

## MEMORANDUM

*On the ethical and legal issues arising from the appointment of the former President of the European Commission Jose Manuel Barroso as non-executive chairman and director of Goldman Sachs International*

Vesco Paskalev (University of Hull)  
Alberto Alemanno (HEC Paris)  
Laurent Pech (Middlesex University)

Corresponding author:

Dr. Vesco Paskalev  
Wilberforce Building, room 425  
University of Hull, Cottingham Road,  
Hull HU6 7RX

Tel: 0044 (0)1482 465747  
e-mail: [V.Paskalev@hull.ac.uk](mailto:V.Paskalev@hull.ac.uk)

## MEMORANDUM

### *On the ethical and legal issues arising from the appointment of the former President of the European Commission Jose Manuel Barroso as non-executive chairman and director of Goldman Sachs International*

The recent appointment of the former President of the European Commission Jose Manuel Barroso as non-executive chairman and director of Goldman Sachs International (Goldmans) has raised significant concern of the citizens, officials and legal scholars in the EU.<sup>1</sup> Even more concerning is the inadequate response of the EU authorities, and in particular the report of the Ad Hoc Ethical Committee (the Ethical Committee) that found no wrongdoing<sup>2</sup> and the failure of the Commission to take any decision on the matter, despite some public statements by its officials, including its current President, to the contrary.<sup>3</sup> The Committee clearly misinterpreted the law – insofar as it refused to recognize the permanent nature of the duty of integrity of former Members as enshrined in the Treaty - as well as its own duties by providing a legal as opposed to an ethical assessment, thus pre-empting the possibility of a referral to the Court of Justice of the European Union. The proposal for strengthening the ethical requirements for former Commissioners for the future only that was floated by Mr. Juncker in the press has not been even discussed in the College of the Commissioners and by now it is apparent that everybody in the Berlaymont is waiting for the whole issue to be forgotten.

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<sup>1</sup> Announced by Goldman Sachs International in a press release on 8 July 2016, available at its web site, <http://www.goldmansachs.com/media-relations/press-releases/current/jose-manuel-barroso-appointed.html>, last accessed on 7 November 2016.

<sup>2</sup> Opinion of the Ad Hoc Ethical Committee delivered on 26 October 2016, [http://ec.europa.eu/transparency/ethics-for-commissioners/pdf/opinion-comite-adhoc-2016-10-26\\_en.pdf](http://ec.europa.eu/transparency/ethics-for-commissioners/pdf/opinion-comite-adhoc-2016-10-26_en.pdf), last accessed on 7 November 2016.

<sup>3</sup> See 'Juncker forces Barroso to face humiliating security checks in Brussels' in *Euractive*, 16 September 2016, <https://www.euractiv.com/section/public-affairs/video/juncker-forces-barroso-to-face-humiliating-security-checks-in-brussels/>, and Juncker au «Soir»: «Il y a un sérieux problème de gouvernance en Europe» in *Le Soir*, 5 November 2016, <http://www.lesoir.be/1360084/article/actualite/union-europeenne/2016-11-04/juncker-au-soir-il-y-un-serieux-probleme-gouvernance-en-europe>, last accessed on 28 December 2016.

This memorandum aims to identify the many flaws of the Opinion of the Ethical Committee (the Opinion), make a correct analysis of the applicable law and outline the action the Commission is obliged to take.

## I.

### Flaws of the Opinion of the Ethical Committee

- 1) The terms of reference of the Ethical Committee are not publicly available, but the reader cannot help puzzling why the Committee finds the case 'exceptional' (para 6). It is mandated to consider whether the prospective occupation of a former Commission President is compatible with Art. 245 TFEU. Even though the Committee itself is established with regard to the notifications pursuant to paragraph 1.2 of the *Code of Conduct for Commissioners* (the Code)<sup>4</sup>, as the Code applies without prejudice to Art. 245, the expiration of the 18-month term does not prevent the Committee to opine on the issue.
- 2) The Ethical Committee seems to confuse two related but separate duties and this plagues the entire Opinion. The first one is the prohibition for lobbying and advocacy under the Code, in its paragraph 1.2. This is the more specific obligation of former Commissioners, the content of which is precisely defined and its enforcement is ensured by prior screening of any appointment. As the limits it places on the occupational freedom of former Commissioners are quite substantial, it expires fairly quickly. Had the 18-month period not expired, Mr. Barroso would be unable to take up a job at any bank, or any other institution, without prior approval.<sup>5</sup> The other obligation is more general, it is pursuant to the primary law (Art. 245 TFEU). In principle it does not restrict former Commissioners from pursuing certain specific careers and its enforcement does not involve prior screening. However, it requires them to exercise self-restraint in doing so, so that their, or the Union's reputation is not damaged. These two obligations are related but independent as both their source and their scope are different. The Ethical Committee seems to be of the view that the latter is merely an operationalisation of the former: indeed, on a number of occasions it starts with a consideration whether the Art. 245 obligations have been complied with, only to conclude that there is no violation because the period specified in the Code has expired. However, the Code itself does not exist in a legal vacuum but must be interpreted in the light of the Treaty. Failing to do so would mean that the Code has limited the material and the temporal scope

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<sup>4</sup> C(2011) 2904 final,

<sup>5</sup> It is worth to note that, if this were the case, Mr. Barroso's case would have been brought before an ad hoc committee whose members were directly appointed by him while he was in office.

of the Treaty Article. On the contrary, it is precisely *when the cooling off period expires and the more specific obligations cease to apply, that the obligations to act with integrity and exercise discretion kick in*. For virtually all issues that it considers, the Ethical Committee concludes that they apply only before the 18-month period, so one cannot help wonder what, if any, are the obligations which Art. 245 provides for the period thereafter.

- 3) It is unclear what are the conclusions the Ethical Committee wishes to draw from the *Bangemann* case (C-290/99) it discusses (para 8). It is unfortunate that the Court did not have the opportunity to define the notions of integrity and discretion in such a case. But it is instructive that the Council *did* refer the issue to the Court in that case, and the Commission should not duck when it is arising again, all the more that a number of other former commissioners got similarly questionable appointments. It is also instructive that the *Bangemann* case was removed from the register *because* the former Commissioner resigned from his controversial position voluntarily. The Ethical Committee notes that the key issue is whether there is a link between the former Commissioner's portfolio and his or her new employment, but fails to even consider whether such issue exists in the case of Mr. Barroso. Given his broad remit as Commission President, and his specific experience during the Financial crisis and the Greek debt crisis, one cannot help thinking that the Committee stopped short of considering the issue because they would not be able to avoid finding that a clear link does exist. In any event, their failure to consider the matter makes the Opinion redundant. At the very least, they could have sought more evidence about the duties of Mr. Barroso to his new employer. Satisfying themselves with a mere statement of his is a negligence of their duty to provide the Commission, and the public, with some relevant information which is not already available.
- 4) Yet another puzzle is that the Ethical Committee, having found that a reputational damage to the Commission and the Union has been done (para 11), still fails to make any judgement about the cause of this damage or to make any recommendations how to mitigate it. Even if the Committee considers that the damage is negligible, or on balance insufficient to warrant legal action to be taken against Mr. Barroso, one could expect an ethical committee to be less economical when opining on such *ethical* issues. Even if they think legal action would be disproportionate, a strong statement condemning Mr. Barroso for the damage that was 'done' (*sic*) could still help deterring others from following his example in the future. On the contrary, the Ethical Committee states that it is not requested to give opinion whether the action in question is 'blameworthy' but only if the legal obligation for acting with integrity was violated. If this was indeed what the Commission mandated it to do, one wonders why it did not ask the legal service instead. The Ethical Committee's excessively restrictive approach which allows it to

avoid consideration of every single ethical issue related to the case amounts to maladministration which the EU Ombudsman may wish to consider in her likely forthcoming inquiry.

- 5) The Ethical Committee identifies all the ethical issues in two paragraphs only, 14 and 15. In paragraph 14 it does state that Mr. Barroso has not shown considerate judgement, but concludes that this is not sufficient to establish that this undermines his integrity as the latter obligation is apparently attenuated after the expiry of the cooling off period. As stated above, this reasoning is valid only if it is accepted that the Code can alter, and in this case attenuate, a Treaty obligation, which is not the case. The Ethical Committee is right to mention that the duty to integrity has to be balanced against other interests involved, e.g. Mr. Barroso's occupational freedom. However, *the Committee shied away from balancing, or offering any meaningful contribution as for the gravity of the damage and the importance of the prevention of potential conflicts of interests.* So even if it is accepted that Art. 245 obligations attenuate over time, the Committee should still have considered the relative weight of the interests on each side. Similarly, in paragraph 15, the Ethical Committee recognises that Mr. Barroso may have to advise his employer on Brexit issues, but fails to discuss if this may have some implications about his integrity, because ... the cooling off period has expired.
- 6) While quickly disposing of the Brexit matter (para 15), the Committee mentions that it can hardly raise an ethical problem because Brexit issues are so new. This is perhaps the weakest statement in a remarkably weak Opinion. The Ethics Committee should have known that while it is indeed the first time a member state is leaving the Union, hardly any of the issues on the negotiating table are new. The most contentious issue is access to the single market, which is established in 1957 and has been developed all along, including during the last decade when Mr. Barroso was at the helm. Another sensitive issue is the so called 'passporting' of financial institutions to operate in the other member states. One may observe tongue-in-cheek that this issue will be either of little interest to Goldmans, or that Mr. Barroso has never had anything to do with financial regulation while presiding the Commission.

For these reasons the College of Commissioners must set aside the Committee's opinion and itself examine Mr. Barroso's case in light of the Treaty obligations that constrain his actions. The next section of this memorandum offers an analysis of the facts of the case and the proper interpretation of the applicable law. It addresses, first, the harm that this appointment of the former Commission President is causing (section II), the remedial actions which the Commission can and ought to take (III) and then focuses on the violations of the EU law committed by Mr. Barroso which entail Commission's duty to

sanction him (IV). Finally, the memorandum briefly discusses the proposals to strengthen the Code of Conduct for the future (V).

## II.

### The Harmful Consequences of the Appointment

- 1) The appointment of a former Commission President as a senior officer in a private undertaking enables the latter to gain *undue advantage* in any consultations or negotiations with European institutions and officials and in this way puts in jeopardy the interests of the Union and its citizens. It should be noted that Goldmans is already lobbying the EU institutions heavily. According to Corporate Europe Observatory it has spent between €1,000,000 and €1,249,999 in 2015 and has had at least 22 high-level meetings with the Commission since December 2014.<sup>6</sup> The appointment of the person who has been on top of the Union administration for the last decade would literally rip the institutions open for the benefit of his new employer. While the latter would gain clear advantage from Mr Barroso's inside knowledge and personal connections with most of the high-ranking officials, the Union institutions would lose significant part of the leverage they may otherwise have. In a letter from 13 September 2016 to Mr. Juncker, Mr. Barroso stated that he was not engaged to lobby the European institutions and does not intend to do so. Even if Mr. Barroso can be trusted that he will not take part in lobbying and will have no direct contact with his former colleagues and subordinates, he is (and has been) in position to provide valuable insider information to his new employer which can jeopardise the position of the Commission. Even if Mr. Barroso fully respects his duties under Art. 339 TFEU, which commits former commissioners to professional secrecy, in any organisation there is a significant amount of information that may not qualify as professional secret for the purposes of the law, but still is available to insiders only. It is worth to note that even in the opinion of the Ethical Committee, exonerating as it is, it is recognised that the professional secrecy may not be sufficient to counter the risk for conflict of interest (para 8). Moreover, in this case it is plausible to assume that it is precisely Mr. Barroso's inside knowledge that Goldmans are hiring him for insofar as he has no particular expertise in the banking sector. As bargaining goes, when the issue is sensitive and stakes are high, even the mere fact that one party is aware that the other may know certain facts is sufficient to undermine the bargaining position of the former.
- 2) Allowing this situation to continue will put all EU officials, and especially the high-ranking employees of the Commission under enormous pressure

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<sup>6</sup> <http://corporateeurope.org/revolvingdoorwatch/cases/jos-manuel-barroso>, last accessed on 5 September 2016.

not only when they have to deal with their former boss directly (quod non as President Juncker already instructed EU officials not to engage with him) but also when they have to deal with an undertaking which has him on its payroll. It is hardly surprising that of all possible citizens, it was a group of EU officials who launched a petition to the Commission to take action on the issue.<sup>7</sup> This petition was subsequently signed by no less than 150,000 EU citizens which is an evidence of the high importance of this particular side of the problem.<sup>8</sup>

- 3) The potential conflict of interests becomes more acute in light of the forthcoming Brexit negotiations. While in the said letter to the current President, Mr. Barroso states that his terms of employment do not cover Brexit, given the size of Goldmans' London branch and its deep entanglement with a multitude of businesses and governments in the rest of the EU, it is hard to believe that there is any part of the bank's business which remains completely unaffected by Brexit. In any event, as the Ethical Committee should not have satisfied itself with taking the word of the former Commission President without further investigation of the terms of his employment, the Commission must, at the very least, conduct further enquiry.
- 4) Further to these harmful effects that Mr Barroso's appointment is likely to cause in the future, it had created substantial dent in the reputation of the Union already. It was immediately perceived as a scandal and remains one for months on.<sup>9</sup> In just one example the British *Daily Mail* reported various European leaders commenting the appointment in strong language: "This

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<sup>7</sup>Available at Change.org, 'For strong exemplary measures to be taken against JM Barroso for joining Goldman Sachs', available at <https://www.change.org/p/for-strong-exemplary-measures-to-be-taken-against-jm-barroso-for-joining-goldman-sachs-international>.

<sup>8</sup> The Guardian, 'EU petition on Barroso's Goldman Sachs job signed by more than 150,000', 11 October 2016, available at <https://www.theguardian.com/business/2016/oct/11/eu-petition-on-barroso-goldman-sachs-job-signed-by-150000>.

<sup>9</sup> See for example The Daily Mail, 'EU watchdog fears Brexit lobbying former official', 6 September 2016, , available at <http://www.dailymail.co.uk/wires/ap/article-3776170/EU-watchdog-fears-Brexit-lobbying-former-official.html>, 'Barroso's Goldman job hits post-Brexit EU as it battles for trust, 8 September 2016, <http://www.dailymail.co.uk/wires/reuters/article-3779303/Barrosos-Goldman-job-hits-post-Brexit-EU-battles-trust.html>, 'EU ethics committee clears Barroso of wrongdoing over Goldman job, <http://www.dailymail.co.uk/wires/reuters/article-3890334/EU-ethics-committee-clears-Barroso-wrongdoing-Goldman-job.html>, 31 October 2016.

nomination shows that the European elite of which Barroso is part knows no shame”, “nothing surprising for people who know that the EU does not serve people but high finance”, “Barroso, an obscene representative of an old Europe” and likening the appointment to giving Europe “the finger.”<sup>10</sup> Even the Ethical Committee could not avoid recognising that Barroso’s appointment created ‘turmoil’ although it chose to avoid evaluating its scale or significance (para 13).

- 5) Finally, the inaction of the Commission against both the actual harm and the potential conflict of interests sets a very bad precedent. Despite the regret and mild reproach expressed by various Commission officials, *the ‘clearing’ of Mr. Barroso by the Ethical Committee not only nullifies the effet utile of the relevant Treaty provisions, in particular Article 245 TFEU, but also fails to exercise deterrence on the future behaviour of former EU Commissioners.* Inaction would signal that the ‘revolving door’ between the European Commission and those which are supposed to be regulated by it is acceptable and that the imbalance in the representation of interests characterising the EU policy process is set to become systemic.

### III.

#### Necessity of Remedial Action

- 1) Contrary to the statements made by some Commission officials, and notwithstanding the Opinion of the Ethical Committee, the expiry of the 18-months cooling period does not prevent the Commission from taking action. Not only it has the necessary powers but is under a Treaty-enshrined obligation to take action to address both the case at hand and to set a precedent limiting the opportunities for such to arise in the future. In particular, it can issue a formal warning to the former President Barroso (1) establishing that he has violated his obligations under the Treaty and (2) calling upon him to resign from the new function. If the latter fails to take appropriate action, the Commission should initiate the procedure under Art. 245 for removal of the pension rights he is entitled to. It bears reminding that presently Mr. Barroso is receiving a hefty amount of taxpayers money on top of his pay from Goldmans.<sup>11</sup> The European Parliament stood up to its responsibility, and on 26 October 2016 resolved to freeze the temporary allowances of former commissioners and urging the Commission to take

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<sup>10</sup> The Daily Mail, 9 July 2016, ‘Barroso slammed over Goldman Sachs Brexit job’, available at <http://www.dailymail.co.uk/wires/afp/article-3682290/Barroso-slammed-Goldman-Sachs-Brexit-job.html> .

<sup>11</sup> Politico.eu, ‘José Manuel Barroso ‘receiving early EU pensions’, 28 September 2016, <http://www.politico.eu/article/jose-manuel-barroso-receiving-early-eu-pensions/>



steps to stop the revolving doors.<sup>12</sup> Notwithstanding this, the enforcement of the Treaties is, above all, responsibility of the Commission itself. It has a legal duty to assure the appropriate behaviour of its former members.

#### IV.

##### **Legal Basis for Remedial Action**

Contrary to the opinions widely circulated in the media, which is now vindicated by the opinion of the Ethical Committee, by accepting the position at Goldmans former president Barroso has violated the law for the following reasons:

- 1) The 18-month period that is commonly mentioned in the media applies to the limitation for former members of the Commission to 'lobby' or 'advocate' the Commissioners stipulated in paragraph 1.2 of the Code. During this period the Commission oversees any appointments and has the power to veto them. As a compensation for such a serious limitation of their occupational freedom former Commissioners receive transitional allowance up to 36 (not 18!) month.<sup>13</sup> This period having expired, Mr Barroso was no longer required to notify the Commission and is not in apparent violation of his duties under the Code. In principle, he may be even entitled to continue to receive his compensation while acting as director of Goldmans.<sup>14</sup> As explained in section I above, most comments, including that of Commission's spokesman and the Opinion of the Ethical Committee as per above, confuse this with the other legal obligation Mr

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<sup>12</sup> European Parliament resolution of 26 October 2016 on the Council position on the draft general budget of the European Union for the financial year 2017, at paragraph 69. This will have only very limited impact on Mr. Barroso, see Euractiv, Parliament freezes Commissioners' pensions over code of conduct row, 31 October 2016, at <http://www.euractiv.com/section/euro-finance/news/parliament-freezes-commissioners-pensions-over-code-of-conduct-row/>.

<sup>13</sup> Art. 7 of Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and members of the Commission and of the President, Judges, Advocates-General and Registrar of the Court of Justice, OJ 187, 8.8.1967.

<sup>14</sup> This will be the case in the unlikely event that his new employer is paying him less than the allowance, Art. 7 (3).

Barroso has, under Art. 245 of the Treaty that is by far more general.<sup>15</sup> The media can be forgiven for confusing the two, but the Ethical Committee has contributed little, if anything, to clarify the situation.

- 2) Under Art. 245 TFEU Mr Barroso is obliged to behave with integrity and discretion as regards to acceptance of certain appointments or benefits not only while in office but also after that. Further, Art. 339 TFEU adds a requirement for professional secrecy to all former employees. Both of these Articles do *not* provide for expiration of these commitments. *The passage of more than 18 months since Mr Barroso left office has no bearings on the obligations to act with integrity and exercise discretion in accepting appointments.* The Ethical Commission is right to note that these obligations grow thinner with the passage of time (para 8), but this is *not because of the period* stipulated in the Code per se, but because with the passage of time *the link* between the old and new employment attenuates and so does the possibility for harm such appointments can inflict on the interests of the Union. Instead of merely noting that the period has expired, the Ethical Committee should have advised the Commission on the substantive questions about the link between Mr. Barroso's employment, and its potential to harm EU interests at this particular point in time.
- 3) *On the substance of Mr. Barroso's obligations:* Art. 245 stipulates two related but separate obligations for former Commissioners. The first is *to behave with integrity*. This apparently involves a great deal of judgement, which is vested in the Commission. In view of a number of MEPs, political leaders, diplomats, pundits as well as the ad hoc Ethical Committee itself, Mr Barroso's appointment was inappropriate. While the Committee asserted that the turmoil Mr. Barroso created, by itself, is not sufficient to constitute violation of this duty, it nevertheless confirmed that "Mr. Barroso has not shown the considerate judgement one may expect from someone having held the high office he occupied for so many years."<sup>16</sup> Even if the Committee does not find this to be failure to act with integrity, its opinion is merely advisory; the Commission *may* take a different view. While the responsibility of the Ethical Committee may be limited – and its terms of reference were not made public – the Commission has responsibility to ascertain that the interests of the Union, including its reputation and *its own integrity as an ethical regulator*, is not compromised, in this case by tolerating inappropriate behaviour by its former members. On account of the numerous shortcomings of the Ethical Committee exposed above, the Commission must set it aside and decide the issue *de novo*. In any event, the Commission must formally consider the matter and take an explicit

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<sup>15</sup> Paragraph 1.2 *in fine* explicitly states its stipulation is with no prejudice to Art. 245, which applies beyond the 18 months.

<sup>16</sup> Opinion of the Ad Hoc Ethical Committee, para 14.

decision. While it may decide either way, its failure to decide anything constitutes failure of its own obligations as guardian of the Treaties and the interests of the EU.

- 4) The second obligation of the former Commissioners is *to exercise discretion in accepting appointments*. While the compliance with this obligation also involves some degree of judgement on the part of the Commission, here Mr Barroso is indisputably on the wrong side of the law. While former Commissioners are not enjoined from taking up new appointments, they are required to 'exercise discretion' in choosing such appointments that do not raise risk for their integrity, and for the reputation of the Union. This opinion was shared by many national and European Union officials, including Mr. Juncker. *Given that there is no shortage of jobs for a former President of the Commission, Mr Barroso should have picked a less controversial one.* As Mr. Barroso has no expertise in the banking sector, one may infer that he has been appointed to his new position exclusively *because* of his position of former President of the Commission. That is precisely the reason why this appointment is perceived as scandalous. A factual examination suggests that should Mr. Barroso had exercised due *discretion* as required by the law, he would have declined Goldmans offer. Now it is incumbent upon the Commission to take remedial action.
- 5) Thus, for the reasons elaborated above, by accepting the appointment by Goldmans, the former Commission President has put himself in a situation of potential conflict of interests, and in any event, in violation of his Treaty obligations to act with integrity and to exercise discretion in his career choices.

## V.

### **Strengthening the Code of Conduct**

This controversial appointment prompted a number of calls to the Commission to strengthen the Code of Conduct in order to prevent such inappropriate appointments for the future. In its resolution to freeze the temporary allowances to former commissioners, the European Parliament explicitly required the Commission to do so in order to prevent 'potential conflicts of interests and revolving doors'.<sup>17</sup> Current Commission President has made a proposal for the cooling-off period for former commissioners to be extended to 24 months and for former commission presidents for 36 months.<sup>18</sup> While strengthening the Code for the future is commendable, this can be no substitution to the remedial action that is necessitated by the case

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<sup>17</sup> See n 12 above.

<sup>18</sup> The proposal has been made by Mr. Juncker in an interview with Le Soir (see n 3 above) and widely quoted by the media throughout the Union, however, no official proposal has been made public by the Commission itself.

at hand. On the contrary, closing the case of Mr. Barroso now with an action oriented only for the future is certain to have the opposite effect. It will be a *licence for future ex-commissioners to take up even more unsavoury positions as soon as they are shielded by the expiry of the 'cooling-off' period*. Only an effective sanction of a former commissioner whose choice of appointment is indisputably inappropriate, as is the case of Mr. Barroso's appointment at Goldmans, can assure that the future ex-commissioners will act with integrity and exercise discretion.

## Conclusion

**With regard to all of the above it is submitted that Mr. Barroso's acceptance of the new appointment was ethically inappropriate and, as a result, in violation of TFEU; that the Commission has powers to take remedial action and is legally obliged to act to enforce the EU law and to protect the interests of the EU. The Opinion of the Ethical Committee has misinterpreted the relevant provisions of the law and failed to correctly appreciate the substance of the matter and therefore its Opinion should be set aside.**

**Thus far, a number of Commission officials, and most importantly, its current President has expressed negative opinions about Mr. Barroso's act, and made a declaration that from now on the latter will be treated as lobbyist rather than former President.<sup>19</sup> All this is commendable but less than sufficient, given the damage done to the reputation of the Union in critical times and the significance of the precedent for the future, especially as there are quite a few former Commissioners whose cooling off period has expired too.**

**The Commission has taken the commendable action to refer the matter to the Ad Hoc Ethical Committee, however the latter regrettably failed to exercise its responsibilities adequately. Now it is up to the Commission, and to its President, to take strong action to restore the reputation of the Union Administration and prevent any such conflicts of interests from arising in the future.**

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<sup>19</sup> Politico.eu, 'Barroso hits back at Juncker over Goldman role', 13 September 2016, at <http://www.politico.eu/article/jose-manuel-barroso-hits-back-at-commission-on-his-goldman-role/>