

HIDING A FOREST BEHIND THE TREES

**Transparency, integrity and accountability
at the European Commission**

This in-depth report is an update to the 2014 Transparency International EU study on the EU integrity system

Transparency International EU (TI EU) is a regional office of the global anti-corruption movement, Transparency International. Working closely with the International Secretariat in Berlin, Germany, TI EU leads the movement's EU-focused advocacy in close cooperation with over 100 national chapters worldwide, but particularly with the 23 chapters in EU Member States. TI EU's mission is to prevent and address corruption and promote integrity, transparency and accountability in EU institutions and in EU internal and external policies, programmes and legislation.

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LIST OF ABBREVIATIONS

ATD	Access to Documents
CoC	Code of Conduct
CoI	Conflict of Interest
CJEU	Court of Justice of the European Union
DDG	Deputy Director General
DG	Directorate-General or Director-General
EASE	Electronic AccesS to European Commission Documents
ECA	European Court of Auditors
EP	European Parliament
EPPO	European Public Prosecutor's Office
EPSO	European Personnel Selection Office
EU	European Union
EVP	Executive Vice President
HoC	Head of Cabinet
HoU	Head of Unit
IIA	Interinstitutional Agreement
IDOC	Internal Disciplinary Office of the Commission
JURI	European Parliament Committee on Legal Affairs
MEP	Member of the European Parliament
NGO	non-governmental organisation
NIS	National Integrity System
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OLP	Ordinary Legislative Procedure
QMV	Qualified Majority Vote
REFIT	Regulatory Fitness
RoP	Rules of Procedure
SG	Secretary-General
SJ	Legal Service
SME	Small and medium enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VP	Vice-President

METHODOLOGY

In 2014, Transparency International EU published the first overall assessment of the EU's integrity system, based on the National Integrity System (NIS) assessments. This aimed to evaluate the strengths and weaknesses of the formal integrity framework of different institutions and then assess its use in practice with a view to making recommendations for improvement. The 2014 EUIS study – the EU Integrity System (EUIS) – analysed the 10 main EU bodies dealing with integrity, namely the European Parliament, the European Commission, the Council of the EU, the European Council, the Court of Justice of the EU, the European Court of Auditors, the European Anti-Fraud Office (OLAF), Europol, Eurojust and the European Ombudsman.

This report is one of three updates Transparency International EU is publishing in 2020, providing a deeper analysis of the transparency, accountability and integrity of the EU's three main institutions: the European Parliament, the European Commission and the Council of the EU. These studies focus on reforms of the past years and make recommendations on how to further the legitimacy of decision-making, focusing on transparent procedures, participative democracy and an effective management of conflicts of interests.

The studies are based on academic literature, desk research and interviews with policy-makers. To verify and deepen our research, we conducted structured interviews with a number of Commission services, including units in the Directorate-General Human Resources dealing with staff ethics, authorisations for activities during leave on personal grounds, ethics declarations and disciplinary proceedings, internal whistleblower protection and the Internal Disciplinary Office of the Commission,

(IDOC); as well as, within the Secretariat-General of the Commission, units dealing with the transparency register, access to documents, document registration, lobby transparency and the code of conduct for members of the Commission.

We are grateful to the Commission for its cooperation and openness in the research for this study, and its readiness to make its staff available for interviews, written questions and review. Any mistakes are the responsibility of the authors alone and do not reflect the views of the people who have been consulted externally, either through interviews or our feedback and review process.

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- ▶ Mario Monti — *Former EU Commissioner and former Prime Minister of Italy*
- ▶ Reinhard Priebe — *Former Director, European Commission*
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EXECUTIVE SUMMARY

This report is an in-depth review of the European Commission's transparency in terms of administrative procedures, legislative transparency, lobby transparency, and its integrity with a focus on rules governing conflicts of interest and revolving doors for Commissioners and staff.

The study provides an update after Transparency International EU's 2014 assessment of the EU integrity system and comes as part of a three-part series encompassing the European Commission, the Council of the EU, and the European Parliament.

The European Commission is the EU's central government administration. As EU integration proceeds, it is dealing with ever-increasing responsibilities and expectations, and has of late branded itself as a 'political' or 'geopolitical' Commission. The discretion the Commission has in the pursuit of its priorities inevitably leads to a tension with its role as independent regulator and enforcer of EU law as so-called 'Guardian of the Treaty'.

The Commission cooperated with our research team and made key staff available for interviews and a review of our findings. This is in line with our overall finding of an institution that is farther advanced in its transparency measures than most national governments and other EU institutions and bodies. Nevertheless, for each achievement we also find areas for improvement and formulate reform recommendations to bring the Commission into line with the open and transparent administration the EU's Treaties foresee.

Accountability: The accountability relationship to the Parliament in practice has improved over the years, with improved scrutiny of Commissioners

by Parliament and institutionalised coordination of political priorities. Nevertheless, Parliament still cannot compel Commissioners into hearings, and lacks a right of legislative initiative. Accountability to the Council may have strengthened of late with the failure of the so-called Spitzenkandidaten-process in 2019.

Administrative transparency: The Commission publishes a vast number of documents and data, but the sheer amounts have developed into challenge. The sprawl of document registers is intended to be unified via a one-stop-shop interface to be introduced by 2023. More recently adopted registers point in the right direction, with a website listing upcoming Commission initiatives noted for its user-friendliness and accessible structure.

Access to documents: A major shortcoming in transparency are very frequent delays in the processing of access to document requests lodged by the public. Commission responses are also perceived as restrictive. In this area, we have a number of recommendations that can hopefully be addressed via the introduction of a new document management systems slated for 2021.

Lobby transparency: The Commission in 2014 became the first large central government administration to publish the meetings of its political decision-makers with lobbyists, and to require their prior registration on the EU Transparency Register. Six years on, we still see too many hiccups in implementation, especially at the level of Commissioners. The vast majority of Commission decision-makers, including Deputy Directors-General, Directors, and Heads of Unit, do not have to publish their lobby meetings, and may even meet with unregistered lobbyists.

Transparency Register: Making meetings conditional on lobbyists' registration, as well as publishing lobby meetings, is necessary for all three of the EU's main legislative institutions. Following recent improvements from the European Parliament, we call on all three institutions to extend these principles to all staff. In the run-up to a new interinstitutional agreement to be adopted by the three institutions in 2021, the offer from the Council to include only the two top officials from each country's Permanent Representations every 13 years is nowhere near sufficient.

Legislative transparency: The Commission is noted for its accessibility and emphasis on public and stakeholder consultations in the preparation of its legislative initiatives. We analysed a number of improvements made in recent years on the scope of consultation as well as transparency on who is consulted. Nevertheless, especially when it comes to Expert Groups managed by the Commission, as well as technical 'comitology committees' composed of Member State representatives, it is still too difficult to follow meetings and processes. The politicisation of technical policy processes has brought with it the requirement of greater transparency and accountability, as we show in our analysis of delegated and implementing acts, stakeholder consultations, and the better regulation agenda.

Ethics framework for Commissioners: We analysed the updated Code of Conduct for Commissioners and its implementation with regard to revolving door cases, following the move of former Commission President Barroso to Goldman Sachs upon expiry of the then 18-month cooling off period. While this period has been lengthened, and the Independent Ethical Committee has been strengthened in

particular thanks to the publication of all of its opinions, the framework has shortcomings as the Committee relies on the President's initiative and cannot conduct investigations on its own accord.

Rules for Commission staff: Rules for staff are in place and detailed guidance is newly available. Awareness of ethics rules is higher than in the Parliament or Council. Nevertheless, while the rules are clear and have recently been strengthened, we find too many examples of Commission officials running the risk of severe conflicts of interest in the posts they take up while they are on unpaid leave or shortly after leaving the service. The issue here is with the implementation of the revolving door rules, and with the lack of transparency on the conditions imposed on officials, which can limit their effectiveness. Either way, the reputation of the institution is put at risk by these cases.

Disciplinary framework: In efforts to create a culture of integrity, the Commission may need to do more on cases of conflicts of interest, fraud, and harassment uncovered in its ranks. The Commission's disciplinary boards should make fuller use, and more readily, of the sanctions at its disposal, as credible enforcement of the ethics rules.

Whistleblowing rules: The current set of whistleblower procedures and protections are already superior to those of the Council and Parliament. Nevertheless, and not least in recognition of the Commission's role in championing whistleblower protection throughout the Union, the Commission should bring its internal rules into line with the scope and protections set out in the 2019 Whistleblowing Directive.

POLICY RECOMMENDATIONS

Administrative transparency

- ▶ Make databases and registers available through a single user interface, with an emphasis on user-friendliness and search functionality.
- ▶ Adopt a strategy to ensure a coordinated and sustained effort across all DGs to increase the number of proactively published documents, in particular among those in the register.
- ▶ Speedily complete the joint legislative database with the Parliament and Council, pursuant to the 2016 Agreement on Better Law-making, ensuring a user-friendly interface based on the European Parliament's legislative observatory, including the publication of all publicly available Trilogue documents.
- ▶ Extend the transparent approach to Brexit negotiations to all trade talks.
- ▶ Stop requiring a postal address for an access to document request, and publish any document released pursuant to a request, as is already done since 2018 by DG SANTE.

Lobbying

- ▶ Establish a mandatory lobby register for the Parliament, Commission and Council, in which direct and indirect lobby activities are covered.
- ▶ Require all Commission staff to only meet registered lobbyists.
- ▶ Publish all meetings with interest representatives in a centralised database, including meetings with Commissioners, Cabinets, DGs and lower-level officials. Publication of meetings should specify any legislative dossiers discussed, and link to the Transparency Register webpage of the organisation concerned.

- ▶ Published data should be available in a centralised website, in a machine-readable format and linked to other relevant websites and datasets, such as the legislative Observatory and the Transparency Register.

Pre-proposal transparency

- ▶ Create a unified interface for better regulation, based on the register on upcoming initiatives.
- ▶ Introduce automatic, timely and standardised publication of meetings, agendas, participants and summaries of expert groups.
- ▶ Take additional steps to ensure balanced representation of external stakeholders on expert groups.

Delegated & implementing acts

- ▶ Streamline the procedures applicable to delegated acts in line with the 'Common Understanding on Delegated Acts' from 2016, including for existing delegated acts, to ease scrutiny procedures.
- ▶ Introduce automatic, timely and standardised publication of meetings, agendas, participants and summaries of comitology meetings.

Code of Conduct for Commissioners

- ▶ The Independent Ethical Committee should have the right to initiate investigations into any suspected or reported breach of the Code of Conduct. Staff resources should be increased to cope with the additional responsibilities.
- ▶ The Independent Ethical Committee should have sanctioning powers.

- ▶ Notifications on new professional activities of former Commissioners' should be made public as soon as they are submitted, pending review by the Independent Ethical Committee.
- ▶ Commission services should conduct proactive monitoring of new professional activities by former Commissioners.
- ▶ Old declarations of interest of Commissioners should not be deleted once an update is filed. All past declarations should remain online.

Rules for Commission staff

- ▶ Declarations of interests submitted by staff should contain all information on financial interests and not be limited to information deemed to be capable of giving rise to a conflict of interest.
- ▶ Staff on unpaid leave should not be allowed to take up roles with private businesses in a sector directly related to their work at the Commission. In particular, no lobbying or public relations roles should be permitted.
- ▶ The Commission should make use more readily of the sanctions at its disposal, including removal of post, to ensure a culture of integrity.

- ▶ The Commission should ensure that the standard for conduct in EU institutions is high, including increased ethical training and awareness-raising.

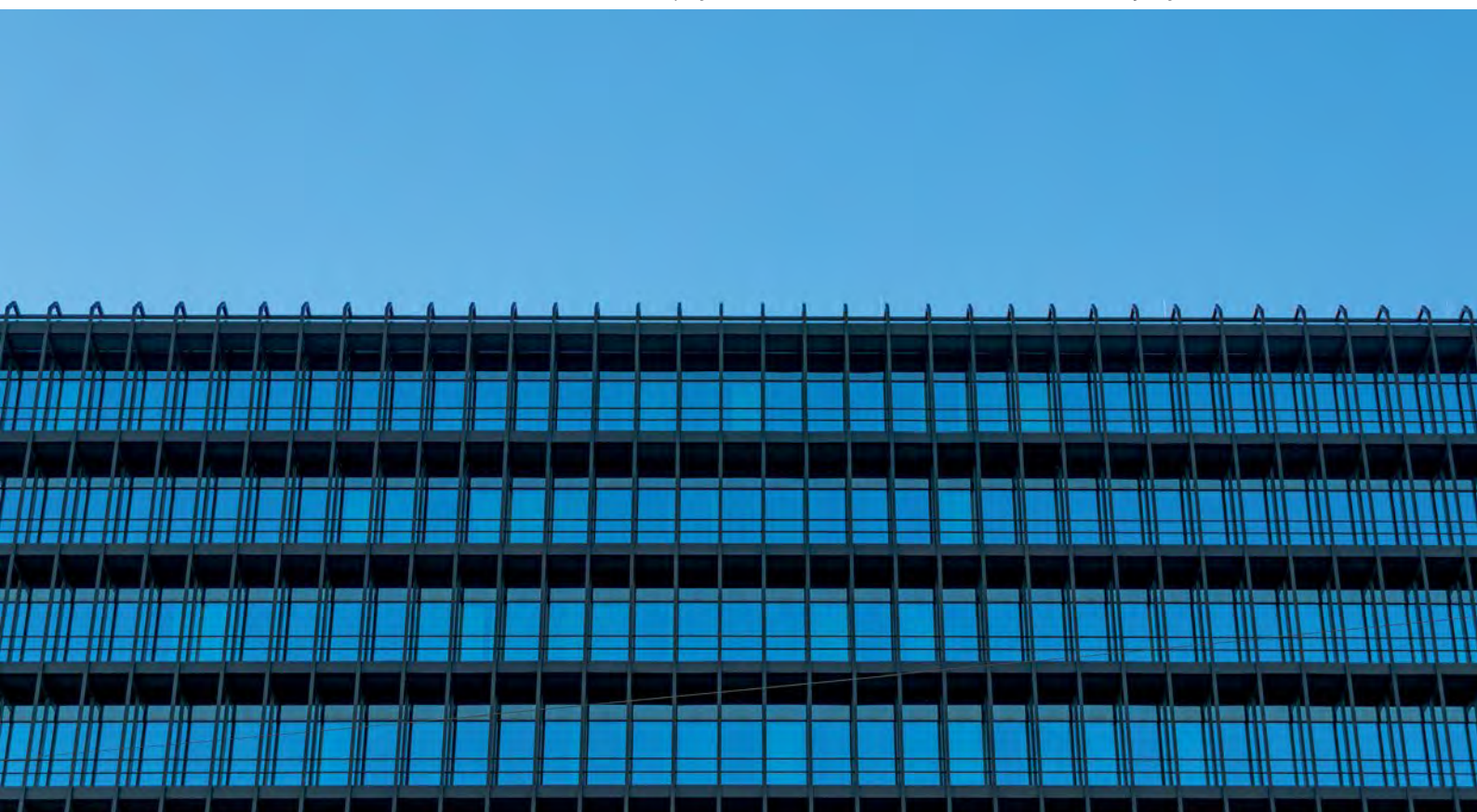
Whistleblowing

- ▶ A revision of the Commission's internal rules should bring current the whistleblower protections in line with the provisions of the 2019 directive.
- ▶ Commission services should increase awareness raising on staff rights and obligations related to whistleblowing and provide systematic trainings for management empowered to receive disclosures.
- ▶ OLAF should have all necessary powers to fulfil its mission. Its operational independence and the transparency and integrity of its procedures, including due process, must be strengthened.

Independent Ethics body

- ▶ In the medium term, all the above monitoring, support functions and sanction mechanisms should be the remit of a well-resourced and independent EU ethics body common to all three EU institutions.

The Commission is the EU's executive arm and as such employs around 32,000 staff, which constitutes the majority of EU officials





The Commission's Berlaymont headquarters

INTRODUCTION

In 2014, Transparency International provided an overall assessment of the integrity system of the European Union, including an in-depth analysis of the 10 institutions most closely concerned with integrity good governance and anti-corruption matters. Five years can be a long time in politics, and indeed we have witnessed some significant changes since then, including improved transparency on the Commission's meetings with lobbyists and efforts for a mandatory lobby register, reforms to its Code of Conduct, financial regulation, whistleblowing rules, approach to expert groups, delegated and implementing acts, impact assessments and better regulation, and a number of initiatives to increase access to information and documents.

One year on from the start of the new Commission under the leadership of President Ursula von der Leyen, it is time to take stock of progress achieved, and identify areas where the Commission needs to improve further.

To this end, this study will focus on the accountability of the European Commission, its administrative and legislative transparency, and the ethics and integrity rules applicable to Commissioners and Commission staff, and make specific reform recommendations where appropriate.

ACCOUNTABILITY

Guardian of the Treaties or ‘Political Commission’?

The independence of the Commission is laid down in the European Union (EU)’s treaties¹ and is generally carefully guarded to create a central authority that all Member States can trust.² The more large and powerful states are able to exert pressure on the Commission, the less it can be relied upon to safeguard the interests of Europe as a whole.

Our 2014 report on the EU integrity system noted a trend towards strengthening the agenda-setting powers of the Council at the expense of the Commission,³ with the elevation of the institutional standing of the European Council through the Lisbon Treaty⁴ and through the rise of intergovernmental policy-making as part of the Eurozone crisis.⁵ This is notable from an accountability perspective, as the circumvention of the ‘community method’ (where legislative initiative lies with the Commission while the Council and Parliament act as co-deciders) vastly reduces transparency and accountability for the public, as well as for the Parliament, Court of Auditors, Ombudsman, the European Anti-Fraud Office (OLAF) and sometimes even the Court of Justice. This can go as far as setting up separate legal entities such as the European Stability Mechanism outside the EU legal framework.⁶ It is also notable from an integrity perspective, in that integrity safeguards such as declarations of financial interests or codes of conduct at the Council and intergovernmental level are uneven or altogether absent.⁷

SHIFT SINCE 2014

The debate on the political nature of the Commission has intensified since Jean-Claude Juncker described his Commission as “political” upon assuming its Presidency in 2014, with President von der Leyen characterising her Commission as “geopolitical” in 2019. Clearly, the nature of the Commission’s work has always been political, at least in part. But framing its work as such also increases its scope to determine what initiatives to bring forward.

The Commission already adopts its own work programme, but according to Article 15 TEU it needs to follow the broad guidelines set out by the heads of state and government in the European Council. Stronger emphasis on the political legitimacy provided via the Commission’s election by the European Parliament allows the Commission greater discretion as opposed to carrying out the priorities set by Member State governments. An enhanced cooperation on the forward-looking agenda has been formalised in an inter-institutional agreement between the Commission and the Parliament already in 2010.⁸

From the very beginning of the Juncker Commission, the new leadership’s mantra was to do less, better (see chapter on Better regulation). In terms of sheer volume, legislative activity has declined markedly, averaging 60 new laws per year against an average of 100 new laws per year under President José Manuel Barroso.⁹ At the same time, the portrayal of the Commission as “political” also puts at risk its more regulatory functions, which are intended as apolitical, e.g. on the application of competition law and the deficit rules under the Stability and Growth Pact, for which the Juncker

Commission introduced additional flexibility. It has also facilitated attempts to “cast the Commission as a partisan actor” in holding the governments of Poland and Hungary to the EU’s values of democracy and opening procedures under the EU’s rule of law mechanism.¹⁰ In this sense the “political” Commission may have helped to focus the agenda of the Commission, but at the risk of undermining its regulatory legitimacy in particular when it comes to its role as enforcer of competition, single market and rule of law norms.

DISCRETIONARY POWERS

As the ‘guardian of the Treaties’, the Commission enjoys broad discretionary powers when it comes to initiating infringement proceedings against Member States at the Court of Justice of the EU (CJEU) for failure to correctly apply EU law, or failure to comply with a CJEU ruling.¹¹ In the case of competition law,¹² the Commission additionally has investigative powers, including the possibility to inspect private offices (‘dawn raids’) and access to information. The fines it can impose go into the billions, up to an overall cap of ten per cent of annual worldwide turnover.¹³ While the Commission is sometimes accused of politicisation in its competition enforcement, a recent proposed merger between French company Alstom and Germany’s Siemens Rail was blocked by the Commission in spite of significant multi-level pressure from the French and German governments, among others.¹⁴

At the same time, it is not clear how the Commission chooses what infringements to pursue, and what kind of violations of EU law on the part of Member States it will accept, and based on what justification. As part of the Juncker Commission’s ambition to be “bigger on the big things” and “smaller on the small things”, the Commission is taking a more strategic approach to infringement proceedings, emphasising dialogue with high-level government representatives before taking legal action.¹⁵ The Commission does not lay out under which circumstances it does not, at present, pursue infringement cases. Rather, it emphasises the discretionary nature of Commission decisions to bring infringement cases to the Courts or not, and to freely determine the timing.¹⁶ This also

appears to mean that the Commission chooses which infringement cases to pursue based on their likelihood of success in Court or depending on the highest benefits of compliance. In recent years this strategic approach by the Commission has also been described as a way to avoid expected political backlash from Member States, developing a “tolerance” for rule-breaking by national governments intended as a “safety valve” for the stability of the political system as such.¹⁷

Complicating efforts to keep track of Commission use of its discretion in this field, in a 2018 judgment the General Court has confirmed that the infringement procedure “has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents”.¹⁸ The Commission enjoys similar levels of discretion over which cases to pursue in competition policy and state-aid, constituting broad areas where a “general presumption of secrecy” applies.¹⁹

An area of particular interest in this regard is the Commission’s action on corruption and the rule of law. Following the Commission’s announcement in 2011 of a biannual EU Anti-Corruption Report,²⁰ a first report was produced in 2014,²¹ while the second report was delayed and later shelved, potentially due to outside pressures.²² Nevertheless the European Semester and the revamped rule of law mechanism were not adequate replacements. It is therefore welcome that, in view of backsliding on the rule of law in at least two Member States,²³ the Commission has strengthened its work in this area once more under President von der Leyen, with annual reports on the rule of law in each country.²⁴

FINANCIAL ACCOUNTABILITY AND EUROPEAN BUDGET

The Commission’s budget is agreed upon by the Council and the Parliament (as the budgetary authority), as part of the broader multiannual financial framework, based on a proposal from the Commission. Salaries, allowances and pensions of staff and Commissioners are set by the Council.²⁵ While staff cuts would normally be only the

Commission's prerogative, within the budgetary limits set by the other institutions, the 2014 staff cuts after the great financial crisis of the previous decade were largely a result of political pressure from Member States.²⁶

The Commission also administers the broader EU budget. The departure of the United Kingdom from the EU has put additional pressure on the budgetary negotiations between the three institutions. However, the Coronavirus induced economic recession during 2020 has prompted an unprecedented increase in budgetary firepower for the European Commission, which is tasked to raise money through common European debt of up to €750 billion for the Next Generation EU recovery²⁷ and resilience instruments as well as €100 billion for the short-term work scheme dubbed SURE.²⁸ The creation of these mechanisms under the auspices of the Commission, instead of the European Stability Mechanism or the Eurogroup, signal a return to the community method in the area of EU economic governance, which promises higher levels of transparency and a clearer accountability framework.²⁹ However, the governance of these instruments – which have yet to be adopted by the co-legislators at the time of writing – also needs to be improved in order to ensure proper accountability at the EU level, in particular by ensuring Parliament has a veto over the Commission's disbursements to Member States.³⁰

Election and accountability of Commissioners

The President of the European Commission is elected by the European Parliament³¹ upon a proposal from the European Council, which acts by qualified majority. According to the Treaty, this proposal shall be made “taking into account” the election to the European Parliament and after “appropriate consultations”.³² This has led to intense debates around the so-called *Spitzenkandidat* process. The main European political groups represented in Parliament had all fielded lead-

candidates, and pledged not to support a candidate who had not set out their priorities during the election campaign in this vein. This worked for the 2014 election of Jean-Claude Juncker, but in 2019, Parliament was unable to agree on a specific candidate for the Commission Presidency after the election results were in.³³ This was followed by heated discussions between the institutions and within the European Council, culminating in the nomination of and very close confirmation vote for Ursula von der Leyen in July 2019.³⁴

The *Spitzenkandidat* process has implications for the independence of the Commission, and for its accountability. A President who is “ beholden ” to the Council would appear less independent, and more likely to run the Commission as a supranational secretariat, tilting the Commission's role back towards the neutral watchdog functions, and reducing the emphasis on its role as a more “political” government of the EU. It should be noted that the majority of Commission Presidents to date were, indeed, former heads of state or government, or at the very least national ministers.

As it happened, candidate von der Leyen and her new Commission nevertheless emphasised their accountability to the Parliament, calling for a “geopolitical” Commission, and committing to a process for a two-year series of conferences on



The Commission's emphasis on its political role may have improved its accountability to the European Parliament. The ‘*Spitzenkandidat*’ or ‘lead candidate’-process failed to produce a Commission President in 2019, however.

the Future of the EU to better define the process by which Commission presidents are elected in future.³⁵ A higher degree of predictability around the selection process may also allow sitting heads of state and government to apply for the role more openly than is presently the case.

Commissioners are required to be wholly independent and act solely in the interest of the Union as a whole.³⁶ This is a Treaty-based requirement also laid down in the Code of Conduct,³⁷ and Member States are specifically required to respect this.³⁸ However, following the rejection of the Lisbon Treaty by a referendum in Ireland, the European Council agreed not to reduce the number of Commissioners as required in principle by the Treaty, so that all countries have their own Commissioner.³⁹ This reinforces the risk that Commissioners may be perceived as the representatives of national governments.

The fact that Commissioners are selected by national governments calls this independence into question: Commissioners owe their job to the national government that sent them, and senior political figures may occasionally be expected, out of loyalty, to keep ‘their’ government informed of Commission initiatives or even to be that country’s voice within the Commission.⁴⁰ Additionally, in spite of the insistence on the independence of Commissioners, smaller Member State governments may find it hard to be heard by the Commission President if they do not have ‘their’ Commissioner at the table, or may even deny a second term to a Commissioner if they ‘forgot’ who nominated them.⁴¹

While this is notoriously difficult to track or quantify, the expectation can be clearly discerned in public discourse, where Members of European Parliament (MEPs) from the party of Commission President Ursula von der Leyen lament they “will clearly miss the German Commissioner” with a view to the President taking a neutral stance within the Commission rather than standing up for the interests of his or her country or party.⁴² Some observers have claimed that the number of emissaries from national political parties in the personal teams of the Commissioners, their so-called Cabinet, has also been rising.⁴³ In the context of country-specific reports produced by the Commission, for example in the context of

deficit recommendations as part of the European Semester, national governments have successfully intervened to change Commission decisions before they are tabled.⁴⁴ The Cabinets of Commissioners not normally involved in those policy areas are thought to routinely influence documents concerning “the country they know best”.

The President of the Commission has, however, complete discretion over the internal structure of the Commission and the portfolios of the Commissioners, including the number and identity of Commission Vice-Presidents – with the notable exception of the High Representative of the European Union for Foreign Affairs and Security Policy, who is also a Commission VP and is appointed by the European Council in agreement with the Commission President.⁴⁵ Portfolios considered to be particularly prestigious or powerful are often attributed to Commissioners from large Member States, implying that some pressure is exerted. A case in point is the current French Commissioner, with widely acknowledged pressure exerted by the French President to allocate a portfolio of unprecedented breadth, including the single market for goods and services, digital policy and a newly created Directorate-General on Defence Industry and Space.⁴⁶

ELECTION OF CANDIDATES

The Commission as a whole is “responsible” to the European Parliament according to the Treaties,⁴⁷ which we take to mean that the Commission is accountable to the Parliament.⁴⁸ This is reflected in the procedure to appoint the Commission. Commissioners-designate are put forward by national governments, with the accord of the Commission President-elect. The European Parliament then vets the Commissioners through a formalised process involving declarations of financial interests to uncover possible conflicts of interest, as well as written and oral questions regarding the Commissioner-designates’ suitability for their portfolio.

The first step is the examination of the declarations of financial and other interests of the nominees.⁴⁹ The 2019 Rules of Procedure of the Parliament assign this responsibility to the Committee on Legal

Affairs (JURI), which is responsible for checking whether the content is accurate and complete, and whether it can lead to conflicts of interest.⁵⁰ Parliament may demand remedies (such as the sale of specific stocks) or determine an irreconcilable conflict of interest.⁵¹ In 2014, when the Juncker Commission was approved, the scrutiny of declarations carried out by the JURI Committee had no guidelines nor the explicit purpose of preventing conflicts of interest,⁵² although some Commissioners were already called upon to sell off some financial interests that were irreconcilable with their intended portfolio.⁵³ The designated Commissioners for the von der Leyen Commission underwent the new procedure, with the JURI Committee already rejecting two candidates based solely on the conflict of interest check, even before the actual Committee hearing.⁵⁴ While this conflict of interest check certainly improves the procedure, it should be noted that it is still performed by political actors behind closed doors. This means that candidates from large Member States or mainstream political parties will face less stringent checks than those with fewer allied MEPs to call on.⁵⁵ Additionally, the JURI Committee only has a short amount of time to make its decision.

In 2019, further Commission candidates were waved through by the JURI Committee, in spite of ongoing investigations against them by national authorities as well as the EU anti-fraud Office (OLAF).⁵⁶ This led to a situation where the policy committees tasked with hearings to ascertain the suitability of candidates in terms of their substantive preparation for their Commission portfolio also chose to probe the conflict of interest allegations, which should have been the purview of the JURI Committee. As it happened, Parliament's internal market and industry committees rejected the French Commission candidate based mainly on questions of integrity, regarding an OLAF investigation into her use of the parliamentary allowance as well as very high outside incomes from a US think tank during her time as an MEP, all while acknowledging her substantive suitability for the proposed portfolio.⁵⁷ The way the process was conducted generated controversy, as it was seen by some, including a number of constitutional lawyers, as overly politicised.⁵⁸

A strengthened focus on potential conflicts of interest is welcome, but it is also important to ensure this is consistent across committees, to avoid the risk that candidates are evaluated

The European Parliament is usually the Commission's natural ally in advancing the European interest as they see it



according to diverging standards. Given that the JURI Committee waved through some candidates who were later blocked mainly over integrity concerns, we recommend that an independent ethics body, composed of ethics professionals, should be tasked with scrutinising the declarations of financial and other interests by candidates, and that the JURI Committee should base its decisions on this independent input. Sufficient time should be allocated for this assessment, as well as the Committee decision.

Following this conflict of interest check, Commissioners have to reply to written questions and an oral, three-hour hearing in front of the parliamentary Committees related to their portfolio. Following these hearings, Commissioners need a two-thirds majority to pass muster.⁵⁹ The Committee may decide to ask further written questions or set another 1.5-hour hearing. Although the Parliament does not have the power to block individual Commissioners, it may block the appointment of the Commission as a whole, meaning that the process cannot be expected to be completed if some Commissioners are not cleared by Committee vote. Once all candidates have been approved individually by a two-thirds majority vote in Committee, the Commission as a whole is elected through an investiture vote by simple majority in the plenary of the Parliament, and finally appointed by qualified majority vote by the European Council, for a five-year term.

Post-election

In terms of ongoing accountability for their work, the Parliament cannot compel Commissioners to appear in front of Committees, although they do regularly present and defend their initiatives. The Commission is obliged to answer oral and written question from MEPs.⁶⁰ All questions and answers are published on the Parliament's website.⁶¹ Twice a year, they hold structured dialogues with Commissioners regarding the implementation of the commitments made during the parliamentary hearings,⁶² and discuss the annual reports in which the Commission must report on its activities.⁶³

The Commission can be dismissed "en bloc" if the Parliament votes on a motion of censure against it, although this requires a majority of two thirds of its constituent members.⁶⁴ Only the President of the Commission can ask individual members of the Commission to resign.⁶⁵ The European Parliament also has investigative powers to assess maladministration or contravention of EU law by the institution,⁶⁶ in particular through the discharge procedure in conjunction with the Parliament's powers over the EU budget.⁶⁷ It may set up Committees of Inquiry with specific powers to hear witnesses and inspect documents.⁶⁸

ADMINISTRATIVE TRANSPARENCY

Transparency is one of the foundational principles of the EU. Article 15(3) of the Treaty on the functioning of the European Union (TFEU) sets out a right for access to documents, which the co-legislators must spell out via a regulation (see access to document regulation below). This also introduces a distinction between administrative and legislative transparency, setting a higher degree of transparency for any meetings and documents that are of a legislative nature. The higher transparency requirement for any legislative business has been confirmed in CJEU case law and may reflect the fact that citizens will have to live with the adopted laws for years if not decades, whereas other administrative decisions may have a less long-lasting impact. This cannot be interpreted as a licence to conduct administrative business in secret, as the Treaties mandate the institutions to “conduct their work as openly as possible”.⁶⁹

This chapter will look into the Commission’s administrative transparency, with a dedicated section on its approach to access to document requests, while the next chapter will look into legislative transparency more specifically.

For administrative procedures, transparency is required in large hierarchical institutions to make sure that formal practices are followed and conflicts of interest, where they arise, can be mitigated. This is of crucial importance across a number of areas, whether it regards public reporting of air quality or the timely publication of notices for job openings in Commission departments, transparency will help ensure the administration works in the public interest. It also necessitates a high degree of transparency on the Commission’s internal organisation, to clarify the mandates, functioning and hierarchical relationships between internal bodies: is the independent ethical committee really independent? Are whistleblowers effectively protected? Are funds and procurement contracts awarded purely based on merit? Administrative

transparency therefore also forms the basis on which much of the ethical framework relies (see chapter on Ethics).

Internal structure and procedures

The Commission is the EU’s executive, implementing EU law (or overseeing Member State implementation of EU law) and administering the EU’s budget. This means the Commission’s closest national equivalent is the central government administration. This is reflected in its staffing. As of 2019, around 32,000 permanent and temporary officials work at the Commission, 20,000 of which are in Brussels, with an additional 3,600 in Luxembourg and the remainder spread across all EU countries.⁷⁰ This constitutes the bulk of EU officials, although it should be noted this is a relatively small number in comparison to the size of national governments in large as well as medium-sized Member States, considering the Commission serves over 440 million European citizens.

The Commission’s technical or services level is structured into Directorates-General (DGs) of greatly varying sizes and roles. The most well-known DGs are policy or “line”-DGs, dealing with a specific policy area (e.g. the Environment, foreign trade, competition or fisheries), followed by “horizontal” DGs, which play a role across policy areas, e.g. the Secretariat-General (SG) as the coordinating Commission service under the President of the Commission, but also the Legal Service (SJ, *Service Juridique*), DG Budget, DG Communication or DG Human Resources. Other DGs fulfil specific roles such as administering Commission buildings, translation of Commission documents into the 24 official languages of the EU, or the Joint Research Centre, which brings together a number of scientific

research institutes. Each DG is led by a career civil servant, the Director-General. All in all, the Commission is structured into 33 policy-focused Directorates-General, 15 horizontal services and it administers six executive agencies.⁷¹

Above the service-level, the political level of the Commission consists of the College of Commissioners, supported by their Cabinets. The College decides collegially, meaning all Commissioners take responsibility for decisions across portfolios. Whether decisions are adopted by written or oral procedure, by unanimity or – more rarely – by a vote, the entire College of Commissioners takes decisions together. Each Commission-President decides about the structure of their College and their Cabinets. The large number of Commissioners, a consequence of the difficulty in getting the Lisbon Treaty ratified in Ireland, may have strengthened the central position of the President and their independence. This development went hand in hand with a strengthening of the coordinating functions of the Secretariat-General.⁷² In 2014, the Juncker Commission introduced a new structure with Vice-Presidents managing a team of Commissioners, as a way to deal with the excessive number of Commissioners, but also to strengthen the coordination of Commission activities and the “political” nature of the Commission.⁷³ VPs did not, however, have authority over a specific Directorate-General, depriving them of the administrative fire-power that comes with the larger number of officials. The small teams housed at the Secretariat-General to assist VPs did not make up for this structural disadvantage.

The von der Leyen Commission further amended this structure with the introduction of three “Executive Vice-Presidents”. On top of managing a team of Commissioners, they would also be assigned responsibility for a specific policy DG, something that had already been trialled when VP Valdis Dombrovskis took over the DG Financial Services and Capital Markets Union following the resignation of the British Commissioner after the Brexit referendum in 2016.⁷⁴ Regular Commission Vice-Presidents do not have dedicated Commission services at their disposal, whereas regular Commissioners continue to have at least one DG under their authority.



The Commission publishes vast amounts of documents and data, but the sprawl of public registers and databases has developed into a veritable challenge

Starting from this institutional setting, the Treaty mandates that the Commission should ensure that its “proceedings are transparent”.⁷⁵

Proactive transparency

Administrative transparency is applied most faithfully at the political level, where agendas are published in advance, and minutes are proactively published once available,⁷⁶ although these are not very detailed. Minutes of the so-called Hebdo-meetings (*hebdomadaire*, or weekly), where the Heads of Cabinet (chiefs of staff) of all Commissioners prepare the College meetings, are not proactively published – even though the Cabinets also pertain to the political level of Commission decision-making. After adoption of a proposal, preparatory documents sent to the College may be made public too.⁷⁷

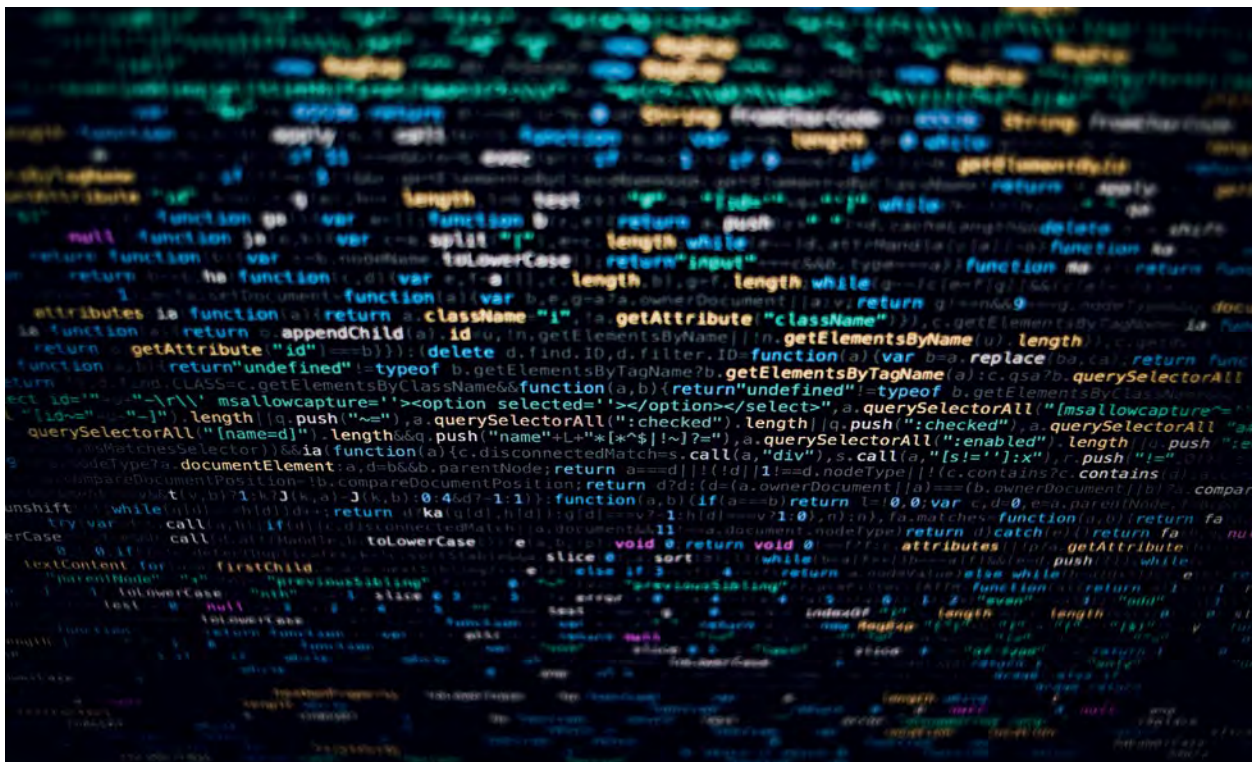
Contrary to this, at the services level there is no requirement to disclose documents related to inter-service consultations – the coordination procedure by which Commission services come to a Commission-wide common position before a file reaches the political level.

However, the Commission publishes large amounts of other documents and information on a daily basis, across a number of databases, registers, websites and portals. This includes documents on regular workstreams – the agendas of weekly meetings of the College of Commissioners, minutes, planning documents, annual reports of the Commission and many DGs, analysis and assessments of Commission and Member State policies, e.g. as part of the European Semester, legislative documents (draft legal proposals, impact assessments and a wealth of accompanying documents), as part of its regular communication, with daily midday press briefings,⁷⁸ innumerable press releases and other explanatory notes issued to the media and public, written answers to parliamentary questions and the agendas of Commissioners and their Cabinets. Since the Commission's transparency initiative in November 2014, this includes a meeting register and, since February 2018, the travel expenditures of

Commissioners, to be published in summarised form every two months, pursuant to the updated Code of Conduct for Commissioners.⁷⁹

A special example is the Commission's proactive approach to transparency in the course of the Brexit negotiations. While negotiation dynamics in international (trade) have traditionally been said to require confidentiality in order not to disclose the bottom line negotiating position, in the case of Brexit, the Commission has been publishing negotiating mandates and intermediate negotiation process from the beginning of talks. It was commended for this inter alia by the European Ombudsman,⁸⁰ and the amounts of documents published in the context of trade negotiations increased.⁸¹

As this first overview indicates, this wealth of information is difficult to organise and access. The Commission website publishes an enormous amount of documents and information, across a large number of sprawling web pages. The main landing page is clearly structured and up to date, although many DGs still use older templates or structure their websites and organisational charts completely differently.



Introduction of a 'one-stop-shop' userface is expected for 2023, streamlining the various document registers and data portals.

DOCUMENT REGISTERS AND DATABASES

The documents made proactively available by the Commission are listed on its central document register, set up in 2002 pursuant to the Access to Document Regulation (ATD-R). It makes hundreds of thousands of documents publicly available. The exact number of documents produced is not recorded, but in 2018 alone, 19,582 new documents were added to the register.⁸² The sheer volume of documents makes the register difficult to use. However, since 2014, a full text search functionality has been added, which considerably improves its usability. The Commission also has to report on how many sensitive documents have not been recorded in the register.⁸³ However, the 2018 and 2019 report does not contain information on this, while the 2017 report states that, within the broad document categories included in the register, “no sensitive documents (...) were created or received by the European Commission in 2017”.⁸⁴ It appears unlikely that the Commission produced no confidential, sensitive or top-secret documents during the year.

There is a series of complementing but also overlapping additional data portals, websites and registers, including but not limited to: a database collecting all opinions from National Parliaments issued on draft Commission legislation;⁸⁵ a database of Commission infringement decisions;⁸⁶ the Comitology register,⁸⁷ which is less usable and less complete than the newer database of “Published initiatives”⁸⁸ but which comes in parallel with yet another “interinstitutional register of delegated acts”⁸⁹ (see chapter on Delegated and implementing acts), to name just a few.

For information on beneficiaries of EU funding, in line with Article 38 of the 2018 Financial Regulation, the Commission publishes information on any EU funding flowing directly from the Commission or executive agencies to beneficiaries, such as grants for specific projects. The information can be searched through a separate “Financial Transparency System” database.⁹⁰ Agricultural subsidies and regional development subsidies are not included, as these are managed by or jointly with national governments.



Publishing documents proactively can reduce the administrative burden in processing access to document requests

Additionally, the Commission’s Publications Office provides:

- ▶ EUR-Lex, which gives online access to the Official Journal of the EU,⁹¹ where any legal acts of the Union must be published to become law.⁹²
- ▶ A database of EU Publications.
- ▶ TED (Tenders Electronic Daily)⁹³ with over 2,000 procurement notices or tenders published every working day from the EU institutions as well as from across the EU.
- ▶ CORDIS (Community Research and Development Information Service) database on EU research results, bringing together research funded by the EU.⁹⁴
- ▶ EU Open Data Portal, giving access to a vast wealth of statistical data from the Commission’s own services as well as from Member States and other sources, as well as specific data collected on behalf of the EU such as regular

Eurobarometer surveys with public opinion surveys from citizens in all EU Member States.

- EU Whoiswho, the directory of EU staff and hierarchies from across a range of institutions.⁹⁵

The Commission's Publications Office has also been selected to develop the joint legislative database encompassing the legislative documents produced by the Commission, the European Parliament and the Council of the EU. The aim is to pool all legislative documents pertaining to a legislative proposal in one place. There is no public timeline on this, but development is still ongoing as of 2020, following agreement in principle on its creation back in 2016.⁹⁶

The Joint Transparency Register⁹⁷ is the database where lobbyists and other interest representatives can register their interests. This is jointly run by the European Commission and the European Parliament, and hosted on Commission servers. It has recently become the largest lobby register in the world, with just over 12,000 registered organisations as of November 2020. The information can be searched easily, but often contains incomplete, outdated or wrong information, depending on the quality of information submitted by registrants.⁹⁸ The Commission is taking steps to improve staff knowledge about the register, and since 2018 integrated it with the publication of meetings at Director-General and Cabinet level (see Lobby transparency section).⁹⁹

The "Register of Commission Expert Groups and other Similar Entities"¹⁰⁰ has an overview of the expert groups, their composition, including for formal, informal, permanent and temporary groups. It also includes calls for applications to participate in an expert group (see the chapter on Pre-proposal transparency).

Clearly, the sheer number of registers means that quite a thorough degree of familiarity with Commission structures and procedures is required to usefully use the documents made available. The overlapping proliferation does not lend itself to the swift implementation of best practices or even a modern-looking user interface. The Commission is currently planning to create a "one-stop-shop" document register by 2023.¹⁰¹ This is not necessarily intended to replace all the above-mentioned register, but to create a common

interface that allows access to all the documents and information held. Particularly with regard to navigation and functionality, this holds out the promise of significantly improving access.

ACCESS TO DOCUMENT REQUESTS

The above-mentioned Commission document register makes available 'public' documents, meaning internal Commission documents are not registered. Many of the 'public' documents listed are, however, not proactively published, meaning they are not actually available and require the additional step of an access to document request. There is a button displayed next to the document to launch such a request. While this at least makes users of the register aware of the documents' existence, the possibility that documents will be disclosed via an access request is a rather narrow definition of what constitutes a public document.

As mentioned above, access to documents in the EU is a Treaty-based right.¹⁰² In 2001, the Commission adapted its internal rules of procedure to implement the ATD Regulation. The regulation sets deadlines by which an answer has to be provided (15 working days, which can be extended by the institution). Although no data is collected on the average duration of replies, this regularly takes significantly longer than mandated by law, as also acknowledged by the Commission.¹⁰³ However, unlike the Council, the Commission does not publish, nor collect, data on the average delay. This is unfortunate, as the institutions should in principle exchange best practices with regard to requests.¹⁰⁴

The Regulation also lists the exceptions under which document requests may be rejected.¹⁰⁵ In general, exceptions to disclosure of documents expire after 30 years, unless these exceptions are related to sensitivity, privacy or commercial interests.¹⁰⁶ Public access to environmental information – particularly where related to emissions – is guaranteed in legislation, with proactive disclosure encouraged.¹⁰⁷

The Commission receives by far the largest number of requests under the access to document

regulation, given it is the largest EU institution. The number of requests is steadily rising (see Table 1). Requests often make reference to more than one document,¹⁰⁸ meaning that the number of documents disclosed may be much higher. According to the Commission, there has been an increase of so-called ‘fishing expeditions’, in which requests are made encompassing a large category of documents, requiring the Commission to go in search of specific documents fulfilling those criteria.¹⁰⁹

However, use of modern technology and automatic registration of documents has the potential to greatly simplify the search for documents,¹¹⁰ both for the purpose of access requests as well as for regular internal administration and document management. In 2021, the Commission is planning to introduce a wholly new system for managing both the back-end and front-end of the access to documents process, which is also set to give users information about the progress of their request, called EASE (for Electronic AccesS to European Commission Documents). Reportedly, it is even experimenting with artificial intelligence use cases

to better compile documents requested on specific topics.¹¹¹

While EU institutions often complain about the administrative burden of granting access to documents, or justifying the rejection of a request, the European Ombudsman notes that the ATD Regulation has a number of mechanisms to limit requests judged ‘excessive’. The public does not have a right to information, but only to existing documents, meaning the Commission is under no obligation to compile or analyse information if it is not already present in a document. If a request is too vague, the institution may simply ask the applicant to be more specific, although the applicant is of course under no obligation to specify or limit the scope of their request. As emphasised by representatives of the European Ombudsman at a recent Council seminar on access to documents, Article 6 of the regulation also offers the possibility to “confer with the applicant informally” and find a fair solution in case the application regards a number or length of documents judged to be excessive. However, it is not clear how often this happens in practice.

While the Commission does not collect this data, there are frequent and significant delays in answering access to document requests. A new system will be introduced in 2021.



The new regulation on the European Food Safety Authority¹¹² has been hailed as the “gold standard”¹¹³ on the proactive publication of documents, as this includes the requirement to publish information while decision-making procedures are still ongoing, thereby better enabling public participation.¹¹⁴

At the same time, the General Data Protection Regulation needs to be reconciled with the ATD Regulation.¹¹⁵ However, this regulation only concerns personal data and, as has been noted elsewhere, information submitted by public officials or experts as part of official hearings should, by definition, be public, and not shielded by privacy considerations.¹¹⁶

Overall, the Commission has granted full access to between 50 and 73 per cent of requested documents in the last six years, with partial access granted to others (i.e. with parts of the document blacked out). However, 10 to 20 per cent of requests are however refused altogether, although confirmatory applications can be very successful if an initial request is turned down. According to a recent survey among users of access to document requests, 75 per cent of requesters felt “increasingly disappointed with EU authorities’ responses”,¹¹⁷ although the survey concerned all EU institutions and not the Commission alone.

TABLE 1: Number of ATD requests, based on annual reports

	2015	2016	2017	2018	2019
ATD requests¹¹⁸	6,752	4,077	6,255	6,912	7,445
Released	69 %	61 %	62 %	59 %	53 %
Partially released	16 %	20 %	20 %	21 %	25 %
Refused	15 %	19 %	18 %	16 %	13 %
No documents held				4 %	9 %

Documents can be requested directly via the Commission’s document register, or by filling out a dedicated form,¹¹⁹ although a postal address is required, something the Ombudsman in 2017 decided was disproportionate, criticising the practice as “archaic”.¹²⁰ Indeed, the regulation has not been updated since 2001, but 15 per cent of those surveyed by Asktheeu.org were put off by this requirement, with others providing work addresses due to the concern of prosecution when investigating official corruption.¹²¹

Ample case-law from the CJEU has made it more difficult for institutions to exclude entire categories of documents from disclosure, requiring more nuanced reasons for refusals, based on the individual document.¹²² However, the Commission has also been able to carve out so-called “general presumptions” of secrecy for other categories of documents, including investigations on competition law and infringement cases against EU Member States.¹²³ Following a recent Court judgment, the Commission now has to disclose the lists of documents falling under this presumption, including title and document number, in case of request.¹²⁴

The ATD Regulation applies to all EU bodies, meaning that good knowledge of the EU’s structure is required to know what institution to address a request to. The transparency advocates Access Info have created a centralised portal, www.asktheeu.org, which allows the filing of ATD requests with all EU institutions, and allows the public to track requests, including the institutions’ answers and documents provided. One advantage of using this website is that requested documents are then available to anyone searching for them on the internet, whereas the Commission will send documents only to the original requester. Since April 2018, DG Health and Food Safety (SANTE) is trialling a new approach, with disclosed documents posted on its website for all to see.¹²⁵

ATD requests are handled in a decentralised way by the DG concerned, with most DGs appointing ATD coordinators. Confirmatory applications – an appeal in case of an initially denied request (fully or in part) – are handled centrally by the Secretariat-General.

RECOMMENDATIONS

- ▶ Make databases and registers available through a single user interface, with an emphasis on user-friendliness and search functionality.
- ▶ Adopt a strategy to ensure a coordinated and sustained effort across all DGs to increase the number of proactively published documents, in particular among those in the register.
- ▶ Speedily complete the joint legislative database with the Parliament and Council, pursuant to the 2016 Agreement on Better Law-making, ensuring a user-friendly interface based on the European Parliament's legislative observatory, including the publication of all publicly available Trilogue documents.
- ▶ Extend the transparent approach to Brexit negotiations to all trade talks.
- ▶ Stop requiring a postal address for an access to document request, and publish any document released pursuant to a request, as is already done since 2018 by DG SANTE.

LEGISLATIVE TRANSPARENCY

Legislative transparency at the Commission encompasses a number of areas. This section will first look into lobby transparency, as the Commission initiates EU legislation and a large part of upstream lobbying activities focus their efforts on this stage of the legislative process. We will then look in more detail into the processes preceding legislative proposals, in particular stakeholder consultations, impact assessments and expert groups, under the heading on Better Regulation. Finally, the section will look into delegated and implementing acts, which require higher levels of transparency in view of the more limited legislative scrutiny.

As regards the crucial topic of legislative transparency in the context of Trilogues, this focuses more on the transparency of the European Parliament and Council in amending the Commission proposal. The in-depth case study on Trilogues is therefore included in our parallel study on the European Parliament.¹²⁶ Nevertheless, we should highlight that Commission President von der Leyen, in her political guidelines for the new Commission, also committed to increased transparency in the legislative process,¹²⁷ further raising expectations for the disclosure of four-column documents and other documentation on Trilogues via the expected joint legislative database.¹²⁸

Lobby transparency

Lobbying is an important element of participative democracy. However, while organised interests have a treaty-based right to be consulted and to contribute their views to the legislative process¹²⁹ in line with the principles of openness discussed in the previous section, the public also has a right to know who influences legislation and how. This is why regulation and transparency on the process of

lobbying is of the utmost importance. Unchecked lobbying by corporate interests can present a serious threat of political capture and to democracy, undermining public trust in government. Four in five Europeans (79 per cent) agree that excessively close connections between business and politics favour corruption in their country.¹³⁰ One of the manifestations of this influence is associated with lobbying practices, which are often perceived as undemocratic and dangerous. A 2013 poll in six European countries showed that 70 per cent of respondents believed lobbyists had a strong influence on EU decision-making and close to three quarters (73 per cent) considered corporate lobbyists were exercising too much power on EU policy-making.¹³¹

Lobbying is any direct or indirect communication with public officials, that is made, managed or directed for the purposes of influencing public decision-making, and exercised by, or on behalf of any organised group.¹³² This definition excludes interactions with citizens, but includes interactions with paid or unpaid individuals representing private, public or collective organised interests. In Europe, lobbying happens at every stage of the legislative process.

As of March 2020, the organisations registered on the EU Transparency Register declared 47,261 individuals involved, in one form or another, in lobbying the EU institutions. Breaking this down into 'full-time equivalents' (the register allows one to specify that some employees are only spending, say, 20 per cent of their time lobbying the EU) yields 23,882 full-time lobbyists at EU level. However, not all of these would necessarily be based in Brussels – a director of public policy or regional director would be involved but could sit at a company's headquarters, for example.¹³³ The number of lobbyists accredited with an access badge to the European Parliament is 7,500.¹³⁴ The over 12,000 organisations registered on the EU Transparency

Register spend a combined annual budget of close to €1.8 billion, according to their own estimates. Of these organisations, 52 per cent are registered as for-profit corporations with the other registrations divided between non-governmental organisations (NGOs), professional consultancies, think-tanks and municipal authorities.¹³⁵

LOBBYING THE EUROPEAN COMMISSION

In 2014, the Juncker Commission adopted a new and simple rule for meetings: “no meeting without registration”, meaning lobbyists could only meet with Commission decision-makers after disclosing information on their activities via the Transparency Register (see below). The Commission would furthermore be the first large government administration in the world to publish all high-level lobby meetings on its website. Both the publication of meetings, as well as the requirement for lobbyists to register first, were big steps forward in lobby transparency in the EU. No comparable rule was introduced for the European Parliament until 2019, and the Council is lagging even further behind.

The new rule has generated a large amount of data, although the information on meetings is published on separate websites for each individual Director-General, for each Commissioner, and yet another website for the meetings of the cabinets of each Commissioner. Transparency International EU therefore designed a tool, Integrity Watch EU, which pulls all this data together, to give a more comprehensive overview of the number and nature of meetings held. This allows an overview of the stakeholders met, the balance between corporates and civil society and aggregations across sectors and interlocutors.¹³⁶

Unfortunately, the “no meeting without registration” rule was not very clearly laid down in the internal working methods, however. The Commission Decisions stipulating that Commissioners and members of their cabinet,¹³⁷ as well as Directors-General,¹³⁸ must publish their lobby meetings online do not contain any mention of a requirement

for interest representatives to enlist on the EU Transparency Register, and would therefore seem to be inconsistent with the stated goal. Commission documents such as the 2016 report on the application of the access to document regulation¹³⁹ credit the 2014 Commission Working Methods with establishing such a rule. However, the working methods only mention this rule for Commissioners,¹⁴⁰ and make no reference to either Cabinets or Directors-General. The updated Code of Conduct for Commissioners of 2018 extended this rule to cabinet members.¹⁴¹ However, for Directors-General it appears the requirement for lobbyists to register before a meeting was only formally introduced with the working methods released by the von der Leyen Commission in December 2019, which adds that “[t]hese obligations also apply to their Cabinet members and the Directors-General of the Commission”.¹⁴²

Both rules – on publication, as well as on excluding unregistered lobbyists – only apply to the very highest level of Commission decision-makers. As it stands, only roughly 250 out of 30,000 Commission officials are banned from meeting unregistered lobbyists.¹⁴³

The limits of “no meeting without registration”

The rule excludes Deputy Directors-General and Directors, and can therefore not be said to extend to Commission “senior management”. It also excludes middle management – Heads of Unit – as well as their deputies, heads of sector and desk officers. While the Commission may be a hierarchical institution, it can by no means be said that all decisions are taken by the political level (Commissioners and cabinets) or Directors-General. On the contrary, the bulk of lobbying in the Commission happens at the levels not touched by the rules, namely, with desk officers who are the pen-holders on any draft legislation or policy documents, and heads of unit or directors, with an estimated 80 per cent of meetings held at this level.¹⁴⁴ If they can be persuaded of a particular point of view or concern as part of so-called ‘upstream lobbying’, this can have as powerful an effect as top-down decisions by political leadership.

Six years after the introduction of the rule, we still see hiccups in implementation, which seems to indicate an insufficient streamlining of procedures. As recently as March 2020, a number of Directors-General and Commissioners stopped logging lobby meetings.¹⁴⁵ Multiple meetings of the von der Leyen Commission were held with organisations that only registered after journalists started raising questions,¹⁴⁶ as well as a Cabinet-level meeting with tobacco lobbyists, which may breach Commission commitments under the World Health Organization (WHO) Framework Convention on Tobacco Control.¹⁴⁷

Another concern is record-keeping as regards such high-level meetings. Examples include the Commission President herself, whose fourth external meeting upon taking office was with the CEO of Palantir, a controversial data analytics firm.¹⁴⁸ Upon access to document requests, the Commission claimed not to possess any records on the meeting.¹⁴⁹ Similarly, during the previous mandate, an investigation by EUobserver identified at least 25 high-level meetings with sensitive private sector players where no records on the discussion were held.¹⁵⁰ A meeting summary would be useful to keep track of what has been discussed or said to company representatives, as also noted in a parliamentary question regarding the encounter.¹⁵¹ The procedure to publish meetings should be automated to a sufficient extent to not get in the way of crisis management, e.g. by integrating it with calendar tools.

Part of the problem may be a lax attitude to violations of the rules on previous occasions. For example, when the Commission decided that the private jet flight taken by then-Commissioner Günther Oettinger with an unregistered lobbyist did not constitute a meeting (in spite of the rather confined space in a private jet) nor a gift exceeding the allowed amount of €150 (a private jet flight may have an equivalent value in excess of €10,000 and therefore would in itself constitute an unacceptable gift). On this occasion, the Commission's chief spokesperson further undermined the "no registration, no meeting" rule by claiming incorrectly that it only applied to meetings within the portfolio of the Commissioner.¹⁵²

A similarly patchy approach to banning lobby meetings emerged in 2018, when Commission Vice-President Jyrki Katainen duly declared a lobby meeting with the Goldman Sachs Group. Upon further inquiry, VP Katainen confirmed, in writing in a 31 January 2018 letter, that the meeting was set up at the request of former Commission President José Manuel Barroso, involved only the two men, and that trade and defence matters were discussed.¹⁵³ It soon became clear this breached the ban on lobby meetings for Barroso, whose move to Goldman Sachs was cleared by the Commission Ad Hoc Ethical Committee (see section under 'Ethics') based on the commitment made by Barroso not to lobby the Commission.¹⁵⁴

In our view it would have been appropriate to call the Ethical Committee once more and consider appropriate consequences for the behaviour of the former Commission President. Instead, Katainen now insists it was a beer among friends, contradicting his own letter, and that the publication of a meeting with Goldman Sachs on his Commission webpage happened by mistake.¹⁵⁵ In light of this, the European Ombudsman recommended a renewed review of the Barroso case by its Independent Ethical Committee (see section on the Code of Conduct for Commissioners) and found that the Commission's failure to set out in writing how Commission officials should react to possible approaches by Barroso constituted maladministration.¹⁵⁶

Following a series of mishaps with meetings of the new von der Leyen Commission registered too late, only registered following questions raised by journalists, or meetings with interlocutors not duly registered on the Transparency Register,¹⁵⁷ the Commission raised questions by noting that phone calls do not constitute meetings and do not require publication, nor the prior registration of lobbyists,¹⁵⁸ as opposed to video calls. VP Věra Jourová confirmed in writing that video meetings e.g. via Skype, WebEx or Zoom are considered proper meetings, but that "one-to-one standard phone conversations" are not included since "personal meetings and visual interactions have a specific, different character from telephone conversations".¹⁵⁹ The Commission clarified to us that "conference calls", defined as calls involving

more than two people, are nevertheless considered reportable encounters whether the camera is switched on or not. Nevertheless, the 2014 decision defines meetings as “bilateral encounters”,¹⁶⁰ which would seem to us to include one-to-one meetings, whether the bilateral encounter happens by phone or video conference. In times of the Coronavirus pandemic, this interpretation of the 2014 decisions and 2019 working methods creates the possibility of circumventing lobby transparency rules by limiting meeting participants and switching off the camera.¹⁶¹

Awareness among Commission officials on rules applicable to dealing with unregistered lobbyists is mixed. The updated 2019 “Commission Ethics Guide” mentions that Commissioners, Cabinets and Directors-General may only meet registered lobbyists, but makes it clear that this rule only applies to their level: “For all other staff, it is recommended to check the credentials of a given interest’s representative to make sure that they are in the Transparency Register, which includes a binding Code of Conduct for interest representatives. If they are not in the Register, staff should always invite to register before having further contacts”.¹⁶² While this certainly does not exclude meetings with unregistered lobbyists, it is an improvement over the previous Ethics Guide, which left it to the discretion of the individual staff member whether to even mention the Transparency Register to unregistered lobbyists.

We cannot identify any arguments against extending the “no registration, no meeting” rule to the entirety of the Commission, and some steps in the right direction have been made, such as requiring registration from any private sector experts

wanting to apply for membership of Commission Expert Groups (see chapter on Pre-proposal transparency). As regards publication of meetings, one of the arguments brought forward against this at lower levels is the protection of the privacy rights of non-exposed officials. We suggest that much in the way that the personal names of lobbyists are not disclosed by the Commission, it would suffice to publish which unit and which directorate are having meetings.

RECOMMENDATIONS

- ▶ Establish a mandatory lobby register for the Parliament, Commission and Council, in which direct and indirect lobby activities are covered.
- ▶ Require all Commission staff to only meet registered lobbyists.
- ▶ Publish all meetings with interest representatives in a centralised database, including meetings with Commissioners, Cabinets, DGs and lower-level officials. Publication of meetings should specify any legislative dossiers discussed, and link to the Transparency Register webpage of the organisation concerned.
- ▶ Published data should be available in a centralised website, in a machine-readable format and linked to other relevant websites and datasets, such as the legislative Observatory and the Transparency Register.



Although the three institutions are expected to introduce a 'mandatory' Transparency Register in 2021, for the first time covering also the Council of the EU, this only brings small improvements. Meetings with the vast majority of officials from all three institutions will not be conditional upon registration, and not be published.

AN EU TRANSPARENCY REGISTER FOR THE COMMISSION, PARLIAMENT AND COUNCIL

At EU level, all organisations that seek to influence decision-making, whether by employing in-house or subcontracting to consultancies, are encouraged to register in the EU's Transparency Register.¹⁶³ The register was set up by the Commission in 2008¹⁶⁴ and broadened in 2011, when Parliament joined, leading to the development of the EU's Joint Transparency Register.¹⁶⁵ Interinstitutional negotiations on the content and format of the register continued, leading to a modified agreement in 2014¹⁶⁶ and a new version of the Transparency Register launched in 2015.¹⁶⁷

The 2014 interinstitutional agreement (IIA) extends the scope of the register,¹⁶⁸ covering a wider range of activities along with direct and indirect lobbying.

The text introduces clearer definitions of both direct and indirect influence; the latter encompassing much of the work that is conducted via intermediate vectors such as media, conferences, think tanks and sponsored research, among other strategies. The new register also requires disclosure of comprehensive information from all registrants,¹⁶⁹ such as information about the main EU policies and legislative files targeted by the registrant, memberships in Commission Expert Groups or similar structures, associations and parliamentary intergroups, as well as financial information on costs related to lobbying, and list of clients for lobby consultancies, with turnover per client to be disclosed in brackets of €10,000. Registrants continue to have to abide by a Code of Conduct

containing basic integrity standards with regard to lobbying activities.

The obvious weakness is that registration is voluntary, so non-registered organisations and individuals can conduct lobbying activities without disclosing any information. They would not be eligible to meet top Commission officials or receive an access badge to enter the European Parliament, but neither is strictly necessary to meet a Member of Parliament or indeed to lobby the European Commission.

While many consultancies have come around to registering over the years, with the major associations representing EU public affairs professionals (SEAP), consultancies (EPACA) and lawyers (CCBE)¹⁷⁰ joining efforts by Transparency International EU in calling for strict lobby regulation to create a level-playing field,¹⁷¹ there are exceptions. It is particularly worrisome when it comes to law firms, as they may not disclose their clients' identity claiming legal protection of the attorney-client privilege.¹⁷² Of course, such professional secrecy requirements only exist for legal representation in a court of law, not for political lobbying.

A lack of monitoring has in the past led to many entries being of low quality, sometimes to the point of being downright meaningless. To help spot mistakes, the register includes a tool through which members of the public can alert the secretariat of the register or submit a formal complaint about possible breaches of the Code of Conduct.¹⁷³ In September 2015, Transparency International EU submitted official complaints against 4,253 organisations in the Register (roughly half of the registrants at the time) that presented obvious flaws or inconsistencies, resulting in the de-registration of the organisations, pending an update in their filings.

This situation improved with the introduction of an automatic warning for users on potential issues and inconsistencies with their entries,¹⁷⁴ such as implausibly high annual lobbying expenditures for organisations with only a handful of employees.¹⁷⁵ Today, every new entry to the register is checked for eligibility and quality of data provided, with organisations contacted in case of doubt.

Administrative resources devoted to running the register may still be insufficient. In 2019, the register's secretariat performed checks on over 4,500 registrants, finding that almost half of the entries were unsatisfactory, leading to removal of more than 1,000 organisations due to "inconsistent and/or incomplete data, failure to update, duplicate registrations and ineligibility", whereas close to a thousand organisations updated their registrations.¹⁷⁶

As of November 2020, the register had over 12,000 entries, with over 1,000 entries added every year. At least 3,500 organisations declare an annual lobby expenditure of €10,000 or less, which would indicate a very limited lobbying activity.¹⁷⁷ In case of non-compliance with the code of conduct for interest representatives, sanctions may be applied.¹⁷⁸ These range from the temporary deregistration and loss of access to the parliamentary access badge to a long-term prohibition from re-registration (up to a length of one or maximum two years). In 2018, a total of 22 alerts concerning 25 organisations were processed, as well as 13 complaints, mainly concerning factual errors on registrants' data.¹⁷⁹ Two cases were investigated as possible breaches, one was closed with a satisfactory explanation and no sanction while the other was ongoing at the time the annual report was issued.¹⁸⁰

Towards a mandatory Transparency Register for the Parliament, Commission and Council?

The register is used by both the Commission and the Parliament. But only the Commission makes high-level meetings conditional on registration. In Parliament, only MEPs with a special role in the legislative process as well as Parliamentary Committee Chairs currently have an obligation to publish their meetings. MEPs have no obligation to meet only registered lobbyists. The Council meanwhile applies none of the rules and is not even part of the current voluntary register, although some Council Presidencies have begun publishing meetings for the two most high-ranking officials as of late (see Transparency International's parallel study on the Council).¹⁸¹

The European Parliament called on the Commission to submit a legislative proposal for the establishment of a mandatory transparency register.¹⁸² In September 2016, the Commission opted for an inter-institutional agreement that is binding only on the institutions themselves, but does not have the force of law or bind third parties, e.g. the lobbyists themselves.¹⁸³ It should be noted that lobby associations themselves have joined the chorus in favour of a mandatory EU lobby register, with the European Public Affairs Consultancies Association (EPACA), the Society of European Affairs Professionals (SEAP) and the Council of Bars and Law Societies of Europe (CCBE) sending letters to the EU institutions to this effect,¹⁸⁴ in an attempt to level the playing field and avoid undue influence by unregistered lobbyists.

The Commission proposal sought to make the register mandatory by making registration a precondition for lobbyists to meet MEPs, as well as Directors-General of the EP Secretariat and Secretaries-General of Parliament's Political Groups – in addition to the conditionality for top-level

Commission meetings.¹⁸⁵ However, many frequent targets of lobbying would not be covered, including committee advisors of the Political Groups, parliamentary administrators and MEP assistants. As discussed in the previous section, Commission staff below the level of Directors-General would continue not to be covered.

In response to the Commission's proposal, the European Parliament reformed its Rules of Procedure in 2019 so as to ensure publication of lobby meetings by certain groups of MEPs that have taken on an institutional role on behalf of Parliament, i.e. rapporteurs, shadow rapporteurs and Committee Chairs, but did not introduce the requirement to only meet registered lobbyists.

In December 2020, the three institutions reached a political agreement in which the abovementioned measures were confirmed, and saw the Council joining the register. Despite the progress made, in the view of Transparency International EU, this agreement does not constitute a mandatory lobby register due to the existence of multiple loopholes.

RECOMMENDATIONS

- ▶ Establish a mandatory lobby register for the Parliament, Commission and Council, in which direct and indirect lobby activities are covered.
- ▶ Require that EU policy-makers, including MEPs, only accept meeting requests from registered lobbyists. Publication of such meetings should be mandatory. Published meetings must state which specific file or files were discussed and give the official names of organisations present, as registered in the Transparency Register.
- ▶ Published data should be available in a centralised website, available in a machine-readable format and linked to other relevant websites and datasets, such as the legislative Observatory and the Transparency Register.

Pre-proposal transparency or “better regulation”

The Commission is bound by the Treaty to carry out “broad consultations” to ensure that the EU’s actions are “coherent and transparent”.¹⁸⁶ In the preparation of a legal proposal, it should also “consult widely”,¹⁸⁷ and maintain “open, transparent and regular dialogue with representative associations and civil society”.¹⁸⁸ The first transparency measure on upcoming legislative proposals is the Commission work programme, which the Commission publishes annually around the turn of the year, and which contains the legislative and non-legislative initiatives to be pursued by the various DGs. As a general rule, bar exceptions in unforeseen matters or arising urgencies, the Commission will not make legal proposals that are not included in the annex to its work programme.¹⁸⁹ While the Commission must consult widely, and justify decisions not to take up initiatives called for by the Council or the Parliament, the Commission’s work programme is drawn up solely on the Commission’s initiative, in keeping with its exclusive right of legislative initiative.

When the Juncker Commission took office in late 2014, it made “better regulation” one of its key focus areas, in particular by universalising the requirement of impact assessments and stakeholder consultations as standard procedure before proposing any new legislation.¹⁹⁰ Better regulation sounds good, but this is not a new claim or ambition on the part of the Commission. Its commitment to public consultations has evolved in stages, starting with its 2001 White Paper on “European Governance” and a 2001 Communication on “Simplifying and improving the regulatory environment”,¹⁹¹ followed by the 2002 “better regulation programme”. Already in 2012, the Commission claimed to have cut 25 per cent of the burden to businesses stemming from EU legislation. The same year, the Commission published a communication on “regulatory fitness” (REFIT), which was further developed in 2015 into the “REFIT platform”, with annual “REFIT scoreboards” published to document progress, as part of the Commission’s “Better Regulation guidelines”

and “toolbox”, both adopted in 2015. This was followed by the 2016 IIA on “Better Law-making”, which includes the Parliament and the Council and contained measures to improve the transparency of the process of the adoption of delegated and implementing acts (see the next section), and updated in the 2017 communication on “Completing the Better Regulation Agenda: Better solutions for better results”,¹⁹² accompanied by the updated 2017 “Better Regulation Guidelines”.¹⁹³

The Juncker Commission also sought to quantify this better regulation effort, ensuring that fewer pieces of legislation would be proposed or enacted, by withdrawing most legislative files not adopted under the previous Commission. It should be noted that also for the purpose of scrapping, amending, or simplifying a law, a new piece of legislation is needed, and that Commission services as well as new commissioners will usually attempt to leave a mark by bringing forward their own initiatives, creating an incentive for new regulation.¹⁹⁴ At the same time, unifying regulation at EU level can



Better regulation has long become a catchphrase for simplified legislation and reducing ‘red tape’ for economic operators. Nevertheless, successive ‘better regulation packages’ keep on finding things to improve.

reduce the fragmentation of product and services markets at national level (so-called positive integration), which may help to reduce red tape, at least when it comes to cross-border economic activity.

Many civil society groups have been critical of the very goal of scrapping legislation for the sake of fulfilling numerical targets, given that this is often seen as reducing environmental safeguards, product regulation that may have been introduced to protect consumers, or similar social goals.¹⁹⁵ This holds true for the announcement of the von der Leyen Commission to follow a “one-in, one-out” approach of scrapping one piece of legislation for every new law adopted.¹⁹⁶ As a form of deregulation, the better regulation agenda is indeed intended to reduce the number of rules that economic operators must follow, so as to improve the business environment and growth. Reiterations of the aim to do less, simplify regulation, cut red tape, etc., remain a popular rhetorical device to address the common criticism of an aloof, bureaucratic EU, and go hand in hand with the overarching goal of deregulation that had become commonplace in the political discourse leading up to the Great Financial Crisis of 2008.

Nevertheless, a simplistic focus on the quantity of legislation would not do the better regulation agenda justice. This is about improving the quality of legislation that is eventually passed into law, and to consult early and widely to achieve this aim. The debate on better regulations covers both, the process of legislation as well as the contents of legislation. In this section, we will seek to evaluate to what extent the better regulation agenda indeed leads to greater transparency and participative democracy in the adoption of legislation, or whether it may even add complexity and thereby reduce transparency.

In the context of transparency and accountability, the most relevant aspect regards the predictability and openness with which new laws are prepared, before the formal legislative process is launched via the publication of a legal proposal by the Commission. This is referred to as “upstream lobbying”, i.e. the opportunity to contribute views on public policy before the Commission has put forward a draft law. This early phase is of crucial importance, given that the framing of the

Commission proposal is thought to have a much higher impact on the final law than the amendments made by the Council and the Parliament.¹⁹⁷ This is because it is difficult to change the entire direction of a legal proposal via Council or Parliament amendments.

With the adoption of the 2015 Better Regulation Package, better regulation has come to mean: (i) more frequent consultation of stakeholders and citizens; (ii) formalising the requirement for impact assessments (and the reform of the Impact Assessment Board into the Regulatory Scrutiny Board); and (iii) periodical evaluation of existing regulation to ascertain whether it is still fit for purpose. This was further updated in July 2017, when the revised “better regulation guidelines and toolbox” introduced horizontal checks to be performed on any new legislative proposal to assess how it contributes to “regulatory fitness” (i.e. reduction of costs to economic operators, by assessing the regulation against the five criteria of effectiveness, efficiency, relevance, coherence and EU added value), as well as whenever legislation is evaluated and revised.¹⁹⁸ The various processes are spelled out and formalised via the better regulation package, to ensure the Commission actually follows these steps in practice, with the notable exception in circumstances of particular urgency.¹⁹⁹

STAKEHOLDER CONSULTATIONS

Stakeholder consultations are the most accessible form of consultation, under which the Commission also counts conferences, public hearings and events, Eurobarometer surveys, expert groups, focus groups, targeted consultations (e.g. targeting SMEs), SME panels, workshops, meetings and seminars.²⁰⁰

Following commitments made by the Commission as part of the 2016 IIA on Better Law-making, in late 2017 the Commission launched a website entitled “Contribute to law-making”, which offers two sub-websites with the possibility to “make suggestions to improve laws”.²⁰¹ This is focused on existing laws and the claim to lighten the burden of government regulation, and “Have your say”,²⁰² where it pooled opportunities for citizens and lobbyists to contribute their views. The most important element of this



Participative democracy throughout the various stages of the Commission's policy cycle has developed into a veritable maze

website is the register of published initiatives,²⁰³ which is more polished and searchable than any of the other Commission registers (see section on administrative transparency for a comparison). Notably, the publication of initiatives and seeking of stakeholder input is now also extended to implementing and delegated acts, which were previously excluded from regular consultation practices.²⁰⁴

The main feature of the website is a timeline for displayed legislative processes, also for consultations that are already closed or are not yet open, thereby providing a comprehensive overview. This also allows feedback on any proposal within four weeks of the publication of roadmaps or inception impact assessments (see below).

The website asks any organisation seeking to influence EU decision-making processes to register in the EU Transparency Register first, although this is not a requirement. Unregistered organisations

are sorted into a separate category, however.²⁰⁵ Additional rules concern basics of etiquette, in particular since some of the feedback is instantly published on the website, except for responses to public consultations, which are collated and published separately once the consultation is closed.

Handling of submitted views

The European Court of Auditors (ECA) in 2019 published an in-depth review of the new Commission consultation framework,²⁰⁶ including an analysis of the way consultations are conducted and how results are taken on board. While the ECA was generally satisfied with the Commission's approach to consultations, it recommended more proactive outreach to ensure higher levels of participation in consultations, using different consultation questionnaires for general and technical audiences, and ensuring wider translation for consultations of particular public interest. An

important recommendation made by the ECA is to provide consultation participants with timely feedback, laying out what has and has not been taken on board. This is crucial to bolster the legitimacy of the consultation process, as well as to encourage stakeholders to participate in future consultations – as they too need to be persuaded to invest sometimes significant resources to meaningfully participate, including the elaboration of detailed submissions. This concern is reflected in the fact the Court “did not find any evidence that the feedback contributions had been taken into account for the consultation strategies”.²⁰⁷

Stakeholder contributions will usually vary widely in detail, technical accuracy and positions taken. The consultation rules give the Commission enough discretion to pool repetitive submissions, and differentiate the weight given to submissions made from the perspective of special interest groups, private (for profit) interests and groups representing public interests. This is supported by research regarding stakeholders’ perspectives on the consultation process as reformed with the 2015 Better Regulation package,²⁰⁸ which notes that insiders do not rate the consultation regime higher than outsiders, a crucial indicator to ensure it does not simply bolster the ability of organised lobbyists to impact legislation.

According to the Court of Auditors, the Commission conducted over 100 public consultations per year from 2015 to 2018, with participation levels depending heavily on the topic. A 2018 consultation on the abolition of summertime yielded 4.6 million responses, the Commission’s record to date. Other consultations on agriculture or natural habitats also drew between 50,000 and 500,000 contributions, although the average (excluding these spikes) was 500 submissions per consultation in 2015 and 2016, and about 2,000 submissions in 2017 and 2018.²⁰⁹ While the numbers are therefore increasing markedly, consultations cannot be expected to draw a representative sample, due to self-selection of consultation participants.²¹⁰ On the flip-side, it is noted that many citizens could not have participated without prior information about the consultation and the topic provided by civil society organisations.²¹¹

In view of the potentially large number of contributions, the Commission aims to publish summaries of the consultation.²¹² According to the Court of Auditors, this happens with a delay of on average six months, although out of 26 consultations analysed, only 20 were followed by a public factual summary report.²¹³ In a survey conducted by the auditors, 41 per cent of consultation participants were satisfied with the summary.²¹⁴

Participation in stakeholder consultations

A more encouraging 65.5 per cent of surveyed participants declared themselves “satisfied” or “very satisfied” with the consultation process overall.²¹⁵ Some respondents noted the opportunity to participate in democracy beyond voting in elections, and 49 per cent of respondents claimed they participated out of “civic responsibility”.

The Organisation for Economic Co-operation and Development (OECD) ranked the stakeholder consultation via the new ‘Have your say’ website as the best across all OECD countries in 2018, noting in particular the sufficient time awarded for feedback, as well as the increasingly multilingual offering.²¹⁶ This assessment was based on criteria such as participation, openness and accountability, effectiveness and coherence (defined as consistency across consultation processes, evaluation and review).

However, the Commission’s own Regulatory Scrutiny Board (see below section on Impact Assessments) sees some shortcomings in the Commission’s stakeholder consultations. In particular, it flagged low participation rates on some of the public consultations, a lack of neutrality in the questionnaires prepared by Commission staff, possibly incomplete coverage of stakeholder groups when conducting targeted consultations (although targeted consultations are recognised as increasing the participation rate), inconsistent use of consultation results in the impact assessments, which the Board scrutinises, and even “inaccurate or biased presentation of consultation results”.



While impact assessments are prepared by policy DGs, making complete independence impossible, they can ensure that policy initiatives are thoroughly reviewed before the Commission tables a proposal

IMPACT ASSESSMENTS

Impact assessments are key to evidence-based policy making. They seek to – with objective, scientific methods – assess the likely impact of regulatory measures. A number of requirements need to be met for this exercise to be credible, such as a sufficient degree of independence of the assessors and in the governance of the body coordinating the production of the vast number of impact assessments required. Additionally, not all political decisions can be replaced by technocratic considerations. The renewed focus on impact assessments and science-driven policy-making as part of the better regulation agenda is an interesting focus for a Commission that branded itself as “political” and now “geopolitical”, as opposed to technocratic.

Impact assessments seek to ensure policy trade-offs are made based on scientific evidence. If this process lacks independence, the assessments risk being biased in favour of the Commission’s preferred and pre-determined course of action.

Commission impact assessments are drafted by the Commission services themselves. It is therefore difficult to see how this can be independent of the political priorities of the Commission or the Directorate-General concerned, as the policy DGs lack the incentives to point out if a proposal may be ineffective or even misguided. Nevertheless, the production of such an assessment puts pressure on services to develop better arguments and seek out evidence in favour of a given proposal.

However, in a second stage, the impact assessment *summaries* are reviewed by a horizontal entity, independent of the DG leading on the impact assessment. This used to be done by the “Impact Assessment Board”. Following a perception that this Board had itself become too politicised,²¹⁷ it was replaced by the “Regulatory Scrutiny Board”.

BOX 1: The Regulatory Scrutiny Board

While the independence of the Regulatory Scrutiny Board is also occasionally called into question,²¹⁸ the Commission decision establishing it specifies that it “shall not seek or take instructions”.²¹⁹ Its independence is bolstered by recruiting all members on fixed, non-renewable three-year contracts,²²⁰ meaning that they cannot be removed before the expiry of their term. It is composed of seven members, three of which are appointed from outside the Commission. However, the members recruited from within the Commission will return to their role relatively soon, while the members from outside only have a three-year horizon, making them less independent than they could be. The limited resources – seven full-time members plus three assistants – also expose the board to the risk of being flooded with impact assessment summaries. The board issues annual reports summarising its activities,²²¹ which constitute an opportunity to report on issues encountered in the discharge of its work.

The Commission's system of impact assessments has been noted as being of "world-leading standard".²²² The Board publishes all of its assessments of the summaries, and a positive impact assessment is a precondition for a proposal to go ahead. The Commission must publicly explain any decision to proceed with a file in the absence of a positive opinion from the Board.²²³ Impact assessments are, according to the Commission, regularly discussed in the closed-door Trilogue negotiations between the Council and Parliament,²²⁴ which would seem to make a contribution to an informed discussion.

Although the requirement for impact assessments can be circumvented by declaring that a proposal is urgent, any legal proposal that is "likely to have significant economic, environmental or social impacts", whether legislative or not, should be preceded by an impact assessment, including delegated and implementing acts. This would seem to be the case for the absolute majority of initiatives. However, in 2015, not even a third of initiatives came with an impact assessment, while 2016 saw an assessment for half of all proposals, and in 2017 the figures were more than 60 per cent, according to an analysis carried out by Clingendael.²²⁵ The European Parliament also "deplored" the lacking assessments.²²⁶ The Commission notes that, in some cases, impact assessments would not be "relevant", or "simply not possible",²²⁷ e.g. when the Commission is legally bound to act, when a communication covers too broad an area to measure possible impacts, or for soft policy instruments that do not, by themselves, constitute a decision and may therefore have limited measurable impact. Many more examples are given in the toolbox.

Impact assessments are not automatically published, unlike the assessments of the Board. The public will usually have access to impact assessment reports, which contain summaries of the impact assessment – including the environmental, social and economic impacts, who will be affected and how, as well as a summary of the consultation carried out and the results it yielded. These reports are published together with the legal proposal when adopted by the Commission,²²⁸ meaning that impact assessment reports for acts not adopted will not necessarily be made public. This may change, as roadmaps and

inception impact assessments should since 2017 be published "as soon as possible".²²⁹ While this seems fairly straightforward, there are still cases where the Commission will not publish. In a recent case of an access to document request rejected multiple times,²³⁰ the Commission ended up publishing a 166-page "impact assessment study", which was blacked out in its totality, except for the contents page.²³¹

EXPERT GROUPS

Beyond classic lobbying and ad hoc stakeholder consultations, the Commission manages a vast network of expert groups to gather feedback on its policies and proposals. Some of these are not limited to members from national authorities but are open to participants from the private sector. This has attracted much criticism over the years, including from the European Parliament through its discharge procedure,²³² and the first own-initiative inquiry launched by the new European Ombudsman once she entered office in early 2014.²³³

2016 reform

The Commission has committed to maintaining a searchable "Register of Commission Expert Groups and Other Similar Entities", and their respective members, which can be consulted online.²³⁴ Safeguards to protect the independence of the Commission from third-party influence are non-binding on the Commission, but have been strengthened significantly in 2016, with the adoption of horizontal rules on the creation and operation of Commission expert groups.²³⁵ The guidelines ensure a common approach to expert groups across the Commission, which is welcome in view of the proliferation of a vast network of groups that dwarf the capacity of watchdog scrutiny.

This includes specific measures on conflicts of interest and on the independence of experts appointed in their private capacity. Accordingly, individuals joining expert groups in their personal capacity ('Type A' members)²³⁶ are required to submit declarations of interests alongside their application to join an expert group,²³⁷ in view of the need to protect the public interest. This will be published by the Commission alongside a



Meeting of a High level expert group on Key Enabling Technologies

recent curriculum vitae. Type A members may also be remunerated, but only under specific circumstances, if their work is “of such a nature that without it the Union policy concerned could not reach its objectives”, and are to be selected following an open call for applications.²³⁸

There is a register on expert groups that requires the publication of members, except in cases where these represent Member State authorities, or where it would pose a threat to their security. Observers are also listed, and Type B and C members (representing stakeholders in an area, e.g. corporate lobbyists or representatives of industry associations) are listed alongside the specific interests they represent.²³⁹ Additionally, Type B and C members may only be appointed if they are registered in the Transparency Register.²⁴⁰

Conflicts of interest

While the aforementioned rules represent big improvements vis-à-vis the situation predating the 2016 reform,²⁴¹ it is not clear in practice how

(potential) conflicts of interest will be treated. As noted by Corporate Europe Observatory, “the Commission official closest to the stakeholder and most in need of his/her advice is supposed to make a judgement call of whether the conflict is significant or not”.²⁴² In principle, the standard applied for the assessment of a conflict of interest is broad, as any interest that may be “reasonably perceived as compromising the expert’s capacity to act independently” is deemed to be significant,²⁴³ although members with such a conflict of interest can also be appointed as a Type B or C member, for whom the requirement for independence is replaced by a requirement to disclose the interests lobbied for via the EU Transparency Register.

However, the new rules still allow carve-outs in case of urgency, including as regards the requirement to organise an open call for experts.²⁴⁴ The composition of expert groups, in part due to the self-selection and the over-representation of corporate interests among lobby groups, continues not to be balanced. The fact that special allowances can only be paid to individual members, and not to experts representing organisations,

undermines the representation of non-profit interests – whether non-governmental organisations (NGOs), academics or think tanks, in particular those from peripheral and poorer EU countries. The new rules also do not require the publication of minutes or summaries from expert group meetings, in spite of repeated Ombudsman and civil society requests²⁴⁵ to this end.

RECOMMENDATIONS

- ▶ Create a unified interface for better regulation, based on the register on upcoming initiatives.
- ▶ Introduce automatic, timely and standardised publication of meetings, agendas, participants and summaries of expert groups.
- ▶ Take additional steps to ensure balanced representation of external stakeholders on expert groups.

Delegated and implementing acts

Similar to national political systems, the executive (i.e., the Commission) is under certain circumstances empowered to adopt technical additions to legislation, so-called implementing and delegated act. This type of legal act is intended for technical subjects that do not lend themselves to high-level political negotiations between the co-legislators, ministers in the Council and Members of the European Parliament, or which may have to be adapted frequently without the need to engage in a new legislative process.

Within the legislative procedure, and based on provisions in the EU's Treaties, the co-legislators have the possibility to delegate authority to adopt 'Delegated Acts' to the Commission (to 'supplement or amend certain non-essential' parts of legislation), or to foresee the parameters within which the Commission may adopt 'Implementing Acts', to ensure uniform conditions of implementation. Common examples are authorisations for use

of specific substances, updates in view of technological developments, or the certification of newly developed products and standards.

These procedures are much faster, but this type of legislative procedure is only legitimate if the procedures, and the scientific evidence they are based on, are transparent and conducted independently, i.e. without the risk of conflicts of interest. This is even more pertinent since delegated and implementing acts can regard direct grants to specific beneficiaries or the authorisation of products and substances from which specific interests stand to profit, providing a strong incentive to try and influence the decision-making process or even the evidence base by funding favourable research. Thanks largely to an increase in scrutiny and transparency, decisions that may in the past have been waved through on the grounds of being purely technical can, on occasion, receive considerable public attention.

This next section will describe the procedures known in EU jargon as "comitology", and the transparency and accountability mechanisms under which the Commission adopts such acts.

TRANSPARENCY AND ACCOUNTABILITY

Access to document legislation (see section on administrative transparency) also applies to comitology committees, but the documents submitted to committee members are confidential and do not need to be disclosed in the Comitology Register. Until recently, even the drafts for delegated and implementing acts did not have to be published until their final adoption by the Commission. However, since 2017, draft delegated and implementing acts are published for stakeholder feedback pursuant to the IIA on Better Law-making.²⁴⁶ The committees' discussions remain confidential. The Comitology Register does, however, contain information on committee agendas, summary records (not full minutes) and voting results,²⁴⁷ although it does not include the voting record country-by-country, as specified by Articles 10(2) and 13(2) of the Standard Rule of Procedure for comitology committees.²⁴⁸

The confidentiality of Member State positions in comitology is a problem, since national governments can only be held accountable if voters know how their own government positioned itself, even if most topics are rather technical. A recent case regarded certain pesticides that were harmful for bees. An access to document request on countries' voting behaviour was refused by the Commission. The European Ombudsman reviewed the decision and recommended access should be granted, due to the higher transparency requirement for legislative activity and the fact that an environmental issue was at stake, which significantly increases transparency requirements pursuant to the Aarhus Regulation.²⁴⁹ At issue is therefore whether comitology is legislative in nature. The Ombudsman branded the Commission decision not to grant access to voting behaviour as "maladministration" – the sharpest condemnation in the Ombudsman's toolbox.²⁵⁰

Unlike some expert groups, the members of comitology committees represent Member States and are not required to publish declarations of financial interests. While the register contains participant lists for comitology meetings, these sheets are filled in by hand and specify that no names may be entered. The list consists of abbreviations for national ministries or acronyms of other presumably governmental organisations. The register further contains a summary of proceedings, the outcome of any votes taken, the agenda and information on the legal basis for acts under discussion as well as the comitology procedure applicable.

In spite of the lack of transparency on the composition of committees, it is clear that the Commission plays a fundamental role as the agenda setter and pen-holder of any draft delegated and implementing acts. The Commission unit in charge of a specific dossier will send the draft act to the members of the relevant comitology committee, convene the committee, explain the draft and ask for opinions or a vote. Whether a vote is necessary, and what majorities are needed to pass it, depends on the type of delegated or implementing act specified in the empowering legislation (the basic act).

In December 2017, the Commission launched an *Interinstitutional Register of Delegated Acts*,²⁵¹

pursuant to the 2016 Agreement on Better Law-making between the Commission, Parliament and Council, in an effort to increase transparency and information-sharing on upcoming delegated and implementing acts. This is important given that the Council and Parliament still need to scrutinise newly passed acts, even if the comitology procedure is designed to work without their input.

Accountability

While the Commission previously based itself on putatively objective science, it has found some decisions under comitology to be fraught with reputational risks and political backlash. In the years 2016 and 2017, a supposedly technical decision to re-certify glyphosate, a pesticide sold exclusively by Monsanto (now BASF) and used widely in the EU, erupted in a major debate about the risks the substance posed for human health. The technical assessments of the European Food Safety Authority and European Chemicals Agency were being called into question based on the lack of transparency of the studies used and the possibility that non-peer-reviewed industry-funded studies may have influenced the result, irretrievably politicising the debate.

Under the current system, responsibility is shared between the Commission and comitology committees filled by Member States, which can blur accountability. Member States will point at the Commission as the initiator of the act, whereas the Commission will point to the fact that Member States could have blocked the law had they wished to do so. Others have taken a different view, suggesting that "to block an implementing measure, you need a qualified majority vote in the Appeal Committee against the Commission's draft. In practice, this is mission impossible".²⁵² The Commission itself states that "there has never been a qualified majority amongst Member States in favour or against a draft Commission decision authorising genetically modified organisms" and that as a result, the Commission had to take decisions "systematically without the support of a qualified majority of Member States in the Committee".²⁵³ The technical nature of most such acts also means that the topics are unlikely to be discussed at political level within national governments.²⁵⁴

The Standing Committee on Plants, Animals, Food and Feed did not have a qualified majority against the re-certification of glyphosate, meaning that the Commission could easily have adopted the implementing act, based on the assessments by the EU's technical agencies. However, in view of the raging political debate, the Commission was keen to avoid taking responsibility for an unpopular decision. The health commissioner Vytenis Andriukaitis decided that the Commission would simply not renew glyphosate unless a qualified majority in favour of re-certification was found among Member States,²⁵⁵ essentially turning the logic of comitology on its head: the Commission would not act unless the political level got involved and would take responsibility in the Commission's stead. In the end, Member States did find a majority to vote in favour of a shorter than usual five-year re-certification.²⁵⁶

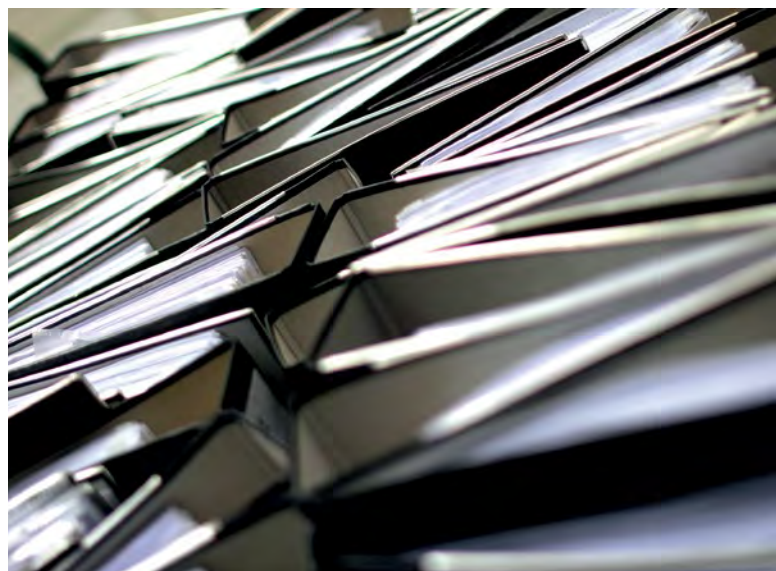
In 2017, the Commission moved to formalise this approach, proposing new comitology rules that would allow it to escalate a topic to the level of the Council of the EU, where national ministers sit, in case a contentious decision repeatedly yields neither a positive nor a negative opinion in comitology committees, and to additionally make appeal committee votes public. Describing the need for such an added layer of political accountability in comitology, then President Jean-Claude Juncker stated in his 2016 state of the union speech that this would allow the Commission to “take responsibility in recognising when some decisions are not for us to take. It is not right that when EU countries cannot decide among themselves whether or not to ban the use of glyphosate in herbicides, the Commission is forced by Parliament and Council to take a decision. So we will change those rules – because this is not democracy.”²⁵⁷ It should be noted this reform is currently stalled at the European Parliament, with no decision from the competent Committee on Legal Affairs.²⁵⁸

DELEGATED ACTS

Delegated acts are “quasi-legislative measures”,²⁵⁹ and more far-reaching than implementing acts – while Article 290 TFEU defines them as “non-legislative”, it also notes the acts are “of general

application” and designed to “supplement or amend certain non-essential elements of the legislative act”. To delegate such powers to the Commission, a legislative act (the “basic act” empowering the delegation) must define the objectives, content, scope and duration²⁶⁰ of the delegation of powers explicitly.

Additionally, the basic act must specify whether Parliament or the Council (each acting on their own) may revoke the delegation, and whether any delegated acts adopted by the Commission enter into force automatically. Alternatively, Council and Parliament may legislate that the delegated act will only enter into force after a defined period of time, and only if none of the two co-legislators has expressed any reservations during a timeframe of two months.²⁶¹ To revoke an act or the delegation itself, Parliament must vote by the majority of its constituent members (a higher-than-usual threshold), and the Council by Qualified Majority Vote (QMV).²⁶² Once the delegation is issued via a legislative act by Parliament and the Council, the Commission is in principle empowered to adopt delegated acts without any involvement of the Member States in comitology committees, which gave rise to virulent criticism. It was said that the EP had “lost the flow of detailed information”,²⁶³ while



While the vast amount of technical legislation is difficult to keep an overview of, the recently launched Register of delegated and implementing acts facilitates this process and allows users to subscribe and get notified of draft acts in policy areas of interest.

others noted the Commission had the “power to both propose and adopt” and to “consults whoever it wants, however it wants”.²⁶⁴

This changed thoroughly with the Interinstitutional Agreement on Better Law-making agreed by the Council, Parliament and Commission in 2016. Through this, the Commission committed to “gathering, prior to the adoption of delegated acts, all necessary expertise, including through the consultation of Member States’ experts and through public consultations”.²⁶⁵ A Common Understanding was adopted, a new Interinstitutional Register of Delegated Acts was launched in December 2017, aiming to provide a complete overview of the lifecycle of delegated acts. By subscribing for specific topics or delegations conferred by specific basic laws, users can be notified about files of interest. The Parliament and Council are on an equal footing when it comes to scrutinising delegated acts. However, the main accountability mechanism for delegated acts is through comitology committees or expert groups, filled with representatives of national ministries or public institutes. In practice, the involvement of Council and Parliament is limited.

To ensure the institutions have the information they need to scrutinise draft delegated acts, Parliament and Council “receive all documents at the same time as Member States’ experts” in comitology committees. The Commission has agreed to systematically consult comitology committees for draft delegated acts, even where the Treaty allows it to adopt delegated acts without mention of comitology.²⁶⁶ Specifically, the newly adopted Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts states that the “Commission shall consult experts designated by each Member State in the preparation of draft delegated acts”, in a timely manner.²⁶⁷ Council and Member State officials must be invited to these meetings, simultaneously.²⁶⁸ This also includes provisions to force the Commission to either take onboard the experts’ feedback or explain why it will not, in annex to committee proceedings.²⁶⁹ In terms of public accountability, a summary of the consultation process must accompany the explanatory memorandum of a delegated act, meaning it will be published together with the delegated act once it becomes law.²⁷⁰

The Commission states that it always consults comitology committees and seeks feedback from citizens and stakeholders within a four-week period,²⁷¹ although exceptions are made in the urgency procedure.²⁷² At the time of writing, three draft delegated acts were open for feedback, whereas 20 draft delegated acts were marked as upcoming, giving stakeholders the possibility to prepare. The forward-looking database is much more accessible and well-structured than the Comitology Register, which only displays information on procedures that have already passed. Importantly, the register on upcoming initiatives also publishes the draft legal texts, while the Comitology Register only allows the filing of access to document requests, even for legal texts that have long been adopted and published in the official journal and EUR-Lex database.

However, the field of delegated acts is uneven and complex. The Commission is still adapting legislation that preceded the Lisbon Treaty and foresees the “regulatory procedure with scrutiny”, which the Treaty replaced by delegated acts back in 2009. The delegations in basic laws may or may not foresee the possibility of revocation, may give different timeframes for that and may set additional conditions, or not. This complicates the delivery, scrutiny by the co-legislators, and by the public. To reduce the potentially endless variety of procedures on delegated acts, at least in the future, the 2016 Common Understanding also includes standard clauses with a limited number of three options on how to delegate authority in a basic law going forward.²⁷³

IMPLEMENTING ACTS

Implementing acts are generally of a more technical nature, and often concern aspects of EU law that must be updated regularly. For example, lists of companies certified as ship-recyclers or, as noted above, the period of authorisation for pesticides such as glyphosate, which must be regularly reviewed to account for new scientific data on risks for human health and the environment.

As with delegated acts, the basic legislative act authorising the adoption of implementing acts lays down the parameters within which the Commission

may do so. For example, it may specify that the Commission can only adopt an implementing act if the comitology committee votes in favour of it by qualified majority²⁷⁴ – normally, a ‘no-opinion’ scenario leads to adoption, too. While the procedure for delegated acts is self-executing based on Article 290 TFEU, implementing acts are based on a 2011 regulation passed by the co-legislators. The Treaty, and the title of the regulation, specify that it is Member States, not the European Parliament, that exert control over the Commission’s implementing acts.²⁷⁵ This introduces a differentiation between the examination procedure and the advisory procedure for the adoption of implementing acts. The examination procedure is reserved for implementing acts of a “general scope” or with particularly important implications, e.g. large funding programmes or adaptations made to agricultural and fisheries policies, the environment, health and safety protections, etc.²⁷⁶

The procedure to be followed is very similar to the one the Commission agreed to follow as part of the Common Understanding on Delegated Acts,

although in this case the Commission is legally bound by the Comitology Regulation, not just by an interinstitutional agreement, which any of the three parties can unilaterally withdraw from. Draft implementing acts and the agenda must be sent to the corresponding comitology committee no less than 14 days before the meeting.

In the committee, the Commission must explain its proposal for an implementing act, and, since 2017, it must also summarise the feedback gathered from stakeholders and citizens via the online consultation platform. The opinion of the committee must be recorded in the minutes, which are later published on the comitology register.²⁷⁷ However, the identity of Member States making remarks or reservations is not disclosed, meaning it is still impossible for the public to hold their national administration to account specifically, unless the Member State requests to be identified in the minutes.

In the case of the *advisory procedure*, the committee may deliver an opinion, by simple majority vote, if necessary. The Commission

Implementing and delegated acts are scrutinised by Member State representatives through an extensive process of so-called comitology meetings.



can then proceed with its implementing act, while “taking utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered”.²⁷⁸ This means the Commission is not bound whatsoever by the committee opinion, given that ‘taking utmost account’ is not a legally actionable term.

In the *examination procedure* on the other hand, Member State opinions are binding. If a negative opinion is passed by simple majority, the Commission cannot adopt the implementing act,²⁷⁹ but may amend its proposal or put it to an appeal committee, which functions like the comitology committee but is composed of higher-ranking national officials. If no opinion is passed at all, the Commission may proceed with adoption. This is the case with most controversial subjects, e.g. glyphosate and genetically modified organisms.²⁸⁰

Parliament and Council must be kept informed of implementing acts. However, even if they formally object to an implementing act, or find that the act goes beyond the Commission’s powers defined in the basic act, the Commission must merely review its implementing act, but is not legally bound to withdraw or amend it.

RECOMMENDATIONS

- ▶ Streamline the procedures applicable to delegated acts in line with the ‘Common Understanding on Delegated Acts’ from 2016, including for existing delegated acts, to ease scrutiny procedures.
- ▶ Introduce automatic, timely and standardised publication of meetings, agendas, participants and summaries of comitology meetings.

ETHICS

The European Union is a representative democracy; citizens transfer powers to elected representatives²⁸¹ and therefore entrust them with the protection of their interests. Levels of trust in EU institutions have been rising slightly since reaching their lowest point in 2014, when “less than a third of Europeans” trusted the Commission.²⁸²

In the next sections, we will assess the Commission’s integrity framework, focusing on the developments in law and in practice; on the rules in place for the Members of the Commission as well as for Commission staff, and the operation of the EU anti-fraud office and whistleblowing policy.

BOX 2: Conflict of interest defined

Conflict of interest as defined by Transparency International

Situation where an individual or the entity for which they work – whether a government, business, media outlet or civil society organisation – is confronted with choosing between the duties and demands of their position and their own private interests.

Conflict of interest as defined by the Code of Conduct of Members of Commission

A conflict of interest arises where a Member of the Commission has a personal interest that may influence the independent performance of its duties. A conflict of interest does not exist where a Member benefits only as a member of the general public or of a broad class of persons.

The Commission’s integrity framework

This section will look into rules to safeguard the integrity of the Commission by detecting and managing potential conflict of interest situations. Conflicts of interest invariably arise in public institutions of the size of the European Commission, so the key lies in devising mechanisms and procedures that raise awareness of the rules, enable detection and reporting of potential conflicts, and set out ways to mitigate them.

The Commission has an ethics strategy, which is continuously revised, including updated guidance documents.²⁸³ This is reflected in the relatively higher awareness of ethics rules in the Commission as compared to the Parliament and the Council, with over 60 per cent of Commission staff claiming good knowledge of the ethical framework,²⁸⁴ and over 50 per cent having participated in ethics-related training.²⁸⁵

Members of the Commission and EU staff are bound by the Treaties to carry out their duties in the general interest of the Union, with independence and integrity.²⁸⁶ The Treaties also establish that the Court of Justice can, upon request by the Commission or the Council, forcibly remove a Commissioner if they are “guilty of serious misconduct” or no longer fulfil the conditions required for the performance of their duties, or lift their right to a pension or other benefits.²⁸⁷ In the exercise of their responsibilities, Commissioners can be held individually accountable.

CODE OF CONDUCT FOR COMMISSIONERS

The ethical standards for Commissioners are further elaborated on in the Code of Conduct for Members of the Commission,²⁸⁸ which entails a duty to “avoid any situation which may give rise to a conflict of interest or which may reasonably be perceived as such”.²⁸⁹

Following the revolving door case of former Commission President José Manuel Barroso, the Ad Hoc Ethical Committee of the Commission concluded that the Code was not sufficiently strict for it to criticise the former President taking up a position with Goldman Sachs International, even if he would “certainly” deal with issues related to his former responsibilities.²⁹⁰ The ethics committee further noted that “the Code apparently starts from the presumption that once that [cooling-off] period has expired, a former commissioner is in principle entitled also to accept occupations related to matters for which he has been responsible as commissioner”. The Committee posits that “[w]hether the Code is sufficiently strict in these respects is not for the Committee to answer”.²⁹¹ The European Ombudsman opened a far-reaching investigation into the matter based on three complaints received inter alia from a group of Commission staff concerned about the reputational consequences about Barroso’s move.²⁹²

As a direct consequence of the Barroso episode, the Juncker Commission decided to update the Code of Conduct,²⁹³ with a new one adopted on 31 January 2018. Replacing the 2011 Code, the update mainly strengthens cooling-off periods, increasing them from 18 to 24 months for Commissioners, and to three years for the President of the Commission, while also introducing a new “Independent Ethical Committee” (see section below). A more exhaustive list of outside activities, a more detailed declaration of interest and definition of conflicts of interest are also among the changes.

With a few exceptions in unpaid roles, Commissioners are not allowed to engage in any outside activities during their mandate.²⁹⁴ The 2018 revision of the Code of Conduct has made the rule more detailed and now lists several outside activities that Members can perform, as long as

their practice does not interfere in their official duties or create a risk of conflict of interest.²⁹⁵ Members will have to inform the President for outside activities such as honorary posts, publication of books or unpaid lectures.

Declarations of interests

One of the most important tools to spot potential conflicts of interest is the declarations of assets, financial and non-financial interests of Commissioners that could lead to a conflict of interest. Since the 2018 reform of the Code of Conduct, these declarations, which have to be updated annually, do not only include the Commissioner’s own interests, but also their spouse or partner or their minor children, to the extent they can give rise to a conflict of interest.

The Code foresees the publication of declarations in an electronic and machine-readable format with all necessary information, financial or otherwise, “capable of giving rise to a conflict of interest”.²⁹⁶ However, there has been some concern as to the exact procedure followed to “identify inaccuracies and other issues before they attract public attention, potentially jeopardising public trust”.²⁹⁷ The code specifies that scrutiny of declarations needs to happen under “the authority of the President”.²⁹⁸ In practice, declarations are systematically checked by services in the Commission’s Secretariat-General, with a particular focus on completeness of the information and whether it is capable of giving rise to conflicts of interest,²⁹⁹ including through open source searches and by offering guidance to incoming Commissioners.

The declarations can be found as a sub-section of the Commissioners’ personal page,³⁰⁰ or on a dedicated page on “Ethics and integrity for Commissioners”.³⁰¹ Declarations furthermore contain previous employments or institutional roles, and must be updated annually, or within two months of a change of the situation of a Commissioner.³⁰² Unfortunately, the website only shows the latest version of their declarations without information regarding prior declarations or updates. Communicating such changes transparently would greatly enhance the usefulness of this tool, as previous interests and the mitigation thereof may still have an impact on a Commissioner’s priorities.

Most Commissioners' outside occupations concern national political engagements and/or activities of an honorary nature in associations or academic institutions. The Code requires that such external activities are non-professional and unpaid.³⁰³ Honorary posts too can lead to risks of conflicts of interest, for example, when such foundations are funded by the Commission.

Failure to disclose information has caused problems in the past, with two-term Commissioner Neelie Kroes (2004-14) reportedly failing to declare her directorship of an off-shore company in the Bahamas, which was revealed by the International Consortium of Investigative Journalists in the 2016 Panama Papers.³⁰⁴ While this would seem to present a clear breach of the Code, the Commission merely issued a reprimand.³⁰⁵ According to Commission minutes, Ms Kroes was also in breach of Article 7(4) of Council Regulation 422/67 determining the emoluments of the President and Members of the Commission by having received a transitional allowance based on her failure to declare her 2015 income, although she later declared the income and the Commission was able to recover the funds.³⁰⁶ It should be noted that then President Juncker did ask the (pre-reform) Ad Hoc Ethical Committee to look into the matter and offer advice on whether to take legal action against the former Commissioner, and it was the latter that advised against taking this action.³⁰⁷

The code also contains provisions regarding gifts, travel and hospitality. Gifts of a value exceeding €150 must not be accepted, or must be handed over to the Commission.³⁰⁸ The Commission's Protocol Department keeps a public register of gifts received.³⁰⁹ As of December 2019, the list of gifts received by former Commissioners from 2014 to July 2019 is public.³¹⁰ Although all items on list will consequently be worth more than €150, the frequency of some countries in gifting to specific Commissioners elicits our curiosity as to the items that may be deemed worth less than €150 and therefore not declared.

Transparency on expenses of Commissioners' missions abroad was also improved with the Code, with Commissioners required to publish the expenses of their travel every two months.³¹¹

Revolving doors

BOX 3: Revolving doors defined

Revolving doors as defined by Transparency International³¹²

Movement of individuals between positions of public office and jobs in the same sector in private or non-profit organisations, in either direction.

Revolving doors as defined by the European Ombudsman³¹³

When staff members leave the EU civil service to take up positions externally (e.g. private sector), or individuals join the public sector from outside.

Commissioners are attractive hires for organisations aiming to influence EU policy-making. Given their contacts and insights, they can become lobbyists with privileged access to inside information. Towards the end of their mandate Commissioners may start to consider their options, which can present potential conflicts of interest in the absence of a sufficiently long cooling-off period.

A 2017 report by Transparency International EU on the revolving door phenomenon found that the 27 former Commissioners from the Barroso Commission took around 114 new positions within a diverse range of sectors, including academia, NGOs, public service and private companies. Forty of these new employments were brought before the ad hoc Ethical Committee (see below), to check if they may constitute a conflict of interest with the Commissioners' previous portfolios. More than half of the Commissioners took on roles for organisations registered in the EU Transparency Register,³¹⁴ although only seven of these were for-profit companies. Among the more controversial cases were the move of the former Commissioner for the digital agenda to ride-hailing company Uber. While this appointment occurred within days of the expiry of the cooling-off period,³¹⁵ a number of these appointments happened before the 18-month period expired.³¹⁶



A number of private sector interests are strategically located all around the Schuman Roundabout in Brussels' EU Quarter

As mentioned above, the cooling off period was extended with the 2018 reform to two years for Commissioners, and three years for the President, during which time Commissioners wanting to engage in any professional activity need to inform the Commission two months in advance.³¹⁷ They are additionally prohibited from lobbying former colleagues, Commissioners or Commission staff on matters related to their portfolio during this time.³¹⁸ The Code, as well as the Treaties,³¹⁹ require former Commissioners to maintain professional secrecy, a requirement which is unlimited in time.

However, there are no sanctions short of the Treaty-based procedure in front of the Court of Justice of the EU pursuant to Articles 245 and 247 TFEU, which the Commission may initiate. Alternatively, the Commission may merely decide to issue a “reprimand”, and to do so publicly. As regards current Commissioners, the President may ask them to resign at any time.³²⁰

The Independent Ethical Committee

First established in 2004, the Commission “Ad hoc Ethical Committee”³²¹ was reformed into the “Independent Ethical Committee” with the 2018 reform.³²² Like its predecessor, the new Committee does not have permanent staff. It is composed of three members, appointed by the Commission on a proposal from the President, for a renewable mandate of three years. Committee members

are not remunerated with the exception of travel reimbursements, meaning they do not derive any personal gain from their role, and they must sign declarations on the absence of conflicts of interest.

The new Committee has a clearer set of rules, including an explicit reference to the provision of secretarial support by the Commission. Its functions consist of advising the Commission President on the application of the Code and providing recommendations on any ethics-related questions, including on the compatibility of new occupations of former Members with Article 245 TFEU. The opinions of the new committee remain non-binding, but are published, making it politically difficult to disregard its advice.

The main innovation regards the formalisation of the appointment procedure of the Committee's members, given that this Committee is no longer ad hoc, plus the requirement to publish an annual report on the implementation of the Code of Conduct, which contains a section on the Committee's work.³²³ For the first such report, issued for the year 2018, this appears to be a minimalist exercise. It highlights that the setup of the Independent Ethical Committee has brought a “substantial improvement” to the ethics regime of the Commission, although this is left unsubstantiated.³²⁴ The current members of the Committee are the ones appointed under the Juncker Commission,³²⁵ the Commissioners whose



post-term office moves they are now asked to judge.

However, the Independent Ethical Committee does not have the ability to initiate investigations. It has to be consulted when former Commissioners seek a new employment related to their former portfolio.³²⁶ Otherwise, the Committee relies on the initiative of the President, meaning it remains reactive in nature. This can become a problem, as the Commission may prefer not to give additional visibility to a topic by soliciting an opinion from the Committee.

A recent episode illustrates this limitation, when President von der Leyen endorsed the Croatian Prime Minister in his re-election campaign, with both being members of the European People's Party. This could constitute a violation of Article 9(3) of the Code of Conduct, which specifies that Commissioners "shall abstain" from making statements on behalf of political parties of which they are a member, "except" when they have notified their intention to take part in an electoral campaign, which may entail unpaid leave.³²⁷ The Code does not appear well-prepared for this scenario, however, as the President may in principle notify herself of such an intention, and even decide whether her own participation in the campaign is compatible with her duties or requires electoral leave,³²⁸ leading the European Ombudsman to observe that "there may be a need for a separate code of conduct" for the Commission President.³²⁹

While some have called this a breach of the Code of Conduct,³³⁰ the Commission itself characterised the incident as a "mistake".³³¹ Our above assessment is not detailed enough to conclude whether a breach of the Code occurred, but it suggests a more thorough investigation is warranted. While the Commission has sought to downplay the matter, taking sides in a national election is no small matter from the perspective of the Croatian citizens which the Commission also serves.³³² Relying on the initiative of the President to solicit an opinion of the Independent Ethical Committee is not an effective mechanism to safeguard the correct implementation of the Code in this case.

Committee opinions

Transparency has been improved significantly. The opinions issued by the Committee are published automatically, as has happened for the first time in the case of former Vice-President Katainen,³³³ pursuant to the Code.³³⁴ The increasing number of Committee opinions posted online do indeed provide a good overview of the information taken into account and the nature of the proposed activities by former Commissioners, increasing the level of public knowledge about those new posts.³³⁵ Deliberations by the Committee remain confidential.³³⁶ Decisions prior to 2018 can only be found in the minutes of College meetings. By searching these, we were able to identify 114 decisions pursuant to opinions from the Committee, with at least five negative opinions issued,³³⁷ although in all cases the former Commissioner in question withdrew their request for employment.³³⁸

The Ad Hoc and the Independent Ethical Committee have not prohibited new employments by former Commissioners,³³⁹ although sometimes Commissioners withdrew notification of a new employment when the Committee considered issuing an outright negative opinion, something that is likely to become clear when the Committee hears the former Commissioner, as is their right.³⁴⁰ By withdrawing the request, publication of a negative opinion can be averted, as such a withdrawal would not be announced, unless the matter was already reported on in the press. Nevertheless, the Committee may report on (envisaged) negative opinions in its annual report, in an anonymised way. We would encourage this practice to promote a better understanding of what

kind of employments would not be acceptable in the Committee's view.

In practice, more may have to be done to ensure Commissioners are aware of the requirements for follow-on employments, with a series of new posts for ex-Commissioners announced before the opinion of the Committee was in. This was the case with former Commissioner Oettinger's appointment,³⁴¹ by publication in the Hungarian Official Journal,³⁴² to the position of Vice-Chairman of the Hungarian National Science Policy Council. Mr Oettinger indicated he would accept the offer, although he had not signed a contract yet.³⁴³ While academic roles attract little scrutiny, this move sits uneasily with Hungary's eviction of Central European University from Budapest and the ongoing Article 7 procedure against it. Mr Oettinger submitted the position for review,³⁴⁴ but, as of September 2020, no opinion or decision on this matter had been published.

In the final year of the mandate in the Juncker Commission, Commissioner Oettinger also founded a consultancy while still in office,³⁴⁵ with the Commission taking more than one year to

ascertain the scope of its activities and issue its approval,³⁴⁶ due to the complexity of the additional information to be ascertained.³⁴⁷ The Independent Ethical Committee and the College of Commissioners adopting the Decision took this case as an opportunity to lay out an unprecedented number of conditions, including the need to submit to the Commission a list of clients every six months during the first two years and to not accept mandates which regard his areas of work within the Commission.³⁴⁸ In the opinion delivered on the case, the Committee also noted that the Commission should consider imposing the same restrictions on all former Members seeking to provide consultancy services,³⁴⁹ due to the potentially unlimited breadth of clients and interests to be represented.

Final decisions

The final decision on whether Commissioners are acting with integrity, and in particular the decision about the existence of conflicts of interest in their future employment, lies with the current Commissioners. Since the opinions of the Ethical Committee have been published, we



In times of the COVID-19 pandemic, the College of Commissioners meets in a larger room to enable socially distanced conduct

acknowledge that the Commission has in recent years implemented the opinions as received from the Ethical Committee. Nevertheless, it seems at least plausible that, in judging the professional choices of their predecessors, Commissioners may consider that they too could seek employment in organisations where the experience from their Commission portfolio remains relevant. This is not in itself a problem – as long as the public can trust that there is a sufficiently independent, serious and transparent review of whether a particular new employment jeopardises the public interest. Alternatively, the Council may also decide to bring a case against a (former) Commissioner to the CJEU, as happened once before.³⁵⁰

To return to the Barroso-example, President Juncker took the revolving door case seriously, asking for an opinion from the ethical committee when he did not have to, and taking it as a cue to reform the entire Code of Conduct. However, Juncker also declared he does “not have a problem with him working for a private bank – but maybe not this bank”,³⁵¹ which would seem to open up a double standard at the expense of Goldman Sachs. But as the Committee notes in its opinion, “Goldman Sachs may be considered at the vanguard of aggressive capitalism but as long as it respects the rule of law, it is in itself not against the law to accept a position at the bank.”³⁵²

The increased transparency of the reformed Ethical Committee certainly reduces the risk that ethics breaches may be treated as a political issue to be sorted out among gentlemen. Nevertheless, the Treaty leaves little room for interpretation: in the end, the current College of Commissioners must decide whether to take action on alleged ethics breaches, or the Council of the EU.³⁵³ Intergovernmental decisions within the Council are, however, even more politicised, reducing the likelihood that ethics considerations will prevail.³⁵⁴ Commission Presidents are not chosen on the basis of their ethics record, and in fact, both President Juncker³⁵⁵ and President von der Leyen³⁵⁶ were dealing with parliamentary Committees of Inquiry in their respective national parliaments investigating their political record whilst taking up the Commission Presidency. There is a strong case for putting an independent, specialised authority in charge of

monitoring and follow-up of breaches. We suggest the EU Ethics Body common to all EU institutions, proposed in the political guidelines of President von der Leyen, should take over this role.

RECOMMENDATIONS

- ▶ The Independent Ethical Committee should have the right to initiate investigations into any suspected or reported breach of the Code of Conduct. Staff resources should be increased to cope with the additional responsibilities.
- ▶ The Independent Ethical Committee should have sanctioning powers.
- ▶ Notifications on new professional activities of former Commissioners’ should be made public as soon as they are submitted, pending review by the Independent Ethical Committee.
- ▶ Commission services should conduct proactive monitoring of new professional activities by former Commissioners.
- ▶ Old declarations of interest of Commissioners should not be deleted once an update is filed. All past declarations should remain online.

RULES FOR COMMISSION STAFF

Whereas Commissioners form the political leadership of the institution and are accountable politically, this does not apply to Commission staff. Most staff spend their entire career at the EU institutions, and their rights and obligations are spelled out in the EU Staff Regulations. This covers procedures and benchmarks for promotion and salary progression, integrity measures and the general principle that staff are to carry out their duties objectively and impartially in the Union’s interests.³⁵⁷

A brief overview of general rules

Gifts and side activities: The Staff Regulations state clearly that EU staff may not accept any gift from any government or external sources, without the permission of the institution, including honour or favours.³⁵⁸ Commission staff may presume gifts are acceptable under a value of €50, and need prior permission for gifts or services (such as dinners, receptions, hospitality) at a value of €50-150.³⁵⁹ The guidance issued on this by the Commission was recognised as best practice.³⁶⁰

Outside activities by EU staff, including paid or unpaid activities, must not interfere with the official's duties nor be incompatible with the interests of the institution.³⁶¹ The framing of the Staff Regulations allows the Commission to refuse outside activities only if this would "interfere with the performance of the official's duties or is incompatible with the

interests of the institution".³⁶² The latest update of the Commission's internal rules on outside activities came in 2018,³⁶³ revising a procedure to request permission to engage in an outside activity. It also lists a number of conditions under which prior permission is deemed to have been granted, with examples, FAQs and guidance provided.³⁶⁴ Outside activities may not be permitted if they are to the detriment of staff performance or the interests of the institution, or if they give rise to a conflict of interest. Whether any of these conditions are met remains for the Appointing Authority to determine.

Remunerated outside activities may be allowed up to a ceiling of €10,000 per year, although a number of income streams are exempt from this ceiling (e.g. royalties for publications or intellectual property rights). Another change introduced in 2018 is that commercial activities will no longer be prohibited by default but assessed on a case-by-case basis.³⁶⁵ The Commission notes this is applied very strictly, allowing only activities that pose no conflicts of interest.

Declaring conflicts of interest: Upon their first employment by the Commission, staff are required to submit self-declarations of potential conflicts of interest stemming from outside activities, financial interests, the previous employer and gainful employment of their spouses.³⁶⁶ This regards at least 2,500 declarations per year, meaning Commission staff cannot complement each case with systematic open source research and veracity checks. Since 2014, a detailed form is used for this purpose, although a declaration is made only once, at the very beginning of an official's career, meaning these circumstances can change significantly. However, staff are required to make ad hoc declarations of conflicts of interest whenever they arise,³⁶⁷ to report on the employment of their spouse,³⁶⁸ to seek permission to perform outside activities while in service or while on leave on personal grounds, to receive gifts, and to resubmit a declaration when returning from leave on personal grounds (see below).

In addition, DG Competition requires officials to certify the absence of conflicts of interest before being attributed a case, bringing the total of ethics declarations to 6,000 per year. However, they only have to declare those interests that may impair their



Beyond its iconic headquarters, the Commission occupies dozens of large office buildings throughout a number of Brussels neighbourhoods

independence or constitute a conflict of interest, meaning that the interpretation is left to the official filling their self-declaration. The Court of Auditors noted that staff members lack the guidance to assess conflicts of interest. This means the declarations depend on subjective judgments,³⁶⁹ a point the European Ombudsman also expressed concern about.³⁷⁰ Staff do receive guidance from the Human Resources department,³⁷¹ and over 70 annual trainings are organised.

The guidance and real-world examples are crucial, as people without specialised knowledge may not always identify a (potential) conflict of interest. The very act of judging one's own potential conflicts of interest creates, in itself, a conflict of interest. A specific scenario that is likely to give rise to such conflicts is described in more detail below (see Officials on unpaid leave).

Politicised appointments: Staff progression and procedures for the selection of senior staff have recently become a flashpoint in the so-called Selmayr affair, which led to sharp criticism and condemnation from the European Parliament³⁷² (for criticism of politicised hiring practices at the European Parliament – see our study focusing on that institution)³⁷³ as well as the charge of ‘maladministration’ from the European Ombudsman,³⁷⁴ who additionally alleged that its enquiry “showed in detail how Mr Selmayr’s appointment did not follow EU law, in letter or spirit, and did not follow the Commission’s own rules,”³⁷⁵ although the Commission denies this.³⁷⁶ The European Parliament piled in that the appointment “was a coup-like action which stretched and possibly even overstretched the limits of the law”,³⁷⁷ all while acknowledging that the Commission could have appointed Mr Selmayr directly to Secretary-General, without the need for a double promotion in the space of a few minutes.³⁷⁸

The broader point of interest here is not this specific case, however, but the delimitation between the political level of the Commission and the services level. The practice of ‘parachuting’³⁷⁹ Cabinet personnel into key functions in the European Commission entails the risk, over time, of a politicisation of the Commission’s administration. Of course, the transition of the Head of the President’s Cabinet to Secretary-General, as in the case of Mr

Selmayr, is a particularly visible case, as it concerns transition from the most powerful staff position at the political level to the most powerful position at the services level. However, many Cabinet officials are appointed to key positions upon their return to the services level.

Nevertheless, internal competitions are regularly organised by the European Personal Selection Office (EPSO) at the request of the Commission.³⁸⁰ These are intended, in the EU Staff Regulations, for staff with at least three years experience.³⁸¹ Recent internal competitions sometimes make use of so-called ‘talent screeners’,³⁸² which could be used as a way to ensure that only Cabinet personnel are eligible. These competitions facilitate the entry into a lifetime employment as EU official for staff who were employed by a Commission Cabinet on temporary contracts (although the number for such externals on temporary contracts is limited for each Cabinet).³⁸³ Cabinet rules do emphasise that “[n]o guarantee may be given concerning recruitment to Commission services, since the normal rules for external recruitment must apply”.³⁸⁴ Nonetheless, towards the end of the Juncker Commission, 411 positions were to be filled via these internal competitions, including five competitions for temporary agents only,³⁸⁵ which excludes regular contract agents and thereby also tilts the field towards temporary Cabinet officials. Judging from press reports, the practice appears to stretch back decades.³⁸⁶

Recent reports point to a stronger involvement of the Commission President and her Head of Cabinet in the appointment of senior management positions (Directors and upward) in the von der Leyen Commission. This is also blamed for the unusually high number of vacant posts among senior management, which reportedly stands at over 20 per cent according to a *Politico* analysis.³⁸⁷

Revolving doors

The EU Staff Regulations establishes an obligation to act with integrity, which extends beyond the period of their employment and requires a cooling-off period of two years for all staff.³⁸⁸ During this time, former staff must inform the Commission of their intention to engage in a professional activity

and, should this activity fall within the scope of their work during the last three years of employment and present a conflict with the legitimate interests of the institution, this activity may either be forbidden or subject to additional conditions (e.g. no lobby meetings).

Senior staff (Directors-General, Deputy Directors-General, Directors, Heads of Cabinet and Special Advisors)³⁸⁹ are prevented, during a 12-month period, from “engaging in lobbying or advocacy vis-à-vis staff of their former institution for their business, clients or employers on matters for which they were responsible during the last three years in the service.”³⁹⁰ The Commission may extend this ban on lobbying to 24 months.

The conditions under which new employments should be prohibited or restricted are laid out in more detail in a Commission Decision from 2018, emphasising factors such as whether the official would work on issues under their responsibility during the last three years of their Commission employment, whether the new employer is a public or private entity and whether the former official would represent interests vis-à-vis the Commission. The inclusion of whether a new occupation “would risk harming the reputation of the former staff member and the Commission, for example, by retroactively casting doubt on the former staff member’s impartiality while he or she was still in the service, thereby tarnishing the Commission’s image”³⁹¹ seems of particular relevance.

Former staff must notify the Commission of intended new employment 30 working days in advance, within their two-year cooling-off period.³⁹² The Appointing Authority in this case is the Directorate-General for Human Resources and Security. It will consult the Directorates-General where the official worked over the last three years, as well as the Secretariat-General, the Legal Service and the Joint Committee (management and staff unions).³⁹³

The point of cooling-off periods is not to prevent former staff from taking up new positions, and indeed the vast majority of new employments pose no risks of conflict of interest whatsoever, including in academia, think tanks and public authorities. Of the over 3,000 senior Commission staff, a large

number leave the Commission each year, most entering retirement. However, hiring former senior civil servants is a preferred strategy of Brussels-based lobbying firms, and entails the risk of conflicts of interest, both in the period leading up to the change of position and as regards lobbying former colleagues or having detailed knowledge of ongoing dossiers, a risk greatly reduced after the expiry of the cooling-off period. At the same time, the rules should account for the fact that contract agents – unlike permanent officials – do not have a choice but to look for alternative employment after their contract has expired or, normally, after six years. At the moment, such differentiation is mainly done on a case-by-case basis. This discretion may enable proportionality, but does not necessarily ensure consistency or reassure the public.

The Commission is obliged to publish annual reports on the new occupational activities of senior officials after leaving the service.³⁹⁴ According to these reports, from 2014 to 2018, the Commission has imposed a ban on lobbying on 34 activities requested by 25 officials, but did not prohibit any of the new employments altogether. Nine post-employment activities were identified as a potential risk of conflict of interest, but none was prohibited.³⁹⁵ The annual reports do mention some conditions imposed on former senior officials, but descriptions are too vague to reassure the public. The Commission emphasises that the DG, hierarchy and former unit of an official would be aware of lobbying restrictions, on a need-to-know basis. Nevertheless, the two examples spelled out in the section below call this mechanism into question. Making the restrictions placed on former officials public would clearly stand a better chance of ensuring compliance, including by displaying the conditions imposed in the relevant entry of the EU Transparency Register, a suggestion also made by the European Ombudsman.³⁹⁶ Otherwise, it is not clear how EU institutions being lobbied by former senior officials can be expected to notice if a breach occurs.

In particular, the general nature of the authorisation decisions by the Commission regarding post-employment activities (most senior officials falling under this procedure go on to offer “consultancy services” without giving any detail about the sector or the identity of current and future clients) makes it

impossible to monitor whether former officials have respected the conditions. The Commission reports it often gives ‘ring-fenced’ authorisations that only apply to specific policy areas, meaning former officials would need to lodge new requests if they were to work on an area not yet approved.

Based on a sample of 65 revolving door cases for lower-level officials, the Ombudsman found a number of loopholes that need to be addressed, including the clarification of which post-term office activities should be prohibited, the need to accelerate the process of assessing requests and delivering decisions and the importance of developing effective measures to monitor staff compliance with ethics obligations.³⁹⁷ The Ombudsman notes that EU institutions have a large degree of discretion on prohibiting any kind of follow-on employment in case of harm to the reputation of the institution, but that the Commission “very rarely uses this legal option”.³⁹⁸ However, the Commission notes it only needs to ban jobs where no mitigating measures can be taken, and that it has increased use of this option since the Ombudsman report.

Officials on unpaid leave

A potential source of conflicts of interest is EU officials’ right to take unpaid leave for an extended period, and up to 12 years, during which they may seek employment elsewhere.³⁹⁹ Leave is initially only granted for periods of up to one year, and may only be extended by one year at a time. This means officials will need to file new requests for leave on personal grounds every year, which the Commission may choose not to grant if this is at odds with the interests of the institution. While officials continue to have to abide by restrictions on outside activities, and need prior authorisation for any gainful employment during this period, some cases suggest a very lax interpretation of these rules, or an outright inability to spot obvious potential for conflicts of interest. In principle, similar provisions apply as for officials who have recently left the service, including the need to seek authorisation for new employments and to submit a self-declaration about conflicts of interest upon return to the service. The guidelines have been updated recently⁴⁰⁰ and, according to

our interviews, strengthened the leeway for the Commission to prohibit lobbying not only vis-à-vis the Commission but also other institutions. The Commission conducts around 700 conflict of interest checks a year regarding intended outside activities of officials during leave on personal grounds. While we have limited insight into this process, the Ombudsman notes that this is generally done in line with the EU Staff Regulations.⁴⁰¹

Since the 2014 revision of the EU Staff Regulations, officials shall not engage in “an occupational activity, whether gainful or not, which involves lobbying or advocacy vis-à-vis his institution”, or give rise to potential conflicts of interest.⁴⁰² However, activities should in principle be authorised and potential conflicts should be mitigated by additional conditions to be imposed, e.g. a ban on any contacts with the previous Directorate-General for as long as the unpaid leave continues.

However, the rules for this programme may have considerable loopholes. A well-known case regards an official who first worked for the multinational oil company ExxonMobil, then joined the Commission’s DG Energy to oversee relations with the Organization of the Petroleum Exporting Countries (OPEC). Until 2019, while on leave from the Commission, they were Saudi Aramco’s “Principal Representative” for Europe and Russia⁴⁰³ – representing the interests of Saudi Arabian state-owned oil giant vis-à-vis public authorities in Europe, which would very much encompass the Commission and DG Energy. This new job was authorised by the Commission, subject to some conditions, although these conditions are not publicly known.⁴⁰⁴

Another more recent case concerns a former head of the Regulatory Coordination and Markets Unit at the Directorate-General for Communications Networks, Content and Technology. In 2018, during unpaid leave, the official was authorised to take up a job as Vodafone Public Policy Development Director, a position that, on the face of it, also involves relations with public authorities. While conditions imposed included a ban on lobbying Commission staff,⁴⁰⁵ an investigation by Netzpolitik showed a number of instances where he interacted directly with Vodafone’s lobby targets

at the Commission.⁴⁰⁶ The Commission's refusal to give access to documents on the matter was deemed to be maladministration by the European Ombudsman,⁴⁰⁷ given that the documents requested would have allowed a conclusion to be drawn as to whether the official in question was in fact honouring the conditions imposed on his activity.⁴⁰⁸ Meanwhile, the annual authorisation for the official in question to continue his unpaid leave and public policy Directorship at Vodafone was renewed in 2019.⁴⁰⁹

The existence of such cases amply illustrates how decisions on potential conflicts of interest require independent oversight and the courage to outright prohibit some moves. According to documents obtained by the Corporate Europe Observatory pursuant to access to document requests, in 2019 the Commission green-lighted 363 new employments for former officials, while rejecting three requests, and authorised 594 new employments for officials on unpaid leave, again rejecting only three.⁴¹⁰

Disciplinary sanctions

The Investigation and Disciplinary Office of the Directorate-General Human Resources and Security of the Commission (IDOC) can launch administrative inquiries and disciplinary procedures, upon a mandate from the Appointing Authority. Under the EU Staff Regulations, sanctions can be considerable, and range from the issuance of reprimands that will mainly affect career progression, to the possibility of downgrading staff in rank and salary bands, or, in exceptional cases, removal from post with or without the reduction of pension rights.⁴¹¹

With regard to offences serious enough to warrant criminal investigations by national prosecutorial authorities, IDOC is obliged to wait until a judgment of last instance is handed down.⁴¹² This leads to the unfortunate situation where even in very grave cases, the judgment of legal appeals must be awaited, a process that may take several years.⁴¹³ Arguably, the 'relationship of trust' between employer and official can break down based on behaviour that might not amount to a criminal

offence, but civil servants could arguably be held to higher standards than simply not crossing the very last line that breaks the criminal code. While the Commission may suspend officials, being unable to remove them earlier or irrespective of a conviction holds clear potential to harm the reputation of the Commission. Nevertheless, the EU Courts have taken a strict stance,⁴¹⁴ annulling decisions based on procedural detail.

The procedures required, even for mere reprimands, are described as very cumbersome. When suspicions arise or are reported from another service, even if the report is anonymous, an administrative inquiry may be opened. For sanctions to be levied, the case has to be brought to a disciplinary board, which normally includes three members appointed by the Commission and two by staff unions.⁴¹⁵ In practice, sanctions tend to be rather limited.⁴¹⁶ IDOC registered 75 cases in 2016, 63 cases in 2017, 77 cases in 2018 and 90 cases in 2019, including categories such as non-respect of financial rules, abuse of IT infrastructure, irregular declarations, grossly inappropriate behaviour, harassment, prolonged unauthorised absences, unauthorised commercial activities and conflicts of interest. Twenty-two officials were sanctioned in 2016, 12 officials in 2017, while 18 were sanctioned in 2018, and only nine in 2019. While three or four permanent officials were removed from post every year in the period 2016-19,⁴¹⁷ with IDOC ascribing a "deterrent function" to the sanctions levied, it is still notable that many officials who were found guilty of fraud, false medical invoices and refusal to follow instructions from hierarchy only received light sanctions, e.g. a downgrading in step, a temporary downgrade in rank, or a mere reprimand or written warning. Since the Commission should assume that not all cases of wrongdoing are reported to IDOC, being reported once should carry the real risk of removal from post if the institution is to uphold the high standard of integrity that citizens expect of the EU's public administration.

IDOC Activity Reports provide an anonymised summary of cases that were closed with a sanction.⁴¹⁸ Although they are only distributed within the institutions, they can make the subject of access to document requests.

RECOMMENDATIONS

- ▶ Declarations of interests submitted by staff should contain all information on financial interests and not be limited to information deemed to be capable of giving rise to a conflict of interest.
- ▶ Staff on unpaid leave should not be allowed to take up roles with private businesses in a sector directly related to their work at the Commission. In particular, no lobbying or public relations roles should be permitted.
- ▶ The Commission should make use more readily of the sanctions at its disposal, including removal of post, to ensure a culture of integrity.
- ▶ The Commission should ensure that the standard for conduct in EU institutions is high, including increased ethical training and awareness-raising.

Whistleblower protection

Internal whistleblowing rules guaranteeing reporting channels and protection are essential to fight corruption and wrongdoing within any institution. Commission staff are the first to know when misconduct occurs. However, there is a risk that those who witnesses it do not report such cases for fear of retaliation. Instead of being praised for the bravery at speaking out in defence of the law or of moral values, whistleblowers are often treated as spies, traitors and generally seen as untrustworthy. Without specific protections, whistleblowers may suffer serious negative consequences: having to move to another post, being cut out from relevant workstreams, overlooked for promotions, demoted or otherwise discriminated against.

Adequate, clear and precise rules that guarantee protection need to be in place to assure that whistleblowers' protection can work efficiently, and empower people to report wrongdoing, creating a



The European Commission has in recent years greatly advanced the cause of Whistleblowers across Europe, culminating in the adoption by the co-legislators of the 2019 EU Whistleblowing Directive

culture of integrity that increases the likelihood that wrongdoing is deterred, uncovered and penalised. Inadequate rules, loopholes and lack of clarity or implementation leads to situations where individuals are kept from speaking up because they may not feel sufficiently protected.⁴¹⁹

The EU Staff Regulations oblige all civil servants to report any illegal activity or misconduct they observe in the course of their work, and oblige EU institutions to adopt specific whistleblowing policies.⁴²⁰ The rules specify several ways for information to be reported and lay down basic provisions for the protection of whistleblowers. In 2012, the Commission was the first EU institution to introduce more detailed rules on the protection of whistleblowers,⁴²¹ welcomed by the European Ombudsman⁴²² and also by Transparency International.⁴²³ In late 2015, the Commission carried out an evaluation to assess the effectiveness of the Guidelines, and in 2016 concluded that no amendments were necessary.⁴²⁴

THE ROLE OF OLAF

OLAF is the main recipient of whistleblowing reports from the Commission, but for OLAF staff this would mean having to go through their own hierarchy (see next section on whistleblowing). Nevertheless, the OLAF Fraud Notification System is a way for OLAF staff to make anonymous reports.⁴²⁵ One of the main peculiarities about OLAF is its relationship to the Commission, given that it is nominally and functionally independent, but also set up as a Directorate-General of the Commission. This is not ideal as OLAF is not just charged with investigating the Member States, third countries, EU institutions and bodies, but also investigations within the Commission. It therefore requires specific measures to safeguard its independence. OLAF's mission is to conduct administrative inquiries into allegations of fraud, corruption or any other illegal activity that adversely affects the EU's financial interests, as well as administrative irregularities that are breaches of EU law, or serious breaches of professional duties by EU officials and Members of the EU institutions. Member States are traditionally reluctant to expand OLAF's operational powers. OLAF's Director-General may decide on his or her own initiative to

open an investigation and whom to charge with it. It should also be noted that the current Director-General is himself a former politician (he is a former Member of the European Parliament, an institution which falls within OLAF's remit).

Many OLAF cases revolve around illegal activities like fraud, regarding corruption or other irregularities, usually committed by economic operators as beneficiaries of EU funds in the Member States or third countries, e.g. in agricultural funds, or structural and cohesion funds used in rigged public procurement procedures, including outside the EU in the case of development aid or humanitarian funds. However, OLAF also plays a role in investigating EU officials, in the Commission as well as in any other EU body, institution or agency, who are suspected of such irregularities. A rich body of case law and bilateral memoranda of understanding regulate OLAF's prerogatives and procedural arrangements vis-à-vis these institutions – for example, the European Investment Bank (EIB) as well as others are required to immediately inform OLAF before opening an investigation.⁴²⁶ It therefore plays an important role in safeguarding the integrity of all EU institutions, but will generally not disclose any information about ongoing investigations, which can drag on for years.

Once OLAF investigations are complete, it has to rely on national prosecutorial authorities to bring cases to court, which means prosecution rates vary widely by Member State.⁴²⁷ According to the OLAF internal watchdog, “from its inception, the extent and impact of OLAF's powers and composition have been somewhat overshadowed by the possible creation of a European Prosecutor's Office”,⁴²⁸ which was first proposed in 2001. This also meant that OLAF was never granted the power to actually prosecute the fraud and corruption cases it was investigating, due also to the fact that Member States could not agree on the granting of such powers. Agreement on the European Public Prosecutor's Office (EPPO) was finally found in mid-2017, but only by using the relatively new tool of “enhanced cooperation”, which allows a large number of Member States to pursue EU integration also in areas where not all countries are willing to go along. The EPPO will therefore commence operation in late 2020, but without Hungary, Poland, Ireland, Sweden and Denmark.

Rates of disciplinary action taken by EU institutions as regards cases involving EU staff are significantly higher, with the Commission taking action in two thirds of cases in which OLAF issues a disciplinary recommendation, which still means a third of OLAF disciplinary recommendations go unheeded.⁴²⁹

With regard to OLAF's role as the main whistleblowing channel for Commission staff, however, OLAF registered only four cases in 2013, three cases in 2014,⁴³⁰ two cases in 2015, none in 2016, one in 2017 and two cases in 2018, although different data are reported in the 2016 Commission review and answers given by Human Resources Commissioner Oettinger in 2019.⁴³¹ OLAF opened an investigation into one of the cases registered during the period 2015-2018, and dismissed the others.

These numbers seem very low in view of the 30,000 staff working at the European Commission. There are several factors that may discourage reporting. Potential whistleblowers may not feel safe to come forward. In its 2016 review, the Commission stated that the low number of whistleblowing cases was in line with the experience in other public organisations, even in the US, where whistleblowing had a longer tradition than in the EU. However, the Commission also recognised that “every case involving serious irregularities that goes unreported and undetected is one too many”.⁴³² One reason cited by the Commission as to the low number may be that persons who simply report wrongdoing openly, without seeking the specific protections accorded to whistleblowers, are simply not counted as such.⁴³³

The Commission itself stated in its legal proposal for the 2019 Directive for the protection of persons reporting on breaches that “where potential whistleblowers do not feel safe to come forward with the information they possess, this translates into underreporting and therefore ‘missed opportunities’ for preventing and detecting breaches of Union law which can cause serious harm to the public interest.”⁴³⁴ Indeed, the Commission itself has been at the forefront pushing for greater protection of whistleblowers in Europe, in studies on “Estimating the Economic Benefits of

whistleblower Protection in Public Procurement” and a “Communication on further measures to enhance transparency and the fight against tax evasion and avoidance”, which identified the need to bolster whistleblowing in these policy fields.

ADAPTING PROTECTION TO THE 2019 DIRECTIVE

In 2018, the Commission adopted a package of measures⁴³⁵ to strengthen whistleblower protection, including the landmark proposal that led, in October 2019, to the adoption of the Directive on the “Protection of persons reporting on breaches of Union law”.⁴³⁶ The Directive lays down common minimum standards across the EU, providing for a high level of protection of persons reporting on breaches. Once it is transposed into national law by Member States, whistleblowers across Europe will enjoy higher protections than Commission staff reporting on breaches internally, within the Commission.

EU staff are not part of the scope of the Directive. EU staff are covered by the EU Staff Regulations, which require that every EU institution sets up an internal whistleblowing policy.⁴³⁷ Commission staff are covered by Commission guidelines,⁴³⁸ which will not be affected by the EU Directive.⁴³⁹ The Commission's internal Guidelines apply to all members of staff, but it is specified that they do not “strictly speaking apply” to seconded national experts, trainees, interim staff and local agents in delegations. The Guidelines encourage those categories of staff to make use of the arrangements set out in the Guidelines, promising that the Commission will protect these categories of staff against retaliation if they report in good faith. The fact that this commitment comes in the form of a footnote may not make it as trustworthy as it could be.⁴⁴⁰ Formal inclusion of those categories of staff would be preferable. According to international standards and best practices, the personal scope of whistleblowing rules should be as wide as possible.⁴⁴¹ Wrongdoing can be encountered by a wide range of individuals, such as consultants, contractors, providers, interns, student workers,

temporary workers, former employees, employees seconded from other organisations, but also individuals who apply for jobs, contracts or other funding.⁴⁴²

The Directive has a broader personal scope. Its Article 4 includes persons who acquired the information in a work-related context including for instance workers, self-employed, volunteers and unpaid trainees, any persons working under the supervision and direction of contractors, subcontractors and suppliers, as well as people who acquired information in a work-based relationship that has since ended or is yet to begin. It also includes facilitators, third persons connected with the reporting persons and who may suffer retaliation in a work-related context, such as colleagues or relatives of the reporting person, and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context. The Commission should broaden the personal scope of its Guidelines, building on the principles set out in the Directive.

Another problematic aspect of the Guidelines is that they explicitly require that the person shall report in “good faith”. While no one would want to encourage malicious or fraudulent reporting, the good faith requirement itself is vague, and cannot easily be proven. Ultimately, it can be perceived as shifting the focus from assessing the merits of the information provided to investigating the whistleblower’s motives, exposing them to suspicion and personal attacks. This can be a serious deterrent to potential whistleblowers. Changing a culture around whistleblowing – going from pleasing one’s hierarchical superiors towards a culture of integrity, in which no one stands above the law – is difficult. Undue emphasis on malicious reporting, when the vast majority of reports can be expected to be made in good faith, is unlikely to incentivise potential whistleblowers to come forward.

This is why the Transparency International principles make no reference to good faith and only require “a reasonable belief that the information is true at the time it is disclosed”. The Council of Europe goes further by stating that their Principle number 22 “has

been drafted in such a way as to preclude either the motive of the whistleblower in making the report or disclosure of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected.”⁴⁴³ The focus of whistleblower legislation should be the message rather than the messenger. A good example can be found in the Directive that does not consider the whistleblower motive for reporting.

In relation to the procedure, the main objective of whistleblowing is to prevent or put an end to wrongdoing. It is thus important that the recipient of the disclosure is in a position to address the reported wrongdoing. Often, this may be the direct superior of the prospective whistleblower. This is why alternative reporting channels must be available to enable whistleblowing. These mechanisms need to earn the trust of prospective whistleblowers, so people feel comfortable using it. The Council of Europe recommends that several types of reporting avenues should be made available and that the circumstances of each case determine which is the most appropriate channel to use. There are three main avenues for reporting wrongdoing: reporting within the workplace (to one’s hierarchy), to the authorities (within the institution) and to external parties (“the public” or journalistic outfits).⁴⁴⁴

The Commission’s Guidelines allow two internal channels and an external channel. The internal channel is the default channel that should be followed by each whistleblower. The first option is reporting in writing to the immediate superior or the Director-General or Head of Service. The second internal option consists of the possibility to bypass these authorities if there are concerns that disclosure may lead to retaliation or that the recipient of the report is implicated in the irregularities. In this case the staff member can address their report to the Secretary-General of the Commission or directly to OLAF.⁴⁴⁵

The external channel is characterised as an option of last resort “ensuring accountability and transparency for maladministration within the EU institutions and for failure to address potential irregularities internally.”⁴⁴⁶ This channel allows whistleblowers to report to other EU institutions,

such as to the Presidents of the European Court of Auditors, the Council or the European Parliament, or to the European Ombudsman, as provided for in Article 22(b) of the EU Staff Regulations.

According to international standards, the protection to report directly to the public should be granted in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest.⁴⁴⁷ The Directive represents this type of best practice, and in Article 15, prescribes the possibility for potential whistleblowers to be protected when, under specific circumstances, they make a public disclosure.⁴⁴⁸ Therefore, in building on the best practices established with the Directive, the Commission should commit to granting protection also to persons making public disclosures under specific, well-defined circumstances.

Finally, and in view of the very low number of recorded whistleblowers to date, the Commission should extend protections granted to whistleblowers even if they report anonymously, via OLAF's Fraud Notification System. Again, the aim is not to encourage a proliferation of anonymous reports; this should be a last resort. However, the lack of trust on the side of potential whistleblowers

that they will indeed be protected makes this a necessary addition to a state-of-the-art whistleblowing policy. Indeed, anonymous reporting already occurs regularly by staff who create email addresses using pseudonyms or provide unsigned written evidence.

RECOMMENDATIONS

- ▶ A revision of the Commission's internal rules should bring current the whistleblower protections in line with the provisions of the 2019 directive.
- ▶ Commission services should increase awareness raising on staff rights and obligations related to whistleblowing and provide systematic trainings for management empowered to receive disclosures.
- ▶ OLAF should have all necessary powers to fulfil its mission. Its operational independence and the transparency and integrity of its procedures, including due process, must be strengthened.

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410 Reply to the access to document request. Available at: www.asktheeu.org/de/request/8376/response/28244/attach/10/03%20FINAL%20REPLY%20GESTDEM%202020%204871%20Ethics%203.pdf

411 Disciplinary measures are found in Article 86 of the EU Staff Regulations and the "Disciplinary proceedings" (Annex IX).

412 Article 25, Annex IX to the EU Staff Regulations, as well as Article 40 of the Commission Decision C(2019) 4231 of 12 June 2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary; and the 2019 revision of the 'Practical Guide to Disciplinary Proceedings'.

413 Vlemish Radio Television, EU civil servant sentenced to four years for rape, 18 February 2019. Available at: www.vrt.be/vrtnws/en/2019/02/18/eu-civil-servant-sentenced-to-four-years-for-rape/

414 Judgment of the Civil Service Tribunal of 18 March 2015 — DK v EEAS, Case F-27/14.

415 Composition and procedures are described in Section 2, Annex IX to the EU Staff Regulations.

416 Possible sanctions are listed in Article 9(1), Annex IX to the EU Staff Regulations.

417 We gained access to the IDOC reports via access to document requests.

418 Article 45 of Commission Decision C(2019) 4231 of 12 June 2019.

419 A best practice guide for whistleblowing legislation, Transparency International 2018, p. 7.

420 Article 22(c) of the Staff Regulations. In 2014, the Staff Regulations have been further revised, introducing an obligation for all the EU institutions to adopt internal rules creating a procedure by which whistleblowers could file reports in a protected setting.

421 See Communication SEC(2012)679 of 6 December 2012 to the Commission on Guidelines on Whistleblowers.

422 Decision of the European Ombudsman closing her own-initiative inquiry OI/1/2014/PMC concerning Whistleblowing, para. 4.

- 423 Transparency International, The European Union Integrity System, 2014. Available at www.transparency.eu/euis, p. 12.
- 424 2016 Report on the Review of the Guidelines on Whistleblowing.
- 425 Available at: https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud_en
- 426 See Transparency International EU, Investing in Integrity? Transparency and democratic accountability of the EIB, 2016. Available at: <http://transparency.eu/eib/>
- 427 2018 OLAF report, p. 41. Available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf
- 428 OLAF Supervisory Committee Opinion No 2/2017, p. 4. Available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/sc_opinion_2_evaluation_report_883_en.pdf
- 429 2018 OLAF report, p. 42.
- 430 Answer given by Mr Oettinger on behalf of the European Commission. Question reference: E-002034/2019. Available at: www.europarl.europa.eu/doceo/document/E-8-2019-002034-ASW_EN.html. In the above-mentioned answer, the EC states that “there is no data available for the years 2014 and 2013”, but in the 2016 Report the Commission wrote that in 2013, four cases were received (all dismissed) and in 2014 three cases were received (all dismissed).
- 431 Ibid.
- 432 2016 Report on the Review of the Guidelines on Whistleblowing.
- 433 See also reply 56 on p. 21 of Acting Secretary-General Juhansone of 18 November 2019 to the written questions to the Commission in the context of the 2018 discharge procedure. Available at: www.europarl.europa.eu/cmsdata/188900/replies%20Acting%20Secretary%20General-original.pdf
- 434 EC Proposal for a Directive of the European Parliament and of the Council for the protection of persons reporting on breaches.
- 435 Available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620400
- 436 Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law.
- 437 Article 22c(2) EU Staff Regulations.
- 438 Communication SEC(2012)679 of 6 December 2012 to the Commission on Guidelines on Whistleblowers.
- 439 E-002563/2018 – Answer given by Mr Oettinger on behalf of the Commission (5 July 2018) to the Parliamentary questions – 14 May 2018 – E-002563-18 Question for written answer E-002563-18 to the Commission
- 440 European Commission Whistleblowing Guidelines, p. 3, footnote n.2.
- 441 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec (2014)7 and Explanatory Memorandum (2014), Principle 3.
- 442 Transparency International, A Best Practice Guide for whistleblowing legislation, 2018.
- 443 Council of Europe, 2014, p. 39.
- 444 Transparency International, A Best Practice Guide for whistleblowing legislation, 2018, p. 31.
- 445 OLAF may also be notified through the Fraud Notification System. And, “In any case, the recipient of the information is in turn obliged to transmit the information thus received without delay to OLAF.” Therefore, while the staff member concerned has a choice of reporting channels.
- 446 See E-002563/2018 – Answer given by Mr Oettinger on behalf of the Commission (5 July 2018). Available at: www.europarl.europa.eu/doceo/document/E-8-2018-002563-ASW_EN.html
- 447 Transparency International, A Best Practice Guide for whistleblowing legislation, 2018, p. 40.
- 448 Article 15 of the Directive on the Protections of persons reporting on breaches of EU law to specific national provisions establishing a system of protection relating to freedom of expression and information.

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