

Strengthening transparency and integrity via the new 'Independent Ethics Body' (IEB)¹

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, provides an overview of transparency and integrity-related elements in the current EU setting, covering both substantive elements (including, in particular, conflict of interest and revolving-doors) as well as the body in charge of ethical control and guidance. Based on a comparison covering France, Ireland and Canada, this study proposes an 'Independent Ethics Body' (IEB) via a new interinstitutional agreement.

Background

EU integration has developed from a community of economic integration, to an entity also safeguarding human rights, to a political Union, and finally to a 'Community of values'. Such an **incremental** approach can also be observed for the relationship of EU law and ethics. In the past, actual or perceived **scandals** (Edith Cresson, Ernst Strasser, John Dalli, José Manuel Barroso, to name but a few) have triggered reforms. However, a reform that is not driven by scandal is preferable. Turning the EU in an 'Ethical Union' by strengthening the 'ethical spirit' of the EU is key for both building up, as well as maintaining trust.

Since the Maastricht Treaty, the EU has strengthened transparency, especially in the field of lobbying. However, transparency in itself is not enough and needs to be backed up with equality and integrity. This analysis in the field of lobbying also applies to our field of ethics in a broad sense. At the moment, various EU institutions have **fragmented** approaches of dealing with ethics (**N.B.** in the following the term of 'institutions' will be used in a broad sense, surpassing those listed in Article 13 TEU). The rigour of the different approaches is frequently related to past scandals.

The **European Parliament** (EP, Parliament) mainly charges its President to deal with possible breaches of Parliament's code of conduct (CoC). While the President is supported by an 'Advisory Committee on the

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/661110/IPOL_STU\(2020\)661110_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/661110/IPOL_STU(2020)661110_EN.pdf)



Conduct of Members', the composition of this body follows a 'self-regulatory' approach and is also composed on the basis of "political balance"; hence, not an ambitious approach.

In the case of the **European Commission** (EC, Commission) the 'Independent Ethical Committee' has more ambitious selection criteria and is composed of external members. Still, this body only has an advisory function too, as the President of the Commission is in charge for the proper application of the Commission's code of conduct.

In the case of the **Council** of the European Union (Council) as well as for the European Council (EUCO), no rules can be identified. The same holds true for the informal meetings of the Euro Group and the Euro-Summit. This is probably related to the fact that it is assumed that ministers are bound by corresponding guidelines at the national level. The only exception is the President of the European Council who has published a code of conduct. This document follows a self-regulatory approach. No ethics body is established as the current EUCO President only has selected supervisory functions concerning former EUCO Presidents.

Besides these institutions in charge of legislative tasks, we can also find rules for the Court of Justice of the European Union (CJEU) as the body in charge of legal control, as well as for the European Court of Auditors (ECA), the institution in charge of financial control. The study also covers the two advisory bodies of the Economic and Social Committee (ECOSOC) as well as the Committee of the Regions (CoR).

One institution, which stands out as being more ambitious, is the **European Central Bank** (ECB). This is not particularly surprising as the ECB operates in a sensitive area. The ECB's Ethics Committee also comprises external members. In its approach, it strives for the "highest [!] standard of ethical conduct". The ECB can also be named in the field of enforcement, as the Governing Council can issue a reprimand and, where appropriate, make it public, in case that adherence cannot be achieved through 'moral suasion'. Finally, the ECB can serve as a role model of consolidating various codes of conduct into a single document.

he **European Ombudsman** (EO) does not only play an important role in this context of transparency and integrity. The EO's rules, amongst others, cover important topics such as declaration of (financial) interest, actual, apparent or potential conflict of interest, the revolving-doors phenomenon, outside activities during the term of office, gifts, both accepted and offered, as well as the protection of whistle-blowers. Similar rules can also be partly found in the other institutions covered in this study. In the case of the European Data Protection Supervisor (EDPS), the EDPS 'Ethics Framework' explicitly mentions that it is built on the best practices of the codes of conduct of the ECA, the CJEU, the Commission and EO.

Most documents analysed for this study mainly covered **members** (Parliament, the Commission, CJEU, ECOSOC, CoR), while some have also covered **staff** (ECA, EDPS). To get a more holistic view in terms of both members and staff in EU institutions, this study also covers the so-called Staff Regulations.

While on the one hand, a certain caution is advisable when transferring concepts from a nation state to a supranational organisation, on the other hand, the wheel does not need to be reinvented. Therefore, this study also takes a closer look at the following three countries: France, which stands out as a country with a strong independent ethics body; Ireland with an interesting Bill (although not adopted), and Canada as a third-country with another inspiring ethics body.

Aim and comparative analysis

The study proposes a new ethics body for the EU, which draws on the best practice from both the EU institutions covered in this study, as well as the ethics bodies in these three countries. Therefore, the whole study is **structured** in the following way: After identifying (1) the relevant legal document(s), (2) the person or body in charge of supervising and or enforcing these ethical standards is identified, as well as her/its (3) relevant competences. This is followed (4) by the *scope rationae personae* (the persons covered by these standards), as

well as (5) the *scope rationae materiae* (the potential ethical challenges addressed). Finally, also (6) principles contained in these documents are emphasised.

In the case of **France**, the '*Haute Autorité pour la transparence de la vie publique*' (HATVP) can be qualified as an independent administrative authority, whose members are nominated for a period of six years, not renewable. Apart from its President, the twelve members are elected by various public players: by the two chambers of Parliament, two High Courts, by the Government, as well as by the Court of Auditors. An ethics officer (*référént déontologue*) shall provide general advice to the High Authority's staff and is also responsible for its training. The HATVP also stands out for its regulation on gifts. HATVP members and staff shall not accept any gifts or invitations with a value of more than € 15, which is ten times less than in Parliament and in the Commission.

The **competences** of the HATVP cover declaration of interests, conflict of interest, ethical advice, post-employment activities as well as competences in the field of lobbying (transparency register). The HATVP's role is strengthened by the fact that French tax authorities must deliver all information necessary, so that the HATVP can assess the completeness, accuracy and sincerity of the declarations of assets and interests. The HATVP is also responsible for the evaluation of ethical principles, both before the appointment of certain senior officials, during their public service activities, and for the period after the termination of those activities. The strong role of this High Authority can also be explained by the fact that failure to comply with the various obligations is punishable by up to three years' imprisonment and a fine of up to € 45,000. Hence, the HATVP can be qualified as a 'powerful watchdog', which is in charge of a large number of people working in the public field: members of government, persons holding a local elected office and those entrusted with a public service mission.

The HATVP can serve as a **role model** for its strong independence, the possibility to request information from tax authorities, as well as the power to take up a case on its own initiative. The High Authority's budget for 2020 comprises € 7,294,355, of which € 4,902,681 is allocated to staff expenditure and € 2,391,674 to operating expenditure.

In the case of **Ireland**, the 'Public Sector Standards Commissioner' (PSSC) is presented as a Bill. While it has not entered into force, it can be seen as an intriguing proposal and 'source of inspiration' for the EU. The PSSC shall hold office for a term of six years and may be re-appointed to that office for a second or subsequent term.

The PSSC's **competences** comprise advice for those subject to this Bill, the drawing up of a model CoC to promote "the highest [!] standards of conduct and integrity among public officials", investigation in case of infringements, as well as enforcement via various sanctions. This model CoC can be supplemented by more specific codes, which are in conformity with the model code of conduct. This Bill would apply for members of the lower and the upper house of the Irish parliament, Members of Parliament (MEP), members of a local authority, and others. This Irish Bill addresses various possible ethical challenges, such as declarations of interest, as well as conflict of interest situations, the obligation to provide certain tax information, gifts, the topic of lobbying, as well as the phenomenon of revolving-doors.

Canada, a so-called third country, stands out as an example of a system that is inspiring in terms of the independence of its ethics institution, which fulfils a strong preventive role in terms of integrity. The Canadian 'Conflict of Interest and Ethics Commissioner' (CIEC) is in charge of both elected and appointed public office holders. She or he is appointed for the longest period covered in this study so far, that is to say seven years, including the possibility of one or more (!) terms of reappointment. The qualification criteria are both content-related and are based on previous activities. The staff of the CIEC's office, approximately 50 persons, must adhere to the "highest [!] ethical standards", to achieve a "high [!] degree of public confidence".

The **mandate** of the Commissioner includes the task to provide confidential policy advice and support to the Prime Minister and the Commissioner is in charge of both members of the House of Commons as well as public office holders. For the **first** group, this comprises the competence to provide advice on the members' obligations. Inquiries can be based on complaints by other members as well as on a resolution of the House. Finally, the Commissioner is also in charge of educational activities. For the **second** group, that is to say public

office holders, the Commissioner is in charge of advice, investigation and enforcement, compliance measures, as well as post-employment. Investigations can be initiated based on a request from a parliamentarian, indirectly based on information from the public via a parliamentarian, or by the CIEC on its own initiative. While the latter possibility strengthens the CIEC's independence, an investigation based on information from the public is important in terms of a bottom-up approach, as we also know it from the EU. According to the CJEU's concept of 'dual vigilance', individuals entitled under EU law also act as 'guardians of the treaties', besides the Commission acting top-down. Canadian statistics show that a huge majority of cases (29/50) are based on information provided by the public.

The CIEC is in charge of declarations of interest, conflict of interest, gifts, as well as post-employment activities, concerning both elected officials, as well as concerning public office holders. The CIEC has a budget of roughly € 4,600,00 and its office comprises 50 members.

Policy recommendations

The objective of an Independent Ethics Body (IEB) is to regain and then to maintain public trust by striving for a high level of integrity and transparency. The Canadian approach of striving for the "highest ethical standards" to achieve a "high degree of public confidence" is convincing. While the concept of 'ethics' should be prominently anchored in the title of this body, the concept of 'integrity' is probably better suited to act as a guiding principle at an operational level. Based on these considerations, the following **policy recommendations** are formulated:

- Integrity cannot be guaranteed through a self-regulatory approach. That is why a strong and independent body is needed, which can guarantee both transparency, as well as integrity. Such an **integrity branch** can be seen as a meaningful addition to the spirit of Montesquieu's separation of powers.
- The rules on the IEB should be **clear and understandable**, precise enough, but not too complicated, as sometimes observed in case of the Irish Bill. At the same time, loopholes should be closed to **avoid circumvention** (e.g. include family members, alternates). Hence, in setting up the IEB a balanced approach should be aimed for.
- If necessary, a **step-by-step approach** can be followed, according to which, for example, more severe sanctions only occur if softer forms such as 'moral suasion' should prove insufficient.
- In the case of persons being subject to both **EU as well as national** ethics rules, stricter rules should prevail in the case of conflict. Mutual information obligations between the EU and the national level shall avoid gaps.
- A **model code of conduct** should be drawn up as a reference document. This should figure as an annex to the document establishing the IEB (see below). Should there be specific requirements or challenges in a particular institution, these could be addressed through more specific codes of conduct. These more **specific** codes must be in line with the model code of conduct, and before their adoption an opinion of the IEB should be requested and taken into account.
- The IEB has to be an **independent** body. The independence of such a body is linked to freedom from political or partisan interference. It also is about neutrality, in terms of relevant expertise, as well as in terms of the absence of conflict of interest.

- The IEB should comprise around seven **permanent members** and should elect its own chair (see below). A staff of approximately 50 persons should support the IEB. One of them should have the role of an 'ethics officer', in charge of ethical questions within the IEB (providing advice and training).
- The seven permanent IEB members ("whose independence is beyond doubt") should be **composed** of both internal EU staff, as well as externals, with a ratio of 5:2 or 4:3 (of internals and externals). The category of internal staff should comprise both current, as well as former members of staff. **High-standards** should avoid conflict of interest situations. The qualification should aim for a combination of substantive criteria (competence, experience, independence, professional qualities, wisdom and foresight) as well as others aiming at previous functions.
- The IEB should have additional **external reserve members** (e.g., four), which are not involved in the daily business but support the IEB in the field of opinions of a more strategic nature. The same qualification criteria would apply. Besides adding more diversity, they also fulfil a similar function as 'Grand Chamber' decisions at the CJEU.
- **Gender parity** shall also be an objective.
- The **selection** of the IEB members shall take place based on an open call, published on the Europa website as well as the Official Journal of the EU, followed by a selection process conducted by a selection committee. This panel can draw inspiration from the CJEU's Article 255 panel, which shall give an opinion on candidates' suitability to perform their duties. Another example would be the 'Identification Committee' in the case of the 'European Group on Ethics in Science and New Technologies' (EGE), the Commission's ethics advisory body.
- Within this study, we can see examples of terms of three years (the Commission, Parliament), five years (Ethics Officer EDPS), six years, renewable even more than once (Irish Bill), as well as six years not renewable (French HATVP), and Canada 'holding the record' with seven years. In terms of an ambitious approach, the EU should aim **for six or seven years, renewable**.
- The permanent IEB members should elect its **chairperson**. The Selection Committee which checks the qualification criteria for all members could be tasked with identification of those three (out of the seven) permanent members, which fulfil even higher criteria. All permanent IEB members shall then elect, by a simple majority, the chairperson and a deputy-chairperson among these three IEB members for the duration of their term.
- IEB decisions should be taken by **simple majority** without providing for possible 'dissenting opinions', except for the 'IEB Grand Chamber' decisions (also including the external reserve members), where more diversity of views might be preferable.
- The IEB should be part of an '**ethics lattice**' (or 'ethics infrastructure'), which also comprises the IEB's ethics officer as well as decentralised ethics officers in each corresponding institutions. The Presidents of these institutions should be involved in terms of annual meetings or conferences, to discuss current challenges and possible future answers.
- Following the afore-mentioned concept of '**dual vigilance**', the IEB should be able to receive information in particular from individuals, civil society, the media and NGOs.
- The IEB should be able to act on its **own initiative** or on request of someone else. It should have competence to decide on its own, whether support by someone else is necessary, as in the case of the HATVP, which may hear or consult any person whose assistance it deems useful.
- The IEB should offer **advice** in written form. The person seeking the advice should be able to rely upon it in relation to the IEB and the institution the person is affiliated with. This advice cannot and should not be binding on the CJEU.

- Another preventive role would be to check for possible **conflict of interest** before working in an EU institution, both as a member, as well as in the case of staff.
- Besides prevention, constant **monitoring** and **investigation** competences are also key. Transparency on its own is not enough and needs to be supplemented by integrity, and both require monitoring and investigation.
- The IEB should be able to **start an investigation** based on an individual request, both from within an institution, as well as from the outside (e.g., individuals, civil society, the media and NGOs), or on its own initiative and should dispose of the relevant tools. Members and staff should be obliged to cooperate with the IEB.
- The **Ombudsman** (in particular in charge of transparency, accountability, ethics) and **OLAF** (investigation in the field of fraud, corruption and any other illegal activity) shall support the IEB, as they both work in similar fields.
- **Whistle-blowing** rules exist in various forms and shall also be in place to support the IEB in terms of the aforementioned bottom-up approach.
- As the EU lacks the necessary legislative competence in **criminal law**, the existing rules of the staff regulations as well as those rules on members (from the field of EU primary and secondary law) continue to apply. As far as possible, the rules under EU secondary law can be strengthened in terms of a more ambitious approach, as long as in line with EU primary law.
- However, also softer forms of **sanctions** (publication in the Official Journal, information provided to superiors) can also prove effective.
- The **scope** of the IEB should cover all branches of power, as suggested by others for the field of lobbying. Hence, the **personal** scope of the IEB should cover not only the Commission, Parliament and the Council, but ideally all those institutions covered in this study, as well as additional ones, such as EU agencies. It should also cover both members of EU institutions and other bodies as well as the staff. On a timeline, the IEB should cover incoming members and staff, current ones, and those who are leaving or have already left.
- The IEB should be **in charge of** all types of conflict of interest (gifts; revolving-doors, including external activities during the job; lobbying) as well as declaration of interests. A broad understanding of conflict of interest (actual, apparent and potential) shall be embraced.
- The EU should strive for a low value of **gifts** than can be accepted to send a clear signal to citizens that decision-making cannot be 'bought'.
- **Declaration of interest** should cover a broad field, including both financial and non-financial information. This information needs to be verified and regularly updated. All information must be provided "in an electronic and machine-readable format" to avoid past examples such as an MEP declaring himself to be "Master of the universe" in a form then published on the Parliament's website.
- These detailed rules should be backed up by **principles** identified in the existing codes of conduct (and related documents) as well as the EU's common **values** (Article 2 TEU), including human rights (Charter of Fundamental Rights of the EU). These (ethical and/or legal) principles include, amongst others, integrity, independence, impartiality, dignity at work, honesty, transparency, and discretion.
- The IEB should possess **staff** and a **budget** that allow them to adequately perform the aforementioned tasks. The French and the Canadian examples can serve as role-models what is necessary.
- According to the CJEU's **Meroni-doctrine**, a delegation of powers is possible, even if not explicitly foreseen in the treaties (i.e. EU primary law). The delegation as such must be explicit. Only existing competences can be transferred to the IEB, that is to say not more competences than the transferring

bodies enjoy under EU primary law. The IEB's competences and tasks must be addressed in a clear and precise manner, thus aiming at the 'executive', not the 'discretionary' approach. Two other prerequisites are not a problem, as the 'institutional balance' (i.e. the relationship of the institutions towards each other) would not be changed and the IEB is not involved in EU law-making. While the IEB would be in charge of 'ethical control', it would nonetheless be subject to the 'legal control' of the CJEU.

- The various potential **legal bases** for setting up the IEB prove insufficient (Rules of Procedure; Staff Regulations; Article 11 TEU; Article 15 (1) TFEU; Article 298 TFEU), too vague (implied-powers doctrine; '*Natur der Sache*'), or too challenging because of high thresholds (unanimity in the Council) and concerns from national constitutional courts (Article 352 TFEU).
- Hence, the IEB should therefore be established by means of an interinstitutional agreement (**IIA**), for which the new Article 295 TFEU, enshrined in the EU Treaties by the Lisbon Treaty, may be used. Such an IIA cannot amend or supplement provisions of the EU treaties. If it is intended, such an agreement can be legally binding, however, not for third-person (in particular lobbyists). Based on the aforementioned *Meroni*-doctrine and the principle of conferral (Article 13 [2] TEU), not more competences can be transferred to the IEB than the participating institutions actually enjoy.
- An IIA, concluded and signed by the participating institutions should be **open** to both additional institutions, as well as to possible extensions of its competences and tasks, e.g. in case of future cooperation with national authorities.
- Setting up the IEB via an IIA would require some **amendments** of EU secondary law. Setting up the IEB would not require amendments of EU primary law, which could be a 'mission impossible'.
- In the field of **EU secondary law**, the existing documents of EU institutions, as covered in this study, would have to be adapted accordingly. This includes the transfer of the tasks that currently fall primarily to the Presidents. The binding nature of advice provided by the IEB on members and staff (except the CJEU) should be clearly stipulated. All possible 'investigation tools', which go beyond the existing rules of the Staff Regulations (or related documents) would require adjustments of EU secondary law. As the recommended legal basis is an IIA, this can only bind EU members and staff (e.g., to direct a person to attend before the IEB to give evidence, to provide documents), but not external persons. Other amendments to EU secondary law (e.g., in the field of whistle-blowing, cooperation with the EO and ECA, integrating existing lobbying rules) might be necessary as well.
- The study has also identified several examples, where changes of EU secondary law are **possible**, but not strictly necessary (for example, support by OLAF and cooperation with the IEB).
- Amendments to **EU primary law** are not necessary. Article 263 TFEU (action for annulment), for instance, covers "acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties", as addressed by the *Meroni*-doctrine. In case of future amendments of EU primary law, the IEB could also be integrated in EU primary law; however, this does not affect the possibility of establishing it now.
- In its resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions, Parliament insisted that "EU institutions must strive for the highest possible standards of transparency, accountability and integrity".² In line with the EU's afore-mentioned step-by-step approach, now is a good time to implement this idea, which was also addressed by Ursula von der Leyen in June 2019. This way, besides examples such as data protection and the Green Deal, the EU

² European Parliament. Resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions (2015/2041 (INI)). https://www.europarl.europa.eu/doceo/document/TA-8-2017-0358_EN.html.

would be able to demonstrate in an additional field an **ambitious** approach and a high level of protection, thereby establishing a benchmark.

- Now it is up to the EU to **take** an important **step** in (re-)gaining citizens' trust. In doing so, the EU has to 'walk the talk'. An outside body shall guarantee stricter application of the current or strengthened rules in order to avoid criticism, as addressed in October 2020 by Corporate Europe Observatory³ with regard to ineffective 'revolving-doors' rules ("only 0.62% revolving door moves rejected") under the Staff Regulations.

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This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

PE 661.110

IP/C/AFCO/2020-82

Print ISBN 978-92-846-7783-2 | doi:10.2861/751473 | QA-02-21-148-EN-C
PDF ISBN 978-92-846-7776-4 | doi:10.2861/837266 | QA-02-21-148-EN-N

³ Corporate Europe Observatory (2020).