

Livre blanc de L'Observatoire de l'Éthique Publique

One year on from Qatargate: How can the European Union be better protected against conflicts of interest and corruption?



December 2023

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Summary

The contributors	3
Abstract	6
Proposals	8
Part 1. The Transparency Toolbox: Democratic Virtue, Implementation Loopholes and Ethical Risks	10
A/ Transparency Rules Regarding the Past: Identifying Conflicts of Interest When Taking Up a Position	11
1. Declarations of Interests	11
2. Gaps in the Regulation	12
B/ Transparency Rules Regarding the Present: Ensuring Integrity in the Performance of Functions	12
1. Lobbying	12
3. Gifts	14
4. Conflicts of Interest	14
C/ Transparency Rules Regarding the Future: Regulating Revolving Doors	16
D/ What's Wrong with Transparency Rules?	17
1. The (Dys)Functioning of Transparency Rules	18
2. Transparency as a Default Position	21
Part 2. General Reform Principles and Specific Policy Proposals	24
A/ The Preventive Toolbox	24
1. First Proposal: A Strong EU Ethics Body	25
Regarding the Past	25
Regarding the Present	25
Regarding the Future	26
2. (Re-)building the Infrastructure of Incompatibilities	26
B/ The Repressive Toolbox	30
1. Plurality of Protected Values of Criminal Offences Included in the Commission's Proposal	30
2. Enforcement of the Criminal Offences Included in the Commission's Proposal	31
3. Proposal for a Two-Step Approach	32

Abstract

1) **Qatargate**¹ has shown that European decision-making processes that regulate a Single Market of 450 million people and 22 million companies are today subject to powerful **influence strategies**. But it has also revealed that in a system built on a historically close relationship between the European regulator and interest groups, and on a weakly organised European civil society, European democracy remains particularly vulnerable. Moonlighting (side jobs), revolving doors in European public decision-makers careers (MEPs, parliamentary assistants, senior civil servants, central bankers, heads of agencies, etc), as well as the opportunities for influence opened up by lobbying practices, are conducive to the emergence of conflicts of interest, forms of collusion and even corruption in the European decision-making process. This creates a **continuum of threats** through which certain private interests are able to exert a disproportionate influence on the decision-making process.

2) The matter is all the more serious in that Qatargate has also revealed the **general state of unpreparedness of the European democracy**, which remains ill-equipped to deal with this threat. The EU has repeatedly opted for **weak protection** based primarily on incentives for transparency, soft law, and consultative ethics committees. As for criminal law, it is underdeveloped, with Qatargate revealing the Union's great dependence on national police and judicial systems and the narrow jurisdiction of European bodies (OLAF, European Public Prosecutor's Office) when it comes to defending the integrity of European democracy. Added to this there is a **permissive institutional culture** within EU bodies, rooted in an underestimation of risks and a general lack of vigilance (tolerance, under-reporting, etc). All these factors are conducive to the emergence of **bubbles of impunity** such as Qatargate.

3) Bringing together a team of academics, both lawyers and political scientists specialising in European law and politics, this White Paper proposes an alternative strategy based on **European society's interest in the integrity of European public officials**. The issue is not simply to protect the reputation of the European institutions, or even that of the European project itself, as has been said too often. It is above all **European citizens and democracy** that are the diffuse victims of corruption, which then undermines the future ability of our institutions to respond legitimately and effectively to the monumental challenges of our time (war and peace, ecological transition, social inequalities, etc). Beyond this, it is also the credibility of the European institutions to handle the new wave of **enlargement** - in which strengthening the fight against organised crime is a key element of the reforms required of the candidate countries - that is at stake.

4) The proposals put forward over the past year by the Commission and Parliament remain very modest, confirming a tendency to underestimate the problem and a strong reluctance to act on the part of European leaders. One example is the central proposal to create a European ethics body, which is certainly positive in itself, but which reflects an **excessive belief in the effectiveness of transparency obligations** in creating a virtuous circle and transforming practices. In a polity where public regulators, corporations and lobbies are closely intertwined, it is not enough to make influence activities "transparent"! As for the proposals announced by the Commission on the fight against corruption in the EU, they are flawed by the fact that they offer **no specific protection** for the institutions and decision-making processes of the EU, and that they make no changes to competent authorities, which continue to be the national law enforcement authorities. In other

¹ *Qatargate* refers to the scandal sparked in December 2022 with the arrest of a Vice-President of the European Parliament, a parliamentary assistant and a former MEP, all three accused of taking part in a corruption scheme designed to influence the European Parliament's position towards the host country of the 2022 World Cup.

words, the EU has so far shown little ambition in examining solutions that would go beyond its usual preference for transparency tools and soft law.

5) By recognising the interest of European society in guaranteeing the integrity of European public officials, this White Paper proposes a new “**art of separation**”² that protects the democratic sphere from influence strategies. It focuses on three areas:

- a) A **policy of knowledge** to measure the extent of the systemic risks associated with conflicts of interest and corruption through the creation of a **permanent and independent Observatory for the Integrity of Democracy** in the EU, modelled on the European Tax Observatory currently chaired by Gabriel Zucman, and the introduction of external evaluations of the EU through direct membership of the Council of Europe’s Group of States against Corruption.
- b) **Preventive measures** to prevent moonlighting and revolving doors, which are key aspects of influence strategies. In addition to the creation of a **single, independent body responsible** for the integrity of democracy, with powers of initiative and real powers of sanction (EU Integrity Body), the White Paper proposes building a new “**infrastructure of incompatibilities**” for European public officials.
- c) **Repressive measures** have so far been neglected. The White Paper calls for a strengthening of sanctions, which are currently very weak or very rarely implemented, against individuals but also against the companies that recruit them and that do not respect the rules on lobbying, moonlighting and revolving doors. Above all, it proposes a strengthening of criminal law around two proposals: the adoption of a new **European directive on the Protection of the integrity of democracy**, creating a complete system of offences (active and passive corruption, active and passive trading in influence) and, in a second phase, the **extension of the competence of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor’s Office** to criminal offences against the democratic interests of the Union. Action must be taken at the European level because it is the responsibility of the EU to defend its democratic system.

² Michael Walzer, “Liberalism and the Art of Separation”, *Political Theory*, 12, no. 3 (1984), p. 315-330. See also Antoine Vauchez and Pierre France, *Sphère publique, intérêts privés. Enquête sur un grand brouillage*, Paris, Presses de Sciences Po, 2017.

Proposals

A new art of separation

1) A risk assessment and knowledge policy

Assessing the scope of influence practices in the EU

⇒ Creation of a permanent, independent Observatory for the Integrity of Democracy.

Encouraging external evaluation of the Union's anti-conflict of interest and anti-corruption tools

⇒ Joining the Group of States against Corruption (GRECO). Alternatively, EU institutions such as the Commission, Parliament or others can undergo an *ad hoc* GRECO evaluation.

2) Preventive policy

Adopt a single, strong and credible institutional framework (and stop self-regulation)

⇒ Creation of a **single European body (EU Integrity Body)** in charge of ensuring compliance with all rules relating to the integrity of European public officials (conflicts of interest, compliance with transparency obligations, etc).

⇒ The body will be given the power to initiate investigations and impose sanctions.

⇒ The body should include representatives from outside the European institutions (specialised NGOs, members of national parliaments), and should be open to receive complaints from citizens and NGOs.

Prevent conflicts of interest through a genuine “infrastructure of incompatibilities” for European public officials.

⇒ For Member of the European Parliament:

- Limit *moonlighting*, in particular by prohibiting all new parallel professional activities for MEPs.
- 12-month post-mandate cooling-off period during which the MEPs cannot engage in lobbying activities vis-à-vis EU institutions and agencies.

⇒ For (senior) officials:

- strengthening and extending the ban on meetings with lobbyists who are not on the Transparency Register to all officials
- ban on lobbying during the cooling-off period to all EU institutions and agencies (not just the institution of the former official).

⇒ Publication of the lists of people on cooling-off periods on the Transparency Register.

- ⇒ Relations with lobbyists: the rule requiring Commissioners and their Cabinet Members to meet only with lobbyists listed in the Transparency Register should be extended to all staff of the European institutions and to Coreper members.
- ⇒ Include private actors (companies, consultancies) in the protection of European democracy by making the adoption of ethical political behavior part of corporate social responsibility requirements.
- ⇒ Involve bar associations in regulating lobbying by lawyers.

3) Repressive policy

Strengthening administrative and civil penalties for non-compliance with ethical and deontological rules and rules of incompatibility (under the authority of the EU Integrity Body).

- ⇒ Introducing credible individual sanctions (ineligibility, reduced pension rights, etc).
- ⇒ Sanctioning companies and consultancies which recruit “revolvers” against the rules of European public ethics by excluding them from public contracts.

Penalising the most serious practices through European law.

- ⇒ Adopt a EU directive on the protection of the integrity of democracy (rather than a directive on the fight against corruption, as proposed by the Commission).
- ⇒ Extension of the powers of both OLAF and the European Public Prosecutor’s Office, to cover criminal offenses against the Union’s democratic interests.

Part 1. The Transparency Toolbox: Democratic Virtue, Implementation Loopholes and Ethical Risks

For almost 20 years, transparency has been presented as one of the most important tools for protecting democracy in the European Union, whether in documents published by the European Commission or in reports by other institutions such as the Council of Europe and the Organisation for Economic Co-operation and Development (OECD). At the same time, non-governmental organisations (NGOs) such as Corporate Europe Observatory, Alliance for Lobbying Transparency and Ethics Regulation (Alter EU) and Transparency International have played a leading role in promoting transparency. Gradually, transparency objectives were institutionalised at European level, providing the basis for the development of the European Ombudsman's missions and authority.

The diversity of transparency actors and policies is also linked to the variety of tools deployed and the ambiguity of the notion “transparency”, which has several meanings and dimensions. Two key objectives can be distinguished: firstly, the democratisation of the decision-making process, guaranteeing the participation of civil society, and secondly, the moralisation of political life and the safeguarding of integrity in the functioning of the European administration in the face of the “continuum of threats”. The latter objective is clearly stated in the joint communication on the fight against corruption.³ We describe below the rules by which the EU protects its democratic processes against such a “continuum of threats”.

Transparency measures are based on tools aimed at the disclosure and publication of information, i.e. requiring those subject to them to provide details of their financial interests, the meetings they attend, the activities they carry out simultaneously with or subsequent to their employment and the gifts they have received as part of their professional activities. The analysis below covers Members of the Commission (Commissioners), Members of the European Parliament (MEPs) and European civil servants. The Staff Regulations also apply to staff of EU agencies⁴ and to parliamentary assistants (accredited parliamentary assistants based in Brussels⁵). We have also included elements regarding the European Central Bank (ECB), where there is an ethics framework for staff members, as well as a code of conduct for high-level officials (members of the Governing Council and the Supervisory Board).

The “transparency toolbox” therefore brings together very heterogeneous rules, varying according to the institution and the type of staff. However, the rules aim to prevent risks at three distinct points in their careers: 1) those aiming to ensure the absence of conflicts of interest when they take office (rules regarding the past), 2) those aiming to guarantee the integrity of their action during their time within the institutions (rules regarding the present), and 3) those aiming to ensure their integrity and discretion after their time within the institutions (rules regarding the future).

³ Joint Communication to the European Parliament, the Council and the European Economic and Social Committee on the fight against corruption. JOIN/2023/12 final.

⁴ See Article 1a of Staff Regulations. Note that agencies' board members and experts are not considered agencies' staff. Some EU agencies have adopted ethics rules concerning internal rules for board members.

⁵ Staff regulations do not apply to local assistants, service providers and paying agents, to whom instead national laws apply.

A/ Transparency Rules Regarding the Past: Identifying Conflicts of Interest When Taking Up a Position

The focus of these rules and practices is on the past, the events and actions that took place prior to the beginning of an electoral or executive mandate.

1. Declarations of Interests

There is a general obligation for Commissioners, Members of the European Parliament and all staff of the EU institutions and agencies to declare any financial interest which may create a conflict of interest in the performance of their duties. This obligation to declare varies, depending on the institutions and hierarchical positions, the individuals targeted, the period covered and the checks and penalties in the event of non-compliance.

The obligation concerning Commissioners can be found in Article 3 of the Code of Conduct for the Members of the European Commission (hereafter CoC).⁶ Besides the member's financial interests, professional and otherwise activities in the last 10 years, memberships in associations, political parties, trade unions and NGOs, the obligation to declare also applies to the member's spouse or partner and in some cases also the member's children. To ensure transparency, declarations must be made public.

Article 4 of the Code of Conduct annexed to Rules of Procedure of the European Parliament lays down a similar obligation to make a declaration of private interests for MEPs.⁷ This information is published on Parliament's website. Transparency is not merely a pious hope, as Members may not be elected as office-holders of Parliament or of one of its bodies, be appointed as a rapporteur or participate in an official delegation or interinstitutional negotiations, if they have not submitted their declaration of financial interests. Members must update their declarations to ensure that any changes occurred are duly accounted for in them. According to Article 5, Members must declare assets and liabilities at the beginning and end of every term of office, change implemented after the Qatargate incident.

Article 11(3) of Staff Regulations (hereafter SR) lays down that before recruiting an official, the appointing authority must examine whether the candidate has any personal interest such as to impair his independence or any other conflict of interest. The candidate, using a specific form, is required inform the authority of any actual or potential conflict of interest. In such cases, the appointing authority must take this into account in a duly reasoned opinion. If necessary, the appointing authority must take the measures referred to in Article 11a(2). This latter Article, however, concerns individual cases where the official may be relieved from responsibility in a particular matter.

In the case of the ECB staff, Article 0.2.1.4 of the ECB Ethics Framework (hereafter ECB EF) requires that prior to a candidate's appointment, the appointing authority, "shall in accordance with the rules on selection and appointment assess whether there may be a conflict of interest".⁸ There is, moreover, a requirement to submit a declaration of interests every year. This requirement is laid

⁶ Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission. C/2018/0700. OJ C 65, 21.2.2018, p. 7–20.

⁷ Rules of Procedure of the European Parliament, 9th parliamentary term, November 2023. Only occupations performed or memberships held during the three years prior to the beginning of the mandate in the current parliamentary term should be declared.

⁸ [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XB1106\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XB1106(01)&from=EN) last modified in 2020.

down in Article 10 of the Code of Conduct for high-level ECB officials (hereafter ECB CoC).⁹ It applies, in the main, to members of the governing Council and the advisory and executive boards. The requirement is extended to cover one's spouse and partner, and in some cases also the person's minor children. These declarations of interest are published on the ECB's website.¹⁰

2. Gaps in the Regulation

One obvious problem relates to Staff Regulations which establish the individual ethical obligations for EU staff members. There is no provision that would enable the appointing authority not to appoint a candidate or to make the reasoned opinions public on the website of the institution in case the incoming official's financial and social ties would deserve scrutiny.

Furthermore, of the European institutions considered above, only the ECB's rules require the declaration of interests of senior officials to be updated annually. In order to have a significant impact, transparency measures must be regularly updated. For example, the code of conduct for MEPs requires financial declarations to be updated following any changes, but there does not appear to be any monitoring of whether or not MEPs are complying with this obligation.

B/ Transparency Rules Regarding the Present: Ensuring Integrity in the Performance of Functions

Another set of rules aims to guarantee officials and decision-makers' integrity during their time in the institutions. These rules pertain to controlling lobbying activities, acceptance of gifts as well as monitoring conflicts of interest.

1. Lobbying

a) Regulation

Lobbying has been the object of increasingly intense regulation since 1996, with the creation of a transparency register in the EP. On the initiative of the Commission, the Connect database was set up in 2002, which contained information on interest groups active at the European level. In 2005, the Commission initiated the European Transparency Initiative that resulted in the setting up of a new register in 2008. In 2011, the Joint Transparency Register (EUTR), common to both institutions, was created. It expanded to include the Council in 2021, when it also became "mandatory".¹¹

The EUTR aims to encourage transparency in the activities of interest groups by requiring them to declare their objectives and missions, the budget allocated to lobbying, the number and names of people engaged in lobbying activities, targeted legislative and policy proposals, etc. While it focuses primarily on the obligations of interest groups (and their compliance with these obligations gives them access to the highest levels of EU institutions), it is coupled, for Commissioners and their Cabinet members, with prohibitions on meeting with non-registered representatives.

⁹ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2022_478_R_0003&from=EN.

¹⁰ https://www.ecb.europa.eu/ecb/access_to_documents/document/html/index.en.html.

¹¹ <https://ec.europa.eu/transparencyregister/public/homePage.do>.

According to Article 7 CoC, Commissioners and their Cabinet members can only meet lobbyists registered in the Transparency Register. Apart from their obligation to check whether or not a lobbyist is registered they need to make public information on such meetings.¹²

Under Article 7 of the Code of Conduct, MEPs “shall publish online all scheduled meetings relating to parliamentary businesses”. While before Qatargate this applied to rapporteurs, shadow rapporteurs and committee chairs, now the requirement is extended to all MEPs. There are no comparable obligations for European civil servants (with the exception of members of the Commissioners’ cabinets), either with regard to registration in the lobbyists’ Transparency Register or online publication of meetings.

The Register does not apply to the ECB either. Although the European Parliament has lobbied to extend it to this institution, its President Mario Draghi has opposed it, claiming that the purpose of contacts with stakeholders is to “gather information”.¹³

While the Transparency Register currently concerns lobbying activities of third country companies, NGOs or associations as well as third country governments when they are represented by consultancy companies or other such intermediaries, Qatargate has prompted the discussion of whether third country governments should register.¹⁴ The Commission is currently considering a proposal to harmonise requirements concerning the transparency of services offered by consultancy and lobbying companies to third country governments.

b) Gaps in the Lobbying Regulation

Several problems have been identified regarding the Transparency Register. The two most severe ones concern its scope and the accuracy of declarations. In terms of its scope, significant improvements could be made by including more Council staff. Although the Council was included in the register’s scope, the rules currently only apply to high-level officials in Permanent Representations, thus excluding Coreper officials (Permanent Representatives Committee, made up of diplomatic staff from the Member States), who are a popular target for lobbyists. To date, the Permanent Representations have only pledged to respect the register during the period in which their Member State holds the Presidency of the Council of the European Union and in the preceding six months.

Another problem relates to the accuracy of the data submitted by lobbyists. The NGO Corporate Europe Observatory study shows that “71% of registrants declaring the highest annual lobby spending in the EU lobby register are implausible”.¹⁵ There also appears to be a persistent under-reporting of lobbying activities¹⁶, as well as an under-representation of law firms among registered lobbyists.

The Register has its own secretariat, which is responsible for dealing with complaints about non-compliance with the Code of Conduct, and may open investigations. However, the operation of

¹² Commission Decision 2014/839/EU.

¹³ euractiv.com/section/politics/news/ecb-chief-rejects-chance-to-adopt-eus-transparency-register/. EU agencies do not implement the EUTR, but they have put in place a host of rules to regulate their activities with lobbyists and other stakeholders, see Emilia Korkea-aho, “EU agencies and lobbying transparency rules: A case study on the islandization of transparency?”.

¹⁴ MEPs need to publish their meetings with public authorities of third country governments, see Art. 7 of the Code of Conduct for Members of the European Parliament.

¹⁵ <https://corporateeurope.org/en/2022/09/complaint-eu-lobby-transparency-register>.

¹⁶ <https://www.alter-eu.org/documents/2015/07/complaints-about-misleading-lobby-register-entries>.

this secretariat is highly opaque, and little is known about how complaints are handled. As a result, European citizens have to rely on NGOs to verify declarations and lodge complaints.

3. Gifts

a) Regulation

There are also restrictions on the acceptance of gifts. Differences between institutions can concern what is considered as a gift, whether or not the gift can be accepted, the value threshold where the gift cannot be accepted, and whether the gift must be declared. For both Commissioners and MEPs, transparency is a key component of the regulation.

Article 6(4) CoC provides that Commissioners must not accept any gift with a value of more than €150, and any gifts over the said limit must be handed over to the Commission. The gifts will be registered in a public register, which identifies the donor.

Article 6 of the Code of Conduct annexed to the Rules of Procedure contains a similar provision with regard to MEPs. However, the rules allows MEPs to attend events organised and paid for by third parties and be reimbursed or paid directly by third parties without this provision applying to these situations.

Staff of the EU institutions cannot – without the permission of the appointing authority – accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever (Article 11 Staff Regulations), unless the value of the gift does not exceed €50 and there is no accumulation.¹⁷

According to the ECB ethics framework, “Members of staff may neither solicit nor accept for themselves or any other person any advantage connected in any way with their employment with the ECB”.¹⁸ Such advantage is conceptualised as “any gift, hospitality or other benefit of a financial or non-financial nature which objectively improves the financial, legal or personal situation of the recipient or any other person and to which the recipient is not entitled by law”.¹⁹ Any gifts must be registered with the Compliance and Governance Office of the ECB.

b) Gaps in the Gifts Regulation

EU staff are in principle prohibited from accepting any gifts. There is no further guidance on how the appointing authority assesses these situations and in which situations they should give permission to accept, for instance, a gift from a third party. There seem to be also problems with the enforcement of the rules. Henrik Hololei from the Commission DG Move was reported to have flown with Qatar Airlines for free while his team was negotiating with Doha on open skies agreement. After the Hololei case was made public, he was subsequently internally demoted.²⁰

4. Conflicts of Interest

a) Regulation

¹⁷ https://commission.europa.eu/about-european-commission/service-standards-and-principles/ethics-and-good-administration/staff-and-ethics_en.

¹⁸ Article 0.2.2.1.

¹⁹ Article 0.2.2.2. There are, however, some exceptions in Article 0.2.2.3.

²⁰ <https://www.politico.eu/article/eu-transport-chief-leave-post-free-qatar-flights-henrik-hololei/>.

While transparency is used as a preventive measure, it is not the tool chosen to deal with cases where there is a real conflict of interest. Apart from the case of MEPs, there is no mention of (public) transparency as a remedy for conflict of interest. Such cases are dealt with internally, within the institution, by referring to the hierarchy (Presidents of the Commission or the European Parliament, or the Appointing Authority in the case of an official or other staff member).

While Article 4 of the Code of Conduct requires Commissioners to inform the President of the Commission who may, in certain situations, inform the President of the European Parliament, there are no rules on how to deal with these situations. This is a major loophole in the rules.

Under Article 3 of the Code of Conduct annexed to the European Parliament's Rules of Procedure, if a MEP becomes aware that they have a conflict of interests, they must immediately take the necessary steps to remedy the situation. If they are unable to resolve the conflict, they must notify the President. Unlike Commissioners, MEPs must disclose any existing or potential conflict of interest in relation to the matter under consideration before speaking or voting in plenary or in Parliament's bodies, or when nominated as rapporteurs.

Under Article 11b of the Staff Regulations, staff members must immediately inform the Appointing Authority of any conflicts of interest and the Appointing Authority may relieve them of their responsibilities. Once again, there is no obligation to disclose the measures taken by the Appointing Authority, including the decision to relieve the official of responsibility.

The same applies at the ECB, where according to the ethics framework, members of staff must inform their superior, who may take any measure he or she deems appropriate to avoid such a conflict after seeking the advice of the Compliance and Governance Office,²¹ which may go as far as relieving them of responsibility for a matter (this measure being presented as a last resort). Senior executives, for their part, must inform the chairman of their body, and the code of conduct provides that they may abstain from taking part in discussions, deliberations or votes in such a situation.

b) Gaps in the Regulation of Moonlighting Activities

One of the most important gaps in the current regulation concerns the regulation of side activities (*moonlighting*).

According to Article 8 CoC, Commissioners must not exercise any professional activity, gainful or not, or public functions of whatever nature, other than those resulting from the performance of their duties. The interpretation of this has been inconsistent. For example, former Commissioner Günther Oettinger tried to set up a consultancy company during his term of office and notified the Commission, which consulted the independent ethics committee. The committee waited until the end of his mandate to give an opinion. There are no precedents as to how such situations would be assessed *during the mandate* (simply because these cases should not occur in the first place) but the assessment of any side activities during the Commissioners' mandate is likely to be conducted with reference to Article 245 of the Treaty on the Functioning of the European Union (TFEU).

The rules are very flexible for MEPs, and there is no general prohibition of moonlighting. According to a 2018 Transparency International report, 31% of MEPs had side paid jobs, with some MEPs getting higher incomes from these side activities than from the official allowance. Some of these positions are with organisations that have not registered in the EUTR. Moonlighting

²¹ Article 0.2.1.3.

seems to be prevalent among lawyer MEPs.²² However, transparency rules apply to side activities, as MEPs have to declare these activities in their declaration of financial interests when their mandate begins. Pursuant to Article 4(2)(d), (e) and (f) of the Code of Conduct annexed to the Rules of Procedure, members must declare membership of any boards or committees of any companies, non-governmental organisations, associations, whether remunerated or unremunerated, occasional remunerated outside activities (including writing, lecturing or the provision of expert advice), if the total remuneration of all occasional outside activities exceeds €5 000 in a calendar year, as well as holdings in any company or partnership, where there are potential public policy implications or where that holding gives the MEP significant influence over the affairs of the body in question.

EU staff, wishing to engage in an outside activity, whether paid or unpaid, need to obtain the permission of the appointing authority (Article 12b SR). Permission is, in principle, foreseen, because the provision is written to imply that the permission is “refused *only* if the activity or assignment in question is such as to interfere with the performance of the official’s duties or is incompatible with the interests of the institution” (emphasis ours).

The ECB’s codes are stricter than those of other institutions. According to Article 7 of the ECB code of conduct, high-level officials are allowed to “undertake private activities in public, international or non-profit organisations as well as teaching and scholarly activities, provided that these are not activities that raise conflict of interest concern”. Such activities must be notified to the Ethics Committee. In the ECB EF, it is moreover noted that members of staff “have to obtain written authorisation before engaging in an external activity”.²³ The Director-General Human Resources or their Deputy, after consulting the Compliance and Governance Office and the relevant line managers, “shall grant such authorisation”.²⁴

C/ Transparency Rules Regarding the Future: Regulating Revolving Doors

The question of revolving doors has emerged in the last decade as another risk of conflict of interest and another area to regulate with the help of transparency. In order to prevent conflicts of interest when former EU officials and political actors leave office, the institutions have introduced rules. These rules differ from one institution to another, but are generally based on cooling-off periods, combined with the obligation to notify any new activity envisaged.

Commissioners have to inform the Commission with a minimum of two months’ notice of their intention to engage in a professional activity during a period of two years after they have ceased to hold office (Article 11 CoC). The Commission makes the final decision on whether or not the planned activity is compatible with Article 245 TFEU after having consulted the Independent Ethical Committee in cases where the envisaged occupation relates to the Commissioner’s mandate. Commissioners must also refrain from lobbying for two years (three years for Commission Presidents).

Staff is under similar obligations, yet for shorter periods of time. Officials intending to engage in an occupational activity within two years of leaving the service must inform their institution. If that activity is related to the work carried out by the official during the last three years of service and

²² See <https://www.politico.eu/article/meps-hold-ethically-slippery-side-jobs-but-they-are-perfectly-legal/> (Axel Voss); <https://corporateurope.org/en/2023/03/complaint-mep-conflicts-interest> (Angelika Niebler).

²³ 0.2.6.1.

²⁴ Ibid.

could lead to a conflict with the legitimate interests of the institution, the appointing authority may either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. Senior officials are prohibited during the 12 months after leaving the service from engaging in lobbying vis-à-vis staff of their former institution on matters for which they were responsible during the last three years in the service (see Article 16 Staff Regulations).²⁵

Before Qatargate MEPs' post-mandate activities were barely regulated. In April 2023, the EP bureau decided on a 6-month cooling-off period following the end of MEPs' mandate. During this period, former Members cannot engage in lobbying with the EP. After this period, if former Members decide to engage in lobbying towards the EP, they have to register in the EUTR. Consequently, they are not entitled to the access rights and facilities provided to them as former members. According to Article 9 of the Code of Conduct, Members shall not engage with former Members whose mandate ended less than six months ago and who are engaged in lobbying activities.

At the ECB, there are different requirements regarding notification and cooling-off periods depending on: (i) whether the tasks of the individual involve supervision, (ii) their role or grade within the ECB, and (iii) the nature of the prospective employer. Some categories of staff, depending on their rank and duties, must provide minimum periods of notice, ranging from six months to two years. The duration of the cooling-off period also depends on the rank and duties of the staff member concerned and ranges from three months to a maximum of two years.

One obvious problem concerns the scope of lobbying prohibitions. Across institutions, former officials or appointing authorities are banned from engaging in lobbying vis-à-vis their former institution, not vis-à-vis all EU institutions.

Cooling-off periods are also softly implemented. For example, in all the Commission's decisions regarding former Commissioners, the outcome is a decision of "compatibility" (with restrictions, obligations and/or conditions). But these positive opinions are only the tip of the iceberg. Some notifications made by Commissioners are withdrawn during the procedure, especially when Commissioners learn that they might expect a decision of incompatibility. Hence, despite transparency, problematic cases are still settled outside the formal procedure with the general public having no access to the decisions.

The absence of a general framework for detecting whether former staff have taken up new jobs without informing the institutions is an additional difficulty. Finally, the institutions (including the agencies) do not monitor whether former members of staff are complying with the restrictions imposed on them with regard to their new jobs. In general, it seems that institutions rely on self-declarations by staff members for identifying potential revolving door situations.

D/ What's Wrong with Transparency Rules?

The current system, as described above, is failing, and we posit that the main reason for the failure is thinking that transparency is a panacea. There may have emerged an overreliance on transparency both as an intended objective (transparent policy-making) and as a policy tool (transparency-enhancing mechanisms). In other words, we tend to understand transparency as an ideal towards which we should be striving as well as a mechanism through which we can attain the objective of transparency.

²⁵ Accredited Parliamentary Assistants, i.e., assistants of the Members of the European Parliament, are bound by this obligation only if they have worked for the European Parliament for at least five years, see Art. 8 of the Implementing Provisions of Title VII of the CEOS (Decision of the Bureau of the Parliament of 14.04.2014).

From the above analysis of the different rules aiming at ensuring the integrity of political and administrative actors within EU institutions, we argue that transparency tools, while diverse, share the same flaws. Moreover, the EU has been unambitious in envisaging alternatives to transparency, settling on transparency as a default position.

1. The (Dys)Functioning of Transparency Rules

In this section, we examine the functioning of transparency rules by focusing on three elements: their institutional architecture, their lack of resources and the fact that they can work against certain privacy safeguards.

Institutional Design

Generally speaking, the prevention of conflicts of interest through transparency is difficult, because each institution focuses on its own problems and creates its own mechanisms around transparency. As detailed above, the rules for each institution share general principles but differ to a large extent in their implementation details. In the case of the ECB, regimes also differ depending on the rank and position in the institution, which makes the institutional design even harder to grasp.

As a result, there are many regimes creating a patchwork like image of the EU ethics framework. The existence of many regimes is also a problem in terms of the proposed EU ethics body unless different institutional rules are harmonised when the new body is set up.

The well-functioning transparency is also hampered by the fact that there is no commonly shared understanding of what constitutes a conflict of interest. The above analysed rules all have a slightly different definition of conflicts of interest. Furthermore, they are implemented differently in different contexts. Compare the two different situations. In the case of gifts, the conflict of interest exists if the gift is over €50. Then again, Article 11b SR concerns measures in case a staff member has a potential conflict of interest. The provision is vague, referring to the existence of “a potential conflict of interest” and only mitigating measures include the immediate notification to the appointing authority and the possibility to relieve the official from certain responsibilities. While the former has a substantive notion of conflict of interest (any gifts more than €50), the latter is clearly a procedural rule. The notion is used both as a legal category and an analytical category.

Self-Regulation and the Lack of External Gaze

The issue with transparency’s institutional design extends to the enforcement of the rules, entrusted to different ethics bodies.

There is an Independent Ethical Committee that assists the President of the Commission in evaluating the post-mandate activities of the Members of the Commission (Article 13 Code of Conduct). There is an additional specific enforcement mechanism before the CJEU. If Commissioners have breached their duty to behave with integrity and discretion or have been guilty of serious misconduct, the CJEU may, on application by the Council acting by a simple majority or the Commission, compulsorily retire them or deprive them of their right to a pension or other benefits (Articles 245 and 247 TFEU). The threshold for triggering the process is however very high.

As far as the MEPs are concerned, an Advisory Committee, at the request of the EP President, assesses alleged breaches of the relevant Code of Conduct and advises the President on possible actions (Article 10 of the Code of Conduct annexed to the Rules of Procedure). However, there is no transparency on the functioning of the advisory committee. Furthermore, the Advisory

Committee cannot sanction anyone on its own: it is up to the European Parliament President to decide on possible sanctions, making the Committee dependent on the President's discretion.

In the case of EU staff, the enforcement of the Staff Regulations is entrusted to the appointing authority, different for each institution (Article 9, Annex IX SR).

The ECB also has an ethics committee composed of three external members. The members' mandate is 3 years, renewable once, making the ECB ethics committee seem very similar to the IEC for Commissioners.

Generally, these bodies do not have binding powers and their work is not entirely transparent. Moreover, they tend to be composed of people from EU institutions themselves. Finally, their efficiency suffers from the disproportionately powerful role of the Commission and European Parliament Presidents in the application and enforcement of the rules and sanctioning. In matters of ethics and public integrity, EU institutions are self-regulated and self-policed.

There are two bodies, which are responsible for a general (external) oversight function. The European Ombudsman conducts inquiries into alleged instances of maladministration in the activities of the Union institutions, bodies, offices or agencies (Article 228(1) TFEU). The European Anti-Fraud Office (OLAF) is responsible for investigating, *inter alia*, serious misconduct which may constitute a breach of obligations by Commissioners, MEPs and staff likely to lead to disciplinary proceedings at EU level and criminal proceedings at national level.

There is also a lack of truly external, that is, non-EU scrutiny. While EU Member States are annually or biannually monitored and given recommendations by international organisations from the Council of Europe to OECD and the EU, the EU itself is not subjected to similar levels of external monitoring. For instance, unlike all 27 EU Member states that are members of the Council of Europe's GRECO, the EU is not. The EU currently has an observer status with GRECO. Through its anti-corruption work, Greco maintains and applies a European standard of democracy. If the EU as an institutional body would be a member of GRECO (or if the EU accepted on an *ad hoc* basis that the EP – or other EU institutions – are submitted to GRECO review), it would be subject to an external, technical, independent and professional assessment on the ethics and integrity framework that would point toward needed reforms.

Lack of Staff and Inquiry Powers

Research on transparency has distinguished between two types of transparency: fishbowl transparency, which refers to “the full disclosure of information without explanatory information or contextualization”.²⁶ Another is a form of transparency that comes with tools to contextualise and to use it. With respect to the latter, the idea is that disclosing information does not necessarily ensure that the information is accurate, complete or easily available. Moreover, simply demanding full disclosure may have unintended effects by creating a situation where people are lulled into a false sense of security, where they assume that if information is disclosed, it must by default be accurate, complete, and accessible.

If the goal is to prevent the interference of external interests in decision-making and to ensure equal (not just transparent and open) access of interests to decision-makers, then transparency must be coupled with measures to actually achieve these goals. An important issue is that there is a need for dedicated staff that would be able to check if transparency requirements are completed

²⁶ R.E. Löfstedt and F. Boudier, “New Transparency Policies: Risk Communication's Doom?” In *Effective Risk Communication*, edited by J. Arvai and L. Rivers III, 73–90. 2014. Oxon and New York: Earthscan.

(for example when an MEP submits a financial declaration), to ensure that the data submitted is correct (i.e. the staff of the EUTR should be well-resourced to sieve through the data submitted by lobbyists), or whether recommendations are followed (whether or not a Commissioner follows cooling-off restrictions). Much of this work has been done by NGOs, yet the public sector cannot relieve itself of its duties as a regulator by shifting the tasks associated to the implementation of transparency tools onto NGOs. Transparency requires material resources to serve its purposes, and the connection between transparency and resources is important to make, because sufficient dedicated staff is ultimately a question for public finances.

The European Ombudsman has drawn attention to the same issue. In a reply to the Ombudsman's question on how the European Defence Agency (EDA) monitors and enforces the restrictions it imposed on the former Chief Executive's new jobs, the EDA said that it "has neither the resources nor the competence to perform a systematic monitoring of post-employment conditions, beyond raising awareness and ensuring transparency on the conditions set".²⁷

Finally, there has been much optimistic thinking about the benefits of artificial intelligence in making transparency effective. It appears that some national and EU level authorities have developed "intelligence software" to monitor for instance former staff's post mandate activities.²⁸ While we remain cautiously hopeful that advances in the use of artificial intelligence may help officials to monitor transparency disclosures in the future, there are likely new problems to address.

Transparency vs. Legitimate Secrecy

When transparency is seen as the only or the most efficient way to ensure integrity, it can create an atmosphere where every action is scrutinised and every decision is questioned. This can be particularly problematic in situations where there are legitimate reasons for confidentiality or privacy, such as in national security or trade negotiations.

The EU's privacy and data protection legislation is also questioning the strategy of solely protecting EU democracy through transparency. While there are certainly situations where it is legitimate not to disclose particular information, there are increasing signs of the Court of Justice of the European Union (CJEU) in particular extending the reach of privacy and data protection to the disadvantage of transparency.

For example, in a recent case C-184/20, the Court ruled that Lithuanian law according to which, individuals who receive EU funding, even if they do not have public roles, are subject to provide a declaration of private interests (DPI), infringes rights in relation to data protection and privacy. This declaration is aimed at fighting corruption and ensuring good governance. Among other things, the DPI indicates information about the declarant's spouse or cohabitant, as well as any transactions above €3000 of value occurred in the previous 12 months (para 29). The DPI is published on the website of the chief ethics commission of Lithuania. Although the CJEU stresses the need for a contextual assessment, it is clear that as the court responsible for protecting the fundamental rights recognised by the EU, it gave priority to the protection of privacy and personal data over the objective of transparency.

²⁷ <https://www.ombudsman.europa.eu/en/case/en/58395>.

²⁸ As for the French authority HATVP, see <https://www.hatvp.fr/en/high-authority/ethics-of-publics-officials/list/>. The European Court of Auditors' report documents how the Body of European Regulators for Electronic Communications (BEREC) and the Single Resolution Board (SRB) have procedures in place to run compliance checks on former staff members who left within the last two years, including the use of publicly available databases. See https://www.eca.europa.eu/Lists/ECADocuments/AGENCIES_2021/AGENCIES_2021_EN.pdf.

2. Transparency as a Default Position

The existence of transparency policies is not enough, and as argued above, the efficiency and success of transparency is dependent on the well-functioning institutional framework and material resources. Taking transparency as the default ethical toolbox neglects to look for alternative - and perhaps better – solutions to protect European democracy. Below, we briefly outline four reasons why transparency, in the limited case of protecting EU democracy, is not an effective regulatory strategy.

Full Transparency Is Impractical

No system is ever fully transparent. The first reason is that it is impractical to create fully transparent conditions. There are always loopholes, which may have been deliberately created or may have arisen from the day-to-day application of the rules. For instance, EU staff tends to be outside of the scope of transparency policies, because most of them were developed after scandals involving the highest political and or administrative actors. It is therefore difficult to extend the transparency requirements vertically (to the lowest levels of the European administration) and horizontally (to the close relations and family members of political/administrative actors). A recent case in France illustrates this difficulty for the *Haute autorité pour la transparence de la vie publique* (HATVP). Agnès Pannier-Runacher, Minister for Energy Transition, did not include in her declaration of financial interests an oil company in which her children are shareholders. Although the children's financial interests do not fall within the scope of the declaration of interest, they have generated a potential conflict of interest. Applying transparency rules to these close circles would automatically lead to an increase in the volume of information, which would require human and material investment, particularly in IT, to manage this extension.

The second reason has more to do with the transparency's nature. Transparency comes with a "halo effect" by which we mean that transparency directs one's gaze, and dictates what we see. Transparency is not a neutral policy mechanism, rather it involves trade-offs and policy choices.

Transparency as a Mechanism of Repression

Transparency can be counterproductive. It may, for example, move lobbying activities to areas which are not subjected to transparency rules, lead to developing informal contacts and so on.

It can also be turned into a mechanism of repression, as has been seen in the aftermath of Qatargate. The European People's Party pushed for a hearing in the plenary on the topic of "EU funding allocated to NGOs incriminated in the recent corruption revelations and the protection of EU financial interests".²⁹ According to a draft proposal reported by EU Politico, the EPP wants Parliament to deny access to any interest representatives that are not on the transparency register, be they lobbyists or NGOs. Organisations should only be allowed to join the register after "comprehensive pre-screening", including that of their funding sources and final beneficiaries. The EPP proposal calls for an "NGO law" to ensure that "large NGOs that are registered in the EU Transparency Register should be treated in the same way as companies and fulfil the same reporting obligations".³⁰

As several NGOs pointed out in the debates following the EPP's proposal, according to the EUTR rules, NGOs already have to file funding sources and budget information that extend beyond the

²⁹ <https://www.politico.eu/newsletter/brussels-playbook/qatargate-reforms-migration-fight-hard-at-work/>.

³⁰ <https://www.politico.eu/newsletter/brussels-playbook/qatargate-reforms-migration-fight-hard-at-work/>.

requirements for corporate lobbyists.³¹ From this point of view, the increase in transparency requirements can become a mechanism for repression, and the objective of transparency is then diverted.

The harmful impacts of transparency are also discussed with reference to the current “Defence of Democracy” package. The primary initiative is a directive that will subject any entity pursuing lobbying activities and is a recipient of a certain amount of funding from third countries to a number of transparency requirements. The initiative is pursued in a political context which has witnessed a marked increase in cases of covert interference by third countries. However, NGOs are concerned that the proposed package risks weakening rather than strengthening democracies as the increased transparency requirements it places on NGOs could amount to unnecessary and disproportionate restrictions on the right to freedom of association.³²

Transparency to What End?

The third concern relates to the growing importance attached to transparency and the ever-increasing infrastructures responsible for its application, which could lead to a superficial form of ethics being favoured, i.e. giving the political-administrative system the *appearance* of openness, rather than the search for real results.

In what could be described as the self-referential nature of transparency, it becomes the objective and not the means to achieve integrity. This can result in a situation where information is disclosed, but it is not necessarily meaningful or relevant to the public (“transparency for the sake of transparency”). In some cases, the focus on transparency can create a situation where individuals or organisations may be more focused on managing their public image than on addressing the underlying issues that may have led to the need for greater transparency.

In this respect, any new transparency design should be carefully evaluated to see whether improved transparency leads to improvements in democratic decision-making so that transparency does not become a self-sustaining moral pose. Such evaluations are no doubt difficult, but necessary.

Transparency as a Currency: The Economy of Transparency

The third point made above about the ends of transparency relates to the notion that we have termed the economy of transparency.

Some EU officials and interest representatives seem to think that if they disclose what is required of them, they are, in turn, entitled to respectable treatment by the media, NGOs and other such actors assuming the role of watchdog, as vividly illustrated by the below quote from the editor of the Politico EU:

In recent months, I’ve been hearing a lot of frustration about transparency. Big Tech companies that reveal more of their lobbying operations only to have that information seized on by NGOs and journalists. MEPs who fill out their disclosures only to have unflattering data scrutinized in the press, while those who blow off the filings avoid this attention. [...] This all disincentivizes transparency, I hear. Here’s the thing: You don’t embrace transparency to get credit from journalists and campaigners. It’s not our job to reward you for it, or cut you slack for what you end

³¹ See Annex II of the IIA 2021.

³² <https://transparency.eu/joint-statement-eu-foreign-interference-law-a-threat-to-civil-society/>.

up revealing. You do it because transparency (and that potential for scrutiny) makes you a more ethical, democracy-friendly operation. You do it because it's the right thing to do.³³

This idea of the economy of transparency makes it clear that we have not thought about what we do with transparency. If it is a currency, what it tells us? How does it benefit us to know that a Commissioner has been given a gift or has met with a lobbyist? What do we do with this information? In this respect, transparency may become an empty vehicle to depoliticise a deeply political issue of political morality and integrity.

³³ <https://www.politico.eu/newsletter/politico-eu-influence/shrugging-off-oversight-uber-crunch-stellantis-skips-lobbying-2/>.

Part 2. General Reform Principles and Specific Policy Proposals

Qatargate could have sparked a momentum for reform and a more general rethinking of ethics within European institutions. However, so far, the proposals remain on the surface of the problem and fail to tackle the systemic causes behind the scandal.

The president of the European Parliament, Roberta Metsola, issued a 14-points plan. The measures aim at enhancing transparency (of meetings, sources of income, conflict of interests) at the European Parliament, make data from disclosure obligations more accessible (on a single web page)), enable better monitoring of declarations in the Transparency Register through random checks, and strengthening of the Advisory Committee on the Conduct of Members. However, one year after Qatargate, no major reform has been launched. Moreover, discussions in the EP committee ING2,³⁴ which is currently discussing a report on recommendations for reform of EP's rules on transparency, integrity, accountability, and anti-corruption, are mainly framed the issue as an external problem, tightening rules for third countries as well as banning MEP friendship groups.

On the Commission side, the publication on 8 June 2023 of a proposal for the creation of an inter-institutional ethics body lacks significantly of ambition. It is a very narrow proposal compared to the ones suggested by academics and civil society organisations. The EU ethics body is downscaled to an advisory body with no powers of investigations.

A/ The Preventive Toolbox

We join the group of scholars calling for the establishment of an EU ethics body, which (i) concerns all institutions including EU agencies, (ii) is independent, (iii) is endowed with staff, resources and powers.

While we support the creation of the European ethics body, we note that its operating rationale is fundamentally based on improving transparency and disclosure obligations for public officials and private sector groups. As we argued in Part 1, transparency has its limits and must be compatible with the protection of privacy. Furthermore, to have a significant impact, sufficient investment is required. Furthermore, giving priority to transparency alone can lead to the illusion that transparency is the ultimate objective, rather than focusing on the need for a democratic decision-making process that serves the general interest.

For this reason, we outline below a few ideas for building what we named as the incompatibility infrastructure. We propose that, alongside renewed efforts to campaign for a strong European ethics body, greater emphasis should be placed on identifying and eliminating incompatibilities. By incompatibilities, we mean the impossibility of performing different functions at the same time. An incompatibility may firstly concern the exercise of an activity at the same time as a political or administrative function. But the incompatibility may also apply to an activity carried out after the cessation of a political or administrative function, during the waiting period.

The establishment of a new “infrastructure of incompatibilities” is all the more necessary given that, despite persistent calls for a powerful European ethics body with extended powers, the institutions have chosen a less ambitious option: a body without investigative powers. The proposed body will be limited to an advisory role. In sum, Qatargate will not lead to the “ethical momentum” we were all expecting.

³⁴ Special Committee on foreign interference and disinformation, and on strengthening integrity in the EP.

1. First Proposal: A Strong EU Ethics Body

In recent years, scholars and NGOs have pushed for the establishment of a common EU Ethics body. Much of this early campaign (pre Qatargate, as the early proposal by Alberto Alemanno was published in 2020) focused on verifying the legal feasibility of the EU ethics system under EU law. According to the proposal, the body should be independent and competent to ensure the enforcement – through investigations and sanctions – of unethical behaviour committed by both appointed/elected members and staff. According to the proponents of the body, it is legally feasible under EU law to set up such a body by pooling together existing monitoring, investigatory, sanctioning as well as advisory powers.³⁵

This EU ethics body, to be able to efficiently tackle the ethics flaws of the EU institutional system, should have enough staff and resources to pursue its missions. The attention has also been paid to its composition. So far, proposals about the composition of the future EU Ethics body have pointed, rightfully, to the lack of independence of current EU ethics bodies' members, but they focused on reforming the way they are appointed and having some “*de jure* members” from other EU institutions (CJEU, Court of Auditors, or European Ombudsman).³⁶

To us, in order to ensure the independence of its members, the EU ethics body should also include external actors such as NGOs representatives (from Transparency International or Corporate Europe observatory), academics, specialised journalists and members / staff from national ethics authorities. To ensure also more accountability and democratic oversight over the activities of this EU ethics body, there could also be representatives from national parliaments. The selections of these actors should be based on two criteria: their independence and their expertise.

Extended Powers for the European Ethics Body

In terms of powers, the new body appears to be a missed opportunity. In our view, ideally, the powers of the new body should include the implementation of rules concerning the past, present and future conduct of the EU's political and administrative staff.

Regarding the Past

The body should be able to check financial declarations and their annual updates. The new body should also systematically ensure that the institutions screen incoming officials before appointment and take mitigating measures in case there is an actual or potential conflict of interest.

Regarding the Present

As far as lobbying is concerned, the ethics body should be in charge of a joint EU Transparency Register, which would include all institutions and EU agencies. It should be competent to conduct investigations on the declarations made in this register, and to sanction in cases where there has been a breach of the code of conduct. The ethics body should also be able to receive complaints, including from NGOs), have dedicated staff to handle these complaints and be transparent about how they handled them.

However, the EU ethics body should not be overly dependent, as it is today for most of the ethical regulations, on the work of NGOs. Some of the verification and investigation activities currently

³⁵ Alemanno, Alberto, Towards an EU Ethics Body (November 20, 2020), accessible at: <https://ssrn.com/abstract=4062961>.

³⁶ Ibid.

successfully carried out by NGOs could be internalised if the EU ethics body had sufficient human and material resources.

There should be one gift register for all the institutions and EU agencies. The EU ethics body should be also in charge of this gift register and be capable of issuing guidance on the acceptance of gifts.

As far as conflicts of interests are concerned, the body should be given powers to assess situations where there is a potential or actual conflict of interests and to issue guidelines and conditions on how to avoid or resolve them. For instance, there should be clear rules and consistent application of the rules that concern side activities (moonlighting).

Regarding the Future

The EU ethics body should have been in charge of applying rules regulating revolving doors through cooling-off periods.³⁷ One crucial issue would be the adoption of a general framework for detecting whether former staff members have taken up new jobs without informing the institutions. The institutions (including agencies) do not currently monitor whether former staff members comply with restrictions imposed on them in relation to their new jobs. In general, it seems that institutions rely on self-declarations by staff members for identifying potential revolving door situations.

The Commission Proposal

While it is clear that a strong European ethics body would have been an essential reform of European ethics rules, the proposed reform is insufficient. According to the Commission's proposal,³⁸ the new body will be advisory in nature, with no investigative powers. Although it can provide guidance and promote ethical behaviour, its efforts will be limited if it does not have the capacity to conduct investigations or impose sanctions. Furthermore, the proposed annual budget for this body is only €600,000. By way of comparison, the budget of the Haute autorité pour la transparence de la vie publique in France is €7.9 million.

This is why we suggest that the EU should explore the issue of incompatibilities in parallel in order to strengthen its commitment to ethical and legitimate governance. This can be seen as a temporary measure until such time as the robust European ethics body is established. However, we believe that a set of incompatibilities is necessary, irrespective of the powers that the EU ethics body will have.

2. (Re-)building the Infrastructure of Incompatibilities

The notion of incompatibility means the limitation of the possibility for the simultaneous performance of several mandates of different political functions. Its primary purpose is to ensure that elected members' public or private occupations do not influence their role as representatives of European citizens.³⁹ There are several types of incompatibilities. One version relates to the

³⁷ See also recommendations in Vidačak and Šelo Šabić 2023 for the European Parliament, accessible at: [https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2023\)702588](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2023)702588).

³⁸ Proposal for an interinstitutional ethics body. COM(2023) 311 final.

³⁹ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)027rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)027rev-e). Ameller has defined incompatibility as “the rule that prohibits members of parliament from engaging in certain occupations during their term of office ... Its object is to prevent members from becoming dependent upon either public authorities or private interests. But the rule operates in a less direct way: it does not prevent a member from being a

simultaneous mandate of executive and parliamentary posts, which is accepted in most European democracies. For the purposes of this report, we are interested in “private incompatibilities”.

According to the Venice Commission, “private occupations are in principle compatible with parliamentary mandates. They are viewed as a means of preventing the exercise of a parliamentary mandate from becoming a fully-fledged profession and of enabling professional groups to be represented in parliament. However, this principle has been undermined by a series of scandals based on collusion between politics and finance and certain private occupations have, as a result, been declared incompatible with political office”.⁴⁰

While the debate on incompatibilities is usually conducted with respect to elective mandates, there can be incompatibilities in relation to the executive function. The incompatibility rule also usually refers to situations where there are two competing mandates. We would like to extend the scope of the incompatibility rule to include certain activities that do not represent another, competing mandate as such, but would however, be incompatible with the public office, like consulting or lobbying activities.

Incompatibilities operate in all three temporal dimensions: past, present and future. When it comes to regulating for instance future activities, these incompatibilities are connected with cooling-off periods. The cooling-off period is a tool that is becoming more common in ethics policies and is aimed at ensuring that individuals who have held a political office or a major administrative position do not engage in activities that could give rise to a conflict of interest for a certain period of time after their term of office or position has ended. The cooling-off period is generally compensated by “transitional allowances”, which are 24 months for former MEPs. To be efficient, the duration of the cooling-off period should be long enough and ideally as long as the period of transitional allowance. The duration of 6 months, as decided for MEPs, seems to be too short to matter.

Below we discuss incompatibilities in all three temporal dimensions, starting with parliamentary function.

Parliamentary Incompatibilities

As is clear from Part 2, in the EU, there have been few if any incompatibilities in relation to MEPs.⁴¹ Below we propose some new incompatibilities and discuss recently amended EP rules in this regard.

Present: MEPs should be banned on taking up side activities (ban on *moonlighting*).

Future: The EP bureau has recently decided on a 6-month cooling-off period following the end of MEPs’ mandate. During this period, former Members cannot engage in lobbying with the EP. After this period, if former Members decide to engage in lobbying towards the EP, they have to register in the EUTR. Consequently, they are not entitled to the access rights and facilities provided to them as former member.

candidate, nor can the validity of an election be questioned on that account. But a member must choose within a predetermined period, which is generally short, between membership and the occupation that is held to be incompatible with it”, see Ameller, M., (1966), *Parliaments*, Cassell, London, p. 66.

⁴⁰ Venice Commission report, p. 15.

⁴¹ European countries regulate private occupations differently. Stricter or conditionally enforceable forms of ineligibility and incompatibilities between an elective mandate and specific economic positions, so-called “economic incompatibilities”, have been expressly introduced in five cases in Europe: Austria, France, Greece, Italy and Portugal, see Venice Commission report, pp. 18-19.

This is an incompatibility rule, which, if implemented, works as a remedy against conflicts of interests resulting from a revolving doors. This is also an important decision by the EP Bureau, because it demonstrates that it is possible and legally feasible to rule through setting up incompatibilities.

Executive Incompatibilities

Unlike parliamentary incompatibilities, there are some examples of existing executive incompatibilities. One existing incompatibility rule with regard to the executive functions is the rule that the staff of EU institutions cannot – without the permission of the appointing authority – accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever (Article 11 Staff Regulation).

Another such existing incompatibility rule is cooling-off period as laid down in the Staff Regulations (for staff members) and the Code of Conduct (for the members of the Commission). This rule is limited in time, i.e. there is a specific period during which the incompatibility rules apply.

We also propose new incompatibilities with regard to the executive functions.

Present: There should be also a consideration of officials' duties in the course of everyday policy-making. For instance, Commissioners and members of their Cabinets can only meet those lobbyists, which are registered in the Transparency Register, which means that need to check whether or not a lobbyist is registered before agreeing to a meeting. This should be strengthened and extended: first, to cover a larger group of institution's staff including also mid-level staff and second, to avoid meetings with former staff members.

In Australia, the Queensland Code of Conduct for public servants provides that public servants must ensure that business meetings with persons who were formerly Ministers, Parliamentary Secretaries or senior government representatives are not on matters those persons had official dealings with in their previous employment in accordance with government policy.⁴² This would, however, require publishing information on former senior staff members' lobbying bans directly on the Transparency Register. This is something that the European Ombudsman has suggested.⁴³

Future: The most urgent reform of the incompatibility rule regarding cooling-off periods is that there should be a total ban on lobbying all institutions (not simply in relation to the departing official's own institution) for the duration of the cooling-off period.

There are also other ways to develop incompatibilities in relation to the cooling-off period.

The incompatibility rule can be based on:

- the profession: a ban to pursue certain activities (lobbying, consulting). However, in the absence of a clear definition of lobbying and consultancy, this rule seems difficult to apply.

⁴² Public Service Commission (Qld), Code of Conduct for the Queensland Public Service (1 January 2011) cl 4.2(b).

⁴³ Decision of the European Ombudsman in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members. She also proposed that the institutions publish information on all cases where they assess a request to take up outside employment and that when the former staff member is moving to an organisation on the Transparency Register, the information published on their case should include a link to the organisation's entry on the Transparency Register, see Report of the European Ombudsman on the publication of information on former senior staff so as to enforce the one-year lobbying and advocacy ban: SI/2/2017/NF.

- the status / type of the company an official or political actor intends to work for (law firms, lobbying firms, consulting firms). However, this rule could easily be circumvented by creating think tanks or NGOs.
- the sector in which the company operates (the sector in which the staff member worked). It should be borne in mind, however, that there are cross-sectoral policies, so that it is not always easy to clearly identify the sector in which the official was operating.

All these features are not mutually exclusive and since they all can be circumvented, it would be preferable to combine them.

Enforcement of Incompatibility Rules

The enforcement of incompatibility rules is not a simple task, as the debate concerning enforcement of cooling-off periods shows. There is a lack of a general framework for detecting whether former staff members have taken up new jobs without informing the institutions. In addition, the institutions (including EU agencies) do not actively monitor whether former staff members are complying with the restrictions imposed on them in relation to their new employment.

In general, it seems that institutions rely on self-declarations by staff members for identifying potential revolving door situations.⁴⁴ According to the discharge report for the European Parliament's budget for 2021, of 459 members of the 8th Parliamentary term who did not return back for the 9th, just one submitted a post-mandate notification of employment to the Parliament in 2021. Out of 203 officials who left, only 54 checked in to see if their new job would be compatible with ethics rules.⁴⁵

Yet there are some good practices to be considered. The European Court of Auditors' report documents how the Body of European Regulators for Electronic Communications (BEREC) and the Single Resolution Board (SRB) have procedures in place to run compliance checks on former staff members who left within the last two years, including the use of publicly available databases.⁴⁶

Sanctions

Sanctions for non-compliance with the rules could target either the individual (the person responsible for the wrongdoing) or the company which hired him or her (in case of moonlighting or revolving doors).

Regarding individual sanctions, we propose the adoption of a range of administrative sanctions for non-compliance with incompatibilities, which could include deprivation of civil rights, ineligibility, reduction of pension rights, reimbursement of the allowance received etc. However, in the absence of an EU Ethics body common to all EU institutions, the adoption of sanctions and their effective use remains in the hands of institution specific internal bodies.

Regarding company-level sanctions, one option worth considering concerns public tenders. This would not need an amendment of the directive on public procurement,⁴⁷ because the exclusion could be decided on the basis of Article 57(4)(e) of the Directive. This provision allows the

⁴⁴ Greco could be authorised to take care of systemic level general monitoring but it cannot monitor each individual.

⁴⁵ https://www.europarl.europa.eu/doceo/document/TA-9-2023-0138_EN.html?utm.

⁴⁶ See https://www.eca.europa.eu/Lists/ECADocuments/AGENCIES_2021/AGENCIES_2021_EN.pdf.

⁴⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1415180510261&uri=CELEX:32014L0024>

contracting authority to exclude an economic operator in case of conflict of interests.⁴⁸ For instance, certain consultancy companies could be excluded from public tenders if they have hired revolvers from EU institutions in breach of cooling-off periods.

The question of involving companies more broadly in ethical compliance in the EU is beyond the scope of this White Paper, but there would be many other ways to do so, beyond sanctioning them. For example, political ethical behavior (regarding lobbying activities or hiring revolvers) could be included in the Corporate Social Responsibility (CSR) activities of large companies.

Finally, there is one specific case worth mentioning. The case of lawyers is problematic for many reasons (legal privilege, consistent under declaration of lobbying activities, numerous cases of revolving doors). Their law firms could be sanctioned in the same way as described above for companies but also, cooperation between the EU ethics body and national bars could be developed. So far, European bars have generally authorised lobbying as a legitimate activity for lawyers and facilitated revolving doors circulations. They could also be involved in their regulation, with the possibility left for national bars to impose (temporary) exclusion of private practitioners or other professional sanctions.

B/ The Repressive Toolbox

After the Qatargate scandal, and in light of the absence of recent legislation addressing corruption in EU criminal law, the Commission found it necessary to formulate a political response. On 3 May 2023, it presented a proposal for a directive to the European Parliament and the Council aimed at combating corruption.⁴⁹ It is crucial to a) examine the criminal offenses outlined in this proposal to ascertain their protected value(s). Additionally, b) it is imperative to analyse the enforcement mechanisms envisaged by the Commission for these offenses. Criminal law devoid of effective enforcement amounts to mere political rhetoric. We propose a c) two-step strategy in conclusion.

1. Plurality of Protected Values of Criminal Offences Included in the Commission's Proposal

The Commission's proposal for a directive on combating corruption not only aims to replace the previously mentioned 1997 EU Convention on corruption but also seeks to supersede Council Framework Decision 2003/568/JHA of July 22, 2003, addressing corruption in the private sector. This relatively obscure normative instrument, which includes criminal law provisions, has had limited impact. In contrast to bribery and corruption involving public officials, it pertains specifically to such activities within the private sector, such as within large firms or in relationships between companies vying for public procurements and their subcontractors. In Framework Decision 2003/568/JHA, democratic values are not in jeopardy; instead, the focus is on honesty in business relations and ensuring fair competition. Despite this, the Commission's proposal includes Article 8, addressing "bribery in the private sector", thereby incorporating elements from Framework Decision 2003/568/JHA. The Commission has adopted a comprehensive approach to corruption, irrespective of whether it compromises the integrity of public officials.

Article 9 of the Commission's proposal addresses misappropriation, a traditional criminal offense against property. It specifically pertains to property managed either by a public official – as stated

⁴⁸ Conflict of interest is defined in Article 24: When staff members of a procurement service provider have "directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure".

⁴⁹ COM(2023) 234 final.

in Article 9(1) – or by any individual in the private sector – as indicated in Article 9(2). This article penalises the commission, disbursement, or appropriation of said property contrary to the intended purpose of the entrusted management. Similar to private corruption, the misappropriation offense is largely unrelated to attacks against democracy. It is even debatable whether its inclusion in the broader category of corruption is accurate.

Finally, the Commission proposes criminalising “abuse of functions” in Article 11. It is crucial to note, however, that the language of Article 11 does not address the conflicts of interest problem discussed below. Moreover, it does not appear to be aimed at addressing any form of integrity breach by public officials, as it does not encompass acts causing harm to third parties but focuses solely on obtaining an “undue advantage” for the public official or a third party. The term “undue advantage” links the offense to the core corruption crimes. Article 11 pertains to a specific form of corruption in which the public official does not explicitly seek an undue advantage before taking action or refraining from it in line with their duty. Instead, their behaviour is more subtle; for example, they may initially act in favour of an economic actor with the expectation of gratitude. This favorable decision may prompt the actor to provide financial support for the official’s political campaign in the future or contribute to her political party. Although this represents a temporally reversed corruption scheme, it is still considered corruption.

In the context of regulating conflicts of interest, the primary issue lies not in the public official obtaining an “undue advantage” but in the misuse of their public position to gain a private advantage. Exploiting a conflict of interest unlawfully undermines democracy, as the public official makes decisions that benefit their interests at the expense of the public interest democratically defined by the legislator. However, the conventional behaviour associated with exploiting conflicts of interest do not appear to be covered by Article 11 of the Commission’s proposal. Additionally, the matter of revolving doors is entirely absent from the Commission’s proposal.

In conclusion, with respect to the offenses delineated in the Commission’s proposal, their objective is not solely the protection of a single value but rather the safeguarding of various values. This encompasses the integrity of EU public officials, which is connected to EU democracy on one side, and various other protected values on the other side, unrelated to democratic interests. Essentially, the proposal offers comprehensive protection for the integrity of private agents, honesty in business transactions, fair competition, and property. Nevertheless, this broad and all-encompassing approach raises concerns about enforcement.

2. Enforcement of the Criminal Offences Included in the Commission’s Proposal

The Commission’s proposal provides limited insight into the enforcement of the offenses it outlines. There is no change in terms of competent authorities; the national law enforcement authorities remain in charge. Article 24 of the proposal emphasises cooperation and mutual legal assistance among a broad spectrum of authorities, including Member States’ authorities, the Commission, Europol, Eurojust, OLAF, and the EPPO. However, its wording is highly general, merely aiming to “facilitate the coordination of investigations and prosecutions”, making it doubtful that any substantial improvement will result from this vague provision. In contrast, Article 25 more precisely calls for the Commission’s assistance to Member States in identifying sectoral corruption risks, exchanging best practices between Member States, and developing guidance materials and methodologies. While these measures are beneficial, they underscore that Member State authorities are the primary actors, despite the existence of European enforcement authorities that currently provide effective solutions against cross-border crimes within the EU.

The Commission's proposal lacks the ambition to establish a set of offenses that could potentially fall under the jurisdiction of OLAF and EPPO. As explained below, the mission of these institutions is to safeguard EU interests through the enforcement of EU criminal law. It raises questions about whether only European financial interests warrant such protection or if the European legislator should use this opportunity to consider incorporating European democratic interests into the scope of OLAF and EPPO's actions by concentrating the new directive on offenses against the integrity of EU public officials.

3. Proposal for a Two-Step Approach

For a middle or long-term strategy, we suggest a two-step approach.

- As a first step, we recommend the adoption of an EU directive on protecting the integrity of EU public officials using criminal law.

Material criminal law aimed at protecting EU democracy needs to be consolidated, strengthened, and integrated into a single coherent legal instrument. Instead of endorsing the Commission's proposal on combating corruption, we propose the preparation of an EU directive focusing on safeguarding the integrity of EU public officials through criminal law. This legal instrument should encompass various offenses, all geared toward upholding the same European value: the integrity of EU public officials, which is crucial for a robust European democracy.

The offenses outlined in the new directive should encompass active and passive corruption, as defined in the 1997 EU Convention on corruption, along with active and passive trading in influence as outlined in the 1999 Criminal Law Convention of the Council of Europe. Additionally, it is imperative to include other criminal offenses targeting the most serious practices arising from conflicts of interest faced by EU public officials. The European legislator must decide on the scope of such offenses, whether to adopt a broad or narrow approach, for instance, by drawing inspiration from national offenses like abuse of powers. Furthermore, the inclusion of the breach of cooling-off periods resulting from revolving doors into the new criminal law instrument should be considered by the European legislator.

Conversely, offenses closely related to corruption of public officials that do not directly harm democracy, such as private corruption or misappropriation of property, should not be incorporated into the new legal instrument.

The proposed strategy's second step involves expanding OLAF and EPPO's jurisdiction over such offenses, assuming that they involve purely EU interests.

- As a second step, we call for the extension of OLAF and EPPO's jurisdiction to criminal offences against the Union's democratic interests.

The enforcement of the offenses outlined in the new directive is a pivotal concern. Enforcement should occur at the EU level because it is the responsibility of the EU to safeguard EU democracy against criminal behaviour. It also seems that the effectiveness of law enforcement for cross-border offenses committed within the EU is heightened when EU entities are involved. Therefore, we assert the necessity of expanding the material field of competence of OLAF and EPPO to cover the offenses specified in the new directive. This expansion serves a legitimate aim and is in line with the principle of subsidiarity. Similar to frauds affecting the Union's financial interests, offenses against the integrity of EU public officials infringe upon purely EU interests, specifically the democratic interests of the Union.

From a technical standpoint, expanding the jurisdiction of OLAF and EPPO necessitates a revision of the legal instruments that define them. These include the Commission Decision of 28 April 1999, which establishes the European Anti-fraud Office (OLAF), and Council Regulation (EU) 2017/1939 of 12 October 2017, which implements enhanced cooperation for the establishment of the European Public Prosecutor's Office.

The decision of whether to adopt a proposed directive and expand the jurisdiction of OLAF and EPPO remains a political one.

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One year on from Qatargate: how can the European Union be better protected against conflicts of interest and corruption?

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