat Cox, a former President of the European Parliament, as unpaid Special Adviser to Ms Meglena Kuneva, who was at the relevant time Commissioner for Health and Consumer Policy (henceforth, 'Commissioner Kuneva'). The complaint was submitted by Corporate Europe Observatory, a non-governmental organisation¹.

2. On 29 May 2009, the complainant sent an open letter to Commissioner Kuneva expressing its concern about a potential conflict of interest in Mr Pat Cox's acting as her Special Adviser on 'Communication and Strategy for Consumers on Citizens'. The complainant argued that the Commission's Rules for Special Advisers, which were introduced by Mr Siim Kallas, the former Commissioner for Personnel and Administration (henceforth, 'Commissioner Kallas'), in response to public concerns about conflicts of interest, include the obligation of a person who is appointed as a Special Adviser to sign (a) a declaration² stating that there is no conflict of interest between the tasks of Special Adviser and his/her other activities (henceforth, the 'Sworn Statement') and (b) a Declaration of Activities identifying his/her other activities, whether gainful or not (henceforth, the 'Declaration of Activities').

3. The complainant pointed out, however, that in the case in hand it was not reassured by the documents posted on the relevant section of the Europa website³. The complainant reasoned that, in addition to his role as Special Adviser to the Commission, Mr Cox was on the advisory boards of at least three corporations (Microsoft, Michelin and Pfizer) which have a strong interest in influencing EU consumer policies. He was also a senior counsellor for the lobbying consultancy APCO. In the complainant's view, APCO represents corporate players eager to influence EU consumer policies. Besides these, the

¹ <http://www.corporateeurope.org/about-corporate-europe-observatory>

² In French, *Declaration sur l'honneur*. In the English version of the Commission's form this is translated as "Declaration on the Honour". The Commission's rules on Special Advisers use the term "Sworn Statement" http://ec.europa.eu/civil_service/docs/special_advisers/comm_c_2007_6655_1_en.pdf

³ http://ec.europa.eu/civil_service/about/who/sa_en.htm



complainant stated that Mr Cox ran his own lobbying firm, European Integration Solutions (EIS).

4. The complainant went on to argue that, as long as the Commission does not disclose both Mr Cox's "*lobbying activities*" and his tasks as a Special Adviser to Commissioner Kuneva, it is impossible to determine whether or not a conflict of interest exists. Moreover, the complainant noted that Mr Cox's CV on the Commission's Special Advisers webpage was incomplete because it did not mention his involvement with APCO, Pfizer and Microsoft. The complainant urged the Commission to publish all the relevant documents in order to provide clarity on the question of a potential conflict of interest. In the absence of such clarification, a conflict of interest would have to be presumed and the Commission "*should be logically expected to terminate Mr Cox's contract*".

5. In her reply of 23 June 2009, Commissioner Kuneva clarified that Mr Cox had been employed since 1 April 2007 as an unpaid Special Adviser and reassured the complainant that she was fully aware of his other activities when she examined possible conflicts of interest. In addition, she explained that Mr Cox has provided "*invaluable advice as to how to communicate consumer policy in a transparent manner to our citizens... which fully represented the spirit and letter of these requirements*." Commissioner Kuneva concluded that she does not consider Mr Cox's activities to be incompatible with his tasks as her Special Adviser and that she will continue to have resort to his invaluable advice.

6. In addition, by letter dated 23 June 2009, Commissioner Kallas explained that the CVs which are published on the Commission's Special Advisers webpage⁴ are not intended to provide an exhaustive description of all the activities undertaken by each Special Adviser, but simply an overview for the benefit of the public. In addition to the CVs, the Commission takes into account all the relevant documents, notably, the Declaration of Activities, to determine whether or not a conflict of interest exists. Mr Cox made his Declaration of Activities before taking up his post and upon renewal in 2008 and 2009. His activities with APCO, Microsoft and Pfizer appeared in the corresponding Declarations.

7. Commissioner Kallas stated next that, according to the Rules on Special Advisers, only the list of Special Advisers, their Sworn Statements and their CVs must be published on the Commission's website. The Declaration of Activities is excluded because its publication would not be in line with data protection rules. Commissioner Kallas concluded that, in light of the above considerations, Commissioner Kuneva was well aware of Mr Cox's activities and acted in full compliance with the applicable rules. Taking into account these activities and the fact that Mr Cox advises the Commission on political communication of consumer policy and not the definition of such policy, the Commission was fully justified in stating that no conflict of interest exists. Finally, Commissioner Kallas informed the complainant that European Integration Solutions had ceased to exist on 31 July 2007.

8. In its letter dated 31 August 2009, which was also copied to President Barroso, the complainant acknowledged the steps taken in transparency and ethics following the introduction of the Rules on Special Advisers, but argued that the current approach to conflicts of interest was insufficient. The complainant stated that what Mr Cox advises the Commission on remains

⁴ http://ec.europa.eu/civil_service/about/who/sa_en.htm



vague. It disagreed with the Commission's view that his involvement in "political communication on consumer issues" excludes a conflict of interest. In the complainant's view, *"the large corporations by which Mr Cox is employed may have an interest in influencing both the message the Commission communicates to the consumer and the manner in which this message is sent."* The complainant also argued that the Special Adviser status gives *"far-reaching access to Commission decision-making that could enable him to exert undue influence on behalf of the corporations for whom he lobbies."*

9. The complainant also asserted that the conclusion reached by the Commissioners is at odds with DG SANCO's guidelines entitled 'Managing Conflict of Interest in SANCO' (henceforth, the 'DG SANCO Guidelines'). In the complainant's view, had these guidelines been followed, the Commission would not have appointed Mr Cox. The complainant insisted that it would be necessary, in the interest of transparency, to disclose at least some of these activities on his CV and allow the public to assess the absence of conflict of interest. In any event, the complainant argued that the Declaration of Activities should also be in the public domain, as should the 'Declaration of Assurance of Meglena Kuneva on the absence of conflict of interest in view of the designation of Mr Pat Cox as Special Adviser to the European Commission' (henceforth, the 'Declaration of Assurance'). Such disclosure would not violate data protection rules, or the principle of proportionality.

10. By letter dated 21 September 2009, the Commission stated that, pursuant to Article 124 of the Conditions for Employment of Other Servants, Special Advisers are obliged to respect the provisions of, inter alia, Articles 11, 11a, 12, 16, 17, 17a and 22 of the Staff Regulations and argued that *"these statutory provisions are in themselves sufficient to ensure that a Special Adviser does not engage in activities which could harm the interests of the Commission."* The Commission, however, reinforced these statutory duties by adopting the Rules on Special Advisers.

11. The Commission described the function of the system and focused on the procedure to ensure in advance that the tasks entrusted to a Special Adviser do not entail any conflicts of interest with his/her outside activities. The Commission distinguished the Rules on Special Advisers as 'special' when compared to the more general rules enshrined in DG SANCO Guidelines which apply to the Commission's experts. It emphasised that, subject to conflict of interest considerations, the Rules on Special Advisers aim to make it possible for the Commission to benefit from the services of an unpaid Special Adviser while allowing him/her to maintain other activities.

12. In the case here concerned, the Commission argued that it would be unreasonable to prohibit all other activities as this would be tantamount to obliging a person to refuse appointment to the Commission and thereby deprive the Commission of the expertise of an exceptionally qualified and experienced adviser. The Commission explained that *"it is clear that being involved in the definition of policies, ..., involves an entirely different degree of influence than communicating to the public policies which have already been defined -"* In the two and a half years following Mr Cox's appointment as a Special Adviser, the Commission did not become aware of any situations of conflict. Nor was there any such indication in the complainant's letters of 29 May and 31 August 2009.

13. By letter dated 29 September 2009, the complainant challenged the Commission's arguments that (a) DG SANCO Guidelines do not apply to the



Commissioner for Consumer Affairs' Special Adviser, (b) the provisions of Articles 11 and 11a of the Staff Regulations were respected in the present case, and (c) communication strategies of consumer policies are not of interest to multinational and lobbying firms.

14. In support of its contentions, the complainant argued that the Commission should have taken the DG SANCO Guidelines into account on this instance. In the same vein, the complainant made clear that it did not suggest that a Special Adviser should refrain from gainful activities. It simply pointed out the major risk of conflict of interest because *"Mr Cox was employed as a lobbyist for large firms with vested interests in EU consumer policy, like APCO, Microsoft, Michelin and Pfizer."* As regards the distinction between policy-shaping and policy-communicating, the complainant stressed that he was unable to verify the absence of conflict of interest because the Commission rejected its requests for a detailed description of Mr Cox's activities.

15. By letter dated 20 October 2009, the Commission confirmed its position that DG SANCO Guidelines are inapplicable because of the differences between the roles of a Special Adviser to the Commissioner and the experts attached to DG SANCO. Given that Mr Cox is attached to Commissioner Kuneva and not to DG SANCO, it is the Rules on Special Advisers which apply in his case. If the DG SANCO Guidelines were applied in the present case, Article 5 (Special Advisers) of the Conditions for Employment of Other Servants⁵ would be rendered meaningless. Second, the statutory provisions on ethics and integrity also apply to Special Advisers who are obliged to make a Sworn Statement that they are aware of the relevant provisions of the Staff Regulations and that there is no conflict of interest in relation to the duties they are about to undertake. Finally, the Commission acknowledged that companies like APCO, Microsoft, Michelin or Pfizer, may have an interest in the formulation of consumer policies. However, Mr Cox was not involved in the formulation but in the communication of such policies to the outside world. His role as Special Adviser did not include an intervention in the decision-making process.

16. In parallel to the above correspondence, the complainant made related access to documents requests to the Commission. In particular, by letter dated 31 July 2009, the complainant made an access request pursuant to Regulation 1049/2001 for the following documents:

- 1) Mr Cox's Declaration of Activities;
- 2) Commissioner Kuneva's Declaration of Assurance; and
- 3) *"Any document giving a more detailed description of Mr Cox's tasks as adviser"*.

17. By letter dated 21 September 2009, the Commission denied access to the Declaration of Activities on the ground that this document was covered by the exceptions enshrined in Article 4(1)(b) of Regulation 1049/2001 because it contained personal data. In fact, the Commission explained that this was the reason for which the Rules on Special Advisers do not foresee the publication of the Declarations of Activities. The Commission provided access to

⁵ "For the purposes of these conditions of employment, 'special adviser' means 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 Communities either regularly or for a specified period and who is paid from the total appropriations for the purpose under the section of the budget relating to the institution which he serves."



Commissioner Kuneva's Declaration of Assurance and explained that the documents relating to the appointment of Mr Cox do not give a more detailed description of his tasks as a Special Adviser.

18. On 23 September 2009, the complainant made a confirmatory application in which he argued that the information provided in the Declaration of Activities cannot be defined as sensitive personal data. The complainant further argued that, even if this were the case, Regulation 45/2001 requires their release on important public interest grounds.

19. On 29 October 2009, the Commission stated that, after consulting Mr Cox, who was the author of the document, and obtaining his permission, it decided to give the complainant access to the Declaration of Activities.

20. By letter dated 31 October 2009, the complainant requested access to all reports of meetings (including minutes/notes) and correspondence (including e-mail) in 2008 and 2009 between Commissioner Kuneva and/or members of her Cabinet and Mr Cox.

21. In its reply of 15 December 2009, the Commission stated that it has not been able to identify any reports of meetings (including minutes/notes) in 2008-2009 between Commissioner Kuneva and/or members of her cabinet and Mr Cox. It did, however, identify two e-mails sent by the Commissioner's Cabinet to him. The first e-mail, dated 22 January 2008, requested Mr Cox to swiftly complete and return the attached Declaration of Activities and the relevant administrative and financial forms, in order to finalise his appointment as Special Adviser for 2008. The second e-mail, dated 6 January 2009, contained the same request for Mr Cox's appointment for 2009. The Declaration of Activities attached to that e-mail was complemented by a handwritten note which provided supplementary information. The attachments also included the Sworn Statement, Commissioner Kuneva's Declaration of Assurance and excerpts from the Staff Regulations and the Rules on Special Advisers.

22. On 19 January 2010, the complainant lodged a complaint with the Ombudsman.

The subject matter of the inquiry

23. The Ombudsman opened an inquiry into the allegations that:

(1) The Commission failed to comply with the relevant procedural rules as regards the appointment of Mr Pat Cox as Special Adviser to Commissioner Kuneva, and

(2) The Commission failed adequately to address the issue of a potential conflict of interest between Mr Cox's remunerated activities and his role as Special Adviser to Commissioner Kuneva.

24. The Ombudsman included in his inquiry the complainant's claim that the Commission should acknowledge that the appointment of Mr Cox as Commissioner Kuneva's Special Adviser in 2007, 2008 and 2009 was not handled according to the Rules on Special Advisers.

25. Further, the Ombudsman requested the Commission to elaborate on the level of control which it applied to determine whether, in accordance with the



relevant rules, the activities of Mr Cox were not in conflict with his tasks as a Special Adviser. Moreover, the Ombudsman asked the Commission to explain whether the considerations pertaining to potential or apparent conflicts of interest, recorded in the Ombudsman's and the Commission's shared understanding relating to Commission officials⁶, also apply to the employment of Special Advisers to the Commission. Lastly, the Ombudsman invited the Commission to explain why the application of the Rules on Special Advisers excludes the cumulative application of DG SANCO Guidelines⁷.

26. The Ombudsman highlighted to the Commission that, although the complaint is against the Commission, the interests of a third party, Mr Cox, were clearly affected. Therefore, the Ombudsman invited the Commission to ensure that its opinion on the complaint takes account of any views that Mr Cox may wish to express regarding the complaint.

The inquiry

27. On 30 April 2010, the Ombudsman invited the Commission to comment on the complainant's allegations and claim. On 29 July 2010, the Commission sent its opinion which was forwarded to the complainant for observations. On 31 August 2010, the complainant submitted its observations.

28. On 27 October 2010, the Ombudsman decided to carry out further inquiries and invited the Commission to elaborate on the information contained in its initial opinion. On 22 December 2010, the Commission sent its reply to the Ombudsman's further inquiries which was forwarded to the complainant for observations. On 14 February 2011, the complainant submitted its observations.

The Ombudsman's analysis and conclusions

Preliminary remarks

29. The Ombudsman will follow the order of the allegations made and proceed to an assessment of whether the Commission complied with the procedural rules governing the appointment of Special Advisers. Next, as a separate analysis, the Ombudsman will assess whether the Commission adequately addressed the issue of a potential conflict of interest in the present case.

⁶ Decision of the European Ombudsman closing his inquiry into complaint 1341/2008/MHZ against the European Commission.

⁷ http://ec.europa.eu/dgs/health_consumer/sdg/docs/conflict_interest_SANCO.pdf.



A. The Commission's alleged failure to comply with the relevant procedural rules as regards the appointment of Mr Pat Cox as Special Adviser to Commissioner Kuneva and related claim.

Arguments presented to the Ombudsman

30. The complainant's arguments concerning the Commission's compliance with the procedural rules on Special Advisers, as well as the applicable rules, differ depending on the year in question. The Ombudsman will, therefore, examine each year separately.

2007

31. As regards the procedure for appointment in 2007, the complainant referred to the Commission's e-mail of 13 March 2007 to Mr Cox requesting "*all the relevant documentation that needed to be filled out in order to finalise [his] appointment as Special Adviser*". The attachment to the e-mail contained several documents which needed to be completed, but not a Sworn Statement or a Declaration of Activities. The complainant argued that these documents were necessary in light of the instructions received by the Commissioners' cabinets on 30 January 2007.

32. In its opinion, the Commission drew the Ombudsman's attention to the fact that a different legal framework governed the appointment of Special Advisers in 2007 to that which was in place in 2008 and 2009. The current applicable Rules on Special Advisers were only adopted on 19 December 2007⁸. The Commission intended to introduce a formal procedure of verification of potential conflicts of interest already at the end of 2006/early 2007. That process, however, was not yet in place when the procedures for the appointment of Special Advisers for 2007 were launched. The Commission argued that, as regards Mr Cox's appointment for 2007, "*... the designation of the Special Advisers on 1 April 2007 was carried out under the former Rules governing Special Advisers.*"

33. Accordingly, by note dated 30 January 2007, the Commission's DG ADMIN contacted all Heads of Cabinet and triggered the procedure for the appointment of Special Advisers in 2007. DG ADMIN did not request candidates to complete and send back declarations on the absence of a conflict of interest (the predecessor of the present Sworn Statement) because, at that time, the format of the new Sworn Statement was still subject to consultations within the Commission services. Consequently, the Commission argued, it could not carry out a formal exercise to verify the absence of conflicts of interest prior to the decision on appointments of Special Advisers for the period from 1 April 2007. That process was completed by 1 July 2007 when the list of appointed Special Advisers together with the mandates, the CVs and the Sworn Statements were published on the Europa Website.

34. The Commission went on to state that the handling of the appointment of Special Advisers in 2007 was thus carried out in full compliance with the rules in force at the time, and every effort was made to ensure that the newly

⁸ Commission Decision C(2007) 6655 on the Rules governing Special Advisers to the Commission adopted on 19 December 2007.



appointed Special Advisers' other activities were compatible with their tasks as Special Advisers.

35. In the specific case here concerned, the Commission explained that, by letter dated 20 March 2007, Commissioner Kuneva's Cabinet made the request to appoint Mr Cox as a Special Adviser and attached his CV dated 19 March 2007. On 30 March 2007, the Commission appointed Mr Cox as Special Adviser to Commissioner Kuneva from 1 April 2007. The contract, which was signed on 18 April 2007, was granted on the condition of returning the completed and signed Declaration of Activities by 16 May 2007. On 5 June 2007, Commissioner Kuneva's Cabinet transmitted Mr Cox's signed contract, Sworn Statement and Declaration of Activities to Commissioner Kallas's Cabinet. In accordance with the empowerment procedure, Commissioner Kallas had the responsibility to sign all Special Advisers' contracts on behalf of the Commission.

36. By e-mail dated 29 June 2007, Commissioner Kallas's Cabinet requested the Cabinets of individual Commissioners to ensure that a statement confirming the absence of any conflict of interest be signed by the Commissioners and sent to Commissioner Kallas by 6 July 2007 (the Declaration of Assurance was introduced by the current Rules on Special Advisers and did not exist at the time)⁹. Commissioner Kuneva's Cabinet forwarded the requested statement on 6 July 2007¹⁰.

37. In its observations, the complainant argued that, although the rules on Special Advisers did not become applicable until December 2007, the rules in force at the time of Mr Cox's appointment for 2007 provided that *"le futur conseiller spécial signe avant sa nomination une déclaration par laquelle il atteste qu'il n'existe aucun conflit d'intérêt avec sa future fonction"*¹¹. Consequently, this condition was not met in the case of Mr Cox's appointment in 2007 because, contrary to the clear provision in the applicable rules, *"Mr Cox was appointed as Special Adviser to Commissioner Kuneva from 1 April 2007"*.

38. The complainant further argued that, in any event, verification of the absence of conflict of interest could not be carried out only on the basis of Mr Cox's CV because the CV did not mention all his activities. While a declaration on the absence of conflict of interest would not have included those either, it would have reinforced the impression that a verification of the absence of

⁹ The e-mail stated "... I would now like to turn to you to request reasonable assurances from you that the attached declarations of the special advisers to your Commissioners do not contain anything, against the background of the special adviser's mandate, that could put the good reputation of the Commission into question.

I would therefore ask you to confirm to me by e-mail, and by 6 July at the latest, that on the basis of the declarations on the absence of conflicts of interest and activities of Mr Cox, your Commissioner does not see a risk for a potential conflict of interest between the outside activities and the exercise of duties as special adviser within the defined mandate. Alternatively, you might wish to indicate to me that your Commissioner is of the opinion that a potential reputational risk might prevail (please specify), but that she considers that this potential reputational risk is acceptable for her and the College as a whole. In the latter case, and should you wish to maintain the special adviser contract, it would be useful to indicate how you will try to mitigate such a risk for potential conflicts of interest, in fact or in appearance."

¹⁰ *"Mr. Cox has been asked to advise Commissioner Kuneva specifically regarding political communication on Consumer issues to stakeholders and the public. There is no policy definition advisory role foreseen. In response to your email of 29 June I would like to clarify the most transparent way of proceeding. The only issues within his statement which could be of any relevance relate to the EIS/ Consulting firm in Ireland doing work notably with Microsoft and other healthcare companies - areas in which he will not be advising the Commissioner."*

¹¹ *"Before his/her nomination, the prospective Special Adviser signs a declaration in which he confirms that there is no conflict of interest with his future tasks."*



conflict of interest had been carried out. The ongoing consultations on the final format of the new Sworn Statements cannot justify the fact that Mr Cox's appointment in 2007 was not carried out in compliance with the rules in force at the time.

39. In his further inquiries, the Ombudsman drew the Commission's attention to the fact that, in its opinion, it did not specifically comment on whether the procedure followed complied with the Rules on Special Advisers applicable in 2007, notably, the Commission's procedural obligation to obtain from the future Special Adviser before his nomination a declaration on the absence of conflict of interest.

40. In its reply, the Commission underscored that the appointments of Special Advisers in 2007 took place in a specific context since the rules on Special Advisers were being modified at that time. The Commission's objective was to ensure an effective examination of conflicts of interest before the Special Advisers took up their duties. Consequently, a specific condition was introduced in Article 6 of the contracts for Special Advisers in accordance with which "[i]n order to obtain a contract, the Special adviser must return the declarations, duly signed for the declarations on the honour and filled in and signed for the declaration of activities." The note sent on 18 April 2007 also underlined that obtaining the contract was dependent on the return of the Declarations filled in and signed. The Commission summarised its position as follows: "*the procedure applied in 2007 for the examination of conflicts of interest provided more safeguards than the mere signing of a declaration on the absence of conflicts of interest (even if such declaration had already been signed before the formal appointment).*"

41. In its observations on the Commission's reply, the complainant argued that the Commission did not carry out its procedural obligations because it did not have a declaration on the absence of a conflict of interest, on 1 April 2007, when the contract took effect and the nomination was approved. The Commission only possessed Mr Cox's CV dated 19 March 2007 and, according to the rules in place at the time, this was not a sufficient basis to endorse the appointment.

2008

42. As regards the procedure for appointment in 2008, the complainant argued that Ms Kuneva's Cabinet asked Mr Cox to complete the Sworn Statement and the Declaration of Activities but failed to provide the complainant with the signed version when he made a request for access to these documents. The complainant argued that these documents were not signed in time for 2008, which means that either the Commission failed properly to follow the Rules on Special Advisers or to respond in full to the complainant's request.

43. In its opinion, the Commission argued that, in accordance with the revised Rules governing Special Advisers that were adopted on 19 December 2007, the requested documents (Sworn Statement and Declaration of Activities) were provided in time before the new contract started running on 1 April 2008. Mr Cox submitted his Sworn Statement as well as his Declaration of Activities on 3 February 2008. Commissioner Kuneva's Cabinet submitted the Declaration of Assurance on 11 February 2008. The Rules on Special Advisers were thus properly followed.

44. Further, the Commission explained in detail the manner in which it had handled the complainant's access to documents requests and enclosed with its



opinion the Sworn Statements and the Declarations on Activities for the years 2007, 2008 and 2009.

45. In its observations, the complainant emphasised that the procedure followed in 2008 should serve as an example compared with 2007 and 2009. In fact, the complainant argued that this strengthens its argument that there had been shortcomings in both years. The Commission could have provided the signed Sworn Statement and the Declaration on Activities at a much earlier stage and could have thereby convinced the complainant that the procedure followed in 2008 complied with the applicable rules. From a substantive perspective, however, the complainant argued that the Commission did not have adequate information to be assured of the absence of conflict of interest in 2008.

2009

46. As regards the procedure for appointment in 2009, the complainant submitted that Commissioner Kuneva made her Declaration of Assurance on 7 January 2009. Mr Cox's Declaration of Activities for 2009 was only signed on 22 June 2009, that is, more than five months later. Consequently, Commissioner Kuneva could not have been fully aware of his activities or have examined potential conflicts of interest.

47. In its opinion, the Commission confirmed that Commissioner Kuneva submitted a Declaration of Assurance dated 7 January 2009. However, "[t]he Declaration of activities provided to the complainant ..., which was dated on 22 June 2009, was an updated version (and therefore the one currently in force at the time of the request for access to documents made by the complainant) of the initial Declaration of activities submitted by Mr Cox before the Decision on appointments of Special Advisers in 2009. Indeed, the Cabinet Kuneva submitted the documents requested when it made its request for the renewal of the appointment of Mr Cox in 2009 in January (Declaration of activities and on the honour signed by Mr Cox, dated 9 January 2009). Admittedly, these Declarations were signed two days after the Declaration of assurance of the Cabinet; however, it should be reasonably assumed that, after two years of appointment, the Commissioner was fully aware of Mr Cox's external activities. DG ADMIN had therefore all documents in its possession to carry out its exercise of verification of absence of conflict of interest before the appointment of Mr Cox for the year 2009. The Commission took its Decision on the appointment of Special Advisers on 8 April 2009."

48. The Commission argued that updating the forms submitted by the Special Advisers during their appointment is foreseen in the contract concluded with the Special Adviser, which expressly provides that "the Special Adviser undertakes to inform on his own initiative the Commission of any relevant change in his other activities". In line with this provision, Mr Cox submitted an updated version of his CV which was published on the Europa Website.

49. In its observations, the complainant insisted that the procedure followed in 2009 was as flawed as in 2007. The basic change that the new rules that came into force in December 2007 aimed to achieve was to "make compulsory the adoption of the declaration on the honour to be signed before taking up duties". The complainant argued that the obligation to sign a declaration that no conflict of interest existed was already contained in the 2004 rules, but it was reportedly not well implemented and Commissioner Kallas rightly wanted to reinforce it.



50. In 2009, however, while the Sworn Statement and the Declaration on Activities were available before Mr Cox's appointment, they were not available before Commissioner Kuneva signed her Declaration of Assurance. The basic reason for introducing the Declaration of Assurance was to enable individual Commissioners to scrutinise the absence of conflicts of interest and not leave this task to DG ADMIN alone. As the Commission admits, Commissioner Kuneva signed her Declaration of Assurance on 7 January 2009 without having Mr Cox's Declarations (signed on 9 January 2009). In view of the fact that the deadline for Commissioner Kuneva's Cabinet to hand in the documents for the approval of her adviser was 23 January 2009, the complainant found it hard to understand why Commissioner Kuneva did not wait. The Declaration of Assurance should not have been signed in the absence of the documents that are necessary to make a judgement, namely, the Sworn Statement and the Declaration of Activities.

51. Instead, the Commission argued in its opinion that it could be "*reasonably assumed*" that, two years after his appointment, Commissioner Kuneva was fully aware of Mr Cox's other activities. The complainant argued that this was an incorrect implementation of the relevant rules. It was also factually incorrect because Mr Cox's list of activities seems to have been modified in 2009, with the addition of the information concerning Microsoft's European Advisory Council and Pfizer's Europe Advisory Council. In fact, the complainant argued that Mr Cox only informed the Commission about these new activities on 22 June 2009, one day before the Commission's reply to a letter from the complainant. It is unclear when exactly Mr Cox took up these duties and whether they should have been taken into account before his appointment in April 2009.

52. The complainant continued by stating that the procedure followed by Commissioner Kuneva did not reveal any serious intention to examine a potential conflict of interest, but rather showed that she regarded the provisions of the new rules on Special Advisers "*as empty formalities*". The Commission also failed to explain why, in response to the complainant's access to documents request, it did not provide the latter with the original Declaration of Activities and its update.

53. In view of the above observations, the Ombudsman carried out further inquiries and requested the Commission to inform him as to when it became aware that Mr Cox's Declaration of Activities had been changed to include his joining the European Advisory Council of Microsoft and the Europe Advisory Council of Pfizer.

54. In its reply, the Commission stated that it received Mr Cox's modified Declaration of Activities on 23 June 2009.

55. In its observations on the Commission's reply, the complainant argued that it remained unclear exactly when Mr Cox joined these two Advisory Councils and whether they should have been taken into account before his re-appointment in April 2009. In the complainant's view, this indicates that Commissioner Kuneva was not entitled to "*reasonably assume*" that "*after two years of appointment ... (she) was fully aware of Mr. Cox's external activities.*" In conclusion, the Commissioner had no right to submit a Declaration of Assurance without having first seen Mr Cox's updated Declaration of Activities.



The Ombudsman's assessment

56. The Ombudsman notes that the rules applied to the appointment process for Special Advisers in 2007 were different from the ones which applied in 2008 and 2009.

57. As regards 2007, the main issue in contention is whether the Commission complied with the condition requiring it to have received a declaration concerning the absence of a conflict of interest¹² before the Special Adviser's appointment. In the course of the present inquiry, the Commission essentially admitted that (i) it did not request such a declaration from Mr Cox at the time because the format of the Sworn Statement was still the object of consultations within its services, (ii) the new Rules for Special Advisers were being developed and (iii) the improvement of the Special Advisers section on its website was going ahead.

58. While the Ombudsman agrees that these developments are of undoubted importance and clearly beneficial to the Commission's efforts to improve both efficiency in the verification of the absence of conflicts of interest of prospective Special Advisers, as well as the transparency of this process vis-à-vis the European citizens, they do not suffice to justify the Commission's failure to comply in a timely manner with a clear procedural rule. The Ombudsman takes the view that the relevant rules mean that Commission ought to have obtained the declaration on the absence of a conflict of interest prior to the nomination, let alone, the appointment of a Special Adviser. Consequently, the Commission's failure to obtain a declaration on the absence of conflict of interest from Mr Cox prior to his appointment as a Special Adviser to Commissioner Kuneva in 2007 constitutes an instance of maladministration.

59. As regards 2008, the Commission explained the steps it took so as to comply with its obligations under the new Rules for Special Advisers which were adopted on 19 December 2007. In this regard, it argued that, following receipt of Mr Cox's Sworn Statement and Declaration of Activities, Commissioner Kuneva made her Declaration of Assurance. The documentation was then forwarded to Commissioner Kallas, who, on behalf of the Commission, appointed Mr Cox as a Special Adviser to Commissioner Kuneva. In light of the above, the Ombudsman concludes that no instance of maladministration has been established regarding the Commission's compliance with the procedural rules for Special Advisers in 2008.

60. As regards 2009, the Ombudsman points out that the procedure established by the Commission's own rules clearly envisages that a Declaration of Assurance can only be given after examining the prospective Special Advisers' Sworn Statement and Declaration of Activities. In fact, Commissioner Kuneva was not entitled to state in her Declaration of Assurance that "*on the basis of the declarations on the absence of conflicts of interest and of activities of Mr. Pat Cox, Mrs Meglena Kuneva does not see a risk for a potential conflict of interest between the outside activities and the exercise of his duties as Special Adviser within the defined mandate*". This is so not because the Commissioner had not thoroughly examined Mr Cox's Sworn Statement and Declaration of Activities but, crucially, because she had not even received them. Moreover, the Ombudsman finds regrettable the Commission's explanation that, after two years, the Commissioner had to be aware of Mr Cox's activities. This could imply that

¹² ADMIN-A-5/sg D(07) 1309, C(2004)1318.



procedures which are designed to ensure and to demonstrate that the Commission has acted properly can be treated as mere formalities.

61. Moreover, the present inquiry also serves to illustrate that the modification of a Declaration of Activities during a Special Adviser's contract is an issue which is not adequately addressed in the Rules for Special Advisers or the contracts signed by them. In fact, there is no procedural safeguard requiring the Commissioner who employs a Special Adviser to carry out a fresh verification of conflicts of interest when the Special Adviser's Declaration of Activities is substantially modified. With this in mind, the Ombudsman takes the view that it would be good administrative practice to ensure that, when a Special Adviser makes a substantial change to his Declaration of Activities, a new Declaration of Assurance must be submitted by the responsible Commissioner. To this effect, the Ombudsman will make a further remark.

62. All in all, the Ombudsman regrets the manner in which the Commission handled the procedure concerning the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva. The Commission's overall approach does not abide by the increasingly high standards which the citizens expect from the Union institutions, and does not show due respect to the procedural safeguards which the Commission itself has put in place in response to public concerns about transparency in relation to Special Advisers. These procedures must not be seen as mere formalities, but as serving objectives which are important to both the Union institutions and Union citizens. The Commission should also be conscious that any shortcomings in its conduct affect, potentially adversely, not only its own reputation, but also the interests and potentially the reputation of a Special Adviser, in this instance, Mr Cox. The Ombudsman intends to return to this issue in his analysis of the second allegation.

63. In light of the above considerations, the Ombudsman makes a critical remark to the Commission for failing to obtain a declaration on the absence of a conflict of interest before appointing Mr Cox as a Special Adviser in 2007. The Ombudsman makes another critical remark to the Commission concerning Commissioner Kuneva's Declaration of Assurance before obtaining Mr Cox's Sworn Statement and Declaration on Activities in 2009. In light of his conclusions, the Ombudsman does not consider it necessary to deal with the claim that the Commission should acknowledge that the recruitment of the Special Adviser was not handled according to the applicable Rules on Special Advisers. The Commission should, however, be able to address this issue in its follow-up to the present decision.

B. The Commission's alleged failure adequately to address the issue of a potential conflict of interest between Mr Cox's remunerated activities and his role as Special Adviser to Commissioner Kuneva

Arguments presented to the Ombudsman

64. In support of this allegation, the complainant argued that Articles 11 and 11a of the Staff Regulations require a Special Adviser to refrain from dealing with a matter in which he has a direct or indirect financial interest. As a Special Adviser to Commissioner Kuneva, Mr Cox dealt with consumer policies and the communication of these policies. Even if he was not in any way involved in drafting policy, the communication of consumer policy would be a field of



interest to the companies from which Mr Cox was receiving remuneration. The complainant insisted that this impaired his independence as a Special Adviser.

65. In its opinion, the Commission responded to the allegation and focused on three issues identified by the Ombudsman in his letter informing it of the inquiry. Moreover, the Commission requested comments from Mr Cox, which it annexed in its opinion and fully endorsed. The Ombudsman will proceed with an outline of the Commission's arguments as they were presented in its opinion, and then make a brief summary of Mr Cox's comments.

66. In this regard, the Commission commenced the analysis of its evaluation of the existence of a conflict of interest by outlining the legal framework applicable to Special Advisers¹³. The statutory provisions thereunder oblige a Special Adviser to carry out his/her duties solely with the interests of the Union in mind, to refrain from taking instructions from any organisation outside his/her institution, to refrain from dealing with a matter in which, directly or indirectly, she/ he has any personal interest such as to impair his/her independence, to refrain from any action or behaviour which might reflect adversely upon his/her position and from any unauthorised disclosure of information received in the line of duty. Should a Special Adviser fail to respect these, his/her contract could be terminated with immediate effect.

67. The revised Rules for Special Advisers reinforce the effect of the above statutory provisions and establish an elaborate procedure in order to ensure beforehand that there are no conflicts of interest between the tasks to be assigned by the Commission to a given Special Adviser and his/her other activities. Nevertheless, the Commission also drew the Ombudsman's attention to the fact that Special Advisers constitute a specific group which is not directly comparable to officials. Article 5 CEOS defines Special Advisers as persons, who by reasons of their special qualifications and "*notwithstanding gainful employment in some other capacity*" are engaged to assist one of the Union institutions. The CEOS are thus based on the assumption that Special Advisers may have other gainful activities.

68. For the same reasons, the last paragraph of Section 5 of the Rules governing Special Advisers provides that the proportionality principle must be observed when checking the absence of conflicts of interest and that account must also be taken of the particular status of Special Advisers and of the nature of their duties, given that they are appointed by Members of the Commission specifically because of their expertise and outside activities. A strict approach, consisting of prohibiting all other activities, would not be in line with this principle and would, in practice, prompt the person concerned to refuse the appointment as Special Adviser, thereby depriving the Commission of the expertise of an exceptionally qualified and experienced adviser.

69. As regards Mr Cox's appointment, the Commissioner started by underlining that Mr Cox's specific mandate was to give advice regarding political communication on consumer issues, and not regarding policy definition. Obviously, had Mr Cox been involved in the definition of policies, it would have implied an entirely different degree of influence than giving advice on the communication to the public of policies which have already been decided. The Commission insisted that it was therefore fully justified and appropriate for it to state that no conflict of interest existed.

¹³ Article 124 of the Conditions of Employment of Other Servants (CEOS) provides that Articles 11, 11a, 12, 16(1), 17, 17a and 22 of the Staff Regulations (SR) apply by analogy to Special Advisers.



70. The Commission contended that the statement of the absence of a conflict of interest was the result of a thorough examination of the merits of the case, including Mr Cox's gainful activities, as well as both the voluntary and the honorary ones. Due, in particular to the limited scope of his mandate, it was concluded at the end of this examination that there was no conflict of interest.

71. The Commission then addressed, as requested by the Ombudsman in his letter opening the inquiry, both the potential and the apparent conflict of interest applicable to this case. In this regard, in defining potential conflict of interest, the Commission referred to point 12 of the Recommendation of the OECD of June 2003 on Guidelines for managing conflicts of interest in the public service (hereafter, the 'OECD Guidelines'), which state that "[a] *potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant official responsibilities in the future.*" The Commission endorsed the OECD Guidelines and held that these considerations apply both in relation to officials and to Special Advisers. In the case at hand, the Commission stated that, in view of Mr Cox's limited mandate, such a conflict did not exist.

72. As regards apparent conflicts of interest, the OECD Guidelines provide that "*an apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case.*" The Commission stated that, as regards an apparent conflict of interest, Mr Cox's mandate, with its restriction to communication questions, was publicly available. In the absence of any involvement in policy definition, it could not even appear that there could be a conflict between his public duties and his private interests.

73. While the Commission accepted the OECD Guidelines, it rejected the applicability of the DG SANCO Guidelines. The Commission reiterated its position that DG SANCO Guidelines apply to experts attached to DG SANCO and not to Special Advisers to the Consumers Commissioner. The Commission also noted that the document in question does not represent official SANCO Guidelines. In any event, even if DG SANCO Guidelines were to be applied to the present case, its terms would have to be interpreted in the light of Mr Cox's concrete mandate. The Commission does not consider that Mr Cox carries out activities for organisations with a "*vested interest*" on the issue of how consumer policy is communicated.

74. In its observations, the complainant argued that, while agreeing with the Commission that "*the starting point for the assessment of the possible existence of conflicts of interest must be the specific mandate assigned to [a Special Adviser]*", there was no clear and detailed description of Mr Cox's tasks as Special Adviser. Such detailed description is needed properly to assess risks of conflicts of interest. The complainant disagreed with the Commission's position that, because Mr Cox was not involved in the definition of policies, this automatically constituted a safeguard against any possible conflict of interest.

75. The complainant further argued that the Commission can communicate its consumer policy in many different ways. The advice provided by Mr Cox on Commission information campaigns for consumers could therefore benefit companies like Pfizer, Michelin, Microsoft and APCO. DG SANCO and Commissioner Kuneva recently ran information campaigns on issues such as unfair commercial practices, product safety, consumer rights and enforcement of consumer law. These are issues which potentially could be of interest to the mentioned companies. The complainant was not in a position to know whether



Mr Cox's advice influenced these information campaigns and, if so, in which direction, because the Commission's failure to provide specific information about Mr Cox's tasks made any such assessment impossible.

76. The complainant referred to Mr Cox's letter to the Commission dated 22 May 2010 in which he referred to a series of *"meetings held in Brussels since 2007" "with the Commissioner and/or members of her cabinet" and "a brief and intensive mission to Sofia, Bulgaria"*. The complainant argued that the Commission did not provide any minutes, notes, agendas, conclusions or other outcomes of these meetings and mission when it, that is, the complainant asked for them on 31 October 2010. This material would permit a thorough and specific verification, in line with the OECD Guidelines.

77. The complainant questioned the Ombudsman's ability to form an opinion on whether there was a conflict of interest without such documents being made available. Furthermore, the complainant argued that, if there was nothing worth keeping on record, it is legitimate to question the Commission's rationale in recruiting Mr Cox as a Special Adviser in the first place and to twice renew his contract. It further argued that all explanations about his work with various companies, given by Mr Cox to the Commission in the course of the Ombudsman's inquiry, should have been asked by the Commission before appointing him. Given the lack of such information, the image of *"a thorough examination of the merits of the case"* promoted by the Commission is unconvincing.

78. Next, the complainant emphasised that, while it did not doubt Mr Cox's merits and in-depth knowledge of EU policies, they could have been used by the Commission in other policy fields where Pfizer, Michelin and Microsoft have no direct or indirect stakes. The complainant clarified that the present complaint and previous publications and correspondence did not aim at *"calling into question Mr Cox's personal integrity"*. It aimed at *"putting an end to a mentality that seems to regard as perfectly normal that high-level decision-makers or their advisors are having parallel loyalties to corporate interest"*, achieving stricter implementation of the current rules in conflicts of interest and highlighting the need for even stricter rules which would also promote citizens' confidence in European institutions.

79. On a general level, the complainant reiterated that, contrary to what the Commission appeared to be implying, it did not ask for an approach which prohibits a Special Adviser from taking part in other gainful activities. In parallel, the complainant does not share the Commission's view that *"[s]pecial Advisers ... are appointed ... specifically because of their expertise and their outside activities."* The complainant's key view instead is that *"there can be no quality public policy advice by somebody working for a powerful commercial interest with stakes in the same policy area."* This is the reason why the complainant considers the DG SANCO Guidelines as the best approach on the issue that should be adopted by the Commission.

80. The complainant closed its observations by expressing the view that *"[a]ll declarations of activities of the Special Advisers should be published on the relevant EC web page. Until the former principle is implemented, Special Advisers' CVs published in the website should include all their paid activities. The Commission should use a broad interpretation to the terms 'policies', 'policy fields' and 'policy matters'" to the effect that somebody working for a company with clear interest in a certain policy field or matter should not be admissible as a Special Adviser in the same policy field.*



81. In his further inquiries, the Ombudsman summarised the Commission's position that the key issue in determining whether there was a potential conflict of interest between Mr Cox's responsibilities as Special Adviser to Commissioner Kuneva and his remunerated positions as stated in his Declaration of Activities is the nature of his tasks as a Special Adviser. The Commission stated that these tasks only included the communication and not the definition of consumer policy. The complainant essentially argued that the communication and the definition of consumer policy are inextricably linked.

82. In view of these differences in perspective, the Ombudsman asked the Commission to provide more detailed information about the tasks Mr Cox actually carried out in the three years he advised Commissioner Kuneva. Specifically, the Ombudsman requested information on the number of days during which Commissioner Kuneva had access to Mr Cox's specialist knowledge, and his activities on those days, including (a) any available agendas, notes, conclusions and minutes of the meetings in which Mr Cox participated in his capacity as a Special Adviser to Commissioner Kuneva between 1 April 2007 and 9 February 2010, and (b) details of any missions and any available mission reports.

83. In its reply, the Commission stated that, according to the appointment decisions, the (maximum) authorised number of days of work was 26 (with 19 mission days) for the contract concluded in 2007, 15 (with 11 mission days) for the contract concluded in 2008, and 20 (with 15 mission days) for the contract concluded in 2009. In fact, Mr Cox made only one mission (comprising 2.5 mission days) in 2007, and none in the following years. On this mission, he accompanied Commissioner Kuneva to Sofia. The Commission has no notes, minutes, conclusions or agendas of any meetings, given that Mr Cox talked to the Commissioner by phone or spoke to her in person when he was in Brussels. No official meetings regarding communication on consumer policy ever took place.

84. In its observations on the Commission's reply, the complainant argued that if no official meetings regarding communication on consumer policy and only one mission took place, the reasons for Mr Cox's reappointment could be questioned. The complainant contended that bestowing the status of a special adviser to people "*with close links to vested interests*" harms the image of the Commission and the trust of citizens in it. The complainant continued by arguing along the lines that Mr Cox was offered a reputational advantage apparently without offering anything in return. Moreover, the complainant insisted that, during unofficial contacts, "*Mr Cox could have influenced the Commissioner in favour of his employers, taking advantage of his status as her Special Adviser*". Finally, the complainant underlined that the absence of records as regards the conversations between Mr Cox and the Commissioner makes any form of genuine scrutiny of potential conflicts of interest impossible.

85. Regarding Mr Cox's contribution to the inquiry, the Ombudsman recalls that he invited the Commission to ensure that its opinion on the complaint takes account of any views that Mr Cox may wish to express regarding the complaint. The Commission followed the Ombudsman's suggestion and, by letter dated 22 May 2010, Mr Cox provided his detailed view about the inquiry. The Commission referred to that letter in its opinion as follows: "*Formally, the complaint is directed against the Commission. It is, however, obvious that the charges alleged against Mr Cox could affect his reputation. The Commission must firmly reject these charges. Mr Cox acted always in accordance with the applicable rules and procedures. There are no indications whatsoever that he was influenced - or might have*



been influenced - in the exercise of his mandate by his personal interest or by the interest of one of the companies with which he had professional contacts. The Commission refers to the letter of Mr Cox of 22 May 2010 and his observations of the same day..., which refute in detail the allegations made against him."

86. The Ombudsman notes that Mr Cox made some general remarks and specific detailed remarks on the complainant's allegations and arguments before concluding that:

"I contend that the complainants, insofar as they have focused their attention on me, have misrepresented poor basic research, taken uncritically from the internet and not subjected to any independent or robust verification procedure, as being 'strong evidence' (cf. Brussels Sunshine blog 22 September 2009). This 'evidence' is accompanied by pseudo scientific foot note references to internet searches. To assert that this is strong evidence is an act of self delusion.

I contend that my specific observations reveal a mixture of truths, half truths and falsehoods and of inflation, conflation and innuendo on the complainant's part in their presentation and treatment of the 'evidence' offered. When taken collectively this fails to establish a reliable foundation for the allegations they have so liberally promoted and broadcast.

I contend the evidential probity and standards demanded by the complainant of others is not matched by a parallel scrupulousness when it comes to the standards applied to their own submissions and behaviour.

I contend that, notwithstanding the multitude of allegations, the entire absence of any specific or concrete evidence on the part of the complainant undermines their egregious assertions and persistent use of innuendo about me.

I contend that the entire absence of any specific or concrete evidence on the part of the complainant is because there is no such evidence.

I contend that the publicity generated by the complainant surrounding this case, in terms of supporting documentation, reflects a low and mean spirited exploitation of my public persona and contempt for my right as a private citizen to my good name, standing and reputation.

I contend that I have been grievously wronged in this affair and call on the appropriate authorities to ensure that the record reflects this.

I contend that the complainants should set the record straight and that they should be obliged to expunge from the internet all unfounded allegations, inferences and innuendo to which they have given credence and publicity."

The Ombudsman's assessment

87. Before proceeding with the assessment of this allegation, a first preliminary point must be made. In accordance with the Treaty on the Functioning of the European Union, the Ombudsman's mandate is to receive complaints concerning instances of maladministration in the activities of the Union institutions. In this regard, the complaint concerns alleged maladministration by the Commission in the manner in which it carried out its procedural obligations in appointing Mr Pat Cox as Special Adviser to Commissioner Kuneva (the first allegation, analysed above) and in whether it adequately addressed the issue of a potential conflict of interest between Mr Cox's tasks as



Special Adviser to Commissioner Kuneva and his outside activities (the allegation dealt with in this section of the present decision).

88. The Ombudsman has been conscious all along that, while the present inquiry concerns an allegation against the Commission, the interests of a third party, Mr Cox, were clearly affected. Consequently, in the interests of transparency and fairness, the Ombudsman invited the Commission to take into account any views Mr Cox may have in relation to the present inquiry when preparing its opinion. The Commission responded to the Ombudsman's request and annexed Mr Cox's comments with its opinion. Guided by the aforementioned principles, the Ombudsman considered it essential that Mr Cox were afforded sufficient opportunity to make his views known on the issues raised and has therefore made reference to his comments in the descriptive part of this decision. However, the Ombudsman's analysis, in accordance with his mandate, is limited exclusively to the allegations against the Commission.

89. The starting point of the Ombudsman's analysis aims to determine the relevant applicable rules. In this regard, it must be underscored that EU public law does not provide a universally accepted definition of conflict of interest or a uniform procedure to address conflicts of interest. The importance of the matter can be hardly overstated. In this respect, the Ombudsman has found that, in order to maintain public trust and confidence in their activities, the institutions should do their utmost to avoid not only actual conflicts of interest, but also potential and apparent conflicts of interest. In making this statement, the Ombudsman drew inspiration from the OECD Guidelines for Managing Conflict of Interest in the Public Service¹⁴, which appear to be developing into the common vocabulary on matters of conflict of interest shared among EU institutions¹⁵.

90. The OECD Guidelines provide a useful definition of what constitutes an actual¹⁶, potential¹⁷ or apparent¹⁸ conflict of interest. It should however be pointed out that the Ombudsman's analysis is not intended to determine, on the basis of the information available following his inquiry, whether an actual, potential or apparent conflict of interest existed between Mr Cox's duties as a Special Adviser to Commissioner Kuneva and his outside activities. While such an analysis would squarely fall within the Ombudsman's mandate, the present inquiry has focused all along on the question of assessing whether the Commission adequately addressed the issue of a potential conflict of interest upon Mr Cox's appointment in 2007 and his re-appointment in 2008 and 2009, according to the relevant rules and principles which applied to Special Advisers at the time.

91. Next, the Ombudsman moves on to the analysis of the standard that the EU institutions ought to observe in order to address and manage conflicts of

¹⁴ <http://www.oecd.org/dataoecd/13/22/2957360.pdf>

¹⁵ Decision of the European Ombudsman closing his inquiry into complaint 1341/2008/MHZ against the European Commission, at paragraph 28.

¹⁶ "A 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities."

¹⁷ "A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant official responsibilities in the future."

¹⁸ "An apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case."



interest¹⁹. In the present context, the general rules which apply to Special Advisers, notably, Article 124 of the Conditions of Employment of Other Servants of the European Community, make Articles 11 and 11a of the Staff Regulations applicable to Special Advisers by analogy²⁰.

92. The analogous application of the Staff Regulations is qualified by a proportionality requirement. In this regard, the last paragraph of Section 5 of the Rules on Special Advisers provides that "[t]he proportionality principle is observed when checking whether there is no conflict of interest on the basis of Articles 11 and 11a of the Staff Regulations, which apply by analogy to special advisers. Account is also taken of the particular status of special advisers and the nature of their duties, given that they are appointed by Members of the Commission specifically because of their expertise and their outside activities." This provision implies that the Commission is prepared to apply a lower threshold at the control of conflict of interest because, unlike officials, an unpaid Special Adviser would normally maintain some professional activity, and, in some cases, he or she may be selected to act as a Special Adviser "because of [his] expertise and outside activities." Therefore, the standard of conflict of interest control is subject to proportionality, understood in this context, as the rigour which the Commission is expected to exercise when determining whether the outside activities of a prospective Special Adviser could give rise to an actual, potential or apparent conflict of interest with his Commission tasks.

93. As regards the complainant's argument that the DG SANCO Guidelines represent the best approach to dealing with issues of conflict of interest by the Union institutions and should be adopted by the Commission, the Ombudsman does not find it necessary to address the issue in the present decision. Whatever the comparative merits of DG SANCO Guidelines, it is clear that the Commission applied the Staff Regulations and the Rules for Special Advisers to address the issue of a potential conflict of interest in the present case. It is in light of these rules and procedures that the Ombudsman intends to carry out his assessment. Only if, in the course of the present inquiry, these procedures were to prove inadequate to serve the purpose for which they were adopted would the Ombudsman be prepared to examine the alternatives contained in the DG SANCO Guidelines.

¹⁹ Point 10 of the OECD Guidelines provide that "As all public officials have legitimate interests which arise out of their capacity as private citizens, conflicts of interest cannot simply be avoided or prohibited, and must be defined, identified, and managed."

²⁰ Article 11 of the Staff Regulations provides:

"An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Communities.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service."

Article 11a

"1. An official shall not, in the performance of his duties and save as hereinafter provided, 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 this matter.

3. An official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties."



94. Moving on to the applicable procedure for managing conflicts of interest concerning Special Advisers, the relevant Rules require the prospective Special Adviser to disclose his or her professional activities by submitting a Sworn Statement and a Declaration of Activities. It is noteworthy that the Sworn Statement is drafted in similar terms to Articles 11 and 11a of the Staff Regulations.

95. Before proceeding with his assessment, the Ombudsman is mindful that addressing the conflict of interest in the specific context of Special Advisers to the President and Members of the Commission is a complex exercise which requires a detailed review of the specific role any individual may be called upon to play within the Union institutions, with a view to contributing to the optimal functioning of those institutions and the Union as a whole. The Ombudsman is convinced that this systemic objective is best served by strict adherence to the rules in place in conjunction with a culture of transparency. These considerations pervade the entirety of his assessment.

96. Against this backdrop, the Ombudsman wishes to recall that the complainant alleged that, on the basis of the available information, he is not convinced that the Commission was right to argue that no conflict of interest existed. In support of this contention, the complainant argued essentially along two lines: first, the Commission as well as the complainant and the public were not in a position to establish the absence of a conflict of interest because there was insufficient information available both as regards Mr Cox's tasks as Special Adviser and his outside activities. The complainant also argued, in the context of the analysis of the first allegation, that such information was not provided in a timely manner either); second, in any event, given that both Mr Cox's tasks as Special Adviser and his outside activities cover the same policy field, which the complainant insists should be broadly defined, a conflict of interest is, in the complainant's view, undoubtedly established.

97. On the other hand, the Commission's main line of argument in response to the complainant's allegation is that the information provided on its website could not be exhaustive because of considerations relating to the protection of personal data. More importantly, the Commission focuses on the distinction between policy-making and policy-communication in consumer matters. In the Commission's view, the nature of tasks entrusted to Mr Cox as a Special Adviser concerns policy-communication and, therefore, any interest in influencing consumer-policy the companies with which Mr Cox has professional contacts, is not relevant. An actual, potential or even apparent conflict of interest cannot, therefore, be established.

98. The first question which the Ombudsman has been called to assess is whether, for the purposes of managing conflicts of interest, the term 'policy field' should be given the broad interpretation the complainant advocates. The complainant argues that, in light of his remunerated activities with companies which can be presumed as having an interest in consumer policy, Mr Cox should have been precluded from an assignment of duties as Special Adviser of Commissioner Kuneva in matters concerning the communication of consumer policy. The Commission takes the opposite view.

99. The Ombudsman emphasises that the scope of the term 'policy field' alone does not suffice to establish the presence or absence of a conflict of interest. In this regard, it should be pointed out that an overlap between a Special Adviser's tasks and his or her outside activities does not automatically imply a conflict of interest. At the same time, the absence of an overlap between the



respective activities does not necessarily establish an absence of conflicts of interest either.

100. It follows that, instead of an abstract test which would establish the presumption of the presence or absence of a conflict of interest in advance, the Rules for Special Advisers are premised on the rationale that, in order for the Commission to establish whether a conflict of interest exists in any given case, it needs to compare the prospective Special Adviser's tasks with his outside activities. The mechanism devised to achieve this consists of a Sworn Statement and a Declaration of Activities submitted by the prospective Special Adviser. Following such an examination, the responsible Commissioner gives his/her Declaration of Assurance before the Special Adviser is appointed by the Commission.

101. In order to ensure that this procedure is not reduced to a mere formality, it is crucial that the Commission examine closely both a prospective Special Adviser's mandate and his or her outside activities before assessing, in specific terms, whether a conflict of interest exists. In order to carry out such an analysis, the Commission must possess sufficiently detailed information at the time of making the appointment. In case the necessary information is missing the Commission should take steps to obtain it.

102. In this respect, as regards Mr Cox's initial appointment in 2007, by letter dated 6 July 2007, Commissioner Kuneva's Cabinet informed Commissioner Kallas that *"Mr. Cox has been asked to advise Commissioner Kuneva specifically regarding political communication on Consumer issues to stakeholders and the public. There is no policy definition advisory role foreseen. In response to your email of 29 June I would like to clarify the most transparent way of proceeding. The only issues within his statement which could be of any relevance relate to the EIS/Consulting firm in Ireland doing work notably with Microsoft and other healthcare companies - areas in which he will not be advising the Commissioner."* The Commission appears to have had a general view of the tasks Mr Cox was intended to carry out as a Special Adviser to Commissioner Kuneva and his outside activities. However the Commission's examination appears to be incomplete because it singled out one of the activities carried out by Mr Cox (his involvement with EIS) as potentially relevant and overlooked all his other activities. The Ombudsman takes the view that the standard adopted by the Commission in its examination in question falls short of the standard expected by the Union institutions in addressing conflicts of interest.

103. That said, the examination carried out in 2007 is the only instance in which evidence exists that the Commission did substantively address the issue of a potential conflict of interest. As regards 2008 and 2009, despite the changes in Mr Cox's Declaration of Activities, the Commission does not appear to have carried out such an exercise at all. It could not have been otherwise given that, in the absence of sufficient information, an adequate examination of the issue of a potential conflict of interest could not have been carried out. The Ombudsman takes the view that this is because the information the Commission had in its possession came from Mr Cox's Declaration of Activities. The Ombudsman notes that that Declaration looks more like a declaration of posts held rather than of the activities he performed. This renders a meaningful assessment impossible.

104. Following the complainant's open letter, the Commission was given a further opportunity to examine the matter anew. Admittedly, the correspondence from the complainant only started at a point when the last



examination of conflicts of interest had already taken place. However, on 29 May 2009, when the complainant started its correspondence with the Commission, Mr Cox was still acting as a Special Adviser to Commissioner Kuneva. The Commission's approach not to seek any clarifications from Mr Cox is disingenuous. Despite the complainant's constant demands for the Commission to inform it, in the interest of transparency, of the nature of Mr Cox's gainful outside activities referred to in his Declaration of Activities, the Commission did not consider it necessary to obtain clarifications from Mr Cox. Instead, it responded to the complainant by stating that Mr Cox did not have a relationship with an organisation with a "*vested interest*". In doing so, the Commission based itself on the examination of one pillar of the envisaged comparison, that is, Mr Cox's mandate as Special Adviser and completely overlooked the other pillar, that is, Mr Cox's outside activities. In any event, the Commission's statement that the absence of a conflict of interest was "*the result of a thorough examination of the merits of the case, including his gainful activities as well as the activities carried out by him in a voluntary or honorary capacity*" is not supported by concrete evidence.

105. The Commission's switching to defensive mode offered a disservice to the organisational culture which ought to be entrenched in the EU institutions when dealing with conflict of interest issues. At the same time, it also offered a disservice to Mr Cox's own interest in responding to allegations which he considers to have been motivated by a personal campaign.

106. In this regard, it must be noted that the Commission formally addressed information requests to Mr Cox only after the Ombudsman invited it to do so. This was despite the fact that Mr Cox demonstrated his constant willingness to cooperate and provide such information. It has become clear, in the context of the present inquiry, that had it done so, the Commission could reasonably be expected to possess sufficient information to carry out a thorough examination of the alleged conflict of interest and to provide a full and cogent response to the complainant when the latter so requested.

107. In view of these considerations, the Ombudsman concludes that the Commission failed adequately to examine the issue of a potential conflict of interest in the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva in 2007, 2008, and 2009. This is an instance of maladministration and the Ombudsman will make a critical remark below.

108. The Ombudsman wishes to recapitulate that, for the Commission to have carried out its duties in a manner compatible with the applicable rules, it ought to have observed its own statements, that is, thoroughly to examine the merits of the case, including the gainful or voluntary activities of all Special Advisers. However, the Commission should possess the information necessary concerning the private interests of a prospective Special Adviser before concluding the absence of a conflict of interest. Should the available information not suffice to carry out such an examination, the Commission must take steps to obtain it.

109. The Ombudsman wishes to point out ways in which the Commission could improve its practices so as effectively to address issues of conflict of interest in relation to Special Advisers. In this regard, the Sworn Statement should not be seen as a substitute for the Commission's assessment of the absence of a conflict of interest.



110. Simply put, it is the Commission's responsibility, not the prospective Special Adviser's, to determine whether there is a conflict of interest that should prevent the latter from being appointed.

111. In this regard, it would be helpful, if the Commission were to take the initiative to ensure that sufficient information is at its disposal, by suitably modifying the Declaration of Activities to enable the prospective Special Adviser to make full disclosure of his/her interests and activities and the nature of those activities. The prospective Special Adviser could then be asked to certify that (1) the Declaration is complete and (2) that, as far as he/she is aware, there is no conflict of interest with his/her prospective functions as a Special Adviser. This would be in line with the OECD Guidelines, which emphasise the completeness of disclosure and encourage public authorities to "[d]etermine whether disclosures of interests contain sufficient detail on the conflicting interest to enable an adequately-informed decision to be made about the appropriate resolution."²¹. To this end, the Ombudsman will make a further remark.

112. In light of the above considerations, the Ombudsman concludes that the Commission failed adequately to examine the issue of a potential conflict of interest in the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva in 2007, 2008, and 2009. This is an instance of maladministration and the Ombudsman makes a critical remark to the Commission. He also makes a further remark to the effect that the Commission could consider modifying the Declaration of Activities of a prospective Special Adviser to enable it to obtain sufficient information to assess the issue of a potential conflict of interest between the Special Adviser's tasks and his or her outside activities.

113. The Ombudsman is well aware of the public interest considerations which are raised in the present inquiry. He will await the Commission's response to his critical and further remarks before deciding whether to initiate an own-initiative inquiry into the general issues governing conflict of interest considerations involving the Commission's Special Advisers.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions regarding the Commission's conduct concerning the object of the present inquiry:

- 1) In 2007, the Commission failed to obtain a declaration on the absence of a conflict of interest before nominating Mr Cox as a Special Adviser.**
- 2) In 2009, the Commission failed to obtain Mr Cox's Sworn Statement and Declaration of Activities before providing a Declaration of Assurance.**
- 3) In 2007, 2008, and 2009, the Commission failed adequately to examine the issue of a potential conflict of interest in the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva.**

The above constituted instances of maladministration by the European Commission and the Ombudsman therefore makes corresponding critical remarks.

²¹ Point 1.2.1.(c) of the OECD Guidelines.



The complainant and the Commission will be informed of this decision.

Further remarks

- 1) It would be good administrative practice to ensure that, when a Special Adviser makes a substantial change to his/her Declaration of Activities, a new Declaration of Assurance be submitted by the responsible Commissioner.
- 2) The Commission could consider modifying the Declaration of Activities of a prospective Special Adviser to obtain sufficient information about the Special Adviser's outside activities to enable it to examine any potential conflict of interest between the Special Adviser's tasks and his/her outside activities. In addition, the Commission could require the prospective Special Adviser to certify that the Declaration is complete and that, as far as he/she is aware, there is no conflict of interest with his/her prospective functions as a Special Adviser.

P. Nikiforos Diamandouros

Done in Strasbourg on 11-07-2011