

Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body

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2. **Reference number:** 2020/2133 (INI) / A9-0260/2021 / P9_TA(2021)0396
3. **Date of adoption of the resolution:** 16 September 2021
4. **Competent Parliamentary Committee:** Committee on Constitutional Affairs (AFCO)

5. Brief analysis/assessment of the resolution and requests made in it:

On 16 September 2021, the European Parliament adopted a resolution ‘on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body’ by 377 votes for, 87 against and 227 abstentions.

It proposes the conclusion of an interinstitutional agreement (IIA), based on Article 295 of the Treaty on the Functioning of the European Union (TFEU), between the Parliament and the Commission to set up an independent EU ethics body. The agreement and the body would be ultimately open to the participation of all EU institutions, agencies and bodies.

The body would be competent to apply the current ethical framework of each of the participating institutions, applicable to its Members (Treaties and Codes of Conduct of the various institutions), but also to its staff (EU Staff Regulations and internal rules of each institution). It would be entrusted with an advisory role towards the institutions, but would also be granted investigative powers as well as powers to issue - usually public - recommendations to the respective institutions regarding their Members and staff, including recommendations for sanctions. Finally, the body would have a broad competence for the ‘examination of conflicts of interest prior to, during and after public office’.

As set out in the 2019 - 2024 Political Guidelines for the Commission, the institutions of the EU should be open and beyond reproach on ethics, transparency and integrity if Europeans are to have faith in the Union. The Code of Conduct for the Members of the European Commission requires them to observe the highest standards of ethical conduct. The establishment of an interinstitutional ethics body will be an additional component of the existing ethical framework and help consolidate and strengthen trust in the EU institutions and in the people serving them.

The design of the body touches upon sensitive aspects of the institutional balance between EU institutions. An interinstitutional ethics body must respect the institutional autonomy and the particularities of each institution as well as the functions of its Members. In this context, some aspects of the resolution of the European Parliament are agreeable to the Commission, while others require further analysis and clarification, give rise to concern or seem not to be compatible with the Treaties.

6. Response to requests and overview of action taken, or intended to be taken, by the Commission:

The Commission has given the resolution careful consideration. It looks forward to continuing the dialogue with the European Parliament and to starting discussions on this matter with all other EU institutions and the two advisory bodies mentioned in Article 13 of the Treaty on

European Union (TEU).

The Commission supports the creation of an independent ethics body common to all EU institutions, as expressed by President von der Leyen in her Political Guidelines for the Commission. The Commission generally welcomes the European Parliament's resolution, and in particular its objective of ensuring that the institutions of the European Union meet and apply the highest standards of independence and integrity.

However, some aspects touch upon the autonomy and independence of all institutions and their Members.

References to the current ethical framework in the Commission and the Parliament

Insofar as the resolution expresses concerns about shortcomings in the application of the current ethical framework notably with regard to Members of the Commission and Members of the Parliament (see inter alia **recitals F, J, K and L**), the Commission recalls that it has already a well-established, strong legal framework, based on the Treaties and secondary legislation, which sets out the ethical requirements for its Members.

It points out that the Commission has set up an ethical body composed of independent personalities, the Independent Ethical Committee established by the Code of Conduct of 31 January 2018. The Committee advises the Commission on the ethical obligations of its Members. It is composed of three external high-level personalities, namely a former Member and Vice-President of the European Parliament, a former Judge of the Court of Justice and a former Director-General of the Commission.

Pursuant to the Code of Conduct for the Members of the Commission, the Commission must seek the Committee's opinion before it decides on the authorisation of post-mandate activities of former Commissioners if those activities are related to their former portfolios. Both the Commission decisions and the related opinions of the Committee have to be published, thereby ensuring transparency with regard to the views of the Committee and the final decision of the Commission. Moreover, the Commission can seek the Committee's opinion on other ethical issues concerning the Members of the Commission.

Ethical framework applicable to the Members of all participating institutions

- **Continued application of the current rules of each institution**

Paragraph 5 of the resolution refers to the existing ethical framework applicable to the Members of the Parliament and the Commission. These are the Statute for Members of the European Parliament, the Parliament's Rules of Procedure, and the Commission's Rules of Procedure and its Code of Conduct. The resolution calls for the currently applicable ethical framework of each institution to continue to apply and for the body to issue recommendations on that basis.

The Commission **agrees** on that point and recalls its support for a body that does not imply the adoption of new ethical rules in the institutions or the adoption of a single set of ethical rules applicable to all institutions. Such unified rules would not be able to reflect the differences between the roles and status of the different institutions and their Members.

- **Competence to make proposals for a common ethical framework**

The Commission has **concerns regarding paragraph 40** of the resolution. The latter refers to the body's competence to make proposals for the development and periodic update of a common ethical framework for the EU institutions, including common rules.

The Commission stresses that the current rules of each institution are based on different provisions in the Treaties for the members of the different institutions and reflect their

different roles. A single set of rules for all would most likely lead to a set of very general principles, which would need to be complemented by specific rules for the members of each institution. It can moreover be expected that this would require lengthy negotiations to reach an agreement. The Commission therefore considers that **a single set of operational ethical rules** applicable to the Members of all institutions **is not feasible while it does not rule out discussions on a set of common principles in line with the Treaty provisions applicable to the different institutions.**

- **No overlap with the missions of existing institutions or bodies**

The resolution mentions that there should be no duplication or interference between the body and ‘the work of the European Anti-Fraud Office (OLAF), the European Public Prosecutor’s Office (EPPO), the European Ombudsman, the European Court of Auditors or the CJEU’ (**paragraph 2**).

The Commission **agrees** on this point. However, certain proposals made in the resolution would be inconsistent with this objective (see in more detail below). The Commission recalls that the competences of the body should not impinge upon those of other bodies. Therefore, its mandate should be limited to a **clearly defined list of competences delegated** by the participating institutions.

Future of the Commission's Independent Ethical Committee and similar bodies in the other institutions

If the institutions agree on the creation of an EU ethics body common to all institutions and if the tasks and functioning of this future body are similar to those of the Commission's current Independent Ethical Committee, the Commission is ready to consider ending the operation of its own Committee and entrusting its tasks to the new body if the other institutions are ready to do the same.

Powers limited to an advisory function

- **Respect of the institutional autonomy**

As regards the role of the body, the Commission notes that the resolution uses a plurality of terms to describe the powers to be attributed to it: ‘propose and advise’ (**paragraph 5**), ‘compliance role’ (**paragraph 9**), ‘monitoring capacity’ (**paragraph 10**), ‘investigation’ (**paragraphs 16 and 24**), ‘interpretative power’ (**paragraph 20**), ‘conduct studies and annual reporting’ (**paragraph 38**). Each of these concepts have a specific meaning and the resolution lacks precision for each of these notions.

Nevertheless, the Commission **agrees** with the resolution, which aims to entrust the body with an **advisory function** towards the institutions (**paragraph 19**) while the decision-making powers for the application of ethical rules would remain within the respective institutions (**paragraph 3**). The Commission stresses that this aspect is **crucial for respecting the institutional autonomy established by the Treaties**. The Treaties establish a system of checks and balances at EU level which is based on the democratic principles set out in Article 10 TEU. This system cannot be changed or overturned by the creation of an administrative body with decision-making powers - or similar, equally intrusive powers - that would bind or constrain the institutions or their members.

- **Possibility to entrust the body with decision-making powers at a later stage**

The Commission **does not agree** with the proposal in **paragraph 9** of the resolution to possibly entrust the body with decision-making powers at a later stage. The Commission recalls that **an institution cannot abdicate the powers conferred upon it by the Treaties** or renounce to exercise them for the benefit of another entity. An administrative body with

decision-making powers over the Members of the institutions is **not provided for in the Treaties**.

Furthermore, some **specific competences mentioned in the resolution** seem to lack grounds and **do not seem justified by the ‘Meroni doctrine’** as referred to in **recital Q**. The ‘Meroni doctrine’ can justify a delegation of powers from the institutions to external bodies as long as they are not binding and do not alter the balance of powers designed by the Treaties. The Commission considers that **decisions on ethical matters and competences such as ‘on-the-spot-checks’ and ‘records-based investigations’** mentioned in **paragraph 16** of the resolution would not fall into the scope of limited and strictly defined executive powers.

However, the Commission does **support the idea that an institution can - and in certain cases should - seek an opinion** from an independent advisory body in order to make an informed decision.

Legal basis of and parties to the interinstitutional agreement

As regards **paragraph 1** of the resolution, the Commission considers that an **interinstitutional agreement (IIA) based on Article 295 TFEU is not an appropriate legal basis** for the establishment of the EU ethics body. An interinstitutional agreement under this provision can only be concluded between the Parliament, the Council and the Commission. Using this legal basis would exclude all other institutions (except for the Council), agencies and bodies from joining at a later stage and concern issues, which affect Members of all EU institutions in the same way. The Political Guidelines of the Commission support the creation of an ‘independent ethics body common to *all* institutions’ as all institutions play an important role in fostering trust in the EU. Instead, the Commission considers a *sui generis* **interinstitutional instrument as the appropriate administrative approach**¹. When there is an agreement on the principle to create an EU ethics body, the Commission will make a proposal for the conclusion of such an agreement.

Areas of competence and ethical issues covered

- **Areas of intervention**

Paragraphs 9 and following of the resolution refer to broad areas of competence of the body. The Commission stresses that it is important that the Body has competences for the implementation of the ethical framework applicable to the Members of all institutions, including both the Members of the European Parliament and the Members of the Commission. Consequently, the Commission considers that **more clarity is needed**, concerning both the body’s competences and the necessary distinction between different areas of intervention.

In view of the Commission, the body should only have **explicitly defined competences** where the body would add real value. This is crucial, on the one hand to respect the institutional balance and independence of each institution as set out in the Treaties and, on the other hand, to limit the tasks of the body to a workable number of areas. In this regard, the position of the Commission on the different topics specifically mentioned in the resolution is the following:

¹ Approach chosen by the Commission in 2000 to propose the set-up of an Advisory Group on Standards in Public Life with the Parliament, Council, Court of Justice, Court of Auditors, EESC and Committee of the Regions (SEC(2000)2077)

- **Declarations of interests**

With regard to the examination of the declarations of interests of the Members of all institutions, e.g. Members of Parliament or Members of the Commission, it is worth exploring the possibility to entrust it to the body after the Members have taken up their functions and have submitted their first declaration as confirmed member to their respective institution. This would allow the body to carry out a thorough examination and identify appropriate remedies where needed. The situation is more complex with regard to declarations to be made before Members take up their function. As regards, for example, the declarations of interests of Commissioners-designate, the constraints of the interinstitutional process to appoint a new Commission need to be taken into account. All institutions and persons concerned have to take decisions within a very limited period.

- **Post-term of office activities of the Members of the institutions**

Concerning post-term of office activities of former Members of the institutions, the Commission agrees that the body could be consulted, on request of the President of each participating institution, on envisaged post-term of office activities of former Members of the signatory parties. This is already case for the Commission's Independent Ethical Committee. The Commission notes however that it would require clarification on which basis the Parliament would consult the body on post-mandate activities of its former Members since the Parliament does not seem to have specific rules for notifying and evaluating post-mandate activities of its former Members.

- **Wider transparency issues**

Paragraph 5 of the resolution refers to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a **mandatory transparency register**, as well as to the Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, and the same decision for its Directors-General. Such wider transparency issues, covered in the specific interinstitutional agreement, should not be part of the competences attributed to the body.

The Commission recalls in this respect that Article 6(4) of the Interinstitutional Agreement on a mandatory transparency register establishes a Secretariat, composed of staff from the Parliament, the Council and the Commission, with the ability to carry out investigations. Those can be launched based on a complaint alleging that a registrant has not observed the code of conduct of the register, as well as on the Secretariat's own initiative in the light of information that the registrant may no longer satisfy the requirements for eligibility as set out in the interinstitutional agreement.

The Commission considers that there is no need for additional scrutiny as this would **risk adding additional administrative layers without added-value**.

Investigative powers and ability to issue recommendations for sanctions

- **Investigative powers**

In **paragraphs 16 and 24**, the resolution calls for the body to have the power to initiate procedures and to conduct investigations based on information it has collected or has received from third parties. More precisely, the resolution aims at entrusting the body with the **power to initiate investigations** on its own initiative as well as to conduct 'on-the-spot and records-based investigations **based on information** it has collected or that it has **received from third parties**, such as journalists, the media, NGOs (non-governmental organisations), whistleblowers, civil society or the European Ombudsman' (**paragraph 16**). The resolution

also refers to an **exchange of information with national authorities** where this is necessary for the performance of its tasks, for example, tax information, land registers and data held by national ethics bodies (**paragraph 8**).

The Commission underlines that requesting information directly from national administrations such as tax authorities or private entities like banks **would require a proper legal basis for legislation**, since it would **interfere with the privacy of the Members of the institutions**, possibly their families, and directly concern third parties. Additionally, the Commission stresses that investigations must be subject to substantiated allegations and suspicions. In this regard, a well-established and sound legal framework that entrusts existing bodies with investigative powers is already in place. National judicial authorities or the European Public Prosecutor's Office (EPPO) are competent in case of suspicions of criminal behaviour. The European Anti-Fraud Office (OLAF) can investigate irregularities affecting the EU budget as well as serious breaches of professional duties. Finally, the European Ombudsman can launch inquiries in case of behaviour that would constitute maladministration. Against this background, investigative powers should remain reserved for these existing bodies. On its part, the body should work on the basis of information provided by the Members, by the Members' institutions or open sources. The body could also have the competence to ask for additional information from a Member or the EU institutions.

- **Possibility to issue recommendations for sanctions of Members of the institutions**

The resolution calls for the possibility of the body to issue recommendations for sanctions to the responsible authorities of the respective participating institutions in relation to their Members (**paragraph 19**).

On this matter, the Commission recalls that, with regard to its Members, there is **already** a robust ethical framework in effect which establishes **provisions for sanctions**, including at Treaty level:

- For the Members of the Commission, **Article 245 TFUE** reserves the competence to issue financial sanctions to the Court of Justice;
- Article 13(3) of the **Code of Conduct for the Members of the Commission** states that the Commission may decide, taking into account the opinion of its Independent Ethical Committee and on proposal of the President, to express a reprimand to its Members and, where appropriate, make it public.

These provisions are applied in addition to the political control exercised by the Parliament and the judicial control of the Court of Justice.

- **Two-step approach mechanism**

The resolution mentions a two-step approach (**paragraph 33**). If the body becomes aware of a breach of ethics rules, it would first **recommend actions to put an end to the breach**. If the individual concerned refuses to take the appropriate actions, 'the EU ethics body should make a **reasoned recommendation for sanctions** measures and transmit all relevant information about the case to the competent authority, which will decide how to follow-up on the recommendation within 20 working days'.

Such a generalised two-step approach could lead to complicated administrative procedures. Moreover, the Commission considers that the 20-day deadline will often be unrealistic in view of all institutions' internal procedures and in view of taking an informed decision. Therefore, **a general deadline should not be set since the duration of a procedure will depend on its complexity**.

More importantly, it is in certain cases not up to individual Members of an institution to take unilateral action. Instead, **it can be the exclusive prerogative of the institution or of its President to decide** on the course of action. At the Commission, this is for instance the case as regards organisational measures within an institution like the establishment of a conflict of interest and the reattribution of a file to another Member.

- **Publicity**

The Commission considers that **making all cases public** (paragraph 34) is **not in line with the advisory character** of the body. The body should exclusively advise and allow the institutions to address a situation. A general publication of all opinions or recommendations can in addition be inappropriate in many situations since **ethical advice can concern personal issues** of Members or their families, can conclude that no or only minor action is needed or require internal deliberations within an institution before a final position is taken.

Therefore, making all cases public would risk not being in accordance with the personal data protection rules, with the aim of providing effective ethical advice, or with the independent decision-making powers of an institution.

Ethical staff matters

- **Personal and material scope**

The resolution states that the body should be competent towards ‘all EU staff falling under the scope of the Staff Regulations’ (**paragraphs 5, 6 and 7**). Its scope would consequently cover officials, temporary agents, contractual agents and accredited parliamentary assistants regardless of their hierarchical position.

The EU civil service is composed of approximately **60 000 staff members** employed by the various institutions, bodies, offices and agencies. Most staff work for the Commission.

As regards the material scope, the body would deal with **all ethics-related areas covered by the Staff Regulations** of Officials and the Conditions of Employment of Other Servants of the European Union and their implementing provisions: outside activities while in active service (which would include e.g. teaching activities of staff); outside activities during leave on personal grounds; post-service activities; publication of articles or books; gifts and hospitalities; protection against harassment, assessment of conflicts of interest; spouse employment; acceptance of decorations; exercise of public functions; judicial testimony; examination of potential conflict of interest before recruiting an official and for officials returning from leave on personal grounds.

The Commission has **strong doubts on this very broad scope** and considers that the competence of the body for all categories of individuals covered by the resolution recalled in paragraphs 5, 6 and 7 would not be balanced. It would generate a **heavy workload** for the body and the institutions and risk delaying procedures or meeting statutory deadlines. It would require significant resources and **duplicate structures** without real added value in most cases.

The 2020 General Report on the Activities of Human Resources and Security prepared by the Commission’s Directorate-General for Human Resources and Security outlines that 5 450 ethics-related requests were treated by the Commission services in 2019. The Commission considers that in the vast majority of cases, **an external body** would not provide added value as it would be distant from the daily work of the person concerned and would **not have the appropriate means to evaluate the actual risks** of conflict of interest. More importantly, such involvement or the transfer of decision-making powers could create in certain instances a

risk for the institutional autonomy of the respective institutions established by the Treaties who bear responsibility for the management of their staff.

The Commission recalls in this respect that **the Staff Regulations** have put in place a **comprehensive set of rules and procedures in the field of ethics and disciplinary action, which is applicable to the staff of all EU institutions, bodies, offices and agencies**. In addition, in case of serious breaches of their obligations, staff members can be subject to investigations by the European Anti-Fraud Office (OLAF), the European Public Prosecutor (EPPO), national authorities or internal services responsible for inquiries. They can be subject to disciplinary proceedings and sanctions as well as to criminal sanctions by national courts in case of criminal offences. Under this well-established system, the body would ultimately have a limited role.

- **Whistleblower protection**

The resolution emphasises the need to protect **whistleblowers (paragraphs 14 and 18)** when they report possible violations of rules. The Commission recalls that such measures are **already set out in the Staff Regulations and in implementing measures** to be adopted by all institutions. The reporting channels are established by the Staff Regulations. There should be no **overlap or duplication** of tasks with existing bodies.

Size and composition of the body

- **Size**

Paragraph 25 proposes establishing a body composed of **9 Members**.

In the view of the Commission, the size of the body must not complicate its functioning and deliberation process. The Commission considers that, in line with its proposal made already in 2000², such a body should rather be composed of **5 Members**, allowing it to function in an **effective and efficient** manner.

- **Composition of the body**

According to the resolution the Members of the body be chosen ‘in particular from among former judges of the Court of Justice, former presidents of OLAF and the Court of Auditors, former or current Members of the highest courts of Member States, former Members of the European Parliament, former staff of the participating institutions and bodies, former EU Ombudsmen, and Members of the ethics authorities in Member States’ (**paragraph 30**). The Commission notes that, while the Parliament mentions former Members of Parliament and of other EU institutions as potential members of the body, it does not mention former Members of the Commission. This distinction is difficult to understand given that the body should be common to all institutions and consequently be responsible for issues concerning the members of all institutions equally. The Commission considers in this regard that the body requires personalities who have high-level experience as well as a strong knowledge and understanding of the functioning of all institutions, including the Commission. In addition, the Commission points out that the **reference to ‘presidents of OLAF’ (paragraph 30)** should read as Director-General of OLAF.

Finally, the Commission has concerns as regards **paragraph 25** of the resolution, which states that where staff matters are concerned, **staff representatives** from the institution of the person concerned should be included in the body’s composition and proposes to amend

² Approach chosen by the Commission in 2000 for the set-up of an Advisory Group on Standards in Public Life with the Parliament, Council, Court of Justice, Court of Auditors, EESC and Committee of the Regions (SEC(2000)2077).

Annex II to the Staff Regulations. The Commission does not see a need or justification to amend existing legislation in view of the creation of the body.

Furthermore, the body will need to be assisted by a dedicated secretariat. The staffing and operating costs will have to be shared equally among the participating institutions.

Topic not related to the creation of an EU ethics body

In **recital T**, as well as **paragraph 40**, the resolution calls for the creation of a **statute for the Members of the Commission**, ‘to be drawn up in accordance with the ordinary legislative procedure’.

The Commission considers that there is **no legal basis in the Treaties** for a comprehensive statute, which would cover the financial and non-financial rights and obligations as well as the working conditions of the Commission. The principles that govern the ethical framework for Members of the Commission are already laid down in Article 17(3) TUE and Article 245 TFUE. Moreover, Article 243 TFEU provides a legal basis for the Council to legislate specifically on the financial rights of the Members of the institutions mentioned in this provision, which is an exclusive competence of the Council. The Council has adopted in this regard Council Regulation (EU) 2016/300. Finally, as regards the ‘**working conditions**’ of Members of the Commission, specific rules related to leave or working time would be **inappropriate** with regard to the specific nature of the Commissioners’ functions which is to be at the service of the Commission at all times and places whenever it is necessary.

Conclusion: The Commission welcomes the resolution adopted by the European Parliament. It considers it an important contribution to the discussions between all institutions.

In this context, the Commission is ready to play its role in the preparatory work for the establishment of an independent EU ethics body, which is common to all institutions.

As a next step, the Commission will consult the other institutions and the two advisory bodies, as defined in Article 13 of the Treaty on European Union, on their position with regard to the establishment of such an ethics body.

The Commission will send a letter to them, explain its position as set out in the present document and seek their views on the resolution of the Parliament.