



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **D**  
**BUDGETARY AFFAIRS**



Budgets



**Budgetary Control**







**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT D: BUDGETARY AFFAIRS**

# **The Code of Conduct for Commissioners - improving effectiveness and efficiency**

**STUDY**

## **Abstract**

The aim of the external study was to provide the Committee on Budgetary Control, and also the Committee on Constitutional Affairs, with an independent evaluation of the current Code of Conduct applicable to Members of the European Commission with the aim of rendering the Code of Conduct more useful. The most important recommendations essentially focus on improving the Commissioners' declaration of interests, limiting the Commissioners' (national) political activity, strengthening post-office employment requirements, introducing additional transparency on Commissioner travel, strengthening the policy on the acceptance of gifts, providing for a specific course of action in the case of conflicts of interest arising in office, introducing monitoring and evaluation, and ensuring oversight in relation to the President of the Commission, highlighting existing complaints procedures in front of the European Ombudsman and providing for sanctions of minor Code of Conduct infringements.

Those recommendations aim to render the Code of Conduct a more effective instrument in promoting ethical conduct and in increasing public trust in the EC's ethics regime.

This document was requested by the European Parliament's Committee on Budgetary Control. It designated Ms Ingeborg Graessle, MEP, to follow the study.

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# Abbreviations

CAN	Canada
CoC	Code of Conduct
DK	Denmark
EC	European Commission
EP	European Parliament
ES	Spain
EU	European Union
OECD	Organisation for Economic Cooperation and Development
SG	European Commission Secretariat General
UK	United Kingdom
UNDP	United Nations Development Programme
WB	World Bank

# Abstract

## **The assessment**

The present assessment has been prepared by the group Blomeyer & Sanz, One World Trust and Centre for Strategy and Evaluation Services during January to April 2009.<sup>1</sup>

The assessment aims to: *'provide the Committee on Budgetary Control and the Committee on Constitutional Affairs with an independent evaluation of the current Code of Conduct applicable to Members of the European Commission'* (Technical Specifications) with a specific focus on the effectiveness and efficiency of the Code's conflict of interest regime.

With regard to effectiveness, the assessment has considered two dimensions: immediate effectiveness, i.e. the extent to which the Code of Conduct (CoC) is effective in preventing conflicts of interest and promoting ethical behaviour; and long-term effectiveness, i.e. does the CoC contribute to improving public trust in the Commission? The CoC's effectiveness is considered limited with regard to both dimensions. As far as efficiency is concerned, the assessment indicates that effectiveness can be improved without incurring significant additional costs. On the contrary, there are several opportunities for enhancing effectiveness whilst reducing the costs of the CoC's operation.

## **Findings**

The Commissioners' ethics regime is more elaborate than a simple reading of the CoC would suggest, and many relevant issues are addressed. However, the assessment shows that there remains significant room for improving the CoC's effectiveness and efficiency.

Since its introduction in 1999, there has only been one significant amendment to the CoC. A comparative study, commissioned by the EC in 2007, already pointed to some

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<sup>1</sup> Peer review was ensured by academic experts from the University of Helsinki, the University of Lausanne and the University of Vaasa.

of the weaknesses. However, the EC uses the study to assert its ethical 'lead' amongst the EU institutions, as grounds for not pursuing any reform of the CoC.<sup>2</sup>

Standing still on ethics implies exposure to a significant risk. Any new conflict of interest will draw criticism over the CoC not being fully equipped to address the relevant issues. Moreover, the EC can be criticised for complacency due to its failure to ensure any systematic review of its ethics requirements. Referring to the consequences of a conflict of interest affecting a Commissioner (and in relation to the Cresson case), the European Court of Justice has pointed to the danger inherent in such a position: *'It also has consequences for the public image and reputation of the Commission, which in this case were indeed severely damaged. And, it may be added, that it takes a disproportionate length of time to restore the goodwill and legitimacy, which such an institution has built up over the years. The damage caused is, therefore, considerable and durable'*.<sup>3</sup>

## Recommendations

The present assessment's recommendations aim to render the CoC a more effective instrument in the promotion of ethical conduct and in increasing public trust in the EC's ethics regime.

This is mainly to be achieved by completing and clarifying existing provisions, formalising already existing practices, and by bringing EC practice in line with international best practice. More in-depth reform is recommended in the area of the Commissioners' political activity, and with regard to the CoC's overall enforcement structures as well as its monitoring and evaluation. The EC's action to review and improve its ethics framework would allow it to demonstrate political commitment to ethics, thus contributing to public confidence at the crucial time of institutional renewal (European Parliament elections in June 2009 / new Commission before end 2009).

Recommendations essentially focus on:

- Improving the Commissioners' declaration of interests (in their current form, the declarations do not facilitate the assessment of possible conflicts of interest; there is no requirement for annual updating of the declarations; and disclosure is limited to the Commissioner and his spouse with no requirements for partners or dependent children);

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<sup>2</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007

<sup>3</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04, 23 February 2006, point 122

- Limiting the Commissioners' (national) political activity (the CoC fails to provide any criteria for assessing a Commissioner's required availability for service);
- Strengthening post-office employment requirements (restrictions are limited to one year, and there are no criteria for assessing compatibility between the Commissioner's former duties and planned private sector employment);
- Introducing additional transparency on Commissioner travel (Commissioner travel is not made public);
- Strengthening the policy on the acceptance of gifts (hospitality and other benefits are not explicitly covered by the CoC, and the identity of donors is not disclosed);
- Providing for a specific course of action in the case of conflicts of interest arising in office (the CoC does not envisage any specific course of action if a conflict of interest arises);
- Introducing implementation structures (the CoC does not envisage any implementation structure);
- Introducing monitoring and evaluation, and ensuring oversight in relation to the President of the Commission (the CoC does not envisage any regular review of its application, and the CoC does not deal with ethics issues affecting the President of the Commission);
- Introducing reporting and dissemination (there is no systematic reporting on the CoC's application, and the visibility of the Commissioners' ethics regime is limited);
- Highlighting existing complaints procedures in front of the European Ombudsman (the CoC does not envisage any complaints procedure);
- Providing for sanctions of minor CoC infringements (the CoC does not envisage any sanctions of minor infringements, e.g. a Commissioner's failure to maintain his declaration up to date).

# Résumé

## L'étude

L'étude a été préparée par le groupe Blomeyer & Sanz, One World Trust et Centre for Strategy and Evaluation Services pendant les mois de Janvier à Avril 2009.<sup>4</sup>

L'objectif de l'étude est de: '*préparer pour les Commissions de Contrôle Budgétaire et des Affaires Constitutionnelles une évaluation indépendante du Code de Conduite des membres de la Commission Européenne*' (Cahier de Charges) avec un intérêt spécifique dans l'efficacité et l'efficience des règles sur les conflits d'intérêt du Code de Conduite (CdC).

En ce qui concerne l'efficacité, l'étude a considéré deux aspects: l'efficacité immédiate, c'est à dire, l'efficacité dans la prévention de conflits d'intérêt et du soutien d'une conduite éthique; et l'efficacité à longue durée, c'est à dire la contribution du CdC à améliorer la confiance publique dans la Commission. L'efficacité du CdC est considérée limitée vis-à-vis des deux aspects. En ce qui concerne l'efficience, l'étude montre qu'il est possible d'améliorer l'efficacité sans augmenter les coûts de l'opération du CdC. Au contraire, il y a des possibilités d'améliorer l'efficacité en réduisant les coûts de l'opération du CdC.

## Résultats

Le CdC est plus sophistiqué qu'une simple lecture du CdC semble suggérer, et beaucoup de questions importantes sont abordées. Néanmoins, l'étude montre qu'il y a encore de la place pour améliorer l'efficacité et l'efficience du CdC.

Depuis son introduction en 1999, le CdC a seulement subi un changement important. Une étude comparative du 2007 (à charge de la Commission), à déjà découvert certaines faiblesses. Cependant, la Commission utilise cette étude pour affirmer son rôle de 'leader' parmi les institutions européennes, et pour ne pas réviser le CdC.<sup>5</sup>

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<sup>4</sup> Les Universités de Helsinki, Lausanne et Vaasa ont assuré un contrôle de qualité.

<sup>5</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007

Cependant, le manque d'action dans le domaine de la gouvernance éthique implique des risques importants. Tout nouveau conflit d'intérêts peut soulever des critiques sur les limitations du CdC. En plus, la Commission peut être critiquée pour ne pas réviser régulièrement son régime éthique. En relation avec les conséquences d'un conflit d'intérêt concernant un Commissaire, la Cour Européenne de Justice (dans le cadre du cas Cresson), signale les dangers inhérents de cette position: *'Il y a des conséquences pour l'image publique et la réputation de la Commission, qui dans ce cas ont été sérieusement endommagées. On peut également ajouter, qu'il prend un temps pas proportionnel de rétablir la bonne volonté et la légitimité, que cette institution a établi au cours des années. Le dommage est considérable et durable'*.<sup>6</sup>

## Recommandations

Les recommandations de l'étude visent à rendre le CdC un instrument plus efficace dans à le soutien d'une conduite éthique et à renforcer la confiance publique dans le régime éthique de la CE.

Cet objectif peut être atteint en complétant et clarifiant les règles existantes et en formalisant des pratiques existantes. Il faut que le régime européen soit en ligne avec les meilleures pratiques internationales. Des réformes plus profondes sont souhaitables dans le domaine de l'activité politique des Commissaires et vis-à-vis les structures d'application du CdC et son suivi et évaluation. Une révision approfondie de son système éthique permettrait à la Commission de montrer son engagement politique en soutenant la conduite éthique, et de contribuer ainsi à augmenter la confiance publique dans un temps de renouvellement institutionnel (élections au Parlement européen du mois de Juin 2009 / nouvelle Commission avant la fin de 2009).

Les recommandations visent essentiellement à:

-  Améliorer les déclarations d'intérêt des Commissaires (dans leur forme actuelle, les déclarations ne permettent pas une analyse facile de possibles conflits d'intérêts; il n'y a pas de mises au jour annuelles; et la règle seulement s'applique aux Commissaires et ces conjoints et pas à des partenaires sentimentales ou aux enfants);
-  Limiter l'activité politique (nationale) des Commissaires (le CdC ne prévoit pas de critères pour examiner la disponibilité de service d'un Commissaire);

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<sup>6</sup> C-432/04, 23 Février 2006, point 122

- ☉ Renforcer les exigences en ce qui concerne l'emploi après le poste dans la Commission (les restrictions actuelles sont limitées à un an, et il n'y a pas de critères pour examiner la compatibilité entre les tâches d'un Commissaire et un futur emploi dans le secteur privé);
- ☉ Introduire une transparence renforcée sur les missions des Commissaires (les coûts de mission des Commissaires ne sont pas publiés);
- ☉ Renforcer la politique sur l'acceptation de cadeaux (les invitations aux vacances et d'autres bénéfices ne sont pas couverts explicitement par les règles du CdC, et l'identité des donateurs de cadeaux n'est pas révélée);
- ☉ Etablir une procédure pour résoudre les conflits d'intérêt (le CdC ne prévoit aucune procédure pour résoudre des conflits d'intérêt soulevés tout au long du travail d'un Commissaire);
- ☉ Introduire des structures de gestion (le CdC ne prévoit aucune structure de gestion);
- ☉ Introduire un système de suivi et d'évaluation et établir une supervision vis-à-vis du Président de la Commission (le CdC ne prévoit aucun type de suivi ou d'évaluation et le CdC ne traite pas des possibles conflits d'intérêt concernant le Président de la Commission);
- ☉ Introduire des rapports réguliers et de la visibilité (il n'y a pas de rapports sur l'application du CdC et la visibilité du CdC est limitée);
- ☉ Faire référence à l'existence d'une procédure de plaintes auprès de l'Ombudsman (le CdC ne prévoit pas de procédure de plaintes);
- ☉ Introduire des sanctions pour des violations légères des normes du CdC (le CdC ne prévoit pas de système de sanctions pour des violations légères, par exemple si un Commissaire n'actualise pas sa déclaration d'intérêts).

# Zusammenfassung

## Die Studie

Die vorliegende Studie wurde von dem Konsortium Blomeyer & Sanz, One World Trust und Centre for Strategy and Evaluation Services während der Monate Januar bis April 2009 erstellt.<sup>7</sup>

Das Ziel der Studie ist: *‘die Erstellung einer unabhängigen Bewertung des Verhaltenskodex der Mitglieder der Europäischen Kommission für die Ausschüsse für Haushaltskontrolle und Konstitutionelle Fragen’* (Ausschreibungsunterlagen) unter Berücksichtigung der Effektivität und der Effizienz der Regelung von Interessenkonflikten durch den Verhaltenskodex.

Was die Effektivität betrifft wurden zwei Aspekte untersucht: die unmittelbare Effektivität, d.h. die Effektivität des Verhaltenskodex bei der Prävention von Interessenkonflikten und der Förderung ethischen Verhaltens; und die Langzeitauswirkung, d.h. der Beitrag des Verhaltenskodex zur Verbesserung des öffentlichen Vertrauens in die Kommission. Die Studie kommt zum Ergebnis, daß die Effektivität des Verhaltenskodex in Hinblick auf beide Aspekte beschränkt ist. In Hinblick auf die Effizienz zeigt die Studie, daß die Effektivität des Verhaltenskodex ohne bedeutende zusätzliche Kosten verbessert werden kann. Im Gegenteil, es bestehen Möglichkeiten die Effektivität zu verbessern bei gleichzeitiger Reduzierung der mit der Umsetzung des Verhaltenskodex verbundenen Kosten.

## Schlußfolgerungen

Die Ethikregeln der Kommission sind komplexer als eine einfache Lektüre des Verhaltenskodex andeutet, und viele relevante Aspekte werden im Verhaltenskodex angesprochen. Es besteht jedoch viel Raum, die Effektivität und Effizienz des Verhaltenskodex zu verbessern.

Seit der Einführung des Verhaltenskodex 1999 ist nur eine wichtige Änderung vorgenommen worden, und eine von der Kommission in Auftrag gegebene vergleichende Studie hat bereits 2007 auf einige Schwächen des Verhaltenskodex

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<sup>7</sup> Die Qualitätskontrolle wurde von Experten der Universitäten Helsinki, Lausanne und Vaasa durchgeführt.

hingewiesen. Die EK benutzt diese Studie jedoch um ihre ethische Führungsrolle zu unterstreichen, und beabsichtigt keine Reform des Verhaltenskodex.<sup>8</sup>

Der fehlende Wille zur Reform birgt ein beträchtliches Risiko. Jeder neue Interessenkonflikt kann zu Kritik des Verhaltenskodex führen, da dieser nicht alle relevanten Aspekte abdeckt. Die EK kann auch aufgrund der fehlenden systematischen Bewertung des Verhaltenskodex kritisiert werden. Der Gerichtshof der Europäischen Gemeinschaften hat auf die Gefahren eines die Kommission betreffenden Interessenkonflikts hingewiesen (im Rahmen des Cresson-Falls): *'It also has consequences for the public image and reputation of the Commission, which in this case were indeed severely damaged. And, it may be added, that it takes a disproportionate length of time to restore the goodwill and legitimacy, which such an institution has built up over the years. The damage caused is, therefore, considerable and durable'*.<sup>9</sup>

## Empfehlungen

Die Empfehlungen der vorliegenden Studie beabsichtigen, die Effektivität des Verhaltenskodex zu stärken - der Verhaltenskodex soll somit ethisches Verhalten fördern, und das öffentliche Vertrauen in die Kommission stärken.

Dies soll durch eine Ergänzung und Klarstellung der existierenden Regeln, der Formalisierung bestehender Praktiken, sowie der Angleichung des Verhaltenskodex an internationale Standards erfolgen. Tiefergehende Reformen werden im Bereich der politischen Aktivität der Kommissare, im Bereich der Umsetzungsstrukturen des Verhaltenskodex sowie der Fortschrittskontrolle und Bewertung angeregt. Durch eine entsprechende Reform kann die EK ihre Verpflichtung zu ethischem Verhalten unterstreichen, und dies zu einem Zeitpunkt der Erneuerung der europäischen Institutionen (Wahlen zum Europäischen Parlament im Juni 2009 / neue Kommission bis Ende 2009).

Die Empfehlungen betreffen die folgenden Bereiche:

-  Verbesserung der Interessenerklärungen der Kommissare (in ihrer derzeitigen Form erlauben die Erklärungen keine eindeutige Analyse möglicher Interessenkonflikte; es besteht keine Pflicht zu jährlicher Revision; und die Erklärungen sind nur für die Kommissare und Ehepartner vorgeschrieben, aber nicht für Lebenspartner und Kinder);

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<sup>8</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, Oktober 2007

<sup>9</sup> C-432/04, 23 Februar 2006, Punkt 122

- Einschränkung der (nationalen) politischen Aktivität der Kommissare (der Verhaltenskodex sieht keine Kriterien zur Untersuchung der erforderlichen Disponibilität der Kommissare für ihre Kommissionstätigkeit vor);
- Stärkung der Erfordernisse bezüglich einer Tätigkeit im Privatsektor nach Ausscheiden aus der Kommission (derzeitige Restriktionen sind auf ein Jahr beschränkt, und der Verhaltenskodex sieht keine Kriterien zur Untersuchung der Vereinbarkeit zwischen der ausgeübten Kommissionstätigkeit und einer geplanten Tätigkeit im Privatsektor vor);
- Einführung zusätzlicher Transparenz im Bereich der Dienstreisen der Kommissare (Einzelheiten zu den Dienstreisen der Kommissare werden derzeit nicht veröffentlicht);
- Stärkung der Regeln zur Annahme von Geschenken (z.B. Einladungen zu Urlaubsreisen werden vom Verhaltenskodex nicht explizit abgedeckt, und die Identität der Schenker wird nicht veröffentlicht);
- Einführung einer Vorgehensweise bei Auftreten von Interessenkonflikten (der Verhaltenskodex sieht derzeit keine bestimmte Vorgehensweise bei Auftreten von Interessenkonflikten während der Ausübung der Tätigkeit der Kommissare vor);
- Einführung von Umsetzungsstrukturen (der Verhaltenskodex sieht keine spezifischen Umsetzungsstrukturen vor);
- Einführung von Fortschrittskontrolle und Bewertung, sowie einer Aufsicht über den Präsidenten der Kommission (der Verhaltenskodex sieht derzeit keine Bewertung seiner Umsetzung vor, und auf mögliche Interessenkonflikte des Präsidenten der Kommission wird nicht eingegangen);
- Einführung von Berichterstattung und verbesserte Darstellung des Verhaltenskodex auf den Internetseiten der Kommission (der Verhaltenskodex sieht derzeit keine systematische Berichterstattung zur Umsetzung vor);
- Klarstellung existierender Beschwerdeverfahren vor dem Europäischen Ombudsman (Der Verhaltenskodex sieht derzeit keine Beschwerdemöglichkeit vor);
- Einführung von Strafen für leichte Verletzungen der Vorschriften des Verhaltenskodex (z.B. Veröffentlichung der Namen der Kommissare die ihre Interessenerklärung nicht aktualisiert haben).

# Introductory Note

The Introductory Note briefly presents the assessment's objectives, the method as well as the report's structure.

## Objectives

The present assessment has been prepared by the group Blomeyer & Sanz, One World Trust and Centre for Strategy and Evaluation Services during January to April 2009.<sup>10</sup>

The assessment aims to: *'...provide the Committee on Budgetary Control and the Committee on Constitutional Affairs with an independent evaluation of the current Code of Conduct applicable to Members of the European Commission...'* with a specific focus on the effectiveness and efficiency of the Code's conflict of interest regime.<sup>11</sup> Particular emphasis is placed on comparing the Code of Conduct (CoC) for members of the European Commission (EC) with similar tools used by other international organisations and national governments.<sup>12</sup> Whilst the CoC is presented in greater detail in section 1.2 (Introduction to governance ethics in the EC), it is worth noting at this stage, that the CoC guides the (currently 27) Commissioners' ethical conduct as well as working relations with EC officials.

The assessment follows up on earlier European Parliament (EP) work on governance in the EC, including a workshop on governance, conducted in October 2007. This workshop indicated the need for further analysis with a particular interest in the effectiveness and efficiency of accountability mechanisms.<sup>13</sup>

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<sup>10</sup> Contract No IP/D/CONT/IC/2008-186. The report has been written by Roland Blomeyer (blomeyer & sanz). Expert input and peer review was provided by Mike Coyne, Anna-Maria Krarup, Jack Malan (Centre for Strategy and Evaluation Services), Robert Lloyd, Shana Warren (One World Trust), Timo Moilanen (University of Helsinki), Yannis Papadopoulos (University of Lausanne), and Ari Salminen (University of Vaasa).

<sup>11</sup> Technical specifications

<sup>12</sup> Wherever the report uses the term 'Code of Conduct' (CoC) it refers to the Code of Conduct for Commissioners, SEC 2004 1487/2 of 24 November 2004.

<sup>13</sup> See Workshop proceedings on [http://www.europarl.europa.eu/meetdocs/2004\\_2009/organes/cont/cont\\_20071003\\_1500\\_audition.htm](http://www.europarl.europa.eu/meetdocs/2004_2009/organes/cont/cont_20071003_1500_audition.htm)

The assessment allows the EP to contribute to the improvement of the CoC, by providing practical recommendations, based as far as possible on concrete examples from the CoC's implementation practice and experiences in EU Member States and international organisations. This practical focus is the assessment's main 'innovation'. To date, most research has focused on how the Member States, and European / International institutions have organised government ethics, however, there is limited insight into how the ethics regimes work in practice.<sup>14</sup>

Note that in order to focus research resources, the assessment mainly deals with the CoC section covering conflicts of interest (the Code's section 1 '*Independence and dignity: Ethical issues*'). However, the assessment also deals with ethics-related issues such as the Commissioners' role in the appointment of support staff.<sup>15</sup>

Finally, the study's ultimate motivation is to contribute to improving governance within the European Union (EU) institutions: '*...conflict of interest offences in general, undermine public trust and confidence in government. In western democratic states, the continuing decline in citizen's trust and confidence in public institutions justifies strong and concerted action to promote good public governance*'.<sup>16</sup> The principle that '*the stronger the ethics framework, the higher the levels of trust*' has been applied.<sup>17</sup> 'Strength' in this context refers to a comprehensive and well-aligned system, not necessarily stricter rules.

Indeed, the entire EU 'project' could suffer significant damage from a Commissioner having or simply appearing to have a conflict of interest, as the Commissioners can be considered to be '*the most visible face of the European Commission*'.<sup>18</sup> In the only European Court of Justice case on Commissioner ethics, the Advocate General notes: '*The personal qualities of these persons reflect directly on the confidence the general*

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<sup>14</sup> In the words of a recent EC Study: '*The real challenges are here: how are registers of interest monitored? How are post-employment rules enforced? How do ethics committees work in practice? These are only some of the questions which merit a deeper examination.*' European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007, page 8

<sup>15</sup> The focus on conflict of interest issues is in line with the differentiation between '*ethical issues*' and '*ethics-related issues*'. The latter are more about management and organisation than about ethics. See Michelle Cini, From integration to integrity, 2007, page 213

<sup>16</sup> OECD, Public integrity and post-public employment: issues, remedies and benchmarks, 6 June 2007, page 6

<sup>17</sup> Michelle Cini, From integration to integrity, 2007, page 212. Note, that the link between stricter ethics rules and public trust has been questioned. Criticism draws mainly on the North American experience, with its large ethics bureaucracy: '*...the danger is that ever more rules, tougher disclosure requirements, stricter monitoring structures, and additional transparency requirements will reveal more violations of rules and standards. However, this development produces the opposite of what rule-makers intend to achieve: public trust is decreasing because the citizens have the perception that their Holders of Public Office are less ethical than they were before.*' European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007, page 121

<sup>18</sup> Ibid, page 108

*public has in the Community institutions, their credibility and therefore their efficacy. (...) That this is not merely a hypothetical observation is demonstrated by the effects of the events leading up to the collective resignation of the Santer Commission in 1999.*<sup>19</sup>

Improving public confidence in the EU institutions remains a challenge, in view of recent Eurobarometer findings: *'Perception that corruption exists within EU institutions (is) now less widespread than in 2005, but continues to be the opinion held by a large majority'*. This is a rather euphemistic statement, considering the figures: in 2005, 71% of Europeans believed that corruption exists within the EU institutions. In 2008, and despite much effort (e.g. the European Transparency Initiative), the figure still stands at 66%.<sup>20</sup>

The EC's action to review and improve its ethics framework would allow it to demonstrate political commitment to ethics, thus contributing to public confidence at the crucial time of renewal of the EP (elections in June 2009) and the EC (the new Commission is to be established before end 2009).

A final comment further to initial discussions on a draft version of this assessment at the Committee on Budgetary Control meeting on 19 March 2009: Whilst the assessment aims to contribute to strengthening the Commissioners' ethics framework, 'strength' is not necessarily understood as stricter rules, but rather as a comprehensive and well-aligned system. Moreover, it is worth adding that the assessment focuses on the Commissioners' performance in office as opposed to their 'private performance': *'A politician's conduct should be exemplary in his field, not in all fields of human life'*.<sup>21</sup>

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<sup>19</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04 (Commission of the European Communities v Edith Cresson), 23 February 2006, points 67 and 74

<sup>20</sup> EC, Special Eurobarometer 291, The attitudes of Europeans towards corruption, April 2008, page 20

<sup>21</sup> *'Politiker sollten auf ihrem Felde Vorbild sein, aber nicht auf sämtlichen Feldern menschlichen Lebens'* Helmut Schmidt / Giovanni di Lorenzo, Auf eine Zigarette mit Helmut Schmidt, 2009, page 123

## Method

The method adopted for delivering the present assessment combines a review of existing literature on government ethics in the EU, research on ethics regimes in a selection of Member States and international organisations, and a detailed assessment of the CoC, in a three-step approach:

-  **Step 1:** First, a series of wider **principles** inspiring the design of ethics regimes is identified (as established by the OECD). Based on these principles, and drawing on existing literature on ethics regimes and insights from focused research on the ethics regimes in a selection of EU Member States and international organisations,<sup>22</sup> the main contents of ethics regimes are noted in an **ethics matrix**. The ethics matrix addresses the following questions: What is covered by an ethics regime? Who is addressed? When, i.e. before, during or after office? How is ethical conduct ensured, i.e. enforcement mechanisms?
-  **Step 2:** The CoC is then analysed on the basis of the ethics matrix. In addition, the assessment of the CoC's enforcement draws on EC feedback on the CoC's practice.<sup>23</sup> The intention of the analysis is to identify gaps in relation to the coverage of relevant issues, weaknesses in enforcement etc., and to provide feedback on effectiveness (achieving results) and efficiency (the cost of results). Examples help to compare the CoC with ethics regimes in a selection of Member States and international organisations.
-  **Step 3:** Based on the ethics matrix identified during Step 1, and focusing on the gaps / weaknesses identified during Step 2, recommendations are made to help improve the CoC's effectiveness and efficiency. Moreover, concrete examples from Member States and international organisations provide inspiration on how to address identified gaps / weaknesses.

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<sup>22</sup> Denmark, Spain, the United Kingdom as well as the United Nations Development Programme and the World Bank. The selection is based on a previous literature review indicating the specific interest of these five cases, e.g. very comprehensive legal framework in Spain; long-standing experience with application in the UK etc. Examples from other countries are provided where they are considered relevant.

<sup>23</sup> EC feedback was provided by the Secretariat General and a member of EC President Barroso's cabinet. The cabinet of Vice President Siim Kallas declined an interview on the grounds that there was nothing to add to an earlier EC study on conflicts of interest in the Member States and EU institutions (European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007).

**A methodological constraint:** In this context, the authors would like to note a methodological constraint. Ultimately, the main indicator for the effectiveness of an ethics regime, is the number of ethics violations the regime helps to prevent. This data, of course, does not exist in relation to the CoC, nor any other ethics regimes (data can only take account of actual ethics violations). In the absence of 'hard' data, the assessment of effectiveness needs to draw on other sources, e.g. statistics related to the use of the CoC's ethics mechanisms, the public perception of ethics in the EU institutions, media feedback on alleged ethics violations or suspicions concerning unethical behaviour etc. Section 1.1.3 ('Effectiveness and efficiency') discusses this issue in more detail.

**Terminology:** Finally, a clarification on terminology: When referring in general terms to 'ethics regimes' or 'government ethics', this implies the wider frameworks for preventing conflicts of interest and promoting ethical behaviour.

A definition for the term 'conflict of interest' is provided in Section 1.1.1. The assessment focuses on ethics regimes addressing the **government level** (members of government such as ministers, as well as the most high ranking office holders such as secretaries of state) as this may be considered the level that most approximates to that of the Commissioners.<sup>24</sup>

The objectives and method have been discussed at an inception meeting with the EP on 12 January 2009; Interim findings were presented at the Committee on Budgetary Control meeting on 19 March 2009; and the final report was discussed with the EP on 6 May 2009. Moreover, consultations have been undertaken with: the EC President Barroso's cabinet, the EC Secretariat General (SG), the EU Ombudsman, the Organisation for Economic Cooperation and Development (OECD), Transparency International, as well as a number of academic experts specialised in research on government ethics (Department of Political Science at the University of Helsinki, Faculty of Social and Political Sciences at the University of Lausanne, Department of Public Management at the University of Vaasa). Finally, the author attended the OECD Global Forum on Public Governance on 4-5 May 2009 to exchange views on the Code of Conduct.

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<sup>24</sup> A recent study notes that Commissioners are '*performing functions akin to those of government ministers*' Cini, From integration to integrity, Administrative ethics and reform in the European Commission, 2007, page 108

## Report structure

Besides the present introduction the report comprises three sections:

-  Section 1 presents the general principles inspiring the design of ethics regimes, and the main contents of ethics regimes. Additionally, Section 1 includes an introduction to the CoC.
-  Section 2 presents the current situation with regard to the content and application of the CoC, with a focus on identifying possible limitations (based on the framework developed in Section 1).
-  Finally, Section 3 presents the assessment's main conclusions and recommendations on improving the CoC's effectiveness and efficiency.

The report also includes three annexes: Annex 1 presents the literature / documentation reviewed; Annex 2 lists the stakeholders consulted; and Annex 3 presents a catalogue of proposed improvements to the current Code of Conduct.

# Section 1 - Background

This section presents the wider principles on which government ethics regimes are based, and the detailed content of ethics regimes (1.1), as well as an introduction to the CoC for members of the European Commission (1.2).

## **1.1 Design, content and effectiveness / efficiency of ethics regimes**

This section provides insights into the wider principles inspiring the framework of ethics regimes (1.1.1) and the detailed content of ethics regimes (1.1.2). Sub-section 1.1.3 includes first reflections on the effectiveness and efficiency of ethics regimes.

The section draws on existing literature on ethics regimes as well as on in-depth research on ethics regimes in a selection of Member States and international organisations. Literature includes research by international organisations such as the OECD as well recent academic contributions. The reviewed literature is listed in Annex 1. In-depth research on ethics regimes was conducted for Denmark (DK), Spain (ES), the United Kingdom (UK), the United Nations Development Programme (UNDP) and the World Bank (WB).

### **1.1.1 Framework**

This section presents the wider principles inspiring the framework of government ethics regimes. Moreover, as the handling of conflicts of interests constitutes a key aspect of any ethics regime, the term's definition is noted. This mainly draws on the work of the OECD such as the *Guidelines for managing conflict of interest in the public service*.<sup>25</sup>

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<sup>25</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003

The latter is one of the main sources for government ethics regimes in the OECD Member States.<sup>26</sup>

Before considering the principles behind the design of ethics regimes, it is worth noting the definition of the term 'conflict of interest'. The OECD Guidelines provide the following definition: *'A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities'*.<sup>27</sup>

This is the definition for an **actual** or **existing** conflict of interest (current or in the past).

The actual conflict of interest is differentiated from an **apparent** conflict of interest: *'...where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case'*, and a **potential** conflict of interest: *'where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future'*.<sup>28</sup>

The Guidelines also explain the difference between a conflict of interest and corruption: *'While a conflict of interest is not ipso facto corruption, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption'*.<sup>29</sup>

What are the wider principles behind the design of an ethics regime?

The OECD notes the following six elements:<sup>30</sup>

- 🗣️ **Compliance versus integrity:** *There are two general approaches to ethical issues. One focuses on strict rules to be followed, sanctions for wrongdoing, and control systems to ensure that rules are respected. The other is an integrity-based approach promoting ethical behaviour and providing incentives for good conduct. To be effective, an ethics framework must incorporate both of these elements and use them in a complementary and balanced way. Regulation is essential, but not sufficient.*

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<sup>26</sup> It can be argued that the EC subscribes to the OECD Guidelines, as according to Supplementary Protocol 1 of 14 December 1960 to the Convention on the OECD, the EC participates in the work of the OECD.

<sup>27</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 4

<sup>28</sup> Ibid

<sup>29</sup> Ibid, page 2

<sup>30</sup> OECD, Public Management Gazette 7, 1997, page 1

-  **Cultural diversity:** *There is no general blueprint for creating an ethics framework. Countries have their own cultural, administrative and political traditions. An effective ethics infrastructure should take into account these national elements, but it should also be the result of systematic thinking and consideration of a few key questions.*
-  **Impact of reforms:** *Public management reforms undertaken in most OECD Member countries are changing traditional behaviour in the public sector. One result of these changes is the increased interaction of the public sector with the private sector. This development has reinforced the need to find effective ways to promote the traditional public service values of accountability, political neutrality, equity and fairness.*
-  **Standards and values:** *It is especially important that issues of ethics and standards of behaviour are given a high priority in a modern public service. There is a need to integrate clear ethical principles into the managerial and accountability structures of organisations to help those who are not by background familiar with public service values.*
-  **Citizens have a role to play:** *The public has the right to know how public institutions apply the power and resources entrusted to them. The conduct of officials is therefore subject to scrutiny. In this sense active transparency and access to public information are essential to democratic governance, but citizens need to be further empowered to play a role in public affairs.*
-  **Monitoring progress:** *Ethical issues cannot be handled with one-off interventions. Continuing efforts and systematic approaches are needed. Sharing ideas and experiences among officials of various countries can provide valuable input to national work, and monitoring progress on the development of ethical frameworks can be part of this learning process.*

In relation to the CoC, the six elements raise a series of questions (see Figure 1 below).<sup>31</sup>

**Figure 1 - Applying the OECD ethics components to the CoC**

OECD ethics infrastructure	CoC
<i>Compliance versus integrity</i>	Are current CoC provisions in the form of an informal code (as supported by the Treaty) sufficient to ensure ethical conduct?
<i>Cultural diversity</i> (i.e. originally focusing on nationality, however, interpreted here as ethics requirements adapted to the office concerned)	Does the CoC address all relevant issues in relation to the office of the Commissioners?
<i>Impact of reforms</i> (i.e. increasing private sector exposure of office holders )	Are ethical issues in relation to the Commissioners' contact with the private sector sufficiently addressed?
<i>Standards and values</i>	Is there clear leadership in the promotion of ethical issues? Are training and guidance systems in place?
<i>Citizens have a role to play</i>	Does the CoC foresee for adequate transparency?
<i>Monitoring progress</i>	Does systematic monitoring & evaluation ensure that the CoC remains relevant and effective?

Two recent studies have assessed the EC's ethics regime against the requirements of the OECD ethics components:

- Michelle Cini provides the most comprehensive assessment focussing on ethics in the EC, covering ethics requirements for EC officials, and including a specific analysis of ethics in the College of Commissioners. With regard to the latter, Cini concludes that '*...in spite of certain weaknesses, the College now has, in the 2004 Code, a more rigorous set of guidelines than ever before to govern the conduct of Commissioners. If the College, or perhaps some external advisory body remains alert to the fact that it needs to keep the Code under constant review, rather than waiting for the next scandal to hit it before it is once again revised, then it is fair to*

<sup>31</sup> Cini uses the OECD ethics components to assess the EC as a whole, comprising ethics rules for officials as well the Commissioners. The present assessment only deals with the Commissioners. Cini, *From integration to integrity*, 2007, pages 17 and 211

*conclude that the Commission now has an acceptable framework in place for framing the ethical conduct of Commissioners’.*<sup>32</sup>

☪ The EC commissioned a study on ethics regimes for holders of public office in 2007.<sup>33</sup> The study described and compared ethics regimes in the 27 EU Member States as well as a number of EU Institutions (i.e. the EC, EP, Court of Justice of the European Communities, European Court of Auditors, European Central Bank, European Investment Bank). In addition to analysing codes of conduct and legal provisions, the study also addressed registers of financial disclosure, the use of training programmes and the role of ethics committees. The study recommended that different EU institutions should adopt their own codes of conduct fitting their own specific institutional needs and particularities. It also suggested adopting a short, aspirational code of ethics for all EU institutions. It further emphasised the importance of credible monitoring and control mechanisms and recommended that EU institutions establish their own advisory ethics committees (note that to date none of these recommendations has been implemented). In general, the study noted the comparatively well established ethics regime at the EC.<sup>34</sup>

### 1.1.2 Content of ethics regimes

This section focuses on the detailed content of ethics regimes, i.e. based on the wider principles, what are the issues or conflict of interest situations that ethics regimes at government level generally address (via formal regulations or codes) and how are they addressed?

A review of recent literature and feedback from research on ethics regimes in a selection of Member States and international organisations shows that with regard to content, most ethics regimes address the following four questions:

☪ **What needs to be covered?** The actual conflict of interest issues covered can be organised in four categories, namely, conflicts related to in-office activity (activities related to the office); conflicts related to political activity (e.g. if the office holder

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<sup>32</sup> Ibid, page 121

<sup>33</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007

<sup>34</sup> However, it is worth noting that there has been criticism of the study for its focus on the existence of ethics rules without considering the rules’ effectiveness, and for exaggerating the costs of enforcing government ethics. ALTER-EU Steering Committee, Critique of flawed study on regulating EU conflicts of interest, February 2008

intends to stand for election); other activity (e.g. other public functions, charitable activities etc.); and financial interests.

🎧 **At what point in time is coverage required?** This addresses the time before taking office (pre-office), during office (in-office) and after leaving public office (post-office).

🎧 **Who needs to be addressed?** Ethics rules focus on the office holder. However, some of the possible conflict of interest situations also involve the office holder's family and other relations (e.g. partners, friends and pre-office professional contacts).

🎧 **And how can compliance be enforced?** Ethics rules generally include provisions on the prevention of conflicts of interest (e.g. via training), internal enforcement (i.e. within the office), external enforcement (e.g. reporting to outside bodies) and sanctions (i.e. the consequences of unethical behaviour).

Based on the literature reviewed and the case studies, the following matrix (Figure 2 below) presents the main issues covered by ethics regimes for public office holders.

**Figure 2 - Content of ethics regimes with regard to conflicts of interest**

1) What ?	2) When?			3) Who?			4) How?			
	2.1) pre-office	2.2) in-office	2.3) post-office	3.1) office holder	3.2) family	3.3) other	4.1) prevent	4.2) internal enforcement	4.3) external enforcement	4.4) penalty
<b>In-office activity</b>										
<ul style="list-style-type: none"> <li>▶ Conflict of interest with pre-office activity</li> <li>▶ Public and private behaviour respectful of the public office (dignity)</li> <li>▶ Confidential treatment of in-office information (discretion)</li> <li>▶ Gifts / decorations / honours</li> <li>▶ Other benefits / hospitality</li> <li>▶ Operational resources: travel and representation, appointment of support staff</li> </ul>										
<b>Political activity</b>										
<ul style="list-style-type: none"> <li>▶ Supporting political activity (e.g. engagement in national political activity) / Standing for election</li> </ul>										
<b>Other activity</b>										
<ul style="list-style-type: none"> <li>▶ Public office</li> <li>▶ For benefit (including seeking future employment)</li> <li>▶ Non for benefit: artistic / scientific / creative / literary / charitable / educational</li> </ul>										
<b>Financial assets</b>										
<ul style="list-style-type: none"> <li>▶ Financial / real estate</li> </ul>										

### 1.1.3 Effectiveness and efficiency

This section considers possible ways of assessing the effectiveness and efficiency of ethics regimes.

#### Effectiveness

The goal of the present assessment is to lead to conclusions on the CoC's effectiveness and efficiency. The assessment's terms of reference define effectiveness as '*achieving results regardless of cost*'. This raises an important question, i.e. what are the CoC's expected results?

Ethics regimes, generally, aim to achieve two types of results, **immediate** and more **long-term** results. Immediate results are about the office holder's ethical conduct, namely the prevention of conflicts of interest. Long-term results include increased public confidence in the office (the office holder's institution).<sup>35</sup>

However, as indicated in the Introductory Note, a difficulty arises when it comes to assessing the effectiveness of ethics regimes, i.e. measuring whether results are being achieved. Indeed, evidence on whether results are being achieved or not is not readily available:<sup>36</sup>

- 🗣️ Concerning the **immediate results**, there is no evidence as to the number of 'ethics violations' an ethics regime helped to prevent, or put the other way round, the number of times an office holder behaved ethically because of the requirements set out in an ethics regime. It is of course possible to count the number of sanctioned infringements of ethics rules, however, this does not tell the full story. Applied to the CoC, there is no knowledge about the number of ethical violations the CoC helped to prevent.
- 🗣️ Looking at the **long-term results**, i.e. increased public confidence in the office, there are problems over the availability of data as well as over causality (i.e. to which extent can the office holder's ethical behaviour account for improved public confidence in the office). In the case of the CoC, there is no data on public perception / improved confidence in relation to the Commissioners. Available data (Eurobarometer) relates to the EC or the EU institutions as a whole.<sup>37</sup>

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<sup>35</sup> See the Introductory Note on the relation between ethics regimes and public confidence.

<sup>36</sup> The lack of empirical evidence is also noted by the recent EC study, European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007, page 8

<sup>37</sup> EC, Special Eurobarometer 291, The attitudes of Europeans towards corruption, April 2008

For the assessment of the CoC's effectiveness, this means that there can be no 'mathematical' measurement of effectiveness by counting immediate or long-term results. Instead the assessment of the CoC's effectiveness needs to rely on more indirect (and less accurate) tools of measurement:

- Concerning the **immediate results**, i.e. the number of 'ethics violations' that the CoC helped to prevent, the assessment will consider EC feedback on the actual application of the main CoC mechanisms. In this context, CoC mechanisms are understood as the different instruments applied to prevent conflicts of interests, e.g. the declaration of activities and interests, the notification of political activity, the register of gifts etc. Indeed, EC feedback on the number of times that a Commissioner sought clarification in relation to the CoC gives an indirect indication of the CoC's effectiveness.

In relation to the immediate results, the assessment will also ask to which extent the CoC mechanisms can be considered effective in dealing with conflicts of interests in areas where the CoC provisions are not explicit or leave room for discretion. In areas where no practical cases have arisen (i.e. there is no experience with actual or potential conflicts of interest), the assessment will discuss the likeliness of the CoC effectively addressing a (hypothetical) conflict of interest.

- Looking at the **long-term results**, i.e. increased public confidence in the office, an indirect measurement of effectiveness is provided by the extent of negative media coverage on the Commissioners' conduct in office (focussing on ethical behaviour). As noted above, existing literature on ethics regimes suggests that office holders not only need to comply with certain ethical requirements, but also appear to do so, and the OECD differentiates between actual and apparent conflicts of interest. Whilst the office holder does not actually find himself in a conflict of interest, the mere appearance of a conflict of interest can be sufficient to damage public confidence. Having said this, negative media coverage needs to be considered with great attention as the media can of course be politically motivated. However, it is worthwhile to consider this indirect measurement as it might point to areas where relatively simple revisions to the CoC provisions could lead to significant gains in public confidence in the EC, by creating a barrier to negative media coverage, politically motivated or not.

## Efficiency

Having discussed the issue of effectiveness, how about assessing the CoC's efficiency? The assessment's terms of reference define efficiency as '*achieving results in the most cost-effective way*'. Efficiency is about how results are achieved, i.e. considering the resources required to achieve the results. Applied to the CoC, the question is about the required human and operational resources (and their cost) in order to make the CoC work.

In this context, earlier research commissioned by the EP has pointed to the need to ensure a healthy balance between effectiveness and efficiency: '*a potential trade-off exists between efficiency of accountability mechanisms and effectiveness of accountability mechanisms*'.<sup>38</sup> The importance of avoiding '*high organisational costs*' was emphasised.

In the specific case of the CoC, the author's initial view is that the emphasis on considerations of efficiency might be somewhat exaggerated. Bearing in mind that the CoC (only) applies to a 'population' of 27 Commissioners, it should be possible to maintain the system with limited resources. A quick comparison to illustrate this point: The ethics regime for Spain's approximately 500 office-holders (including members of government), with far more resource-demanding mechanisms when compared to the CoC, is maintained by five officials (see Figure 3 below).<sup>39</sup>

Moreover, when balancing effectiveness and efficiency, the significant gains in public confidence (via stronger effectiveness) need to be born in mind. Here, a parallel can be drawn to the significant EC resources allocated to the functions of evaluation and regulatory impact assessment, where it is considered that the significant costs involved are outweighed by the benefits of effective policy and better regulation.<sup>40</sup>

However, the assessment will address the efficiency of the CoC's main mechanisms, by asking about costs and putting costs in relation to results. Looking closer at efficiency might also reveal areas where stricter requirements would lead to a saving of resources, e.g. introducing a strict zero-gift policy might free resources currently allocated to maintaining the register of gifts (by the SG Protocol Service), and the function of establishing whether a gift's value amounts to more than €150 (by the Office of Infrastructure and Logistics).

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<sup>38</sup> Leuven Centre for Global Governance Studies, Efficiency of Accountability Instruments in International Organisations, Briefing Note for the Workshop on Governance in the European Commission, 3-4 October 2007, page 1

<sup>39</sup> Interview with Spain's Office of Conflicts of Interest on 2 February 2009. The five staff include one senior, two middle-rank and two junior staff.

<sup>40</sup> E.g. the EC SG counts with four Directorates dedicated to different aspects of better regulation.

**Figure 3 - human resources in relation to addressees in 2007/2008<sup>41</sup>**

	EC	Spain (Office of Conflicts of Interest)	UK (Committee on Standards in Public Life)*	United Nations Development Programme (Ethics Office and Legal Support Office)	World Bank	Canada (Conflict of Interest and Ethics Com- missioner)
Addressees	27	500	5000000	1700 (officials subject to annual disclosure)	210	1100 (officials subject to annual disclosure)
Staff	no full-time staff allocated**	5	10	3	15	45

\* The Committee on Standards in Public Life estimates that some 5 million public-office holders are subject to the seven Principles of Public Life.<sup>42</sup>

\*\* EC Secretariat General feedback indicates that the help-desk function is delivered by two staff (not exclusively), and that DG Personnel and Administration's Cabinet Support Cell has nine staff.

<sup>41</sup> Information based on interviews conducted for the case studies.

<sup>42</sup> Committee on Standards in Public Life, Letter to the Head of the Cabinet and Head of the Home Civil Service, 20 April 2006

## 1.2 Introduction to governance ethics in the College of Commissioners

This section presents the CoC's history (1.2.1), the overall legal framework for the Commissioners' ethics regime (1.2.2) as well as the related institutional framework (1.2.3).

### 1.2.1 The Code of Conduct's history

A code of conduct for the Members of the EC was first proposed by the Santer Commission, and then adopted by the subsequent Prodi and Barroso Commissions.<sup>43</sup>

 **The Santer Commission** (1994-1999): Irregularities under the Santer Commission and the subsequent Independent Expert Committee report on fraud, mismanagement and nepotism in the European Commission,<sup>44</sup> are considered to have contributed to the Santer Commission proposing a code of conduct shortly before its resignation.<sup>45</sup> Until this draft code, Commission ethics were only addressed by the then Treaty article 157(2) (the current 213(2)). The Independent Expert Committee therefore analysed irregularities under the Santer Commission on the basis of an unwritten '*...core of 'minimum standards in public life' accepted in the legal orders of the Community and the Member States*'.<sup>46</sup>

 **The Prodi Commission** (1999-2004): Based on the Santer Commission's draft code, the Prodi Commission adopted the first Code of Conduct for members of the EC on 16 September 1999.<sup>47</sup> The Prodi Commission also prepared a proposal for establishing an '*Advisory Group on Standards in Public Life*', to provide advice on standards of professional ethics with a view to avoiding conflicts of interest in the EP, the Council, the EC, the Court of Justice, the Court of Auditors, the

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<sup>43</sup> Cini provides a detailed history of the Code's origins and revisions. Cini, *From integration to integrity*, 2007, pages 108 to 121

<sup>44</sup> EP, Committee of Independent Experts, *First report on allegations regarding fraud, mismanagement and nepotism in the European Commission*, 15 March 1999

<sup>45</sup> EP, Committee of Independent Experts, *Second report on reform of the Commission*, 10 September 1999, page 257

<sup>46</sup> EP, Committee of Independent Experts, *First report on allegations regarding fraud, mismanagement and nepotism in the European Commission*, 15 March 1999, page 140

<sup>47</sup> EC SEC(1999) 1479 of 16 September 1999

Economic and Social Committee and the Committee of the Regions.<sup>48</sup> This proposal was not pursued as the EP indicated its preference for each institution to independently address its own ethics issues.<sup>49</sup>



**The Barroso Commission** (2004-2009): The Code of Conduct for members of the EC in its current form was adopted by the Barroso Commission at its first meeting on 24 November 2004.<sup>50</sup>

The CoC comprises two main sections and two annexes. Section 1 addresses ethical issues and is the main subject of the present study. The main focus of this section is on the declaration of interests (outside activities and financial interests), the notification of political activity, the handling of post-EC employment and the register of gifts. Section 2 deals with the Commissioners' relations with their departments. The annexes comprise the format for the Commissioners' declaration of interests as well as rules concerning Commissioners' missions / travel. The CoC substituted the previous ethics regime introduced by former Commission President Prodi in 1999.<sup>51</sup>

Comparing the Prodi Code with the Barroso Code shows that the latter introduces the following three modifications with regard to the ethics regime:

- ▶ Requirement to notify the President when participating in an election campaign (compatibility assessment by the President);
- ▶ Requirement to notify the President when standing for election (withdrawal in case of active role in election campaign);
- ▶ The President can ask a Commissioner to resign: '*A member of the Commission shall resign if the President so requests*'.<sup>52</sup>

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<sup>48</sup> Proposal for an Agreement between the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions establishing an Advisory Group on Standards in Public Life, SEC / 2000 / 2077 final

<sup>49</sup> EC, Communication 'Completing the reform mandate: progress report and measures to be implemented in 2004, COM(2004) 93 final, 10 February 2004

<sup>50</sup> EC SG, Minutes of the 1680th meeting of the European Commission on 24 November 2004, PV(2004) 1680, 1 December 2004, page 13

<sup>51</sup> EC SEC(1999)1479 and SEC(1999)1481 as amended by SEC(2004)227 and COM(2004) 93/annex 4

<sup>52</sup> Note that the President's right to request a Commissioner to resign is not limited to ethics issues, e.g. a Commissioner could be asked to resign for poor policy performance.

In 2005, the Commission launches the European Transparency Initiative, which notes the CoC as a major achievement.<sup>53</sup> A possible revision of the CoC (as recommended by an Interdepartmental Work Group on preparation of the *'European Transparency Initiative'* and chaired by the SG) is only considered useful in the framework of an inter-institutional debate on ethical standards,<sup>54</sup> and the EC offers to re-launch the debate on the *'Advisory Group on Standards in Public Life'*.<sup>55</sup>

In response, the EP confirms its preference for each institution to establish its own ethics system instead of following the EC proposal for a common ethics structure covering all institutions.<sup>56</sup> In 2006, the EC's Green Paper *'European Transparency Initiative'* notes the CoC as a major achievement, and confirms the debate with other institutions on rules and standards on professional ethics of public office holders in the EU institutions as one of the Transparency Initiative's main areas of action, however, there is no mention of any plans to further reform the CoC.<sup>57</sup> In 2007, the EC's follow-up on the Green Paper makes no further mention of the CoC for members of the Commission,<sup>58</sup> and it can therefore be concluded that, in general terms, the EC is satisfied with the CoC.

In December 2007, the EC releases a comparative study on the ethics regimes in the Member States and EU institutions.<sup>59</sup> This study confirms that the CoC compares relatively well with the ethics regimes in the Member States and other EU institutions, whilst also noting limitations with regard to enforcement and review.<sup>60</sup> Referring to the study, a recent EC Communication is open to future reform of the CoC: *'...the Commission intends to broaden the mandate of its ad hoc Ethical Committee and request it to give an opinion on the advisability of*

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<sup>53</sup> EC, Communication to the Commission, Preparing the launch of a European Transparency Initiative, SEC(2005)1300/5, 8 November 2005

<sup>54</sup> Ibid, page 7

<sup>55</sup> EC, SEC(2005) 644/4, 17 May 2005

<sup>56</sup> EP, Committee on Budgetary Control, Working Document on the European Transparency Initiative, 4 December 2006, page 7 / European Parliament, Committee on Budgetary Control, Report on transparency in financial matters, 25 January 2008, page 6

<sup>57</sup> EC, Green Paper - European Transparency Initiative, COM(2006) 194 final, 3 March 2006, page 3

<sup>58</sup> EC, Communication from the Commission - Follow-up to the Green Paper *'European Transparency Initiative'*, COM(2007)127 final, 21 March 2007

<sup>59</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007

<sup>60</sup> See section 1.1.1 for a discussion on this study's findings.

*revising the Code of Conduct of Commissioners'*.<sup>61</sup> However, to date, this intention has not been followed up.

### **1.2.2 Legal framework**

The current legal framework for the Commissioners' ethics regime is mainly set out in the Treaty, and further elaborated in a set of 'secondary rules', comprising the Code of Conduct and the Framework Agreement on relations between the European Parliament and the Commission. The most important provisions are noted below, as the present report will frequently refer to these provisions.

#### **The Treaty**

**Treaty Section 3, Article 213(1)** makes a first reference to the Commissioners' independence:

*'The Members of the Commission shall be chosen on the grounds of their general competence and their independence shall be beyond doubt.'*

**Article 213(2)** provides further detail in relation to the ethics regime:<sup>62</sup>

*'The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.'*

*In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.'*

*The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of*

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<sup>61</sup> Communication from the Commission to the European Parliament, the Council and the Court of Auditors, Synthesis of the Commission's management achievements in 2007, COM(2008) 338 final, 4 June 2008, page 15

<sup>62</sup> Note in this context, that first case law exists on the application of this article, and this will be addressed in Section 2. See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04, 23 February 2006

*Justice may, on application by the Council or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 216 or deprived of his right to a pension or other benefits in its stead.'*

Finally, the Treaty also provides for sanctions:<sup>63</sup>

**Article 216:** *'If any Member of the Commission no longer fulfills the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council or the Commission, compulsorily retire him.'*

**Article 217(4):** *'A Member of the Commission shall resign if the President so requests, after obtaining the approval of the College.'*

### **'Secondary rules'**

**The Code of Conduct:** The CoC is not a legal provision and therefore not '*judiciable*'. In its introduction, the CoC refers to the Treaty and thus intends to provide a framework for applying the Treaty provisions concerning Commissioner ethics. In the words of the EP Independent Expert Committee: *'Codes of conduct are not "formal procedures", but are designed to provide an ethical reference point for officials and holders of a public mandate. They aim to assist them in living up to the principles of conduct which provide the foundations for public life and which have been defined as: selflessness, integrity, objectivity, accountability, openness, honesty and leadership'*.<sup>64</sup>

**Framework Agreement on relations between the European Parliament and the Commission, 26 May 2005:** The Framework Agreement includes a series of references to the Commissioners' ethics regime. Two of the most important provisions are noted below (the provisions apply to ethical conduct as well as to political responsibility for policy performance):

**Article 2:** *'Each Member of the Commission shall take political responsibility for action in the field of which he or she is in charge, without prejudice to the principle of Commission collegiality. The President of the Commission shall be fully responsible for identifying any*

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<sup>63</sup> As noted above, a President's right to request a Commissioner to resign is not limited to ethics issues, e.g. a Commissioner could be asked to resign for poor policy performance.

<sup>64</sup> EP, Committee of Independent Experts, Second report on reform of the Commission, 10 September 1999, page 256

*conflict of interest which renders a Member of the Commission unable to perform his or her duties. The President of the Commission shall likewise be responsible for any subsequent action taken in such circumstances; if an individual case has been re-allocated, the President shall inform the President of Parliament thereof immediately and in writing.'*

**Article 3:** *'If Parliament decides to express lack of confidence in a Member of the Commission, the President of the Commission, having given serious consideration to that decision, shall either request that Member to resign, or explain his or her decisions to Parliament.'*

### 1.2.3 The institutional framework

The institutional framework related to the CoC's application mainly involves the Commissioners, the SG, and the Directorate General Personnel and Administration:

-  **Commissioners and their cabinets:** Respect of the CoC is primarily the responsibility of the Commissioners with support of their Cabinets and supervision by the President.
  
-  **EC Secretariat General:** Directorate B Better Regulation and Administration (Unit B4 Public service ethics) provides informal advice to Commissioners and their cabinets on ethics issues ('help-desk function'). SG feedback indicates that during 2008 alone, advice on outside activities was provided on some 210 occasions (20 consultations on honorary non paid activities and 190 consultations on honorary sponsorship / patronage).<sup>65</sup> Moreover, the SG's Protocol Service (an independent directorate) maintains the public register of gifts presented to Commissioners.
  
-  **EC Directorate General Personnel and Administration:** The Directorate General's '*Cabinet support cell*' provides informal advice to Commissioners and their cabinets on ethics issues (focussed on matters related to personnel and administration). Two offices associated to the Directorate General complete the institutional framework: the Brussels Office for Infrastructure and Logistics is responsible for the valuation of gifts worth over €150, and the Office for Administration and Payment of Individual Entitlements monitors Commissioner travel on official business.

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<sup>65</sup> SG feedback of 13 February 2009

Whilst a series of EC actors are involved to operate the CoC, it is worth noting that there is no dedicated unit to ensure overall implementation of the CoC's provisions: '*...no specific structure has been established to ensure its application*'.<sup>66</sup>

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<sup>66</sup> SG letter of 9 December 2008, (SG/B/4 D(2008) 10214

## Section 2 - The Code of Conduct for members of the European Commission

This section provides an assessment of the CoC's main mechanisms, following the order of their presentation in the Code, i.e.: Declaration of interests (2.1); Notification of political activity (2.2); Post-EC employment (2.3); Operational resources (travel and representation, and support staff) (2.4); Register of gifts (2.5).<sup>67</sup>

Each of these five sub-sections includes: a description of the mechanism in place (addressing coverage, i.e content and clarity); and an assessment of the mechanism's application focussing on the following issues:

- 🎧 Internal enforcement: how is enforcement ensured within the EC?
- 🎧 External enforcement: is there any external oversight vis-a-vis the EC's enforcement of the CoC and are there any complaint mechanisms?
- 🎧 Sanctions: what is foreseen in the case of major or minor infringements?
- 🎧 Effectiveness (achieving results) and efficiency (the cost of achieving results)

Finally section 2.6 asks whether any additional mechanisms are required?

Discussions are illustrated with feedback from stakeholder consultations and in-depth research in Denmark, Spain, the United Kingdom, the United Nations Development Programme and the World Bank (best practice examples are presented in grey text boxes). Examples from other ethics regimes are provided wherever they are considered relevant (e.g. Canada).

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<sup>67</sup> Considering the assessment's time schedule (January to April 2009) it was decided to focus resources on the most important mechanisms, leaving aside some of the CoC's less 'prominent' features, e.g. the notification to the President of a Commissioner's intention to publish a book.

## 2.1 Declaration of interests

This section assesses one of the CoC's most prominent mechanisms, the declaration of interests.

### 2.1.1 Description of the mechanism (coverage and clarity)

The declaration of interests covers outside activities as well as financial interests.

The CoC's section 1.1.1 requires the Commissioners to list all '*honorary, unpaid posts in political, cultural, artistic or charitable foundations or similar bodies*' including '*posts in educational institutions*' in the declaration of interests. The declaration needs to cover the ten years prior to taking up office, and differentiate between activities which ended prior to taking office and ongoing activities. The CoC's section 1.1.2 requires the Commissioners and their spouses to declare any '*financial interest or asset*'. Finally, the CoC's section 1.1.3 requires the Commissioners to declare '*the professional activities of their spouses*'.

The following paragraphs address the issues of coverage and clarity:

-  **Outside activities:** The requirements with regard to the declaration of the Commissioners' outside activities constitute one of the few passages in the CoC supported by a definition (the CoC defines '*honorary posts*' and '*foundations or similar bodies*').
-  **Financial interests:** Concerning financial interests, the CoC provision is ambiguous as it is not clear whether all financial interests need to be declared or only such interests which might create a conflict of interests: '*Commissioners must declare any financial interest or asset **which might** create a conflict of interests in the performance of their duties.*' (CoC, Section 1.1.2; highlighting by the author). Moreover, the CoC provisions require the disclosure of assets, but not of liabilities / debts.
-  **Spouse's professional activity:** Concerning the Commissioners' spouses, the CoC does not provide an indication whether activities relate to ongoing activity or also cover activity that ended prior to the Commissioner taking up office ('*To obviate any potential risk of a conflict of interests, Commissioners are required to declare the professional activities of their spouses*').

The CoC provisions only address the Commissioners and their spouses, and there is no requirement for declarations to cover activities / financial interests of partners or other family members.<sup>68</sup>

### 2.1.2 Application

How are the CoC's requirements concerning the declaration of interest applied in practice?

The CoC stipulates in section 1.1.4 that the declarations must be completed upon taking up office, and revised during the term of office in case of any changes in the information. The format for the declaration of interests is annexed to the CoC (Annex I). Moreover, the CoC specifies that declarations '*shall be scrutinised under the authority of the President*', and provides for their publication on the EC website. The CoC does not include any specific provisions concerning infringements related to the declaration of interests (e.g. if a declaration is not updated though information has changed).

The SG (Directorate B Better Regulation and Administration, Unit B4 Public service ethics) performs a scrutiny of Commissioner declarations of interest, and provides informal advice to Commissioners and their cabinets on ethics issues ('*help-desk function*'). SG feedback indicates that during 2008 alone, advice on outside activities was provided on some 210 occasions.<sup>69</sup>

The declarations of interest have been completed by all Commissioners and published on the website of the EC.<sup>70</sup> An analysis of the declarations (in January 2009) indicates a series of inconsistencies:

 **Outside activities:** In the declaration of interests format, the CoC envisages two categories: '*1.1 Posts in foundations or similar bodies*' and '*1.2 Posts held in educational institutions*'. However, two declarations introduce categories not covered in the format, i.e. '*1.3 Former public offices*' or '*1.3 Other*'.<sup>71</sup> Whilst this a positive feature in relation to the two declarations, it raises the question as to why other Commissioners don't mention former public offices.

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<sup>68</sup> As this omission affects all CoC mechanisms, this issue is addressed in a separate section below (2.6.4).

<sup>69</sup> SG feedback of 13 February 2009

<sup>70</sup> [http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm) (accessed in January 2009)

<sup>71</sup> Commissioners Kroes and Ashton, [http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm) (accessed in January 2009)

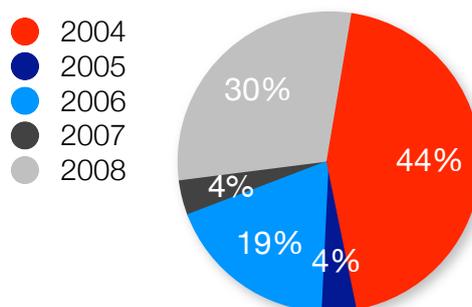
**Outside activities - Posts in foundations or similar bodies - Posts currently held:**

One declaration shows a misunderstanding of the CoC requirements, i.e. the declaration notes ‘*Vice-president of the European Commission*’ under the category of outside activities (posts currently held). Whilst this is a minor issue, it is noted here to show that additional guidance on completing the format is required.

**Financial interests:**

For shares and other stock, the format requires the disclosure of information on the name of the company, the number of shares / securities and the total current value. Five declarations do not fully respect the format annexed to the CoC, as the declarations do not provide the required detail in terms of company name, number of shares and total current value (e.g. the company name is not indicated). Moreover, looking at the date of the declarations currently posted on the EC website (in January 2009), 12 declarations are dated in 2004, one in 2005, five in 2006 (including for the Commissioners from Bulgaria and Romania), one in 2007, and eight in 2008 (including for the two Commissioners who joined the EC in 2008). This raises a question in relation to the required revision in the case of a change of circumstances. Five declarations dated in 2004 and 2006 include information on financial interests (shares). For these five declarations, information in terms of the ‘*total current value*’ can be considered to be out of date in 2009.

**Figure 4 - Dating of declarations of interest<sup>72</sup>**



**Assets - Real estate:**

The completion of this section appears inconsistent. The CoC does not require the declaration of homes reserved for the exclusive use of the owner or his/her family (‘*Any property owned either directly or through a real estate company must be declared, with the exception of homes reserved for the exclusive use of the owner or his/her family.*’). However, 16 declarations appear to declare personal homes.

<sup>72</sup> Situation in January 2009

- 🗣️ **Assets - Other property:** The CoC requires the declaration of ‘...*other property whose possession could create a conflict of interests, especially from a tax point of view...*’. The completion of this section appears inconsistent. Some declarations use this category to indicate property such as cars, bank accounts or jewellery, whilst other declarations leave this category blank.
- 🗣️ **Spouse’s professional activity:** Two declarations note the spouse’s activities under this category, however, the information is provided in terms which do not allow for any assessment of whether the spouse’s activity might constitute a conflict of interest or not (despite the CoC requirement: ‘*The declaration must state the nature of the activity or the title of the position held and, if applicable, the name of the employer*’).
- 🗣️ **Scrutiny of declarations:** The provision relating to the President of the Commission’s scrutiny of declarations ‘*with due regard for Members’ areas of responsibility*’ is ambiguous. The provision could be interpreted to imply that it depends on the Commissioners’ portfolio whether a specific outside activity or financial interest constitutes a conflict of interest. For example, if the Commissioner for the ‘Competition’ portfolio holds an honorary post in a charity working on education issues in the developing world, this would not constitute a conflict of interests, however, there could be a conflict of interests if the same post is held by the Commissioner with the portfolio ‘Development and Humanitarian Aid’. The provision is problematic when considering Treaty article 219 (‘*The Commission shall act by a majority of the number of Members*’), i.e. when voting on specific decisions related to a specific portfolio, all Members of the Commission vote no matter the nature of their portfolio.

### 2.1.3 Effectiveness and efficiency

Is the declaration of interest an effective and efficient mechanism with regard to preventing conflicts of interest (the CoC’s immediate objective), or with regard to increasing public trust in the institution (the CoC’s wider objective)?

- 🗣️ **Effectively preventing conflicts of interest?** A first indicator for effectiveness is provided by SG feedback on Commissioners asking for advice in relation to outside activities. SG feedback indicates that during 2008 alone, advice on outside activities was provided on some 210 occasions (20 consultations on honorary non paid activities and 190 consultations on honorary sponsorship / patronage).<sup>73</sup>

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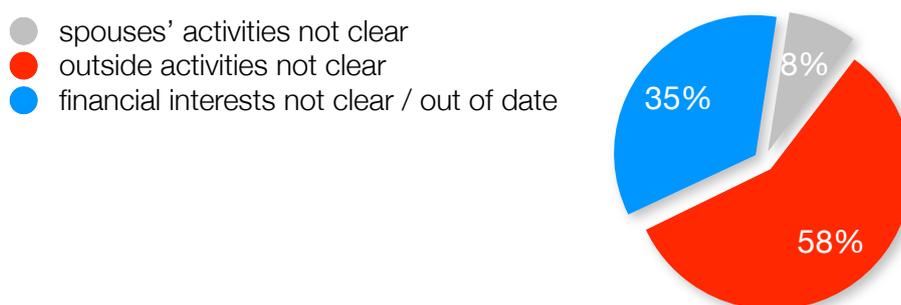
<sup>73</sup> SG feedback of 13 February 2009

However, in some cases, the declarations' effectiveness in preventing conflicts of interest is constrained, by the absence of sufficient detail to allow an assessment of whether a reported activity or interest constitutes a conflict of interest, and / or by the failure to ensure that declarations are kept up-to-date (in relation to the value of financial assets). These deficiencies concern 18 out of 27 declarations. Whilst the EC SG emphasises that the declarations are subject to scrutiny by the EP before the hearings of the Commissioners designate, as well open to public scrutiny via their publication on the EC website,<sup>74</sup> the scrutiny can only be meaningfully exercised on the basis of sufficiently detailed declarations.

In this context, the OECD Guidelines emphasise the importance of disclosures on interest to '*contain sufficient detail on the conflicting interest to enable an adequately-informed decision*'.<sup>75</sup>

However, concerning outside activity, several declarations only note the name of the foundation or similar body, but do not specify the foundation's objective. The consequence is that the presence of a possible conflict of interest can only be assessed on the basis of additional research. The same lack of detail affects two declarations in relation to the reported activity of the Commissioner's spouse. Examples of good practice, i.e. declarations providing the name of the foundation or similar body as well as detail on related objectives can be noted for Commissioners Borg, Kroes and Vassiliou.

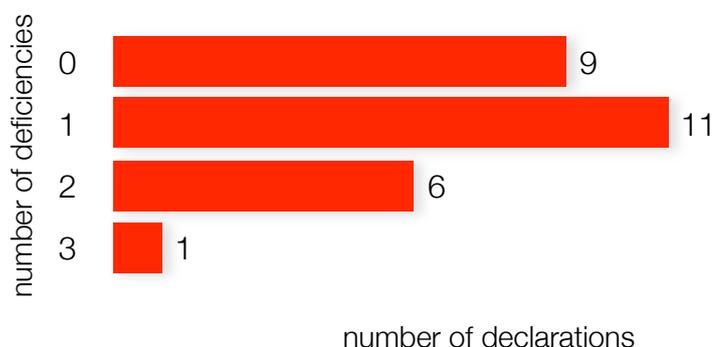
**Figure 5 - Deficiencies in the declarations of interest (total of 26 deficiencies)**



<sup>74</sup> SG feedback of 10 March 2009

<sup>75</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 8 (point 1.2.1 c)

**Figure 6 - number of deficiencies per declaration**



**ES:** The Office of Conflicts of Interest analyses the form and content of declarations on activities and on financial interests. In relation to financial interests, the Office verifies the correctness / completeness of information by asking the relevant institutions for confirmation. Moreover, comparisons between the office-holder's 'wealth' at the start / end of office are established to identify any variations which are not explained in the declaration.<sup>76</sup>

**EC Register of Interest Representatives:**<sup>77</sup> Interest representatives do not only identify themselves with their name but are also required to provide information on their goals / remit (*'Describe your organisation's goals / remit'*) as well as the territorial level of their operation and interests (*'Are the interests your organisation represents sub-national, national, European, global'*).

Finally, and with regard to financial interests, the CoC provisions only cover assets but not any liabilities. However, a conflict of interest can arise just as well in relation to a liability (pressure by the creditor) as to an asset, and the OECD Guidelines therefore note debts and assets alike with regard to possible conflict of interest situations.<sup>78</sup>

<sup>76</sup> Interview with Spain's Office of Conflicts of Interest on 2 February 2009.

<sup>77</sup> <https://webgate.ec.europa.eu/transparency/regrin/welcome.do> (accessed in March 2009)

<sup>78</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 7 (point 1.1.1 c)

**UNDP:** the UNDP ethics system requires financial disclosure of any liabilities over \$50000 (≈ €37596) owed to any creditor, including property mortgages and liability to a former spouse, but excluding liabilities owed to a parent, sibling, or dependent child.



**Effectively increasing public trust?** There is of course no evidence as to the declarations' contribution to increasing (or decreasing) public trust in the EC. However, it can be assumed that weaknesses in the format (e.g. insufficient detail, information not up-to date, inconsistent completion of the format) do not contribute to increasing public trust, as gaps and inconsistencies can be interpreted as a failure to attach sufficient importance to the completion of the declarations of interests. The OECD Guidelines emphasise formal and accurate disclosure: '*disclosure is usually formal (...), and is required to be provided periodically, (generally on commencement in office and thereafter at regular intervals, usually annually)*'.<sup>79</sup> Moreover, the OECD recommends '*that the organisation's administrative process assists full disclosure, and that the information disclosed is properly assessed, and maintained in up-to-date form*'.<sup>80</sup>

**DK / ES / WB / UNDP:** Declarations of interests are completed upon taking up office, updated when changes occur, updated annually (and in the case of Spain, completed upon leaving office).

**UNDP:** The UNDP ethics regime calls for annual financial and outside activities disclosures. While these documents may not be reviewed in great detail, requiring completion on an annual basis demonstrates to staff that the organisation is concerned with ethical issues. It also provides an annual reminder to staff to think individually about ethical issues beyond the disclosure process. In an organisation where office holders may not have the time or scope to consider ethical issues as a regular part of their jobs, annual disclosures can provide a useful entry point.

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<sup>79</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 7

<sup>80</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 8



**Efficiency?** SG feedback on the resources allocated to the different CoC mechanisms does not allow for a detailed breakdown of resources between the different mechanisms, as there is no ‘accounting’ by mechanism, and there is no staff dedicated exclusively to the CoC. However, SG feedback provides a general picture of the scale of resources assigned: Within the SG, the above noted ‘help-desk function’ is delivered by two staff (not exclusively dedicated to the CoC). DG Personnel and Administration’s ‘Cabinet support cell’ counts nine staff entrusted with administration of human resources for the Commissioners and their cabinets (each cabinet tends to count some 20 to 30 staff).

Considering the SG’s function of scrutinising the declarations, efficiency could be enhanced (reducing the resources allocated to scrutiny) via more detailed declarations. This is mainly understood in the sense of enhancing the declarations’ clarity, i.e. by providing information on the objectives and remit of foundations or similar bodies in which the Commissioners have been / are active. This would reduce the need for seeking clarification without placing any substantial additional burden on the Commissioners (it can be assumed that the Commissioners have readily available information on the objectives of the foundations in which they are active).

Efficiency could be further enhanced by focusing the declaration of financial interests on interests which are of financial significance. This could be achieved by establishing a limit under which minor financial interests do not need to be declared (e.g. cars, jewellery).

**DK:** Only financial interests of over €6700 need to be declared.

**UK:** Disclosure is limited to interests in shareholdings in any public or private company or other body which are greater than 15% of the issued share capital of the company or body; or 15% or less of the issued share capital, but greater in value than the current parliamentary salary. The nature of the company’s business in each case should be registered.

**UNDP:** Declaration is only required for assets and profits on sale of investment property valued at \$10000 (≈ €7519) or above excluding personal property not held for investment purposes (UNDP Financial Disclosure Form and Instructions for Submission).

Efficiency would also benefit from adopting a standardised electronic format for the declarations. This would facilitate immediate 'statistical' analysis of the most relevant areas (e.g. what are the most important outside activities or financial interests in terms of the number of Commissioners concerned?), and thus allow for 'tailor-made' design of guidance. The current format dates back to 1999 and has not been altered since the Prodi Commission adopted the first Code of Conduct.<sup>81</sup>

**ES:** The declaration takes the form of a detailed 36-page format (not including guidance). There are two different formats, the first upon taking up office, and the second at the moment of leaving office. An interesting feature is that the content of a declaration cannot be corrected after submission. Corrections / updates can of course be submitted (updates are required on an annual basis), however, the IT system keeps track of changes without affecting the original content. This aims to prevent 'ex-post corrections' under political pressure (Law 5/2006, Art. 14.1).

**UNDP:** The UNDP uses an 18-page electronic disclosure format with eight pages of instructions. (UNDP Financial Disclosure Form and Instructions for Submission).

**EC Register of Interest Representatives:**<sup>82</sup> Interest representatives can disclose information on their activities as well as financial data online on a three-page electronic format.

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<sup>81</sup> EC Code of Conduct, SEC(1999)1479, 16 December 1999

<sup>82</sup> <https://webgate.ec.europa.eu/transparency/regrin/welcome.do> (accessed in April 2009)

## 2.2 Notification of political activity

This section assesses the CoC provisions concerning the Commissioners' political activity.

### 2.2.1 Description of the mechanism (coverage and clarity)

The CoC provisions on outside activities note that Commissioners may hold posts in political foundations or similar bodies, and that Commissioners may be active members of political parties, unless this compromises their availability for service in the Commission.

The Prodi Commission's CoC made no further reference to political activity,<sup>83</sup> and it is only with the current CoC that a mechanism of notifying political activity to the President of the Commission was introduced: A Commissioner wishing to participate in an election campaign or to stand for election to public office needs to inform the President of his intention. Depending on the level of activity, the President decides on whether the political activity is compatible with the Commissioner's office. In the case of an active role in an election campaign, the concerned Commissioner is to withdraw from the work of the Commission for the duration of the campaign.

The following paragraphs address the issues of coverage and clarity:

-  **Availability for service:** The CoC does not define the concept of '*availability for service*' (political activity is allowed unless this compromises availability for service).
-  **Criteria for the compatibility assessment:** Moreover, the CoC provisions allow for discretion as there are no detailed criteria for the President's decision on whether a political activity is compatible with a Commissioner's duties or not ('*The President, taking into account the particular circumstances of the case...*').
-  **Active role:** There is no definition of what constitutes '*an active role*' in an election campaign.
-  **Commission President political activity:** Finally, the CoC does not address the case of the Commission's President wishing to participate in an election campaign or to stand for election. A Commissioner's intention to participate in an election

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<sup>83</sup> EC Code of Conduct, SEC(1999)1479, 16 December 1999

campaign or to stand for election is to be notified to the President, however, there is no provision for the case of the President himself engaging in political activity.

### 2.2.2 Application

- Whilst the EC website provides access to the Commissioners' declarations of interests, it does not report on the application of the CoC provisions concerning political activity.<sup>84</sup>
- Concerning Commissioner membership in political parties, there is no mechanism for declaring membership (the declaration of interests only requires the declaration of '*honorary, unpaid posts in political (...) foundations or similar bodies*'), and the Commission has not reported on any cases of membership of a political party considered to have compromised availability for service.
- Since the Barroso Commission took up office in November 2004, there have been two cases of notifications of political activity with subsequent withdrawal from the work of the European Commission.<sup>85</sup> Commissioner Michel withdrew from the work of the Commission on 12 May 2007 to participate in the Belgian election campaign (notified to the President on 16 March 2007),<sup>86</sup> and Commissioner Frattini withdrew on 14 March 2008 to participate in the Italian election campaign (notified to the President on 7 March 2008).<sup>87</sup> Whilst other members of the EC also engaged in political activity (see the section on effectiveness / efficiency below), it appears that these were not subject to any notification.

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<sup>84</sup> [http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm) (accessed in April 2009)

<sup>85</sup> Commissioner Kyprianou also notified political activity (in Cyprus). However, as he decided not to participate in the election campaign, there was no need to withdraw from the work of the Commission.

<sup>86</sup> EC SG, Minutes of the 1781st meeting of the Commission, PV(2007) 1781, 28 March 2007, page 11

<sup>87</sup> EC SG, Minutes of the 1822nd meeting of the Commission, PV(2008) 1822, 19 March 2008, page 15

**Figure 7 - Cases of withdrawal due to political activity**

<p><b>Michel</b> (June 2007 parliamentary election campaign in Belgium)</p>	<ul style="list-style-type: none"> <li>▶ Michel requests unpaid leave to stand for election in the Belgian parliamentary elections (lowest-placed name on the list). Barroso grants unpaid leave from 12 May to 10 June 2007 (EC press release, 16 March 2007; also published on the Commissioner's website: <a href="http://ec.europa.eu/commission_barroso/michel/Press/press_release/index_en.html">http://ec.europa.eu/commission_barroso/michel/Press/press_release/index_en.html</a>).</li> <li>▶ EP Committee on Development Cooperation criticism of the CoC for allowing unpaid leave for political activity (alleged conflict with Treaty provisions on independence).</li> </ul>
<p><b>Frattini</b> (March-May 2008 parliamentary election campaign in Italy)</p>	<ul style="list-style-type: none"> <li>▶ Frattini requests President Barroso to grant unpaid leave to participate in election campaign from 14 March to 15 April 2008 (Letter Frattini to Barroso / EC press release, both dated 7 March 2008)</li> <li>▶ Barroso grants unpaid leave and notes that active role not compatible with Commission office (Letter Barroso to Frattini, 7 March 2008)</li> <li>▶ Frattini website declaration on his political activity, 9 March 2008</li> <li>▶ Barroso extends unpaid leave to 28 April 2008 (Barroso letter to Frattini, 15 April 2008)</li> <li>▶ Barroso extends unpaid leave to 15 May 2008 (Declaration on Commissioner website, 28 April 2008)</li> <li>▶ Frattini resigns on 8 May 2008 (Declaration on Commissioner website, 28 April 2008), and replaced by Tajani on 9 May 2008</li> </ul>

### 2.2.3 Effectiveness and efficiency

Is the notification of political activity an effective and efficient mechanism with regard to preventing conflicts of interest (the CoC's immediate objective), or with regard to increasing public trust in the institution (the CoC's wider objective)?



**Effectively preventing conflicts of interest?** The CoC provisions concerning political activity aim to ensure that Commissioners are available to perform their duties, i.e. dedicate sufficient time to their role as Commissioner. Commission resources are only to be used for the purposes of the Commissioner's office. A Commissioner can be forced to choose between his post and political activity, if the President should decide that the intended political activity is not compatible with the Commissioner's duties. Moreover, the CoC provides for a withdrawal from office in the case of a Commissioner intending to perform an active role in an election campaign.

Considering the two cases presented above (Commissioners Michel / Frattini notification of political activity and subsequent withdrawal), the mechanism can be considered effective in preventing conflicts between the Commissioners' office and political activity. Effectiveness could be further enhanced by ensuring that there is sufficient time between notification and withdrawal to organise the coverage of the Commissioner's activity during withdrawal (in the case of Commissioner Frattini, there was only one week between notification and withdrawal).

However, in the two cases examined, the Commissioners requested a withdrawal, and there is no practical experience with the scenario of a Commissioner notifying active political activity, whilst wishing to remain in office (or, simply not notifying political activity). In the case of a Commissioner intending to participate in an election campaign, the CoC envisages the President to decide on compatibility '*taking into account the particular circumstance of the case*'. Moreover, withdrawal is only required in the case of an '*active role*' in the election campaign. Whilst definitions / criteria are missing in both cases, it can be assumed that the two cases presented above (Frattini / Michel) will act as precedents (i.e. withdrawal in the case of political activity of a similar extent).

 The following two cases reflect on two of the gaps identified above (section 2.2.2), i.e. the missing definition for '*availability for service*' (i.e. active membership of political parties is allowed unless this compromises the Commissioner's availability for service), and the missing provisions concerning political activities developed by the President.

In March 2007, and in the context of her participation in Sweden's Social Democratic Party congress, Commissioner Wallström notes national political activity on her Commission blog (a blog hosted on the Commissioner's website).<sup>88</sup> The Commissioner was subsequently reported to engage in national political activity without notifying the President.<sup>89</sup> The CoC fails to address this scenario effectively, as a definition for '*availability for service*' is missing. Indeed the notification mechanism only applies to Commissioners intending to participate in an election campaign or standing for election.

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<sup>88</sup> 'I gladly accepted to be member of a temporary working group which will frame the discussion on international and European issues – this is the sort of contribution I can make to Swedish politics, even from Brussels.' Commissioner Wallström blog entry of 22 March 2007: (<http://blogs.ec.europa.eu/wallstrom/2007/03/22/>). Note also the recent EP questions on Commissioner Wallström's political activity in relation to the forthcoming EP elections: H0147/2009 and H0150/2009, both dated 24 February 2009

<sup>89</sup> Financial Times, 19 March 2007 (<http://blogs.ft.com/brusselsblog/2007/03/michel-the-belghtml/>), The Local, 19 March 2007 (<http://www.thelocal.se/6734/20070319/>)

Similarly, the CoC does not provide a mechanism relating to political activity by the President. The CoC requires Commissioners to notify political activity to the President, however, there is no reference to the scenario of the President himself participating in an election campaign or standing for election. Again, practical experience demonstrates the need to address this gap: In February 2005, President Barroso supported the Portuguese Social Democratic Party in the national election campaign in Portugal by appearing in a television spot.<sup>90</sup> The CoC does not foresee this situation and does not require any notification with regard to the President's political activities.

The two cases show that regardless of the judgement on the individual cases, the CoC is ill-equipped to address a Commissioner's active party-political activity (outside participation in election campaigns / standing for election) or indeed any political activity developed by the President. Whilst in the two cases (Wallström / Barroso) the scale of political activity remained limited, the question remains as to how the hypothetical scenario of 'excessive' political activity is to be dealt with, short of falling back on the President's right to request a Commissioner to resign.



**Effectively increasing public trust?** The barrier to political activity is also understood to contribute to the Commissioner's independence of national interests.<sup>91</sup> Too heavy an involvement in national politics could affect (or be perceived to affect) the Commissioner acting only '*in the general interest of the Community*' as required by the Treaty.<sup>92</sup> The EC has answered EP questions on its political activity by noting: '*the Members of the Commission are politicians carrying out a political function, who, while honouring the obligations imposed by this function, remain free to express their personal opinions quite independently and on their own responsibility*'.<sup>93</sup>

The EC has also pointed out that a Commissioner resigning before the end of his mandate to engage in political activity '*is not an exceptional event*'.<sup>94</sup> The following figure notes Commissioners having resigned to engage in political activity. This shows that only 15 Commissioners have resigned to engage in political activity

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<sup>90</sup> The Independent, 17 February 2005 (<http://www.independent.co.uk/news/world/europe/barroso-backs-rightwing-party-in-advert-483697.html>)

<sup>91</sup> Walter van Gerven, Political, ethical and financial and legal responsibility of EU Commissioners

<sup>92</sup> Treaty Article 213(2): '*The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties*'

<sup>93</sup> EC answer to EP questions E2459/99, 2628/99, 2600/99 of 7 February 2000, Official Journal C 225 E, 8 August 2008, page 139

<sup>94</sup> EC joint answer to EP questions E5585/2008 and E5586/2008, 11 November 2008

since the first Commission in 1958, with nearly half of the resignations affecting the Barroso and Prodi Commissions. Considering that a total of about 140 Commissioners have served since 1958, resignations are rather ‘exceptional’, however, growing in importance. Whilst only three resignations are noted for the Barroso Commission, further resignations can be expected in the framework of forthcoming national and EP elections.<sup>95</sup>

**Figure 8 - Commissioner’s resigning to engage in political activity**

<b>Barroso</b> (2004-09)	<ul style="list-style-type: none"> <li>▶ Frattini (national elections, Italy, 2008)</li> <li>▶ Mandelson (national government, UK, 2008)</li> <li>▶ Kyprianou (national government, Cyprus, 2008)</li> </ul>
<b>Prodi</b> (1999-04)	<ul style="list-style-type: none"> <li>▶ Busquin (EP elections, 2004)</li> <li>▶ Diamantopoulou (national elections, Greece, 2004)</li> <li>▶ Barnier (national government, France, 2004)</li> <li>▶ Solbes (national government, Spain, 2004)</li> </ul>
<b>Santer</b> (1995-99)	▶ -
<b>Delors</b> (1985-95)	▶ Abel Matutes (EP elections, 1994)
<b>Thorn</b> (1981-85)	<ul style="list-style-type: none"> <li>▶ Cheysson (national government, France, 1981)</li> <li>▶ O’Kennedy (national election, Ireland, 1982)</li> <li>▶ Pisani (national government, France, 1984)</li> </ul>
<b>Jenkins</b> (1977-81)	▶ -
<b>Ortoli</b> (1973-77)	<ul style="list-style-type: none"> <li>▶ Deniau (national government, France, 1973)</li> <li>▶ Hillery (national elections, Ireland, 1976)</li> </ul>
<b>Mansholt</b> (1972-73)	▶ -
<b>Malfatti</b> (1970-72)	▶ Malfatti (national election, Italy, 1972)
<b>Rey</b> (1967-70)	▶ -
<b>Hallstein</b> (1958-67)	▶ Caron (national election, Italy, 1963)

<sup>95</sup> See footnote 95

**Figure 9 - Number of resignations by Commission**



The difficulty with assessing the relation between Commissioner political activity and public trust lies in the ‘sui-generis’ nature of the College of Commissioners. This makes it difficult to draw on Member State experience. Walter van Gerven notes: ‘*The most delicate question is in how far Commissioners – who, as mentioned above, are holders of public office rather than civil servants and, moreover, part of the Community’s main policy-formulating and law-initiating body - are allowed to represent views advocated by a political party of which they are - or perceived to be (mainly because of their affiliation in their national past) - if not an active, then at least a passive member*’.<sup>96</sup>

Reviewing the Prodi Commission’s Code of Conduct, the Committee of Independent Experts noted: ‘*Commissioners must carry out their duties with complete political neutrality. They should not be permitted to hold office in any political organisation during their term of office*’.<sup>97</sup>

Along similar lines, and in relation to the Cresson case, the European Court of Justice’ Advocate General argued: ‘*The Commission can only succeed in fulfilling these tasks if it and its individual members are seen to operate with complete impartiality and in complete independence. Only then will it be able to command the authority to gain the requisite confidence of the other institutions of the Community, the Member States and the general public.*’<sup>98</sup>

<sup>96</sup> Walter van Gerven, Political, ethical and financial and legal responsibility of EU Commissioners, page 5

<sup>97</sup> European Parliament, Committee of Independent Experts, Second report on reform of the Commission, 10 September 1999, page 24

<sup>98</sup> See Opinion of Advocate General Geelhoed on case C-432/04, 23 February 2006, point 72

Concerning the Member States' confidence in the Commission, it can be assumed that a Commissioner developing political activity in support of a national opposition party will find it more difficult to gain the Member State government's confidence.<sup>99</sup>

It can therefore be questioned whether the above noted political activity (e.g. Wallström, Barroso) is in the general interest of the Community.

On the basis of Article 213(1) '*independence beyond doubt*', Walter van Gerven argues for a prohibition of a Commissioner's active party membership / participation in election campaigns: '*being an active member of a political party, a fortiori campaigning for that party, implies in my view that the person concerned accepts to adhere to the party line, and therefore to follow and take instructions from that party – and/or is perceived to do so*'.<sup>100</sup>

Considering public trust in the Commission, the following reflections also argue for a limitation of a Commissioner's national political activity. A Commissioner (temporarily) withdrawing from the Commission to participate in an election campaign or stand for election, can be considered to disrupt the work of the Commission, thus undermining public trust in the Commission's effectiveness. In the case of Commissioner Michel's temporary withdrawal, the portfolio (Development and Humanitarian Aid) was covered by Commissioner Rehn (Enlargement). In the case of Commissioner Frattini's withdrawal (Justice, Freedom and Security), Commissioner Barrot (Transport) took over the portfolio, first as 'caretaker', and following Commissioner Frattini's resignation, as regular Commissioner. Commissioner Barrot's takeover of the Justice, Freedom and Security portfolio was subject to a previous EP hearing,<sup>101</sup> whilst there was no hearing for Commissioner Rehn's coverage of the Development and Humanitarian Aid portfolio.<sup>102</sup> In both cases it can be argued that Commission work was disrupted as the substituting or new Commissioner needed to familiarise himself with the new portfolio. Moreover, considering the 'organisation' of Commissioner Frattini's withdrawal, it is noteworthy, that unpaid leave had to be extended on two

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<sup>99</sup> Also note Commissioner Wallström's support for former French presidential candidate Ségolène Royal. Blog entry of 23 April 2007: (<http://blogs.ec.europa.eu/wallstrom/title/>)

<sup>100</sup> Walter van Gerven, Political, ethical and financial and legal responsibility of EU Commissioners, 2007, page 6

<sup>101</sup> See the details on [http://www.europarl.europa.eu/hearings/commission/2008\\_comm/default\\_en.htm](http://www.europarl.europa.eu/hearings/commission/2008_comm/default_en.htm)

<sup>102</sup> The European Parliament / Commission Framework Agreement allows Parliament to request a hearing: '*Where the responsibilities of a Member of the Commission are changed substantially, that Member shall appear before the relevant parliamentary committee at Parliament's request.*' Article 5, Framework Agreement on relations between the European Parliament and the Commission, 26 May 2005

occasions (leave was first granted for one month, and then twice extended by two weeks).<sup>103</sup>

Disruption particularly threatens the end of a Commission's term, as Commissioners might be attracted to stand in national or European elections prior to the expiry of their office. However, the withdrawal or resignation of several Commissioners at around the same time has the potential to significantly constrain the Commission's effectiveness as the remaining Commissioners could be required to cover several portfolios during months (Commissioner Frattini's withdrawal lasted nearly two months). End April 2009 and with six months before the Barroso Commission's end of term (expected for October / November 2009), several Commissioners have been reported to intend to stand in national / European elections.<sup>104</sup> Note that EP elections are scheduled for 4 to 7 June 2009, however, the new Commission is only expected to take up office in October / November 2009, i.e. a 'caretaker' Commission might have to cover some five to six months. EC President Barroso has addressed this situation by issuing a set of guidelines for Commissioners wishing to participate in elections.<sup>105</sup>

In the case of a Commissioner standing for election, it can also be argued that allowing for temporary withdrawal, damages public trust in the Commissioner's commitment to his office. If a Commissioner decides to stand for election, it can be assumed that he is willing to resign as a Commissioner, his office thus becoming 'second choice'. Temporary withdrawal allows the Commissioner to keep his options open in the case of an unsuccessful election campaign.

Finally, allowing Commissioners to stand for election during their office can be criticised for placing costs on the Community budget, i.e. should a Commissioner after participating in an election campaign finally decide to resign, additional EP hearings are required for the new Commissioner.

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<sup>103</sup> See figure 8 above.

<sup>104</sup> In February 2009, Commissioner Grybauskaitė (Financial Programming and Budget) announced her intention to stand for election in the Lithuanian presidential elections. See <http://www.baltictimes.com/news/articles/22431/> (accessed on 9 April 2009). President Barroso authorised her withdrawal as of 17 April 2009. Commissioner Kallas (Administrative Affairs, Audit and Anti-Fraud) was designated to take over her responsibilities during her leave (EC SG, Minutes of the 1867th meeting of the Commission, PV(2009) 1867, 24 March 2009, page 31). Commissioners Reding (Information Society and Media), Hübner (Regional Policy) and Kuneva (Consumer Affairs) have declared their candidacy for the European elections. See <http://www.euractiv.com/en/opinion/new-european-commission/article-180216> (accessed on 9 April 2009) and <http://www.euractiv.com/en/eu-elections/kuneva-lead-liberal-list-bulgaria/article-181673> (accessed on 28 April 2009). The Financial Times also reports the possible candidacy of Commissioner Michel (Development and Humanitarian Aid). See <http://www.ft.com/cms/s/0/33440294-f649-11dd-a9ed-0000779fd2ac.html> (accessed on 9 April 2009).

<sup>105</sup> SEC(2009) 373. See EC SG, Minutes of the 1867th meeting of the Commission, PV(2009) 1867, 24 March 2009, page 31

**WB:** The World Bank Code requires *'that neither the Organizations nor their officers interfere in the political affairs of member countries'*. (Article 2b, World Bank Code of Conduct for board officials, 2007)

 The effectiveness of CoC provisions on political activity could be enhanced by providing for additional transparency. A website dedicated to the CoC could note the Commissioners' notifications to the President as well as the consequences (President decision on compatibility, Commissioner withdrawal from office). This would prevent media speculation on a Commissioner's political activity and thus enhance the Commission's image. Note the example of former Commissioner Frattini's withdrawal in 2008 - with all relevant information available on the Commissioner's website.<sup>106</sup>

Moreover, effectiveness could be enhanced by explicitly stating in the CoC that withdrawal means taking unpaid leave. Whilst not noted in the CoC, this is the established practice, and clarification in the CoC would help avoiding any misunderstandings, e.g. claims that political activity is developed at the cost of the institution.<sup>107</sup>

 **Efficiency?** The current arrangements for notifying political activity do not involve any costs apart from the President's working time to assess compatibility and provide or decline authorisation of a Commissioner's political activity. Limiting the Commissioners' political activity to passive membership of political parties would eliminate these costs.

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<sup>106</sup> All documentation published on [http://ec.europa.eu/commission\\_barroso/frattini/news/archives\\_2008\\_en.htm](http://ec.europa.eu/commission_barroso/frattini/news/archives_2008_en.htm) (accessed in March 2009)

<sup>107</sup> SG feedback of 13 February 2009

## 2.3 Post-office employment

This section assesses the CoC provisions related to post-office employment, i.e a Commissioner's employment after leaving his office. This issue has caused significant concern in the past, with several examples of former Commissioners leaving their office to take up employment in the private sector.<sup>108</sup> In the case of one former Commissioner, the Council took legal action in line with Treaty 213(2), however the case was subsequently withdrawn.<sup>109</sup> Note that when legal action was taken in August 1999, the CoC was not yet in place (the first CoC was announced in July and adopted in September 1999).

### 2.3.1 Description of the mechanism (coverage and clarity)

Developing Treaty Article 213(2),<sup>110</sup> the CoC provides that a Commissioner wishing 'to engage in an occupation during the year after they have ceased to hold office' shall inform the Commission 'in good time'. The latter examines the planned occupation, and if the occupation relates to the Commissioner's portfolio, an 'Ad Hoc Ethical Committee' shall advise the Commission on the occupation's compatibility with Treaty Article 213(2).

Two EC decisions provide for the establishment and composition of the Ad Hoc Ethical Committee (three members to be appointed for three year periods).<sup>111</sup> In 2004, former Commissioners Filippo Maria Padolfi and Karel van Miert as well as former European Court of Justice member John Murray were appointed as members of the Ad Hoc Ethical Committee for a three year period. Consultations on the appointment of new members are currently ongoing, with a view to ensuring that the Ad Hoc Ethical Committee is operational to assess any post-office employment in relation to the forthcoming Commission renewal.<sup>112</sup>

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<sup>108</sup> E.g. Martin Bangemann was Commissioner for internal market and industrial affairs from 1989 to 1995, Commissioner for industrial affairs, information & telecommunication technologies from 1995 to 1999, and joined the Spanish telecommunications company Telefonica in July 2000.

<sup>109</sup> Action brought by the Council against Martin Bangemann on 3 August 1999, Official Journal 1999 C314, page 2. Removed from the Court register on 3 February 2000, Official Journal 2000 C122, page 17

<sup>110</sup> Treaty Article 213.2: '...their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.'

<sup>111</sup> C(2003) 3750 of 21 October 2003 and C(2004) 1866 of 19 May 2004

<sup>112</sup> SG feedback of 18 February 2009

The following paragraphs address the issues of coverage and clarity:

- 🔊 **Focus on private sector appointments:** The CoC provision addresses the case of a Commissioner wishing to take up a private sector activity. Leaving the Commission to take up a public office is not covered according to the SG (though Treaty Article 213(2) does not distinguish between public and private appointments and only includes a general requirement to behave with integrity and discretion).<sup>113</sup>
- 🔊 **Length of notice:** The CoC provisions do not include any definition of the concept '*in good time*', i.e. the length of 'notice' required.
- 🔊 **Criteria for compatibility assessment:** Moreover, there is no elaboration as to the criteria to be used by the Ad Hoc Ethical Committee to provide its opinion. In this context, SG feedback notes that specific guidance was not deemed necessary due to the committee members' '*high ethical and competence standards*'.<sup>114</sup>

### 2.3.2 Application

There has been no requirement for making use of the CoC post-office employment provisions for the Barroso Commission since the three Commissioners who resigned from their office during 2008 (Kyprianou, Frattini and Mandelson) took up public office (in their national government), and as noted above, the provision is only applied to Commissioners leaving the Commission to take up private sector employment (including think tanks).<sup>115</sup>

However, SG feedback confirms that the provisions were applied to five former Commissioners (Prodi Commission), with the Ad Hoc Ethical Committee finding post-office employment to be compatible with former Commission duties. A total of 13 notifications on post-EC employment were assessed in 2005.<sup>116</sup>

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<sup>113</sup> Interview with the SG on 27 January 2009

<sup>114</sup> SG feedback of 18 February 2009 on C(2003) 3750 of 21 October 2003

<sup>115</sup> In 2005, the EC assessed former Commissioner Kalniete's employment in the Robert Schuman Foundation's Management Board. See Minutes of the 1698th meeting of the Commission, PV(2005)1698, 27 April 2005, page 12

<sup>116</sup> SG Annual Activity Report 2005, 29 March 2006, pages 25-26. Assessments concerned former Commissioners Byrne, Bolkestein, Busquin, De Palacio, Kalniete, Kinnock, Monti, Nielson, Patten, Vitorino. See SG Minutes PV(2004)1682, PV(2005)1687, PV(2005)1693, PV(2005)1698, PV(2005)1704, PV(2005)1711, PV(2005)1714, PV(2005)1717, PV(2005)1720. The last Prodi Commission weekly meeting notes that planned post-EC activities of Commissioners Kinnock, Lamy, Schreyer, Vitorino and Telicka are not related to their Commission portfolios. See SG, Minutes PV(2004)1679.

### 2.3.3 Effectiveness and efficiency

Are post-employment provisions effective and efficient with regard to preventing conflicts of interest (the CoC's immediate objective), or with regard to increasing public trust in the institution (the CoC's wider objective)?

 **Effectively preventing conflicts of interest?** As noted above, there is only limited experience with the application of the CoC post-office employment provisions (the five above noted cases did not imply any conflicts of interest).

However, the provisions' effectiveness with regard to preventing conflicts of interest can be questioned from the point of view of the duration during which Commissioners are subject to the CoC post-office employment rules, i.e. one year. Looking at some of the EU Member State ethics regimes as well as the European Commission's own staff regulations,<sup>117</sup> the one-year period can be considered short: ES and UK have two-year limitations; DK has no time limit as there is specific legislation on the secrecy of public sector information). In this context, OECD research notes two-year time limits for Japan, Korea, Turkey, and the Netherlands (even longer restrictions are in place in Germany and France).<sup>118</sup>

The EC comparative study on conflicts of interest for public office holders argues, that the duration of the '*cooling-off period*' in the CoC cannot be considered a serious weakness,<sup>119</sup> as the Treaty already includes a continuing requirement to behave with integrity and discretion.<sup>120</sup> However, why then limit the CoC provision to one year?

The conflict of interest literature supports a balance between post-office restrictions and the freedom of employment (i.e. avoiding strong restrictions) with the argument that junior public officials should have the opportunity of enhancing their skills via private sector experience.<sup>121</sup> However, this argument does not apply to senior public officials or members of government, and some countries with a

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<sup>117</sup> Article 16: '*Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof.*' Regulation 31 of 5 March 1969 (and subsequent amendments) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community

<sup>118</sup> OECD, *Avoiding conflict of interest in post-public employment: Comparative overview of prohibitions, restrictions and implementing measures in OECD countries*, 2006, page 8

<sup>119</sup> European Institute of Public Administration, *Regulating Conflicts of Interest for Holders of Public Office in the European Union*, October 2007, page 66

<sup>120</sup> Treaty Article 213(2): '*...their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.*'

<sup>121</sup> OECD, *Public integrity and post-public employment: issues, remedies and benchmarks*, 6 June 2007, page 7

long experience of ethics regimes have opted for longer ‘probation’ periods, the more senior the public office holder.<sup>122</sup>

In this context it is worth noting that, before taking up office in 2004, Commissioner Kroes committed herself ‘*not to engage into any business activity following the end of my term as Competition Commissioner*’.<sup>123</sup>

**ES:** an office holder’s conflict of interest has consequences for the private sector employer. The employer is excluded from public procurement for the duration of the conflict of interest. Since the law’s entry into force in 2006, this sanction has not been applied. Moreover, for two years after leaving their public office, high-ranking officials cannot engage in technical assistance contracts with the public administration, directly or through companies where they hold more than 10% of the share capital. (Law 5/2006)



**Effectively increasing public trust?** Just as with the Commissioners’ political activity, the effectiveness of CoC provisions on post-office employment could be enhanced by providing for additional transparency. A website dedicated to the CoC could note the Commissioners’ notification on post-office employment, the Ad Hoc Ethical Committee’s opinion (the Commission decision on the establishment of the Ad Hoc Ethical Committee stipulates confidentiality in the committee’s deliberations),<sup>124</sup> and the final Commission decision. In cases where the Commission decides that post-office employment is compatible, transparent procedures, especially with regard to the criteria leading to the Commission’s decision, can be expected to limit outside criticism (e.g. against allegations that decisions are biased in favour of the concerned Commissioner).

Finally, effectiveness might be enhanced by strengthening the Ad Hoc Ethical Committee’s independence. The Commission decision on the establishment of the

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<sup>122</sup> E.g. ‘Canada’s experience (...) has resulted in a longer disqualification period for Cabinet ministers (two years) than for other public office holders and for public servants (one year).’ Ibid, page 19

Similar findings are reported for the United States and Korea in OECD, *Avoiding conflict of interest in post-public employment: Comparative overview of prohibitions, restrictions and implementing measures in OECD countries, 2006*, page 7

<sup>123</sup> Letter by Commissioner-designate Neelie Kroes to President Barroso, dated 17 September 2004 and attached to her public declaration of interests

<sup>124</sup> C(2003) 3750 of 21 October 2003, Article 8

Ad Hoc Ethical Committee stipulates that members are appointed by the Commission on the proposal of its president.<sup>125</sup>



**Efficiency?** The EC decision establishing the Ad Hoc Ethical Committee includes a forecast of travel and subsistence expenses incurred by the committee members with annual costs estimated at €2100. However, as the current committee decided to work mainly by written procedure, total costs for the period 2004 to 2007 only amounted to €1625.<sup>126</sup> Considering that the three committee members are only reimbursed for travel and subsistence costs, and that the scope of work is limited by the number of Commissioners, there are no concerns regarding cost efficiency.

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<sup>125</sup> C(2003) 3750 of 21 October 2003, Article 5

<sup>126</sup> SG feedback of 18 February 2009 on C(2003) 3750 of 21 October 2003 (Article 10)

## 2.4 Operational resources

This section addresses CoC provisions that can be considered as ‘ethics-related’, i.e. provisions on different types of Commissioner operational resources, including travel and representation and support staff (focus on the appointment of Cabinet members).<sup>127</sup> Ethics issues are at stake as it needs to be ensured that an appropriate use is made of the available resources (e.g. cost effectiveness), and that resources are used for the exclusive purposes of the Commissioners’ office (i.e. not for private purposes). Moreover, decisions on staff issues should not be influenced by private considerations.

### 2.4.1 Description of the mechanism (coverage and clarity)

#### Travel and representation

The CoC defines missions as ‘*travel by a Commissioner on Commission business away from the Commission’s place of work*’ (Section 1.2.4), and subjects such travel to a set of rules included as an annex to the CoC (Annex 2).

The CoC’s Annex 2 includes 13 articles setting out the rules governing Commissioner travel.<sup>128</sup> The general EC staff travel rules are to be applied in the absence of specific rules in the CoC.

At the core of the CoC’s Annex 2 is a system of controlling the appropriate use of travel resources: The travel budget is established each year by the Commission on proposal by the President; The Office for Administration and Payment of Individual Entitlements (EC Directorate General Personnel and Administration) monitors the use of the travel budget, and is in charge of the control and reimbursement of actual travel expenses. Most notably, the Office for Administration and Payment of Individual Entitlements ‘*has instructions to suspend the settlement of all expense claims and the payment of advances once the annual limit has been reached*’ (Article 3, third bullet point).

With regard to representation, the CoC only refers to the applicable rules without providing any definition or going into further detail (Section 1.2.5). The CoC notes that the framework for representation is set out in a Commission Decision of 19 September

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<sup>127</sup> Cini differentiates between ‘*ethical issues*’ and ‘*ethics-related issues*’. The latter are more about management and organisation than about ethics. See Michelle Cini, *From integration to integrity*, 2007, page 213

<sup>128</sup> Note that there appears to be a formatting mistake in the CoC’s Annex 2 as the first article is numbered as ‘3’.

1979 (COM(79) 507), with any representation costs not covered by this decision to be met by the 'flat-rate entertainment allowance provided for in the regulation laying down the emoluments of the Members of the Commission'. In this context it is worth noting that the CoC requires updating as SG feedback notes a different Commission Decision to be applicable (Commission Decision C (2007) 3494 of 13 July 2007).<sup>129</sup>

## Support staff

There is no mention of staff resources in the CoC section dealing with conflicts of interest (the CoC's section 1 '*Independence and dignity: Ethical issues*'). Staff issues are, however, addressed in the CoC's Section 2, i.e. the Commissioners' working relations with their departments. Section 2.4.2.2 '*Management of human resources*' notes the Commissioners' right to information or involvement in decision-taking.

The Commissioners have a right to information with regard to appointments of Heads of Unit and Advisors. However, for the functions of Director General (AD15 and 16), Deputy Director General, Head of service or equivalent, Director (AD14 and 15), Deputy Director (AD13) and Principal Adviser, the Commission is the appointing authority.<sup>130</sup> The CoC refers to the relevant EC procedures, noting the following in a footnote: SEC(2004)913, C(2004)1597 (4 and 5), SEC(1999)1485, and SEC(2000)2305/5.

The assessment focuses on the staff for which the Commission is the appointing authority, and within this group, on staff working in the Commissioners' Cabinets (also known as Private Offices).<sup>131</sup> Cabinet members are appointed at the levels of AD15 (Head of Cabinet, EC President), AD14 (Head of Cabinet), AD13 (Cabinet Expert / Adviser), AD12 (Deputy Head of Cabinet).<sup>132</sup>

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<sup>129</sup> SG feedback of 13 February 2009

<sup>130</sup> Currently there are 40 AD16, 244 AD15 and 454 AD14 officials. See EC staff statistics on [http://ec.europa.eu/civil\\_service/about/figures/index\\_en.htm](http://ec.europa.eu/civil_service/about/figures/index_en.htm) (accessed in April 2009). During 2007, there have been selection procedures for one Director General, ten Deputy Director Generals, 45 Directors. See EC DG Personnel and Administration, Annex 5, Annual Activity Report 2007, 2008, page 6

<sup>131</sup> The focus on Cabinet members is in line with the assessment's technical specifications

<sup>132</sup> EC Decision C(2005)4467/1

## **2.4.2 Application**

### **Travel and representation**

The ethics implications with regard to the Commissioners' travel and representation resources are that available resources need to be used adequately (cost effectiveness), and that resources are to be used for the sole purpose of the Commissioner's office.

This is ensured via a system of controls of expenses, i.e. for travel and representation expenses, control of the legal commitment is ensured by the Head of Cabinet. Control of the budgetary commitment and payment is ensured by the Office for Administration and Payment of Individual Entitlements (EC Directorate General Personnel and Administration).

SG feedback indicates that the Office for Administration and Payment of Individual Entitlements as well as Directorate General Personnel and Administration's Cabinet Support Cell provide regular advice on the application of the rules to the Commissioners' cabinets.<sup>133</sup>

The EC does not specifically report on the Commissioners' use of travel and representation resources.

### **Support staff**

Commission decisions on Cabinet appointments are not made public in the minutes of the weekly College of Commissioners' meetings (as is the practice for Commission staff decisions at levels AD13-16).

Cabinet appointments are decided on by the President on the exclusive proposal of the Commissioner concerned (Decisions on other senior appointments are taken by the Commission on proposal by the Commissioner for Administrative Affairs, Audit and Anti-Fraud, and in agreement with the President and the Commissioner responsible for the Directorate General to which the candidate is appointed).

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<sup>133</sup> SG feedback of 13 February 2009

### 2.4.3 Effectiveness and efficiency

Are provisions on operational resources effective and efficient with regard to preventing conflicts of interest (the CoC's immediate objective), or with regard to increasing public trust in the institution (the CoC's wider objective)?

 **Effectively preventing conflicts of interest?** The CoC requirements concerning travel and representation can be considered effective in ensuring that resources are only used for the purpose of the Commissioners' office as the CoC envisages adequate control over Commissioner resource decisions.

However, concerning staff, the CoC differs from other ethics regimes as no specific course of action is envisaged for a Commissioner's staff decision concerning a family member (including partners) or other relation (friends, former colleagues or business partners etc.) apart from the general statement in the CoC's introduction requiring Commissioners *'to discharge their duties in the general interests of the Community'*.

Other ethics regimes tend to highlight that the office holder's involvement in the appointment of officials (or promotion) could actually constitute or be perceived to constitute a conflict of interests. This is achieved by providing for detailed definitions of conflicts of interest or specifically noting ethical requirements in relation to appointment procedures. Moreover, generally, a specific course of action is provided for, i.e. abstention from participation in related decision-making.

**EC:** *'An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter.'* Staff Regulations' Article 11(a).<sup>134</sup>

**CAN:** *'No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest (...) No minister of the Crown, minister of state or parliamentary secretary shall, in his or her*

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<sup>134</sup> Regulation 31 of 5 March 1969 (and subsequent amendments) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Article 11a

*capacity as a member of the Senate or the House of Commons, debate or vote on a question that would place him or her in a conflict of interest.'*  
Article 6, Conflict of Interest Act.

In October 2006, the EP raised this issue in relation to Commissioner Verheugen's appointment of his Head of Cabinet.<sup>135</sup> Noting the Commissioner's '*very close personal ties*' to the concerned staff, the EP questioned whether the appointment complied with '*rules of transparency and impartiality*', and asked whether in analogy to the Wolfowitz case,<sup>136</sup> the Commissioner should be asked to resign. The EC answered: '*The Commission is able to confirm that the appointment of all Heads and indeed members of Cabinets within the Commission has fully complied with the rules and provisions governing the appointment of Heads of Cabinet and Cabinet members*'.<sup>137</sup> The possibility of the appointment of Commissioner Verheugen's Head of Cabinet implying a conflict of interest was not considered.

This raises the question as to whether, in principle, a Commissioner can take a decision on the appointment of an 'acquainted' official whilst respecting the requirement to act in the general interest. This situation can only be considered to constitute a typical case of a conflict of interest between the public office and the office-holder's private interests. Irrespective of whether the concerned candidate is the most suitable candidate for appointment or not, personal considerations influencing the appointment can not be excluded.

**WB:** '*Treatment of staff shall not be influenced by personal ties between a supervisor and the staff member (...) A sexual relationship between a staff member and his/her direct report, or indirect manager or supervisor is considered a de facto conflict of interest*'. WB Staff Rule 3.01 Section 4

In the Wolfowitz case, the WB commented on this rule: '*It makes clear that personal relationships between a direct or indirect manager and a subordinate constitute a de facto conflict of interest. It imposes on the manager the obligation to seek a resolution to the conflict. Most importantly,*

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<sup>135</sup> See EP questions E4684/2006 of 23 October 2006 and E3084 of 20 June 2007

<sup>136</sup> In June 2007, former WB President Paul Wolfowitz, resigned further to having promoted the career of his girl friend within the WB. The investigation of this case shows that Wolfowitz failed to avoid a conflict of interest by negotiating the 'related' official's specific terms for an external assignment. WB Ad Hoc Group Report, 13 May 2007, page 30. See the WB website: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:21304215~pagePK:98400~piPK:98424~theSitePK:95474,00.html> (accessed in April 2009)

<sup>137</sup> See EC answers of 11 December 2006 and 21 September 2007

*it underscores the risk the rule seeks to avoid: that treatment of staff is influenced by personal ties'.<sup>138</sup>*

**UK:** Ongoing ethics reforms include provisions on barring members of parliament from hiring their own staff.



**Effectively increasing public trust?** With regard to Commissioner travel and representation, there is an additional ethics implication. Information on Commissioner travel and representation expenses allows for the monitoring of possible conflicts of interest, e.g. a Commissioner's travel or representation expenses can be related to his subsequent decisions. In this regard, the effectiveness of CoC requirements could be enhanced by providing for additional transparency, e.g. via the annual publication of the Commissioners' travel and representation costs.

Indeed, several EP questions to the EC have focused on the Commissioners' travel and representation expenses, suggesting that the EC provide more comprehensive information with a view to monitoring possible conflicts of interest: *'Then Parliament could also scrutinise the Commission's work more easily'.<sup>139</sup>*

The EC's first response indicates that there is no intention to publish comprehensive information on the Commissioners' use of travel and representation resources.<sup>140</sup> Subsequent EP questions are answered with information on the Commissioners' use of resources (information is provided to the EP, however information is not published).<sup>141</sup>

An EC answer provided in 2008 sheds a light on the detail of information shared with the EP: noting resource constraints as well as *'security and diplomatic reasons'*, the EC declines to provide information on a specific Commissioner's use of travel resources in terms of the duration and purpose of the mission, activities developed during the mission, and the composition of the travelling delegation.<sup>142</sup>

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<sup>138</sup> WB Ad Hoc Group Report, 13 May 2007, page 35 Note that whilst the Wolfowitz case also involved violations of WB staff rules, Commissioner Verheugen's Head of Cabinet was appointed in compliance with relevant staff regulations.

<sup>139</sup> See EP question E4199/2005 of 16 November 2005

<sup>140</sup> See EC answer of 26 February 2006 to EP question E4199/2005

<sup>141</sup> See EP question E0014/2006 of 10 January 2006 for travel resources used in 2005, E0557/2007 of 12 February 2007 on travel and representation resources used in 2005 and 2006, E1966/2008 of 9 April 2008 on travel and representation resources used in 2007, and E1477/2009 of 6 March 2009 on travel resources used in 2008.

<sup>142</sup> See EC answer of 16 April 2008 to EP question E1584/2008

**UK:** The cabinet office publishes all travel over £500 (≈ €560) undertaken by ministers. Published information includes the date of travel, the destination, the purpose of travel, the type of transport used, the number of persons accompanying the minister (where non-scheduled means of transport are used), total travel costs and whether the minister was accompanied by his spouse / partner (and whether related costs were included or not). This information has been made public on an annual basis since 1997.<sup>143</sup>

 **Efficiency?** SG feedback indicates that DG Personnel and Administration's Office for Administration and Payment of Individual Entitlements allocates '*on average 2 persons for travel and 1.5 persons as concerns professional representation*'.<sup>144</sup>

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<sup>143</sup> See [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics.aspx](http://www.cabinetoffice.gov.uk/propriety_and_ethics.aspx) (accessed in April 2009)

<sup>144</sup> SG feedback of 13 February 2009

## 2.5 Register of gifts

This section assesses the operation of the CoC provisions on gifts.

### 2.5.1 Description of the mechanism (coverage and clarity)

The CoC's section 1.2.5 stipulates that '*Commissioners shall not accept any gift with a value of more than EUR 150.*' More expensive gifts shall be handed over to the SG's Protocol Service, with the latter maintaining the public register of gifts.<sup>145</sup> If there is any doubt as to a gift's value, the Office for Infrastructure and Logistics (EC Directorate General Personnel and Administration) undertakes a valuation.

Considering the mechanism's coverage and clarity, two issues arise. The CoC provisions only appear to address physical gifts (there is no definition of the term '*gifts*'); other benefits such as hospitality (e.g. holiday invitations) are not explicitly mentioned. Moreover, the CoC does not specify the detail of information to be provided in the public register (e.g. on the gifts' donors).

### 2.5.2 Application

The SG Protocol Service maintains detailed information on the origin of gifts worth over €150 (i.e. donor names), however, details are not published for considerations of diplomacy.<sup>146</sup> The register of gifts is updated twice a year (the current register shows gifts presented until 24 October 2008).<sup>147</sup> Moreover, the Protocol Service provides guidance on the CoC provisions on gifts in the context of annual protocol training for the Commissioners' Cabinets.

SG feedback further indicates that: '*the advance party in charge of the preparation of the visit is informed that the CoC will be applicable and that gifts above 150€, will have to be handed over to the Protocol. The advance party in charge is also informed that the*

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<sup>145</sup> [http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm) (accessed in April 2009)

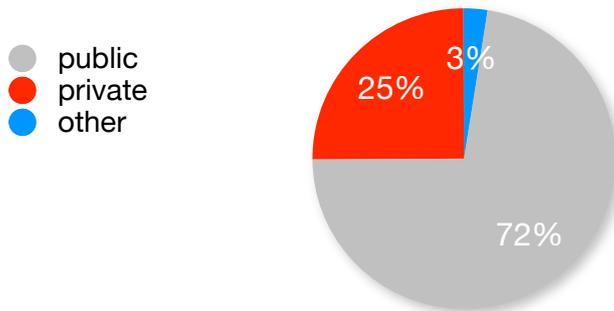
<sup>146</sup> Interview with the SG on 27 January 2009

<sup>147</sup> Answer by Commission President Barroso to EP Question E-3375/05, 25 November 2005

*involved member of the Commission will not reciprocate*'.<sup>148</sup> Note, however, that the Commissioners' representation rules allow the Commissioners to present a gift in the framework of official missions: '*Sont couvertes par la présente décision, les dépenses de représentation engagées par un Membre de la Commission pour des motifs de représentation en raison des usages (par exemple: repas, bouquet de fleurs ou cadeaux en cas de déplacement officiel)*'.<sup>149</sup>

The current public register notes a total of 232 gifts worth more than €150 for the period November 2004 to October 2008. 72% of donors are from the public and 25% from the private sector (Figure 10 below). About 49% of all gifts originate in the EU (Figure 11 below). The large majority of gifts are presented to a small number of Commissioners with the President in the lead, followed by the portfolios for competition and enlargement; seven Commissioners have received no gifts; and 17 Commissioners have received between one and five gifts (Figure 12 below).

**Figure 10 - Donors of gifts worth more than €150, November 2004 to October 2008**<sup>150</sup>

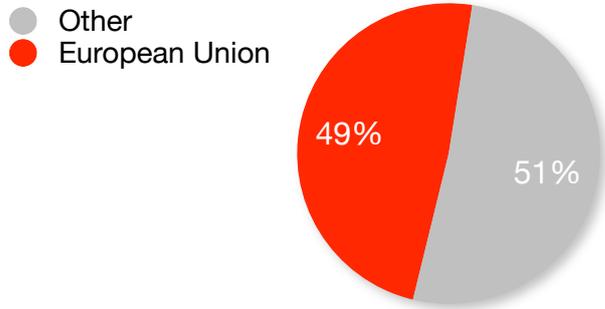


<sup>148</sup> SG feedback of 13 February 2009. Note, however, that EC Decision C (2007) 3494 of 13 July 2007 (Article 1) on representation costs allows the Commissioners to present a gift in the framework of official missions: '*Sont couvertes par la présente décision, les dépenses de représentation engagées par un Membre de la Commission pour des motifs de représentation en raison des usages (par exemple: repas, bouquet de fleurs ou cadeaux en cas de déplacement officiel). L'utilisation des présents mis à disposition par le service du Protocole est à privilégier*'

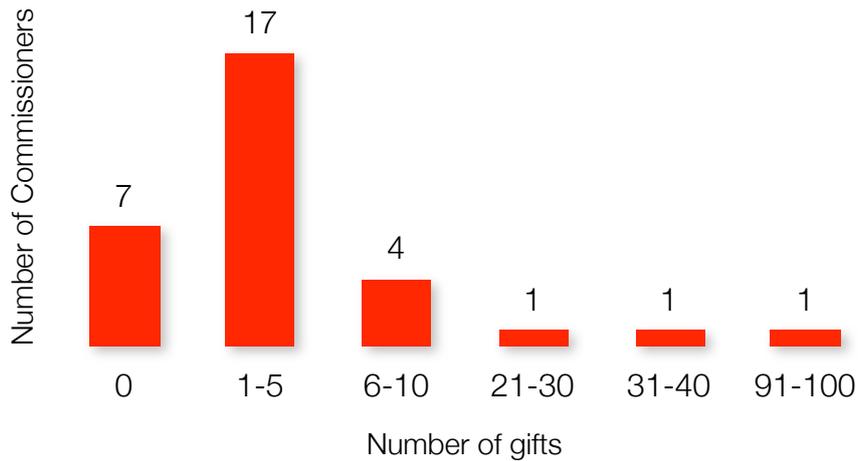
<sup>149</sup> EC Decision C (2007) 3494 of 13 July 2007 (Article 1(1)b)

<sup>150</sup> The category 'other' includes gifts presented by 'royal family', 'university' and 'religion'. Figures as on 6 April 2009 on the public register ([http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm)) and covering gifts presented during November 2004 to October 2008.

**Figure 11 - Origin of gifts worth more than €150, November 2004 to October 2008**



**Figure 12 - Receivers of gifts worth more than €150, November 2004 to October 2008**



Concerning other benefits extended to the Commissioners (e.g. hospitality), there are no explicit provisions in the CoC (only gifts are mentioned), and Commissioners reported to have accepted such benefits (holiday invitations) include EC President Barroso (in 2004) and former Commissioner Mandelson (in 2008).<sup>151</sup>

The EC has addressed this issue in reply to different EP Questions: *'The principles and rules governing the acceptance of gifts by Members of the Commission in the exercise of their duties, irrespective of the form such gifts may take — including, in principle, non-*

<sup>151</sup> See International Herald Tribune of 21 April 2005 and Daily Telegraph of 27 October 2008. Note in this context that the Commission President reacted to criticism by committing to abstain from any decisions related to the business area of the concerned 'holiday sponsor'. Cini, *From integration to integrity*, 2007, page 195

*tangible gifts such as trips unrelated to the performance of their duties — are laid down in the code of conduct for Members of the Commission*'.<sup>152</sup> The EC has also clarified that hospitality received in the Commissioner's official capacity is not covered: *'The hospitality extended to Commissioners in their official capacity, in the context of their representative functions or professional obligations, are not regarded as gifts*'.<sup>153</sup> Note, however, that the interpretation of the CoC's gift policy as covering other hospitality was not applied to hospitality received by former Commissioner Mandelson.<sup>154</sup>

**DK:** The Danish Code of Conduct for public administration (chapter 6) provides a detailed account of the type of gifts that are acceptable. The definition of gifts and benefits is very broad and refers not only to physical objects, but also to hospitality (invitations, travel...), sponsorships, discounts or cash payments.

**UK:** *'If a Minister accepts hospitality, the Minister should notify their Permanent Secretary and it should be declared in the Register of Members' or Peers' Interests. Registration of hospitality would normally be required for hospitality over £600 (≈ €672) in value for the Commons and £1000 (≈ €1120) for the Lords.'* (Article 7.24, Ministerial Code, 2007)

### 2.5.3 Effectiveness and efficiency

Is the register of gifts an effective and efficient mechanism with regard to preventing conflicts of interest (the CoC's immediate objective), or with regard to increasing public trust in the institution (the CoC's wider objective)?



**Effectively preventing conflicts of interest?** SG feedback notes a reduction in the number of gifts received as a result of the information on gifts given by the Protocol Service in the course of preparing a visit (see Figure 13 below),<sup>155</sup> and current CoC provisions could therefore be considered effective in preventing

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<sup>152</sup> Answer by Commission President Barroso to EP E-2163/05, 19 August 2005

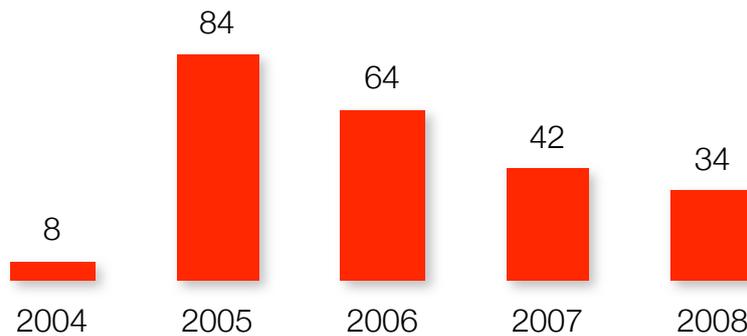
<sup>153</sup> Answer by Commission President Barroso to Parliamentary Question E-3375/05, 25 November 2005 and E-6113/08, 9 December 2008

<sup>154</sup> See Daily Telegraph of 27 October 2008

<sup>155</sup> SG feedback of 13 February 2009

conflicts of interest if it were not for the missing disclosure of donors, and the omission to explicitly require Commissioners to disclose the receipt of other benefits such as hospitality received when not performing official duties (see below).

**Figure 13 - Annual volume of gifts, November 2004 to October 2008**<sup>156</sup>



**Effectively increasing public trust?** The public register of gifts does not reveal the gifts' donors. This limits the instrument's effectiveness as the public can see who receives gifts, but not assess whether this has any ethics implications (e.g. further to receiving a gift, a Commissioner's action benefits the donor).

The EC justifies the confidentiality of the gifts' origin by reference to diplomatic considerations.<sup>157</sup> In answer to an EP question on why the donors of gifts are not disclosed the Commission answered '*To publish a list of gifts containing the names of the donors would cause embarrassment to those visitors who, acting on advice, did not present any gift*'.<sup>158</sup> A more recent EP question - '*Why is the Commission not as open as the British Parliament about the gifts etc received by Commissioners?*' - was not answered directly.<sup>159</sup>

The EC stance can be questioned as it gives more importance to avoiding a visitor's embarrassment than protecting a Commissioner from a conflict of interest. It is also questionable whether an 'enlightened' visitor who understands the CoC

<sup>156</sup> The steep increase in 2005 is explained by the Commission taking up office in late 2004. Figures for 2008 only cover the months January to October.

<sup>157</sup> SG interview of 27 January 2009

<sup>158</sup> Answer by Commission President Prodi to EP Question E-1920/02, 23 September 2002

<sup>159</sup> EP Question E-6113/08, 12 November 2008

requirements, and therefore abstains from presenting a gift, is likely to be embarrassed by a different visitor who does not act in accordance with the CoC requirements.

Moreover, Member State experience shows that the origin of gifts can be made public without negative diplomatic consequences, e.g. by indicating the name of the visitor's institution instead of the actual visitor's name. Finally, it is not clear why diplomatic considerations should apply to private sector gifts.

**UK:** The cabinet office publishes all gifts received by ministers, indicating the origin of gifts, i.e. for companies: the name of the company; and for public sector donors, the country and name of the institution. This information has been made public since 2001.<sup>160</sup> The UK gift policy allows four options as regards the handling of gifts above a value of £140 (≈ €157): the gift can be declined, the receiving member of government can buy the gift after independent valuation, it becomes government property or it is handed over to a charity (Ministerial Code 2007, Article 7.22).

**WB:** The WB provides for three options for gifts of a value of over \$50 (≈ €38): *'turned over to the Organization for charitable donation, display on the premises, or independent appraisal on the basis of which the Board Official may be allowed to purchase the gift'*. (Article 10, World Bank Code of Conduct for Board Officials, 2007)

Moreover, effectiveness is constrained by the missing requirement to disclose the receipt of other benefits such as hospitality. Whilst the Commission interprets the CoC requirements to cover hospitality, it appears that this is not effectively applied (note the reported receipt of hospitality by former Commissioner Mandelson in 2008).

Finally, effectiveness is likely to benefit from the introduction of a strict 'zero-gift policy' (i.e. no gifts to be accepted). Research has shown that *'...strict gift policies have a positive impact on gift taking. Strict gift policies may seem extreme by prohibiting public officials from receiving gifts from anyone. However, they eliminate any doubt, are easy to understand and also easy to enforce.'*<sup>161</sup> Considering cultural traditions in presenting gifts, it should, at least, be possible to introduce a

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<sup>160</sup> See [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics.aspx](http://www.cabinetoffice.gov.uk/propriety_and_ethics.aspx) (accessed in April 2009)

<sup>161</sup> H. Fain, The Case for a Zero Gift Policy, in: Public Integrity, Winter 2002, p. 61

zero-gift policy for the European Union (accounting for 49% of all gifts currently registered).



**Efficiency?** SG feedback indicates that the operation of the CoC's provisions on gifts only require minor resources: assessments of a gift's value are only required on rare occasions, and the Protocol Service resources allocated to the gifts policy is estimated at one person/two hours a month (covering both the gifts policy and the more general 'help-desk function').<sup>162</sup> Whilst only minor resources are required to operate the current CoC gifts policy, applying a strict zero-gift policy (at least for the EU) would allow a further reduction of costs.

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<sup>162</sup> SG feedback of 13 February 2009 indicates that the value of gifts is usually assessed by the Protocol Service. Only if the value of a gift appears very high, the Office for Infrastructure and Logistics (EC Directorate General for Administration and Personnel) contracts an expert to undertake the evaluation (mainly for insurance purposes).

## 2.6 What is missing?

Whilst the previous sections have already identified a series of gaps in relation to the CoC's five main mechanisms, this section asks whether any further provisions are required in order to promote ethical conduct in the College of Commissioners. This covers both, additional mechanisms as well as horizontal provisions (applying to all mechanisms) to strengthen the CoC.

The ethics matrix is applied to the CoC, thus identifying gaps (2.6.1). Gaps are then noted, following the format of the ethics matrix:

- 🕒 What needs to be covered? (2.6.2)
- 🕒 When - at what point in time is coverage required? (2.6.3)
- 👤 Who needs to be addressed? (2.6.4)
- 🕒 and how can compliance be enforced? (2.6.5)

### 2.6.1 Applying the ethics matrix to the CoC

The following figure applies the ethics matrix as introduced in section 1.1.2 (Content of ethics regimes) to the CoC. Red-coloured question marks highlight possible gaps in the CoC; green tick marks indicate that the CoC deals with the concerned issue (not implying a judgement on whether the concerned issue is dealt with in an effective way).

**Figure 14 - Ethics matrix applied to the CoC**

1) What ?	2) When?			3) Who?		4) How?				
	2.1) pre-office ✓	2.2) in-office ✓	2.3) post-office ✓	3.1) office holder ✓	3.2) family ?	3.3) other ?	4.1) prevent ?	4.2) internal enforce-ment ?	4.3) external enforce-ment ?	4.4) penalty ?
<b>In-office activity</b>										
<ul style="list-style-type: none"> <li>▶Conflict of interest with pre-office activity ?</li> <li>▶Public and private behaviour respectful of the public office (dignity) ✓</li> <li>▶Confidential treatment of in-office information (discretion) ✓</li> <li>▶Gifts / decorations / honours ✓</li> <li>▶Other benefits / hospitality ?</li> <li>▶Operational resources: travel and representation, appointment of support staff ✓</li> </ul>										
<b>Political activity</b>										
▶Supporting political activity (e.g. engagement in national political activity) / Standing for election ✓										
<b>Other activity</b>										
<ul style="list-style-type: none"> <li>▶Public office ✓</li> <li>▶For benefit (including seeking future employment) ✓</li> <li>▶Non for benefit: artistic / scientific /creative / literary / charitable / educational ✓</li> </ul>										
<b>Financial assets</b>										
▶Financial / real estate ✓										

### 2.6.2 What? - Gaps with regard to coverage

This section focuses on the issue of conflicts of interests arising in the course of a Commissioner’s term, and caused by the Commissioner’s pre-office professional activity / pre-office financial interests.<sup>163</sup> As shown in the ethics matrix above, the CoC does not explicitly deal with this situation: whilst the declarations of interest require a Commissioner to list all professional activities engaged in over the ten years prior to taking up office as well as current financial interests, the CoC does not specify a course of action if a conflict of interest arises.<sup>164</sup>

<sup>163</sup> Other gaps with regard to coverage have been addressed under sections 2.1 to 2.5.

<sup>164</sup> However, this does not mean that such a conflict of interest cannot be addressed. Treaty Article 217(2) allows the President to re-allocate responsibilities and Article 217(4) provides for the possibility of the President asking a Commissioner to resign. As to a conflict of interest arising in relation to the President’s pre-office professional activity, Article 216 allows the Council to ask the Court of Justice to compulsorily retire any member of the Commission.

The OECD Guidelines are clear on the necessity for an explicit procedure to deal with such a conflict of interests: *'...the registration or declaration of a private interest does not in itself resolve a conflict. Additional measures to resolve or manage the conflict positively must be considered'*.<sup>165</sup>

The OECD Guidelines note the following possible measures: *'Divestment or liquidation of the interest by the public official; Recusal of the public official from involvement in an affected decision-making process; Restriction of access by the affected public official to particular information; Transfer of the public official to a duty in a non-conflicting function; Re-arrangement of the public official's duties and responsibilities; Assignment of the conflicting interest in a genuinely 'blind trust' arrangement; Resignation of the public official from the conflicting private-capacity function; Resignation of the public official from their public office.'*<sup>166</sup>

The following considerations argue in favour of introducing more explicit provisions in the CoC:

-  The Staff Regulations' Article 11(a) covers the scenario of a conflict of interest caused by pre-office professional activity: *'An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter'*.<sup>167</sup> Considering the Commissioners' more far-reaching powers (when compared to regular officials), it would appear all the more important to introduce explicit provisions for the Commissioners. Note in this context that the European Court of Justice, referring to the Staff Regulations' Articles 10-12, considered: *'Although these rules do not apply to Members of the Commission, it may be accepted that these standards constitute an absolute minimum to be respected by them'*.<sup>168</sup>

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<sup>165</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 8

<sup>166</sup> Ibid

<sup>167</sup> Regulation 31 of 5 March 1969 (and subsequent amendments) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Article 11a

<sup>168</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04 (EC v Edith Cresson), 23 February 2006, point 76

Whilst there are no explicit provisions in the CoC, in practice, there is already some experience with such conflicts of interest. Indeed, a course of action has been established in relation to Commissioner Kroes (responsible for the Competition portfolio). Before taking office in 2004, Commissioner designate Kroes committed herself to abstain for one year from any official activity that could have a relation to any of her former private sector activity.<sup>169</sup> Before taking up office, Commissioner Kroes also established a trust, governed by an independent trustee, to take care of her financial interests.<sup>170</sup>

**ES:** For financial interests of over €100000, an independent trust needs to be established to manage financial interests during the term of office. (Law 5/2006, Article 13)

**UK:** The general rule is that ministers should dispose of their interests. However, *'Where it is proper for a Minister to retain a private interest, he or she should declare that interest to Ministerial colleagues if they have to discuss public business which in any way affects it and the Minister should remain entirely detached from the consideration of that business. Similar steps may be necessary in relation to a Minister's previous interests.'* (Article 7.6, Ministerial Code, 2007)

**WB:** *'If an actual or apparent conflict of interest arises or there is doubt whether a conflict of interest exists, the Board Official concerned shall promptly disclose the matter to the Ethics Committee for guidance and shall recuse himself or herself by withdrawing from attendance and participation in deliberations or decision-making connected with that matter, pending guidance from the Ethics Committee.'* (Article 7a(i), Code of Conduct for Board Officials, 2007)

**CAN:** The establishment of an independent trust is required for assets worth more than 20000 Canadian Dollars (≈ €12482).<sup>171</sup>

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<sup>169</sup> Letter by Commissioner-designate Neelie Kroes to President Barroso, dated 17 September 2004 and attached to her public declaration of interests

<sup>170</sup> Annex 2 to the public declaration of interests for Commissioner Neelie Kroes

<sup>171</sup> Parliament of Canada, Conflict of Interest and Ethics Commissioner, Annual Report 2007-2008 in respect of the Conflict of Interest Act, 2008, page 8

SG feedback provides additional insights into the procedure applied for Commissioner Kroes: *'an internal procedure was set up to identify the relevant cases, which are signalled by the Director General of DG Competition, as they come to DG Competition's table. For the cases identified, the President decides whether it is justified to reallocate responsibility. The President of the Parliament is informed about the reallocation decision'*.<sup>172</sup> SG feedback confirms that this procedure has been applied on 22 occasions (to Commissioner Kroes), with the President reallocating responsibilities in all cases.<sup>173</sup> Moreover, the EP is informed of all reallocation decisions in line with the 2005 Framework Agreement on relations between the European Parliament and the Commission.<sup>174</sup>

Whilst more limited in its scope, a de facto arrangement exists for Commission President Barroso. When accused of favouring the business interests of a shipping industrialist friend, President Barroso committed himself to abstention in relation to EC anti-trust issues concerning the shipping industry.<sup>175</sup> However, subsequently there has been no need to apply this arrangement.

Considering the objectives of effectively preventing conflicts of interest and increasing public trust, it can be argued that the CoC could only benefit from 'formalising' existing practice in relation to conflicts of interest arising from pre-office professional activity. Similarly, and with regard to conflicts of interest arising from pre-office / in-office financial interests, formalising the approach adopted by Commissioner Kroes can only contribute to the CoC's effectiveness (i.e. requiring the establishment of independent financial management). In this context it should also be noted that whilst conflicts of interests are more likely to occur in relation to Commission portfolios with a direct private sector relation (e.g. Competition, Industry and Enterprise etc.) other portfolios can also be affected, e.g. the Development portfolio could be affected by a Commissioner with pre-office professional experience or links to a NGO involved in development cooperation.

Finally, if it is decided to introduce detailed provisions on dealing with such conflicts of interest, it is advisable to ensure utmost transparency, e.g. making re-allocations public.

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<sup>172</sup> SG feedback of 13 February 2009

<sup>173</sup> SG feedback of 18 February 2009

<sup>174</sup> Article 2: *'...The President of the Commission shall be fully responsible for identifying any conflict of interest which renders a Member of the Commission unable to perform his or her duties. The President of the Commission shall likewise be responsible for any subsequent action taken in such circumstances; if an individual case has been re-allocated, the President shall inform the President of Parliament thereof immediately and in writing.'*

<sup>175</sup> Cini, *From integration to integrity*, 2007, page 195

### 2.6.3 When? - Weaknesses with regard to the timing of application

Two gaps have been identified in relation to the ‘timing’ of the CoC provisions: the duration of post-office restrictions and the requirement to keep declarations of interests up-to-date. These two issues have already been discussed in sections 2.1 (Declarations of interest) and 2.3 (Post-office employment).

### 2.6.4 Who? - Limitations concerning the Code’s addressees

The CoC’s principal addressees are the Commissioners. However, Section 2.1 (Declarations of interest) has noted that the declarations of interest also cover the Commissioners’ spouses. The Commissioners are required to declare their spouses’ professional activities as well as financial interests and assets. Section 2.1 has already noted that there are deficiencies with regard to the declaration of the spouses’ activities and financial interests (e.g. inconsistent completion of the declarations, insufficient detail to assess potential conflicts of interest).

This section therefore focuses on potential conflicts of interest in relation to a Commissioner’s other family members and relations (e.g. partners, friends, pre-office professional contacts). The Briefing Note presented at the EP workshop on governance noted the missing provisions in relation to other Commissioner relatives as one of the CoC’s main deficiencies.<sup>176</sup>

Whilst there does not appear to be any practical experience with conflicts of interests affecting a Commissioner’s other family members, there have been media reports on potential conflicts of interest in relation to friends / pre-office professional contacts.<sup>177</sup> The following paragraphs briefly discuss conflicts of interest in relation to other family members and relations.

- 🗣️ There is no experience with conflicts of interest in relation to a Commissioner’s other family members. However, the same motivation behind declaring a spouse’s activities and interests should apply to other family members living with the Commissioner or close to the Commissioner e.g. children with professional activity. Note in this context that the Staff Regulations treat *‘non-marital partnerships’* as

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<sup>176</sup> Leuven Centre for Global Governance Studies, Efficiency of Accountability Instruments in International Organisations, Briefing Note for the Workshop on Governance in the European Commission, 3-4 October 2007, page 3

<sup>177</sup> The cases have already been noted in Section 2.5 and concerned two members of the Commission (Barroso, Mandelson) accepting hospitality from friends / pre-office professional contacts.

marriage.<sup>178</sup> Other ethics regimes distinguish between first- and second degree family, with requirements the more demanding the closer the family members are to the office holder. Moreover, the same requirements are applied to partners as to spouses.

**ES:** With regard to financial interests, Law 5/2006 covers ‘partners’ as well as spouses (*‘cónyuge o persona que conviva con él en análoga relación de afectividad’*), and family members (e.g dependent children) (Article 6.1). The declaration of activities covers the member of government and his / her spouse, partner, and second-degree family (*‘familiar dentro del segundo grado’*) (Article 11).

**Finland:** The Administrative Procedure Act (434/2003) provides ethics rules for the official with regard to some conflict-of-interest situations. A civil servant has to disqualify him/herself in cases when, for example, the official him/herself or a close person is a party to the matter, or when specific benefit or specific loss from the decision of the matter is foreseen for the official or a close person. The Act provides a very detailed definition of term close person, including official’s spouse, child, grandchild, sibling, parent, grandparent etc. It defines a spouse as a partner in wedlock, a domestic partner and a partner in a registered partnership.

**UK:** The Ministerial Code of Conduct requires a declaration of interests by Ministers and the *‘interests of the Minister’s spouse or partner and close family which might be thought to give rise to a conflict’* (Ministerial Code, July 2007, Article 7.3).

 Concerning a Commissioner’s other relations such as friends or pre-office professional contacts, it appears obvious that it is not feasible to cover these with a declaration of interests (where to draw a line? how to monitor?). In this regard, the enforcement of ethics needs to rely on the Commissioners noting such conflicts of interest as they arise and abstaining from any related decision-making (see section 2.6.2 above).

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<sup>178</sup> Regulation 31 of 5 March 1969 (and subsequent amendments) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Article 1d (second paragraph)

### 2.6.5 How? - Weaknesses in relation to the Code's application

Section 1.2.3 has presented the wider institutional framework ensuring the CoC's application (the Commissioners, the EC SG, and the EC Directorate General Personnel and Administration), and sections 2.1 to 2.5 have discussed the application of the CoC's specific mechanisms.

The present section addresses gaps in relation to the CoC's application with a focus on a series of 'horizontal' issues affecting all of the CoC's mechanisms. The section is structured by looking first at internal enforcement (enforcement within the EC), then at external enforcement ('supervision' by outside institutions), and finally at the sanctions applied to the CoC's infringements.

#### Internal enforcement

Three horizontal issues will be discussed in relation to internal enforcement: the prevention of conflicts of interest, the monitoring and evaluation of the Commissioners' ethics regime, and finally, the CoC's enforcement in relation to the President of the Commission.

 **Preventing conflicts of interest:** Most ethics literature coincides on the importance of prevention, and a code of conduct essentially aims to prevent conflicts of interest by highlighting relevant issues and providing for mechanisms to help avoid conflicts of interest. The OECD Guidelines note with regard to prevention: *'guidelines and training materials, as well as advice and counselling, should provide practical examples of concrete steps to be taken for resolving conflict of interest situations'*.<sup>179</sup>

EC SG feedback indicates that a series of preventive measures are in operation: *'Incoming Commissioners receive extensive briefings (including on ethics issues) and ethics issues are also addressed in the framework of the Commissioners' preparations for their hearings at the EP. In addition, the President's Office holds information sessions at regular intervals involving cabinets, during which financial rules and ethics matters are recalled. Moreover, ethics matters are at times discussed during the informal College breakfasts and seminars, the latter organised twice per year (...) Guidance is also provided via the Cabinet's intranet and internal guidelines for the Cabinets. If needed and when requested to do so, the Secretariat General provides advice to the Commissioners' cabinets in relation*

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<sup>179</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 7

*to the Code of Conduct.*' The SG notes that the cabinets '*most generally welcome its advice*'.<sup>180</sup>

Can preventive measures be considered effective? Considering the actual use of the SG '*help-desk function*' (during 2008 alone, advice on outside activities was provided on some 210 occasions), it appears that prevention is largely effective, i.e. conflicts of interest are avoided by asking the SG for advice before engaging in an activity that could constitute a conflict of interest.<sup>181</sup>

However, there might be scope for further enhancing effectiveness. Indeed an internal advisory function such as the SG's help desk function, could be criticised for its lack of independence, e.g. being biased in favour of the Commissioners. The 1999 Committee of Independent Experts recommended: '*An independent standing "Committee on Standards in Public Life" should be created by interinstitutional agreement to formulate, supervise and, where necessary, provide advice on ethics and standards of conduct in the European institutions*'.<sup>182</sup> This resulted in the proposed *Advisory Group on Standards in Public Life*.<sup>183</sup>

President Barroso confirmed the usefulness of such an independent advisory function in relation to criticism over having accepted hospitality from an entrepreneur friend.<sup>184</sup> Note that the advisory function could follow the model of the inter-institutional Advisory Group on Standards in Public Life or take the form of an 'enlarged' Ad Hoc Ethical Committee, i.e. a widening of the functions of the already existing structure.

**UK:** The Committee on Standards in Public Life was established in 1994. Its remit is to 'examine current concerns about standards of conduct of all holders of public office' (including ministers) and its main task is to investigate cases that have been recommended by the Parliamentary Commissioner for Standards. The members are appointed by the Prime Minister to whom the Committee reports. The Committee can recommend penalties to be voted on by Parliament, but it is an advisory, not a regulatory

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<sup>180</sup> SG feedback of 13 February 2009

<sup>181</sup> Ibid

<sup>182</sup> EP, Committee of Independent Experts, Second report on reform of the Commission, 10 September 1999, page 24

<sup>183</sup> Proposal for an Agreement between the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions establishing an Advisory Group on Standards in Public Life, SEC / 2000 / 2077 final

<sup>184</sup> Cini, From integration to integrity, 2007, page 195

body and its terms of reference specifically preclude it from investigating individual cases, or specific allegations of misconduct.

**WB:** The Ethics Committee bears primary responsibility for the implementation and interpretation of the Code of Conduct for Board Officials. This Committee responds to requests for guidance in relation to conflicts of interest and the financial disclosure process. The establishment of a permanent, standing Ethics Committee has resulted in more consistent guidance to Board Officials regarding their responsibilities under the Code of Conduct. Perhaps most significantly, the Ethics Committee's emphasis on providing proactive guidance, rather than seeking out non-compliance, has resulted in Board Officials making better use of its advisory services. Because going to the Committee feels safe and its responses and recommendations are perceived as safe, fair, and reasonable, Board Officials are not fearful of going to seek guidance. Many queries tend to be seeking reassurance that planned activities are in line with both the letter and the spirit of the Code. (Section C, World Bank Code of Conduct for Board Officials, 2007)

OECD research on post-office employment provides a useful example in relation to the possible tasks of an advisory body: *'In the United States, in addition to educational or training materials prepared by individual agencies, the Office of Government Ethics posts on its website (...) a digest of its informal opinions regarding post-employment matters.'*<sup>185</sup>

Similarly, the WB and UNDP ethics systems provide for the collection of ethics advice and cases dealt with. Such a public case law digest could contribute to efficiency as Commissioners could first consult existing 'case law' before asking for advice. Confidentiality could be guaranteed by removing any identifying details from the published cases.

**UNDP:** The UNDP regularly publicises the results of disciplinary hearings, with individual identifying information removed, throughout the organisation via email. This publicity serves a strong deterrent function by highlighting the negative consequences, both reputational for the organisation and personal for the staff member concerned, of ethics violations.

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<sup>185</sup> OECD, Public integrity and post-public employment: issues, remedies and benchmarks, 6 June 2007, page 20

**WB:** In the case of the WB, the existence of a permanent standing Ethics Committee, with contracted support through financial officers who implemented the bulk of the financial and outside interests disclosure process, has had an important result: the development of a repertoire of ‘case law’ through repeated interpretations of the Code. The permanent, standing Ethics Committee therefore serves to continuously reinforce and clarify the Code, simplifying its interpretation over time.

Finally, establishing an independent structure to provide ethics advice to Commissioners would address criticism over the EC President’s independence in overseeing the CoC’s enforcement. The ethics literature coincides in that there is an inherent conflict of interest in ‘colleagues’ judging each other on ethics issues.<sup>186</sup> Dennis Thompson notes three issues - all of direct relevance when applied to the Commissioners’ ethics regime:<sup>187</sup>

- ▶ Collegial interdependence: The Commissioners depend on each other to perform their tasks. Judging a colleague’s ethical conduct is likely to be biased by sympathy.
- ▶ Institutional norms: Judging a colleague’s ethical conduct is likely to raise issues about the institution’s norms and might require the ‘judge’ to demonstrate that his own ethical conduct differs from the one of the ‘accused’ colleague. Under pressure to defend himself the ‘judge’ might be more lenient in respect of his ‘accused’ colleague’s conduct.
- ▶ Public accountability: When judging his colleague, the ‘judge’ himself is under close public scrutiny, and this pressure might influence his judgement.

Dennis Thompson therefore concludes: *‘Because of all these factors, when a legislative body investigates, charges, and disciplines a member, it is not observing the principle that one should not judge in one’s own cause. It is not in the best position to reach an impartial judgment on the merits, treat members with fairness, and maintain public confidence in the process’.*<sup>188</sup>

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<sup>186</sup> Dennis Thompson, Overcoming the conflict of interest in Congressional ethics, 16 January 2007, page 1

<sup>187</sup> Ibid, page 2

<sup>188</sup> Ibid, page 4



**Monitoring & evaluation:** The CoC is not reviewed in the framework of a systematic monitoring and evaluation process. Whilst differences between the Prodi and the Barroso codes (e.g. introduction of a mechanism for reporting political activity) can be explained by reflecting on implementation experience (active political activity of some of the members of the Prodi Commission), no structured process is in place to review the CoC's effectiveness (e.g. no monitoring system making use of result indicators, no periodical internal / external evaluation etc.).

However, the ethics literature emphasises the importance of continuously reviewing an ethics regime's effectiveness via systematic monitoring and evaluation. The OECD Guidelines note: *'Monitoring and evaluating the effectiveness of the policy - over time, organisations should ensure that the policy remains effective and relevant in dealing with current and anticipated conflicts in a continuously evolving environment, and change or redevelop the policy as necessary.'*<sup>189</sup>

The recent EC study notes in this context: *'Probably more important than detailed reporting obligations are credible monitoring and control mechanisms. So far this does not seem to be the case for all EU institutions'*.<sup>190</sup> Furthermore, it should be appreciated that the benchmarks against which the CoC is compared are themselves in a process of development and change, not least in response to increasing expectations on the part of the general public.

In practical terms, monitoring and evaluation can be organised internally or externally (or combining both), with credibility all the higher, the more independent the review is from the actors concerned. Should the establishment of the *Advisory Group on Standards in Public Life* be considered, the latter might be entrusted with monitoring and evaluation. Alternatively, an 'internal' approach could be adopted by asking the Ad Hoc Ethical Committee to ensure monitoring and evaluation.

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<sup>189</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 7 (point 2.1.2 b)

<sup>190</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007, page 84 and 106, citing Frankel, M.S., Professional Codes: Why, How, and with What Impact?, in: Journal of Business Ethics, No.8, pp.110-111, 1989: *'It would be unfortunate if the emphasis on a code of ethics as a product obscured the value of the process by which a code is developed and subsequently revised. This process is a time of critical self-examination by both individual members and the profession as a whole. The profession must institutionalise a process whereby its moral commitments are regularly discussed and assessed in the light of changing conditions both inside and outside the profession. The widespread participation of members in such an effort helps to reinvigorate and bring into sharp focus the underlying values and moral commitments of their profession. It is a time of testing one's professional ethics against those of colleagues and for testing the profession's ethics against the experience of its members and the values of society. This process of selfcriticism, codification, and consciousness-raising reinforces or redefines the profession's collective responsibility and is an important learning and maturing experience for both individual members and the profession.'*

Entrusting an outside body with the CoC's review process would also address criticism over the Commissioners being, at the same time, the CoC's 'legislators' and 'judges'. In this context, the 1999 Committee of Independent Experts recommended the proposed '*Committee on Standards in Public Life*' to '*approve the specific codes of conduct established by each institution*'.<sup>191</sup>

 **Overseeing the President:** Earlier sections have reported on the importance of the President's role in ensuring the CoC's enforcement, whilst noting that the CoC fails to address the scenario of a conflict of interest affecting the President himself. For example, the declarations of interests are scrutinised by the President (Section 2.1), active political activity is reported to the President (Section 2.2), the President reallocates responsibilities when potential conflicts of interest arise (Section 2.6.2) etc.

The recent EC study therefore asks the question '*And what happens if the President breaches the code?*'.<sup>192</sup> The President judging his own ethical conduct is a clear breach of the legal maxim '*No one should be the judge in his own cause*'. As noted above, serious misconduct can of course be addressed by falling back on Treaty Article 216 which allows the Council to ask the European Court of Justice to compulsorily retire any member of the Commission. However, such a course of action can only be considered a 'last resort' applying to particularly serious misconduct.

Here again, the *Advisory Group on Standards in Public Life* or the (enlarged) Ad Hoc Ethical Committee might be useful mechanisms to deal with conflicts of interest in relation to the President.

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<sup>191</sup> EP, Committee of Independent Experts, Second report on reform of the Commission, 10 September 1999, page 24

<sup>192</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007, page 102

## External enforcement

This sub-section refers to 'supervision' of the CoC's application by outside institutions. Two issues are addressed: oversight and reporting on the CoC's application, and complaint procedures in case of infringements.

 **Oversight and reporting:** The CoC does not include any provisions on reporting or outside oversight over its application. In 2005 and 2006, the SG Annual Activity Reports included a specific sub-section related to the Code of Conduct ('*Sub-activity 6.4 - Code of conduct and ethical questions*'), however, the 2007 Annual Report no longer includes this sub-section, and there is no further mention of the Code of Conduct.<sup>193</sup>

As noted above, the 2005 Framework Agreement on relations between the European Parliament and the Commission envisages reporting to the EP, however, this is limited to specific issues of the CoC's application as well as changes to the CoC,<sup>194</sup> and the SG confirms: '*The EC does not report on the application of the CoC as a whole*'.<sup>195</sup>

Comprehensive reporting on the CoC's application can contribute to enhancing public trust in the Commission's ethics regime, whilst only requiring limited resources (the very comprehensive SG feedback on the CoC's application for the present assessment, was provided within two weeks of the author's request).

**ES:** Twice a year, the Office of Conflicts of Interest submits detailed reports on the application of the ethics regime for office holders to Parliament (information on compliance, the number of office-holders affected, infringements and sanctions). The reports are confidential and are not made public. Sanctions are published in the official journal (under the previous law (Law 12 1995), five sanctions were published).

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<sup>193</sup> SG Annual Activity Report 2005 of 29 March 2006, Annual Activity Report 2006 of 23 March 2007, Annual Activity Report 2007 of 31 March 2008

<sup>194</sup> Article 2: '*...The President of the Commission shall be fully responsible for identifying any conflict of interest which renders a Member of the Commission unable to perform his or her duties. The President of the Commission shall likewise be responsible for any subsequent action taken in such circumstances; if an individual case has been re-allocated, the President shall inform the President of Parliament thereof immediately and in writing.*'

<sup>195</sup> SG letter SG/B/4 D(2008) 10214 of 9 December 2008

**CAN:** The Canadian Conflict of Interest and Ethics Commissioner publishes an annual report on the implementation of the Conflict of Interest Act (governing the ethics requirements of public office holders). In less than 20 pages, the 2007-2008 Annual Report provides key information on application, interpretation of ethics requirements, ethics investigations, and human and operational resources. The report is available on the Commissioner's website.<sup>196</sup>

Finally, the visibility of information on the CoC is limited. On the EC website, information on the CoC only becomes visible after scrolling down two pages of information on the Commissioners, and the CoC is not announced at the top of the page (see Figure 15 below).<sup>197</sup> It is therefore recommended that a dedicated webpage be established with all information on Commissioner ethics. A good example for visibility is the information on the UK Ministerial Code (see Figure 16 below).<sup>198</sup>

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<sup>196</sup> <http://ciec-ccie.gc.ca/resources/Files/English/Public%20Reports/Annual%20Reports/Public%20Office%20Holders/2007-2008%20Annual%20Report%20in%20respect%20of%20the%20Conflict%20of%20Interest%20Act.pdf> (accessed in April 2009)

<sup>197</sup> [http://ec.europa.eu/commission\\_barroso/index\\_en.htm](http://ec.europa.eu/commission_barroso/index_en.htm) (accessed in April 2009)

<sup>198</sup> See [http://www.cabinetoffice.gov.uk/propriety\\_and\\_ethics.aspx](http://www.cabinetoffice.gov.uk/propriety_and_ethics.aspx) (accessed in April 2009)

Figure 15 - Current presentation of CoC information

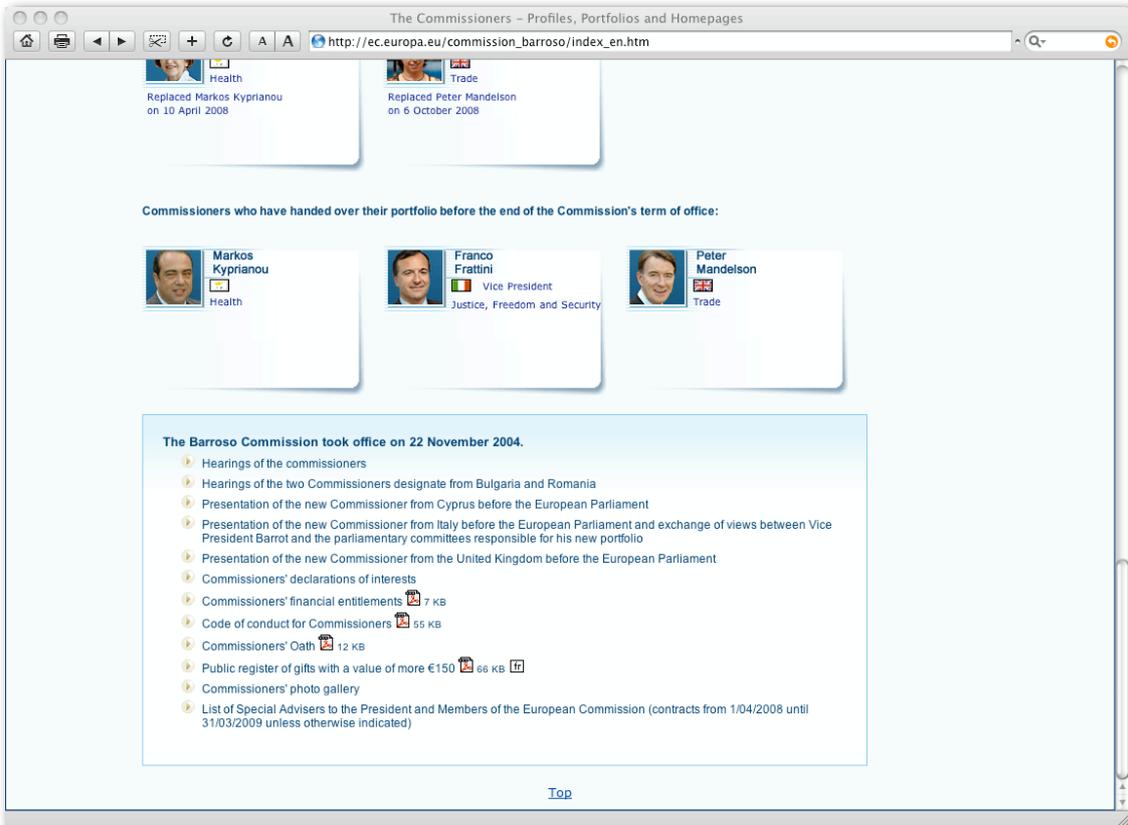
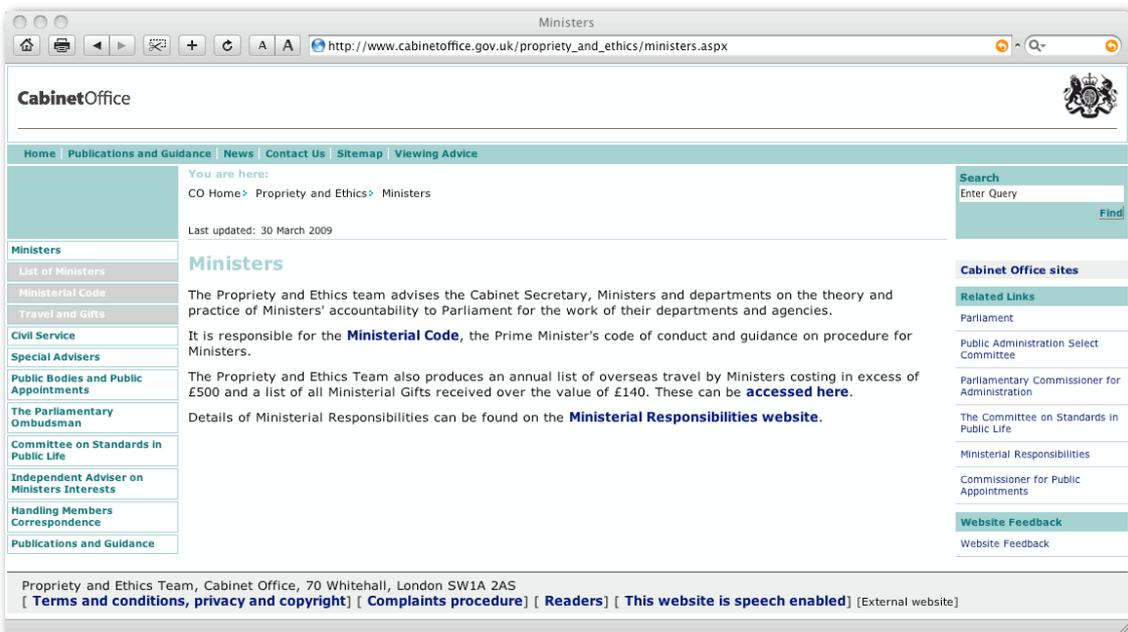


Figure 16 - Website on the UK Ministerial Code





**Complaint procedures:** The CoC does not provide for any procedures for complaints. The OECD Guidelines recommend: *'Develop complaint mechanisms to deal with allegations of non-compliance, and devise effective measures to encourage their use. Provide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused'*.<sup>199</sup>

Complaints against an EU institution fall under the competence of the European Ombudsman. In line with Treaty Article 195(4), any citizen of the EU has the right to submit a complaint against an EU institution or body in cases of *'maladministration'*.

The European Ombudsman has defined maladministration: *'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'*.<sup>200</sup>

The recent online interactive guide to the European Ombudsman provides the following details: *'Maladministration means poor or failed administration. This occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights. Some examples are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay'*.<sup>201</sup>

In this context, the European Ombudsman was asked whether it considered itself competent to deal with complaints concerning infringements of the CoC. The Ombudsman's answer differentiates between complaints against the EC as an institution (a), and complaints against individual Commissioners (b):<sup>202</sup>

- (a) The Ombudsman confirms its competence with regard to the scenario of a complaint over the Commission's failure to take appropriate action in respect of a Commissioner's non compliance with the CoC.
- (b) However, the Ombudsman does not consider itself competent to deal with a complaint against an individual Commissioner, unless the Commissioner is acting in his official capacity. This raises the question as to when a Commissioner is considered to act in his official capacity and when he is

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<sup>199</sup> OECD, Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 12

<sup>200</sup> European Ombudsman, 1997 Annual Report, 1998, page 23

<sup>201</sup> <http://www.ombudsman.europa.eu/atyourservice/interactiveguide.faces> (accessed in March 2009)

<sup>202</sup> European Ombudsman feedback of 20 March 2009

acting as a private person, a question that can only be answered on a case-by-case basis.

Considering the well-established Ombudsman complaint procedures, it is considered that the introduction of specific complaint procedures for the CoC is not required. However, the CoC could introduce a reference to complaints before the Ombudsman.<sup>203</sup>

**WB:** The Ethics Committee, in cooperation with the Board of Directors are responsible for handling allegations of misconduct. Internal allegations against a Board Official are submitted to the Chair (or any other Committee member). Allegations from outside the Board are submitted directly to the Committee Chair.

The Committee, in cooperation with its Counsel, then reviews the allegations to determine if there is sufficient evidence of misconduct and whether the allegations are appropriate for consideration by the Board of Directors. Once it is determined that an investigation is warranted, the Committee notifies the Board Official concerned as well as the Board of Directors. The Committee may seek advice or assistance from the Ethics Advisors or appoint an outside investigator to conduct the investigation. Significantly, the Board of Directors has final say over whether an investigation will take place.

The Official concerned is obliged to cooperate fully during the course of any investigations that are deemed to be necessary. The Official concerned is notified when the investigation reaches its conclusion of its findings and recommendations. At this point, the Official has an opportunity to make his or her case to the Board of Directors. If the Committee finds that no investigation is warranted, the Official concerned can request non-confidential written confirmation of that determination which can be disclosed outside the Bank.

Based on the Committee's findings and recommendations, as well as any additional information subsequently provided by the Official concerned party, a final decision is made by the Board of Directors. In cases where misconduct is judged to have occurred, the Board of Directors may issue written censure submitted to the Governors who appointed or elected that

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<sup>203</sup> Entrusting the Ombudsman with complaints on ethics issues is in line with international practice. See OECD, Public Management Occasional Papers No. 14, Ethics in the public service, Current issues and practices, 1996, page 33

director, or, if another Board Official is concerned, submit such censure to the director who appointed the Official. The Board of Directors is granted wide and non-specific powers to deal with violations by presidents; they may take any 'appropriate action'.

**UNDP:** The UNDP ethics regime has a clear whistleblower mechanism. The existence of such a mechanism tied clearly to the ethics regime ensures that staff who uncover potential conflicts of interest or other ethical or standards of conduct violations can confidently come forward to the UNDP Ethics Office without fear of retaliation. This protection is particularly important given the focus of the regime on preventing inadvertent, rather than deliberate, violations.

## Sanctions

The final sub-section on possible CoC deficiencies deals with the issue of sanctions.

In the context of the CoC's provisions on post-office employment, the CoC refers to sanctions in the framework of Treaty Articles 213(2) in conjunction with Article 216 (compulsory retirement via the European Court of Justice). Moreover, and this time without any reference to a specific CoC mechanism, the CoC also notes the President's right to ask a Commissioner to resign in line with Treaty Article 217(4).

However, there is no further mention of sanctions in relation to the CoC's other main mechanisms, such as the declaration of interests, the notification of political activity, or the gifts policy. The Briefing Note presented at the EP workshop on governance therefore asserted that '*A system of sanctioning should be further elaborated*'.<sup>204</sup>

Before coming to a conclusion on the CoC's sanctioning system, it is worth looking at the existing sanctioning system as developed in the Treaty and other instruments. The Treaty envisages a series of sanctions, namely Articles 197 in conjunction with 201 (political accountability of the College vis-a-vis the EP), Article 213(2) in conjunction with 216 (compulsory retirement / deprivation of right to pension), Article 217(2) (withdrawal of portfolio / re-allocation of specific files), and 217(4) (resignation at the request of the President).

Moreover, the Framework Agreement on relations between the European Parliament and the Commission allows the EP '*to express lack of confidence in a Member of the*

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<sup>204</sup> Leuven Centre for Global Governance Studies, Efficiency of Accountability Instruments in International Organisations, Briefing Note for the Workshop on Governance in the European Commission, 3-4 October 2007, page 4

*Commission'* (Article 3). Finally, national sanctions apply to cases where ethical misconduct infringes national civil or criminal law.

All these provisions are not mutually exclusive: *'Which mechanism is applied depends on the nature of the infringement and the type of standards involved. All these mechanisms serve different purposes and are therefore not mutually exclusive'*.<sup>205</sup>

-  Looking in more detail at Treaty **Article 213(2) in conjunction with 216** (compulsory retirement / deprivation of right to pension), the European Court of Justice has clarified that this provision applies not only to the explicitly mentioned case of incompatible post-office employment (*'duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits'*), but to any breach of a Commissioner's obligations.<sup>206</sup> Moreover, *'Article 213(2) EC contains no requirements as to the degree of seriousness of an alleged breach of obligations by a (former) Member of the Commission as a criterion for the Commission or the Council making an application to the Court. The decision to initiate proceedings under this Treaty provision is a matter for the sole discretion of the institution involved. Any decision to instigate proceedings under this provision against a (former) Member of the Commission is taken collectively by the College of Commissioners. It may be presumed that such a decision will not be taken lightly'*.<sup>207</sup>
-  Concerning **Article 217(2)** (*'The President may reshuffle the allocation of those responsibilities during the Commission's term of office.'*), it can be noted that this is not necessarily a sanction of ethical misconduct, but rather a preventive measure in case of 'real or apparent conflicts of interest'. SG feedback confirms that this is interpreted to allow the President to *'reallocate a specific file, or even an entire portfolio, to another Commissioner'*.<sup>208</sup>
-  Finally, the European Court of Justice comments on the application of **national law**: *'...where the conduct in question constitutes a criminal offence under national law, the public office holder concerned may be liable to criminal prosecution in one of the Member States. In that case, the immunity of the Member of the Commission must be waived as is provided for in Article 20 in conjunction with*

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<sup>205</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04, 23 February 2006, point 71

<sup>206</sup> *'Article 213(2) EC, therefore, can be invoked in respect of a breach of any of the obligations incumbent on a Commissioner, irrespective of whether he still holds office or his term of office has ended.'* Ibid

<sup>207</sup> Ibid, point 100

<sup>208</sup> SG feedback of 13 February 2009

*Article 18 of the Protocol on the privileges and immunities of the European Communities of 8 April 1965'.<sup>209</sup>*

Having looked at the existing sanctioning system, and considering the European Court of Justice' wide interpretation of Article 213(2), it appears that sufficient sanctions are in place to deal with **serious ethical misconduct**. In this context the CoC could introduce additional clarity by introducing a separate section on sanctions referring to the Treaty provisions and their interpretation by the European Court of Justice.

**DK:** Act no 117 of 15 April 1964 on the Accountability of Ministers stresses the application of the Penal Code in case of neglect of duty or providing misleading/false information.

**ES:** Law 5/2006 differentiates between sanctions for major / minor infringements and refers to the possibility of penal sanctions (Art. 18.4).

However, more **minor infringements** (e.g. failing to correctly complete or update a declaration of interests) are not likely to be addressed by referring to the Treaty. As noted by the European Court of Justice, the Treaty can be applied irrespectively of the seriousness of an alleged breach. Considering the serious consequences, it is however probable that the Treaty will remain reserved for sanctions of serious ethical misconduct.

Should minor infringements therefore go without sanctions? Tolerating minor infringements could erode the Commissioners' respect for the CoC provisions, and the resulting occurrence of (minor) infringements could damage public trust in the EC's ethics regime.

This could be addressed by introducing monitoring and reporting requirements on the CoC's application, and ensuring the publication of reports. It can be expected that Commissioners will be keen to avoid any negative publicity, e.g. by being named in a monitoring report for not having properly completed or updated a declaration of interests: *'...the general assumption is that Commissioners will normally be politically astute enough to recognise that to breach the Code would not only damage the reputation of the Commission, but also their own reputation.'*<sup>210</sup>

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<sup>209</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04, 23 February 2006, point 71

<sup>210</sup> Michelle Cini, *From integration to integrity*, 2007, page 120

**ES:** Minor infringements include the late submission of declarations of interests, and this is sanctioned by warnings (Article 17(3) and Article 18(7), Law 5/2006).

**CAN:** The Canadian Conflict of Interest Act foresees a monetary penalties regime for minor infringements: *'Every public office holder who contravenes one of the following provisions commits a violation and is liable to an administrative monetary penalty not exceeding \$500'* (≈ €312). This covers late submission of a declaration of interests, missing information or failure to update the declaration; failure to timely notify gifts or outside employment etc. (Article 52, Conflict of Interest Act).

# Section 3 - Conclusions and recommendations

The final section presents conclusions (3.1) and recommendations (3.2).

## 3.1 Conclusions

This section briefly summarises the main gaps identified in the current CoC and presents the assessment's reflections on effectiveness and efficiency.

The Commissioners' ethics regime is more elaborate than a simple reading of the CoC would suggest. Whilst there are weaknesses (and these are the main focus of the conclusions and recommendations), the existing CoC provisions address many of the relevant ethics issues (see ethics matrix in section 2.6.1). Preventive and advisory efforts are in place (e.g. SG help desk function, President Barroso's recent guidelines for members of the Commission wishing to participate in the EP elections), and there are established enforcement practices that go beyond the CoC provisions (e.g. Framework Agreement between the European Parliament and the European Commission on the notification of certain conflicts of interest to the EP etc.). Moreover, the CoC is not out of line with similar documents in some, at least of the Member States.

However, the assessment shows that there remains significant room for improving the CoC's effectiveness and efficiency.

With regard to effectiveness, the assessment has considered two dimensions: immediate effectiveness, i.e. the extent to which the CoC is effective in preventing conflicts of interest and promoting ethical behaviour; and more long-term effectiveness, i.e. does the CoC contribute to improving public trust in the Commission? Effectiveness is considered limited with regard to both dimensions.

Concerning efficiency, the assessment indicates that effectiveness can be improved without incurring significant additional costs. On the contrary, there are several opportunities for enhancing effectiveness whilst reducing the costs of the CoC's operation (e.g. by introducing a standardised electronic format for declarations of interest, introducing a strict zero-gift policy etc).

### **3.1.1 What are the CoC's main deficiencies in terms of coverage and clarity?**

Despite this being a standard feature of conflict of interest prevention, the CoC does not envisage a procedure for dealing with conflicts of interest arising in-office, and caused by a Commissioner's pre-office activities or interests. Whilst the declarations of interests require a Commissioner to list all professional activities engaged in over the ten years prior to taking up office as well as current financial interests, the CoC fails to specify a course of action (e.g. disposal of financial interests) if a conflict of interest arises.

The CoC also compares poorly with established ethics standards on the acceptance of gifts. The CoC provisions address physical gifts, however, other benefits such as hospitality (e.g. holiday invitations) are not explicitly mentioned. Moreover, the CoC does not envisage the disclosure of a gift's origin.

Finally, there are also several deficiencies in relation to the clarity of the CoC's provisions, including ambiguous wording, missing definitions, and missing criteria for assessing ethical behaviour. For example, the CoC stands out among the assessed ethics regimes for failing to provide a definition of the term 'conflict of interest'. These deficiencies affect all of the CoC's main mechanisms, i.e. the declaration of interests, the notification of political activity, the provisions on post-office employment and the register of gifts.

### **3.1.2 When - the point in time in which CoC requirements apply?**

Two deficiencies have been identified in relation to the 'timing' of the CoC provisions: the duration of post-office restrictions and the requirement for maintaining declarations of interests up-to-date. The CoC's duration of post-office restrictions is limited to one year. This is short when assessed against international experience. Whilst the CoC envisages that declarations of interests should be revised as information changes, the missing requirement for regular revision, has resulted in several out-of-date declarations (the standard in this area is annual revision).

### **3.1.3 Who does the CoC address?**

The CoC's principal addressees are the Commissioners, whilst the declarations of interests also cover the Commissioners' spouses. Here, it is considered that the same motivation behind declaring a spouse's activities and interests should also apply to other

family members / partners living with the Commissioner (other ethics regimes do not differentiate between spouses and partners).

#### **3.1.4 How is the CoC enforced?**

Weaknesses have been identified in relation to internal and external enforcement as well as with regard to the sanctioning of CoC infringements.

In relation to internal enforcement, it is considered that the prevention of conflicts of interest would benefit from a stronger advisory function. However, the main deficiencies are the missing provisions for the monitoring and evaluation of the CoC, and the CoC's failure to specify enforcement measures in relation to the President of the Commission. Concerning external enforcement, there are no systematic reporting arrangements, and no mention is made of complaint procedures. Finally, whilst the CoC provisions envisage sanctions for serious ethical misconduct, minor infringements are not explicitly sanctioned.

### 3.2 Recommendations

Further to the above summary on the CoC gaps and constraints on effectiveness and efficiency, this section provides a series of recommendations to overcome the identified shortcomings. First a series of introductory remarks on the 'philosophy' behind the recommendations:

Is the EC resting on its laurels? Since its introduction in 1999, there has only been one significant amendment to the CoC. There have been discussions over the Commissioners' ethics, however, the EC does not consider a further revision of the CoC useful, unless this is set in the framework of an inter-institutional debate on ethical standards.<sup>211</sup> Drawing on its comparative study,<sup>212</sup> the EC asserts its ethical 'lead' amongst the EU institutions, as grounds for not pursuing any reform of the CoC.<sup>213</sup>

However, standing still on ethics implies exposure to a significant risk. Any ethics issue arising will draw criticism over the CoC not being fully equipped to address the relevant issues. Moreover, the EC can be criticised for complacency due to its failure to ensure a systematic review.

Referring to the consequences of a conflict of interest affecting a Commissioner (and in relation to the Cresson case), the European Court of Justice has pointed to the danger inherent in such a position: *'It also has consequences for the public image and reputation of the Commission, which in this case were indeed severely damaged. And, it may be added, that it takes a disproportionate length of time to restore the goodwill and legitimacy, which such an institution has built up over the years. The damage caused is, therefore, considerable and durable'*.<sup>214</sup>

The present assessment's recommendations aim to render the CoC a more effective instrument in the promotion of ethical conduct and in increasing public trust in the EC's ethics regime.

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<sup>211</sup> EC, Communication to the Commission, Preparing the launch of a European Transparency Initiative, SEC(2005)1300/5, 8 November 2005, page 7

<sup>212</sup> European Institute of Public Administration, Regulating Conflicts of Interest for Holders of Public Office in the European Union, October 2007

<sup>213</sup> *'In particular, the European Commission emerged as a leader of the group of European Institutions examined (together with the European Investment Bank), for the comprehensiveness of its rules'* SG feedback of 13 February 2009. See also President Barroso's answer to EP question E6113/2008 of 9 December 2008: *'The Commission has adopted a set of sound rules on ethical conduct and transparency. This was confirmed among other things at the end of 2007 by the final report of a comparative study of the rules in force within the European institutions and the Member States carried out, at the Commission's request, by outside consultants'*.

<sup>214</sup> See Opinion of European Court of Justice Advocate General Geelhoed on case C-432/04, 23 February 2006, point 122

This is mainly to be achieved by completing and clarifying existing provisions, formalising already existing practices, and by bringing EC practice in line with international best practice. More in-depth reform is only recommended in the area of the Commissioners' political activity, and with regard to the CoC's overall enforcement structures as well as its monitoring and evaluation. The EC's action to review and improve its ethics framework would allow it to demonstrate political commitment to ethics, thus contributing to public confidence at the crucial time of institutional renewal of the EP and EC (EP elections in June 2009 / new Commission end 2009).

Recommendations focus on the CoC's main mechanisms and on a series of horizontal issues affecting all mechanisms. Annex 3 presents a summary of the recommendations to facilitate discussions towards a reformed Code of Conduct.

Each recommendation is followed by an indication of efficiency implications, i.e. does the recommendation imply any significant increase in costs (↑), a decrease (↓) or no change (=).

The indication of efficiency implications is based on the assessments in Section 2, and considers cost implications in a medium to long-term perspective, i.e. after initial investment costs (e.g. introduction of an electronic format for declarations of interest) are compensated by a reduction in the required human resources to ensure implementation.

In cases where even a long-term perspective implies an increase in costs, the recommendation is maintained as it is believed that costs are substantially offset by gains in public confidence.

## Declaration of interests

 In their current form, the declarations of interests do not sufficiently facilitate the assessment of possible conflicts of interest caused by a Commissioner's outside activities. It is therefore recommended that the declarations of Commissioners' outside activities in foundations or similar bodies note the foundations' objectives (e.g. political, cultural, artistic, or charitable). Moreover, it is recommended that all financial interests over a certain value are declared (assets and debts), and not only financial interests '*which might create a conflict of interests*'. It is also recommended that the Commissioners' spouses or partners declare ongoing activity as well as activity that ended prior to the Commissioner taking up office. Information on the spouses or partners' activities and financial interests should be provided with sufficient detail to allow an assessment of possible conflicts of interest. A guidance note could be added to the format for the declarations of interests to prevent inconsistent completion (e.g. on real estate or other property).

(Costs: ↓)

 The EC is advised to introduce an electronic format for the declaration of interests. This would contribute to consistent completion, and facilitate immediate 'statistical' analysis of the most relevant areas (e.g. a significant number of Commissioners reports financial interests), thus allowing for 'tailor-made' design of guidance. Moreover, it is recommended that declarations of interests are updated whenever information changes, and at least once a year. Declarations of interests should be completed for the Commissioners, their spouses or partners, and dependent children.

(Costs: ↓)

## Political activity

 The current CoC does not provide any criteria to assess '*availability of service*' ('*Commissioners may be active members of political parties or trade unions, provided that this does not compromise their availability for service in the Commission*'). This requires clarification in the form of a definition or examples. Moreover, the CoC does not address the scenario of political activity developed by the President of the Commission (the CoC envisages that Commissioners notify political activity to the President, however, nothing is stipulated for the President).

(Costs: ↓)

- 🗣️ The Commissioners' political activity (at national level) is difficult to assess due to the 'sui generis' nature of the Commission (difficult to draw on Member State / International Organisation experience). However, a Commissioner's political activity has significant potential to undermine public trust in the Commission (according to the Treaty, the Commissioners are supposed to be acting in the exclusive interest of the Community). It is therefore considered that the effectiveness of the Commission's ethics regime can only be guaranteed by limiting national political activity to passive political activity (e.g. not going beyond passive party membership).

(Costs: ↓)

- 🗣️ Alternatively, the CoC could be improved by providing for additional transparency on a Commissioner's political activity (e.g. publication of the notification of political activity, the President's assessment / decision), and requiring a minimum time of notice between notifying and engaging in political activity. Moreover, the CoC could formalise existing practice by noting that withdrawal signifies taking unpaid leave.

(Costs: =)

### **Post-office employment**

- 🗣️ It is recommended to establish clear criteria for the Ad Hoc Ethical Committee to assess whether post-office employment is compatible with former Commission duties (currently, there are no criteria), and to make the assessments public (currently, the assessments are confidential). It is also recommended to extend the post-office employment restrictions to two years after leaving office, and to require a minimum time of notice between notifying post-office employment and engaging in this activity.

(Costs: =)

### **Travel**

- 🗣️ It is recommended that the EC publishes an annual overview of the Commissioners' travel, indicating the date of travel, the destination, the purpose of travel, the type of transport used, the number of persons accompanying the Commissioner (where non-scheduled means of transport are used), total travel costs and whether the Commissioner was accompanied by his spouse / partner.

(Costs: ↑)

## Staff

- It is recommended that Commissioners abstain from decision taking related to staff issues (appointment, review, promotion) involving family members or close relations (partners).

(Costs: =)

## Register of gifts

- The definition of the concept of 'gifts' should be widened to explicitly include hospitality (e.g. holiday invitations). Moreover, a strict zero-gift policy (i.e. no gifts to be accepted) should be introduced for gifts originating in the European Union, since in the EU diplomatic considerations no longer justify accepting gifts from public institutions or the private sector. For gifts made by donors from outside the EU, there should be full public disclosure (i.e. the register of gifts should note the institution or company that made the gift).

(Costs: ↓)

## Conflicts of interest with pre-office activities / interests

- It is recommended that the CoC specifies a procedure for conflicts of interest arising in office but caused by a Commissioner's pre-office activities / interests. This should include the introduction of 'blind trust' arrangements for the management of financial interests above a certain value.

(Costs: =)

## Horizontal issues

- Prevention:** Recalling the legal maxim '*No one should be the judge in his own cause*', the EC is advised to re-launch the proposed Advisory Group on Standards in Public Life, however, with the Advisory Group's remit limited to the EC. Alternatively, the functions of the existing Ad Hoc Ethical Committee (currently limited to advising on post-office employment issues) could be widened.

The main function of this body would be to guide the Commissioners on the CoC's application, and to ensure systematic review (monitoring and evaluation, including scrutiny of declarations of interest). It is also recommended to establish separate guidance materials or integrate guidance in the CoC e.g. in the form of definitions (e.g. of conflict of interest) and examples. Information on ethics questions asked in

the past (e.g. ethics cases dealt with by the SG help desk function) could be systematically disseminated.

☉ The current members of the Ad Hoc Ethical Committee are nominated by the Commission on a proposal by the President. In order to strengthen the independence of their work, it is recommended that the members of the proposed Advisory Group on Standards in Public Life or the widened Ad Hoc Ethical Committee are nominated in common agreement between the EP and EC.

☉ Finally, The CoC does not provide for any oversight in relation to the President of the Commission. This omission could be addressed by entrusting the Advisory Group on Standards in Public Life or Ad Hoc Ethical Committee with oversight.

(Costs: ↓ - the new structure's costs are compensated by reduced SG costs)

☉ **Reporting:** The 2005 European Parliament / European Commission Framework Agreement has provisions for informing the EP on the re-allocations of Commissioner responsibilities resulting from potential conflicts of interest. Here it could be considered to provide systematic information to the EP for all CoC mechanisms.

(Costs: ↑)

☉ **Dissemination:** The visibility of current information on the CoC is limited. It is recommended that a dedicated webpage be established with all information on Commissioner ethics, and including annual public reporting on the CoC's operation.

(Costs: ↑)

☉ **Complaints:** The CoC makes no reference to complaints, and it is therefore recommended that a reference to the European Ombudsman functions is introduced in the CoC.

(Costs: =)

 **Sanctions:** With regard to sanctions, the CoC refers to Treaty Article 213(2), and notes the President’s right to request a Commissioner to resign. No sanctions are provided for minor infringements of the CoC’s provisions. The Treaty provisions are considered to be adequate with regard to serious ethical misconduct (note the European Court of Justice’ wide interpretation with regard to sanctions).<sup>215</sup> Here, it should be sufficient to introduce a clearer reference to existing Treaty sanctions of major infringements, and their interpretation by the European Court of Justice. However, it is recommended that the CoC introduces sanctions for minor infringements (e.g. publication of a Commissioner’s failure to correctly complete or update the declaration of interests).

(Costs: =)

**Figure 17 - Summary of efficiency implications** (Significant increase in costs (↑), decrease (↓) or no change (=))

Recommendation		Efficiency
Declaration of interests		↓
Political activity		↓
Post-office employment		=
Travel		↑
Staff		=
Register of gifts		↓
Conflicts of interests with pre-office activities / interests		=
Horizontal issues	Prevention	↓
	Reporting	↑
	Dissemination	↑
	Complaints	=
	Sanctions	=

<sup>215</sup> See Opinion of Advocate General Geelhoed on case C-432/04, 23 February 2006

## Annex 1 - Bibliography

This annex includes references for the literature / documentation used in preparing the present study (chronological order).

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## Annex 2 - Stakeholder consultations

This annex lists the stakeholders and experts consulted during the course of the assessment (in alphabetical order):

Torben Andersen, Head of Administrative Department, Prime Minister's Office (responsible for Guidelines on Ministers Expenses), Denmark

Elia Armstrong, Ethics Office, United Nations Development Programme

Adrian Aupperle, Policy Officer, Transparency International

Anne-Kristine Axelsson, Head of Legal Department, Prime Minister's Office (responsible for Handbook for Ministers), Denmark

Fred Baechli, Board Operations Department, World Bank Group

Janos Bartok, Principal Administrator (Integrity), Innovation and Integrity Division, Public Governance and Territorial Development Directorate, OECD

Dominique Clayes Bouuaert, Head of Unit, Unit B4 Public service ethics, Directorate B Better regulation and administration, Secretariat General, European Commission

Olivier Dandoy, Member of Cabinet with responsibility for Code of Conduct coordination, Cabinet of the President of the European Commission

Nicky Daniels, Propriety and Ethics team, Cabinet Office, UK

Claus Dethlefsen, Folketingssekretær (second in charge of the administration of Parliament), Denmark

Nicolás Domínguez Toribio, Office of Conflicts of Interest, Ministry of Public Administration, Spain

Ingeborg Gräßle, Member of the European Parliament

Peri Johnson, Legal Support Office, United Nations Development Programme

Charlotte Krüger, special consultant, Legal Department, Prime Minister's Office, Denmark

Flor María López Laguna, Deputy Director, Head of the Office of Conflicts of Interest, Ministry of Public Administration, Spain

Dirk Mattheisen, Board Operations Department, World Bank Group

Jonathan Ng, Office of Audit and Investigations, United Nations Development Programme

Hubert Szlaszewski, Director, Directorate B Better regulation and administration, Secretariat General, European Commission

Mai Vestergaard, Parliamentary Ombudsman's Office, Denmark

Manuel Villoria Mendieta, Professor for Politics, Faculty of legal and social sciences, University Rey Juan Carlos, Madrid

# Annex 3 - Towards a reformed Code of Conduct

This annex presents an overview of reform proposals made in the present assessment.

Issue	Reform proposals
<b>Code of Conduct mechanisms</b>	
Declaration of interests	<ul style="list-style-type: none"> <li>✓ Provide information on the objectives of organisations in which outside activity takes place</li> <li>✓ Declare all financial interests (assets and liabilities) over a certain value (e.g. €10000)</li> <li>✓ Update information annually and whenever information changes</li> <li>✓ Partners and dependent children to disclose the same information as spouses</li> <li>✓ Introduce electronic format</li> </ul>
Political activity	<ul style="list-style-type: none"> <li>✓ Limit national political activity to party membership</li> <li>✓ <u>Alternative:</u> define 'availability for service' and provide criteria for assessing availability</li> <li>✓ Publish assessments of availability for service</li> <li>✓ Introduce timelines for notifying political activity (e.g. two months before engaging in political activity) and withdrawals (e.g. maximum withdrawal time of one month)</li> </ul>
Post-office employment	<ul style="list-style-type: none"> <li>✓ Provide criteria for assessing the compatibility of post-office employment</li> <li>✓ Publish assessments of compatibility</li> <li>✓ Extend the post-office employment restriction to two years</li> <li>✓ Introduce timelines for notifying post-office employment (e.g. two months before engaging in post-office employment)</li> </ul>
Travel	<ul style="list-style-type: none"> <li>✓ Publish Commissioner travel on an annual basis, indicating the date of travel, the destination, the purpose of travel, the type of transport used, the number of persons accompanying the Commissioner, total travel costs and whether the Commissioner was accompanied by his spouse / partner</li> </ul>
Staff	<ul style="list-style-type: none"> <li>✓ Provide for abstention from staff decisions involving family / close relations</li> </ul>
Register of gifts	<ul style="list-style-type: none"> <li>✓ Clarify the definition of gifts (including hospitality)</li> <li>✓ No gifts to be accepted from donors from a EU Member State</li> <li>✓ Disclose the identity of donors from outside the EU</li> </ul>
Handling conflicts of interest	<ul style="list-style-type: none"> <li>✓ Establish a procedure for dealing with conflicts of interest</li> <li>✓ Introduce divestment of financial interests above a certain value</li> </ul>
<b>Horizontal issues</b>	
Prevention	<ul style="list-style-type: none"> <li>✓ Establish a structure to oversee the application of the Code of Conduct (Advisory Group on Standards in Public Life or 'widened' Ad Hoc Ethical Committee), with members to be nominated in agreement between the EC and EP, and supported by a Secretariat (e.g. 1 staff within the Secretariat General)</li> <li>✓ Entrust this structure with providing guidance on the Code's requirements, regular monitoring and evaluation, and oversight in relation to the EC President</li> <li>✓ Establish guidance materials (e.g. define the term 'conflict of interest') and disseminate information on ethics 'cases'</li> </ul>
Reporting	<ul style="list-style-type: none"> <li>✓ Publish annual reports on the Code's application</li> </ul>
Dis-semination	<ul style="list-style-type: none"> <li>✓ Establish a dedicated website on the Code's application</li> </ul>
Complaints	<ul style="list-style-type: none"> <li>✓ Introduce a reference to the European Ombudsman function</li> </ul>
Sanctions	<ul style="list-style-type: none"> <li>✓ For major infringements: Introduce a reference to existing Treaty sanctions</li> <li>✓ For minor infringements: Introduce sanctions (e.g. reporting of infringements)</li> </ul>



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