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More screen-time for Commissioners? Improving the quality and independence of EU ethics screening

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The European Parliament's (EP) attempt to scrutinise the conflicts of interest of commissioners-designate in early October raised eyebrows among MEPs, the media and civil society. They pointed to the numerous flaws in the process – the ludicrously tight timetable, the lack of transparency, and the political horse-trading. Despite numerous concerns raised, all commissioners-designate were given the green light to move to the next phase of parliamentary scrutiny: the individual hearings that took place in November.

For many, the solution seems obvious: ethical screening should be taken out of the hands of MEPs and managed by an independent body. It is questionable, however, whether a fully independent body is the silver bullet for handling potential conflicts of interest in the appointment process. Recent experience would suggest that such bodies are symptoms of political dysfunction, rather than its remedy. A more modest tweaking of the existing integrity framework at national and EU levels would have the effect of increasing the objectivity of conflict of interest assessments, while retaining the necessary political ownership of key decisions.

BACKGROUND: A FLAWED SCREENING PROCESS

Let us first examine the flaws in the existing process. Each prospective commissioner is required to make a detailed declaration of interests on a form that is submitted to the EP's Legal Affairs Committee (JURI). On this occasion, JURI members had three days to review the information and 15 minutes per commissioner at the committee meeting to assess if there were any potential conflicts of interest.

Assessments were carried out only by the members of the JURI committee, without – in theory – any input from their parliamentary colleagues, civil society organisations or media reports. Furthermore, both the declarations of interest and the deliberations at this stage are, by design, shrouded in secrecy.

Finally, MEPs had very limited information on which to base their assessments, hamstrung as they were by the EP's own rules of procedure to rely only on the information submitted by the commissioners-designate. Even that thin base was whittled away by the discretion the nominees have to decide what constitutes a potential conflict of interest in their case, and by confusion over what kind of information they were obliged to provide.

It should go without saying that aggressive deadlines, exclusion of key personnel and limited or ambiguous information are not conducive to good decision-making in any field, let alone complex and contested ethical decisions.

This process can and should be improved, but perhaps not in the way that many of its critics have suggested. It is important to acknowledge and preserve some of the good points – transparency was improved as some commissioners were more forthcoming with their declarations, clarifying or adding information as requested. In at least one case, a potential conflict of interest was identified and resolved, with the Croatian nominee, Dubravka Šuica, divesting herself of shares in a maritime shipping company that sat uncomfortably with her new portfolio as commissioner for the Mediterranean.

Much of the dissatisfaction with this year's process is due to the contrast with previous cycles, where concerns about possible conflicts of interest were used to dismiss candidates at this early stage of proceedings. Unlike in 2019, there was not a sufficient majority willing to flex parliament's muscles and spike the candidacy of the Hungarian and Romanian nominees, conveniently a scalp from each of the major political groups. If we are charitable, this might point to a growing political maturity: the management of conflicts of interest is no longer seen as a stratagem in a bigger institutional or ideological game.

This would be a welcome development as the most important characteristic of any screening process is its independence and objectivity. Too often, at the EU level and elsewhere, such processes have been weaponised for institutional, political or ideological objectives. Where such dynamics prevail, potential conflicts of interest are seen as exclusion criteria for political appointments rather than risks to be managed. The game – played to its highest level in the US regarding the confirmation of presidential appointments – is to dismiss, or at least wound, as many of your political opponents as possible. It's a system that is widely seen as broken and inefficient. Under the Biden presidency, the average length of the confirmation process was 144 days, twice as long as under the Reagan administration. A major reason for these delays is the onerous, time-consuming process of rendering nominees bullet-proof in the face of accusations of conflicts of interest or other ethical misdeeds – accusations that are frequently raised by hostile political opponents.

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STATE OF PLAY:... THE RICH VARIETY OF ETHICAL SYSTEMS IN EU MEMBER STATES

Those proposing reforms of the existing screening system should take a close look at how other countries approach this task. First of all, the EP's role is unique within the EU in that none of the national parliaments have a role in assessing conflicts of interest of executive appointments in advance of ministers taking up their post. The norm in the vast majority of member states is that ministers and others in senior executive positions are required to make a full declaration of all assets (less frequently their interests, such as outside employment) only *after* their appointment.

There is a good deal of variation in the details of how these appointments are subsequently monitored and verified. The publication of declarations is the norm across a belt of member states to the east and south. Monitoring is sometimes carried out by the national court of auditors or supreme court. Some countries, including France, Italy, Romania, and Slovenia, have independent commissions or agencies that are charged with verifying the information declared. Estonia, uniquely, has given this task to a parliamentary select committee. Only in a few countries, like Denmark, Germany, Netherlands, and Sweden, are there no obligations for ministers to declare assets. Historically, such checks were considered unnecessary in what were seen as "high-trust societies".

While there is frequent public disclosure of the original declarations (updated annually in some member states), the process of dealing with any conflicts of interest that might be exposed rarely happens in the full glare of transparency. Once in post, ministers and others can take advantage of a wide variety of advisory bodies, ranging from the institutions and agencies mentioned above to specialised ethics commissioners and advisors. The focus is on identifying and resolving conflicts of interest and other ethical dilemmas rather than assessing fitness for office through a rigorous screening process.

If de-politicisation and discretion are the touchstones of an effective ethics framework, this raises doubts about the wisdom at the EU level to have conflicts of interest assessments (and proposals for their resolution) made by a committee of professional politicians. The argument has been made that such screenings should be conducted by an independent, external body. Such a body would be more objective and bring much-needed expertise and consistency to the assessments.

In the eyes of many commentators, the gold standard for such an external body is France's High Authority for Transparency in Public Life (HATVP), which has an impressive armoury of monitoring and sanctioning powers. It can request information from the prosecution services, tax authorities and financial intelligence unit to verify both declarations of interests *and* assets. If a conflict of interest is identified, it can issue binding orders to resolve it. Failure to comply with these orders is a criminal offence that brings with it a one-year prison sentence and a €15,000 fine. This is not just a paper tiger: at least one junior French minister received a suspended sentence for failing to fully declare her assets.

However, the idea that such an external body is the gold-plating that the EU screening process needs

deserves to be treated with caution. First of all, the screening process and initial efforts to resolve conflicts happen behind closed doors, with publication of the assessments a last resort in many cases. Secondly, giving an EU body binding powers to request information from national authorities (such as tax information) would quickly descend into a legal quagmire, possibly requiring treaty change, which few would be willing to countenance. In the recent debate over the creation of an independent ethics body, formed this year under the name of the Inter institutional Ethics Body (IEB), there was little appetite in the Commission or Council for a new independent body with substantial powers.

There is much to admire about the rigour brought to the job by the HATVP and similar centralised agencies specialising in verifying asset declarations, such as Romania's National Integrity Agency (ANI) or, for senior officials, the US Office of Government Ethics (OGE). ANI in particular has an impressive track record of enforcement. If all we want from an integrity screening process or an ethics regime is clear and hard rules that are ruthlessly enforced, then these agencies serve as standout models. But a conflict of interest policy – and ethics policies more generally – also have broader objectives, such as to improve the integrity of senior officials entering public life and to improve trust and confidence in public institutions.

Measuring whether these higher-order objectives are achieved is no easy feat, but we do have some survey data of trust in national governments. Among EU countries, France and Romania are some of the worst performers, with recent Eurobarometer results for France particularly alarming – less than one in five people trust the national government. Over a 10-year period up to 2017, when the HATVP was established, confidence in the French government barely moved at all. The US executive is no better placed, with record numbers of respondents declaring they had no trust and confidence in the Biden administration.

Obviously, there are many more determinants of public trust in institutions than just how conflicts of interests are handled, but these results should give us pause before thinking that stronger, more centralised ethics bodies can deliver better outcomes than alternative arrangements. Indeed, given that the creation of these bodies is often a response to political or corruption scandals– Watergate in the case of the OGE, the Cahuzac affair in the case of HATVP – their appearance is often a symptom of political dysfunction rather than a remedy for it.

PROSPECTS– FOUR STEPS TO A MORE OBJECTIVE AND INDEPENDENT CONFLICT OF INTEREST ASSESSMENT

Where does that leave the EU process? There are four changes that are necessary but which would leave the current institutional landscape largely untouched. This more incremental approach would avoid sterile debates about the necessity of re-opening treaties or transferring significant new powers to EU institutions.

Firstly, there should be an end to the practice of commissioners only declaring those interests that they believe would create a conflict. There should be a change to the Code of Conduct for Members of the Commission that would **make it an obligation for nominees to make a full declaration of assets *and* interests**, bringing the Commission in line with the EU norm. The new IEB should be charged with standardising what kind of information should be disclosed, also drawing on best practices in member states.

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Secondly, **completed declarations should be sent to the appropriate national body for verification** as soon as a commissioner is nominated. This would ensure that verification is done in most cases by professionalised bodies that already have access to important datasets that are needed for this task, such as land registers and tax records, and are familiar with national contexts and languages. This would be an improvement over the rather amateurish and rushed process that is currently conducted by the EP legal affairs committee, whose own rules of procedure do not allow it to refer to third-party information in any case.

As noted above, there are a handful of member states – for example, Germany – where there are no disclosure requirements for ministers and therefore no corresponding national body. In cases where no analogous body can be found, the European Anti-Fraud Office (OLAF) should be empowered to review these declarations. OLAF would of course lack the access to national data sets but would at least have the capacities and skill sets to conduct this kind of review using public information.

Leveraging the strengths of an EU network of ethical monitoring bodies may require some legal basis to ensure consistency, adequate data protection and appropriate protocols for exchange of information. This could be done through ordinary legislative procedure

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rather than relying on the diminishing prospects of treaty change. It would have the added advantage of helping to standardise best practice across the EU.

Thirdly, **verified declarations should then be sent to the European Ombudsman** who would be well-placed to assess whether any of the assets or interests declared would present a potential conflict with commissioner-designates' assigned portfolios. This would build on the ombudsman's de facto role as the integrity watchdog of the EU institutions and long experience of assessing how EU conflict of interest rules are implemented, including in cases of commissioners and other senior officials.

This 'gatekeeper role' – making assessments about possible conflicts of interest and proposing how they might be resolved – would introduce a professional and objective assessment in place of what are currently more political assessments made under time pressure by MEPs and EP staffers, some of whom are novices to the EP and to EU affairs. One would also hope for a more consistent approach to these assessments over time with the benefit of in-depth expertise and a strong institutional memory. Such powers would only require minor changes to the ombudsman's legal statute, which can be amended on the initiative of the EP in a special legislative procedure that is considerably lighter than ordinary legislation.

Fourthly and finally, **only cases where the ombudsman had identified conflicts that could not be resolved by the nominee** (for example, through divestiture of assets or recusal from certain kinds of decisions) **would be sent to the EP's legal affairs committee** for further deliberation. At this stage, for the sake of a broader public debate, both the ombudsman's assessment and the vote should be public. Should the committee agree with the ombudsman's assessment that there is no way to reconcile the conflict of interest with the proposed portfolio, it can vote on whether the nominee can proceed to the next stage of the confirmation hearings, as it does currently. It would be a vote, however, grounded in a robust technical assessment and avoid nominees being held as political hostages over ostensibly ethical concerns. This also provides the necessary democratic legitimacy to the act of effectively ending a political nominee's European aspirations. It would be too easy and too glib to say that the integrity of politics is too important to be left to politicians. Rather, we should acknowledge that they need all the help they can get while keeping some sense of ownership over the ethics of their profession.

The proposals put forward in this paper are clearly not a panacea for improving trust in the European Commission or European policymaking in general. They would, however, ensure that the process of screening designated commissioners for potential conflicts of interest is a dispassionate, objective exercise that draws on the existing strengths of the European system at EU and national levels. It would provide room for independent judgement without requiring the creation of a new, independent body. Only a few minor legislative tweaks and a considerable amount of good will are required to make this system work for the benefit of greater integrity in EU decision-making.

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