AN INDEPENDENT ETHICS BODY FOR THE EU? LAW AND ETHICS IN LOBBYING

Webinar organised by the Society of European Affairs Professionals (SEAP) | 20 May 2020 | 17:00-18:00h (20 min presentation)

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N.B. Please note that whenever appropriate, screenshots are linked to the relevant website.
Jean Monnet Chair | now: EU values & ethics

my views | academic perspective | no payment etc. involved | part of Jean Monnet activities

open access via

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Previous Chair: EU & Ethics.
2016 to 2019

New Chair: EU Values.
2019 to 2022

EU Values & DIgitalization for our CommuNITY (DIGNITY)
Relationship of EU law, ethics and values

EU law refers to non-legal concepts, such as ethics (or morality)

Law

values

& human rights

Ethics Morality

Gaps need to be filled with EU values, human rights (etc.)

Relationship of EU law, ethics and values

*Article 2*

The **Union is founded on the values** of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are **common to the Member States in a society in which** pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

values & human rights

**Picture source:** The Economist, December 9th – 15th 2006 [Link].
### Values and (ethical) principles | digitalization

#### Trust (as an overarching goal)

**General field**

**Common values (Art. 2 TEU):**
- human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights
- pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men

**legal principles:**
- sustainability
- non-discrimination
- privacy
- traceability
- transparency
- responsibility
- proportionality & balance
- precaution

#### Health field (additionally)

**Health values (2006):**
- universality, access to good quality care, equity, and solidarity

#### more abstract

**specific ethical principles:**
- explicability
- auditability and traceability
- neutrality
- security and safety
- reversibility
- accountability

**principles of ‘biomedical ethics’:**
- respect for autonomy
- nonmaleficence
- beneficence
- justice

#### more concrete

**legal principles:**
- sustainability
- non-discrimination
- privacy
- traceability
- transparency
- responsibility
- proportionality & balance
- precaution

#### Operating principles (2006):
- quality, safety, care that is based on evidence and ethics, patient involvement, redress, privacy and confidentiality

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Structure

Setting the agenda

Regulatory framework

New ethics body

Conclusion

CoC = code of conduct
COI = conflict of interests
EC = European Commission
EP = European Parliament
IIA = Inter-Institutional Agreement
TEU = Treaty on European Union (EU)
TFEU = Treaty on the Functioning of the EU
Lobbying | scandals and perception

Picture source: Link

Picture source: Link

Picture source: Link

Picture source: Link
Necessity of **dialogue** in a democracy (pro lobbying)

- “[EU] institutions shall, by appropriate means, give citizens and representative associations the **opportunity to make known and publicly exchange their views** in all areas of Union action” (Art. 11 para. 1 TEU)
- They “shall maintain an **open, transparent and regular dialogue** with representative associations and civil society” (Art. 11 para. 2 TEU)
- “[EC] shall carry out broad **consultations** with parties concerned in order to ensure that the Union’s actions are coherent and transparent” (Art. 11 para. 3 TEU)

**Key issue: trust**

Danger to democracy in case of **unethical** lobbying (contra lobbying)

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**law & ethics**

**lobbying situation**
Point of departure

More transparency and scrutiny

If Europeans are to have faith in our Union, its institutions should be open and beyond reproach on ethics, transparency and integrity.

I will support the creation of an independent ethics body common to all EU institutions. I will engage and work closely with the other institutions to make this happen.

I also believe we need more transparency throughout the legislative process. I will work together with the European Parliament and the Council to make this happen. Citizens should know who we, as the institutions who serve them, meet and discuss with and what positions we defend in the legislative process.

Structure

Setting the agenda

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New ethics body

Conclusion
Lobbying | targets | substantive issues

### 22 Legal and Ethical Rules in EU Decision-Making: “Soft Law”...

#### Table 22.2 Challenges in lobbying and corresponding principles

<table>
<thead>
<tr>
<th>Common challenges</th>
<th>Corresponding principles</th>
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<tbody>
<tr>
<td>General mistrust with regard to lobbying and asymmetric information</td>
<td>Transparency</td>
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<td>General risk of a lack of ethics in lobbying</td>
<td>General “guiding” principles for ethical behavior</td>
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<tr>
<td>Col, acceptance of gifts, and corruption</td>
<td>Independence, objectivity, and accountability</td>
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<td></td>
<td>toward citizens and one’s institution</td>
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<tr>
<td>Revolving doors phenomenon</td>
<td>Rules on post term-of-office</td>
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</tbody>
</table>

Lobbying | targets | substantive issues

Lobbying | experts etc. | substantive issues

- **Experts advising the EC:**
  - The Commission has established horizontal rules on the creation and operation of EC expert groups, which strive for a **balanced composition** of expert groups (recital 4) and comprise rules on conflict of interest, in order to “ensure the **highest level of integrity of experts**” (EC decision establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final 30.5.2016 [EC decision experts], recital 3, Art. 2(4), Art. 11)

- **‘Food for thought’ from other field:**
  - **scientific risk assessment** carried out as thoroughly as possible on the basis of **scientific advice** founded on the principles of **excellence, transparency and independence** is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures” (General Court, Case T-70/99, *Alpharma*, para. 183)

- **Lobbyists:** *(see next slide)*
  - Agreement between the EP and the EC on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [IIA 2014], OJ 2014 L 277/11 ([Link](#))
  - Voluntary **transparency register** (Annex I, IIA 2014)
  - **Code of conduct** (Annex III, IIA 2014)
Lobbying: “objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions” (Art. 7) | thus, all branches of power

- **Transparency Register and Code of conduct** (= Annex III): voluntary (nudging: EP access passes, Art. 29; and other incentives, Art. 30)

- **Rules for interest representatives** (excerpt)
  - **Transparency**: lobbyists have to identify themselves and to declare their interests (pt. a) and shall not claim any non-existent relationship with EU institutions (pt. c)
  - **Conflict of interest**: less of a problem; not induce members and staff of EU to contravene rules applicable to them (pt. g)
  - **Revolving doors**: tasks lobbyists not to induce former EU staff etc. to abide by the rules and confidentiality requirements which apply to them (pt. h)
  - **Sanctions**: lacks in serious penalties in case of non-compliance
**Targets | procedural safeguards | EC & EP CoCs**

- **Ex ante** (i.e. training and awareness raising) or **ad hoc** (i.e. interpretation via opinions)
- **EC**: Ad Hoc Ethical Committee (AHEC), as of 1 February 2018: Independent Ethical Committee (IEC)
  - “the Committee shall advise the Commission on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code” (Art. 12 para. 1 new EC COC)
  - “The Committee shall consist of three members selected for their competence, experience, independence and professional qualities. They shall have an impeccable record of professional behaviour as well as experience in high-level functions in European, national or international institutions. The composition of the Committee should reflect experiences in different institutions or functions. The members are appointed by the Commission, on a proposal from the President. They shall sign a declaration on the absence of conflicts of interest. Their term is three years, renewable once. If a member ceases office before the completion of the term, the Commission appoints, on a proposal from the President, a new member for the remainder of the term.” (Art. 12 para. 4 new EC COC)
  - Unanimity, or dissenting opinions (Art. 12 para. 7 new EC COC)
- **EP**: Advisory Committee of the EP on the Conduct of Members (**ACCMEP**)
  - EP has established an ‘Advisory Committee on the Conduct of Members’ (‘the Advisory Committee’) (Art. 7 EP CoC), which shall make recommendations in the event of possible breaches of the EP’s code of conduct (Art. 8 EP CoC). Requirements for qualification of its five members are “not very ambitious” (Frischhut, 2019, p. 56), since it only requires “taking due account of the Members’ experience and of political balance” (Art. 7(2) EP CoC)
- **Staff**: staff regulations [Art. 336 TFEU] (Art. 11 para. 2)
- **EU Ombudsman**: “instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the [CJEU] acting in its judicial role” (Art. 20(2)d TEU, Art. 228 TFEU, Art. 43 CFR, etc.)
Setting the agenda
Regulatory framework
New ethics body
Conclusion
Calls for an independent ethics body for the EU

• Such an independent ethics body has already been called for in literature ...  

  • **Credibility / independence**: “Once values and a code are in place, an ethics committee is needed to support the other program elements. In government, ethics committees provide oversight, counselling and/or promotion of the program”, “absolute independence from the government of the day in order to avoid the appearance of being used for political purposes”, “an independent body with greater authority would be more appropriate” (N.B. compared to the EC White Paper, COM (2000) 200 final) (Dercks, 2001, p. 351)

  • **Independence / common body**: “an EU inter-institutional ethics committee (or committee on standards) could be set up in order to promote an ethics programme common to all EU institutions and bodies. This committee would have to be separate and independent (or as independent as possible) from the institutions and bodies that it is overseeing. It could be charged with the supervision and implementation of general standards applying to all EU institutions and bodies and could report annually” (White, 2014, p. 286)

  • **Via IIA**: “recommended that, in order to supervise the general standards, a Committee of Standards in Public Life be set up, under an interinstitutional agreement” | “not only with a set of standards, but also to update them regularly, monitor their application and implementation in more specific codes of conduct, and to give advice on specific particular issues or questions which are brought to its attention […] and acquire the moral authority that would help to establish and restore the credibility of the Community Institutions, both internally and externally” (CIE, 1999, Vol II, p. 121)

  • **At least the big three**: “To tackle ethical problems in the EU, it may be an option to install an independent ethics body which supports all three major decision-making bodies within the EU.” (Grad & Frischhut, 2019, p. 319)
• **... and elsewhere** (in the context of “Defending integrity against conflicts of interest”, pts. 27-34):
  
  • “Calls for strengthening the restrictions on former Commissioners by extending the ‘cooling-off period’ to **three years** and making it binding for at least all activities falling within the remit of the Transparency Register” (EP, 2017, pt. 31)
  
  • “Believes that decisions on senior officials’ and former Commissioners’ new roles must be taken by an **authority appointed as independently** as possible of those affected by its decisions” (EP, 2017, pt. 32)

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<th><strong>Members (No &amp; appoint.)</strong></th>
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<th>EP CoC</th>
<th>‘Independent Ethical Committee’</th>
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<td>“five members, appointed by the President at the beginning of his or her term of office”, possibility for 6th member (Art. 7(2-3))</td>
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<td>“three members”; “members are appointed by the Commission, on a proposal from the President” (Art. 12 (4))</td>
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| **Tasks** | ad hoc advice for members (Art. 7(4)); make recommendations in the event of possible breaches of EP COC (Art. 8), also in case of ambiguity with regard to a conflict of interests (Art. 3(2)), or suspicion of wrong declaration of interest (Art. 4(5)) | general advise on “any ethical question related to this Code” (Art. 12 (1)); conflict of interests (Art. 4); post term of office activities (Art. 11); application of CoC as such (Art. 13) |

| **Qualification** | only requires “taking due account of the Members’ experience and of political balance” (Art. 7(2)), thus not very ambitious | “selected for their competence, experience, independence and professional qualities [...] impeccable record of professional behaviour as well as experience in high-level functions in European, national or international institutions”, no COI (Art. 12 (4)) |

| **Term** | not explicitly mentioned, but reference to “term of office”, thus five years (Art. 7(2)), “coterminous” with EP President (Rule 2, ACCM RoP) | “three years, renewable once” (Art. 12 (4)) |

| **Chair** | rotating chair (Art. 7(2)), for 6 months (Rule 3, ACCM RoP) | permanent chairperson elected by members (Art. 12 (5)) |

<p>| <strong>Other</strong> | “minority recommendation” (Rule 5(2), ACCM RoP) | “dissenting point of view” (Art. 12 (7)) |</p>
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<td>“three members”; “members are appointed by the Commission, on a proposal from the President” (Art. 12 (4))</td>
<td>more members (cf. also EO, 2018, 26), due to increased number of institutions (EP, EC, if possible also Council, etc.); idea of ‘Identification Committee’ (cf. EGE)</td>
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<td><strong>Tasks</strong></td>
<td>ad hoc advice for members (Art. 7(4)); make recommendations in the event of possible breaches of EP COC (Art. 8), also in case of ambiguity with regard to a conflict of interests (Art. 3(2)), or suspicion of wrong declaration of interest (Art. 4(5))</td>
<td>general advise on “any ethical question related to this Code” (Art. 12 (1)); conflict of interests (Art. 4); post term of office activities (Art. 11); application of CoC as such (Art. 13)</td>
<td>combination of existing tasks (ad hoc advice, breaches, especially COI, etc.)</td>
<td>both for institution (via its President, etc.), as well as for members</td>
<td>also on its own initiative (EO, 2018, 26)</td>
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<td><strong>Qualification</strong></td>
<td>only requires “taking due account of the Members’ experience and of political balance” (Art. 7(2)), thus not very ambitious</td>
<td>“selected for their competence, experience, independence and professional qualities [...] impeccable record of professional behaviour as well as experience in high-level functions in European, national or international institutions”, no COI (Art. 12 (4))</td>
<td>clearly aim for higher EC standards, including inspirations from the EGE (“wisdom and foresight”), and CJEU (“persons whose independence is beyond doubt”, Art. 253 TFEU)</td>
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<td>“three years, renewable once” (Art. 12 (4))</td>
<td>five years, not 2<em>2.5 years (cf. EUCO, Art. 15(5) TEU), or 3</em>2.5 years (cf. EGE, Art. 4(5))</td>
<td>partial replacement (cf. CJEU, Art. 253 TFEU)</td>
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<td><strong>Chair</strong></td>
<td>rotating chair (Art. 7(2)), for 6 months (Rule 3, ACCM RoP)</td>
<td>permanent chairperson elected by members (Art. 12 (5))</td>
<td>person with even higher qualifications than members</td>
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<tr>
<td><strong>Other</strong></td>
<td>“minority recommendation” (Rule 5(2), ACCM RoP)</td>
<td>“dissenting point of view” (Art. 12 (7))</td>
<td>dissenting opinions (cf. also EGE)</td>
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Selection of some legal issues

• **Task**
  - “not only with a set of standards, but also to **update** them **regularly, monitor their application and implementation** in more specific codes of conduct, **and to give advice** on specific particular issues or questions which are brought to its attention” (CIE, 1999, Vol II, p. 121)
  - Offer “guidance on the **interpretation and implementation** of the provisions of this Code of Conduct” (Art. 7 (4) EP CoC)
  - **Ad hoc advice for members** (Art. 7(4) EP CoC), also in case of ambiguity with regard to a conflict of interests (Art. 3(2) EP CoC)
  - **Annual report** (Art. 7 (5) EP CoC)
  - Should contain elements of **whistle-blowing** (see also EP, 2017, pt. 60), inspired by the current directive (Directive 2019/1937)

• **Institutional setting**
  - Should be **independent and external** (on the EC, cf. Dercks, 2001, p. 356)
  - Should not be part of, but able to **request support** etc. from the Ombudsman (Dercks, 2001, p. 354)
  - **External members**, therefore (basically) no “advice from outside experts” necessary (Art. 7(5) EP CoC)
  - Via an IIA | cf. “**set up, under an interinstitutional agreement**” (CIE, 1999, Vol II, p. 121)


Selection of some legal issues

- **Legal basis** | based on existing analyses with regard to a mandatory transparency register (depending on design)
  - Art. 352 TFEU (gap-filling clause): **possible, but challenging**
    - If necessary for objectives of treaties (Art. 3 TEU), but no legal basis -> Council **unanimity** and EP consent
    - “With the **objective of transparency**, Art. 11 (2) TEU contains a contractual safeguard for the use of Art. 352 TFEU.” (Nettesheim, 2014, p. 23; translation)
  - Art. 295 TFEU (IIA): **possible, but no external effect**
    - “make arrangements for their cooperation” (Art. 295 TFEU)
    - IIA **cannot** give rise to obligations to third parties” (EP, 2010, pt. 46)
  - Art. 298 TFEU (‘sound administration’): **only for administration** | not the other branch(es) of power
    - Problem: does not include **MEPs** (Gerig & Ritz, 2014, p. 854)
  - Implied powers: **too uncertain**
    - Vague, therefore uncertainties remain (mentioned by: Gerig & Ritz, 2014, p. 854)
  - Art. 11 TEU | Art. 15(1) TFEU : do **not** contain a legislative competence (Krajewski, 2013, p. 7; EP, 2010, paras. 32, 35)
  - Undescribed competences by nature of the matter (**Natur der Sache**): **too uncertain**
    - also no legal basis Nettesheim, 2014, p. 23
  - Staff regulations (Art. 336 TFEU): **only internal**
    - also no legal basis, as only binding for staff, not for lobbyists (Krajewski, 2013, pp. 13-14)
  - Rules of procedure | **and also** IIA: **only internal**
    - also no legal basis, as they can only “include requirements for lobbyists when they interact with the institutions” (Krajewski,, 2013, p. 14) | no penal sanctions for non-compliance (Krajewski,, 2013, p. 14)
Concluding theses

1. High(est) **legal and ethical** standards are key, in order to (re-)gain citizens’ **trust** and find a **balanced solution** for the type of lobbying, both necessary for, but not harmful to democracy. Also the driving force behind founding the EGE were “**public concerns** arising on ethical issues” (Pirs & Frischhut, 2020).

2. In EU law we can find rules on both **targets** and **actors** (**experts** vs. **lobbyists**) of lobbying, where this contribution focussed on the **targets**.

3. A body like the ‘**common and independent ethics committee**’ (**CIEC**) sketched here, has been called for many years.

4. Such a CIEC should strive for **high(est) standards** (selection criteria), involve **more members**, and should be **responsible for a broad range of tasks** (during and after office, for individual members and the institution as such). This CIEC should also be able to draft opinions on its **own initiative**.

5. If the committee is based on an **IIA**, it might have to be **supplemented** by other accompanying regulations in case of necessary legal effects in relation to third parties (Krajewski, 2013, p. 6) or former members, as we know from the discussions on EU regulation for a mandatory transparency register (on the question of legal basis and impacts on fundamental rights, especially the freedom of speech, e.g. Nettesheim, 2014).

6. The principles of **excellence, transparency and independence** can serve as guiding ideas in the formation of this new body.


Documents mentioned on slides

- **Agreement** between the EP and the EC on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [IIA 2014], OJ 2014 L 277/11 ([Link](#)).


- European Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final 30.5.2016 ([Link](#)).


- European Ombudsman Decision [of 20 July 2018] in the joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA on the European Commission’s handling of post-mandate employment of former Commissioners, a former Commission President and the role of its ‘Ethics Committee’ ([Link](#)).


Thank you for your attention!

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Professor & Study Coordinator European Union Law

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Backup slides

1. Dercks, 2001 I, II | further details | Link
2. EP Resolution 2017 | further details | Link
3. EGE mandate | further details | Link
4. EC new Code of Conduct | further details | Link
5. EP Code of Conduct | further details | Link
6. Inspiration from EGE and EO | further details | Link
7. European Ombudsman 2018 | further details | Link
8. Nettesheim 2014 | further details | Link
9. EC proposal mandatory register 2016 | further details | Link
10. EP legal opinion 2010 | further details | Link

- Hybrid approach, based on both values and compliance, including accountability and discipline (recommendation [rec.] 1, p. 349).
- Conduct a dialogue on values with internal and external EC stakeholders, in order to determine “shared organizational values” (rec. 2, p. 349).
- Develop a single code of conduct (rec. 3, p. 351).
- Establish a single ‘Committee on Standards’, i.e. an independent ethics committee (rec. 4, p. 351).
- Mandatory orientation and ongoing ethics training (rec. 5, p. 352).
- Ethical conduct as a prerequisite for promotion (rec. 6, p. 352).
- Effective and consistent sanctions for ethics violations (rec. 7, p. 352).
- More powers for ombudsman’s office, including possibility for anonymous complaints (i.e. whistle-blowing) (rec. 8, p. 354).
- Training for Commissioners and other top officials on ethical leadership (rec. 9, p. 355).
- Sanctions for Commissioners and other top officials in case of unethical leadership (rec. 10, p. 355).
- More openness and transparency (rec. 11, p. 356).
- Implement laws and regulations to establish fundamental values of public service (rec. 12, p. 356).
- Require “annual independent social auditing” of Commission ethics, and publication of the results on Europa, the EU’s web site” (rec. 12, p. 356).


- Hybrid approach, based both on values (emphasizing the desirable), as well as on compliance (emphasizing the negative) (pp. 348-349)

EP Resolution 2017 | mandatory register

- **Necessity for mandatory register**
  - “whereas a legal act as a new basis for a mandatory Transparency Register necessitates a legal definition of the activities falling under the remit of the register, which would help clarify existing ambiguous definitions and interpretations of transparency, integrity and accountability” (EP, 2017, recital G)
  - “Reiterates its longstanding call to back up the EU Transparency Register with a legislative act, if it is not possible to close all loopholes and achieve a fully mandatory register for all interest representatives with an interinstitutional agreement;” (EP, 2017, pt. 14)

- **Legislative footprint**
  - “Welcomes the decision of its Bureau to request that its administration develop a template for all rapporteurs and draftspersons for opinions to produce a voluntary legislative footprint, setting out what interest representatives and organisations they have consulted; the template should be also provided as an IT tool” (EP, 2017, pt. 1)
  - “Believes that rapporteurs, shadow rapporteurs and committee chairs should publish their meetings with interest representatives falling under the scope of the Transparency Register regarding files under their responsibility through a legislative footprint and that any exceptions should protect the life and liberty of informants acting in good faith” (EP, 2017, pt. 4)

- **Expert groups**
  - Important to work on conflicts of interest in expert groups (EP, 2017, pt. 35)

Other issues

• “Encourages the Commission to develop measures to achieve a **better balance** by empowering **underrepresented** interests” (EP, 2017, pt. 10)

• **Council** invited to join Transparency Register (EP, 2017, pt. 14; see also pt. 27)

• Asks for a “culture of **integrity**” (EP, 2017, pt. 29)

• ‘**R revolving door**’ effect; should also apply to President of the Council (EP, 2017, pt. 30)

• ‘**Cooling-off period**’:
  • Former Commissioners: to be extended to 3 years (EP, 2017, pt. 31)
  • Others: 18.month (EP, 2017, pt. 34)

• “Believes that decisions on senior officials’ and former Commissioners’ new roles must be taken by an **authority appointed as independently** as possible of those affected by its decisions” (EP, 2017, pt. 32)

• **Whistleblowing** rules for EU institutions emphasized (EP, 2017, pts. 60f)

• Conflict of interests in **product regulation** (EP, 2017, pt. 68)

• Independence of **Agencies** (EMA, etc.) from economic sector (EP, 2017, pt. 71)


N.B. As applied (de lege ferenda) to this context of lobbying

• Task “to advise the [EU institutions] on ethical questions relating to [all related questions on interest representations], either at the request of [one or more EU institution(s)] or on request by its chair with the agreement of the [relevant EU institution(s)].” (Art. 2)

• Ad personam membership: “Members shall serve in a personal capacity” (Art. 4(2))

• Independence:
  • “They shall advise the [the EU institutions] in the public interest and independently from any outside influence. Members shall inform the [competent Secretary] in due time of any conflict of interest which might undermine their independence.” (Art. 4(2))
  • “independent, pluralist and multidisciplinary” (Art. 4(4))
  • **Qualification and selection procedure:** (see also Art. 4 (7-11))
    • “selection process overseen by an Identification Committee” (Art. 4(3))
    • **high level of expertise and pluralism**, a geographical balance, as well as a balanced representation of relevant know-how and areas of interest, taking into account the specific tasks of the [body]” (Art. 4(4))
    • “The composition of the group shall ensure that **independent advice of the highest quality** can be provided, combining **wisdom and foresight**. The credibility of the group shall be built on the **balance of qualities** amongst the women and men who make it up, and they shall collectively reflect the breadth of perspectives across Europe. **Gender balance** shall be strictly taken into account, and due consideration accorded to **age balance** and **geographical distribution.”** (Art. 4 (6) lit. a)
    • “internationally recognised experts, with a track record of excellence and experience at the European and global level” (Art. 4 (6) lit. b)
    • “The Members shall reflect the broad **cross-disciplinary scope** of the group's mandate, embracing philosophy and ethics; natural and social sciences; and the law. However, they shall **not perceive themselves as representatives of a particular discipline**, worldview, or line of research; they shall have a **broad vision** which collectively reflects an understanding of important ongoing and emerging developments, including inter-, trans-, and multi-disciplinary perspectives, and the need for ethical advice at the European level.” (Art. 4 (6) lit. c)
    • **Not lit. c – lit. e, as to characteristic of EGE’s taks** (Art. 4 (6) lit. c – lit. e)
EC new Code of Conduct I | other issues

  - “Code of Conduct [...] should be revised in order to take account of the experience gained in its application and be up to the high ethical standards that are expected of Members of the Commission” (recital 5)
  - “An Independent Ethical Committee should assist the Commission in the application of this Code of Conduct by providing independent advice.” (recital 11)
  - “Members and their members of Cabinet shall meet only those organisations or self-employed individuals, which are registered in the Transparency Register” (Art. 7(1)); reference to Decision 2014/839/EU, Euratom (Art. 7(2))

- **Post term of office activities:**
  - 2 years for former members (Art. 11(2)), 3 years for former President (Art. 11(5))
  - “The Commission shall examine the information provided in order to determine whether the nature of the planned activity is compatible with Article 245 of the Treaty on the Functioning of the European Union, and if the planned activity is related to the portfolio of the former Member, it shall decide only after having consulted the Independent Ethical Committee.” (Art. 11(3))
  - Independent Ethical Committee (Art. 12); see next slide

- **Independent Ethical Committee (IEC) (Art. 12)**
  - **Task:** “shall advise the Commission on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code” (Art. 12 (1))
  - **Qualifications:** “members selected for their competence, experience, independence and professional qualities. They shall have an impeccable record of professional behaviour as well as experience in high-level functions in European, national or international institutions. The composition of the Committee should reflect experiences in different institutions or functions” (Art. 12 (4))
  - **Independence:** “shall sign a declaration on the absence of conflicts of interest” (Art. 12 (4))
  - **Appointment IEC members:** “three members”; “members are appointed by the Commission, on a proposal from the President” (Art. 12 (4))
  - **Term:** “three years, renewable once” (Art. 12 (4))
  - **Chairperson:** “The Committee shall elect a permanent chairperson from among its members. The chairperson convenes meetings further to receiving a request from the President.” (Art. 12 (5))
  - **Transparency:**
    - “The deliberations of the Committee shall be confidential.” (Art. 12 (6))
    - “dissenting point of view” (Art. 12 (7))
  - **Duty of cooperation** for (former) members with the IEC (Art. 12 (3))
  - **Dissenting opinion:** Unlike the EP’s committee, the IEC can also include a “dissenting point of view” in its opinion (Art. 12(7) EC CoC)
EC new Code of Conduct III | IEC tasks

  - **Independent Ethical Committee (IEC) (Art. 12)**
    - **General task:**
      - “An Independent Ethical Committee should assist the Commission in the application of this Code of Conduct by providing independent advice.” (recital 11)
      - “shall advise the Commission on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code” (Art. 12 (1))
  - **Conflict of interests:** EC President takes appropriate measures, “if necessary after consultation of the [IEC]”, especially in case of “the reallocation of a file”, etc. or in case of “request for the sale or placing in a blind trust” etc. (Art. 4 (4))
  - **Post term of office activities:** Commission “shall decide only after having consulted the Independent Ethical Committee”, plus list of activities where this is not necessary, but the President may seek the IEC’s opinion “in cases of doubt” (Art. 11 (3)); “opinions of the [IEC] shall be made public with due consideration to the protection of personal data” (Art. 11 (7))
  - **Application of the Code as such:**
    - Is a duty of the EC president, “assisted by the [IEC]” (Art. 13 (1))
    - Opinion of IEC has to be taken into account in case of infringements (Art. 13 (3))
    - Work of the IEC to be included in the annual report on the application of the CoC (Art. 13 (4))
EP Code of Conduct

- **European Parliament (EP)**
  - EP has established an ‘Advisory Committee on the Conduct of Members’ (‘the Advisory Committee’) (Art. 7 EP CoC), which shall make recommendations in the event of possible breaches of the EP’s code of conduct (Art. 8 EP CoC)
  - **Requirements for qualification** of its five members: “not very ambitious” (Frischhut, 2019, p. 56), since it only requires “taking due account of the Members’ experience and of political balance” (Art. 7(2) EP CoC)
  - **Composition:**
    - “five members, appointed by the President at the beginning of his or her term of office from amongst the members of the Committee on Constitutional Affairs and the Committee on Legal Affairs, taking due account of the Members‘ experience and of political balance” (Art. 7(2) EP CoC); if breach by member who’s political party is not represented -> 6th member (Art. 7(3) EP CoC)
    - **Rotating chair** (Art. 7(2) EP CoC)
  - **Task**
    - **Ad hoc advice** for members (Art. 7(4) EP CoC), also in case of ambiguity with regard to a conflict of interests (Art. 3(2) EP CoC)

Inspiration from EGE and EO | further details

- **EGE inspiration**
  - **Term of mandate** increased from 2 to 5 years (not recommended, the current situation of 2 times 2.5 years) (Frischhut, 2019, p. 102)
  - **Qualifications**: “The composition of the group shall ensure that independent advice of the highest quality can be provided, combining wisdom and foresight. The credibility of the group shall be built on the balance of qualities amongst the women and men who make it up, and they shall collectively reflect the breadth of perspectives across Europe. Gender balance shall be strictly taken into account, and due consideration accorded to age balance and geographical distribution.” (Art. 4 (6) lit. a)

- **Dissenting opinions** (Art. 5 (8))

- **European Ombudsman (EO) inspiration**
  - “1) The [EC] should grant the Ethics Committee the authority to act on its own initiative whenever it considers this appropriate. | 2) The [EC] should proactively publish all opinions provided by the Ethics Committee, as well as its own decisions related to those opinions. | 4) The [EC] should increase the number of members of the Ethics Committee.” (EO, 2018, para. 26)

Source: Decision of the European Ombudsman [of 20 July 2018] in the joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA on the European Commission’s handling of post-mandate employment of former Commissioners, a former Commission President and the role of its ‘Ethics Committee’ (Link)
• Decision of the European Ombudsman [of 20 July 2018] in the joint inquiry into complaints 194/2017/EA, 334/2017/EA, and 543/2017/EA on the European Commission’s handling of post-mandate employment of former Commissioners, a former Commission President and the role of its ‘Ethics Committee’ (Link)
  • **Time limit**: “The Ombudsman found that the Ethics Committee correctly observed that the obligations of Article 245 TFEU are not time-limited; they do not cease to exist following the end of the notification period.” (EO, 2018, para. 14)
  • **Terminology**: ‘Notification period’, not ‘cooling-off period’ (para. 15)
  • **Hierarchy of law and legal value of CoC**: “the Code of Conduct is not legislation” (para. 16)
  • **General recommendations**: “1) The [EC] should grant the Ethics Committee the authority to act on its own initiative whenever it considers this appropriate. | 2) The [EC] should proactively publish all opinions provided by the Ethics Committee, as well as its own decisions related to those opinions. | 3) The [EC] should take the appropriate measures so that, in the future, persons serving as Special Advisers to the [EC] are not eligible to be members of the Ethics Committee. | 4) The [EC] should increase the number of members of the Ethics Committee. | 5) The [EC] should extend the ‘notification period’ in the Code of Conduct to several years to make sure it is at least notified of all new roles of former Commissioners, to which it can then react if necessary.” (EO, 2018, para. 26)’ (para. 15)
  • **Follow-up**: EC has to issue a decision after it receives an opinion (para. 49)

- Art. 11 TEU no competence to issue legislative acts (p. 14)
- Same holds true for Art. 15 TFEU (p. 14)
- Art. 298 TEFUE
  - **only for administration**, not for judiciary and executive branch of power (p. 15)
  - can **not serve as a legal basis** for a mandatory transparency register (p. 16)
  - is addressing the administration and not other entities, “thus a diametrically different objective” (pp. 17-18, translation)
- Art. 298 TEFUE and implied powers: different view than Krajewski (pp. 14-20)
- Fundamental rights – **freedom of speech**: can be affected, although he admits that so far no CJEU case-law on this question | yes, legitimate aim | proportionality: depends, but rather sceptical (pp. 24-25)
- Fundamental rights – **freedom to conduct a business**: does not go beyond freedom of speech (p. 27)
- Fundamental rights – **private life**: also sceptical (p. 27)
• Commission Proposal for a Interinstitutional Agreement on a mandatory Transparency Register, COM(2016) 627 final 28.9.2016 (Link)
  • Based on Art. 295 TFEU (p. 2)
  • “This interinstitutional agreement establishes a framework for a transparent and ethical interaction between interest representatives engaging in activities covered by this agreement and any of the three institutions.” (Art. 1)
  • Obligation on further implementation at EU level, by the different EU institutions: “Each of the three institutions shall take the necessary internal measures to give effect to the types of conditionality referred to in” (Art. 5(2))
  • Invitation to other institutions (Art. 12)
  • Legal basis for mandatory register: Art. 352 TFEU, or IIA; but in the later situation, no penalties, as not covered by the “right of internal self-organisation” (pt. 29)
  • “Conference of Presidents, as the authority responsible for matters concerning relations with the other institutions and bodies of the European Union” (pt. 50)
Other documents


Commission Decision (2014/839/EU, Euratom) of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, OJ 2014 L 343/22, Link