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On behalf of: LobbyControl, Corporate Accountability International and Corporate Europe Observatory, Hereafter referred to as “the Complainants.”

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2. Against which European Union (EU) institution or body do you wish to complain?

European Commission

1. 3. What is the decision or matter about which you complain? When did you become aware of it?

2.

The reappointment of Mr. Michel Petite to the European Commission's ad hoc ethical committee. It came to our attention in mid-December 2012 that the European Commission decided to renew the mandate of the three members of the ad hoc ethical committee (Michel Petite, Rafael Garcia-Valdecasas and Terry Wynn) for a second three year period.

1. 4. What do you consider that the EU institution or body has done wrong?

Article 4 of the 2003 Commission decision on establishing the ad hoc ethical committee states that the appointment of a member requires their "independence, an impeccable record of professional behaviour as well as sound knowledge of the existing legal framework and working methods of the Commission".¹ As explained in our complaint to the Commission (Annex 1), the Complainants believe that the questions raised about Mr. Petite's independence and record of professional behaviour make him ill-equipped to hold this position, and that by reappointing him to the ad hoc ethical committee, the Commission breached Article 4 of the 2003.

Mr. Petite headed the Commission's Legal Service from 2001 to the end of 2007 and then went through the revolving door to private law firm Clifford Chance, a firm that also offers lobbying services. Clifford Chance, on its website, tells potential clients “You may be faced with the prospect of a regulatory development or policy decision that threatens the very nature of your business.... We offer a blend of legal and political expertise” and can assist in “approaching government or the EU institutions... advising on the parliamentary and political process, and drafting and tabling amendments to proposed legislation.”² Mr. Petite represents the interests of companies,³ and specialises in European Commission policies, community law and competition law, alongside antitrust,

trade, banking, taxation and government relations and public policy (according to the company's website).⁴ 'Government relations and public policy' are synonyms for lobbying services. The Commission granted approval for his move to Clifford Chance but told Petite not to lobby former colleagues or to deal with cases involving his previous department, for just one year.

Lack of Transparency of Mr. Petite's employer

Despite advertising lobbying services ('political advocacy strategy' and 'government relations'), on its website, Clifford Chance has not registered in the EU's voluntary Transparency Register, which means it is impossible to see for which clients Mr. Petite and his colleagues are working. We believe that the fact that Mr. Petite works for a law firm that offers lobbying services but which has not signed up to the Transparency Register calls into question whether he has an "impeccable record of professional behaviour" in relation to ethics and lobbying.

The Commission responded to this point by saying that "As regards the fact that Clifford Chance is not registered in the EU Transparency Register, please note that registration is not compulsory, although the Commission and the European Parliament encourage all those who wish to be involved in the European decision-making process to register." Rather than rebutting our argument, we feel this response only shows a worrying lack of regard for transparency and a surprising inability to understand that hiring an ethics adviser who does not, in his professional interest representation activities, choose to be transparent, appears incongruous.

In the Commission's December 2012 response to European Parliament's questions about the circumstances leading to the resignation of Commissioner Dalli, it became clear that tobacco giant Philip Morris International is a client of Clifford Chance, and that as a Clifford Chance lawyer Mr Petite presented views on tobacco legislation at meetings with Legal Service officials. The Commission response notes that Mr. Petite met with Legal Service officials in September 2011 and in September 2012. "Mr Petite mentioned that his law firm provided legal advice to a tobacco company (Philip Morris International) and set out his views on some legal issues of tobacco legislation."⁵

The Commission's definition of lobbying

We argue that setting out views on tobacco legislation, whilst working for a tobacco firm, to former colleagues in a Commission department falls under the definition of lobbying - or "interest representation" - that applies to the Commission's Transparency Register. This definition covers "Activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and decision-making processes of the EU institutions" including "contacting members or officials of the EU institutions".⁶

The Commission has responded to this by arguing that "Mr Petite's contacts with the Commission on issues related to the tobacco directive were not lobbying activities, since they were limited to the Legal Service on legal issues; moreover, they were fully transparent, Mr Petite having clearly mentioned that his law firm provided legal advice to a tobacco company (Philip Morris International)."

This response is clearly unconvincing. The European Union is a body whose existence and remit is based on treaty law, and which deals with the making and revision of laws. Legal expertise is required and used in lobbying all the time, and using legal language or arguing about the interpretation of legal text is a common lobbying strategy. As any lawyer, or person familiar with the legal system or policy-making world, knows, both treaty and case law are open to different and often contradictory legal interpretation. It is exactly these kinds of lobbying services that Clifford Chance offer and provide to clients, when they refer to 'government relations' and 'public policy' – offering to represent a legal interpretation of an existing or proposed law to public officials, which is favourable to the interests of a company client. It is therefore not a satisfactory response from the Commission that because these meetings were limited to legal issues – even though on a directive of great commercial interest to a client – that this was not lobbying.

Furthermore, the Commission illustrates a weak and inadequate understanding of 'full transparency'. The suggestion that because Mr. Petite mentioned his client at the start of the meeting, it was therefore “fully transparent” is flawed, as the existence of the meeting was undisclosed until the Dalli scandal led MEPs to specifically ask about all such contacts. Since it is unlikely the occurrence of these meetings would have come under public scrutiny in the absence of the political fallout from the Dalli scandal, it is not true to say that these contacts occurred in full transparency. The Commission is only considering that Mr. Petite was transparent about his client when meeting with the legal service, whereas our complaint criticised the fact that the public only learned who Mr. Petite is working for by chance, as a result of the Dalligate scandal.

Representing Philip Morris in court

We also noted in our complaint to the Commission that Mr. Petite represented Philip Morris Norway in 2011 before the Court of Justice of the European Free Trade Association (EFTA).⁷ We argue that Mr. Petite's legal representation work for Philip Morris Norway adds to the controversy around his double role with the Commission and the tobacco industry, given that in 2004 he signed the Anti-Contraband and Anti-Counterfeit Agreement with Philip Morris International, *on behalf of the European Community*.⁸ This agreement was part of an out of court settlement in a case of Philip Morris International's involvement or complicity in large scale cigarette smuggling. It is our opinion that Mr. Petite's role representing Philip Morris International (and other corporate clients) raises doubts about his independence and his ability to rigorously assess potential conflicts of interest and judge whether ex-Commissioners moving into private sector lobby jobs are appropriate or not, whether conditions and restrictions should be imposed and if so which ones, etc.

The Commission has responded that it does not share this assessment, noting that the Norwegian case concerned the free movement of goods and the legality of national provisions banning visual displays of tobacco products and smoking devices in shops. The Commission states that “It is evident that there are neither legal nor factual links between this case and the Anti-Contraband and Anti-Counterfeit Agreement with Philip Morris International, on which Mr Petite intervened back in 2004, as Director General of the Commission's Legal Service. The fact that the two cases concerned legal entities of

the Philip Morris group cannot be seen as an element suggesting the risk of a potential conflict of interest. ”

However, in combination with the points and arguments already made above, we maintain that this fact does trigger the “risk of a potential conflict of interest”, be it actual or apparent. In this case, concerning a role in an ethical advisory body, whose integrity and transparency are paramount to public trust in the European Commission, it is the *appearance* of conflicts of interest that is particularly important. It is common sense that it is highly remarkable to switch roles in the way that Mr. Petite has done: from signatory on behalf of the EU to a multi-billion euro out-of-court deal with Philip Morris International, to defending Philip Morris Norway in a court case aimed at rolling back restrictions on tobacco marketing in Norway. It most certainly raises questions about Mr. Petite’s independence as the EU’s top ethics advisor. The complainants are not the only ones who have noted this; on the contrary, it is remarkable that the Commission is unable to see (or admit) this link.⁹

The Complainants believe that because it is not conceivable that there is no other figure, with the relevant expertise but without such contested independence and professional behaviour, who could fulfil the role on the ad hoc ethical committee, it is not defensible to reappoint Mr. Petite to this position.

WHO rules

As an additional argument, the Complainants believe that it is questionable whether Mr. Petite's role in the committee is in line with the guidelines for Article 5.3 of the WHO Framework Convention on Tobacco Control, which state that parties must “avoid the creation of any perception of a real or potential partnership or cooperation” and avoid any preferential treatment of the industry.¹⁰ Appointing a lawyer who works for the tobacco industry to an influential position advising the Commission on ethical issues could be construed as creating the perception of potential partnership or cooperation with the tobacco industry.

Furthermore, the Commission has stated that the ethical committee post “does not deal with any subject which is linked to the tobacco directive”.¹¹ We do not believe this assertion can be robustly defended. It is impossible to guarantee that no Commissioner will, in future, want to go and work for the tobacco industry, or lobby consultancies and law firms that represent them. The WHO guidelines also require clear policies to prevent health officials going through the revolving door into tobacco industry jobs.

Moreover, the ad hoc ethical committee “may be requested by the President to deliver opinions on any general ethical question concerning the interpretation of [the] Code of Conduct [for Commissioners]”.¹² This means the ad hoc ethical committee has a potentially far broader remit than only post-employment matters, thereby increasing the possibility of the committee’s dealing with subjects that may link to the tobacco directive.

The ad hoc ethical committee may not yet have been asked to assess other types of ethical issues, but the fact that it has the potential to do so is of significant importance, and should be taken into consideration when selecting the membership of the

committee.

For example, consider the possibility that the complaint that led to the resignation of Commissioner Dalli had been transferred not to OLAF, but to the ad hoc ethical committee. The Commission has stated that there was no indication of criminal activity by Mr. Dalli, so this could theoretically have been an option. In such a case, Mr. Petite (representing the interests of Philip Morris International) would have been judging a case that centres around a yet to be clarified tobacco industry lobbying scandal.

Such thought experiments aside, if the Commission chooses to make use of the possibility to ask the ad hoc ethical committee for advice on wider ethics issues (cases that are not about post-employment conflicts of interest), then Mr. Petite's independence would immediately become an issue, especially as long as it remains unclear who the clients of Mr. Petite and Clifford Chance are (something the Commission is not currently aware of).

In response to our concerns, the Commission only said that "As regards the possibility that a current Commissioner might in the future move to the tobacco- sector when leaving the Commission, please note that it is highly hypothetical. Should this occur, the ad hoc Ethical Committee would be asked to deliver its opinion on the compatibility of this envisaged activity with the Commissioner's portfolio, and the Commission would then take its decision." This response simply circumvents its earlier assertion that the ethical committee does not deal with any subject linked to the tobacco directive, and therefore provides no real rebuttal.

It is also worth noting that the ad hoc ethical committee does more than "deliver its opinion on the compatibility of [an] envisaged activity with [a] Commissioner's portfolio". It also makes recommendations for conditions to be attached to the approval of the job move. The Commission, as far as we are aware, has almost always followed the recommendations of the committee.

Commission's responses to the complainants' questions

In our original complaint to the Commission, we also asked several questions, which reflected our concerns regarding Mr. Petite's re-appointment. We do not believe that the Commission's responses to our questions adequately address these concerns. They do not therefore support the Commission's conclusion that "there is no justification to revoke its decision to extend the mandate of the ad hoc ethical committee".

No overview on possible conflicts of interest

In response to our first question, if the Commission has a full overview of which clients Mr. Petite works for at Clifford Chance, whether in the role of lawyer, arguing a client's case before a judge or jury in a court of law, or in the field of 'government relations and public policy', the Commission stated that it has "no information about the identity of Clifford Chance's clients for which Mr Petite provides legal advice. There is no obligation for Mr Petite to provide this information to the Commission. His post-retirement activity as a lawyer with Clifford Chance was authorized by the Commission with some

restrictions which he respected.” As a member of the ad hoc ethical committee, the Commission should have assessed Mr. Petite for potential conflicts of interest. Without knowing whose interests Mr. Petite represents, as a lawyer or lobbyist, it is not clear how the Commission can have done this.

Reliance on integrity, when integrity is under question

In reply to our second question, if the Commission has assessed whether these roles could jeopardize Mr. Petite's independence as a member of the ad hoc ethical committee, and if so, what its conclusion is, the Commission stated that:

“Mr Petite's activity as a legal counsel with Clifford Chance, a law firm providing services inter alia in the field of European Law, does not affect his independence as a member of the Ad hoc Ethical Committee. The fact that Philip Morris is one among a large number of Clifford Chance's clients and that Mr Petite has provided legal advice to this company does not affect the independence of the Ad hoc Ethical Committee nor that of Mr Petite in exercising his mandate as a member of this Committee.

In providing legal advice to companies, Mr Petite is bound by the applicable rules that apply to the legal profession. When acting as a member of the Committee, and contributing with the other members to opinions to be delivered to the Commission, he acts in full independence. The members of the Committee had their mandates extended because of their in-depth knowledge of the EU institutions, and their previous demonstration of independence in that role.

The Commission is confident that, should any member of the Committee be confronted with a risk of conflict of interests impairing his independence in exercising his mandate, this member would immediately inform the other members of the Committee and the Commission in order to protect the Committee's impartiality and independence. ”

This response shows that the Commission relies entirely on the presumed integrity of the members of the ad hoc ethical committee, which is precisely what is under question. We do not therefore believe this response is adequate.

The Commission refers to the members' “previous demonstration of independence”, but we would like to point out, for the record, that the ad hoc ethical committee, under the chairmanship of Mr. Petite over his previous three year term, has not taken the kind of strict approach towards regulating revolving door cases that would justify a claim like this.

The Commission also says that members “would immediately inform the other members of the Committee and the Commission, if they were confronted with a risk of conflict of interest. It is not clear however if this just an optimistic assumption or whether there are internal rules that stipulate when and how members have to do this. Or whether this has ever happened, in the nine years since the ad hoc ethical committee was set up. If not, then this is far from reassuring. Relying on the voluntary initiative of the members, with

no rules in place, is certainly insufficient to avoid the risk of conflicts of interest and to secure independence.

Advising on moves to clients

Regarding our third question, whether Mr. Petite, as part of the ad hoc ethical committee, has advised on any decisions relating to ex-Commissioners who moved to companies that were clients of Clifford Chance (which we believe would constitute a clear conflict of interest for Mr. Petite), the Commission stated that it “has no information concerning the identity of any law firm providing advice to companies who may employ former Commissioners.” This is not what the question pertained to.

The Commission's answer nonetheless concludes that “The fact that one of the private entities for which a former Commissioner currently works might be a client of one or another law firm does not entail any risk of conflict of interests or incompatibility with regard to the obligations of the Treaty or the Code of Conduct for Commissioners.” We do not believe this is a satisfactory response. It is fairly self-evident that if a Commissioner wishes to move to a company that is a private client of the firm for which the person advising on the ethical implications of such a move works, there is a *prima facie* risk of conflict of interest.

Lack of transparency on cases covered by ad hoc ethical committee

Our fourth question asked for a full list of cases on which the ad hoc ethical committee has advised, to which the Commission responded that, in conformity with the last paragraph of point 1.1.1 of the Code of Conduct for Commissioners applicable to the Members of the Barroso I Commission (SEC(2004) 1487/2), the Commission has consulted the ad hoc ethical committee on all post-office activities of Commissioners that were related to the portfolio of former Commissioners. The Commission further noted that this information “is already public and was included in the answers given by the Commission to parliamentary questions, in particular P 6910/10 and E 8111/12.. You can find it at the following link. <http://www.europarl.europa.eu/plenary/en/parliamentary-questions.html>”.

This response is inadequate, for several reasons. Firstly, the list provided as an answer to the parliamentary question P-6910/10 “What jobs are now held by Commissioners who left the Commission in the years between 2004 and 2010?”,¹³ is dated 5 October 2010, and states that “decisions about four new communications made to the Commission by former commissioners will be adopted in the coming weeks”.¹⁴ This list, whilst it does name specific Commissioners and their subsequent activities, is nonetheless out of date and incomplete.

Secondly, the more recent parliamentary questions, E-8111/12 submitted in September 2012, asking “What jobs do the Commissioners now have who have left the Commission since 2010? When did the Ethics Committee consider these jobs in each case? What comments did the Committee make on each occasion?”¹⁵ do not receive an answer sufficient to provide a proper update. The Commission's answer, of 7 November 2012,¹⁶ states only that assignments accepted “concern non-executive positions in private sector companies and other bodies, public or international office positions,

teaching and think-tank occupations and assignments in non-profit foundations” and refers to the answer to P-6910/10. But as previously noted, P-6910/10's answer is incomplete and dates only until October 2010, whereas E-8111/12 concerns moves since 2010. The Commission further responds that it consulted the ad hoc ethical committee about fourteen situations where the envisaged occupation was potentially related to the portfolio of the former Member of the Commission. “In thirteen cases the Committee considered the envisaged occupations to be compatible with the Code of Conduct and with Article 245(2) TFEU, in some cases upon conditions or restrictions. In one situation the Committee gave a negative opinion”. It does not however elaborate on when the committee considered them, what their comments were, which case was refused, or any other specific names or activities.

Thirdly, even if the Commission had provided full and complete information in its responses, the public should not have to be dependent on if and when an MEP chooses to table a question on the activities of former Commissioners and the recommendations of the ad hoc ethical committee in order to access this information – it should proactively be made transparent online. A commitment to publish online the details of Commission decisions on individual cases of post-mandate employments of former Commissioners has previously been made. It was stated in an email to CEO of 30 September 2011, from Christian Linder, Member of Cabinet of Commissioner Sefcovic, that the reason there is no such online list yet “is that there has been no case since the new code of conduct was adopted. When this will be the case, the services will create some space on an appropriate website.”

Finally, although the Commission did not refer to it, access to documents requests also led to the release of a list of cases considered by the ad hoc ethical committee, but this is also out of date.

In summary, we do not believe that a former Commission official who himself went through the revolving door to a law firm that offers lobbying services (even though Mr. Petite's move to Clifford Chance was formerly approved by the Commission at the time), that represents a tobacco industry client and refuses to sign up to the Transparency Register, is a credible advisor to the Commission on revolving door cases and other ethics issues.

For all of these reasons, which we do not believe were adequately responded to, or refuted, by the Commission, we believe Mr. Petite's re-appointment to the ad hoc ethical committee is at odds with Article 4 of the 2003 Commission decision requiring members to be independent and have an impeccable record of professional behaviour, and should therefore be revoked.

1. 5. What, in your view, should the institution or body do to put things right?

The Commission should immediately revoke the re-appointment of Mr. Petite to the ad hoc ethical committee.

The Commission should, in the short term, replace him with someone who both meets,

and crucially *appears to* meet the requirement for independence. The very minimal criteria for this must include *not* being a high-profile revolving door case, who - it has been publicly revealed - meets with former colleagues to represent legal views on areas of extreme interest to his firms corporate clients.

The cases that were decided on during Mr. Petite's years as chair of the ad hoc ethical committee should be reviewed.

The Commission should also introduce a pro-active transparency policy of publishing the CV's and Declarations of Interest of the members of the ad hoc ethical committee online, as is the case for the Commission's Special Advisers. The online transparency regarding both the members of the ad hoc ethical committee and its decisions should be improved.

In the longer term, in order to ensure that decisions about Commissioners' ethics are truly independent, the Commission should set up an independent ethics committee, with a broader and better defined mandate than the existing ad hoc ethical committee, which deals primarily with post-employment issues. This committee must be fully independent and composed of experts on public administration ethics.

6. Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes. On 14 January 2013 , the Complainants wrote to European Commission President José Manuel Barroso to make a complaint against the decision to renew the mandate of the three members of the ad hoc ethical committee, in particular the re-appointment of Michel Petite, and requesting that the Commission re-considers Mr. Petites' re-appointment. See Annex 1.

We received a response to our complaint on 28 January 2013 from Catherine Day, stating that Mr Barroso had asked that she reply on his behalf. The response concludes that the Commission considers that there is no justification to revoke its decision to extend the mandate of the ad hoc ethical committee.

1.

2. 7. If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

3.

N/A

1. 8. Has the object of your complaint already been settled by a court or is it pending before a court?

2.

No

1. **9. Please select one of the following two options after having read the information in the box below:**

2.

Please treat my complaint publicly

1. **10. Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?**

2.

Yes

Date and signature:

8.2.2013,



Nina Katzemich, LobbyControl

On behalf of the organizations LobbyControl, Corporate Europe Observatory and Corporate Accountability International

List of annexes supplied with this Complaint

1. Annex1_Complaint_to_Barroso_re_Petite_ethical_committee

2. Annex2_Response_from_Day_to_Complaint