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Draft recommendations of the European Ombudsman in his inquiry into complaint 775/2010/ANA against the European Food Safety Authority

Dear Mr Then,

Please find enclosed, for your information, a copy of my draft recommendations that I have sent to EFSA in relation to your complaint. The first draft recommendation is made as a general matter and without reference to the specific case that gave rise to the present inquiry.

My draft recommendations are as follows:

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.

I have asked EFSA to send its reply by 31 March 2012.

Yours sincerely,

P. Nikiforos Diamandouros

Enclosure:

- Draft recommendations sent to EFSA



Draft recommendations

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

Made in accordance with Article 3(6) of the Statute of the European Ombudsman¹

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'².

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 Swiss-based biotechnology company, to take up the post of Head of Biotech Regulatory Affairs for Europe, Africa and the Middle East. 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 Regulations³.

¹ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

² 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.

³ 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



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 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 been on leave on personal grounds from the Belgian Ministry of Public Health. On 15 May 2008, she took up her new post and by e-mail of 19 May 2008, she 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 Syngenta in the EuropaBio 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 objection 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.

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.



The subject matter of the inquiry

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

11. The Ombudsman included in his inquiry the complainant's claims that EFSA should:

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

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

12. 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 at 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.

13. 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 party⁴, 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, it should be noted that the complainant has 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

14. On 25 May 2010, the Ombudsman invited EFSA to comment 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.

15. 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

⁴ Article 10.1 of the European Ombudsman's Implementing Provisions, available at: <http://www.ombudsman.europa.eu/resources/provisions.faces>.



inquiries, which was forwarded to the complainant for observations. 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.

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

20. EFSA underlined that by law⁵, 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 Regulation⁶ or the Deliberate Release Directive⁷. Furthermore,

⁵ 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.

⁶ 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.



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 Panels⁸.

21. EFSA explained that the majority of the members of its staff are employed on 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 (an association of biotechnology companies) held on 5 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

⁷ 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.

⁸ 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/expertsselection.pdf>.



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. 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 provided by EFSA in 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) her 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. Finally, the Ombudsman drew EFSA's attention to the fact that this information was requested in application of Article 3(2) of the Statute of the European Ombudsman⁹ and Articles 5.1 and 5.2 of the European Ombudsman's Implementing Provisions¹⁰. He promised that should EFSA specify that any one of the requested documents was confidential, he would treat them as if they had been obtained by his services during an inspection. In accordance with

⁹ <http://www.ombudsman.europa.eu/resources/statute.faces#h12>

¹⁰ <http://www.ombudsman.europa.eu/resources/provisions.faces>



Article 13.3 and 14.2 of the European Ombudsman's Implementing Provisions, neither the complainant nor the public would be given access to them¹¹.

32. 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*".

33. 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.

34. As regards the Ombudsman's request for additional information, EFSA enclosed with its reply the requested documents mentioned in points 1 to 3 of paragraph 29 above. Due to data protection considerations, EFSA provided documents 2 and 3 on a confidential basis.

35. As regards point 4 of paragraph 29 above, EFSA provided a number of documents, the most relevant for the purposes of the present inquiry being: (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; (ii) EFSA's Policy on Declarations 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).

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

37. 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 EU 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.

38. 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 Syngenta, 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.*"

¹¹ <http://www.ombudsman.europa.eu/resources/provisions.faces>



39. 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

40. The Ombudsman wishes to clarify the scope of his analysis into the present complaint and to explain which issues he will address and which he will not. In this regard, it is necessary to make 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 is conscious that, while the present inquiry concerns an allegation against EFSA, EFSA's conduct is inextricably linked to the factual circumstances surrounding the departure of a member of its staff. As mentioned in paragraph 13 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 wishes to emphasise 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.

41. Moving on to the second preliminary remark, the Ombudsman notes 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 is 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 the potential conflict of interest arising from this relationship.

42. The Ombudsman wishes to emphasise that the present inquiry was opened in order to investigate the question 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 possesses sufficient information to make an assessment of the above-mentioned issue. He therefore does 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 remains free to lodge a new complaint concerning this further issue, after having made appropriate approaches to EFSA in that regard.

43. Moving on to the analysis of the issue originally raised by the complainant, the Ombudsman considers 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. The procedural aspect is dealt with in paragraphs 52-64 and the substantive aspect in



paragraphs 64-67 below. Paragraphs 44-51 examine the framework of rules and principles that applies to both aspects.

44. The Staff Regulations contain rules and principles that 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 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."

45. In this regard, it is 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.



46. Moreover, Article 18 of EFSA's Decision on outside activities and assignments¹², in force at the relevant time, which was "*intended to prevent conflicts of interest from arising, without imposing unreasonable restrictions on officials' outside activities*", provides as follows:

"1. An official leaving the service of the Commission¹³ 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..."

47. The provisions quoted above are largely echoed and further elaborated in the more recent EFSA Decision on the implementation of Article 16 of the Staff Regulations¹⁴, which was provided to the Ombudsman in the course of his inquiry.

48. Clearly, the combined legal framework established by the rules outlined above imposes the following procedural obligations on officials and, by extension, temporary and contract agents¹⁵. 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

¹² EFSA Decision on outside activities and assignments, C(2004)1597 85-2004, Brussels, 28.4.2004.

¹³ The provisions originate from the European Commission. For all ends and purposes, "*Commission*" should be read as "*EFSA*".

¹⁴ 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.

¹⁵ Article 21 of EFSA Decision on outside activities and assignments, C(2004)1597 85-2004, Brussels, 28.4.2004.



Union¹⁶) 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.

49. 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.

50. 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.

51. 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

52. EFSA's compliance with its *procedural* obligations will be examined in light of its actions at the different chronological signposts identified above. The first signpost is that of 31 March 2008, when the former staff member's contract ended. This date is 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.

53. This means that an obligation is 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 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

¹⁶ 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.



explanations provided by EFSA, it cannot be established whether EFSA's former staff member did sign such a declaration.

54. By way of further general explanation of the above, and without reference to the specific case at hand, the Ombudsman considers it useful to make clear that, in his view, the second paragraph of Article 16 of the Staff Regulations¹⁷ 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 takes 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 45 above.

55. 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.

56. The existing 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*".

57. It is 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, 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. This policy initiative would be in line with the OECD Post-Public Employment: Good Practices for Preventing Conflict of Interest¹⁸. To this end, the Ombudsman will make a draft recommendation.

58. The second signpost is 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 suggests 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. However, no

¹⁷ Quoted in paragraph 45 above.

¹⁸ *Post-Public Employment: Good Practices for Preventing Conflict of Interest*, OECD 2010, pp. 38-39.



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, if such an assessment had taken place at that stage, it would be difficult to understand why EFSA considered it necessary to approach its former staff member concerning this issue on 9 December 2009.

59. 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 58 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 current occupational activity, 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.

60. 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.

61. However, no record of EFSA's assessment leading to the above conclusion has been presented to the Ombudsman in this case, even though, as already mentioned above, the Ombudsman specifically asked for such documentary evidence. This is surprising. Despite the fact that it is true, as EFSA pointed out, that 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 is questionable whether this rule was applicable in the present case. 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 at protecting the interests of the person in question in such a situation. This is not the case here, as EFSA's former staff member only informed EFSA after she had already started working for her new employer.

62. In any event, 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' activities¹⁹. The need to keep a proper record of assessments of matters which entail a possible conflict of interest is particularly important in the case of an institution or body like EFSA, whose mandate is of special interest to EU citizens at large. It should be pointed out in this regard that, according to its website, EFSA is "[c]ommitted to ensuring

¹⁹ In this connection, the Ombudsman recalls 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.



that Europe's food is safe"²⁰. 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.

63. 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

64. As regards the substantive aspects of the present case, the Ombudsman notes 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.

65. The Ombudsman considers it possible that EFSA's view that there was no conflict of interest is 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 considers 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, it should be 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. It should also be 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.

66. It is true 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. The Ombudsman is also 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, 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.

67. 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 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

²⁰ <http://www.efsa.europa.eu/>



analysis which led it to the conclusion that there was no potential conflict of interest in this case.

68. In light of the foregoing considerations, the Ombudsman reaches 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 constitutes maladministration.

69. The Ombudsman notes that, as a general rule, when maladministration occurs, the institution concerned should properly acknowledge it and take appropriate remedial action²¹. In the present case, EFSA has neither accepted that it made a mistake, nor put forward any measures it intends to take in order to prevent similar shortcomings from reoccurring in future. The Ombudsman will therefore make appropriate draft recommendations.

70. As regards the remedial action that needs to be taken, the Ombudsman considers it appropriate to offer the following guidance.

71. The Ombudsman considers that, without prejudice to Ombudsman's draft recommendation mentioned in paragraph 57 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 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 granted²².

72. 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 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.

73. What clearly needs to be improved, however, is the manner in which the relevant rules are applied in practice and the Ombudsman will make a further draft recommendation accordingly. It should be borne in mind that the assessment of a potential conflict of interest in the context of a 'revolving door'

²¹ See, in this regard, the Ombudsman's recent Draft recommendation in his inquiry into complaint 882/2009/VL 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.

²² 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."



type of conflict is a complex exercise which requires a careful examination of the staff member's tasks²³ and the envisaged activities in the intended employment. In order to carry out such an analysis, (i) the institution must possess sufficiently detailed information and, in cases where such necessary information is not provided or is incomplete, it should take steps to obtain the missing information²⁴. As a minimum, such information should include 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. After having collected the necessary information, (ii) EFSA should proceed with an assessment that is as thorough as possible. Finally, (iii) EFSA should properly record the results of its assessment.

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

B. The draft recommendations

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendations to EFSA. The first draft recommendation is made as a general matter and without reference to the specific case that gave rise to the present inquiry.

- 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.**

EFSA and the complainant will be informed of these draft recommendations. The European Court of Auditors, which has been asked by the European Parliament "*to undertake a comprehensive analysis of the agencies' approach to the management of situations where there are potential conflicts of interest*"²⁵, will also be informed.

²³ Under the Staff Regulations, the objective is to determine whether a new occupational activity is "*related to the work carried out by the official*".

²⁴ See similar considerations in the Decision of the European Ombudsman closing his inquiry into complaint 476/2010/ANA against the European Commission, paragraphs 95-104.

²⁵ European Parliament resolution of 10 May 2011 on the 2009 discharge: performance, financial management and control of EU agencies (2010/2271(DEC) available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0163&language=EN&ring=A7-2011-0149>



In accordance with Article 3(6) of the Statute of the European Ombudsman, EFSA shall send a detailed opinion by 31 March 2012. The detailed opinion could consist of the acceptance of the draft recommendations and a description of how they have been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on **07 -12- 2011**