

TOWARDS AN EU ETHICS BODY

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Executive Summary

The European Union's ethical framework governing the conduct of its staff and members appears adequate and sound. Yet, over the past years, multiple cases of unethical behaviour in the EU institutions have revealed significant systemic shortcomings, notably in the framework's current implementation. Acknowledging these far-reaching problems, Commission president Ursula von der Leyen has pledged, when entering office, to create an independent ethics body common to all EU institutions. Likewise, the Council of the EU expressed its support for "the further improvement of harmonised [ethics] frameworks within and across the EU institutions based on closer inter-institutional cooperation and the exchange of best practices with a view to strengthening trust in the EU as a whole"¹.

The revolving door cases of former members of the Commission such as José Manuel Barroso and Neelie Kroes, MEPs such as Sharon Bowles and Holger Krahmer, or staff members such as Adam Farkas and Aura Salla are a star reminder that the current EU ethics oversight system falls short of reducing the risk of unethical behaviour to a minimum.

Against this backdrop, this study discusses how to improve the current EU ethics system, by focusing in particular on the members of the European Parliament and European Commission as well as all EU institutions' staff (officials). First, it identifies its current shortcomings. Second, it provides a concise, comparative analysis of some national ethics oversight frameworks to ascertain the ideal ethics body for the European Union, notably in terms of design and prerogatives. Third and last, it offers a detailed legal analysis of how to set up such a new body under EU law, by identifying a few available legal bases for it. Ultimately, it suggests the conclusion of an Inter-Institutional Agreement (IIA) between two, or more, EU institutions aimed at pooling together – within the framework of their respective procedural autonomy – the monitoring of the respect for the ethical standards to an Interinstitutional Body (IIB), both for members and staff, as well as entrusting to it investigatory and partial sanctioning power. In particular, when it comes to the staff, the present disciplinary system would be split into two procedures, one for ethical violations that would be outsourced to the ethics body – essentially conflict of interests –, and another one for the violation of the remaining professional obligations under the current staff disciplinary procedure. As for members, the body could only inflict soft penalties, such as reputational and those entailing a change in the position within the EU institution, leaving the irreversible ones (essentially those foreseen by the Treaty for Commissioners and the Rules of Procedure of the EP for MEPs) to the present ethics regime as

¹ Council conclusions on the European Court of Auditors' Special Report No 13/2019 entitled "The ethical frameworks of the audited EU institutions: scope for improvement", 10.01.2020.

foreseen in the Treaties. The IIA could even foresee the possibility to entrust to the body the verification of the respect of lobbying rules as well as to provide interpretative advice.

Diagnosis

When it comes to the current state of play, the EU ethics system applicable to members – be they elected or appointed – is highly fragmented, with each EU institution having its own dedicated framework, limited in its independence, lacking adequate investigatory powers and whose sanctioning powers are seldom used. In the case of the European Parliament, the enforcement of ethics rules to members occurs in the absence of predictable rules of procedure and with limited publicity. This is further aggravated by limited awareness and guidance regarding the ethics standards applicable to EU institutions' members and staff, what inevitably translates into limited, lax enforcement.

What EU ethics body for the Union?

The national ethics frameworks enacted in France, UK and Canada and the one proposed in Ireland offer some ideas on how to address and overcome some of these flaws. First, these countries' bodies suggest that it is possible to pool into one single and permanent oversight body – be it a collegial or one-person entity – the task of ensuring the respect of ethics standards. Second, in so doing and by diversifying their composition and selection procedure, they show that is possible to guarantee a greater independence of such an oversight body. Third, they prove that is equally possible to have such a body cover both members and staff, and even expand its scope to cover their respect of lobbying rules as well as to provide interpretative advice. Fourth, they show the importance of monitoring, investigatory and sanctioning powers to render the system effective in preventing and effectively sanction breaches.

How can the EU set up such an ideal ethics body?

The question addressed by the final part of the study is the extent to which a single, independent, and permanent EU ethics body entrusted with analogous prerogatives – and common to the Parliament and the Commission, possibly the Council and other EU institutions, agencies and bodies –, could legally be established under EU law. Based on a thorough legal analysis, the study suggests that such an EU ethics body could – as a matter of principle – be established either through the beefing up of one of the **pre-existing EU institutions or bodies** or the creation of a **novel entity**. After exploring the possibility to entrust an extra competence to the European Ombudsman, OLAF or the Court of Auditors respectively, the study concludes that several arguments, both specific to each of these institutions as well as broader ones, disfavor the attribution of an additional role of EU ethics body to one of these actors. Ultimately, it concludes that, given the ambitions pursued by this initiative, the best possible manner to ensure the

independence of an ethics watchdog entails the setting up of an autonomous, self-standing body. Three legal bases may enable the creation of such a body. While Art. 298 TFEU seems to offer a promising legal basis for the establishment of a new EU body in charge of administering and overseeing the respect of the ethics standards potentially applicable to all EU institutions, agencies and bodies, it seems more questionable when applied to their members, be they elected or appointed, who – by definition – are not part of the EU administration. Another potential legal basis is offered by Art. 352 TFEU which allows the EU to act in areas where EU competences have not been explicitly granted but are necessary for the attainment of the objectives set out in the Treaty . However, more specific legal bases preclude recourse to such a provision, which in any case requires unanimity in the Council. In terms of its envisaged content and objectives, the most suitable legal basis to set this body up is offered by Art. 295 TFEU.

A template for a EU ethics body common to all EU institutions via an Inter-institutional Agreement

This oft-used provision enables the conclusion of an IIA between two, or more, EU institutions through which to set out the basic arrangements for their cooperation in ensuring the respect of the EU ethical regime. However, the choice of this legal basis – like any of the others above – falls short of establishing the previously identified ideal ethics body with analogous prerogatives. What follows is the best possible legal template that might be used to set up an ethics body that most closely resembles the ideal model previously identified. An IIA-powered ethics body could be entrusted with the authority to ensure the respect of ethics standards and obligations as well as lobbying rules, both for members and staff. When it comes to its enforcement prerogatives, the body could enjoy: (i) an autonomous **monitoring** capacity, through inter alia a centralised collection – and standardised scrutiny – of the veracity of the declarations of financial interests; (ii) a right of **initiative** and **investigation** – in close cooperation with OLAF – and, ultimately (iii) partial **sanctioning** powers, in relation to soft – as opposed to hard – sanctions for members.

One of the advantages of such a construct is that – as the relevant EU institutions and bodies would act within the framework of their respective procedural autonomy and come under the purview of the ethics body on a voluntary basis – it would facilitate a **more coherent, effective practice throughout the institutions**. Moreover, this delegation and institutional set up would enable **other EU bodies, such as the EU agencies**, to subject themselves to the ethics body's scrutiny **on a voluntary basis** and at any point in time.

Ultimately, this new system of enforcement of ethics requirements would be not only more effective than the one ensured by the present EU institutions' individual frameworks, but also more independent, permanent through better coordinated powers, which they could be enhanced any time via a legislative instrument if need be.

Aims of the study

This study pursues the following aims:

1. To provide a detailed **legal and policy analysis of the existing EU ethics system** by focusing on both the actual ethics standards and their oversight institutional systems, with a special focus on the European Parliament, the European Commission and all EU institutions' staff;
2. Once identified the major shortcoming of the current system and based on a comparative analysis, **to ascertain the ideal ethics body for the European Union**;
3. To verify the **legal feasibility of this newly designed EU ethics body** under EU law through the identification of its legal basis, legal instrument and major legal issues raised by such a new EU independent body. Ultimately, it provides an **initial legal template** that might be used to set up an ethics body that most closely resembles the ideal model previously identified.

Introduction

All public authorities and governmental entities, including the EU institutions, share a common mission: to serve the public interest. Hence the need to ensure the public integrity of – and trust in – public officials, whether appointed or elected, paid or unpaid, through the adoption of ethical frameworks².

Far from being inherently corrupted, the members of the EU institutions – be they elected or appointed – and their staff are **by the nature of their office continuously confronted to external influence, and often face ethical dilemmas**. As such – also due to the (perceived) bigger distance from citizens – they are particularly vulnerable to unethical conduct. Those may arise from personal, representational or other pecuniary or non-pecuniary situation, and may not only negatively affect the EU financial management but also – by attracting high level of public interest – reduce trust in the EU. Indeed, any perceived lack of integrity within the institutions presents a reputational risk not only to the institutions themselves, but also to the European project as a whole.

² See, OECD: Managing conflict of interest in the public sector, 2005; OECD, Recommendation on Public Integrity, Paris, 2017.

To minimize such risk, the EU has developed over time its own institution-by-institution EU ethics system, which strives to preventively govern and frame individual conduct through a set of norms (ethical standards)³ and mechanisms (ethical oversight bodies), as well as penalties. However, over the past years, cases of unethical conduct in the EU institutions have revealed significant systemic shortcomings in the EU ethics system, which together render it inadequate to attain its declared goals. Acknowledging these far-reaching problems, **Commission president Ursula von der Leyen has pledged to take action and promised in the political guidelines to her candidacy to create an independent ethics body common to all EU institutions**⁴. Such a body has also prominently been called for by civil society organisations, notably Transparency International, as well as French President Macron, and appears among the priorities of the Vice President of the European Commission for Values and Transparency. Since then, a series of cases, such as the failed confirmation of three EU Commissioners by the European Parliament, and Phil Hogan's resignation have further highlighted the limits of the current EU ethics oversight system.

Against this backdrop, this study discusses **how to improve the current EU ethics system** by focusing on the establishment **of a EU ethics body**. In so doing, it first identifies the EU ethics system's major shortcomings. Second, after providing a concise, comparative analysis of some national ethics oversight bodies, it ascertains the ideal ethics body for the European Union and its design and prerogatives. Third, it verifies the legal feasibility of such a new body under existing EU law, by identifying an appropriate legal basis for its set up. While the main focus of the analysis is on the European Parliament, the European Commission as well as **the EU institutions' staff**, the proposed new ethics body could fit in and cover all EU institutions, agencies and bodies.

³ These are essentially framed as rights, duties and qualities of EU members and staff and overall indicate what is considered as appropriate behaviour from them.

⁴ President von der Leyen's mission letter to Věra Jourová, p.5 ("I want you to work together with the European Parliament and the Council on an independent ethics body common to all EU institutions"). Available at https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-jourova-2019-2024_en.pdf

SECTION 1 - WHY THE EU NEEDS A NEW INDEPENDENT ETHICS BODY? DIAGNOSIS OF CURRENT STATE OF AFFAIRS OF THE EU ETHICS SYSTEM BASED ON INSTITUTIONAL PRACTICE

A brief analysis of the current EU ethics system identifies several major, interrelated deficiencies⁵:

- 1.1 Fragmentation of the EU ethics institutional oversight system
- 1.2 Weak enforcement mechanisms with limited independence and investigatory powers
- 1.3 Limited awareness and guidance regarding the ethics standards applicable to EU institutions' members and staff

1.1. Fragmentation of the EU ethics institutional oversight system

First, the EU **lacks a harmonized ethics framework** common to all its institutions, members and staff⁶. As a result, various, bespoke ethical frameworks coexist under EU law, each with (i) its own ethics standards and obligations, and (ii) different enforcement mechanisms that – through the exercise of a variety of monitoring, investigatory and sanctioning powers – ensure their respect. The Council of the EU expressed explicitly its support for “the further improvement of harmonised [ethics] frameworks within and across the EU institutions based on closer inter-institutional cooperation and the exchange of best practices with a view to strengthening trust in the EU as a whole”⁷.

As summarised in Table I, the **ethics standards of conduct** to be enforced are scattered across multiple legal sources, ranging from the EU Treaties to dedicated Rules of Procedure, Codes of Conduct and, in the case of EU officials, EU Staff Regulations⁸.

⁵ Unlike the recent study conducted by the Court of Auditors, this examination focuses on both the ethical framework as it stands in the books and how is implemented. See European Court of Auditors, “Special report: The ethical frameworks of the audited EU institutions: scope for improvement”, No 13/2019, para.16.

⁶ The Council of the EU is the only major institution without an ethical framework governing the work of its members, namely representatives of the member states. When it comes to agencies, no horizontal requirements in relation to ethics are applicable (except for staff, see See Art. 1a(2) and 110(2) et seq. of the Staff Regulations). Instead, the precise ethical standards applicable are firstly to be found in each agency’s establishing regulation and in any further relevant secondary legislation. Two texts have been adopted in an effort of harmonisation: a Common Approach on Decentralised Agencies (2012) and Guidelines on the prevention and management of conflicts of interest in EU decentralised agencies (2013) – which concern Executive Directors, SNEs and members of the Management Boards, Scientific Committees, and Boards of Appeal (with stakeholder members and Member States’ representatives in the Scientific Committees explicitly excluded from the Guidelines’ scope).

⁷ Council conclusions on the European Court of Auditors' Special Report No 13/2019 entitled "The ethical frameworks of the audited EU institutions: scope for improvement", 10.01.2020.

⁸ The European Code of Good Administrative Behaviour offers the only harmonized, interinstitutional document.

Table I – Ethical standards applicable to staff and Members of the EU institutions

		EU STAFF	MEMBERS		
			Parliament (EP)	Council	Commission (EC)
STANDARDS	PRIMARY LAW	Art. 339 TFEU (confidentiality, in office + after) + 41 CFR (good administration)			
			Art. 6(1) 1976 Act (independence)		Art. 17(3) TEU + 245 TFEU (independence, integrity, discretion – in office + after)
SECONDARY LAW		Art. 36(3), 61 EU Financial Regulation (conflict of interests)			
		Art. 11, 11a, 12, 12b, 13, 15, 16, 17, 19, 21a, 22a, 27, 40 Staff Regulations (independence, impartiality, loyalty to the Union – in office + after; whistleblowing) European Code of Good Administrative Behaviour (independence, impartiality) (EP) Guide to the obligations of officials and other servants of the EP/CoC (independence, circumspection, discretion) (Council) Decision on whistleblowing (EC) Decisions on outside activities (in office + after) and on transparency of DG’s meetings + Guidelines on whistleblowing + Code of Good Administrative Behaviour for staff of the EC, Annex to RoP (independence, impartiality)	Art. 2- 3 Statute for MEPs (independence) Rules 2, 10, 11 RoP (independence, dignity, confidentiality, transparency) Art. 1-3, 4(6), 5, 6 CoC, Annex I to RoP (independence, integrity, openness, transparency, honesty, dignity, inform EP if lobbying after leaving office)	Art. 6 RoP (confidentiality)	Art. 9 RoP (confidentiality) Art. 2, 5-11 + Annex II to CoC (independence, integrity, dignity, transparency, loyalty, discretion – in office + after, no lobbying after – for 2 or 3 years) Decision on transparency of Members’ meetings

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While the Treaties merely contain references to legal principles such as independence, integrity, confidentiality and discretion, other sources translate them into more concrete and tangible standards of conduct. A common core of ethics principles – applicable throughout and after⁹ the end of the term of office – exists¹⁰. It consists of: (i) independence; (ii) integrity and discretion in office; (iii) obligation of professional secrecy; (iv) integrity and discretion post mandate.

As both members and staff are asked to act solely in the public interest and refrain from obtaining or seeking any direct or indirect financial benefit or reward, central to the application of these principles is the concept of **conflict of interest**. This emerges wherever public officials are, or are perceived to be, confronted with a situation where their private interests diverge from the duties

⁹ Except for MEPs.

¹⁰ Except for the Council.

of their position¹¹. Such a situation of conflict may arise during or after¹² the term of the mandate or service, but also in relation to situations that occurred before¹³.

There are specific regimes defining inter alia a gift policy, outside activities and assignments while in office, that help members and staff to preventively know what conducts are compatible with the office.

Thus, while cross-institutional harmonization might not always be warranted, some common approaches might be needed, such as a commonly agreed definition of conflict of interest to start with¹⁴.

In addition, should specific formal obligations be imposed on EU institutions' members and staff when it comes to their relations with organized interests (i.e. lobbying), the respect of those rules would benefit from being entrusted to a single EU ethics body. At the moment, those are essentially imposed on organized interest representatives, with a few requirements for EU Commissioners, members of their cabinets and Directors General as well as MEPs (with a specific provision on rapporteurs)¹⁵.

1.2 Weak enforcement mechanisms with limited independence and investigatory powers

The respect of these ethics standards and obligations is entrusted to a variety of **oversight mechanisms of different nature**, including ad hoc advisory committees, like the EU Parliament Advisory Committee on the Conduct of Members (PACCM) and the EU Commission Independent

¹¹ This definition is offered by Art. 3(1) of the Code of conduct for MEPs, whereas Art. 2(6) of the Code of Conduct for Members of the Commission, as reformed in 2018, reads: "A conflict of interest arises where a personal interest may influence the independent performance of their duties. Personal interests include, but are not limited to, any potential benefit or advantage to Members themselves, their spouses, partners or direct family members. A conflict of interest does not exist where a Member is only concerned as a member of the general public or of a broad class of persons".

¹² A duty to notify the relevant institution within 2 years of leaving the service applies to the staff as well as members of the Commission (3 years for the President). This is because they continue to be subject to certain obligations, such as integrity and discretion. Despite receiving a transitional allowance, former MEPs have no limitation on their future employment.

¹³ While members are required to make a declaration of interests, the staff should merely inform the institution of any potential or actual conflict via "a specific form". Based on the latter information, the Appointing Authority should verify whether candidate has a personal interest impairing their independence or any conflict. See Art. 11 of the Staff Regulations.

¹⁴ See supra note 12.

¹⁵ See Art. 7 of the Code of conduct for Members of the Commission, Rule 11 of the European Parliament Rules of Procedure and Art. 4(6) of the Code of conduct for MEPs. See, also, Commission Decision 2014/838/EU of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals, *OJ L 343, 28.11.2014, p. 19–21*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.343.01.0019.01.ENG

Ethical Committee (CIEC), and, in the case of EU officials, institution-by-institution Appointed Authorities helped by Disciplinary Boards, and ultimately, the General Court of the EU (following the suppression of the EU Civil Service Tribunal) as well as the Court of Justice. In addition, OLAF investigates serious matters relating to the discharge of professional duties constituting a dereliction of the obligations of EU officials liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of Members of institutions and bodies¹⁶. However, the disciplinary recommendations issued by OLAF concern exclusively ‘serious misconduct’ of EU staff or members of the EU institutions and are directed to the authority having disciplinary powers in the institution concerned. Therefore, the primary responsibility for the enforcement vis-à-vis members belongs to the president of each EU institution, who may refer to advisory ethical committees as mentioned above for advice. In particular, in the case of the EU Commission, the President may ask a Commissioner to step back any time¹⁷, and when infringements qualify as ‘serious misconducts’ by a member of the Commission, the College of Commissioners may seize the Court of Justice¹⁸. When it comes to the members of the European Parliament, it is the President who is tasked, with the assistance of PACCM and – in case of appeal – the Bureau¹⁹, to impose penalties. However, when it comes to the suspension or removal from one or more of the offices of an MEP²⁰, the Rules of procedure entrust such a power to the President (right of initiative), Conference of Presidents (decision to proceed) and the Parliament itself (actual sanction). Ultimately, the institutional role played by the presidents of these two, combined with their political color and the fact that they are both party and judge of the ethics regime, cast doubt on their suitability for such an oversight role²¹.

In fact, no EU ethics body – with the limited exception of OLAF (in case of ‘serious misconduct’ and the EU Ombudsman (when overseeing how the EU ethics bodies operate)²² – enjoys **the right to initiate investigations** whenever it finds it reasonable, and no mechanism enables third parties to prompt a verification. Only the Presidents of the Parliament and the Commission may do so. When it comes to the staff, the initiative belongs to the Appointing Authority, assisted as the case may be, by the Disciplinary board (one per each institution, agency or body)²³, OLAF or a national

¹⁶ Art. 5 of the OLAF decision read in light of Art. 3 of the same decision, and Art. 5 of the OLAF regulation.

¹⁷ Article 17(6) TEU (‘A member of the Commission shall resign if the President so requests’).

¹⁸ Articles 245 and 247 TFEU.

¹⁹ Art. 72 of the Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament, OJ C 159, 13.7.2009, p. 1–24.

²⁰ Rule 21, Rules of Procedure of the EU Parliament.

²¹ This is true also for advisory ethics bodies whose composition and appointment procedure raise questions about their independence. Members are appointed by the Commission, on a proposal from the President. In the case of Parliament the Committee is only composed of MEPs, and not independent ethics professionals.

²² Art. 228(1) TFEU.

²³ Under Service Level Agreements, IDOC provides support in the area of investigations and disciplinary issues to the European External Action Service (EEAS) and to the Executive Agencies.

court²⁴. While the director general of OLAF has the power to open an internal administrative investigation within an EU institution acting on his/her own initiative²⁵, the exercise of such a right in relation to ethical conduct is made conditional about the existence of “serious facts linked to the performance of professional activities which may constitute a breach of obligations” by staff or members. This leaves uncovered an area of minor ethical misconducts in relation to which no real investigative authority exists and is exercised. It must be noted that insofar as OLAF acts independently from other EU institutions, including the very same EU Commission that has created it, no current EU oversight system or body is in a position to oversee the exercise of OLAF’s right of initiative.

When it comes to **monitoring**, the EU Staff Regulation imposes a duty on officials when becoming aware of facts giving rise to a presumption of the existence of illegal activities as well as conduct which may constitute a serious failure to comply with an official’s professional duties, including of ethical nature, to inform his authorities or OLAF²⁶. The EU however does not provide harmonised staff whistleblower protection. Thus, while OLAF actively encourages citizens to report fraud anonymously on a secured website, the European Commission’s guidelines discourage anonymous reporting and the Parliament’s rules forbid staff to act anonymously²⁷. In addition, the Parliament fails to protect accredited parliamentary assistants (APAs) who report fraud and wrong-doing by their own MEP²⁸. Third parties can also write letters or complaints to the relevant institutions.

²⁴ Where there is evidence that a breach of Staff Regulations may have occurred, the Appointing Authority may decide to open an administrative inquiry.

²⁵ Art. 5 of the OLAF decision read in light of Art. 3 of the same decision.

²⁶ Art. 4 of the OLAF Decision.

²⁷ Article 22(a) to Article 22(c).

²⁸ *Ibidem*.

Table II – Enforcement mechanisms of ethical standards applicable to staff and Members of the EU institutions

		EU STAFF	MEMBERS		
			Parliament (EP)	Council	Commission (EC)
ENFORCEMENT MECHANISMS	PRIMARY LAW	Art. 285 et seq. TFEU Court of Auditors (audit)			
		Art. 228 TFEU + 43 CFR EU Ombudsman (maladministration; inquiries, on complaints or own initiative)			
				Art. 17(6+8), 18(4) [= HRVP] TEU + 234, 245, 247 TFEU (central role for President; limited role for EP and ECJ)	
	Art. 36(3), 61(2) EU Financial Regulation (internal control, key role for Appointing Authority)				
SECONDARY LAW	EC Decision establishing the European Anti-fraud Office (OLAF)				
	Art. 11, 11a, 12b, 13, 15, 16, 17a(2), 22, 26, 40, 43, 44, 49, 86, 90-91a + Annex IX to Staff Regulations Procedure 2018/2975(RSP) + Reg. 45/2001 (central roles for Appointing Authority and Disciplinary Board, ultimate CJEU's jurisdiction, "specific form" to declare interests before recruitment, personal file on conduct)	Rules 21, 175-177, 236 RoP (central role for President)		Art. 3, 4, 11-13 + Annex I to CoC (central role of President assisted by Independent Ethical Committee, declaration of interests)	
	(EP) Guide to the obligations of officials and other servants of the EP/CoC (refers to Staff Regulations)	Art. 3, 4, 7, 8 CoC, Annex I to RoP (central role for President, acting on its own or informed by third parties, and assisted by Advisory Committee on the Conduct of Members, declaration of interests)		Rule 127 + Art. 2, 6, 9 Annex VII to EP RoP (motion of censure in EP, assessment of declaration of interests by JURI)	
	(Council) Decisions on administrative inquiries and disciplinary proceedings				
	(EC) Decision on outside activities after leaving the Service; General implementing provisions for administrative inquiries and disciplinary proceedings				

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The privileged instruments used to prevent the breach of ethics rules – mainly of the principles of independence and integrity – by members are **declarations of interests**. While both MEPs and Commissioners are required to regularly submit and update declarations of financial interests, those declarations' correctness, completeness and compatibility with the respective Codes of conduct are not checked according to any written standard procedure, as found in the ECA's 2019 Special Report²⁹. The only check conducted is a check "for general plausibility, that means to ensure that [declarations] contain no manifestly erroneous, illegible or incomprehensible information, based on available information", as conceded by the Commission in response to the report³⁰. As a result, there is considerable uncertainty among both Commissioners, MEPs and staff on the importance of diligence when filing declarations.

In fact, the EU ethics framework disposes of limited or no **power of investigation** of the EU institutions themselves regarding breaches of ethics standards. The Commission Independent Ethics Committee (IEC) may ask for additional information to the Commission through the Secretariat General, or from the (former) members directly by asking clarifications and more specific information and/or inviting her/him to a hearing. In other words, both the Commission

²⁹ Recommendation 1(c), European Court of Auditors' Special Report, *op.cit.*, p. 37., as well as para.46-50.

²⁹ European Court of Auditors' Special Report, *op.cit.*, p.60.

³⁰ European Court of Auditors' Special Report, *op.cit.*, p.2 of Annex - EU Commission response.

IEC and the Parliament Advisory Committee on the Conduct of Members (PACCM), within the remit of their respective institutions, have only direct access to existing internal sources of information. This however presupposes that such a relevant information be already collected by the institution itself, *quod non* in most occasions. Moreover, no EU ethics body enjoys a fact-checking authority that would work with the EU and national public bodies such as tax authorities. Yet both prerogatives are required to ensure the effectiveness of the ethics oversight.

When it comes to **sanctions**, these may be classified in four main categories. First, there are measures that primarily affect an official's reputation (e.g. call to order, written warnings, reprimands and publicity). Second, measures that affect an official's position within the organisation (e.g. relegations in step and downgrading for staff; temporary suspension from participation in all or some of the activities of the Parliament for MEPs, such as rapporteurships, Committee Chairmanships, relocation of files for Commissioners). Third, measures that irreversibly alter the relation between the officials and the organisation (e.g. removal from post). Fourth, some of these sanctions may be accompanied by – or consist alone of – financial decisions, such as temporary forfeiture of entitlement to the daily subsistence allowance for MEPs and the deprivation of right to pension or other benefits in the case of members of the Commission and staff.

Table III – Sanctions [(i) reputational, (ii) position within the institution, (iii) irreversible sanction, (iv) financial]

		EU STAFF	MEMBERS		
			Parliament (EP)	Council	Commission (EC)
SANCTIONS	PRIMARY LAW				Individual/collective resignation, compulsory retirement/removal from post, financial sanctions (Article 17(6+8), 18(4) [= HRVP] TEU + 234, 245, 247 TFEU)
	SECONDARY LAW	<p style="text-align: center;">Relieve from responsibility (Art. 36(3), 61(2) EU Financial Regulation)</p> <p>Written warning, reprimand, relieve from responsibility, deferment of advancement, relegation, downgrading, suspension, transfer, removal from post, financial sanctions/damages (Art. 11, 11a, 12b, 13, 15, 16, 17a(2), 22, 26, 43, 44, 49, 86, 90-91a + Annex IX to Staff Regulations Procedure 2018/2975(RSP) + Reg. 45/2001)</p> <p>(EP) Guide to the obligations of officials and other servants of the EP/CoC (refers to Staff Regulations)</p> <p>(Council) Decisions on administrative inquiries and disciplinary proceedings</p> <p>(EC) General implementing provisions for administrative inquiries and disciplinary proceedings</p>	<p>Call to order, deny right to speak, exclusion, reprimand, temporary suspension, limited access to information, no representation, terminate office, financial sanctions (Rules 21, 175-177, 236 RoP + Art. 8 CoC, Annex I to RoP)</p>		<p>Relocation of file, sale/placing in a blind trust financial interests, reprimand (public or not) (Art. 3, 4, 11-13 + Annex I to CoC)</p> <p>Collective resignation (Rule 127 + Art. 2, 6, 9 Annex VII to EP RoP)</p>

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However, as demonstrated below by Tables IV and V, an excursus of the enforcement practice suggests that only few cases have led to the imposition of penalties for the members of the EU institution³¹. This can be explained by the limited – or even absent³² – power of investigation of the EU institutions themselves regarding breaches of ethics standards, and limited coordination with national authorities.

However, where the Appointing Authority or OLAF becomes aware of evidence of failure by the staff, they may launch administrative investigations to verify whether such failure has occurred³³. OLAF can do the same vis-à-vis members too, yet its competence to investigate is limited to

³¹ See, e.g., for the Commission: Jan-Pieter Kuijper, *Misteps by Commissioners: Legal or Political Sanctions?*, in F. Amtenbrink (2019) *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*, Cambridge: Cambridge University Press; for the European Parliament, Advisory Committee of the conduct of Members, Annual Reports from 2015-2018 (during the 2014-19 legislative term, the Advisory Committee dealt with a total of 26 MEPs involved in potential breaches of the Code of Conduct, however none of them was sanctioned).

³² The Parliament has no power of investigation over its own members who are accountable to their voters and enjoy free mandate. See European Court of Auditors' Special Report, *op.cit.*, Annex – European Parliament response. Yet insofar as citizens do not have access to the information to judge their representatives, be that due to missing checks on the veracity of financial interests or to the incomplete information on lobby meetings, this accountability does not exist.

³³ Art. 86 Staff Regulations.

‘serious misconducts’ and not all ethical standards breaches. This leaves open an entire category of misconducts by members that by failing to qualify as ‘serious’ they may escape the investigatory powers of OLAF, as well as the initiative by the Commission and Parliament (‘s President) vis-à-vis its own members.

Table IV – Overview of some emblematic past cases concerning members and showing the weaknesses of the current model³⁴

	MEMBERS					
	Parliament (EP)			Commission (EC)		
Name	Jean-Luc DEHAENE	Louis MICHEL	Rachida DATI	Edith CRESSON	Neelie KROES	John DALLI
Year	2012	2013	2013	1999	2000-2009	2012
Committee / Portfolio	BUDG (sub. AFCO)	LIBE (sub. DEVE)	ECON (sub. ITRE)	Research, Science and Technology	Competition, then Digital Agenda	Health and Consumers Policy
Facts	Undeclared stock options from ABInBev	Submission of 200+ amendments drafted by lobby groups	Consultancy with GDF Suez	Appointment of a friend as visiting scientist to DG RTD and later JRC	Undeclared directorship of Mint Holdings Limited	Secret meetings with tobacco industry + kickbacks
Ethical standard(s) concerned* <small>*Rules currently in force</small>	Independence, dignity, honesty, confidentiality, openness, transparency [see Art. 339 TFEU + Art. 6(1) 1976 Act + Art. 2- 3 Statute for MEPs + Rules 2, 10, 11 RoP + Art. 1-3, 4(6), 5 CoC, Annex I to RoP]			Integrity, dignity, good administration [see Art. 245 TFEU + Art. 41 CFR + Art. 2, 6 + Annex II to CoC]	Integrity, declaration of interests [see Art. 245 TFEU + Art. 3, 4, Annex I to CoC]	Independence, integrity, dignity, confidentiality, discretion, transparency, loyalty, good administration, declaration of interests [see Art. 17(3) TEU + Art. 245, 339 TFEU + Art. 41 CFR + Art. 9 RoP + Art. 2- 7, Annex I to CoC + Decision on transparency of Members’ meetings]
Sanction	Declared but no measure taken to avoid conflict	Advisory Committee: breach but no follow-up sanction by President	ECJ : breach but no sanction	EC: accepted Ms KROES’ apologies	‘Voluntary’ resignation	

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When ethical breaches come to light, this is not usually due to systematic checks by the European Parliament or internal reporting, but rather journalistic investigations. In particular, efforts to deter the filing of incomplete or inaccurate declarations by members is further hampered by the very limited sanctioning powers, in particular in relation to MEPs. An additional layer of complexity in the enforcement of ethics standards has to do with often overlapping considerations of political nature that blur the evaluation of the ethical conduct.

³⁴ See Transparency International EU (2018) “Moonlighting in Brussels – Side Jobs and Ethics Concerns at the European Parliament”; Corporate Europe Observatory et al. (2014) “Mind the gap – MEP code of conduct is not effectively enforced”, briefing issued in May 2014.

Table V – Overview of recent cases of revolving doors, authorised (or not examined) despite the risk of breaching ethical standards³⁵

Name	STAFF			MEMBERS						
	Parliament (EP)	Commission (EC)								
Year	2019	2019	2020	2014	2014	2015	2015	2016	2017	2020
Position or portfolio when in office	Official working on telecom. market regulation at the EC	Executive Director of the European Banking Authority	Member of EC VP J. Katainen's Cabinet then EPSC/IDEA	Chair of ECON	Member of ENVI (worked on car industry regulation)	Member of AGRI	Competition, then Digital Agenda	President	Financial Stability, Financial Services and CMU	Digital Economy and Society, then Budget and HR
Occupation after leaving office	Lobbyist for Vodafone (<i>on leave from EC</i>)	Non-Executive member of the Board of Directors of TheCityUK Limited (<i>inter alia</i>)	Public Policy Director, Head of EU Affairs at Facebook	Non-Executive Director of the London Stock Exchange Group (<i>inter alia</i>)	Gov. Affairs Director at Opel Group, then Head of EU Affairs Automotive at Daimler	Agri-business Senior Consultant at Hume Brophy	Member of the Advisory Board of Bank of America Merrill Lynch (<i>inter alia</i>)	Chairman and Non-Executive Director of Goldman Sachs International (<i>inter alia</i>)	Senior Project Manager at Freshfields Bruckhaus Deringer (<i>inter alia</i>)	Member of Advisory Council of Deloitte Deutschland (<i>inter alia</i>)
Ethical standard(s) concerned* <small>*Rules currently in force</small>	Integrity and discretion as regards the acceptance of certain appointments, loyalty to the EU institutions Obligation not to lobby his/her former institution (1 year limit) Confidentiality <small>[see Art. 339 TFEU + Art. 16-17, 40 Staff Regulations + EC Decision on outside activities]</small>			Confidentiality (sole ethical standard still applicable to MEPs after leaving office) <small>[see Art. 339 TFEU]</small>			Integrity and discretion as regards the acceptance of certain appointments Obligation not to lobby new Members nor their staff (2-3 years) Confidentiality, collegiality and discretion <small>[see Art. 245, 339 TFEU + Art. 2, 5, 11 CoC]</small>			
Decision* <small>*Concerning the occupation above-mentioned only</small>	Authorised	Forbidden before 1 February 2022	Authorised with specific conditions	N/A (former MEPs shall only "inform" the EP) <small>[see Art. 6 CoC, Annex I to RoP]</small>			Authorised Ethical committee <u>not</u> consulted	<i>Absence of notification</i> Ethical committee consulted	Authorised with specific conditions Ethical committee consulted	

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Ultimately, if the very limited sanctions at the disposal of the different institutions are never or little applied, this questions the overall effectiveness of the EU ethics framework.

1.3 Limited awareness and guidance regarding the ethics standards applicable to EU institutions' members and staff

There is also **limited awareness and knowledge** about the existing ethics rules, reporting and sanction mechanisms³⁶. As the Court of Auditors' Special Report³⁶ finds, staff across all institutions are largely uninformed about their rights and duties in this area and lack awareness about

³⁵ See Corporate Europe Observatory (2020) "From Facebook friends to lobby consultants", report issued on 22 October 2020; Transparency International EU (2017) "Access all areas: when EU politicians become lobbyists", report issued on 31 January 2017; Corporate Europe Observatory (2014) "MEPs in a spin with industry", report issued on 1 September 2014.

³⁶ European Court of Auditors' Special Report, *op.cit.*, para.26.

existing rules and reporting and sanctioning mechanisms. In a survey conducted for the very same report, only about half of the staff members of the audited EU institutions considered their own knowledge of the ethical frameworks good or very good. More than half had never received any kind of ethics training and more than two thirds found the guidance provided to them on ethics issues unspecific and lacking real-life examples. The ECA discovered further that knowledge about reporting mechanisms for unethical conduct was insufficient amongst almost 70% of staff members. While there are clear, although non-uniform, rules on how to deal with gifts offered to EU staff, there is no mechanism determining what happens if somebody accepts a gift or entertainment *against* those rules, and it is not evident that staff actually know about their entitlements and duties regarding this issue. This means not only that staff members may be breaking rules while believing and meaning to act correctly, but also that possible wrongdoings are underreported and their clearance inconsistent.

In these circumstances, although *de iure* “institutions have, to large extent, adequate ethical frameworks in place”³⁷, in practice, the EU ethics framework proves incapable to effectively prevent – and adequately sanction – major breaches of EU ethics standards and to make staff – and even more so members – aware of the ethics framework.

With a diverse variety of national ethics systems developed in EU Member States and beyond over years and decades, there are invaluable lessons to be learnt. Indeed, as EU member states face similar challenges and have over time developed a variety of ethics frameworks, the next section looks at these models in order to identify an ideal model for the EU to follow while ensuring the respect of its existing ethics standards.

SECTION 2 – WHAT ETHICS BODY FOR THE EUROPEAN UNION?

This section contrasts the existing EU ethics with some national frameworks, with the aim of identifying an ideal EU ethics infrastructure. It does so by analysing the main features of three existing and one envisaged ethics oversight bodies, by focusing in particular on scope and mandate, independence, power of monitoring, investigation and sanction.

³⁷ European Court of Auditors' Special Report, *op.cit.*, para.26.

2.1 A COMPARATIVE ANALYSIS OF SOME EXISTING ETHICS SYSTEMS AND OVERSIGHT BODIES WITHIN THE EU AND BEYOND

The national ethics body worth examining are the French *Haute Autorité pour la Transparence de la Vie Publique*, the Committee on Standards in Public Life in the UK, the Conflict of Interest and Ethics Commissioner in Canada as well as the envisaged Public Sector Standards Commissioner in Ireland. Although the latter has not been set up, its innovative design deserves a close look in this study.

2.1.1 Scope of the mandate

The scope and mandate of the EU ethics system – as operationalised through its variety of institutional mechanisms – cover the respect of the ethical conduct of members and staff and possible conflicts of interests, both during and after the mandate or service, as well as the duties of independence and confidentiality. When compared with some other (national) ethics frameworks, this appears quite fragmented.

The **French *Haute Autorité pour la Transparence de la Vie Publique* (HATVP)**³⁸ oversees not only the ethical conducts of members of governments, parliament and regional governments and their respective public employees, but also of those working for an array of other French public institutions, public companies and even sports federations, as well as of the members of the European Parliament elected in France³⁹.

Similarly, the **Irish Public Sector Standards Commissioner (PSSC)**, which was until recently envisaged to replace the Standards in Public Office Commission⁴⁰, would oversee legislation wide range of elected and unelected public officials⁴¹, as does the **Canadian Conflict of Interest and Ethics Commissioner (CIEC)**⁴². However, interestingly, the CIEC has no remit over the members of the Canadian Senate⁴³. This might be explained by the fact that the CIEC is established by the

³⁸ Art. 19-23, Loi n°2013-907 du 11 octobre 2013 relative à la transparence de la vie publique (hereinafter, Loi n°2013-907).

³⁹ Art. 4 and 11, Loi n°2013-907.

⁴⁰ Art. 26 et seq., Public Sector Standards Bill 2015 (Bill 132 of 2015) (hereinafter, PSSB). The PSSB aimed at creating the position of PSSC but lapsed on 14 January 2020 due to the dissolution of the Dáil and Seanad before the elections. A new text has not been tabled yet.

⁴¹ Art. 4-5, Public Sector Standards Bill 2015 (Bill 132 of 2015) (hereinafter, PSSB).

⁴² Art. 81 and 87, Parliament of Canada Act (R.S.C., 1985, c. P-1) (hereinafter, the PCA), Art. 2, 28-32 and 39-50, Conflict of Interest Act (S.C. 2006, c. 9, s. 2) (hereinafter, CIA) and Art. 4 and 26 (*inter alia*) of the Conflict of Interest Code for Members of the House of Commons (hereinafter, CICMHC).

⁴³ The Canadian Senate is designed after the British House of Lords. Its 105 members are not elected but appointed by the Governor general on the advice of the Prime minister.

House of Commons, to whom (s)he is responsible and his or her Office belongs. It is the duty of the Senate Ethics Officer⁴⁴, together with the Standing Committee on Ethics and Conflict of Interest for Senators, to administer and interpret the Conflict of Interest Code for Senators⁴⁵.

In the **UK**, the **Committee on Standards in Public Life (CSPL)**⁴⁶'s mandate covers all issues that concern the standards of conduct of all holders of public office, elected or not, except the ones belonging to the devolved legislatures or governments⁴⁷. Its mandate encompasses even the issues relating to the funding political parties as well as to the “ethical standards of the delivery of public services by private and voluntary sector organisations”⁴⁸. Nevertheless, the CSPL does not have the remit to deal with individual cases. Thus, although the scope of its mandate appears very wide, the capacity to act in practice is very limited. Moreover, its mandate is not enshrined in any founding act. The CSPL was created on the personal initiative of then Prime minister John Major. Its creation was simply announced by the latter in the House of Commons. The only available text is the Code of Practice for Members of the CSPL⁴⁹.

2.1.2 Independence

Unlike the EU highly decentralized model, national experiences suggest that a one-stop-shop authority may offer a more independent, effective and consistent institutional design. However, the EU attempt at setting up a centralized Advisory Group on Standards in Public Life for its seven main institutions derailed in 2000⁵⁰. France, Ireland and Canada have each centralised this task to one, single entity covering both members and staff. Despite having also one entity covering all

⁴⁴ Art. 20, PCA.

⁴⁵ Conflict of Interest Code for Senators, adopted by the Senate on 16 June 2014, available at: <<http://sen.parl.gc.ca/se0-cse/eng/code-e.html>> (last access 31 October 2020). See also the obligations stemming from Art. 16, PCA.

⁴⁶ The CSPL is an advisory non-departmental public body created in 1994 to advise the British Prime Minister on ethical standards across the whole of public life in the UK. Among all ethics bodies in the UK, this one enjoys the widest scope, reason why we have chosen to examine its regime in the framework of this study. See its Terms of reference: <<https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about/terms-of-reference>> (last access 29 October 2020).

⁴⁷ This echoes, in the case of the EU, the line to draw in terms of scope between the EU and the Member States officials – see below.

⁴⁸ Parliamentary Question answered by Lord Wallace on 28th February 2013, Hansard Column WA347.

⁴⁹ Code of Practice for Members of the Committee on Standards in Public Life, November 2016, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679416/Code_of_Practice.pdf> (last access 31 October 2020)

⁵⁰ Proposal for an Agreement between the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions establishing an Advisory Group on Standards in Public Life, EC (2000) 2077.

aspects of ethics in public life, the UK does have a myriad of more specific ethics bodies granted with more powers than the CSPL⁵¹.

Moreover, the composition of the EU various ethics oversight mechanisms also cast doubt on their respective independence, in relation to members⁵². Not only the presidents of the Parliament and the Commission are both party and judge when ensuring the respect of their respective ethics framework, but they are also in charge of proposing the members of their advisory bodies.

In **France**, only the president of the HATVP is appointed by the President of the French Republic. Other six members are either current or former members of the highest judicial bodies (*Conseil d'Etat*, *Cour de cassation* and *Cour des comptes*) and are chosen by those bodies, and four members are appointed by the speakers of each Houses of Parliament after a qualified majority vote (3/5) in the respective House⁵³. The government appoints the two remaining members. As a result, some members are former or current members of the judiciary, whereas others may be former members of the executive or legislative bodies, but not necessarily. They are appointed for a 6-year mandate, non-renewable⁵⁴.

In **Canada**, the Canadian Governor in Council appoints the CIEC for a renewable 7-year term, after consulting with all party leaders in the House of Commons and with approval of the House⁵⁵. (S)he shall be either a former judge of a superior court or of any other court whose members are appointed under an Act of the legislature of a province, a former member of a federal or provincial board, commission or tribunal, or a former Senate Ethics Officer or former Ethics Commissioner⁵⁶. While this process makes the appointment heavily dependent on Parliament, to whom the CIEC reports directly, it is sufficient to prevent individuals from exerting undue influence.

With the PSSC proposal, **Ireland** envisaged to follow the Canadian example by appointing one Commissioner. The proposal suggests the appointment for a renewable 6-year term by the Irish President, on advice of the government and with resolutions by both Houses of Parliament, meaning that both executive and legislative powers are involved in his/her selection⁵⁷.

⁵¹ See Rebecca Dobson Phillips (2020) "British Standards Landscape: A mapping exercise", report was commissioned by the CSPL.

⁵² When it comes to staff, the members of the Appointing Authority, Staff Committee and Disciplinary Board are by definition public servants. See Art. 5-6 of Annex IX of Staff Regulations.

⁵³ Art. 19, Loi n°2013-907.

⁵⁴ *Ibidem*.

⁵⁵ Art. 81(1) and (3), PCA.

⁵⁶ Art. 81(2), PCA.

⁵⁷ Art. 26(3) and (6), PSSB.

Interestingly, the PSSB does not require any specific experience from the candidate to the position.

In the **UK**, the CSPL is composed of eight members⁵⁸. The Prime minister appoints all of them, a feature that echoes the role of the European Commission president vis-à-vis the members of the independent ethical committee. Four “independent” members are selected following open competition in accordance with the Commissioner for Public Appointments’ Governance Code. These members are appointed for a five-year non-renewable term, like the chair, whose method of appointment does not appear in the documents made publicly available on the Committee’s website. The three other members, the “political members”, are appointed for renewable three-year terms on the recommendation of the leaders of the three main parties, namely the Labour Party, the Conservative Party and the Liberal Democrat Party.

2.1.3 Monitoring role

When it comes to monitoring, we highlighted that the EU ethics framework lacks autonomous monitoring capacity. As a result, it is reactive as opposed to proactive.

Ultimately, when breaches come to light, this is not usually due to systematic checks by the EU institutions or internal reporting, but rather journalistic work. If the collection of declarations of financial interests responds to a preventive logic, the EU respective ethics bodies fail to ensure a regular and efficient standardised examination of declarations regarding possible conflicts of interests, by limiting their verification to a ‘plausibility check’. Moreover, the EU lacks a public registry of all declarable information.

The **French HATVP** instead has authority over the public register of lobbyists and may monitor the compliance by both lobbyists and lobbied – be they MPs or their assistants – with ethics and lobbying rules⁵⁹. It collects and makes publicly available – with its observations if needs be – declarations of assets, income and other interests⁶⁰ and performs regular – as opposed to a single check at the submission – in-depth checks for correctness and possible conflicts of interest⁶¹.

Likewise, the **Canadian CIEC** oversees the compliance with all rules contained in the CIA⁶². (S)he is also tasked with administering a public registry of information declared by “public office

⁵⁸ Committee on Standards in Public Life, “Membership”, see : <<https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life>> (last access 30 October 2020)

⁵⁹ Art. 18-1 et seq., Loi n°2013-907.

⁶⁰ See Art. 5, Loi n°2013-907. Most declarations are available online, but declarations of members of the European Parliament elected in France are only accessible to the public physically at the prefecture, see Art. 12.

⁶¹ See Art. 7, 9, 11(5), 18-6 and 20(1)(1° and 7°), Loi n°2013-907.

⁶² Art. 30, CIA. See also Art. 41, 41.1-41.5, PCA.

holders” (i.e. mostly members of the executive and their staff)⁶³. This public registry⁶⁴, composed of inter alia all the “public declarations”⁶⁵ and the “summary statements”⁶⁶, ensures that the public (including journalists) and all public office holders are equally aware of declarable information and measures taken to prevent conflicts of interest. The CIEC shall review annually with each reporting public office holder the information contained in his or her “confidential report”⁶⁷ (i.e. a more detailed declaration of his or her assets, income and other interests than the public declaration⁶⁸) and the measures taken to satisfy his or her obligations under the CIA⁶⁹. On an indicative basis, the public registry has been consulted 23,266 times over the period 2019-2020⁷⁰. It must be noted that Members of the House of Commons do enjoy a specific regime⁷¹. Only a summary of their “disclosure statement” is made public⁷².

Similarly, the **Irish PSSC** would collect and oversee the compliance of all declarations of interests (including here again assets, income and other interests) with the rules enshrined in the PSSB⁷³. (S)he would do the same with tax clearance certificates and certificates of compliance⁷⁴, and would administer a registry of all gifts whose value exceeds 600 EUR received by elected or unelected officials⁷⁵.

In the **UK**, the CSPL does enjoy a general monitoring role on all issues relating to the standards of conduct of all public office holders. It can conduct “broad inquiries, collecting evidence to assess institutions, policies and practices” and make “recommendations to the Prime Minister where appropriate”⁷⁶. As the CSPL does not have the remit to deal with individual cases, there is no obligation of individuals to declare interests to the CSLP. If any obligation of this kind does exist, it comes with the specific internal regime applicable to each institution.

⁶³ For the notion of “public office holder”, see Art. 87, PCA and Art. 2(1), CIA.

⁶⁴ Art. 51, CIA.

⁶⁵ Art. 25, CIA.

⁶⁶ Art. 26, CIA. This statement must indicate the steps taken by the public office holder to proceed with a divestment of an asset, to effect a recusal or to comply with any other order made by the CIEC after his or her check of the assets, income and interests declared.

⁶⁷ Art. 22, CIA.

⁶⁸ The CIEC shall also take note of all gifts whose value exceed C\$200 and of all firm offers of outside employment (and of their acceptance, if this is the case), see Art. 23-24, CIA.

⁶⁹ Art. 28, CIA.

⁷⁰ Office of the CIEC, Annual Report 2019-2020, in respect of the Conflict of Interest Act, available at: <<https://ciec-cicie.parl.gc.ca/en/publications/Pages/ARAct201920-RALoi201920.aspx>> (last access 31 October 2020)

⁷¹ Art. 20 et seq., CICMHC. See also their obligation to disclose, *inter alia*, trusts (Art. 41.2, PCA and Art. 21(1)(b.1), CICMHC), gifts (Art. 14, CICMHC) and sponsored travel (Art. 15, CICMHC).

⁷² Art. 23(2), CICMHC.

⁷³ Art. 7-8, 20 et seq., PSSB.

⁷⁴ Art. 16, 18-19, PSSB.

⁷⁵ Art. 11(4), PSSB.

⁷⁶ Committee on Standards in Public Life, “About us”, see : < <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about>> (last access 31 October 2020)

2.1.4 Right of initiative

As previously noted, current EU ethics body do not⁷⁷ enjoy a right to initiate investigations whenever they would find it reasonable, and no mechanism enables third parties to prompt a verification. This comes in contrast with the prerogatives enjoyed by some national ethics bodies.

The **French HATVP** does enjoy the right to initiate an investigation on the situation of an individual when it deems it necessary⁷⁸. It can also make general recommendations on its own initiative on how ethical rules should be applied⁷⁹. Importantly, third parties – including explicitly NGOs fighting against corruption – can inform the HATVP of any misbehavior and prompt an assessment⁸⁰.

Likewise, in **Ireland**, the envisaged PSSC would be entitled to start investigating a case on his or her own initiative⁸¹ or following the receipt of a complaint made in writing by any person⁸². (S)he would also be entitled to make, on its own initiative, general recommendations to any public body⁸³ on its code of conduct⁸⁴ and make special reports to the Minister for Public Expenditure and Reform on any issue the PSSC deems appropriate⁸⁵.

In **Canada**, the CIEC has also a right to examine on his or her own initiative a matter if (s)he “has reason to believe that a public office holder or former public office holder has contravened” to the rules⁸⁶. Whereas (s)he is required to examine a matter that would be brought to him/her by a parliamentarian⁸⁷, the Conflict of Interests Act is silent on whether third parties – be they citizens or NGOs – can bring a case to the attention of the CIEC. The Act barely says that the CIEC, in the case of a request from a parliamentarian, “may consider information from the public that is brought to his or her attention” *via* the parliamentarian⁸⁸. In any case, even if it is not formally foreseen under this regime, it can be expected that the CIEC takes into account any alert (s)he would receive and decides to start examining a case, thanks to his/her right of initiative. The CIEC does also enjoy a right to start on his or her own initiative an inquiry on a matter related to a

⁷⁷ With the limited exceptions of the EU Ombudsman and the DG of OLAF. See above, Section 1, 1.2.

⁷⁸ Art. 20(2), Loi n°2013-907. See also *inter alia* Art. 7, 18-6 and 18-7 of the same text.

⁷⁹ Art. 20(1)(5°), Loi n°2013-907.

⁸⁰ See Art. 5(1) and 12(2) (to send comments on declarations of interest), 18-7 (“*signalement*”) and 20(2), Loi n°2013-907.

⁸¹ Art. 36(2), PSSB.

⁸² Art. 33-34, PSSB.

⁸³ See the list at Art.6, PSSB.

⁸⁴ Art. 30(3), PSSB.

⁸⁵ Art. 31(1)(b)(ii), PSSB.

⁸⁶ Art. 45(1), CIA.

⁸⁷ Art. 44(1-3), CIA.

⁸⁸ Art. 44(4), CIA.

Member of the House of Commons. In addition, it shall conduct an inquiry if a Member “has reasonable grounds to believe that another Member has not complied with his or her obligations” and requests it. The request can also come from the House of Commons as a whole, through the adoption of a resolution⁸⁹.

On the contrary, **in the UK**, if the CSLP enjoys a right of initiative, this is only to initiate an inquiry that would lead to the publication of a report or recommendations of general (i.e. not individual) nature⁹⁰.

2.1.5 Advisory role

In the EU ethics system, only the Commission and Parliamentary ethics bodies do play an advisory role to their respective institution⁹¹, by essentially providing advice on how to interpret and apply ethical standards to individual cases. Therefore, there’s no general advisory function, which could offer guidance to both staff and members before engaging into a given conduct.

The HATVP, the PSSC and the CIEC are instead also tasked with the provision of both general and individual advice. More importantly, individual members or staff can directly address them to receive such a personal advice.

In **France**, the HATVP can indeed provide any member of staff, at their request, with personal advice on any ethical issue they would encounter. These opinions are nevertheless confidential⁹². The HATVP can also answer requests for advice made by interests representatives relating to the rules applicable to them⁹³, or members or staff on how to deal with interest representatives⁹⁴.

In **Ireland**, any person to whom the PSSB would apply could request the PSSC “for advice in relation to steps that could be taken by the person to comply with the provisions” of the Bill⁹⁵. Interestingly, if the request is made in relation to a particular case, the PSSB would provide the requested with a moratorium: “the provision concerned (...) shall not, as respects the person who made the request, apply in relation to that case during the period from the making of the request to the time when advice is given by the [PSSC] in relation to the case or he or she declines to give such advice”⁹⁶. Moreover, the PSSC would be entitled to “issue confidential advice and guidance

⁸⁹ Art. 27 and 29, CICMHC.

⁹⁰ See the CSLP’s Terms of reference, *op.cit.*

⁹¹ While the advice to the Parliament (President) is confidential, that to the Commission is rendered public upon the adoption of its final decision.

⁹² Art. 20(1)(3°), Loi n°2013-907.

⁹³ Art. 18-6, Loi n°2013-907.

⁹⁴ Art. 20(1)(6°), Loi n°2013-907.

⁹⁵ Art. 29(1), PSSB.

⁹⁶ Art. 29(2), PSSB.

to any person” on his or her own-initiative where (s)he would consider it appropriate⁹⁷. It is unclear from the text of the PSSB whether an advice that would have been requested shall be confidential too.

In **Canada**, the CIEC must also provide confidential advice to the Prime minister (on his or her request or not) with respect to the application of the Conflict of Interest Act to individual public office holders but also to individual public office holders directly⁹⁸. Members of the House of Commons can also request an opinion⁹⁹. In this scenario, the CIEC can only make the opinion given public if the Member has made it public, if (s)he gives his or her consent or if the opinion is anonymized. One specificity of the Canadian regime is interesting to note: an opinion given by the CIEC to a Member of the House of Commons is binding on the CIEC “in relation to any subsequent consideration of the subject matter (...) so long as all the relevant facts that were known to the member were disclosed” to the CIEC¹⁰⁰.

Only some the features we have highlighted under this subsection coincide with what we find at the EU level. For instance, civil servants can seek advice of the Appointing Authority of their institution on how to comply with the standards of conduct laid down in the Staff Regulations¹⁰¹. When it comes to members, whereas MEPs can request confidential guidance to the Parliament Advisory Committee on the Conduct of Members (PACCM) on the interpretation and implementation of their code of conduct¹⁰², the same is not true for members of the Commission. Indeed, only the President of the European Commission can seize the independent ethical committee¹⁰³. In other words, the latter can only reply to requests for advice – be it general or on an individual case – made by its appointing authority. On this issue, the European Commission’s situation echoes the one of the CSLP in the UK, which advises directly the Prime minister. However, the CSLP can only provide general, non-individual advice¹⁰⁴. Yet, as discussed, the CSPL does enjoy a wider mandate than what EU ethics bodies do.

⁹⁷ Art. 29(3), PSSB.

⁹⁸ Art. 43, CIA.

⁹⁹ Art. 26, CICMHC.

¹⁰⁰ Art. 26(3), CICMHC.

¹⁰¹ Art. 25, Staff Regulations.

¹⁰² Art. 7(4) of the Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interests, Annex I to the Parliament’s Rules of Procedure (February 2020). However, the Advisory Committee on the Conduct of Members is not entitled to produce general recommendations.

¹⁰³ Art. 12, Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission (2018/C 65/06).

¹⁰⁴ Committee on Standards in Public Life, “About us”, see : < <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about> > (last access 31 October 2020)

2.1.6 Investigatory powers

As discussed, the EU ethics framework disposes of limited or no power of investigation of the EU institutions themselves regarding breaches of ethics standards. Moreover, no EU ethics framework, be that of the Commission or of the European Parliament, enjoys fact-checking authority that would work with EU and national public bodies such as tax authorities. Only OLAF does have investigatory powers but in relation to ‘serious misconducts’ only, thus leaving uncovered a wide zone of ethical misconducts by both staff and members. This situation comes in drastic contrast with the powers that enjoy the French HATVP, the Irish PSSC and the Canadian CIEC.

In **France**, the HATVP can ask any person falling under its scrutiny directly for any information and documents necessary for assessing their ethical conduct or checking their declarations and can hear summon any person it considers helpful¹⁰⁵. Tax authorities automatically furnish all information needed by the HATVP to ass the exhaustiveness, correctness and sincerity of all declarations from members of Government¹⁰⁶. For the latter but also for all other public office holders falling under its scrutiny, the HATVP can ask them – and their spouses or civil partners – to furnish a series of tax documents¹⁰⁷. If they fail to do so within two months, the HATVP can require the tax authorities to provide them directly. Moreover, the HATVP can ask the tax authorities to exercise their specific power called “*droit de communication*” to obtain all information deemed useful for the scrutiny, and launch an international administrative assistance procedure if needs be. Moreover, the HATVP does also enjoy prerogatives vis-à-vis interest representatives¹⁰⁸. Indeed, it can require them to provide the HATVP with any information or document it would need, even those covered by professional secrecy. It can also ask a judge for a search warrant in order to let the HATVP’s staff search the professional premises of an interest representative.

Upon the receipt of a complaint or on its own initiative, the **Irish** PSSC (assisted by the Deputy Public Sector Standards Commissioner, hereinafter the Deputy Commissioner¹⁰⁹) could request a member of its staff – the “authorised official” – to carry out a preliminary inquiry¹¹⁰. The latter can consist in interviewing any person or requesting any person to provide with a written statement. Following this preliminary inquiry, the “authorised official” sends a report outlining his or her opinion to the PSSC, the complainant (if any) and the respondent. If the contravention at stake is deemed severe, the PSSC could either proceed to the prosecution phase directly or

¹⁰⁵ Art. 20(2), Loi n°2013-907.

¹⁰⁶ Art. 5(1), Loi n° 2013-907.

¹⁰⁷ Art. 6 and 11(5), Loi n°2013-907.

¹⁰⁸ Art. 18-6, Loi n°2013-907.

¹⁰⁹ Art. 28, PSSB.

¹¹⁰ Art. 35, PSSB.

refer the matter to the Deputy Commissioner for further investigation¹¹¹. In fact, the PSSC is not obliged to start with a preliminary inquiry; (s)he can directly refer the matter to the Deputy Commissioner whenever (s)he considers it appropriate¹¹². The Deputy Commissioner would then appoint an “investigation officer”¹¹³ out of the Office’s staff who would be entitled to hear any person and/or ask any person to produce “any document or thing in his or her possession or power”¹¹⁴. An investigation officer could also seek to obtain from a judge a warrant to enter and search any premises and seize and remove any document or thing¹¹⁵. At the end of the investigation, the Deputy Commissioner would have to report to the PSSC and share with him or her his or her “recommendation”¹¹⁶. The PSSC could then hold one or more confidential or public, online or offline sittings during which (s)he could summon witnesses¹¹⁷. Unlike interest representatives appearing before the French HATVP, witnesses can here rely on the duty of professional secrecy or any proven duty of confidentiality not to disclose information¹¹⁸. Finally, the PSSC would publish a report in relation with the investigation¹¹⁹.

When examining a matter¹²⁰, the **Canadian** CIEC enjoys similar prerogatives, such as the right to summon witnesses and to require them to produce any documents or things that (s)he considers necessary¹²¹. Following his or her investigation, the CIEC shall report to the Prime minister and make his or her report public¹²². When it comes to the examination of matters that concern Members of the House of Commons, the CIEC has the right to summon a Member – and, if needs be, some of his or her family members –to discuss the correctness of his or her “disclosure statement”¹²³. If (s)he conducts an inquiry related to a Member, be it on his or her own initiative, on the request of another Member or of the House, the CIEC has to report on the results to the Speaker of the House and make his or her report public¹²⁴. As explained above, the **British CSPL** does not have remit on investigating individual cases. It can only conduct broad inquiries and collect anonymous evidence¹²⁵.

¹¹¹ Art. 35(8), referring to Art. 36(1) and Part V, PSSB.

¹¹² Art. 36(2), PSSB.

¹¹³ Art. 37, PSSB.

¹¹⁴ Art. 38(2), PSSB. See also Art. 44 (discovery of documents).

¹¹⁵ Art. 38 (3-6), PSSB.

¹¹⁶ Art. 39, PSSB.

¹¹⁷ Art. 40, PSSB.

¹¹⁸ Art. 41(1-2), PSSB.

¹¹⁹ Art. 50, PSSB.

¹²⁰ Art. 44, 45 and 49, CIA.

¹²¹ Art. 48(1), CIA.

¹²² Art. 44(7) and 45(3), and 44(8) and 45(4), CIA.

¹²³ Art. 22, CICMHC.

¹²⁴ Art. 28(1-3), CICMHC.

¹²⁵ Committee on Standards in Public Life, “About us”, see : < <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about> > (last access 31 October 2020)

2.1.7 Sanctioning powers

When a EU official is found in breach of ethics standards, (s)he will be subject to the adoption of legally binding measures, which may be judicially reviewed by the EU General Court¹²⁶. The same is not always true vis-à-vis members – be it of the Commission or Parliament – for which reputational sanctions, such as recommendations or reprimands, or those affecting their position within the institution do not produce per se legally binding effects, and whose effectiveness is entirely left to publicity and ensuing peer-pressure mechanisms¹²⁷. Only in few circumstances they are accompanied by financial sanctions. In essence, apart from the motion of censure affecting the whole Commission, only when members of the EU Commission are brought before the Court of Justice in case of ‘serious misconduct’, or before the Conference of Presidents and the entire Parliament, any serious breach of their professional obligation, the duty of integrity and discretion included, those sanctions are binding.

In **France**, the HATVP can order any public office holder concerned by the Loi n°2013-907 to put an end to a conflict of interest and make this order public a month after issuance¹²⁸. It can also issue a formal notice ordering a public office holder that would have failed to submit a(n exhaustive) declaration of interests or to give further explanations when requested to comply within a month¹²⁹. Concerning interest representatives, the HATVP can also issue a formal notice ordering him or her to comply with the ethics rules, and make this formal notice public¹³⁰. If a public office holder remains in default of submitting a declaration, makes a substantial omission or provides the HATVP with fake information, (s)he incurs a sanction of 3 years imprisonment and 45,000 € fine¹³¹. Moreover, if the HATVP observes a change in the interests declared by a public office holder for which it has not received sufficient explanations, it publishes a special report and refers the matter to the public prosecutor office¹³². If an individual – be it a member, a staff or an interest representative – fails to comply with an order from the HATVP or to provide the latter with any requested information, (s)he incurs a sanction of 1 year imprisonment and 15,000 € fine¹³³. Lastly, any former public office holder who envisages a new occupation within three years after leaving office must receive from the HATVP an opinion of compatibility (“*avis de compatibilité*”) of such an activity with the former position held. This opinion can encompass

¹²⁶ Art. 91 Staff Regulation.

¹²⁷ In the case of MEPs¹²⁷, the penalties can be the object of an appeal (internal appeal procedure). See Art. 8 Code of Conduct and Art. 177 of the Rules of Procedure

¹²⁸ Art. 10, 11(5) and 20(2)(2°), Loi n°2013-907.

¹²⁹ Art. 4(5), 11(5) and 20(2), Loi n°2013-907.

¹³⁰ Art. 18-7, Loi n°2013-907.

¹³¹ Art. 26(1), Loi n°2013-907. In addition to these penalties, the criminal court hearing the case can also decide to suspend one’s civic rights and/or right to occupy a public function.

¹³² Art. 7 and 11(5), Loi n°2013-907.

¹³³ Art. 26(2), Loi n°2013-907. For interest representatives, see Art. 18-3, 18-9 and 18-10.

conditions – possibly made public. If the new position is deemed incompatible, the HATVP will issue an opinion of incompatibility (“*avis d’incompatibilité*”) and can publish the latter. In this case, if the individual has already engaged in the new occupation, then the new work contract will be void. If (s)he disregards the opinion of incompatibility and engages in the new activity concerned, or fails to comply with any of the conditions imposed, the HATVP publishes a special report and refers the matter to the public prosecutor office¹³⁴.

In **Ireland**, all offences are listed under Art. 32 PSSB. On one hand, in the case of minor contraventions, the PSSC could limit his or her decision to providing confidential advice or general guidance on how to remedy the matter. This decision does not necessarily require accomplishing a preliminary inquiry or any investigation¹³⁵. On the other hand, in the case of serious contraventions, the PSSC could either prosecute the offence himself or herself summarily or refer to the Director of Public Prosecutions. Prior investigation is here again not a necessity¹³⁶. Penalties range from, on summary conviction, a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both, to, on conviction on indictment, a fine not exceeding €100,000 or imprisonment for a term not exceeding 5 years or both¹³⁷. In addition or in substitution, the court examining the matter could order that the person be disqualified from holding office for a certain period¹³⁸. A specific regime applies should the public office holder fail to furnish to the PSSC a correct and exhaustive “statement” (i.e. declaration of interests). In such a scenario, the PSSC could issue him or her a notice requiring him or her to remedy the matter¹³⁹, or directly a so-called “fixed payment notice”¹⁴⁰. If (s)he pays the fixed amount of 200€ before a specified date, no further proceedings would be initiated. If not – or in case the PSSC would not consider appropriate to suggest a “fixed payment notice” –, this offence is punishable with a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both¹⁴¹. Note that a contravention could also have civil consequences¹⁴². The PSSC could indeed decide to issue a censure or a warning, recommend a suspension or removal from office, or direct that the person concerned undertake actions to secure compliance with the PSSB within a period specified¹⁴³. Moreover, the PSSC would enjoy the right to disqualify an individual from any (new) appointment to any position as a public official (except elected positions) in case of failure to be tax

¹³⁴ Art. 20(1)(4°) and 23, Loi n°2013-907. Only some categories of occupations are concerned.

¹³⁵ Art. 33(2)(b), 33(3)(a), 35(6)(b)(i) and 47(5)(a), PSSB.

¹³⁶ Art. 47(5)(c) and 51(2-3), PSSB.

¹³⁷ Art. 53(1), PSSB.

¹³⁸ Art. 54(1), PSSB. This would not be possible if the case concerns a member of either House of the Oireachtas. In this case, the relevant House could decide on a suspension. See Art. 54(2-3).

¹³⁹ Art. 23(10), PSSB.

¹⁴⁰ Art. 31(4) and 52, PSSB.

¹⁴¹ Art. 53(2), PSSB.

¹⁴² Art. 55 et seq., PSSB.

¹⁴³ Art. 55(2) and 56, PSSB.

compliant¹⁴⁴. Finally yet importantly, the enforcement powers regarding post-employment rules would lie in the remit of the Outside Appointments Board and not of the PSSC's¹⁴⁵.

In **Canada**, after the review of an official's disclosed assets and liabilities, the CIEC can order divestment, conflict of interest screens and any other measure (s)he deems necessary to achieve compliance with the CIA¹⁴⁶. (S)he has also the ability to authorise (or forbid) any outside activities¹⁴⁷. In case of breach, the CIEC may issue a notice of violation and impose publicly an administrative monetary penalty, not exceeding C\$500 for some contraventions but otherwise of an amount let to his or her discretion following certain criteria¹⁴⁸. These sanctions are only the ultimate step, as the combination of the threat of public shaming and the offer to right one's wrongs has been successful in Canada in directing public officials towards a more ethical execution of their offices. This low-profile solution – which remains essentially untested within the EU – creates strong incentives for concerned individuals to follow the recommendations given by the CIEC to avoid publication. Indeed, publication of ongoing investigations and the disclosure of the identity of complainants are restricted in order to encourage complainants to come forward in the first place. However, if the misconduct constitutes an offence under another Act, the CIEC must refer the matter to the relevant authorities¹⁴⁹. Regarding post-employment activities, the CIEC oversees the respect by former public office holders of their duties¹⁵⁰ and is entitled to waive certain requirements or restrict limitations on a case-by-case basis¹⁵¹. (S)he can also order any current public office holder not to have official dealings with a former reporting public office holder¹⁵². Concerning the Members of the House of Commons, the CIEC has the faculty to direct a Member to terminate a trust or, at least, “not to derive any benefit or income from the trust for the purpose of financing a nomination contest, a leadership contest or an electoral campaign”¹⁵³. Such an order must be reported to the relevant Committee of the House which will examine the Member's compliance with the order¹⁵⁴. If a Member contravenes the CIEC's order, (s)he is liable on summary conviction to a fine of between C\$500 and C\$2,000¹⁵⁵. If the CIEC has reasonable grounds to believe that a Member accepted benefits from trusts relating

¹⁴⁴ Art. 57, PSSB.

¹⁴⁵ Art. 59-60, PSSB.

¹⁴⁶ Art. 22(2)(g) and 27-30, CIA.

¹⁴⁷ Art. 15(1.1, 2 and 3), CIA.

¹⁴⁸ Art. 52, 53, 56, 57 and 62, CIA. The CIEC shall report on any contravention to the Prime minister, see Art. 44, 45 and 47.

¹⁴⁹ Art. 49, CIA.

¹⁵⁰ Art. 37, 38 and 40, CIA.

¹⁵¹ Art. 39, CIA.

¹⁵² Art. 41, CIA.

¹⁵³ Art. 41.2 and 41.3, PCA.

¹⁵⁴ Art. 41.5, PCA.

¹⁵⁵ Art. 41.3(6), PCA.

to position, (s)he shall also notify it to that Committee¹⁵⁶. The CIEC can also require any information¹⁵⁷ to be included in the "disclosure statement" and prohibit a Member from owning securities in a public corporation that contracts with the Government¹⁵⁸. Last, following an inquiry on a Member's misconduct, the CIEC must make a public report to the Speaker of the House in which (s)he may recommend appropriate sanctions¹⁵⁹.

Finally, in the **UK**, as the British CSPL does not have remit on addressing individual cases, it does not as a result enjoy any enforcement prerogatives related to ethics breaches by individuals¹⁶⁰.

2.2WHAT ETHICS BODY FOR THE EUROPEAN UNION? AN IDEAL OVERSIGHT SYSTEM

This comparative analysis suggests that some of the flaws previously identified in the current EU ethics framework could potentially be addressed through the creation of a single EU ethics body. This ideal EU ethics body would be common to as many EU institutions, agencies and bodies as possible and cover both members and staff. Unlike any of the existing EU ethics committees, this newly established EU ethics body should be, first of all, independent and, second, competent to advice, monitor, investigate, and sanction any unethical behaviour committed during and after the term of office or service. Table VI compares the previously examined national ethics bodies with those existing in the EU.

¹⁵⁶ Art. 41.1 and 41.4, PCA.

¹⁵⁷ Art. 21(1)(f), CICMHC.

¹⁵⁸ Art. 17, CICMHC.

¹⁵⁹ Art. 28(1, 2 and 6), CICMHC.

¹⁶⁰ Committee on Standards in Public Life, "About us", see : < <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about> > (last access 31 October 2020)

Table VI – Ethics bodies in selected countries compared with the EU ethics bodies

	FRANCE HATVP	IRELAND PSSC (as envisaged to replace SIPO)	UNITED KINGDOM CSPL	CANADA CIEC	EU		
					STAFF AA/DB	EP Advisory Com.	EC IEC
Scope: members + staff ?	YES	YES	YES	YES	NO	NO	NO
Independence	YES	YES	Central role of PM	Central role of HoC	YES	Central role of President	
Monitoring role	YES	YES	YES*	YES	YES	NO	NO
Right of initiative (on individual cases)	YES	YES	NO	YES	YES	NO	NO
Advisory role	YES	YES	YES*	YES	YES	YES	YES
Investigatory powers (on individual cases)	YES	YES	NO*	YES	YES	Hear the Member	Hear the Member + ask for info.
Sanctioning powers (on individual cases)	Formal notices/Orders (possibly public) to comply Public registry Public (special) reports Referral of matters of criminal offence to judiciary	Confidential advice or general guidance (Fixed payment) notice Prosecute offences summarily or refer to DPP Censure, warning, order and/or recommendation for a suspension or removal from office	Public recommendations, reports, reviews, blogs and articles but of non-individual nature	Compliance orders (incl. divestment or recusal) Notice with public adm. monetary penalties Public registry (Post-employment) Waiver or reduction of limitations, order	Written warning Reprimand Relieve from responsibility Deferment of advancement, relegation, downgrading, suspension, transfer	Recommendations to the President Public annual <i>anonymised</i> reports	Public opinions to the EC Public annual <i>anonymised</i> reports
	(imprisonment + fine) (Post-employment) Prohibition or imposition of binding employment conditions in case of conflict with former position	Disqualify from any new appointment (if failure to be tax compliant)	*No remit to comment, monitor, give advice nor investigate on individual cases.	not to deal with a former public office holder (MPs) Recommend sanctions publicly, terminate a trust	Removal from office Financial sanctions/damages		
Budget (2020)	7,294,355 €	N/A	£ 348,424	C\$ 8,020,000 (actual spending)	N/A	N/A	Reimb. of expenses
Staff (2020)	57 FTP	N/A	5 FTP + 1 Press	50 employees	N/A	Secretariat support	

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Here’s a brief overview of the **main features** an **ideal EU ethics body** may present.

In terms of **scope** and **mandate**, an ideal EU ethics body would be in charge to monitor and sanction the respect of existing ethics standards, namely the respect of the ethical conduct of members and staff. In addition, the body could also be given authority over the public register of lobbyists and may monitor and enforce the compliance by lobbyists and lobbied – be they Commissioners, MEPs, their assistants and staff– with lobbying rules. Should additional formal obligations be imposed on EU institutions members and staff when it comes to their relations with organized interests, the respect of those rules could also be entrusted to the EU ethics body. Moreover, it might also provide advice, possibly separated by a firewall from monitoring and sanctions.

To ensure its independence, **its members** would no longer be exclusively appointed by the same institution¹⁶¹ but rather be selected by a variety of institutional actors and from different backgrounds. Some members may sit *de jure* in the committee due to their past functions. Examples include the former Presidents (or vice-presidents) of the European Court of Justice and of the Court of Auditors, as well as the former European Ombudsman¹⁶².

When it comes to its prerogatives, an ideal ethics body would be entrusted with an autonomous **monitoring** capacity – through inter alia a standardised scrutiny of the veracity of the declarations of financial interests as well as an EU harmonised staff whistleblower policy –, a right of **initiative** and enhanced **investigatory** powers as well as **advisory authority**. The exercise of these prerogatives presupposes a significant increase in budget and personnel currently allocated to the various EU ethics frameworks and bodies¹⁶³ (see Table VI).

The **sanctions** for an infringement of ethics standards are currently foreseen in the Treaties, Rules of procedure, Codes of conduct and Staff Regulations¹⁶⁴, but little applied¹⁶⁵. Therefore, an ideal EU ethics body should be entrusted with the authority to adopt these penalties – and potentially others than those already foreseen – within the limits imposed by the Charter of Fundamental Rights and the Treaties. Thus, as illustrated by the HATVP, the publication of an ethics body's recommendation does not per se infringe the freedom of mandate of members. In the *Dennekamp* case, following the request for access to documents to identify those MEPs that benefited from an additional pension scheme in order to identify possible conflicts of interests, the General Court of the EU rejected the EP's argument that publication of the names of the MEPs would undermine the independence of their mandate:

“No proper evidence is adduced in support of such assertions, whereas the limited nature of the information disclosed by the transfer of data at issue must be emphasised, and there is nothing to explain how the independence of an MEP's mandate would be damaged if the public knew of his membership of the additional pension scheme. The same applies in respect of the argument concerning the fact that MEPs might attract criticism from the public in relation to an alleged conflict of interest”¹⁶⁶

¹⁶¹ Art. 12(4) Code of Conduct for Members of the Commission; Art. 7(2) Code of Conduct for the members of the EU Parliament.

¹⁶² Former EU officials would be eligible to join as members of the EU Ethics Body only insofar as they are retired officials, and exercise no other functions. Thus, for instance, some former Secretary Generals of the EU Commission continue working for the EU administration in different functions. The same is true for former Presidents of the EU institutions who exercise other activities that might potentially be in conflict with those they would be called to exercise when joining the EU Ethics Body.

¹⁶³ See Table VI.

¹⁶⁴ See Table III.

¹⁶⁵ See Tables IV and V.

¹⁶⁶ Judgment of the General Court of 15 July 2015, *Dennekamp v Parliament*, T-115/13, EU:T:2015:497.

The decisions of the body should be **legally binding** for the recipient member, staff and institution. As such, they would be legally reviewable before the Court of Justice of the EU. Moreover, the body's activities would be subject to possible complaints to the EU Ombudsman, who can make non-binding decisions in case of maladministration. The body like any other body would not be legally mandated to follow the Ombudsman's recommendations.

In addition, such an ideal ethics body should be entrusted with **advisory** authority so as to be able to provide advice both *in abstracto* and *concreto*. This would enable anyone, be it a staff or a member – to ask for advice on the interpretation of an ethical standard in relation to a given conduct.

The next and last section examines the legal feasibility of setting up such an ideal ethics body under EU law.

SECTION 3 – HOW CAN THE EU SET UP SUCH AN ETHICS BODY?

This section aims at verifying the **legal feasibility** under EU law **of a single, independent, permanent EU ethics body common to all EU institutions**, the mandate of which encompasses both their members – be they appointed or elected –, and career staff, and whose investigatory and sanctioning powers correspond to those of the ideal model previously identified. It does so by identifying the necessary legal basis and legal instrument required to set this body up, and discussing the major legal issues that this new EU independent body may raise. Based on a thorough analysis, this study formulates some recommendations on how to set up this new EU ethics body and sketches some of its possible main features, ranging from its mandate to its investigatory and sanctioning powers.

The analysis suggests that the EU ethics body, as currently envisaged by the EU Commission¹⁶⁷ may be established – at least theoretically – either through:

- 1) the beefing up of one the **pre-existing EU institutions or bodies**;
or
- 2) the creation of a novel **independent entity**.

Both avenues are explored below, whereby the advantages and disadvantages of both options are identified in light of the ambitions of the envisaged new ethics enforcement system.

¹⁶⁷ President von der Leyen's mission letter to Věra Jourová, p. 5 ("I want you to work together with the European Parliament and the Council on an independent ethics body common to all EU institutions"). Available at https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-jourova-2019-2024_en.pdf

3.1 A EU ethics oversight function entrusted to one of the pre-existing bodies

To understand whether pre-existing EU institutions, agencies or bodies may be invested with an additional role of EU ethics body, this section examines the specific institutional context and constraints surrounding each of them. It then discusses some of the arguments calling for the ethics body to be set up autonomously.

3.1.1 European Ombudsman

The EU Ombudsman is tasked to uncover maladministration in the activities of the Union institutions and bodies¹⁶⁸. Under its actual mandate¹⁶⁹, the Ombudsman already oversees how the EU institutions enforce the respect of ethics standards and principles on both their members – elected or appointed – and career staff insofar as this may qualify as maladministration. Its role in relation to the enforcement of those standards is therefore indirect. Through its work, the Ombudsman contributes to clarify how those standards must be interpreted and apply by other EU institutions to avoid instances of maladministration.

While the Ombudsman might – as a matter of principle – have a direct role to play in ensuring compliance with EU ethics rules, it cannot operate any other functions than those foreseen in its foundational Statute¹⁷⁰. While it could appoint an advisory committee to exercise such as an additional task, the Ombudsman cannot take its orders¹⁷¹. For this a revision of the Statute would be required.

What is more, the Ombudsman decisions are not legally binding, but merely advisory in nature, which would render this institution unfit for purpose.

Moreover, the modalities of selection of the Ombudsman – through election by the European Parliament – render this institution unfit to play such an additional role.

¹⁶⁸ Art. 228 TFEU.

¹⁶⁹ Art. 2 of the Statute: “Within the framework of the aforementioned Treaties and the conditions laid down therein, the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role, and make recommendations with a view to putting an end to it. No action by any other authority or person may be the subject of a complaint to the Ombudsman”.

¹⁷⁰ *Ibidem* (“No action by any other authority or person may be the subject of a complaint to the Ombudsman”).

¹⁷¹ Art. 9(1) of the Statute: “The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he shall neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties”.

Ultimately, should the Ombudsman be invested with the authority to directly take decisions on ethics, it would remain open to the Ombudsman itself to define what ethics standards are, and what relation they would entertain with maladministration review. This may inevitably raise issues with the delegation doctrine, as no well-identified legal basis exists for the exercise of such an extra power.

The sum of these circumstances makes the Ombudsman not the most apt body to whom to entrust this additional task.

3.1.2 OLAF

The EU Anti-Fraud Office investigates fraud against the EU budget, corruption and serious misconduct within the European institutions, and develops anti-fraud policy for the European Commission¹⁷². It finds its legal basis in the EU Treaties¹⁷³. It has no direct decision-power and relies on Member States' cooperation to discharge its mission. Under its current mission, OLAF is about countering fraud, not unethical behavior per se.

However, its Director can launch internal administrative investigations into serious offences against ethical standards, such as the duty of integrity and discretion (e.g. Commissioner Dalli case), by both Staff members and of members of the institutions¹⁷⁴, whenever "there is a sufficient suspicion"¹⁷⁵.

A possible arrangement to attribute to OLAF some further competences in the area of ethical conduct would entail a new coordination between OLAF and the existing dedicated ethics oversight regimes. Yet this would require a new founding regulation, or at least its amendment. This does not seem a viable option and would not turn OLAF into a full functioning independent, permanent ethics body with autonomous decision power.

¹⁷² Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999, establishing the European Anti-fraud Office (OLAF), OJ L 136, 31.5.1999, p. 20–22.

¹⁷³ Articles 162 TEC; 325 TFEU.

¹⁷⁴ Art. 2(1) let. b of OLAF decision: "The Office shall be responsible for carrying out internal administrative investigations intended: (...) (b) *to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities*".

¹⁷⁵ Article 5 of the Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1–22.

Moreover, following the establishment of the European Public Prosecutors' Office (EPPO)¹⁷⁶, the OLAF Regulation was amended and is expected to enter into force before the EPPO starts work at the end of 2020¹⁷⁷. While both bodies are entrusted with the mandate to protect the financial interests of the Union, they must do so in their respective remit. EPPO has drastically reduced the scope of action of OLAF, whose action remains supportive and therefore complementary to the former¹⁷⁸.

3.1.3 European Court of Auditors

The European Court of Auditors (ECA) audits the EU's finances. The starting point for its audit work is the EU's budget and policies, primarily in areas relating to growth and jobs, added value, public finances, the environment and climate action¹⁷⁹. The ECA audits the budget in terms of both revenue and spending.

As one of the few EU oversight bodies, the ECA seems *prima facie* to lend itself to play the role of EU ethics body. However, the ECA in its current settings is about audits and not ethics. Under both the Treaty and its Statute, it cannot operate any other functions than those foreseen in its foundational legal framework. In addition, its members and staff are equally subject to ethics duties, what would lead to create an inherent conflict of interest and therefore the need to create an additional lawyer of oversight within the ECA.

Preliminary findings

In addition to this context specific analysis for each of these existing EU institution and bodies, there are arguments that disfavor, as a matter of principle, the attribution of an additional role of EU ethics body to one of the pre-existing EU institution or body.

To 'reprogram' an existing structure to take on a wholly new additional task and perform that task properly would be a Herculean task, possibly as cumbersome – if not more – than to set it

¹⁷⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ L 283*, 31.10.2017, p. 1–71.

¹⁷⁷ Commission Staff Working Document Assessment Accompanying the document Proposal for a Regulation amending Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, SWD/2018/251 final.

¹⁷⁸ Article 101(3) of the EPPO Regulation.

¹⁷⁹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 PE/13/2018/REV/1, *OJ L 193*, 30.7.2018, p. 1–222.

up from scratch. Also from a purely legislative perspective, the attribution of additional competences to a pre-existing body would entail the preparation, adoption and revision of an existing foundational regulation as well as the adaptation of – and ensuing sync with – the existing EU ethics system.

Ultimately, given the ambitions pursued by this initiative, the best possible manner to ensure the independence of an ethics body entails the setting up of an autonomous, self-standing body, which would also be more recognizable to the citizens.

3.2 A EU ethics body common to all EU institutions

There are three major legal bases that may enable the EU to establish a new, independent and centralised EU ethics oversight body as briefly idealised above. Which of these three is ultimately used must, in line with established case law of the Court, be determined by objective factors which are amenable to judicial review, including in particular the aim and the content of the measure.¹⁸⁰ Each of these legal bases presents some advantages and disadvantages in relation to the envisaged model for the setting-up of such a body.

3.2.1 Article 298 TFEU: EU Public Administration

The first legal option for the setting up of an independent EU ethics system is Art. 298 TFEU. This provision has never been used since its introduction into the Lisbon Treaty.¹⁸¹ It states that '[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration'. Paragraph 2 goes on by mandating that '[i]n compliance with the Staff Regulations and Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end'. Against this background, the objectives of a possible EU ethics body seem to include (increased) openness, efficiency and independence.

While this provision seems to offer a promising legal basis for the establishment of a new EU body in charge of administering and overseeing the respect of the ethics standards applicable to staff, it seems more questionable when applied to the members of the Commission, MEPs and the Council's members, as well as to the latter's various committees and working groups made

¹⁸⁰ Judgment of the Court (Grand Chamber) of 8 September 2009, *Commission v. Parliament & Council*, C-411/06, EU:C:2009:518, para. 45.

¹⁸¹ However, the European Parliament has requested the European Commission to propose a European Administrative Procedure Act based on Art. 298 TFEU. See European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration, OJ 2018 C 86/126.

of national representatives. The crux of the issue here is how the reference in Article 298 TFEU to the 'European administration' is to be understood. In any event, MEPs cannot be brought under the notion of administration. However, national civil servants could be said to form part of a *European* administration which evidently also encompasses the *EU* administration.¹⁸² The Court has effectively already accepted such a reasoning on EU judiciary in relation to national judges who, in so far as they may rule on the application and interpretation of EU law, have to comply with the guarantee of judicial independence since the latter "is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice [...] but also at the level of the Member States as regards national courts."¹⁸³ Conversely then, also national civil servants, in so far as they prepare, implement or apply EU law, should comply with the principles of good administration.

While such an argument could indeed be made in light of the EU's executive federalism,¹⁸⁴ the European Parliament's Working Group on EU Administrative Law has found that "[t]he balance of academic opinion is quite clear that [Art. 298 TFEU] only provides a legal basis for action in the field of **direct Union administration**, as opposed to administration of Union law by the Member States."¹⁸⁵ If the European administration is approached from an organizational perspective, rather than a functional and/or procedural perspective,¹⁸⁶ one can indeed neatly distinguish the EU administration from the national administrations and restrict the scope of the regulations adopted pursuant to Art. 298(2) TFEU to the European administration *sensu stricto*.

This suggests that Art. 298 cannot validly offer an adequate legal basis to set up the envisaged EU ethics body, covering both staff and members.

3.2.2 Article 352 TFEU: flexibility clause

¹⁸² Indeed, according to Schmidt-Aßmann, the European administration is composed of a multitude of national and community administrations with mutual interrelations. See Eberhard Schmidt-Aßmann, 'Principes de base d'une réforme du droit administratif (parties 2 et 3)', (2008) 24 *RFDA* 4, p. 667.

¹⁸³ Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, para.42.

¹⁸⁴ Thus Duijkersloot and Widdershoven argue that Art. 298 TFEU could be used to adopt rules applicable to national civil servants. See Antonius Duijkersloot & Rob Widdershoven, 'Kroniek Europees bestuursrecht', (2003) *Nederlands Tijdschrift voor Bestuursrecht* 10, p.351.

¹⁸⁵ Working Group on EU Administrative Law, 'State of Play and Future Prospects for EU Administrative Law', (2011) *Working Document to be submitted to the Committee on Legal Affairs*, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/juri_wdadministrativelaw_/juri_wdadministrativelaw_en.pdf, Last Accessed: 8 January 2020, p. 8. Also Schwarze endorsed the views of the working group, providing further arguments. See Jürgen Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon', (2012) 18 *EPL* 2, pp. 302-303.

¹⁸⁶ On these different ways of viewing the EU administration, see Herwig Hofmann, Gerard Rowe And Alexander Türk, *Administrative law and policy of the European Union*, Oxford: Oxford University Press, 2011, p. 4.

An alternative legal basis may be offered by Art. 352 TFEU. This provision, generally referred to as the 'flexibility clause', allows the EU to act in areas where EU competences have not been explicitly granted in the Treaties but are necessary for the attainment of the objectives set out in the Treaty. It thus represents a mean of adapting to new challenges, but it is subject to two clear conditions namely that (i) there must be an objective that Treaties aim to attain and that (ii) this legislative act is not to refer to the Common Foreign and Security Policy (CFSP). In addition, the Court has clarified that Art. 352 TFEU may be used as the legal basis for a measure only where no other provision of the Treaty gives the institutions the necessary power to adopt it.¹⁸⁷ In light of the objectives pursued by the envisaged measure, there exist – as shown above – more specific legal bases which would preclude recourse to Art. 352 TFEU.

Also at a practical level, recourse to the flexibility clause would be problematic. It was originally included by the authors of the Treaties in recognition of the fact that it would be impossible to provide for all contingencies that may arise throughout the integration process. It requires unanimity in the Council and, since the Lisbon Treaty, also the consent of the European Parliament. The requirement for a unanimous vote means that only a very minimal level of harmonisation could likely be achieved. The Commission is obliged to draw the attention of national Parliaments to the use of this legal basis. The ex-ante review procedure for subsidiarity applies to all legislative proposals. In the light of the above, Art. 352 TFEU does not easily lend itself to be used in the present circumstances.

3.2.3. Article 295 TFEU: Inter-institutional Agreement (IIA) and joint decision setting up an EU Inter-institutional Body (IIB)

In terms of its envisaged content and objectives, the most straightforward way to adopt the necessary measures to establish an EU ethics body is to rely on an interinstitutional agreement (IIA). IIAs are notably foreseen in Art. 295 TFEU, which allows the Parliament, Council and Commission to conclude binding agreements between themselves, to organise their cooperation.¹⁸⁸ IIAs thus provide a framework for coordination among EU institutions,¹⁸⁹ and can be legally binding as (concerted) measures of self-organisation.

¹⁸⁷ Judgment of the Court (Grand Chamber) of 2 May 2006, *Parliament v. Council*, C-436/03, ECLI:EU:C:2006:277, para. 36.

¹⁸⁸ Art. 295 TFEU: "The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."

¹⁸⁹ See the opinion of Advocate General Wathelet delivered on 17 March 2015 in the case *European Commission v Council of the European Union*, C-425/13, EU:C:2015:174, para. 82-90.

While it is contested in how far IIAs concluded between two (or more) institutions may impose obligations on – or have repercussions – for other institutions,¹⁹⁰ it can be safely assumed that all institutions agree to the EU ethics body's scrutiny either by being party to the IIA or by unilaterally subscribing to it, even at later stage.

In any event, **the proposed IIA**, by giving meaning to the existing ethics standards scattered across primary law and other sources such as Statutes, Rules of procedure and Codes of conduct of the institutions, will **not compromise the substantive rights and obligations** provided by the latter. Rather the proposed IIA would concretize and make enforceable these obligations for which the EU institutions must already take all adequate measures to make them a reality in the EU decision-making process. As a result, the envisaged IIA might be said to belong to the category of **IIAs derived from Treaty provisions**. Therefore, in addition to its self-binding component, the IIA would have to be regarded as a legal act derived from the Treaties and therefore enjoy a specific legal status¹⁹¹. They are not part of primary law, nor of secondary law, but are somewhere in between, as they come to complement primary law. The IIAs indeed complement, where necessary, the provisions of the Treaty by giving full meaning to them.

The IIA could – as a matter of principle – also set up the organizational framework, including the structure of the body, so as to ensure these ethical standards are effectively upheld. By way of a voluntary, concerted agreement, each institution could delegate the exercise of its own administrative competence to a new independent entity – by relying on its own procedural autonomy – in order to ensure the respect and enforcement of the ethics standards applicable to its members and staff¹⁹².

There are however limits to which powers the institutions can confer on this new body. Indeed, when establishing such an ethics committee through an IIA:

1. the **EU institutions can only bind themselves** and therefore cannot impose duties of cooperation on member states' authorities. As such, they cannot create further obligations beyond non-EU bodies, such as national authorities who would then be asked to cooperate by sharing information. Rather, any cooperation between the new body and

¹⁹⁰ Bart Driessen, 'Interinstitutional conventions and institutional balance', (2008) 33 *European Law Review* 4, p. 553. See also the very critical opinion of the Council Legal Service on the 2010 Framework Agreement between the Commission and the Parliament, Council of the European Union, 15018/10, Brussels, 18 October 2010. As for the case law, Advocate General Sharpston recalled: "[w]hether the Interinstitutional Agreement at issue here is binding is to be determined by consideration of the wording and the context of that agreement" (Opinion delivered on 11 April 2019 in the case *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:321, para. 93).

¹⁹¹ Jörg Monar, 'Interinstitutional Agreements: the Phenomenon and its New Dynamics after Maastricht', *CMLRev* 1994, 693-719, p. 697.

¹⁹² Communication from the Commission - A new type of office for managing support and administrative tasks at the European Commission /* COM/2002/0264 final */.

national authorities to ensure the enforcement of EU ethical standards would require the adoption of one of the Union legal acts mentioned in Art. 288 TFEU and therefore the choice of a different legal basis (such as those discussed above). The IIA may however expressly foresee:

- a) the possibility of **voluntary working arrangements** between national authorities (as well as their ethics bodies) and the EU ethics body¹⁹³;
- b) the possibility that the EU legislator may confer **additional powers** to the ethics body to allow it to enjoy further prerogatives¹⁹⁴.

2. the **EU institutions must respect higher law**, such as Treaty provisions regarding ethics standards (wherever available), but not necessarily lower sources, such as EU Institutions' Rules of Procedure, or Codes of conduct¹⁹⁵. The rationale being is that EU institutions cannot by way of IIA amend binding legislation. The first implication of this is that, should the EU ethics body be entrusted a competence also in relation to the EU staff – and not only members appointed or elected –, the IIA and any arrangements adopted pursuant to it must be in conformity with the **Staff Regulations**.¹⁹⁶ This being said, the Staff Regulations do leave sufficient flexibility for the institutions to cooperate to uphold a high ethical standard. Two provisions seem of critical importance in this regard: **Article 9(1a)** provides that “[f]or the application of certain provisions of these Staff Regulations, a common Joint Committee may be established for two or more institutions.” Moreover, under the Staff Regulations, the Appointing Authority cannot take certain decisions – notably those on certain conflicts of interests (Art. 13 and 16) – without consulting with the Joint Committee. An IIA could thus set up a Joint Committee common to the institutions and premised on a high standard of ethical integrity. Cumulatively, **Article 2(2)**

¹⁹³ Voluntary working arrangement are common practice for EU agencies.

¹⁹⁴ Thus, for instance, a reference to Article 352 TFEU could be envisaged.

¹⁹⁵ See e.g. the opinion of Advocate General Sharpston delivered on 18 September 2008 in the case *Glencore Grain Rotterdam*, C-391/07, EU:C:2008:514, para. 74-76. Called upon to analyse regulations, Advocate General Sharpston emphasizes the hierarchical relation between (certain) IIA and legislation by underlining that the legislation at stake does not fully respect the two first recitals (clear, simple and precise drafting of EU legislation in order to ensure legal certainty, in respect of the ECJ case-law) of an IIA (Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ 1999 C 73, p. 1.). See also: Opinion of Advocate General Sharpston delivered on 10 April 2008 in the case *Heinrich*, C-345/06, EU:C:2008:212, para. 65; Opinion of Advocate General Geelhoed delivered on 5 April 2005 in the case *Alliance for Natural Health and Others*, Joined cases C-154/04 and C-155/04, EU:C:2005:199, para. 68-72, 82 and 88.

¹⁹⁶ This follows from the general scheme of the Treaties and the nature and function of IIAs. In *Slovakia & Hungary v. Council*, the Court exceptionally accepted that a non-legislative act could effectively amend a legislative act but noted that the objectives pursued by the primary law provisions that are the legal bases of the acts in question are paramount. See Joined Cases C-643/15 and C-647/15, *Slovakia & Hungary v. Council*, ECLI:EU:C:2017:631, para. 73. In light of the objectives pursued by Article 295 TFEU, the institutions' arrangements for cooperation could not amount to derogations from the Staff Regulations.

of the Staff Regulations also allows the institutions to “entrust to any one of them or to an inter-institutional body the exercise of some or all of the powers conferred on the Appointing Authority other than decisions relating to appointments, promotions or transfers of officials.” This is the legal basis for the creation of EPSO and it could equally be **the enabling clause** for an IIA setting up or foreseeing the establishment of a EU ethics body competent on staff matters. Under the Staff Regulations, it would therefore be possible to set up an EU ethics body with the power to decide on inter alia conflict of interests of staff and to annex to such an EU ethics body a common Joint Committee that is specifically set up with the aim of upholding a high standard of ethical integrity.

3. the EU institutions should, in line with the *Meroni* doctrine,¹⁹⁷ indicate **the ethics standards and conduct whose enforcement is delegated to the ethics body**. The conferral of powers to the ethics body cannot allow it to define, amend, complete or harmonise the relevant ethical standards by itself, as those are foreseen by inter alia the Treaty, Statutes, Rules of Procedure, Codes of Conduct and the Staff Regulations. However, by enforcing these standards, the body would establish **some common approaches to concretize the application of already existing obligations**. In other words, while the current fragmentation of standards would not be overcome, their fragmented enforcement will. To ensure compliance with the *Meroni* doctrine when the body adopts sanctions, the institutions could pre-define the possible infringements and the factors to be taken into account when determining the sanction.¹⁹⁸
4. the EU institutions are **not limited** – in their delegation of powers to a new EU ethics body – **to the competences they already exercise**. Rather they are entitled to foresee and entrust new competences to such a new body, including investigatory as well as sanctioning powers, as compared – but not limited – to the ones currently enjoyed by existing EU ethics bodies. The only caveat to such a possibility resides in the EU institutions themselves already enjoying, yet not necessarily exercising, such powers¹⁹⁹. While investigatory powers are inherent to the procedural autonomy of each EU institution – yet must be exercised within the limits established by the Charter of Fundamental Rights (Art. 52) – sanctioning powers are not. Therefore, a legislative act is

¹⁹⁷ See Judgment of the Court of 13 June 1958, *Meroni v. High Authority*, 9/56, EU:C:1958:7. The *Meroni* doctrine has been reinterpreted by the Court in *Short selling*, see Judgment of the Court (Grand Chamber) of 22 January 2014, *UK v. Parliament & Council*, C-270/12, EU:C:2014:18.

¹⁹⁸ See by analogy Annexes III and IV to the Credit Rating Agencies Regulation which circumscribe the sanctioning powers of the European Securities and Markets Authority. See Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, *OJ* 2009 L 302/1.

¹⁹⁹ This means that an IIA may enable – as a matter of principle – the European Parliament to delegate the enforcement of ethics standards to an oversight system that might not entail the sole participation of MEPs. This is true insofar as the EP already enjoys such a competence, despite not having exercised it.

needed to grant the body the necessary competence to autonomously sanction. However, such a sanctioning power would have to be exercised within the limits established by the Treaty, which entrusts, for instance, to the sole Commission the possibility to go to Court against one of its (former) members or to its President to dismiss a Commissioner²⁰⁰. This suggests that while some sanctioning powers could be delegated from the EU institutions to the ethics body – notably in relation to reputational, temporary and financial sanctions²⁰¹ –, this will still not be able to pursue irreversible sanctions. For the latter, the Treaty foresees, to take again the example of the Commission, that the sole President of the Commission can act in case of individual dismissal²⁰², or, the Commission go before the EU Court of Justice, when the sanction sought is compulsory retirement²⁰³ or removal from the post²⁰⁴. When it comes to the Parliament, irreversible sanctions are foreseen not in the Treaties themselves, but in the Rules of Procedure, which entrusts the enforcement of these sanctions to the Conference of Presidents²⁰⁵, and ultimately the Parliament itself²⁰⁶.

The IIA, in combination with a joint decision, could set up an EU Inter-institutional Body (IIB)

An IIA concluded between two, or more EU institutions²⁰⁷ can set out the **basic arrangements** for their cooperation to ensure that the ethical regime applicable to the respective EU institution, members and staff, is upheld. Such an IIA could then contain a clause allowing two or more institutions, offices, bodies and agencies of the EU to entrust the monitoring of the respect for the ethical standards to an interinstitutional body (IIB), similarly to the Staff Regulations allowing the EU institutions to outsource tasks to the EPSO.²⁰⁸ Other interinstitutional bodies where a

²⁰⁰ Article 245 and Article 247 TFEU.

²⁰¹ With the exception of loss of the pension right for Commissioners, for which Article 245 TFEU expects the Court, upon the request of the Council of the Commission, to decide.

²⁰² Article 17(6) TEU.

²⁰³ Article 247 TFEU.

²⁰⁴ Article 245 TFEU.

²⁰⁵ Rule 176(6) Rules of Procedure EP (early termination of an office).

²⁰⁶ Rule 21 Rules of Procedure EP (early termination of an office).

²⁰⁷ While Art. 295 only refers to the European Parliament, the Council, and Commission, the general principle of sincere cooperation between all institutions suggests that an IIA could be concluded with institutions not expressly mentioned in Art. 295 TFEU. For a precedent, see 2000 Proposal for an Agreement between the European Parliament, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions establishing an Advisory Group on Standards in Public Life - SEC(2000) 2077 final, Brussels 29.1.2000.

²⁰⁸ See Art. 2(2) of the Staff Regulations (“However, one or more institutions may entrust to any one of them or to an inter-institutional body the exercise of some or all of the powers conferred on the Appointing Authority other than decisions relating to appointments, promotions or transfers of officials”). This provision was originally introduced in the Staff Regulations through Council Regulation No 3947/92, OJ L 404/1.

similar method has been used are the Publications Office of the EU²⁰⁹, the European Administrative School²¹⁰, and the Computer Emergency Response Team (CERT). Interinstitutional bodies are typically entities which do not form an integral part of any of the institutions and which are designed to carry out tasks common to the institutions. One of oft-cited advantages of these bodies is that they ensure a coherent practice throughout the institutions, which would especially be relevant for an interinstitutional ethics body, without affecting their institutional autonomy.²¹¹

The actual setting up of an interinstitutional body would be then realized through an **arrangement** (like it is the case, for instance, for the Computer emergency response team for the Union's institutions, bodies and agencies, CERT-EU) among the relevant institutions²¹². Another option being the adoption of a **joint decision** by the institutions involved (like it is the case for, e.g., the European Administrative School, the Publications Office of the European Union²¹³ and the EPSO)²¹⁴. When it comes to the decisional authority of the IIB, each EU institution would

²⁰⁹ 69/13/Euratom/ECSC/EEC: Decision of 16 January 1969 setting up the Office for Official Publications of the European Communities, OJ L 13/19, as amended by Decision 80/443/EEC, Euratom, ECSC: Decision of 7 February 1980 amending the Decision of 16 January 1969 establishing the Office for Official Publications of the European Communities, OJ L 107, 25/04/1980, p. 44–46. See also 2000/459/EC, ECSC, Euratom: Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities, OJ L 183, 22.7.2000, p. 12–15, as replaced by 2009/496/EC, Euratom: Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union, OJ L 168, 30.6.2009, p. 41–47.

²¹⁰ See 2005/118/EC: Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the Ombudsman of 26 January 2005 setting up a European Administrative School (OJ L 37, 10.2.2005, p. 14–16) aimed at providing professional training to the staff of the signatory institutions (i.e. the European Parliament, the Council, the European Commission, the Court of Justice of the European Union, the European Court of Auditors, the European Economic and Social Committee, the European Committee of the Regions and the European Ombudsman) and 2005/119/EC: Decision of the Secretaries-General of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions and the Representative of the European Ombudsman of 26 January 2005 on the organisation and running of the European Administrative School, OJ L 37, 10.2.2005, p. 17–20.

²¹¹ See European Commission, Communication on a new type of Offices for managing support and administrative tasks at the European Commission, COM (2002) 264 final, p. 6.

²¹² See, e.g., Arrangement between the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, the European Court of Auditors, the European External Action Service, the European Economic and Social Committee, the European Committee of the Regions and the European Investment Bank on the organisation and operation of a computer emergency response team for the Union's institutions, bodies and agencies (CERT-EU), OJ C 12, 13.1.2018, p. 1–11.

²¹³ Decision 2009/496 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union, OJ L 168, 30.6.2009, p. 41–47.

²¹⁴ See Decision 2009/496, *op.cit.*; Decision 2005/118 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions

commit – in the same arrangement or joint decision – to replace its pre-existing dedicated body – when in existence – with the new one, and define the modalities for transition from the old to the new regime.

To proceed this way in ensuring an ethical EU administration appears as the legally most appropriate option and practically also one of the most promising ones. This since the institutions and bodies mentioned in Art. 13 TEU would come under the purview of the ethics committee on a voluntary basis and their institutional autonomy – and institutional balance – would therefore not be breached. Moreover, this delegation and institutional set up would enable other EU bodies, such as the EU agencies, to subject themselves to the ethics committee’s scrutiny on a voluntary basis. In any event, failing to do so, the EU legislature would have the competence to bring these bodies under the mandate of the ethics committee, but only through legislation²¹⁵.

3.2.4 How a IIA-powered EU ethics body may ultimately look like

The previous analysis shows that no legal basis is per se conducive to the creation of an ethics body capable of matching all the features previously envisioned within our ideal model. Thus, while Article 298 TFEU (EU Public Administration) could enable the creation of an independent, centralised and permanent ethics body with significant investigatory and sanctioning powers, this would not cover the members but only the staff. It would also require being adopted via the legislative process. When it comes to Article 352 TFEU (Flexibility Clause), this would entail to not only going through the legislative process but also obtaining the unanimity of EU member states. Therefore, when measured against these difficulties, an Article 295 TFEU IIA-powered ethics body appears not only the most legally correct but also the most practical and suitable way to establish an EU ethics body capable of addressing some of today’s shortcomings. However, as our previous analysis shows, such a legal basis falls short of establishing the previously identified ideal ethics body with analogous prerogatives. It is in the light of the above that this section sums up in greater detail how an IIA-based ethics body would ultimately look like and what features it may have.

Scope & mandate

In terms of **scope** and **mandate**, an IIA could pool into one single, permanent oversight body the task of ensuring the respect of ethics standards and obligations, and do so both for members and

and the Ombudsman setting up a European Administrative School, OJ 2005 L 37/14; Decision 2002/620 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman establishing a European Communities Personnel Selection Office, OJ 2002 L 197/53.

²¹⁵ This would however require the adoption of a legislative act based on an autonomous legal basis, as to amend the foundational legislative act of each agency.

staff. When it comes to the staff, the body would not entirely replace the present staff disciplinary procedure. Its competence would rather be limited to the monitoring and enforcement of the sole ethical obligations, notably those revolving around conflicts of interests²¹⁶, imposed on staff. The body would therefore not be in charge of ensuring the respect of other professional obligations, such as the prohibition of sexual and psychological harassment, the duty of residence or the rules governing the running for political office. The latter would remain on the present disciplinary system, and that despite the fact these professional obligations are equally subject to the disciplinary proceedings of Annex IX of the Staff Regulation. This split of the staff disciplinary system into two separate procedures appears in line with the principle of good administration as it contributes to harmonise – as recently requested by the Council – the EU ethics regime. However, to make this happen, the IIA will need to rely on an enabling clause foreseen in the Staff Regulations – be it Article 9(1)a or Article 2(2) – to entrust the ethics body the power to cover the respect of ethical obligations, such as the conflict of interests²¹⁷, while leaving the respect of non-ethical obligations, such as political office, residence and freedom of expression, to the present system.

Composition

When it comes to its **composition**, the IIA might also clarify the modalities of appointment of the body's members, who could be selected by a variety of institutional actors and from different backgrounds, as discussed above.

Enforcement

When it comes to the body's enforcement prerogatives, the body could be entrusted by the IIA with:

- an autonomous **monitoring** capacity, through inter alia a centralised collection – and standardised scrutiny – of the veracity of the declarations of financial interests;
- a right of **initiative** and **investigation** – in close cooperation with OLAF –; and, ultimately
- **sanctioning** powers, in relation to soft – as opposed to hard – sanctions for members.

When it comes to the body's enforcement prerogatives, an IIA could first legally entrust the body with **monitoring** capacity. To be able to monitor potential breaches of ethical standards and obligations, the body must be able to build upon both internal/external input as well as an

²¹⁶ Art. 11 and 11a of the EU Staff Regulations.

²¹⁷ See Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovakia & Hungary v. Council*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, para. 73.

autonomous and centralised collection system, notably one for the declarations of financial interests. For this, the IIA would first **pool together the existing monitoring capacity of the various EU ethics systems**. In particular, by coordinating the existing reporting systems, the body could offer a one stop-shop mechanism for both internal (EU officials) and external reports²¹⁸. Moreover, the body would also be collecting and making publicly available declarations of assets, income and other interests – as currently required both for members and staff – and performs in-depth checks for correctness and for possible conflicts of interest. This could be realised through the creation of a **EU public registry of all declarable information**, by staff and members, within the limits posed by the rules for data protection in the EU institutions²¹⁹. It's on the basis of all available information that the body would be empowered to undertake a standardised examination of declarations regarding possible conflicts of interests, by going beyond today's plausibility check.

Second, the IIA could also entrust the body with a right of **initiative**. The presidents of the Commission, of the Parliament as well as the Staff Appointing Authority²²⁰ enjoy such a right of initiative in relation to the verification of the ethical conduct of their members and staff respectively. Therefore, the IIA could legally foresee that such a right – being inherent to their procedural autonomy – be delegated to the body itself. Importantly, based on the example provided by HATVP, the IIA could envisage that third parties – including previously identified NGOs fighting against corruption – could inform the body of any misbehavior and prompt an assessment.

Third, the IIA can pool together existing **investigatory powers**, as they are presently enjoyed by the relevant institutions – from the ethics bodies overseeing members to the individual disciplinary boards for staff –, and entrust their exercise to the body itself. However, the IIA must regulate these administrative inquiries so as to ensure the protection of the fundamental rights of the persons concerned, as required by Article 52 CFR. While OLAF already satisfies that condition (when running its investigations for 'serious misconducts'), as well as does the Appointing Authority vis-à-vis the staff²²¹, the body's exercise of investigatory authority vis-à-vis both staff and members should also be subject to the guarantees currently foreseen in the Staff Regulations, as well as the Parliament's Rules of Procedure²²² and Commissioners' Code of

²¹⁸ In the absence of harmonised staff whistleblower protection, their input will however be limited.

²¹⁹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, PE/31/2018/REV/1, *OJ L 295*, 21.11.2018.

²²⁰ Article 86 of the Staff Regulations and Annex IX.

²²¹ Article 2(1) of ANNEX IX Disciplinary proceedings, Staff Regulations.

²²² Rule 174(2), Rules of Procedure of the EU Parliament, as well as Rule 21 and Art. 72 of the Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament, *op.cit.*.

Conduct. This is needed for the handling of that category of members' misconducts that, by failing to qualify as 'serious', escape OLAF's investigations. Moreover, the exercise of the body's investigatory authority must be coordinated with OLAF – which in turn is in the process of defining its own relationship with EPPO – and its prerogatives. To this end, the IIA must expressly confer to the body investigatory competence for every instance of alleged ethical misconduct that has not led OLAF to open an administrative enquiry.

Fourth, when it comes to **sanctioning powers**, the IIA can entrust the body with some, but not necessarily full, authority. For staff, the body would take over from the Appointing Authority – through an enabling clause in the Staff Regulations²²³ – and adopt any of the penalty foreseen for a breach of an ethical obligation. When it comes to members, the IIA can grant the body sanctioning authority in relation to 'soft' penalties, i.e. reputational, as well those affecting the position of the member within the institution, but not necessarily those that are of irreversible nature, such a termination. Thus, for instance, being the compulsory retirement of a Commissioner being foreseen by the Treaty, this penalty can only be requested by the President of the Commission or the Commission itself²²⁴. When it comes to the early termination or suspension of an office of an MEP²²⁵, the Rules of procedure entrust the power of initiative to the President – as well as the Conference of Presidents – and the actual sanctioning power to the Parliament itself. As such, the transfer of such a prerogative to the ethics body seems less automatic than that for soft penalties.

The decisions of the body being **legally binding** for the recipient member and staff, they must be legally reviewable before the Court of Justice of the EU. Moreover, the body's activities – like those of any other EU institutions – are subject to possible complaints to the EU Ombudsman, who can make non-binding decisions in case of maladministration. As previously noted, the body, like any other EU institution, agency or body, would not be legally required to follow the Ombudsman's recommendations.

Last but not least, the IIA can also confer on the ethics body **advisory** authority so as to be able to provide advice both in abstracto and concreto. This would enable anyone, be it a staff or a member – to ask for advice on the interpretation of an ethical standard in relation to a given conduct, by thus acting as preventive mechanism and fostering legal certainty predictability.

²²³ Be it Article 9(1)a or Article 2(2) of the Staff Regulations.

²²⁴ Articles 245 and 247 TFEU.

²²⁵ Rule 21, Rules of Procedure of the EU Parliament.

The conferral and exercise of these prerogatives to such a new ethics body presupposes a significant increase in budget and personnel currently allocated to the various EU ethics frameworks and bodies²²⁶.

Conclusion

This legal study concludes that there is a case for the creation of a **single, permanent, and independent EU ethics body** to be established to reduce the risk of unethical behaviour to a minimum. It demonstrates that it is **legally feasible** under EU law **to set up such a body** by pooling together existing monitoring, investigatory, sanctioning as well as advisory powers.

For this to occur, it recommends the conclusion of an inter-institutional agreement between the European Commission and Parliament, possibly the Council, and open to more EU institutions that could voluntarily join, aimed at entrusting – within the framework of their respective procedural autonomy – the respect of the existing ethical standards to an interinstitutional body. The agreement between the institutions involved would set out the **basic arrangements** for their cooperation and coordination to ensure that the ethical regime applicable to the respective EU institution, members and staff, is upheld.

Unlike any of the existing EU ethics bodies, the newly established body would be, first of all, independent, and, second, competent to ensure the enforcement of unethical behaviour committed by both appointed/elected members and staff.

While an IIA-powered ethics body cannot fully overcome the current fragmentation of EU ethics frameworks, it can – by pooling together their respective enforcement mechanisms – favour **common approaches** to concretise the application of the existing ethical obligations. By agreeing on a stronger mechanism to control the declaration of interests of the members and staff of the EU institutions and monitor their respect, this new system of enforcement of ethics requirements would be not only more effective than the current EU institutions' individual frameworks – through new additional powers –, but also more independent and permanent.

²²⁶ As highlighted in Table VI.