



P. Nikiforos Diamandouros
European Ombudsman

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Strasbourg, 23 -05- 2013

Decision of the European Ombudsman closing his inquiry into complaint
775/2010/ANA against the European Food Safety Authority

Dear Mr Then,

On 24 March 2010, you submitted a complaint to the European Ombudsman against the European Food Safety Authority (EFSA), concerning alleged maladministration relating to the procedures and practices EFSA applies when dealing with potential conflicts of interest arising when a departing staff member moves to a biotechnology company.

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

EFSA has taken action to strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type and to require serving staff members to disclose them in a timely manner, in accordance with EFSA's Policy on Declaration of Interests. However, EFSA unduly restricted the scope of what might amount to a possible conflict of interest in such circumstances. It follows that EFSA accepted and implemented the Ombudsman's first draft recommendation only in part.

EFSA failed duly to acknowledge its failure to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising from the move of a former member of its staff to a biotechnology company. Consequently, EFSA failed to implement the Ombudsman's second draft recommendation.

EFSA has taken action to ensure that, if a similar case arises in the



future, it (i) obtains sufficient information, including, as a minimum, a proper account of the tasks carried out at EFSA, a precise description of the proposed new employment, and information concerning possible links between the new and the previous employment, (ii) proceeds with an assessment that is as thorough as possible, and (iii) properly records the results of its assessment. Therefore, EFSA accepted and implemented the Ombudsman's third draft recommendation.

I have also made the following further remarks:

In order to improve on the implementation of the Ombudsman's first draft recommendation, EFSA could consider taking the following action.

(a) Regarding the disclosure of negotiations with prospective employers, Article 23(9) of EFSA's revised Implementing Decision on Independence requires that the Annual Declaration of Interest of a serving staff member in negotiations with a prospective employer be updated to reflect that change in that staff member's interests. However, the relevant form in Annex I does not foresee the possibility of a future employment but only 'past' and 'current'. EFSA could consider addressing this issue by amending the relevant form.

(b) Regarding EFSA's assessment of the negotiations with a prospective employer disclosed by a serving staff member, EFSA could consider deleting the part of the sentence in Article 23(6) of EFSA's revised Implementing Decision on Independence which reads "*when the staff member has received an offer and the tasks assigned to the staff member have an impact on EFSA's decision making process*", in line with the Ombudsman's analysis in paragraph 84 of the present decision. This would enable EFSA to assess, without being restricted by the wording of the extant provision, whether negotiations between a serving staff member and a prospective employer constitute a conflict of interest in any given case, in a manner that complies with the applicable rules and the principles of good administration.

(c) Negotiations with a prospective employer entail two obligations for a serving staff member: (i) the obligation of disclosure to EFSA so as to protect the latter's independence, and (ii) subject to the conditions laid down in Article 16(2) of the Staff Regulations, the obligation, when an offer by a prospective employer is made to a serving official and before he or she can accept it, to request authorisation to engage in such an activity. In the interest of clarity, EFSA could consider spelling out the link between Article 23 of its revised Implementing Decision on Independence and its Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union.

(d) In this connection, while, in principle, Article 1 of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union includes also serving officials ("*all staff members and former members*"), the modalities for the application of that procedure focus only on "*former staff members*" (Articles 3, 5 and 6 and the Annex 2 Application for authorisation to engage in an occupation after leaving EFSA in accordance with Article 16 of the Staff Regulations). Since this might cause confusion about the temporal scope of the staff members' obligations, EFSA could consider deleting the word "*former*" from the above provisions or adding the word "*serving*".



I apologise for the length of time it has taken to complete this inquiry.

Please find enclosed my decision on your complaint.

Yours sincerely,

P. Nikiforos Diamandouros

Enclosure:

- Decision on complaint 775/2010/ANA



Decision

of the European Ombudsman closing his inquiry into complaint 775/2010/ANA against the European Food Safety Authority (EFSA)

The background to the complaint

1. The present complaint concerns the procedures and practices applied by the European Food Safety Authority ('EFSA') in relation to the potential conflict of interest that arises when a departing staff member moves to a biotechnology company. The situation which gives rise to this type of conflict of interest is often referred to as 'revolving doors'¹.
2. The complainant, a German non-profit organisation, complained about EFSA's handling of the move of the Scientific Co-ordinator and Head of EFSA's Genetically Modified Organisms (GMO) Unit (hereafter, the 'former staff member'), to a biotechnology company, to take up the post of Head of Biotech Regulatory Affairs. Specifically, the complainant expressed concern about the fact that the former staff member took up her new post in May 2008, that is, less than two months after her departure and that EFSA did not impose any 'cooling-off' period or any conditions on the move, as it was empowered to do by the Staff Regulations².
3. The complainant took the following action before turning to the European Ombudsman. First, by letter of 8 November 2009, it requested information from EFSA regarding the move in question. Second, on 10 November 2009, it issued a press release in which it criticised EFSA for lack of transparency as regards the issue. Third, on 24 November 2009, it requested access to all documents relating to EFSA's decision to allow the former staff member to move to her new post.
4. On 9 December 2009, EFSA contacted its former staff member and informed her of the specific questions asked by the complainant. EFSA underscored the

¹ This description is commonplace and has also been used by the Organisation for Economic Cooperation and Development (OECD). See, *Post-Public Employment: Good Practices for Preventing Conflict of Interest*, OECD, 2010.

² Specifically, Article 16 of the Staff Regulations provides:

"An official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits. Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. The institution shall, after consulting the Joint Committee, notify its decision within 30 working days of being so informed. If no such notification has been made by the end of that period, this shall be deemed to constitute implicit acceptance."

The Staff Regulations are available at: http://ec.europa.eu/civil_service/docs/toc100_en.pdf



duty of officials intending to engage in any occupation within two years of leaving the service to inform their institution thereof. Furthermore, it stated that "[f]rom HR record, at the time of your departure, you had not indicated any specific employment. Would you be so kind to update us on this aspect so we have all required information?"

5. In her response of 11 December 2009, the former staff member stated that her contract with EFSA had ended on 31 March 2008 and that, subsequently, she had not been in active employment until 15 May 2008, when she took up her new post. By e-mail of 19 May 2008, the former staff member informed her "former EFSA colleagues and the GMO Panel Members" about her new employment. The former staff member then stated that "[s]ince that time I have met with EFSA at several occasions as representative for [the biotechnology company] in the EuropaBio [an association of biotechnology companies] delegation and participated in the tripartite meeting with EFSA and the European Commission on 5 March 2009."

6. By e-mail of 21 December 2009, EFSA thanked its former staff member for the clarification provided and reminded her of her obligations after leaving the service under Article 16 of the Staff Regulations.

7. On 11 January 2010, EFSA replied to the complainant's requests of 8 and 24 November 2009. In its letter, EFSA first underscored its obligations regarding the processing of personal data and access to documents. Second, it confirmed that, from 1 April 2003 to 31 March 2008, its former staff member was Head of the GMO Unit and gave a brief description of her tasks. EFSA then emphasised its strict policy on declarations of interest, which applies to its entire staff. It confirmed that it raised no objections to the move. Third, EFSA enclosed the requested documents, which included the above-mentioned e-mail correspondence between the former staff member and EFSA.

8. On 14 January 2010, the complainant issued a press release in which it criticised EFSA's position on the matter. The press release made reference to the former staff member's e-mail to EFSA of 19 May 2008, in which she stated that she "... will be among those asking about progress on specific files." According to the complainant's press release, "in her previous position at the EFSA she had been in charge of precisely this group of experts dealing with such applications".

9. On 24 March 2010, the complainant lodged the present complaint with the Ombudsman.

The subject matter of the inquiry

10. The Ombudsman opened an inquiry into the following allegation and claims:

Allegation:

EFSA failed adequately to address the issue of a potential conflict of interest in the move of its former staff member to a biotechnology company.

The Ombudsman communicated to EFSA the complainant's argument in support of its allegation that EFSA should, in accordance with Article 16 of the Staff Regulations, either have forbidden the move or have imposed conditions on it.



Claims:

(1) EFSA should acknowledge that it failed to act to prevent a potential conflict of interest in this case.

(2) EFSA should commit itself to adopt a more pro-active and critical approach in the future as regards its procedures for departing staff.

11. The Ombudsman also noted that the grounds on which EFSA decided that the work carried out by its former staff member was not related to her EFSA work were not obvious from the available information, in particular, it was not clear whether EFSA had any knowledge of the tasks the former staff member was going to perform in her new employment. The Ombudsman therefore requested EFSA to include, in its opinion, a full clarification of the grounds on which it based its decision not to raise any objections. Furthermore, the Ombudsman requested a list of all correspondence and internal notes/briefings relevant to this case, as well as details of the meetings which the former staff member had with EFSA in the two years following her departure.

12. The Ombudsman highlighted to EFSA that his inquiry only concerned the complainant's allegation and claims against EFSA. The complainant had requested that its complaint be dealt with publicly. Although the Ombudsman has the power to declare a complaint confidential on his own initiative, in order to protect the interests of a third party³, in the present case, he decided not to exercise this power because it is in the public interest that the complaint should be dealt with transparently. In any event, the complainant had already given publicity to the complaint. In this connection, the Ombudsman informed EFSA that he would have no objection if EFSA considered it appropriate to inform its former staff member of the complaint and of its opinion thereon.

The inquiry

13. On 25 May 2010, the Ombudsman asked EFSA for an opinion on the complainant's allegation and claims. On 23 July 2010, EFSA sent its opinion, which was forwarded to the complainant for observations. On 20 August 2010, the complainant submitted its observations.

14. On 4 October 2010, the Ombudsman decided to carry out further inquiries and invited EFSA to elaborate on the information contained in its initial opinion. On 30 November 2010, EFSA sent its reply to the Ombudsman's further inquiries. On 20 December 2010, EFSA submitted additional information to complement its reply to the Ombudsman's further inquiries. That further reply was also forwarded to the complainant for observations. On 24 February 2011, the complainant submitted its observations.

15. On 7 December 2011, the Ombudsman addressed draft recommendations to EFSA. On 13 December 2011, EFSA sent an initial reply to the Ombudsman's draft recommendations and, on 22 March 2012, it sent its detailed opinion thereon. EFSA requested that Annexes III and IV of its detailed opinion would not be disclosed to the complainant because of data protection considerations. On 11 April 2012, the Ombudsman returned these documents to EFSA on the

³ Article 10.1 of the European Ombudsman's Implementing Provisions, available at: <http://www.ombudsman.europa.eu/resources/provisions.faces>.



ground that its request did not comply with Article 4.4 of the European Ombudsman's Implementing Provisions⁴. The Ombudsman forwarded EFSA's detailed opinion and the remaining annexes to the complainant and invited it to send any observations it wished to make by 31 May 2012. On 18 April 2012, the complainant sent its observations on EFSA's detailed opinion⁵. On 24 May 2012, EFSA informed the Ombudsman that it had obtained the consent of the persons mentioned in Annexes III and IV of its detailed opinion to disclose their contents and that these annexes, which it re-sent to the Ombudsman, could therefore be disclosed to the complainant. The Ombudsman forwarded these documents to the complainant and invited it to submit observations by 30 June 2012. The complainant did not submit any additional observations.

The Ombudsman's analysis and conclusions

A. Allegation that EFSA failed adequately to address the issue of a potential conflict of interest in the move of its former staff member to a biotechnology company and related claims

Arguments presented to the Ombudsman

16. In support of its allegation, the complainant argued that EFSA should, in accordance with Article 16 of the Staff Regulations, either have forbidden the move or have imposed conditions on it.

17. In its reply to the complainant dated 11 January 2010, EFSA stated that it had raised no objections to the move. EFSA appears to have based its conclusion on the consideration that its former staff member did not have any relevant decision-making authority within EFSA, given that her Unit only offered secretarial support to EFSA's GMO Panel.

18. As noted above, in his letter opening an inquiry into the present complaint, the Ombudsman requested EFSA to include, in its opinion, a full clarification of the grounds on which it based its decision not to raise any objections. Furthermore, the Ombudsman requested a list of all correspondence and internal notes/briefings relevant to this case, as well as details of the meetings which the former staff member had with EFSA in the two years following her departure.

19. In its opinion, EFSA provided a factual account of the former staff member's move to a biotechnology company. Specifically, EFSA pointed out that when her contract expired in March 2008, she was Head of the GMO Unit providing secretarial support to the GMO Panel. The GMO Unit consists of EFSA staff members who provide a permanent secretariat to the independent scientific

⁴ The European Ombudsman's Implementing Provisions, available at: <http://www.ombudsman.europa.eu/resources/provisions.faces#hl3>, provide that "[t]he opinion shall not include any information or documents which the institution concerned regards as confidential". The Ombudsman also returned to EFSA the documents that were enclosed with its reply to his further inquiries, informing it that they were not part of the complaint file.

⁵ The complainant's observations took the form a press release which was issued by the complainant and Corporate Europe Observatory on 18 April 2012 and forwarded to the Ombudsman on the same day.



experts appointed as members of the GMO Panel by EFSA's Management Board.

20. EFSA underlined that, by law⁶, only the members of the GMO Panel are entitled to approve EFSA's scientific opinions on the applications submitted in the context of the authorisation procedures under the Genetically Modified Food and Feed Regulation⁷ or the Deliberate Release Directive⁸. Furthermore, EFSA noted that its staff members cannot be members of EFSA's Scientific Panels and provided information on the procedure followed in the selection of the members of its Scientific Panels⁹.

21. EFSA explained that the majority of the members of its staff are employed on the basis of five-year contracts as temporary or contract agents, with the possibility of renewal. Article 16 of the Staff Regulations requires former staff members to inform EFSA of their intention to engage in an occupational activity for a period of two years after leaving EFSA, so that the Appointing Authority can consider whether that may lead to a conflict of interest.

22. In the present case, EFSA stated that its former staff member took up her new employment in May 2008 and that on 19 May 2008 she informed EFSA of that fact. In accordance with Article 16 of the Staff Regulations, EFSA assessed the information provided and considered that her previous job had been to manage the secretariat supporting EFSA's independent scientific experts. In effect, she was not a decision-maker in relation to EFSA's scientific advice, for that is the exclusive role of the members of the GMO Panel. Nor did she take decisions on any authorisation or approval, as, by law, that is the role of the risk managers, not of EFSA. Therefore, EFSA raised no objections.

23. In November 2009, EFSA again checked its former staff member's employment status and reminded her of her obligations in relation to confidentiality. Moreover, EFSA noted that its staff members are bound by the obligation to refrain from any unauthorised disclosure of information received in the line of duty unless the information has already been made public or is accessible to the public, while they no longer have access to privileged information after leaving service. EFSA emphasised that at no time had it become aware of any evidence to suggest that its former staff member breached her responsibilities as outlined above. It added that if such breaches were to occur, appropriate action would be taken.

24. As regards the information requested by the Ombudsman, EFSA forwarded its exchange of correspondence with the complainant. EFSA also provided the dates of the meetings between itself and its former staff member in her new capacity, which include (i) two meetings between the European Commission's Directorate-General Health and Consumers, EFSA and EuropaBio held on 5

⁶ Article 28(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L 31, p. 1, as last amended.

⁷ Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ 2003 L 268, p. 1.

⁸ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ 2001 L 106, p. 1.

⁹ Decision of the Executive Director concerning the selection of members of the Scientific Committee, Scientific Panels and external experts to assist EFSA with its scientific work, signed on 19 June 2009 and available at: <http://www.efsa.europa.eu/en/keydocs/docs/expertselection.pdf>



March 2009 and 3 March 2010, (ii) an EFSA GMO workshop with Stakeholders, and (iii) two EFSA technical meetings with Stakeholders and applicants held on 5 March 2009 and 29 April 2009.

25. In its observations, the complainant disagreed with EFSA's statement that its former staff member *"was not making direct decisions on GMO market applications."* The complainant argued that as *"a leading member of staff she would certainly have had many ways of influencing the work of the GMO panel (preparing decisions, drafting guidelines, having meetings with stakeholders). Since there was no cooling off period after she resigned her post, her specific contacts and knowledge were exceedingly relevant for her new job. It is unacceptable for EFSA to downplay [its former staff member's] role simply to escape criticism of their management decisions."*

26. Moreover, the complainant argued that EFSA's statement revealed that its former staff member only informed EFSA of her new position on 19 May 2008, that is, after having already taken up employment with her new employer. This meant that she had started her new job without having obtained EFSA's approval. It was only in November 2009, after the complainant's public communication, that EFSA reacted and contacted its former staff member in order to remind her of her obligations. The complainant argued that, in terms of both legal requirements and timing, EFSA's conduct was inappropriate and insufficient. The complainant went on to argue that EFSA's reply confirmed that it had failed adequately to address the issue of a potential conflict of interest.

27. Concerning the list of meetings EFSA enclosed with its opinion, the complainant expressed concern about the former staff member's role in the meetings between EFSA and biotechnology companies. It expressed the view that the former staff member could be perceived to have acted as a lobbyist at those meetings.

28. In his further inquiries, the Ombudsman asked EFSA to provide any available information documenting EFSA's assessment of the alleged potential conflict of interest, for example e-mail exchanges, notes for the file, or a decision of the competent service within EFSA.

29. Moreover, the Ombudsman asked EFSA to provide additional documents and/or information in order to enable him to obtain a better understanding of the former staff member's tasks when working at EFSA. Specifically, the Ombudsman asked for: (1) the job advertisement concerning the post of Head of the GMO Unit; (2) the former staff member's application, including any annexes; (3) all her staff reports; and (4) any internal rules and/or guidelines relevant to the issue and, more specifically, (a) any information/guidelines communicated to staff regarding conflicts of interest, and (b) any rules on how EFSA itself deals with conflicts of interest, such as the rules on who assesses them and how, and whether there is a conflict of interest in relation to a former staff member's activities following the termination of his or her service at EFSA.

30. In the same letter, the Ombudsman acknowledged the information EFSA provided him with in relation to the meetings which the former staff member had with EFSA in the two years following her departure. For the sake of completeness, the Ombudsman also requested details of all internal meetings and meetings with external stakeholders (including any available minutes) in which the former staff member participated during the last 12 months of her employment at EFSA.



31. In its reply to the Ombudsman's further inquiries, EFSA confirmed that the information previously supplied concerning its former staff member's move was complete. In line with the provisions of Article 16 of the Staff Regulations, EFSA *"did not explicitly notify its consent to the new job assignment"*.

32. Next, EFSA reiterated that its former staff member acted as Head of the GMO Unit, that the GMO Unit consists of EFSA staff members and that it provides a permanent secretariat and administrative support to the GMO Panel. In turn, GMO applications are approved only by the members of the GMO Panel while EFSA staff members cannot form part of any of EFSA's Scientific Panels or its Scientific Committee. Consequently, its former staff member took no decisions in relation to EFSA's scientific outputs, as this is the exclusive role of the members of the GMO Panel. Nor did she take decisions on any authorisation or approval, as the role of the risk managers is assumed by the Commission and the EU Member States, not by EFSA.

33. As regards point 4 of paragraph 29 above, EFSA provided a number of documents. The most relevant documents for the purposes of the present inquiry are: (i) the EFSA Code of conduct on declarations of interests, which was in force between March 2004 and September 2007 and which was replaced by document (ii); (ii) EFSA's Policy on Declaration of Interests (pursuant to EFSA's Management Board Decision on 5 October 2007); (iii) the Guidance Document on declarations of interest (applicable from 8 September 2007); (iv) the Procedure for identifying and handling potential conflicts of interest (applicable from 8 September 2007); and (v) the EFSA Decision on outside activities and assignments (applicable from 28 April 2004).

34. Finally, EFSA provided a record of the meetings in which its former staff member participated during the last year of her employment at EFSA.

35. In its observations on EFSA's reply, the complainant stressed that the former staff member's move from EFSA to a biotechnology company without a cooling-off period was not acceptable from the public interest perspective and was contrary to the Staff Regulations. In accordance with Article 16 of the Staff Regulations, conflicts of interest have to be avoided in the course of one's employment as well as after leaving the service.

36. In the complainant's view, there was no doubt that the work performed by the former staff member in her new employment *"is related to the work she carried out during her work at EFSA and is in conflict with the legitimate interests of the institution. Nevertheless EFSA did not take any initiative to prevent [her] from moving to a job as a lobbyist for [a biotechnology company], which is one of the biggest producer[s] of genetically engineered plants. There is no doubt that the management of EFSA failed to fulfil its due diligence and its specific obligations according to EU staff regulations."*

37. The complainant then shifted the focus of its observations to its investigations about the Chair of the GMO Panel and his activities at the International Life Sciences Institute ('ILSI'). It argued that there was a link between the Head of the GMO Unit and the Chair of the GMO Panel in a period when *"many important decisions were taken by EFSA."* It asked the Ombudsman to investigate further that relationship and, more specifically, the potential conflict of interest concerning the Chair of the GMO Panel.



The Ombudsman's assessment leading to draft recommendations

38. The Ombudsman clarified the scope of his analysis into the present complaint and explained which issues he would address and which he would not. In this regard, he made two preliminary remarks. First, in accordance with the Treaty on the Functioning of the European Union ("TFEU"), the Ombudsman's mandate is to investigate complaints concerning instances of maladministration in the activities of the Union institutions. The Ombudsman was conscious that, while the present inquiry concerns an allegation against EFSA, EFSA's conduct was inextricably linked to the factual circumstances surrounding the departure of a member of its staff. As mentioned in paragraph 12 above, the Ombudsman informed EFSA that he would have no objection if it considered it appropriate to inform its former staff member of the complaint and of its opinion thereon. At the same time, however, the Ombudsman emphasised that the subject-matter of his inquiry is not the propriety of EFSA's former staff member's actions but the allegation and claims made against EFSA.

39. Moving on to the second preliminary remark, the Ombudsman noted that, in its observations, the complainant put forward, for the first time in the present inquiry, a grievance concerning the role of the Chair of the GMO Panel. The mention of the Chair of the GMO Panel was understood to serve two purposes. On the one hand, in order to counter EFSA's argument that its former staff member did not make any direct decisions, the complainant argued that she was in a position to influence the decisions that were made, through her contact with the Chair of the GMO Panel. On the other hand, however, the complainant also invited the Ombudsman to examine the relationship between the Chair of the GMO Panel and his activities at the ILSI and to investigate a potential conflict of interest arising from this relationship.

40. The Ombudsman emphasised that the present inquiry was opened in order to investigate whether EFSA properly handled the potential conflict of interest arising from the move of its staff member to a biotechnology company, which was raised by the complainant in its initial complaint. The Ombudsman possessed sufficient information to make an assessment of the above-mentioned issue. He therefore did not consider it appropriate to include the further issue, which the complainant raised in its observations, in the present inquiry, since doing so would inevitably delay his decision in this case. However, the complainant remained free to lodge a new complaint concerning this further issue, after having made appropriate approaches to EFSA in that regard¹⁰.

41. Moving on to the analysis, the Ombudsman considered that the allegation comprises two aspects, that is, a *procedural* aspect and a *substantive* one. The procedural aspect of the allegation focuses on the question whether EFSA followed the applicable procedures as regards its former staff member. The substantive aspect of the allegation concerns the substantive evaluation which EFSA carried out.

42. The Staff Regulations contain rules and principles which EFSA must apply in discharging its procedural and substantive responsibilities. These rules and principles are intended to protect the interests of the European Union by ensuring the loyalty, independence and integrity of its staff. Since the entry into

¹⁰ In this connection, on 21 March 2012, the complainant lodged a complaint with the European Ombudsman concerning EFSA's handling of an alleged conflict of interest concerning the Chair of one of its scientific panels (Complaint 622/2012/ANA). The inquiry into the complaint is on-going. For more information, see: <http://www.ombudsman.europa.eu/cases/caseopened.faces/en/11475/html.bookmark>



force of the Treaty of Lisbon, the specific provisions should be viewed through the lens of Article 298 TFEU, which provides that "[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration."

43. In this regard, the Ombudsman considered it useful to recall, in particular, the following provisions of the Staff Regulations:

"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.*

Article 12

An official shall refrain from any action or behaviour which might reflect adversely upon his position.

...

Article 16

An official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. The institution shall, after consulting the Joint Committee, notify its decision within 30 working days of being so informed. If no such notification has been made by the end of that period, this shall be deemed to constitute implicit acceptance."

44. Moreover, Article 18 of EFSA's Decision on outside activities and assignments¹¹, in force at the relevant time, which was "*intended to prevent conflicts of interest from arising, without imposing unreasonable restrictions on officials' outside activities*", provided as follows:

¹¹ EFSA Decision on outside activities and assignments, C(2004)1597 85-2004, Brussels, 28.4.2004.



"1. An official leaving the service of the Commission¹² shall sign a declaration following a form provided by the Appointing Authority so as to acknowledge that he is aware of his continuing obligations to the Commission, in particular under Articles 16, 17b and 19 of the Staff Regulations.

2. For a period of 2 years after leaving the Commission, a former official wishing to take up an assignment or outside activity shall inform the Appointing Authority. The former official shall in particular provide:

- a description of his activity during his last three years of active service at the Commission;
- a description of the activity that he wishes to take up including information on the position he is to occupy and the expected duration of the activity;
- the name, address and telephone number of the potential employer;
- the employer's fields of activity;
- the links with his former functions in the Commission, if any.

To this end the former official will fill in and file with the Commission the application form provided by the Appointing Authority.

3. Any permission granted pursuant to this application form under paragraph 2 of this Article shall be limited to employment with the named employer, and any person with whom the employer merges or transfers the undertaking by which the official is employed..."

45. The provisions quoted above are largely echoed and further elaborated in the more recent EFSA Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union¹³, which was provided to the Ombudsman in the course of his inquiry.

46. Clearly, the combined legal framework established by the rules outlined above imposes the following procedural obligations on officials and, by extension, on temporary and contract agents¹⁴. A member of staff must, first, inform his or her institution of his or her intention to take up an occupational activity elsewhere, whether gainful or not, and provide sufficient information, such as that described in Article 18(2) of EFSA's Decision on outside activities and assignments cited above (or, under the current rules, Article 3(3) of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union¹⁵) and, second, seek authorisation from the institution if he or she intends to pursue an activity which is related to the work carried out by him or her during the last three years and which could lead to a conflict of interest.

¹² These rules originate from the European Commission. For all ends and purposes, "Commission" should be read as "EFSA".

¹³ EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other Servants of the Union, Parma, 7 December 2010.

¹⁴ Article 21 of EFSA Decision on outside activities and assignments, C(2004)1597 85-2004, Brussels, 28.4.2004.

¹⁵ Article 3(3) of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union, Parma, 7 December 2010.



47. The corresponding procedural obligations incumbent on EFSA are: first, to obtain sufficient information from a departing member of staff about his or her intended occupational activity, whether gainful or not; second, to assess the information obtained in order to determine whether the new occupational activity of its staff member could lead to a conflict with EFSA's "*legitimate interests*"; and third, should this be the case, either to forbid him or her from undertaking the new activity or to give its approval subject to any conditions it deems fit to impose in the circumstances.

48. It is obvious from the wording of the rules ("*official intending*", "*forbid him from undertaking*", "*wishing to take up an assignment*") that the relevant information should be provided to the institution concerned in good time before the departing official starts his or her new assignment. Given that the purpose of the relevant rules is to prevent a possible conflict of interest, the decision on whether a conflict of interest could arise should in any event be taken before the new employment is taken up. Clearly, an institution should take all necessary measures to try to ensure that all members of its staff comply with the rules mentioned above. In a case where a member of staff takes up a new post without giving prior information, the institution concerned must, as soon as it discovers the situation, take appropriate follow-up action.

49. In the case under examination, the former staff member's contract ended on 31 March 2008. On 15 May 2008, she took up employment with a biotechnology company. On 19 May 2008, she informed EFSA of her new employment. On 8 and 24 November 2009, the complainant contacted EFSA in relation to the issue. On 9 December 2009, EFSA contacted its former staff member requesting information and reminding her of her obligations under Article 16 of the Staff Regulations. On 11 December 2009, the former staff member replied and provided clarifications. In the end, EFSA decided not to raise any objections to its former staff member's new employment.

The procedural aspect

50. EFSA's compliance with its *procedural* obligations was examined in light of its actions at the different chronological signposts identified above. The first signpost was that of 31 March 2008, when the former staff member's contract ended. This date was crucial because it represents the first moment at which a member of staff could, without informing his or her institution, legitimately enter negotiations with a potential future employer about a job which might give rise to a conflict of interest.

51. This meant that an obligation was incumbent upon EFSA to ensure that, at that time, its departing staff member complied with her obligations under Article 16 of the Staff Regulations. To achieve this objective under the relevant procedural rules applicable at the time, the departing staff members should sign a declaration to acknowledge their continuing obligations towards EFSA, including those resulting from Article 16 of the Staff Regulations. On the basis of the explanations provided by EFSA, it could not be established whether EFSA's former staff member signed such a declaration.

52. By way of further general explanation of the above, and without reference to the specific case at hand, the Ombudsman considered it useful to make clear that, in his view, the second paragraph of Article 16 of the Staff Regulations¹⁶

¹⁶ Quoted in paragraph 43 above.



could also apply in cases in which an EU official negotiates or accepts an offer of future employment while still working for an EU institution. In any event, the Ombudsman took the view that negotiations by a serving member of staff concerning a future job that could amount to 'revolving doors' would themselves constitute a conflict of interest that would fall under the Staff Regulations, in particular Articles 11a and 12, quoted in paragraph 43 above.

53. Set within the context of a regulatory agency and in order to discharge its obligations, EFSA would want to ensure that it is informed whenever serving members of its staff are negotiating an employment offer from a prospective employer. EFSA would also want to know when a staff member has accepted such an offer before the end of her/his contract with EFSA.

54. The current procedural rules, namely, EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union, do not specifically deal with this issue other than to define in Article 1 thereof the scope of the Decision to include "*all staff members and former members*".

55. It was therefore necessary, again as a general matter and without reference to the specific case at hand, to point EFSA in the direction of strengthening and improving its rules to ensure that it will be in a better position to address a potential conflict of interest of the 'revolving doors' type in cases concerning the negotiation or acceptance of offers by staff members while in employment at EFSA. In this regard, the Ombudsman pointed out that EFSA should require serving staff members to disclose in a timely manner the negotiating of employment offers or the acceptance of employment offers that could constitute a conflict of interest. He stated that this policy initiative would be in line with the OECD Post-Public Employment: Good Practices for Preventing Conflict of Interest¹⁷. To this end, the Ombudsman made a draft recommendation that "*EFSA should strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type. In this regard, EFSA should make clear that such negotiations themselves may amount to a conflict of interest. It follows that EFSA should require serving staff members to disclose them in a timely manner, in accordance with EFSA's Policy on Declaration of Interests*".

56. The second signpost was that of 19 May 2008, when the former staff member informed her "*former EFSA colleagues and the GMO Panel Members*", as she subsequently put it, of her new employment. In its opinion, EFSA argued that its former staff member had thus informed it about her employment. Article 18 of EFSA's Decision on outside activities and assignments, which was in force at the relevant time, provided that such a notification had to cover certain items of information and had to be given by means of a specific application form. It would seem that the former staff member's e-mail of 19 May 2008 fulfilled neither of these requirements. In any event, EFSA's procedural obligations at that stage required it to assess the information it had obtained, ask for any further information it might need and assess whether its former staff member's employment elsewhere gave rise to a conflict of interest. While the evidence on file suggested that the former staff member's e-mail of 19 May 2008 never reached EFSA's Human Resources department, in its opinion, EFSA stated that an assessment was carried out and that the conclusion reached was that there was no reason to oppose the departing staff member's move.

¹⁷ *Post-Public Employment: Good Practices for Preventing Conflict of Interest*, OECD 2010, pp. 38-39.



However, no evidence of that assessment was presented to the Ombudsman, even though EFSA had specifically been asked to provide any available information documenting EFSA's assessment of the alleged potential conflict of interest, for example e-mail exchanges, notes for the file, or a decision of the competent service within EFSA. In any event, had such an assessment taken place at that stage, it would have been difficult to understand why EFSA considered it necessary to approach its former staff member concerning this issue on 9 December 2009.

57. The third signpost is that of 8 November 2009, when the complainant contacted EFSA on this issue. It was at the latest at this moment that EFSA should have complied with its procedural obligations, described in paragraph 56 above. However, EFSA only contacted its former staff member on 9 December 2009, that is, one month later, to remind her of her obligations under the Staff Regulations. Furthermore, EFSA did not ask its former staff member for information about her occupational activity at the time, which it might have needed in order to decide on how to proceed further in this case. Nor did it ask for information that could have enabled it to determine whether, before the end of the contract at EFSA, its former staff member had already had contacts with the new employer concerning possible (future) job opportunities.

58. In its opinion and in its further submissions sent in the course of the present inquiry, EFSA submitted that it had assessed the information it had received concerning its former staff member's move and reached the conclusion that there was no conflict of interest.

59. However, no record of EFSA's assessment leading to the above conclusion was presented to the Ombudsman, even though, as already mentioned above, the Ombudsman specifically asked for such documentary evidence. The Ombudsman considered this to be surprising. In spite of the fact that, as EFSA pointed out, Article 16 of the Staff Regulations provides that an institution's omission to address a negative decision to a former member of staff within 30 days of the latter having informed the institution "*shall be deemed to constitute implicit acceptance*", it was questionable whether this was the case in the situation under examination. After all, Article 16 of the Staff Regulations envisages that the institution concerned is informed of a staff member's (or former staff member's) intentions before he or she takes up a new employment, and the above-mentioned rule is clearly aimed also at protecting the interests of the person in question in such a situation. This was not applicable here, as EFSA's former staff member only informed it after she had already started working for her new employer.

60. In any event, the Ombudsman emphasised that the importance of keeping a record of the analysis that there was no conflict of interest is paramount. This is because institutions must be perceived to act properly and to be in a position to defend their decisions vis-à-vis EU citizens, when asked to do so. This approach is instrumental in building public trust and confidence in the EU institutions' activities¹⁸. The need to keep a proper record of an assessment of a matter which entails a possible conflict of interest is particularly important in the case of an

¹⁸ In this connection, the Ombudsman recalled that he has already stated that "[t]he integrity, transparency and accountability of public administrations are prerequisites for, and underpin, public trust, as a keystone of good governance... Trust depends on a belief in the integrity of officials, who are expected to conduct themselves in a manner that will bear the closest public scrutiny". See P.N. Diamandouros, Promoting ethical behaviour by EU civil servants: the role of the European Ombudsman, Jean Monnet Lecture, University of Bristol, 5 May 2011.



institution or body like EFSA, whose mandate is of special interest to EU citizens at large. The Ombudsman went on to state that it should be pointed out in this regard that, according to its website, EFSA is "[c]ommitted to ensuring that Europe's food is safe"¹⁹. The fulfilment of this mission is not only endangered in cases where actual conflicts of interest are tolerated, but also where EFSA's approach gives rise to the impression that it failed properly to assess a possible conflict of interest.

61. At the very least, EFSA should therefore have prepared an internal note in order to record the fact that it assessed the matter raised by the complainant and to set out the reasons on the basis of which it arrived at the conclusion that no conflict of interest existed.

The substantive aspect

62. As regards the substantive aspect of the present case, the Ombudsman noted that, in the course of the present inquiry, EFSA consistently took the view that there was no conflict of interest because its former staff member's tasks were limited to providing secretarial support to the GMO panel and because she did not have any input in the decision-making.

63. The Ombudsman considered it possible that EFSA's view that there was no conflict of interest was correct. However, the assessment to be carried out in such cases should be a thorough one. In the Ombudsman's view, EFSA adopted an unduly narrow approach by focusing exclusively on the question whether its former staff member was able to take, or to play a part in, decisions on applications submitted to EFSA. The Ombudsman considered that a thorough assessment requires that the former staff member's tasks at EFSA be compared with those performed in her new employment. What is more, he recalled that the person concerned had been the Head of EFSA's GMO Unit for five years and could thus be expected to have gained valuable insight into how EFSA, in general, and its panels, in particular, function. The Ombudsman also noted that, according to the former staff member's e-mail of 19 May 2008, her new job appeared to entail close contact with EFSA. These circumstances should clearly have been taken into account by EFSA when deciding on whether there was a potential conflict of interest.

64. The Ombudsman acknowledged that, as EFSA noted in its opinion, its staff members are bound by the obligation to refrain from any unauthorised disclosure of information received in the line of duty even after they leave EFSA's service. Moreover, the Ombudsman was pleased to hear that EFSA has clearly stated that if there were to be any indication that its former staff member breached this duty, it would take appropriate action. However, he added, it should also be recalled that informing an institution of any proposed new employment *before* taking up such employment is also a duty incumbent on members of the EU's administration. The fact that this obligation was not sufficiently respected in the present case should have induced EFSA to pay even more attention to the issue of a possible conflict of interest.

65. At the same time, EFSA should obviously be mindful of its duty of care towards its staff members and the need to ensure that no shadow is cast upon a former staff member's integrity and discretion. While, in accordance with Article 16 of the Staff Regulations, EFSA may be entitled to abstain from

¹⁹ <http://www.efsa.europa.eu/>



addressing a decision to a former staff member as the absence of a decision would, by default, be deemed to constitute an implicit acceptance, EFSA's aforementioned duty would be best served by an appropriate recording of the analysis which led it to the conclusion that there was no potential conflict of interest in this case.

The Ombudsman's conclusions

66. In light of the foregoing considerations, the Ombudsman reached the conclusion that EFSA failed to fulfil the procedural obligations emanating from the applicable rules. Moreover, EFSA did not carry out as thorough an assessment of the alleged potential conflict of interest of its former staff member as it could and ought to have carried out. This constituted maladministration.

67. The Ombudsman noted that, as a general rule, when maladministration occurs, the institution concerned should properly acknowledge it and take appropriate remedial action²⁰. In the present case, EFSA neither accepted that it made a mistake, nor put forward any measures it intended to take in order to prevent similar shortcomings from reoccurring in future. The Ombudsman therefore made a further draft recommendation that "*EFSA should acknowledge that it failed to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising from the move of a former member of its staff to a biotechnology company*".

68. As regards the remedial action that needed to be taken, the Ombudsman considered it appropriate to offer the following guidance.

69. The Ombudsman considered that, without prejudice to his first draft recommendation reproduced in paragraph 55 above, EFSA's rules and procedures are sufficiently robust to enable it to carry out an examination of a potential conflict of interest in 'revolving doors' cases. The Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union elaborates on the previously applicable rules and provides for (a) a declaration to be made by the departing staff member in which she/he undertakes to respect Article 16 of the Staff Regulations, and (b) a procedure pursuant to which staff members, for a period of two years after leaving the service, are required to apply for authorisation to undertake outside activities, to provide relevant information and to declare any changes in the circumstances after permission has been granted²¹.

70. The declaration in question serves to ensure that EFSA staff members are aware of their obligations upon their departure. At the same time, the relevant

²⁰ See, in this regard, the Ombudsman's draft recommendation in his inquiry into complaint 882/2009/ML against the European Commission. See, also, the decision of the European Ombudsman closing his inquiry into complaint 3800/2006/JF against the European Commission, paragraph 74.

²¹ Article 5 of the Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union provides:

"1. A former staff member shall inform EFSA without delay where any other change in one or more of the circumstances linked to his/her new or future post and already communicated to EFSA arises after permission has been granted.

2. EFSA shall examine whether to modify the conditions of or, in exceptional circumstances, to withdraw its permission in the light of such a change. The decision shall be taken by EFSA's Executive Director.

3. Irrespective of the decision to be taken, in the event described in paragraph 1 of the present Article, the former staff member shall be reminded by the HR Unit of his/her obligations towards EFSA and of the fact that EFSA reserves the right to undertake all necessary actions in order to ensure the implementation of the above-mentioned obligations."



authorisation form enables EFSA to obtain sufficient information, as outlined above, to empower it to carry out a full assessment of a potential conflict with its legitimate interests.

71. What clearly needed to be improved, however, was the manner in which the relevant rules were applied in practice and the Ombudsman made a third draft recommendation accordingly. Bearing in mind that the assessment of a potential conflict of interest in the context of a 'revolving door' type of conflict is a complex exercise which requires a careful examination of the staff member's tasks²² and the envisaged activities in the intended employment, the Ombudsman made a draft recommendation that "*if a similar case arises in the future, EFSA should: (i) obtain sufficient information, including, as a minimum, a proper account of the tasks carried out at EFSA, a precise description of the proposed new employment, and possible links between the new and the previous employment; (ii) proceed with an assessment that is as thorough as possible; and (iii) properly record the results of its assessment*".

72. In following the above procedure, the Ombudsman emphasised that EFSA should strive to attain the highest level of scrutiny, commensurate with the importance of its mission and citizens' expectations.

73. To recapitulate, the draft recommendations made by the Ombudsman were:

"1) EFSA should strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type. In this regard, EFSA should make clear that such negotiations themselves may amount to a conflict of interest. It follows that EFSA should require serving staff members to disclose them in a timely manner, in accordance with EFSA's Policy on Declaration of Interests.

2) EFSA should acknowledge that it failed to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising from the move of a former member of its staff to a biotechnology company.

3) If a similar case arises in the future, EFSA should: (i) obtain sufficient information, including, as a minimum, a proper account of the tasks carried out at EFSA, a precise description of the proposed new employment, and possible links between the new and the previous employment; (ii) proceed with an assessment that is as thorough as possible; and (iii) properly record the results of its assessment."

The arguments presented to the Ombudsman after his draft recommendations

74. EFSA's submissions made in its initial reply, its detailed opinion and the enclosed annexes can be grouped into two main categories: (a) EFSA's initiatives which affect the framework within which it deals with issues of ethics and integrity, including conflicts of interest, and (b) EFSA's specific actions taken with a view to implementing the Ombudsman's draft recommendations within the above general framework.

75. As regards point (a), EFSA's initiatives are: (i) new rules on independence; (ii) investment in infrastructure; (iii) staff training; and (iv) institutional changes. Concerning point (i), on 21 December 2011, EFSA adopted a new

²² Under the Staff Regulations, the objective is to determine whether a new occupational activity is "related to the work carried out by the official".



Policy on Independence and Scientific Decision Making Processes²³ and, on 21 February 2012, the Executive Director adopted the Decision implementing EFSA's Policy on Independence and Scientific Decision-Making Processes regarding Declarations of Interests (hereinafter, 'EFSA's revised Implementing Decision on Independence')²⁴. It should be added that, in December 2010, EFSA adopted a Practical Guide to Staff Ethics and Conducts. Concerning point (ii), EFSA invested EUR 1.7 million in an electronic Declaration of Interests ('DoIs') tool and allocated three staff members to the screening of DoIs. Concerning point (iii), EFSA provides mandatory training courses to staff members on ethics and integrity, taking into account that EFSA staff and experts have a scientific background and that they work within the framework of the EU institutions for a limited period of time. Concerning point (iv), EFSA appointed an advisor for staff members and experts on ethics, conduct and integrity.

76. Moving on to point (b), EFSA provided the following information. As regards the first draft recommendation, EFSA made the preliminary point that, given that the first draft recommendation was not linked to the specific case at issue, it should be rejected. In spite of this procedural argument, EFSA outlined the steps it has taken in order to address the substance of the Ombudsman's draft recommendation. In this regard, EFSA highlighted the above-mentioned "*new, comprehensive and sophisticated*" Policy on Independence and Scientific Decision Making Processes and EFSA's revised Implementing Decision on Independence. EFSA argued that, based on the experience gained in the past and following a public consultation and a Stakeholder Consultative Workshop on independence, it has substantially strengthened its rules and procedures regarding conflicts of interest, also with respect to negotiations between its staff and prospective employers. In this regard, staff members are required to declare any negotiation with prospective employers having a vested interest in EFSA or in its activities. It is foreseen that EFSA may consider these negotiations to constitute a potential conflict of interest. A procedure has been established to determine whether a conflict of interest exists and, in such a case, what measures should be taken (for instance, reassigning a staff member to a different unit or taking any appropriate measure to prevent or remedy the conflict of interest)²⁵.

77. As regards the Ombudsman's second draft recommendation, EFSA maintained that it did perform an assessment of the existence of a potential conflict of interest with respect to its former staff member concerned and concluded that no conflict of interest existed. However, EFSA stated that, regrettably, it did not process the screening of the information it had obtained from its former staff member in a traceable manner. EFSA explained that this oversight was also due to the fact that it was unfamiliar with these issues, given that its former staff member was the first to move to a company active in a sector of relevance to EFSA. Furthermore, EFSA acknowledged that the system put in place in 2011 with a view to implementing Article 16 of the Staff Regulations is more robust than the one that was in force in 2008 and 2009 and outlined its differentiating features. Specifically, the new system (i) provides for measures based on a thorough assessment of the potential conflict of interest, (ii) obliges staff members to declare all relevant negotiations with a prospective employer without delay, and (iii) provides for a traceable process and forum where difficult cases are thoroughly discussed and assessed. EFSA also acknowledged that it failed to record the assessment of the potential conflict of

²³ <http://www.efsa.europa.eu/en/keydocs/docs/independencypolicy.pdf>

²⁴ <http://www.efsa.europa.eu/en/keydocs/docs/independencerules.pdf>

²⁵ Article 23 of EFSA's revised Implementing Decision on Independence.



interest arising from the move of its former staff member to a biotechnology company in the way it would be done today, and it assured the Ombudsman that it has put in place all measures to ensure that such an oversight will not be repeated in the future.

78. As regards the Ombudsman's third draft recommendation, EFSA submitted that it had already put in place the processes and checks necessary to ensure that it deals with similar cases in the manner recommended by the Ombudsman. In effect, in 2011, EFSA was confronted with a case similar to the one at issue, and it processed that file in accordance with the Ombudsman's third draft recommendation. As documented in Annexes III and IV of its detailed opinion, in that case, its Legal and Regulatory Affairs Unit performed a detailed assessment and conveyed it to the Joint Committee. The Executive Director then took an informed decision proportional to the tasks, seniority and function of that person, imposing certain limitations on the staff member's future activities in the private sector. The measures focused on (i) forbidding the concerned person to contact his former colleagues and EFSA's experts with a view to gaining access to non-public documents and information during the entire year following his termination of service, and (ii) obliging him to avoid conflicts of interest that could arise if he were to approach EFSA's scientific experts. EFSA argued that this means that, as requested by the Ombudsman in the third draft recommendation, the screening process concerning staff leaving EFSA is duly recorded in a traceable manner. Moreover, the process put in place ensures that, in future cases, EFSA will implement the applicable provisions in the way indicated by the Ombudsman.

79. In its observations, the complainant pointed out that EFSA had admitted that it had not taken the necessary action to stop the revolving doors. However, it argued that EFSA should have admitted to the problem much earlier, because this lengthy process further damages EFSA's credibility. The complainant maintained that it is not clear whether "*... EFSA will stop such a move to the industry in the future*". The complainant referred to two other cases which, in its view, demonstrate that much stronger action must be taken in order to protect the independence of EFSA and added that, having postponed the approval of EFSA's budget, the European Parliament was also concerned about EFSA's independence.

The Ombudsman's assessment after his draft recommendations

80. As a preliminary point, the Ombudsman notes that, in its observations on EFSA's detailed opinion, the complainant referred to two other cases in support of its argument that stronger action must be taken to protect EFSA's independence. The Ombudsman does not consider it necessary to examine these cases for the purposes of assessing EFSA's response to his draft recommendations for the following reasons. As regards the first case, the complainant lodged a complaint with the European Ombudsman concerning EFSA's handling of an alleged conflict of interest concerning the Chair of one of its scientific panels (Complaint 622/2012/ANA) on which the Ombudsman's inquiry is ongoing²⁶. As regards the second case, the Ombudsman considers that broadening the scope of the present inquiry so as to examine this further issue would not be in the interest of efficiency. However, should the complainant take the view that this further issue so merits, it could consider lodging a new complaint with the Ombudsman.

²⁶ See footnote 10 above.



81. Moving on to the substantive assessment, the Ombudsman welcomes the fact that, in its submissions, EFSA highlights the importance of ethical behaviour and integrity for its staff and experts. It is particularly encouraging that these statements are complemented by concrete measures, such as the appointment of an ethics advisor and the introduction of compulsory training for all staff members²⁷. They constitute a welcome positive response to the Ombudsman's general exhortation, in paragraph 72 above, that EFSA should strive to attain the highest level of scrutiny, commensurate with the importance of its mission and citizens' expectations.

The first draft recommendation

82. Moving on to the examination of EFSA's reactions to his specific draft recommendations and the measures taken to implement them, the Ombudsman regrets EFSA's preliminary remark that his first draft recommendation goes beyond the scope of his inquiry and should, therefore, be rejected. It should be reiterated that, in the present case, the departing staff member took up her new post one and a half months after the end of her contract with EFSA. Neither the Ombudsman nor, regrettably, EFSA possesses sufficient information to determine at what point in time the departing staff member negotiated and accepted the offer of a new post. As explained in paragraphs 51-55 above, the Ombudsman considered that, in order to help EFSA better to address revolving door cases in the future in circumstances of a practically seamless transition from the public to the private sector, it was necessary to ask it to improve its framework for dealing with conflict of interest issues in the case of serving staff members. Even if EFSA had doubts as to whether the first draft recommendation was formally covered by the present inquiry, it could have acknowledged that the draft recommendation was, in substance, justified and helpful to EFSA.

83. This approach would have been all the more logical in view of the action taken by EFSA to strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type and, thus, to implement the Ombudsman's first draft recommendation. Specifically, EFSA's revised Implementing Decision on Independence, which was adopted following the Ombudsman's first draft recommendation, provides that "[i]n addition to the interests defined under Article 1 of the present decision, EFSA staff shall declare also any negotiation with prospective employer(s) having a vested interest in EFSA or in its activities" (Article 23 (3)). The Ombudsman notes that Article 1 of the above Decision offers a broad definition of "interest"²⁸. In principle, and save for an issue that will be addressed in paragraph 84 below, EFSA's revised Implementing Decision on Independence sufficiently implements the Ombudsman's first draft recommendation that "EFSA should require serving staff members to disclose [negotiations by serving staff members concerning future jobs] in a timely manner, in accordance with EFSA's Policy on Declaration of Interests."

84. Furthermore, it should be noted that, in reaction to the draft recommendation which states that "EFSA should make clear that such negotiations

²⁷ This is also in line with the recommendations made by the Court of Auditors in its Special Report No 15/2012, Management of Conflict of Interest in Selected EU Agencies, available at: <http://eca.europa.eu/portal/pls/portal/docs/1/17190743.PDF>

²⁸ "Interest meaning the relation of being objectively concerned in something, e.g. by having a right or title thereto, a claim thereupon, or a share therein. For the purposes of the present Decision, declarable interests shall be all interests falling within fields of competence of the Authority."



themselves may amount to a conflict of interest", Article 23(6) of EFSA's revised Implementing Decision on Independence now provides that "[n]egotiations with a prospective employer may be considered by the Appointing Authority as a CoI when the staff member has received an offer and the tasks assigned to the staff member have an impact on EFSA's decision making process". The Ombudsman welcomes this reference. However, he considers that the wording of the provision ("*negotiations may be considered*", "*when the staff member has received an offer*" and, especially, "*the tasks assigned to the staff member have an impact on EFSA's decision making process*") narrows its scope and, consequently, unduly restricts EFSA's future assessment of a possible conflict of interest. Moreover, these limitations appear hard to reconcile with both Article 16(2) of the Staff Regulations and EFSA's own definition of a conflict of interest in Article 1(3)(c) of its revised Implementing Decision on Independence²⁹.

85. The Ombudsman, therefore, considers that EFSA's implementation of his first draft recommendation is not fully satisfactory. Given the forward-looking nature of that recommendation, the Ombudsman complements it with the following further remarks.

(a) Regarding the disclosure of negotiations with prospective employers, Article 23(9) of EFSA's revised Implementing Decision on Independence³⁰ requires that the Annual Declaration of Interest ('ADoI') of a serving staff member in negotiations with a prospective employer be updated to reflect that change in that staff member's interests. However, the relevant form in Annex I does not foresee the possibility of a future employment but only 'past' and 'current'. EFSA could consider addressing this issue by amending the relevant form.

(b) Regarding EFSA's assessment of the negotiations with a prospective employer disclosed by a serving staff member, EFSA could consider deleting the part of the sentence in Article 23(6) of EFSA's revised Implementing Decision on Independence which reads "*when the staff member has received an offer and the tasks assigned to the staff member have an impact on EFSA's decision making process*", in line with the Ombudsman's analysis in paragraph 84 of the present decision. This would enable EFSA to assess, without being restricted by the wording of the extant provision, whether negotiations between a serving staff member and a prospective employer constitute a conflict of interest in any given case, in a manner that complies with the applicable rules and the principles of good administration.

(c) Negotiations with a prospective employer entail two obligations for a serving staff member: (i) the obligation of disclosure to EFSA so as to protect the latter's independence, and (ii) subject to the conditions laid down in Article 16(2) of the Staff Regulations³¹, the obligation, when an offer by a prospective employer is made to a serving official and before he or she can accept it, to request authorisation to engage in such an activity. In the interest of clarity, EFSA could consider spelling out the link between Article 23 of its revised Implementing Decision on Independence and its Decision Implementing

²⁹ "Conflict of Interest (CoI) meaning a situation when an individual is in a position to exploit his or her own professional or official capacity in some way for personal or corporate benefit with regard to that person's function in the context of his or her cooperation with EFSA."

³⁰ "Any change regarding interests already declared shall result in a swift update of the ADoI..."

³¹ As explained in paragraph 52 above, the obligation to apply for authorisation to engage in an occupational activity applies also to serving staff members.



Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union³².

(d) In this connection, while, in principle, Article 1 of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union includes also serving officials ("*all staff members and former members*"), the modalities for the application of that procedure focus only on "*former staff members*" (Articles 3, 5 and 6 and the Annex 2 Application for authorisation to engage in an occupation after leaving EFSA in accordance with Article 16 of the Staff Regulations). Since this might cause confusion about the temporal scope of the staff members' obligations, EFSA could consider deleting the word "*former*" from the above provisions or adding the word "*serving*".

The second draft recommendation

86. The second draft recommendation was, in summary, that EFSA should acknowledge the shortcomings in its handling of the specific case. The Ombudsman regrets that, instead of doing so, EFSA maintained that it did carry out an assessment of the conflict of interest in the present case and reached the conclusion that there was no conflict of interest although that assessment was not recorded. What is particularly disappointing is that, at this late stage in the Ombudsman's inquiry, EFSA introduced a new factual claim according to which its former staff member had informed it that she "*did not have a new employment coming up after quitting EFSA*".

87. The Ombudsman notes that EFSA did not provide evidence to support this claim and he sees no reason, therefore, to revise or qualify the finding set out in his draft recommendation that there is nothing to suggest that EFSA carried out any such assessment before its former official took up her new employment.

88. Therefore, contrary to EFSA's statement that it considers the second draft recommendation to have been accepted and implemented, the Ombudsman concludes that EFSA's reply to the second draft recommendation is inadequate. The Ombudsman considered the possibility of submitting a special report on the matter to the European Parliament³³. However, in view of the fact that EFSA has strengthened its procedural framework for dealing with conflicts of interest in response to the Ombudsman's other draft recommendations, the Ombudsman takes the view that it would not be useful to do so. The Ombudsman also recalls in this context that another inquiry concerning similar issues and relating to EFSA is ongoing.

The third draft recommendation

89. The third draft recommendation had three aspects, of which the first was to ensure that, if a similar case arises in the future, EFSA should obtain sufficient information so as to carry out an assessment of a conflict of interest that is as thorough as possible. In order to establish whether EFSA successfully implemented this aspect, points (a) and (b) set out below should be taken into account.

³² It could do so, for instance, by amending Article 23(10) of EFSA's revised Implementing Decision on Independence.

³³ In accordance with Article 3(7) of the European Ombudsman's Statute and Article 8.4 of the European Ombudsman's Implementing Provisions.



(a) Staff members, both former and serving, wishing to engage in an occupational activity must comply with Article 3 of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union, which provides:

"1. In accordance with Article 16 of the Staff Regulations, for a period of two years after leaving EFSA, former employees intending to engage in an occupational activity, whether gainful or not, are obliged to inform EFSA of their intention.

2. When informing EFSA pursuant to Article 16 above, the former staff to whom paragraph 1 of this Article applies, shall fill in, sign and file with EFSA Human Resources (HR) Unit an application for an authorisation of the future occupational activity by the Executive Director of EFSA, in his/her quality as Appointing Authority.

3. The form (Annex II hereto) will be provided to the concerned person by EFSA's HR Unit, and will include inter alia the following information:

a. a description of his/her activity during his/her last three years of active service at EFSA. This information can be replaced by his/her job description;

b. the name, address and telephone number of the future employer;

c. the future employer's fields of activity;

d. a description of the activity that the former staff member is likely to take up with the future employer, including information on the position he/she is supposed to occupy and the expected duration of that activity; and

e. the links between the former staff member future activity with his/her former function in EFSA, if any."

The Annex II form to which this Article refers requires the person concerned to provide information about the activities carried out at EFSA and "*the new activity and related tasks to be undertaken*" and asks the EFSA staff member whether (i) the prospective employer has an interest in EFSA's field of activities, "*direct or indirect commercial, financial or contractual links (including grants) with a Community institution or body*", (ii) during his/her work at EFSA, the staff member had "*direct or indirect relations with the body/entity for which [he/she] intends to work*", and (iii) his/her new activity "*will have direct or indirect links with other EFSA's departments*".

b) In addition, serving staff members must also observe the procedure laid down in EFSA's new framework on independence. That procedure puts emphasis on ensuring that DoIs are duly recorded³⁴ and that, when a change regarding declared interests takes place, the ADoI is swiftly updated³⁵.

90. On the basis of the above, the procedure in place and the available forms appear to enable EFSA to obtain sufficient information about the tasks carried out at EFSA, a precise description of the proposed new employment and any possible links between the new and the previous employment.

³⁴ Article 6(4) of EFSA's revised Implementing Decision on Independence, as regards the Annual Declarations of Interest; Article 7(2), as regards the Specific Declarations of Interest; and Article 8(2), as regards the Oral Declarations of Interest.

³⁵ Article 23(9) of EFSA's revised Implementing Decision on Independence, as regards the Annual Declarations of Interest.



91. As regards the other two aspects of the third draft recommendation, EFSA enclosed with its detailed opinion, in Annexes III and IV, information about the manner in which it carried out its assessment in the case of a staff member who left in 2011 to take up employment in an industry of relevance to EFSA, thereby providing a proper record of the results of its assessment. Furthermore, EFSA enclosed in Annex III, a Note to the Director from the Head of Legal and Regulatory Affairs in which a detailed account of that staff member's tasks is provided and juxtaposed with the activities of the prospective employer and the tasks to be undertaken by EFSA's staff member in that context. That Note is taken into account by EFSA's Executive Director in her decision (Annex IV) on the staff member's request for authorisation to engage in an occupational activity as evidenced by the conditions attached thereto. Without it being necessary to examine the substantive evaluation made by EFSA, it is evident that a thorough assessment was carried out in that case, in line with the Ombudsman's draft recommendation.

92. In light of the above, the Ombudsman considers that EFSA has accepted and satisfactorily implemented the third draft recommendation.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

EFSA has taken action to strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type and to require serving staff members to disclose them in a timely manner, in accordance with EFSA's Policy on Declaration of Interests. However, EFSA has unduly restricted the scope of what might amount to a possible conflict of interest in such circumstances. It follows that EFSA accepted and implemented the Ombudsman's first draft recommendation only in part.

EFSA failed duly to acknowledge its failure to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising from the move of a former member of its staff to a biotechnology company. Consequently, EFSA failed to implement the Ombudsman's second draft recommendation.

EFSA has taken action to ensure that, if a similar case arises in the future, it (i) obtains sufficient information, including, as a minimum, a proper account of the tasks carried out at EFSA, a precise description of the proposed new employment, and information concerning possible links between the new and the previous employment, (ii) proceeds with an assessment that is as thorough as possible, and (iii) properly records the results of its assessment. Therefore, EFSA accepted and implemented the Ombudsman's third draft recommendation.

The complainant and EFSA will be informed of this decision.

Given that, in its 'Special Report No 15/2012, Management of Conflict of Interest in Selected EU Agencies', the Court of Auditors referred to the Ombudsman's draft recommendations in the present case, it should also be informed of the present decision.



Further remarks

In order to improve on the implementation of the Ombudsman's first draft recommendation, EFSA could consider taking the following action.

(a) Regarding the disclosure of negotiations with prospective employers, Article 23(9) of EFSA's revised Implementing Decision on Independence requires that the Annual Declaration of Interest of a serving staff member in negotiations with a prospective employer be updated to reflect that change in that staff member's interests. However, the relevant form in Annex I does not foresee the possibility of a future employment but only 'past' and 'current'. EFSA could consider addressing this issue by amending the relevant form.

(b) Regarding EFSA's assessment of the negotiations with a prospective employer disclosed by a serving staff member, EFSA could consider deleting the part of the sentence in Article 23(6) of EFSA's revised Implementing Decision on Independence which reads "*when the staff member has received an offer and the tasks assigned to the staff member have an impact on EFSA's decision making process*", in line with the Ombudsman's analysis in paragraph 84 of the present decision. This would enable EFSA to assess, without being restricted by the wording of the extant provision, whether negotiations between a serving staff member and a prospective employer constitute a conflict of interest in any given case, in a manner that complies with the applicable rules and the principles of good administration.

(c) Negotiations with a prospective employer entail two obligations for a serving staff member: (i) the obligation of disclosure to EFSA so as to protect the latter's independence, and (ii) subject to the conditions laid down in Article 16(2) of the Staff Regulations, the obligation, when an offer by a prospective employer is made to a serving official and before he or she can accept it, to request authorisation to engage in such an activity. In the interest of clarity, EFSA could consider spelling out the link between Article 23 of its revised Implementing Decision on Independence and its Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union.

(d) In this connection, while, in principle, Article 1 of EFSA's Decision Implementing Articles 16, 17(2) and 19 of the Staff Regulations and Articles 11 and 91 of the Conditions of Employment of other servants of the Union includes also serving officials ("*all staff members and former members*"), the modalities for the application of that procedure focus only on "*former staff members*" (Articles 3, 5 and 6 and the Annex 2 Application for authorisation to engage in an occupation after leaving EFSA in accordance with Article 16 of the Staff Regulations). Since this might cause confusion about the temporal scope of the staff members' obligations, EFSA could consider deleting the word "*former*" from the above provisions or adding the word "*serving*".

P. Nikiforos Diamandouros

Done in Strasbourg on 23-05-2013