Constructing an EU Ethics Oversight Authority

A White Paper

European Parliament Resolution of 16 September 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body (2020/2133(INI))

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Disclosure

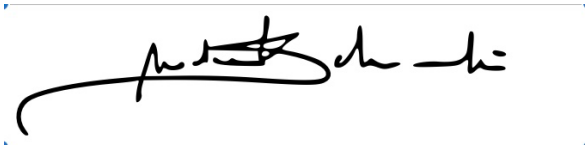
The authors declare the following material facts:

(i) We have been offered, and we have accepted, remuneration for the time spent preparing this report, in the amount of € 4,860 each.

(ii) We have been assisted and supported by staff in the office of MEP Sabrina Pignedoli.

(iii) We have had offered, and we have accepted, to have our travel to Brussels for a meeting on 7 December 2022 paid for by the EUP.

(iv) We have no other conflicts of interest to declare.

Signature 

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I. Introduction

This white paper provides a critical analysis of the proposed independent EU ethics body (EUEOA), as put forward by the European Parliament Resolution of 16 September 2021, to strengthen transparency and integrity in EU institutions. The resolution has as rapporteur Daniel Freund. The report does so by way of an internationally comparative, cross-jurisdiction analysis, and informed by regulatory theory, in particular financial regulatory theory. The purpose of which is to assess the strengths and weaknesses (including European constitutional law) of the proposal, and to assess the extent to which it will, under the current EUP Resolution, be created *fit for purpose.* We proceed from a point of departure that assumes the following:

- Good government is preferable to poor or bad government.
- Good government requires mitigation of corruption.
- The **revolving door** is, rightly, regarded as a form of **soft corruption**.
- The effects of **unresolved conflicts** of interest can lead to corruption.
- Together – conflicts of interest and the revolving door – **diminish the confidence** and trust that EU citizens have in EU Institutions, and in the EU Project.
- As such, resolving conflicts of interest and closing the revolving door – ethics oversight – are important and essential activities, and should be conducted within a **framework which is fit for purpose**.
- Regulatory oversight attempts frequently fail, because they fail to understand the requirements necessary to be fulfilled, to ensure that a supervisory agency is created *fit for purpose*. For this report, fitness for purpose includes checks-and-balances, designed to ensure that the supervisory agency does not itself fall prey to conflicts of interest, or the revolving door.
- We rely on **experiences from the United States** to demonstrate how ethics oversight regimes fail when they are not fit for purpose – including where that lack of fitness for purpose is as a result of a lack of comprehensive oversight; lack of enforcement; and issues falling between the gaps.
- We rely on experiences from – in particular – failures in oversight from **attempts to regulate the financial industry**. We use financial industry oversight and supervision because it is in attempts to regulate the financial industry that we see the clearest examples of the revolving door between supervisors and supervised, and unmitigated conflicts of interest. As a result, we see the clearest examples of supervisory failures – caused especially as a result of unaddressed conflicts of interest.

From here this report assesses the framework, as described in the EU Resolution, to determine its fitness for purpose. The report is divided as follows: **Part II** offers insights into conflicts of interest, as they

bedevil political institutions in the United States. Crucially also, Part II analyses the failure to enforce ethical rules, despite the myriad forms of ethical oversight, present in US political institutions. This is presented as a lesson, the implications of which are salutary for the EU Project, and for the drafters of the EU Resolution. **Part III** provides a detailed examination of particular forms of conflicts of interest, such as the *revolving door*, and lobbying. **Part IV** provides a detailed analysis of the proposed structure of, and internal safeguards in, the proposal for an EUEOA, as expressed in the EU Resolution. It compares the proposed EUEOA structure with international evidence, the purpose of which is to apply research into regulatory failure, and the failures of oversight arrangements, observed elsewhere. In **Part V**, the legal basis required to establish such a body is analysed, by addressing the concerns raised as a result of the adoption of the EU Parliament's resolution.

A. Background

On 16 September 2021, the European Parliament adopted a resolution "on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," by 377 votes for, 87 against and 227 abstentions. This builds upon the 2019 - 2024 *Political Guidelines for the Commission*, according to which the institutions of the EU should be open, and beyond reproach on ethics, transparency and integrity, if Europeans are to have faith in the Union.

As the EU Commission has not followed through on this commitment, the Parliament proposed the creation of an interinstitutional agreement (IIA) (based on Article 295 of the Treaty on the Functioning of the European Union (TFEU)), between the Parliament and the Commission, to set up an independent EUEOA. While initially created by the Parliament, Commission and Council, such an agreement and body would ultimately be open to the participation of all EU institutions, agencies and bodies.[1]

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

The design of the EUEOA touches on key aspects of the institutional balance between EU institutions. Consequently, we include a comparative and legal perspective, in order to assess the policy and legal soundness of the Parliament's proposal.

[1] See on this point the model proposed by Alberto Alemanno, "Towards an EU Ethics Body," *SSRN Papers*, (20 November, 2020), available at: <https://ssrn.com/abstract=4062961>.

II. Conflicts of interest. Lessons for an EUEOA from the United States

1. We provide, below, details of existing oversight mechanisms in the United States government. We indicate that, whilst present in many different forms, ethics oversight in the United States government remains inadequate and flawed. We demonstrate where US government ethics oversight has failed, because these failures provide insights into the EU's current, similarly patchy framework, replete with underlap and gaps. Our assessment is that the **current framework** in the EU is **inadequate to the task**. We are of the view that a **consolidated oversight framework** would be preferable.

1.1. In the United States, the structures in place to enforce ethical conduct from Members of the United States Congress are, arguably, more advanced than those currently in place in the EU. However, even if the US Congress' ethics oversight framework is an advance on that currently in place for the EUP, it is nonetheless weak by design, offering limited deterrence to misbehaviour, and contributing to widespread voter cynicism.[2]

1.2. The U.S. Constitution grants the U.S. House of Representatives and U.S. Senate the sole responsibility to punish, up to and including expulsion, members of Congress who behave "unethically or break federal law."[3]

1.2.1. Self-policing is broadly seen as a failure. For instance, cross-partisan political reform group Issue One notes that, "[…] as allegations of sexual harassment, discrimination and self-dealing roil Capitol Hill, it is abundantly clear that relying solely on members of Congress to police themselves has proven inadequate. Cases of ethical misconduct by elected lawmakers and their staff continue to permeate throughout the legislative branch, undermining a culture of compliance and high moral standards."[4]

1.2.2. The Office of Congressional Ethics (OCE) is an independent, non-partisan entity, charged with reviewing allegations of misconduct against House of Representatives members and staff. The OCE consists of an eight-person Board of Directors, all private citizens who agree not to work as lobbyists, federal workers or run for federal office. The OCE Board authorizes each stage of the

[2] "Poll: Congress and the Public," *Gallup News,* available at: <https://news.gallup.com/poll/1600/congress-public.aspx>.
[3] Meredith McGehee and William Gray, "The Ethics Blind Spot," *Issue One*, 13 February 2018, available at: <https://www.issueone.org/wp-content/uploads/2018/02/Ethics-Blind-Spot-Final.pdf>.
[4] Ibid.

investigative process into allegations and "ultimately decide[s] whether to recommend that the House Committee on Ethics review a matter or dismiss it."[5]

1.2.3. The House Committee on Ethics is, in turn, a bipartisan House of Representatives committee, consisting of ten Members, five Members from the two national political parties. The committee has "authority over the interpretation, administration, and enforcement of the Code of Official Conduct for the House of Representatives. The Committee educates Members, officers, and congressional staff on House ethics rules and has the responsibility to investigate and sanction violations of these rules. The Committee accepts complaints about Members only from other Members."[6]

1.2.4. Then Chairman of the House Ethics Committee, Ted Deutch (D-Fla), noted that, "The committee is evenly divided, five-five, anything that the committee does requires a bipartisan vote. We need six votes."[7] This is problematic at a time of historic political polarization between the two major parties in the US Congress;[8] besides two Independents in the US Senate who caucus with the Democrats, every member of Congress in both the 117th (2021-2022) and 118th Congresses (2023-24) is a member of either the Democratic or Republican parties. Paralysis is not the exception but the norm.

1.2.5. The House Ethics Committee's inefficacy means that matters that they do elevate can take a year or more to investigate.[9]

1.2.6. In 2020, Rep. Donna Shalala was discovered to have failed to disclose stock transactions, violating the STOCK Act.

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[5] "Citizen's Guide," *Office of Congressional Ethics*, available at: <https://oce.house.gov/learn/citizen-s-guide#:~:text=The%20OCE%20is%20an%20independent,determines%20such%20review%20is%20warranted>.

[6] "Citizen's Guide," *Office of Congressional Ethics*, available at: <https://oce.house.gov/learn/citizen-s-guide#:~:text=The%20OCE%20is%20an%20independent,determines%20such%20review%20is%20warranted>. And: "About," *Committee on Ethics, US House of Representatives*, available at: <https://ethics.house.gov/about>.

[7] P. Kane, (2022) "Analysis | House Ethics Committee struggles to crack down on bad behavior," *The Washington Post*, WP Company. Available at: <https://www.washingtonpost.com/politics/2022/04/02/house-ethics-committee/>. (Accessed: November 14, 2022).

[8] Drew DeSilver, "The Polarization in Today's Congress Has Roots That Go Back Decades," Pew Research Center, Pew Research Center, 22 April 2022, available at: <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/>.

[9] Joey Fox, "Malinowski Inquiry Unlikely to Be Resolved before November Due to Ethics Committee Member's Death," *New Jersey Globe*, 19 August, 2022, available at: <https://newjerseyglobe.com/congress/malinowski-inquiry-unlikely-to-be-resolved-before-november-due-to-ethics-committee-members-death/>; see also: "Outside ethics experts often criticize the panel for both a lack of transparency and slow-moving investigations that can take years before there's any outcome. Its subpoenas are issued secretly and sometimes cases are closed with no public reckoning," (2022), *The Washington Post*, WP Company, available at: <https://www.washingtonpost.com/politics/2022/04/02/house-ethics-committee/>.

- Per reporting by The American Prospect, Shalala's office stated that the Rep "sold most of the individual stock holdings" while working with the House Ethics Committee to set up a blind trust after being sworn into Congress in January 2019. But The American Prospect did not find any STOCK Act disclosures from Shalala, although "members of Congress have 45 days to disclose stock transactions to the Clerk of the House, and those disclosures are publicly listed in a *periodic transaction report* (PTR)."[10]
- A conservative watchdog group filed a complaint against Shalala to the Office of Congressional Ethics.[11]
- A political publication, *Roll Call*, predicted Shalala's sanction for violating the STOCK Act would be a $200 waivable fine.[12]
- She ended up paying a $1,200 fine to the House Ethics Committee.[13]

1.2.7. Clearly, the current ethics program is NOT preventing conflicts of interest. Often it has been left to the press to reveal congressional conflicts of interest. Business Insider headlines **since this August**:

- *New Hampshire's GOP Senate nominee Don Bolduc is breaking federal law by not disclosing his personal finances*;[14]
- *GOP Rep. Chris Jacobs just violated a federal conflict of interest stock-trading law for the second time*;[15]
- *GOP Rep. Carol Miller just violated a federal conflict-of-interest and transparency law*;[16]

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[10] David Dayen, "Unsanitized: The Mystery of Donna Shalala's Unreported Stock Sales," *The American Prospect,* 21 April, 2020, available at: <https://prospect.org/coronavirus/unsanitized-mystery-donna-shalala-unreported-stock-sales/>; and Ryan Nicol, "Take Two: Donna Shalala and Maria Elvira Salazar to Face off Again for CD 27 Seat," *Florida Politics - Campaigns & Elections*, *Lobbying & Government*, 1 November, 2020, available at: <https://floridapolitics.com/archives/377393-shalala-salazar-face-off/>.

[11] J. Edward Moreno, "Watchdog Group Files Ethics Complaint against Rep. Shalala," *The Hill*, The Hill, 24 April, 2020, available at: <https://thehill.com/homenews/house/494510-watchdog-group-files-ethics-complaint-against-rep-shalala/>.

[12] Chris Marquette, "What Will Come of Donna Shalala Stock Scandal," *Roll Call*, 24 April, 2020, available at: <https://rollcall.com/2020/04/24/what-will-come-of-donna-shalala-stock-scandal/>.

[13] Ryan Nicol, "Take Two: Donna Shalala and Maria Elvira Salazar to Face off Again for CD 27 Seat," op cit.

[14] Madison Hall, "New Hampshire's GOP Senate Nominee Don Bolduc is breaking federal law by not disclosing his personal finances," *Business Insider*, 17 September 2022, available at: <https://www.businessinsider.com/don-bolduc-republican-new-hampshire-senate-finances-law-2022-9>.

[15] Madison Hall, "GOP Rep. Chris Jacobs just violated a federal conflict of interest stock-trading law for the second time," *Business Insider,* 12 September, 2022, available at: <https://www.businessinsider.com/gop-rep-chris-jacobs-violates-stock-act-again-2022-9>.

[16] Madison Hall, "GOP Rep. Carol Miller just violated a federal conflict-of-interest and transparency law," *Business Insider*, 7 September, 2022, available at: <https://www.businessinsider.com/congress-carol-miller-stock-trades-investments-2022-9>.

- *Carl Paladino, a Donald Trump-boosting New York congressional candidate, is violating federal law by not disclosing his personal finances;*[17]
- *2 Republicans in Congress just violated a federal conflict-of-interest and transparency law;*[18]
- *4 House Democrats just violated a federal conflict-of-interest law with late financial disclosures;*[19]
- In October 2022, the staff director and chief counsel of the Office of Congressional Ethics, an "independent, non-partisan entity charged with reviewing allegations of misconduct against Members, officers, and employees of the House of Representatives, and referring matters to the House Committee on Ethics when the OCE Board determines such review is warranted,"[20] was criminally charged with driving while intoxicated. Prior to this incident, the same individual was "sued in federal court for allegedly using his federal position to influence local law enforcement."[21]

1.3. The evidence from the United States suggests strongly, therefore, that Parliamentary oversight of Parliamentary ethics is a flawed framework, inadequate to the task.

2. In reinforcing the lessons for the EUP that can be learned from the experience of the US House of Representatives, we find similar deficiencies in The United States Senate, which also suffers from weak and rare enforcement of ethics rules.

2.1. In the Senate, the Select Committee on Ethics is a bipartisan committee consisting of three Members from the majority party and three Members from the minority party. The committee is responsible for investigating allegations of misconduct by Senators and Senate staff.[22]

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[17] Madison Hall, "Carl Paladino, a Donald Trump-boosting New York congressional candidate, is violating federal law by not disclosing his personal finances," *Business Insider*, 20 August, 2022, available at: <https://www.businessinsider.com/carl-paladino-new-york-congress-violating-federal-law-finances-2022-8>.

[18] Madison Hall and Dave Levinthal, "2 Republicans in Congress just violated a federal conflict-of-interest and transparency law," *Business Insider*, 16 August, 2022, available at: <https://www.businessinsider.com/stock-act-congress-republican-rick-scott-brian-mast-2022-8>.

[19] Madison Hall and Bryan Metzger, "4 House Democrats just violated a federal conflict-of-interest law with late financial disclosures," *Business Insider*, 16 August, 2022, available at: <https://www.businessinsider.com/stock-act-democrats-congress-violations-gottheimer-scanlon-susie-lee-schneider-2022-8>.

[20] "Citizen's Guide," *Office of Congressional Ethics*, available at: <https://oce.house.gov/learn/citizen-s-guide#:~:text=The%20OCE%20is%20an%20independent,determines%20such%20review%20is%20 warranted>.

[21] Jana Winter, "Exclusive: Head of Congressional Ethics Office charged with DUI after crashing into Pa. home," *Yahoo! News*, 13 October, 2022, available at: <https://news.yahoo.com/exclusive-head-of-congressional-ethics-office-charged-with-dui-after-crashing-into-pa-home-193233703.html?guccounter=1>.

[22] "About Us," *US Senate Select Committee on Ethics*, available at: <https://www.ethics.senate.gov/public/index.cfm/aboutus>.

2.2. The Select Committee on Ethics has not sanctioned a Senator since 2007.[23]

2.2.1. That is not for lack of ethically troubling behaviour. Consider pandemic era trades by sitting US Senators with privileged access to government information. "The timely stock trades of Sens. Richard M. Burr, R-N.C., Dianne Feinstein, D-Calif., James M. Inhofe, R-Okla., and Kelly Loeffler, R-Ga., came under scrutiny when they all traded stocks before the coronavirus pandemic decimated the stock market in March. In June, the Senate Ethics Committee dismissed insider trading allegations against Loeffler, weeks after the Justice Department concluded its inquiry into whether she sold off stock after a coronavirus briefing, using material nonpublic [sic] information.[…] Last month, Burr announced that the DOJ had concluded its review of his financial transactions and closed the case."[24]

2.2.2. House and Senate Committees proceed so slowly that avoiding accountability becomes a mere matter of waiting them out. The "House and Senate too often allow their respective ethics committees to politicize investigations and delay many of them for years. When faced with the difficult task of passing judgment on a fellow lawmaker, **the committees tend to wait for a member of Congress to resign, lose re-election or leave office voluntarily** [emphasis added]**.** In the House, this happened in at least 15 cases since 2009: The pending investigations are closed; no judgment is reached; voters never know what really happened; the lawmakers who were innocent of the allegations do not receive a clean bill of health; ethical violators are never held accountable. This is no way to foster a culture of accountability or public trust in those elected by the people."[25]

3. Weak ethics oversight and enforcement is not confined to the US Parliament, however. The United States' Executive Branch also suffers from weak and rare enforcement of ethics rules, and again this speaks to the patchy framework that exists in the EU Commission and the various Institutions. Crucially, it also speaks to the inherent deficiencies that exist in a model which requires Executive Branch oversight of Executive Branch ethics compliance. In that respect the current EU framework repeats the same lesson demonstrated by inadequate ethics oversight by the US Parliament. Moreover, it reinforces the benefit in having a consolidated framework, purpose-built, with adequate authority and powers of oversight, such as that proposed by the EUEOA. A proposal which includes a remit for the EUEOA that ensures important issues will not fall between the gaps and, crucially, will have an adequate enforcement capacity. Weaknesses evident in the US Senate framework include:

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[23] Chris Marquette, "Senate Ethics Has Not Sanctioned a Member in 14 Years," *Roll Call*, 2 February, 2021, available at: <https://rollcall.com/2021/02/01/senate-ethics-has-not-sanctioned-a-member-in-14-years/>.

[24] Chris Marquette, "Senate Ethics Has Not Sanctioned a Member in 14 Years," *Roll Call*, 2 February, 2021, op cit.

[25] Meredith McGehee and William Gray, "The Ethics Blind Spot," *Issue One*, 13 February, 2018, op cit.

3.1. In the U.S., the Director of the Office of Government Ethics (OGE) serves a six-year term, but they can be removed without cause by the current political administration.[26]

3.2. The OGE is not a real enforcement agency; instead, it has been structured to play a merely advisory role.[27] It appears from afar to be an independent agency, but is not in reality. Instead, it provides guidance and oversight to "designated agency ethics officials (DAEOs) in over 130 executive branch agencies."[28] While the OGE can investigate and refer matters to agencies with sanction power over its employees, the OGE itself has no enforcement mechanisms.[29]

3.3. During the Trump Administration, the OGE Director, Walter Schaub, left the position before his six-year term was finished after his enthusiastic investigations into the Trump Administration resulted in no enforcement actions, and therefore the end of the Director's effective authority.[30]

3.4. A prominent example of OGE's weaknesses during the Trump Administration was White House advisor Kellyanne Conway's promotion of the retail business of President Trump's daughter, Ivanka.[31] While the OGE found Conway to be in violation of ethics laws banning "public officials from using their position to endorse products or services," and the OGE Director recommended disciplinary action, there were no repercussions. Why? Because the White House has sole authority to sanction its employees, and did not agree with Shaub's assessment. The lack of enforcement mechanisms at OGE's disposal during the Trump Administration eventually led OGE Director Schaub to leave the position early, believing he had reached the end of the Director's effective authority.[32]

3.5. Earlier in the Trump Administration, Schaub had called for President Trump to step away from his business dealings, and place all his assets into a blind trust.[33] Instead, the President moved his assets

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[26] "Proposals for Reform: National Task Force on Rule of Law & Democracy," *Brennan Center for Justice*, 2 October, 2018, available at: <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-national-task-force-rule-law-democracy>.

[27] Ibid.

[28] Fedweek, "Report Examines Role of Office of Government Ethics," 1 March, 2022, available at: <https://www.fedweek.com/issue-briefs/report-examines-role-of-office-of-government-ethics/>.

[29] "Proposals for Reform: National Task Force on Rule of Law & Democracy," *Brennan Center for Justice*, op cit.

[30] Rosalind S. Helderman and Matea Gold, "Federal Ethics Chief Who Clashed with White House Announces He Will Step Down," *The Washington Post*, 6 July, 2017, available at: <https://www.washingtonpost.com/politics/federal-ethics-chief-who-clashed-with-white-house-announces-he-will-step-down/2017/07/06/4732c308-624c-11e7-a4f7-af34fc1d9d39_story.html?utm_term=.80376b51491f>.

[31] Drew Harwell, "Federal Ethics Chief Criticizes White House for Decision Not to Discipline Conway," *The Washington Post*, 9 March, 2017, available at: <https://www.washingtonpost.com/politics/federal-ethics-chief-criticizes-white-house-for-decision-not-to-discipline-conway/2017/03/09/d5cdd226-0511-11e7-ad5b-d22680e18d10_story.html>.

[32] Rosalind S. Helderman and Matea Gold, "Federal Ethics Chief Who Clashed with White House Announces He Will Step Down," *The Washington Post*, op cit.

[33] Lisa Rein, "Federal Ethics Chief Blasts Trump's Plan to Break from Businesses, Calling It 'Meaningless'," *The Washington Post*, 28 October, 20211, available at:

into a trust managed by his sons, and gave up management of his company. Measures Schaub called "wholly inadequate[.]"[34]Yet, Schaub had no actual enforcement power to force the President to abide by ethics standards.

3.6. In addition to a lack of enforcement mechanisms, the OGE is also hobbled by lacking the number of employees necessary to expand their oversight and take on any new enforcement authorities. In 2021, OGE had 80 employees and a budget of $21 million, in order to provide ethics guidance to over 2.7 million federal employees.[35] Many additional hires of attorneys, investigators and other staff are needed to enforce ethics rules across the federal executive branch.[36]

3.7. Recommendations for OGE reforms are highlighted by the obvious fact that the head of the OGE needs protection from removal, and fixed terms. "OGE also is not truly independent. Although its director serves for a fixed five-year term and is usually a nonpartisan expert, **there appears to be no statutory safeguard against** a president, upset by OGE's pursuit of ethical issues in his or her administration, **removing the director without cause**. This is less protection than that accorded other important watchdog agencies, including the Securities Exchange Commission and Federal Election Commission, whose leaders the president may generally remove only for good cause (e.g., neglect of duty or misconduct in office)."[37]

3.8. Among several reforms suggested by the Brennan Center for Justice, in light of the Trump Administration ethics abuses, specific note should be made of the need for an entity to enforce the anti-conflicts of interest emoluments clauses of the Constitution[38] (banning receipt of gifts by members of the government from foreigners or states).[39] The absence of an adequate enforcement mechanism enabled Trump to get away with clearly problematic behaviour.[40]

3.9. Additional recommendations for OGE from the Brennan Center include strengthening its sphere of influence, including:

<https://www.washingtonpost.com/news/powerpost/wp/2017/01/11/federal-ethics-chief-blasts-trumps-plan-to-break-from-businesses-calling-it-meaningless/>.

[34] Ibid.

[35] United States Office of Government Ethics, "Annual Performance Report Fiscal Year 2021," 2021, available at: <https://www.oge.gov/web/OGE.nsf/0/75C8D490064D2C078525881300624ACD/$FILE/OGE%20APR.pdf>; See also: USAspending.gov, "Office of Government Ethics (OGE) Agency Profile," Updated 30 August, 2022, available at: <https://www.usaspending.gov/agency/office-of-government-ethics?fy=2022>.

[36] "Proposals for Reform: National Task Force on Rule of Law & Democracy," *Brennan Center for Justice*, op cit.

[37] "Proposals for Reform: National Task Force on Rule of Law & Democracy," *Brennan Center for Justice*, op cit.

[38] "The Emoluments Clauses of the US Constitution," *Congressional Research Service*, 27 January, 2021, available at: <https://crsreports.congress.gov/product/pdf/IF/IF11086>.

[39] Martha Kinsella and Daniel I. Wiener, "Restoring the Rule of Law," *Brennan Center for Justice*, 25 October, 2022, available at: <https://www.brennancenter.org/our-work/analysis-opinion/restoring-rule-law>.

[40] Ciara Torres-Spelliscy, "Supreme Court Ducks an Opportunity on Trump Emoluments Cases," *Brennan Center for Justice,* 19 February, 2021 available at: <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-ducks-opportunity-trump-emoluments-cases>.

- Granting OGE the power, under certain circumstances, to conduct confidential investigations of ethics violations in the executive branch "on referral from another government body or on its own initiative."
- Creating a separate enforcement division within OGE, allowing OGE to bring civil enforcement actions in federal court;
- providing OGE an opportunity to review and object to conflict-of-interest waivers; and
- Confirming that White House staff must follow federal ethics rules.[41]

4. Ethics enforcement outside the White House and across Cabinet Departments is also weak. Again, this provides a salutary lesson for the EU: a dispersed ethics oversight regime, federated and bifurcated, is inadequate to the task of enforcing a government-wide ethics framework; one that is consistent and adequately operationalised. Examples of inadequacies in the White House and Cabinet departments ethics oversight framework abound.

   4.1. Ethics officials face conflicts of interest when their personal careers (especially promotions) are handled by the same leadership whose conduct they must oversee. During the early Trump Administration, Commerce Secretary Wilbur Ross maintained investments in shipping companies, regulated in part by the Commerce Department he ran. Ross' failure to either divest, or recuse appropriately, was signed-off by an alternate designated ethics official, David Maggi, following particular scrutiny of Ross's investment in a shipping company, tied to Russian leader Vladimir Putin.[42] Ross publicly stated that Maggi had cleared Ross to retain the investment.

   4.2. However, the ability of the person being investigated to influence the career trajectory of the ethics official calls into question the clearance of Ross. "Maggi was elevated from an alternate designated ethics official to the permanent position sometime after September 5, according to records with the Office of Government Ethics. That means that, after Maggi accepted Ross's ethics agreement and allowed him to maintain the shipping investment, Ross — who controls hiring for the position — rewarded him with a promotion."[43]

   4.3. The explicit purpose of the Inspectors General (IG) system in the U.S. "is to create independent and objective units within each agency whose duty it is to combat waste, fraud, and abuse in the programs and operations of that agency. To this end, each IG is responsible for conducting audits and investigations relating to the programs and operations of its agency, and providing leadership and coordination and recommending policies for, and to conduct, supervise, or coordinate other activities

[41] Proposals for Reform: National Task Force on Rule of Law & Democracy," *Brennan Center for Justice*, op cit.
[42] David Dayen, "The Wilbur Ross Scandal Isn't About Russia, It's About Corruption," *The Intercept,* 8 November, 2017, available at: <https://theintercept.com/2017/11/08/wilbur-ross-paradise-papers-trump-russia/>.
[43] Ibid.

for the purpose of promoting economy, efficiency, and effectiveness and preventing and detecting fraud and abuse in those programs and operations."[44]

4.4. That makes the IG system, in part, an ethics oversight authority. However, the IG system itself has received inadequate oversight from the Integrity Committee (IC). According to the good government group Project on Government Oversight, the IC "is failing in its mission to hold inspectors general accountable for bad behaviour. [...] in various instances the IC declined to open investigations into credible allegations of misconduct, spent so much time on an investigation that its recommendations were no longer as relevant to the affiliated agency in question, and neglected to ensure inspectors general and their staff were held accountable once an allegation had been substantiated."[45]

4.5. The Office of the Inspector General of Homeland Security has been wracked with controversy. Then-Deputy Inspector General of Homeland Security Jennifer Costello "reportedly spearheaded an internal pressure campaign to secure the position of acting inspector general for herself" which the IC refused to investigate. Costello then battled President Trump's next appointee Joseph V. Cuffari, and both "Costello and Cuffari levied numerous misconduct allegations against each other to the IC over the course of their internal power struggle."[46]

4.6. Costello was eventually placed on administrative leave in 2020, but the IC never acted. Cuffari remains DHS inspector general to this day, and is currently under investigation by the IC after involvement in a headline making scandal, connected with the January 6, 2021 attack on the US Capitol, by a group of Trump supporters.[47] "The Department of Homeland Security's chief watchdog scrapped its investigative team's effort to collect agency phones to try to recover deleted Secret Service texts this year, according to four people with knowledge of the decision and internal records reviewed by The Washington Post."[48]

4.7. The Project On Government Oversight (POGO) has made a series of recommendations for IG reform to ensure more internal accountability and external supervision of Inspector Generals, including more funding for the broader Council of the Inspectors General on Integrity and Efficiency, as well as

[44] Council of the Inspectors General on Integrity and Efficiency, "The Inspectors General," Authorities Paper, 11 June, 2014, available at: <https://www.ignet.gov/sites/default/files/files/IG Authorities Paper - Final 6-11-14.pdf>.

[45] Joanna Derman And Liz Hempowicz, "From Sleeping Dogs To Watchdogs: To Ensure Integrity For Our Inspectors General, Congress Must Reform The Integrity Committee," *Project On Government Oversight*, 5 October, 2022, available at: <https://www.pogo.org/report/2022/10/from-sleeping-dogs-to-watchdogs-to-ensure-integrity-for-our-inspectors-general-congress-must-reform-the-integrity-committee>.

[46] Ibid.

[47] Ibid.

[48] Maria Sacchetti and Carol D. Leonnig, "Homeland Security Watchdog Halted Plan To Recover Secret Service Texts, Records Show," *The Washington Post*, 29 July, 2022, available at: <https://www.washingtonpost.com/national-security/2022/07/29/homeland-inspector-general-texts/>.

external review by the Government Accountability Office of IC investigations.[49] Regardless of the specifics, it is clear that Inspectors General in the United States lack adequate accountability while holding a position that requires them to be beyond reproach.

5. Individual Agencies are also wracked with difficulties in enforcing ethical standards. This has been the experience in the United States, and an experience which speaks to the current EU regime, in which the Institutions, individually, maintain their own ethics frameworks. The leading example from the US is that of the Federal Reserve System ("The Fed"). It is the central banking system of the United States of America, and the most powerful independent agency of all. Its ethics oversight has been flawed and patchy.

   5.1. In the past year, the Federal Reserve has endured multiple investigations into its top officials, after two such officials were found by the Inspector General of the agency to have been "trading securities that could have benefited from the central bank's 2020 intervention in financial markets[.]"[50]

   5.2. These pandemic-era scandals have damaged the standing of the Federal Reserve and, remarkably, have shown no sign of ending. As noted by *Reuters* on November 1, 2022, "A little more than a year after a trading controversy rattled the Federal Reserve's standing in Washington and beyond, new ethics missteps have hampered efforts by the U.S. central bank and its chief, Jerome Powell, to put the matter behind them."[51]

   5.3. While much of the public attention to the Fed scandals has focused on what rules did or did not exist, the absence of effective ethics enforcement was a major problem.

   5.4. While the Fed's Ethics Office initially warned of situations in which pandemic-era trading might appear improper, the lack of consequences associated with warnings, and the limited recommendations themselves, underscore a broad weakness of the ethics office itself.[52]

   5.5. The Office of Inspector General (OIG) for the Board of Governors of the Federal Reserve System (Board) describes itself as "an independent and objective oversight authority" for the Fed.[53]

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[49] Joanna Derman And Liz Hempowicz, "From Sleeping Dogs To Watchdogs: To Ensure Integrity For Our Inspectors General, Congress Must Reform The Integrity Committee," *Project On Government Oversight*, op cit.

[50] Rachel Siegel, "Fed Inspector General Probe Clears Powell, Clarida of violating laws," *The Washington Post*, 14 July, 2022, available at: <https://www.washingtonpost.com/business/2022/07/14/fed-ethics-scandal/>.

[51] Michael S. Derby, "A year after trading scandal, Fed is again under ethics spotlight," *Reuters*, 1 October, 2022, available at: <https://www.reuters.com/markets/us/year-after-trading-scandal-fed-is-again-under-ethics-spotlight-2022-11-01/>.

[52] Jeanna Smialek, "Fed Ethics Office Warned Officials to Curb Unnecessary Trading During Rescue," *The New York Times*, 21 October, 2021, available at: <https://www.nytimes.com/2021/10/21/business/economy/federal-reserve-ethics-trading.html>.

[53] Office of Inspector General for the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau, "Introduction to the OIG," 4 October 2021, available at: <https://oig.federalreserve.gov/introduction.htm>.

5.6. The task of investigating potentially improper trading at the Fed was thus handed over to the Federal Reserve's OIG.

5.7. When these investigations cleared the top two members of the Federal Reserve's Board of Governors (as opposed to the two regional bank presidents who had resigned), "Powell, Clarida cleared by Fed watchdog of wrongdoing in trading activity," was a representative headline.[54]

5.8. The press generally accepted the Fed's characterization that the IG investigation was "independent" when, in reality, the Federal Reserve's Inspector General is chosen by the board, and can be fired by two-thirds of its members for any reason. This results in perverse incentives either to investigate, or not to investigate, as thoroughly as a situation may demand. As Dennis Kelleher, President and CEO of Better Markets, noted, "The Federal Reserve's Inspector General's report today on its investigation into the personal trading by the Chair and former Vice Chair Clarida during the pandemic while in possession of material non-public information was very narrow, omits key information, and is not credible.[55]

6. There are several lessons for the EUEOA from how the federal government of the United States has been ineffective in enforcing its panoply of ethics laws. Among them are the principle that the **more ethics enforcement responsibility is divided, the less likely it is to be deployed effectively**. Similarly, complexity that appears to offer tailoring of rules often backfires. Further, the less likely it is that rules will be enforced in a timely manner, the less likely rules will be followed at all. Sufficient enforcement staff are necessary to enforce rules effectively — and, critically, **enforcement staff cannot be subject to management by the political leadership** who they are monitoring. However, even independence of enforcement staff is no guarantee of effectiveness, if partisan gridlock is a potential obstacle to the ultimate enforcement of ethics rules.

[54] Victoria Guida, "Powell, Clarida cleared by Fed watchdog of wrongdoing in trading activity," *Politico*, 14 July, 2022, available at: <https://www.politico.com/news/2022/07/14/powell-clarida-cleared-by-fed-watchdog-00045915>.

[55] Dennis Kelleher, "Federal Reserve's IG Report On Chair/Former Vice Chair's Trading Was Very Narrow, Omits Key Information And Is Not Credible," *Better Markets*, 14 July, 2022, available at: <https://bettermarkets.org/newsroom/federal-reserves-ig-report-on-chair-former-vice-chairs-trading-was-very-narrow-omits-key-information-and-is-not-credible/>.

III. The 'revolving door'. Lessons for an EUEOA from the United States

7. The United States is plagued by a lack of monitoring of officials after they leave the federal government. There is an excessive focus on complicated schemes designed to ensure no one is denied the job they want, rather than prioritizing enforceable rules that will protect against abuse-via-loopholes. Rules should be simple, and designed to prevent conflicts of interest *ex ante*. The goal should be to ensure that the public is confident that officials are pursuing the public interest, rather than favouring corporate interests, with whom they have had, or will have, business ties. It is both more effective and far less resource intensive to set clear rules, and enforce them stringently, even if it means periodically barring someone whose behaviour is relatively harmless.

7.1. Congressional post-employment restrictions and lack of enforcement are strongly evident.

7.1.1. For the United States House of Representatives, "Section 207 imposes a one-year "cooling-off period" on the former Members, officers and covered employees. As a general matter, for one year after leaving office, those individuals may not seek official action on behalf of anyone else by either communicating with or appearing before specified current officials with the intent to influence them."[56]

7.1.2. Sanctions for violating federal ethics codes as a Representative include fines and referral to the Department of Justice.[57]

7.1.3. Senate ethics rules stipulate that departing Senators must not only avoid conflicts of interest, but avoid "the appearance of a conflict between their duties to the Senate and the interests of the prospective employers with whom they are negotiating."[58] They are also required to file a disclosure after they begin negotiations with a new private employer, and recuse themselves from any potential conflict, as well as notify the Select Committee of a recusal.[59]

[56] U.S. House of Representatives Committee on Ethics, "Post-Employment Restrictions," 14 July, 2011, available at: <https://ethics.house.gov/outside-employment-income/post-employment-restrictions>.
[57] Ibid.
[58] U.S. Senate Select Committee on Ethics, "Employment Negotiations and Post-Employment," Flyer, October, 2020, available at: <https://www.ethics.senate.gov/public/_cache/files/9dbac7a9-ffb4-433b-bb30-b8783d72fc15/flyer---employment-negotiations-and-post-employment---oct-2020.pdf>.
[59] Ibid.

7.1.4. Departed Senators have a two-year contact ban, stopping them from lobbying and communicating with any member of Congress (House or Senate) or their employees, on behalf of a third party, with intent to influence official action.[60]

7.1.5. The Campaign Legal Center has recommended that "Congress should hold itself to the same standard as the executive branch by instituting its own five-year post-employment lobbying ban. (Currently, there is only a one-year lobbying ban for former House members and two years for former Senators.) Bills like the Cleaning Up Washington's Act aim to expand the post-employment lobbying restrictions for Congress to five years."[61]

7.2. However, the American executive branch, post-employment restrictions, are plagued by inadequate enforcement.

7.2.1. U.S. law 18 U.S. Code § 207 (a)(1) permanently bars officials from "switching sides" or representing a private party on "particular matters" involving identified parties that the official worked on "personally and substantially" while in government.[62] Further, 18 U.S. Code § 207 (a)(2) bars officials for a period of two years from "switching sides" on particular matters that were under their responsibility while in government.[63]

7.2.2. 18 U.S. Code § 207 (c) (1) bars executive branch officials, for a period of one year, from communicating with any officer of the agency in which they served, on behalf of a private party, with the intent to influence.[64]

7.2.3. 18 U.S. Code § 207 (d) (1) bars "very senior" executive branch officials, for a period of two years, from communicating with certain other "very senior officers" (see: 18 U.S. Code § 207 (c) (2)) on behalf of a private party, with the intent to influence.[65]

7.2.4. While OGE provides definitions and elaboration[66] of many terms and concepts, and some agencies have created additional restrictions for their employees, the result is a patchwork

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[60] Ibid.

[61] Sophia Gonsalves-Brown, "Revisiting President Trump's Forgotten Five-Point Ethics Plan," *Campaign Legal Center*, 28 September, 2020, available at: <https://campaignlegal.org/update/revisiting-president-trumps-forgotten-five-point-ethics-plan>.

[62] 18 U.S. Code § 207 – Restrictions on Former Officers, Employees, and Elected Officials of the Executiev adn Legislative Branches [(a)(1) – Permanent Restrictions on Representation on Particular Matters.

[63] 18 U.S. Code § 207 – Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches [(a)(2) – Two-Year Restrictions Concerning Particular Matters Under Official Responsibility.

[64] 18 U.S. Code § 207 – Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches [(c)(1) – One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.

[65] 18 U.S. Code § 207 – Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches [(d)(1) – Restrictions on Very Senior Personnel of the Executive Branch and Independent Agencies].

[66] 5 C.F.R. §2641 – Post-Employment Conflict of Interest Restrictions.

ethics edifice that reflects more contingency than design. Discrepancies and loopholes predictably abound.

7.3. Presidents have taken to issuing executive orders on ethics upon taking office in order to address some of the inadequacies and gaps within existing, permanent law. These orders require executive branch appointees to sign pledges that limit their behaviour, beyond what existing law requires.[67]

7.3.1. President Biden's executive order on ethics made modest improvements, such as extending the cooling-off period for departing officials, covered under 18 U.S. Code § 207(c) to two years.[68]

7.3.2. Biden added a one-year prohibition for departing officials on "shadow lobbying", for those covered by 18 U.S. Code § 207 (c), and 18 U.S. Code § 207(d).[69]

7.3.3. Biden's order required appointees to agree, for a period of two years from the date of appointment, not to "participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."[70]

7.3.4. Biden's appointees who had been registered lobbyists also agreed to not

(a) work, for a period of two years, on any particular matter on which they lobbied;

(b) participate in the "specific issue area in which that particular matter falls"; or

(c) "seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment."[71]

7.3.5. The implementation of Executive Order No. 13770 by President Trump did not effectively close the loopholes he claimed it did. Former Trump Administration officials have still been able to lobby Congress, and in many instances, can lobby the administration – even if they aren't able to lobby their former agencies directly. As of mid-2020, just 6 months after Biden's inauguration, more than 80 Trump officials had gone to work as lobbyists.[72]

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[67] Tamara Keith, "Biden's Ethics Pledge is Stringent. Some Want It To Be Even Stronger," *NPR*, 2 February, 2021, available at: <https://www.npr.org/2021/02/02/962950047/bidens-ethics-pledge-is-stringent-some-want-it-to-be-even-stronger>.

[68] Executive Order on Ethics Commitments by Executive Branch Personnel, United States, (Enacted: 20 January 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/>.

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] Theodoric Meyer and Debra Kahn, "Dozens of Trump veterans cash out on K St. despite 'drain the swamp' vow," *Politico*, 8 July, 2020, available at: <https://www.politico.com/news/2020/07/08/trump-administration-veteranslobbying-348273>.

7.3.6. "Ryan Jackson, who left the EPA in January [2020] after three tumultuous years as chief of staff, appeared on reports disclosing nearly $600,000 in lobbying by the National Mining Association – including lobbying the EPA on a section of the Clean Water Act related to state-issued permits for activities that release discharge into water (including mining)."[73]

7.3.7. At the beginning of the COVID-19 Pandemic, Public Citizen called for an investigation into the potential violation of ethics pledges, by several former employees, who had left the Trump Administration prior to the pandemic. Many were working at companies like Cigna, which had the opportunity to receive significant grants, loans, and contracts in the wake of the COVID-19 pandemic, as well as lobbying firms which represented many of these corporations. This was argued to be in violation of Trump's Executive Order No. 13770, that restricted lobbying activities after departure from public service, including limiting the ability for former appointees to lobby the agency within which they worked.[74]

7.3.8. The chief of staff of Trump's Interior Secretary left her job to work for petroleum giant BP. At Interior, "Downey Magallanes [...] participated in deliberations over how to scale back safety monitoring rules for offshore oil and gas operations. And she helped develop a leasing plan that would permit drilling in most U.S. continental shelf waters." She met with BP executives five times during her tenure as chief of staff to Ryan Zinke.[75]

7.3.9. Downey Magallanes' hiring occurred despite Trump's ban on "political appointees from lobbying their respective agencies for five years after leaving office, and from lobbying anyone in the executive branch for the rest of his administration."[76]

7.3.10. After her hiring by BP, Magallanes "lobbied Congress and the federal government — including the Department of Energy and the Environmental Protection Agency (EPA) — according to reports disclosing nearly $2.8 million paid for lobbying."[77] She avoided Trump's ban by lobbying a different agency.[78]

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[73] Sophia Gonsalves-Brown, "Revisiting President Trump's Forgotten Five-Point Ethics Plan," *Campaign Legal Center*, 28 September, 2020, op cit.

[74] Greg Holman, "Public Citizen's Submitted Ethics Complaint Regarding COVID-19 Lobbying," *Public Citizen*, 6 July, 2020, available at: <https://www.citizen.org/article/public-citizens-submitted-ethics-complaint-regarding-covid-19-lobbying/>.

[75] Juliet Eilperin, "Top Interior Staffer Who Backed Shrinking National Monuments To Join BP," *Washington Post,* 28 August, 2018, available at: <https://www.washingtonpost.com/national/health-science/top-interior-staffer-who-backed-shrinking-national-monuments-to-join-bp/2018/08/27/ab241d0a-aa42-11e8-8a0c-70b618c98d3c_story.html>.

[76] Greg Holman, "Public Citizen's Submitted Ethics Complaint Regarding COVID-19 Lobbying," *Public Citizen*, op cit.

[77] Sophia Gonsalves-Brown, "Revisiting President Trump's Forgotten Five-Point Ethics Plan," *Campaign Legal Center*, op cit.

[78] Ibid.

7.3.11. There are no specific legal restrictions against lobbyists, as a class, revolving into government. Such behaviour is generally dealt with, inadequately, by executive orders, as well as the general legal standard designed to prevent conflicts of interest.

- The general statute is 18 U.S.C. § 208, which "prohibits Government employees from participating personally and substantially in official matters where they have a financial interest."[79]
- That limit includes involvement in any "particular matter involving specific parties" when the new government official, within the past year, has a "covered relationship," including "as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."[80]

8. Lobbying and Shadow Lobbying: Many American laws, including ethics executive orders, rely on limiting "lobbyists" from entering government service and working on behalf of past clients, or lobbying former colleagues after they leave government. However, the definition of lobbying is far too narrow to encompass the common-sense notion of who is, and is not, lobbying, resulting in considerable behaviour that appears to be proscribed being treated as legal.

8.1. To register as a lobbyist: "A lobbyist must register under the LDA if they meet all of these requirements:

- Are paid to lobby on behalf of a client.
- Make more than one contact with covered government officials regarding the client's issues.
- Spend at least 20 percent of their time on lobbying activities, including preparing for these "contacts," for a given client."[81]

8.2. "When an individual engages in advocacy to influence public policy but does not register as a lobbyist, it's typically referred to as 'shadow lobbying.' [..] This phenomenon extends to former members of Congress who advise lobbying firms but don't register, or heads of trade associations who run multi-million dollar lobbying operations but don't register. This can leave a portion or, in some cases, all of a lobbying operation's details hidden from the public. Also not disclosed in public lobbying filings are the millions of dollars corporations and trade associations spend on public relations and ad campaigns to influence policymakers."[82]

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[79] 18 U.S.C. § 208.

[80] 5 C.F.R. § 2635.502(b)(1)(iv) - Personal and business relationships.

[81] Karl Evers-Hillstrom and Dan Auble, "'Shadow lobbying' in Trump's Washington," *Open Secrets*, 3 October, 2019, available at: <https://www.opensecrets.org/news/reports/shadow-lobbying-2019>.

[82] Ibid.

8.3. Limitations on lobbyists either "revolving in" or "revolving out" of government only work if the law is adequately capacious to encompass all people understood to be *de facto* lobbyists. If either the definition or enforcement is inadequate, revolving door restrictions will founder.

- "Under the LDA's current language, most *shadow lobbyists* likely aren't violating the law. And if they did violate the law, they probably wouldn't have much to worry about."[83]
- **Lack of laws**: ""The law only requires very specific kinds of activity before the Congress to be reported," said Jeffrey M. Berry, political science professor at Tufts University. "The reasons why people don't register are they prefer not to have their names reported or they just feel it's not required by law.""[84]
- **Lack of enforcement**: "The Secretary of the Senate has referred a total of 19,705 cases of potential non-compliance under the LDA to the U.S. Attorney for the District of Columbia, which is tasked with enforcing the law. However, only nine violations have been publicly enforced in the law's 24-year history, all of which resulted in fines."[85] [as of 2019].
- "The "20 percent rule" [of the LDA] has proven difficult to enforce, as many government affairs employees say they don't spend one-fifth of their time doing explicit lobbying work. At the same time, some former members of Congress who are now "strategic advisers" say they don't need to register as they don't make direct contact with their former colleagues about specific issues."
- Shadow lobbying is a response to public scepticism of lobbyists – be it Democratic presidential contenders rejecting lobbyist contributions,[86] or limits on lobbyists entering government, registering as a lobbyist can serve to reduce the very influence that a lobbyist is peddling.
- Additionally, transparency concerning lobbying strategies allows the press and opponents to understand your strategy, and potentially to delegitimize it.[87]
- The number of registered lobbyists fell during the Obama Administration, "a steady decline that coincided with congressional lobbying reforms [and] specific restrictions on registered lobbyists entering the Obama administration."[88] This fits patterns that indicate professional influence-peddlers move back and forth between registering, without a notable shift in responsibilities.[89]

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[83] Ibid.

[84] Ibid.

[85] Christian D. De Fouloy, "Shadow Lobbying In The U.S.A.," *Association of Accredited Public Policy Advocates to the European Union*, 15 November, 2019, available at: <http://www.aalep.eu/shadow-lobbying-usa>.

[86] Karl Evers-Hillstrom and Dan Auble, "'Shadow lobbying' in Trump's Washington," *Open Secrets*, op cit.

[87] Ibid.

[88] Ibid.

[89] Ibid.

8.4. Campaign Legal Center's recommendations to address the enforcement difficulties with respect to "lobbying", to make sure former government officials do not violate limitations on private sector post-government work, include:

- "Strengthen[ing] and expand the federal definition of a *lobbyist* to include all individuals paid to influence government;"[90] and
- "Expanding the definition of what constitutes lobbying activity requiring disclosure will help close the shadow lobbying loophole and give the public transparency surrounding who is trying to influence policy." How? By "expanding the scope of individuals and activities that would be subject to lobbying disclosure requirements to include counselling in support of lobbying contacts."[91]

8.5. When seeking enforceable standards for potential government employees who have met a new, broader standard for lobbyists, one possibility is to create a new "corporate lobbyist" definition, so as to identify individuals paid to influence the government on behalf of for-profit entities, and their front-groups.

- Ethics law should distinguish between public interest lobbyists, and those who are selling their connections and inside knowledge to the highest corporate bidder. It certainly does not comport with common understandings of what makes lobbying troublesome with only a focus on ideologically-minded lobbyists. In the popular imagination, lobbyists adopt the cause of whichever client is willing to pay them the most, with no regard for the impact of the client's preferred policy agenda, and no qualms about changing their position if monetary incentives change. Even if you squint, that does not describe public interest lobbyists, whose resumes most often show a years' or lifelong commitment, to their cause (for which they've most often toiled from positions with much more modest pay).
- From the perspective of public trust, ethics resources would be far better spent, meaningfully curbing the influence of those who work to undermine the public interest on behalf of corporations, whether they're registered lobbyists or not.

8.6. Lobbying restrictions can be too weak when they are too narrow. For instance, "Trump's ethics pledge banned all executive branch appointees from lobbying the agency at which they were employed – **rather than the entire government** – within five years of leaving government service."[92]

8.7. Ethics rules are also meaningless without enforcement. Any new measures must be accompanied by a credible threat of vigorous enforcement.

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[90] Sophia Gonsalves-Brown, "Revisiting President Trump's Forgotten Five-Point Ethics Plan," *Campaign Legal Center*, op cit.
[91] Ibid.
[92] Ibid.

8.7.1. In 2019 an Office of Inspector General (OIG) investigation at the Federal Trade Commission found that former Commissioner Joshua Wright had clearly and repeatedly violated "federal conflict of interest rules [that] impose strict ethical restrictions including a lifetime ban on former senior government officials lobbying the government on matters in which they were "personally and substantially" involved while serving in government."[93]

8.7.2. Commissioner Wright, who served on the FTC from 2013 to 2015, "met or attempted to meet with FTC officials on at least six different occasions" in the spring of 2017, to encourage the agency to settle the lawsuit it had just announced against the tech company Qualcomm. Wright was legally barred from lobbying any officials on the Qualcomm case, having worked on it while serving on the Commission. In 2018, the OIG referred the alleged violations to the Trump era Department of Justice (DOJ). The DOJ declined to take action.[94]

8.7.3. There is a need for more regular tracking of former government officials, to make sure they are properly following ethics laws and rules. Aspects of this include:

(i) Increased capacity: relying on an "honor code" is insufficient, government employees must monitor post-employment compliance.

(ii) Government agencies systematically disclosing the date, recipients, and subject of all communications between current and former staff of an agency, can help.

(iii) Sanctions of illegal behaviour must be likely, and adequate to discourage officials rule breaking.

(iv) The scope of prohibitions must be broad enough to track public intuition about when a former employee is providing a client or employer an unfair advantage, with the government.

8.8. There are several lessons for the EUEOA from how the federal government of the United States has attempted to address the problem of the revolving door. Among them are that rules known not to be enforced regularly, such as restrictions on post-government employment, are ineffective. That *ad hoc gap filling* is far less effective than developing an intelligible system, based on clear rules, enforced by an appropriate number of civil servants. That while it makes sense to have rules about people entering government service from lobbying, and leaving government to lobby, effective rules require dealing with the breadth of what is, in reality, lobbying. That is to say "shadow lobbying" — i.e., lobbying-like activities somehow outside the United States' creaky definition of lobbying – is lobbying. In turn, that

[93] "Letter Requesting Re-Referral of Ethic Complaint Against Former Commissioner Joshua Wright," *Revolving Door Project*, 3 March, 2022, available at: <https://therevolvingdoorproject.org/wp-content/uploads/2022/03/Letter-Requesting-Re-Referral-of-Ethics-Complaint-Against-Former-Commissioner-Joshua-Wright.pdf>.

[94] "Letter Requesting Re-Referral of Ethic Complaint Against Former Commissioner Joshua Wright," *Revolving Door Project*, op cit.

points to a broader principle: It is better to err on the side of slightly overbroad but clear and simple restrictions, rather than attempting to carefully tailor rules for every possible eventuality. Why? Because loopholes quickly swallow complex rules.

IV. Analysis of key provisions of the proposed EUEOA

A. Key provisions of the Resolution

9. In this part, we analyse the provisions in the EU Resolution for the creation of an EUEOA – both individually and as a whole – to make an assessment of the **quality** of the framework, as contemplated by the Resolution. This enables an inquiry into the fitness for purpose, or otherwise, of the proposed structure, powers and jurisdiction of the EUEOA, as it is contemplated by the EU Resolution. Part of that inquiry is the extent to which the creation of an EUEOA is envisaged to include **internal defences, checks-and-balances, and the facilitation of robust corporate governance**, in order to ensure that an EUEOA will itself **not fall prey** to conflicts of interest or the revolving door.

   9.1. At the very least, this Agency's creation should take account of **poor enforcement**, as an identified failing in oversight regimes currently in operation in the US and the EU. Put differently, **enforcement** is crucial – currently in both the US and the EU we see authorities with the power to enforce ethics standards – but which consistently fail to do so. Consequently, an assessment of an Agency's power, but which excludes its potential for effective enforcement, provides for an incomplete assessment.

   9.2. We find that a number of identified causes for the failure of other ethics regimes elsewhere, has been structural (i.e. a lack of independence; failure to manage conflicts of interest and the revolving door; susceptibility to capture, etc). Consequently, in assessing the potential for effective enforcement from an EUEOA, we examine the structure proposed by the EU Resolution, to determine the extent to which the EUEOA, as it is envisaged, will **address these causes of poor supervisory oversight**, identified elsewhere.

   9.3. Implicit in this inquiry is an assessment of the potential value that this proposal, for the creation of an EUEOA, represents for the attainment of the goals of **good, efficient, uncorrupted government**; which enjoys the **trust and confidence** of the citizenry.

   9.4. We make frequent reference to supervision of, and the mitigation of conflicts of interest and the revolving door within, the financial industry. We do so because these issues are most attenuated in the financial industry (as evidenced by, for example, unmitigated conflicts of interest preceding the global financial crisis). The financial industry's power, influence, resources and the extent of its operations and presence, combined with the salaries it pays, attenuates and exacerbates supervision and oversight. Mechanisms to combat conflicts of interest and the revolving door between the financial industry and supervisors is, therefore in our view, instructive.

10. As such, we find this initiative – for the creation of an EU Ethics Oversight Authority (EUEOA) – is a valuable one, proffered in response to observed instances of unresolved conflicts of interest between EU officials and EU Parliamentarians (EUP), and includes the observed phenomenon of the revolving door.

11. We agree with the assertion that observed conflicts of interest and instances of the revolving door create an impression in the minds of EU citizens of a regime which is corrupt, sclerotic, untrustworthy, disconnected from the lives of those it ought to serve and from its purpose – a 'swamp'.

12. We agree with the assertion that this will diminish the standing of the EU project, and its support among EU citizens.

13. If unaddressed, these practices present significant dangers to the EU project:

    13.1. They can lead to the rise of demagogues who promise to *drain the swamp* (*à la* the election as 45th President of the United States, Donald Trump).

    13.2. They can lead to antagonism towards the EU, and ultimately present a threat of disintegration of the EU (*à la* Brexit).

14. We strongly support particular details in the EU Resolution, which speak to minutiae, because:

    14.1. Often the solutions to such problems is sought in primarily large, grandiose structures.

    14.2. While such macro-solutions are doubtless necessary, they fail to grasp the nature – or at least the nuances – of the task to which an EUEOA will be set.

    14.3. Large, grandiose solutions find analogy in very large stones placed upon a path and set to disrupt the progress of an adversary. But such a strategy on its own fails to recognise that even very large stones can be moved – and relatively easily – through the power of leverage. Put simply, the larger the stone, the longer must be the steel bar used to lift it. But if the bar is long enough then, theoretically, any sized stone can be moved.

    14.4. In this analogy "leverage/length of the bar" has its equivalent in machinations designed to emasculate the supervisory authority from within (board composition; process of board appointments; tenure of board appointees; capture of the board or its members; interference with investigations and inquiries; interference with the authority's budget allocation; political pressure; efforts to diminish the authority's jurisdiction; bribery/blackmail of board members; revolving door offers to board members, etc).

    14.5. Following on from the above, strategies that fail to *sweat the details* fail to recognise that, if effective, such an authority will frustrate and disrupt the efforts of those who seek personal enrichment by virtue of their position. Such individuals will, typically, not respond overtly or directly. But that is not to say they should not be expected to respond at all. Individuals who stand – personally – to lose

should be expected to fight back, and fight back hard. But they should also be expected to use subterfuge, manipulation, dirty tricks, and an "indirect approach".[95]

14.6. As a result, it is necessary to examine the ways in which supervisory authorities have been suborned elsewhere. It is also necessary to attempt to foresee ways in which the proposed EUEOA can be expected to weather efforts to undermine its efficacy.

14.7. In our view, the **proposal in its current form proposes both a commendable suite of solutions, and represents a potential global benchmark**.

15. As a reference point we note the structure, profile and essence of the French equivalent *Haute Autorité pour la transparence de la vie publique / High Authority for transparency in public life*. This initiative represents a valuable comparator. It is, in our view, a similarly excellent suite of solutions.

16. Turning to specific aspects of the proposal as outlined in the European Parliament Resolution of 16 September, 2021.[96]

16.1. The proposal that the EUEOA have a board comprised of nine people (three from the Commission, three from the EUP and three from the Bench of the EUCJ, Court of Auditors and EU Ombudsman),[97] we note the following attributes:

16.1.1. the composition of the board is an uneven number;

16.1.2. is a large enough number to make corralling board members at the behest of one, dominant personality, more difficult;

16.1.3. strikes a balance between the Commission and the EUP;

16.1.4. includes a rump constituency comprised of individuals steeped in a culture of fierce independence and the pursuit fairness (EUCJ) and ethical behaviour (Court of Auditors and Ombud);

16.1.5. we note as a potential point for consideration, and pose the following question: which of the first two constituencies (Commission; EUP) are more likely to field board members who would be susceptible to conflicts of interests and/or the revolving door? Would it be advisable to reduce the representation from either of those two constituencies to two members, and increase by one the representation from the third estate? (See further discussion at § 16.19.1.1.2, below).

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[95] Basil Liddell Hart, "Strategy: the indirect approach," in *Strategic Studies*, pp. 101-104. Routledge, 2014.

[96] European Parliament Resolution of 16 September 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body (2020/2133(INI)).

[97] Ibid., **§ 25**.

16.2. We note the criteria for selection: independent, chosen on the basis of their competence, experience and professional qualities, as well as their personal integrity, have an impeccable record of ethical behaviour and provide a declaration of the absence of conflicts of interest.[98]

16.2.1. It may be argued that such *motherhood and apple-pie* statements are potentially facile. While we recognise that such statements are more difficult to enforce, because they are essentially qualitative, we nonetheless disagree with the assertion that they are, as a result, of no use. Qualitative statements can be useful in framing debate and pursuing agreed outcomes. Moreover, in an environment, such as the EUP, based as it is on debate, such framing can be useful in mounting challenges to board appointments whose character and integrity is questionable. Put differently, where there is evidence of deficiencies in a board appointee's character and integrity, then the framework created by the strictures listed in **§ 26 of the EUP Resolution** operate as a *fait accompli* for the ineligibility of that appointee.

16.3. Further criteria under **§ 26 of the EUP Resolution**: considers that the members should be chosen for a period of six years and be renewed by a third every two years.

16.3.1. We note that there are two options here for appointments for six years: one term of six years, or multiple terms totalling six years. The question is then, which is preferable?

16.3.1.1. Arguments in favour of the latter would likely focus on accountability, and the positive effect on accountability, to be had from a regime that requires board members to stand for reappointment. However, set against that is the risk of board members taking a *light-touch* approach to supervision / *pulling their punches* in order not to antagonise powerful interests. We have seen evidence of this in Australia, where the Chair of the Australian Prudential Regulation Authority (APRA) and the Chair of the Australian Securities and Investments Commission (ASIC) have demonstrated a willingness to be submissive to government interference,[99] in the hope of being re-appointed (despite the fact that both incumbent Chairs cannot easily be fired. Legislation protects them). Put differently, a term limit of one, six-year term, will give board members the confidence and the willingness to *rock the boat*, if need be, because they do not stand to lose in a contest for re-election.

16.3.1.2. There is evidence that ten years should be regarded as the maximum[100] for a board appointment. This is supported by evidence that a board member's contribution will be

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[98] Ibid., **§ 26 of the EUP Resolution**.

[99] David Llewellyn-Smith, "Wayne Byers has this one chance to repair his shattered reputation," *Macrobusiness*, 21 April, 2021, available at: <https://www.macrobusiness.com.au/2021/04/wayne-byers-has-this-one-chance-to-repair-his-shattered-reptutation/>.

[100] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", *Federal Law Review*, Vol. 49, no. 4 (25 September, 2021) at 526, citing Robert B. Stobaugh, *Report of the NACD Blue Ribbon Commission on Director Professionalism*, 1996.

greater in the early years of their appointment, than in the latter years;[101] and that length of tenure facilitates the creation of undesirable relationships between board members and entities over which they will have authority.[102] Evidence also points to an inverse relationship between board member independence, and length of tenure:[103] the longer the board member serves, the more likely they are to be invested in whatever may be the EUEOA's direction, and the less likely they are to challenge prevailing orthodoxies. That can include the independence of board members, from decisions made by the management of the EUEOA.[104]

16.3.1.3. That said, there is also evidence to suggest advantages in terms of appointments which are not too short. Specifically, these relate to the mitigation of *groupthink*, in that board members who have served for long enough develop the confidence to challenge one another, and provide alternative perspectives.[105] This comports with the findings of the Walker Review,[106] which recommended *that the competencies that should be assessed include informal and relationship skills – capability to challenge other members and influence the outcomes of the Board and stakeholders.*[107]

16.3.1.4. We note, and this is not addressed by the EUP Resolution, that a question remains as to the appointment of executive management of an EUEOA. This is a question that

[101] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing Ralph Katz, "The Effects of Group Longevity on Project Communication and Performance", *Administrative Science Quarterly*, Vol. 27, no. 1 (March, 1982), at 81.

[102] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing Martin Lipton & Jay W. Lorsch, "A Modest Proposal for Improved Corporate Governance", *The Business Lawyer*, Vol. 48, no. 1 (November, 1992), at 66.

[103] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing Nikos Vafeas, "Length of Board Tenure and Outside Director Independence", *Journal of Business Finance & Accounting*, Vol. 30, no. 7-8 (September/October 2003), at 1043.

[104] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing Rob Goodlad, "Board independence and longevity are funds biggest worries", *Investor Strategy*, (Sunday 1 June, 2014), published electronically.

[105] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing Carrie R. Leana, "A Partial Test of Janis' Groupthink Model: Effects of Group Cohesiveness and Leader Behavior on Defective Decision Making", *Journal of Management*, Vol. 11, no. 1 (April, 1985), at 5.

[106] David Walker, "A review of corporate governance in UK banks and other financial industry entities. Final recommendations", series edited by HM Treasury, HM Treasury, 26 November 2009.

[107] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 523.

demands further discussion. However, we note that the Coaldrake Review[108] discusses this issue, and recommends that, in order to address failings in accountability organisations in the Australian state of Queensland, Agency CEOs and Directors-General be appointed to fixed, five-year contracts, unaligned to the electoral cycle.

16.4. **Paragraph 27 of the EUP Resolution**: the professionalisation of the verification of candidates' declarations:

16.4.1. This is preferable to *no framework* or *no process* for verification, and as such is a useful and commendable addition.

16.5. **Paragraph 29 of the EUP Resolution**: Parliament elect the members of the body with the support of a large majority, possibly similar to the procedure for members of the Authority for European Political Parties and European Political Foundations or decisions regarding the Sakharov Prize: this proposal has strengths and weaknesses:

16.5.1. **A disadvantage** can occur in that worthy candidates could be blocked due to ideological and party-political considerations. We see evidence of this becoming more prevalent in, for example, the United States Congress, with the appointment of candidates to, for example, the US Supreme Court (as was the case with Judge Merrick Garland. Despite his demonstrable competency and eligibility for appointment to the US Supreme Court, his candidature was blocked by a hostile Congress, determined to stymie an Obama Administration appointment[109]).

16.5.2. **An advantage** arises in the need to gain broad consensus for the election of a particular candidate. That will likely have the effect of removing from contention candidates who are connected with some measure of controversy, by requiring a broad consensus to be achieved.

16.5.3. **On balance** we are of the view that the first consideration is less likely to present a risk in the case of the EUP, than is the case with the US Congress, because the US Congress is a two-party political regime. This tends towards a more absolutist, *zero-sum* and conflictual approach to political compromise, than would likely be the case with the EUP.

16.6. In respect of **§ 30 of the EUP Resolution**, it would be preferable, in our view, to develop a tradition that favours the election of some of those listed in **§ 30**, above other potential candidates.

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[108] Peter Coaldrake AO, "Let the sunshine in. Review of culture and accountability in the Queensland public sector," Final Report, 28 June, 2022, available at: <https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf>, at 3.

[109] The Times Editorial Board, "When the GOP stole Merrick Garland's Supreme Court seat, they set the stage for a miserable battle," in 'Editorial', *Los Angeles Times*, 31 January, 2017, available at: <https://www.latimes.com/opinion/editorials/la-ed-supreme-court-nomination-20170131-story.html>.

16.6.1. Former judges of the CJEU, former presidents of OLAF and the Court of Auditors, former or current members of the highest courts of Member States, former EU Ombudsmen, and members of the ethics authorities in Member States would be preferable.

16.6.2. Former Members of the European Parliament, former staff of the participating institutions and bodies less so.

16.6.3. This is so because it is members of the EU Parliament and staff of the participating institutions and bodies that are most likely to be the focus of inquiries by the EUEOA. In this vein the risk is presented that former EUP members may have connections with current EUP members, which are not easily captured by conflict-of-interest declarations or enquiries (for example a former EUP member should be expected to have to recuse themselves from an investigation into a current EUP member from the same party). These conflicts-of-interest, less easily identified, could include, for example, friendships. Similarly with staff of participating institutions. Conflicts-of-interest may arise, but not be easily identified, in the case of officials investigating colleagues with whom they have developed friendships.

16.7. **Paragraph 32 of the EUP Resolution** makes an important proposal, in that oversight authorities, inadequately resourced in their secretariats, will not perform as expected. This has been the case with the Australian Communications and Media Authority,[110] and indeed, across the full gamut of Australian accountability agencies.[111]

16.8. Similarly, **§ 34 of the EUP Resolution** makes a contribution that is, in our view, highly beneficial and important, namely: "… the reasoned recommendation of the independent ethics body… should be made public…" This comports with the notion that public opprobrium – *Sunlight* – is highly effective in combatting malfeasance in public office.[112] This proposal, in turn, feeds into a substantial body of international scholarship attesting to the value and benefits of public exposure. The notion has, in one of its most celebrated iterations, that of US Supreme Court Judge William Brandeis' expression "Sunlight is said to be the best of disinfectants".[113] Scholarship on this point traces its roots to

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[110] Denis Muller, "As News Corp goes 'rogue' on election coverage, what price will Australian democracy pay?" *The Conversation*, 9 May, 2022, available at: <https://theconversation.com/as-news-corp-goes-rogue-on-election-coverage-what-price-will-australian-democracy-pay-181599>; Anthony Klan, "Media "regulator" investigates just 4% of complaints," *The Klaxon*, 11 August, 2021, available at: <https://theklaxon.com.au/media-cop-investigates-just-4pc-complaints/>.

[111] See: The Centre for Public Integrity, "Accountability Deficit: the $1.4 billion funding cut of accountability institutions," in Briefing Paper, October 2020, published electronically, available at: <https://publicintegrity.org.au/wp-content/uploads/2020/10/Briefing-Paper-Budget-2019-2020.pdf>.

[112] It is of note that **§ 34** specifically encompasses the notion, and seeks to harness the power, of public opprobrium, when it states: "… considers as a first measure that the publication or forwarding of recommendations and decisions could constitute a sanction in itself…" European Parliament Resolution of 16 September 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body (2020/2133(INI)).

[113] Louis D. Brandeis, "What Publicity Can Do", in *Other People's Money: And How The Bankers Use It*, 1914, 92. See also: James R. Barth, Gerard Caprio & Ross Levine, "Making the Guardians of Finance Work for Us", in

American scholarship going back some 160 years. Indeed, the earliest well-springs of this initiative are based upon the writings of Charles Francis Adams Jnr[114] who, writing in the 1860s, put forth the idea – in the words of Thomas K. McCraw – of a *Sunshine Commission*,[115] the purpose of which would have been to exercise oversight over, and mitigate the capture of, the Railroad Commissions in the United States by the *railroad barons*.[116]

16.9. The provisions of **§ 38 of the EUP Resolution** are noted with approval. The writers find analogy in the obligations to conduct and publish research placed upon the National Credit Regulator in South Africa.[117] In the South African context this has the effect of shining a light on credit practices which harm consumers. In particular, the NCR's research highlights industry-wide trends, but also drills down into the behaviour of specific sectors within the credit industry (such as micro-lenders), and even, where necessary, the behaviour of individual firms. In doing so, this has the effect of holding

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Guardians of Finance: Making Regulators Work for Us, 2012, at 217; Ross Levine, "The governance of financial regulation: reform lessons from the recent crisis", series edited by Monetary and Economic Department, in *BIS Working Paper*, Vol. 329, Bank for International Settlements, November 2010, at 9; Lawrence G. Baxter, "Understanding Regulatory Capture: an Academic Perspective from the United States", in *Making Good Financial Regulation. Towards a Policy Response to Regulatory Capture,* edited by Stefano Pagliari, series editor: ICFR (International Centre for Financial Regulation), 2012 at 62; Andy Schmulow, Karen Fairweather & John Tarrant, "Twin Peaks 2.0: reforming Australia's financial regulatory regime in light of failings exposed by the Banking Royal Commission", *Law and Financial Markets Review*, Vol. 12, no. 4 (30 November, 2018), at 198; Andrew Schmulow, Karen Fairweather & John Tarrant, "Restoring Confidence in Consumer Financial Protection Regulation in Australia: A Sisyphean Task?", *Federal Law Review*, Vol. 47, no. 1 (1 February, 2019), at note 139; Andrew Schmulow, "Regulating the Regulator : Improving Consumer Protection under a Twin Peaks Regulatory Framework", *The International Review of Financial Consumers*, Vol. 3, no. 1 (April, 2018), at 9; A. D. Schmulow, "Let the sunshine in", *Financial World*, (June/July, 2019), published electronically, at 7; A. D. Schmulow, "Watching the watchdogs", *Financial World*, (April/May, 2018), published electronically, at 40; A. D. Schmulow, "Constructively tough? Neither side has committed to fully adopting perhaps the most important recommendation of the banking royal commission", *The Conversation*, (17 April, 2019), published electronically.

[114] Adams put forth his ideas in a series of articles (see footnote 116, below).

[115] Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn*, 1986, 19-20. See also: Stefano Pagliari, "How Can We Mitigate Capture in Financial Regulation?", in *Making Good Financial Regulation. Towards a Policy Response to Regulatory Capture,* edited by Stefano Pagliari, series editor: ICFR (International Centre for Financial Regulation), 2012.

[116] Charles Francis Adams, *Railroads: Their Origin and Problems*, 1878, 138; Adams, Jr., Charles Francis, "Art. I. - Boston", *The North American Review*, Vol. 106, no. 218 (January, 1868). The compelling nature of this approach was eventually enlivened in legisaltion in the United States with the enactment of *The Government in the Sunshine Act,* 1972 (Pub. L. No. 94-409, 90 Stat. 1241 (1976)). See further: Susan T. Stephenson, "Government in the Sunshine Act: Opening Federal Agency Meetings," *American University Law Revie*w 26, no. 1 (Fall 1976): 154-207; Robert W. Sloat, "Government in the Sunshine Act: A Danger of Overexposure ," *Harvard Journal on Legislation* 14, no. 3 (April 1977): 620-650, at 623; Baird, Benita S. "The Government in the Sunshine Act: An Overview." *Duke Law Journal* 1977, no. 2 (1977): 565–92. https://doi.org/10.2307/1372048; Kathy Bradley, "Do You Feel the Sunshine--Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You," *Federal Communications Law Journal* 49, no. 2 (February 1997): 473-490, at 475ff; Julia Black & Stéphane Jacobzone, "Tools for Regulatory Quality and Financial Sector Regulation: A Cross-Country Perspective", in *OECD Working Papers on Public Governance*, no. 16, Organisation for Economic Co-operation and Development (OECD)/Organisation de coopération et de développement économiques (OCDE), 17 December 2009, at 52.

[117] A.D. Schmulow, "Curbing reckless and predatory lending: A statutory analysis of South Africa's National Credit Act", *Competition and Consumer Law Journal*, Vol. 24, no. 3 (26 April, 2016), at 227ff.

credit-providers to account. Doubtless it would suit some, if not many, credit providers if they were able to escape such scrutiny, by preventing such research from taking place. This is in fact what has happened in the United States, where gun manufacturers have prevented the US government from conducting research into the prevalence of gun-related deaths. Indeed, the gun lobby has gone so far as to ensure that the Centre for Disease Control (CDC) is prevented from exposing and tracking the extent to which gun-related morbidity has become a leading cause of death in the United States.[118]

As such, the function envisaged by **§ 38 of the EUP Resolution**, if used to good effect, can have a sanitising effect on practices which can be shown to present higher risks and evidence more often repeated breaches, of ethical conduct; as well as a capacity to expose industries or external lobbyists that are repeat offenders. In the case of the former, that can help to shine a light on poor culture within offending institutions.

16.9.1. So, for example, if the EUEOA determined that senior EC bureaucrats were revolving to positions in firms linked to the Russian government, and that these practices were harmful to the national security of member states, then exposing those practices and dangers in published reports can have the effect of making such appointments to firms linked to the Russian government *prima facie* problematic. That in turn would place an immediate burden on those officials to demonstrate – and to have to do so continuously – that revolving to such a firm should not automatically be disallowed. In the parlance of *conduct risk* this has the effect of identifying potential risks earlier, and provides opportunities to tackle those risks sooner.

16.9.2. Other examples abound, and demonstrate the value of this provision. The scandal involving the bail-out of Banca Monte dei Paschi di Siena (MPS) is one such example. We recognise the indubitable conflict of interest that arises when a senior government official permits taxpayer funds to be used to bail-out a bank (MPS), and then revolves to an entity (UniCredit) where he becomes Chair of the Board, and proceeds to enter into negotiations for UniCredit to buy MPS – minus MPS's non-performing loans.[119] Bank bail-outs often involve taxpayer funds (used to remedy poor business decisions and excessive risk-taking by bank directors – none of which were caused by the same taxpayers who are then left to make good the bank's liabilities). Due to the notion of *too big to fail*, and the concomitant risk of a financial crises in the event that a *too big to fail* bank collapses, we have seen too often that bank bail-outs punish taxpayers and governments, but very seldom attract any consequences for the directors involved. As such, financial industry issues and potential crises carry additional risk to taxpayers. Well documented

[118] Todd C. Frankel, "Why the CDC still isn't researching gun violence, despite the ban being lifted two years ago", 'News/Storyline', *The Washington Post*, 14 January, 2015.

[119] European Parliament, Parliamentary question - E-004791/2021, "Italian issue of revolving doors," Question for written answer E-004791/2021, to the Commission under Rule 138, from Sabrina Pignedoli (NI), Mislav Kolakušić (NI), Dino Giarrusso (NI), Rosa D'Amato (Verts/ALE), Piernicola Pedicini (Verts/ALE), Ignazio Corrao (Verts/ALE), Gunnar Beck (ID), Carlo Fidanza (ECR), (21.10.2021), available at: <https://www.europarl.europa.eu/doceo/document/E-9-2021-004791_EN.html>.

analysis of these kinds of conflicts, published by an EUEOA, could potentially limit, and mitigate, the risks that such conflicts-of-interest cause (before they arise), by singling out those risks. This would have been invaluable in the case of MPS.

16.9.3. The power envisaged within **§ 38 of the EUP Resolution**, by which an EUEOA will have power to recommend to the EUP changes for improving ethical standards, is also noted with approval. An EUEOA will be best placed to understand where the gaps are in the current regime, and consequently well-placed, if not best placed, to suggest improvements. The logic of this should not be taken for granted. In Australia we have seen recently how the Australian Federal Government stripped ASIC (Australia's version of the SEC) of any role in making policy. This was described as an attempt by the then Federal Government to put ASIC *back in its box*, after it was perceived by the former Federal Government as being insufficiently pro-business, too quick to take financial industry entities to task for practices which harmed consumers, and inadequately supportive of the former government's economic agenda.[120] An enshrined power, vested in the EUEOA, to make recommendations to the EUP, to enhance ethical conduct, is therefore one that deserves support.

16.10. **Paragraph 39 of the EUP Resolution** is noted with approval. If an EUEOA is ineffective, then this initiative will create a superfluous additional layer of bureaucracy and additional costs, without concomitant advantage. That in turn will not only fail to enhance confidence amongst EU citizens in the EU project, but may in fact damage confidence further. In Australia the inefficacy of the financial industry regulators, ASIC and APRA was highlighted by the findings of the 2018 Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC). Representing a collapse in the public's confidence in APRA and ASIC (after what emerged in evidence before the FSRC about both Agencies and their failures), the FSRC recommended in its Final Report[121] that an oversight authority be created to assess the efficacy of the two financial industry regulators, each on a bi-annual basis. That recommendation has subsequently been enlivened in legislation,[122] which established such an oversight authority. It is therefore sensible that the efficacy of the EUEOA be tested.[123]

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[120] See for eg: Mizen, Ronald, "ASIC dumps 'why not litigate' policy as Frydenberg resets path," *The Australian Financial Review*, 26 August, 2021, available at: <https://www.afr.com/politics/federal/asic-dumps-why-not-litigate-as-frydenberg-resets-path-20210825-p58lyx>.

[121] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", Vol. 1, Financial Services Royal Commission, 1 February 2019, at 41.

[122] *Financial Regulator Assessment Authority Act, No 63 of 2021 (Cth)*, Australia, (enacted: 29 June).

[123] This provision is one that is supported by a wealth of international authority on the need to conduct oversight of the overseers – to supervise the supervisors. See for eg: James R. Barth, Gerard Caprio & Ross Levine, "Making the Guardians of Finance Work for Us", op cit, where the authors argue for the need to ceate a *Sentinel* – a guardian to watch over the guardians (supervisors) of the financial industry.

16.11. Details in **§ 40 of the EUP Resolution**, that require financial interests to be accessible in machine-readable format, are insightful. The first author's experiences with both the establishment of a new regulatory structure for the financial industry in South Africa, and with legislative reforms for the financial industry in Australia, are instructive on this point.

16.11.1. In South Africa the newly established financial industry conduct regulator, the Financial Sector Conduct Authority, has been bedevilled by an inability to search through large volumes of documentation in their possession, which they inherited from their predecessor, the Financial Services Board (FSB). As a result, there are potentially millions of pages of non-machine-readable PDFs, which contain information which is potentially relevant to future investigations (as it establishes patterns of behaviour), which cannot, for all intents and purposes, be accessed.

16.11.2. In Australia, the Australian Law Reform Commission Inquiry (ALRC) into financial services legislation has determined that one of the issues bedevilling enforcement of the law is the length of the legislation and its attendant instruments (800,000 words in the case of the former, and over 38,000 pages in the case of the latter[124]). The principal piece of legislation (*Corporations Act (Cth) 2001*) has over 14,000 internal cross-references.[125] Consequently, and in order to enable navigability and search across such a vast legislative regime, the ALRC has recommended that all future Federal Government legislation be readable in extensible markup language (XML).[126]

16.11.3. As such the recommendation in **§ 40 of the EUP Resolution** will enable users and citizens to access, search, and navigate the EUEOA's determinations and enabling legislation which, in turn, will support transparency and engender trust. As such this provision is to be commended.

16.12. **Paragraph 42 of the EUP Resolution** provides for a framework within which the EUEOA will operate, and does so with, in the first author's view, the best approach: that the EUEOA conduct itself in adherence to the highest standards of ethical probity by ensuring that no discussions take place *in the shadows*.[127] This provision is important and strikes the correct note, for a number of reasons.

16.12.1. This stricture will insulate the EUEOA from the risk – including in the minds of the public – that deals are being struck in secret/out of the public gaze by powerful private entities and their well-paid lobbyists, whose job it is to *get into the ear* of decision-makers in the EUEOA, and *massage* the outcome in a manner that benefits the private interests they represent. Put

[124] Australian Law Reform Commission, "Financial Services Legislation, Interim Report A," ALRC Report 137, (1 November, 2021), available at: <https://www.alrc.gov.au/wp-content/uploads/2021/11/ALRC-FSL-Interim-Report-A.pdf>, at 111 and 39

[125] Ibid., at 109.

[126] Recommendation 11, ibid., at 14.

[127] See further: Peter Coaldrake AO, "Let the sunshine in. Review of culture and accountability in the Queensland public sector," 28 June, 2022, op cit., at 3.

differently, meetings with private interests present a risk of soft corruption, as well as a corrosion of the EUEOA's commitment to its mandate, its culture and its efficacy.

16.12.2. The greater the degree of transparency in the functioning and operations of the EUEOA, the greater will be the opportunity for public scrutiny. That in turn will correlate to greater degrees of trust and confidence in the entity by the public. Well may it be said that this is a matter of perception. But it is, in our view, precisely perceptions of the trustworthiness, independence, and courage to tackle unethical behaviour, that is vital for the success of this initiative. To that end the EUEOA must not only avoid a perception of bias, it must avoid the mere apprehension of bias.

16.12.3. By exposing dealings and discussions that may take place between the EUEOA and private actors and, by in turn, preventing deals being done *in the shadows*, this provision effectively places the EUEOA *out of reach* of those who may seek to procure special treatment. Put differently, if a private actor has nothing to hide by engaging with the EUEOA, then this provision will present no difficulties. Conversely, where this provision has the effect of causing some measure of inconvenience or distress to a private actor in its attempts to engage with the EUEOA, then the assumption should subsist that an attempt is being made to procure some measure of advantage which is itself unethical.

16.12.4. This provision comports with the notion of *Sunshine*, alluded to in § 16.8 of this document, above.

16.12.5. This provision, by insulating the EUEOA from attempts at *secret deals* or deals *done in the shadows*, insulates the EUEOA's culture; it acts as a buttress against countervailing forces and undue, inherently unethical pressures. That in turn reinforces the *esprit de corps* of those who work in the EUEOA: individuals within the EUEOA who are committed to its mandate and purpose, and who are sincere in their efforts to enliven that mandate and purpose, will become dispirited and dejected if they observe their efforts being undermined by outcomes from meetings between the leadership of the EUEOA and private actors – meetings conducted *in the shadows* – which have the effect of undermining the good work which they have done. Put differently, a failure to address and mitigate this risk can have the effect of instilling a fatalistic sense in the employees of an EUEOA, and in so doing *hollow out* their resolve.

16.12.6. As a potential template, the Coaldrake Review[128] recommends that meetings between interested parties and accountability agencies should include, at least, the following:

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[128] Loc cit., at 53, citing New South Wales Independent Commission Against Corruption, Investigation into the Regulation of Lobbying, Access and Influence in NSW (June 2021), available at: <https://www.icac.nsw.gov.au/ArticleDocuments/884/Investigation_into_the_regulation_of_lobbying_access_and_influence_in_NSW-Eclipse_Jun21.pdf.aspx>, at 12. See also 'Yearbury Report': Kevin Yearbury, "Strategic Review of the Integrity Commissioner's Functions," 30 September 2021, available at: <https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/2021/5721T1755.pdf>, at 11.

- *date and location where face-to-face lobbying communications took place*
- *the name and role of the government official(s) being lobbied*
- *a description of their lobbying communications*
- *a description of the purpose and intended outcome of their lobbying communications*
- *whether lobbying was undertaken on behalf of another party.*

16.13. **Paragraph 43 of the EUP Resolution** confirms prudent and sensible forms of review (namely to the EU Ombudsman and the CJEU). This is important as an adjunct to supporting the rule of law, and confirming procedural and substantive fairness, in that determinations by an EUEOA will not operate without avenues for review and/or appeal.

16.14. In respect of **§ 45 of the EUP Resolution**, this sentiment is both admirable and, in our view, necessary. For an EUEOA to gain and maintain legitimacy, it should indeed lead by example.

16.14.1. Moreover, the specific recommendations – that recommendations, annual reports, decisions and spending – be published, comports with the sentiments expressed in § 16.8 of this document, above, namely the benefits of *Sunshine*.

16.14.2. The recommendations regarding making such disclosures available in machine-readable format, comport with the analysis in § 16.11 ff of this document, above.

16.15. **Paragraph 45 of the EUP Resolution** first alludes to an alarmingly high rate by which members of the Commission and members of the EUP have, in the past, revolved to industries, including those registered in the EU Transparency Register.[129] It then recommends the introduction of rules for post-public employment.[130] Here the South Korean example may be instructive. Under South Korea's *Public Service Ethics Act*[131] government officers are required to fulfil a three-year cooling-off period, before accepting work in a private company, whose business is "closely related to" the work that the government officer performed in the five-years prior to their resignation.[132]

16.16. **Paragraph 50 of the EUP Resolution**, which recommends adequate colling-off periods is to be commended (see analysis in § 16.15 of this document, above).

16.17. **Paragraph 52 of the EUP Resolution** recommends that cooling-off periods be extendable for senior officials on a proportionate, case-by-case basis. We support this recommendation with a

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[129] Available at: Europa Transparency Register, <https://ec.europa.eu/transparencyregister/public/homePage.do>, accessed 1 November, 2022.

[130] See also: Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit, at 523.

[131] Act No 3250, 31 December 1981.

[132] Youkyung Huh and Jung, Hongjoo, "Regulatory Structure and the Revolving Door Phenomenon in South Korea," Chap 12, in Andrew Godwin & Andrew Schmulow, eds., *The Cambridge Handbook of Twin Peaks Financial Regulation*, 2021, at 233.

caveat: the possibility of discretion opens the door to the possibility of soft corruption. That is to say, *discretion exercised in a manner that implies favouritism, or deference to powerful and influential individuals*. For that reason, it should be made clear that this discretion can only be exercised to *extend* and make *more onerous* existing provisions related to cooling-off. Base-line provisions should serve as the minimum, below which no possibility of discretion exists.

16.17.1. In terms of who should exercise that discretion, it strikes us as appropriate that that power should reside in the EUEOA, as this would represent both an arms-length arbiter, and one whose functions and culture are steeped in supporting ethical conduct amongst EU officials and Parliamentarians.

16.18. **Paragraph 55 of the EUP Resolution** presents an opportunity for the future work of the EUEOA, namely that all instances of revolving door behaviour should be regarded as *prima* facie unethical. The EUEOA can, and should, assume as part of its mandate, to sensitise the EC and EUP and other bodies of this notion, and should be forceful in enhancing the collective consciousness within the EU of this notion.

16.19. In respect of **§ 56 of the EUP Resolution**, it is unclear whether this phrase "Considers that the procedures for selecting candidates for senior positions should be carried out on the basis of fully objective criteria and be fully transparent for the general public" refers to candidates for senior positions in the EC and other EU Agencies, or whether this refers to candidates for senior positions in the EUEOA.

16.19.1. Whether this phrase refers to the former, or to the latter, it is our view that it is essential, and of the highest importance, that candidates for senior positions in the EUEOA be of the highest calibre, and possessed of the highest standards of ethics.

16.19.1.1. Regulating in an attempt to ensure high levels of a personal attribute and character is, needless to say, challenging. But not impossible. In addition to the analysis provided in § 16.3 of this document, above, relating to term limits, there are other considerations that, together, can form a constellation of impediments for unsuitable candidates. These include:

16.19.1.1.1. Ensuring that the Chair of the Authority has a term that is further limited (for example, limited to one, three-year term), so that the Chair does not imprint on the Authority their own biases and prejudices, to the point where matters that should be considered by the EUEOA, fall between the cracks.

16.19.1.1.1.1. Rotating the leadership can have the effect of mitigating the risk of *groupthink*.[133] See also analysis at § 16.3.1.3 of this document, above.

[133] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 524, citing Ramon J. Aldag & Sally

16.19.1.1.2. Further to § 16.1.5 of this document, above, we note that current developments in regulatory oversight – such as the establishment of the Financial Regulator Assessment Authority in Australia – initially came with a proposal for representation on – admittedly – a much smaller board (of four) – by a representative of the Australian Commonwealth (Federal) Treasury. This was met with stiff resistance by consumer-focused NGOs.[134] Their response was, specifically, a concern about the risk of regulatory capture. Their advocacy was to have the proposed government representative removed.

16.19.1.1.3. Moreover, evidence from elsewhere demonstrates the risks to the efficacy and legitimacy of such institutions when personnel are hired who have a connection – including a former connection – to those entities they will be called-upon to supervise. In this regard the subornation of the US Public Company Accounting Oversight Board (PCAOB)[135] is apposite. The lesson that this experience indicates is the importance of personal independence, that is to say, personnel who have neither a current nor former relationship with the entities that they will be empowered to supervise.

16.19.1.1.4. Further, there are certain biases, observed by behavioural research, drawing a connection between former decisions (for example, taken by an individual when they were in an Agency, henceforth to be regulated by the EUEOA), and individuals' increasing level of commitment to those ideas, with the passage of time.[136]

> *... evidence suggests that individuals tend to increase (rather than question) their commitment to their prior decisions, when they are not achieving their desired outcomes... supported by research into confirmation bias, showing that individuals tend to seek or interpret evidence in a way that confirms their prior beliefs, and discount evidence that disconfirms their prior beliefs. Thus, if Board members of the [EUEOA] were involved in prior [EU Agency] decisions, that may be an impediment to the independence of their assessments. Similarly, a long tenure for any member on the [EUEOA] may limit their objective evaluation of the [EUEOA's] past decisions, actions or inaction.*[137]

R. Fuller, "Beyond Fiasco: A Reappraisal of the Groupthink Phenomenon and a New Model of Group Decision Processes", *Psychological Bulletin*, Vol. 113, no. 3 (May, 1993), at 5.

[134] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit, at 510/11.

[135] Ibid., at 519.

[136] See: ibid., at 523.

[137] Ibid., at 523, citing Barry M. Staw, "Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action", *Organizational Behavior and Human Performance*, Vol. 16, no. 1 (1976), at 27; and Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises", *Review of General Psychology*, Vol. 2, no. 2 (1998), at 175.

16.19.1.2. That said, it is impossible to recruit personnel who come free of any ideological baggage, and/or experiences that may have shaped their views. The question is therefore not *how to prevent*, but rather *how to mitigate* biases. Our view is that this is best achieved through a diverse workforce; and

16.19.1.3. through the encouragement of a robust culture within the EUEOA, which favours and encourages debate and respectful disagreement.

... other studies have shown that a moderate level of task conflict can encourage the discussion of different perspectives, and that dissent contributes to improved detection of the truth.[138]

16.19.1.4. Finally, while defining personal moral attributes is, as conceded above, difficult, it is a worthy exercise to, at least, attempt. By defining legislative provisions, not from a prescriptive, black-letter law perspective, but rather from a principles-based perspective, significant regulatory challenges in other fields (for e.g. financial industry and financial system supervision) have been undertaken (with varying degrees of success).[139]

16.19.1.4.1. In the event that this observation is assessed as having value, then it is important for legislators who may be unfamiliar with principles-based legislative drafting to be supported in understanding its internal dynamics. These include:

16.19.1.4.1.1. framing a core set of principles (aimed at achieving these stated goals in respect of personal morals), should be located at an adequate level in the legislative hierarchy. Because principles appear more amorphous, and more inclined to create than to dispel legal confusion, such provisions run the risk of being overlooked or ignored. This was a key finding of the Australian Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry.[140] Located at the correct hierarchical level, the

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[138] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 523/4, citing Karen A. Jehn & Elizabeth A. Mannix, "The Dynamic Nature of Conflict: A Longitudinal Study of Intragroup Conflict and Group Performance", *Academy of Management Journal*, Vol. 44, no. 2 (April, 2001), at 238; and Charlan Jeanne Nemeth & Barry M. Staw, "The Tradeoffs of Social Control and Innovation in Groups and Organizations", *Advances in Experimental Social Psychology*, Vol. 22 (1989) at 175.

[139] See: Schmulow, Andrew and Shoshana Dreyfus, *Submission to the Australian Law Reform Commission Inquiry into A Review of the Legislative Framework for Corporations and Financial Services Regulation*, Submission 56, Australian Law Reform Commission Inquiry into A Review of the Legislative Framework for Corporations and Financial Services Regulation 21 March, 2022, available at: <https://www.alrc.gov.au/wp-content/uploads/2022/03/56.-A-Schmulow-and-S-Dreyfus.pdf>.

[140] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, op cit, at 10. Specifically in relation to s 912A of the *Corporations Act*. *Corporations Act (Cth), 2001*, (Australia).

legislation can then usefully direct users as to how and when to enliven the principles;[141]

16.19.1.4.1.2. a further key-finding in respect of principles-based versus prescriptive, black-letter drafting (specifically in relation to the ineffectiveness of s 912A[142]) was that it created a prohibition (on certain forms of conduct), but no sanction in the event of a breach; rendering the provision equivalent to *virtue-signalling*. As such, it is important that mechanisms which oversee the EUEOA be empowered to remove senior officials found to have mislead investigations into their probity (if the phrase in § 16.19 of this document, above, is taken to mean senior positions *in the EUEOA*); or, senior officials in any EU Agency under the EUEOA's jurisdiction (if the phrase in § 16.19 in this document, above, is taken to mean senior positions *throughout the EU*) be subject to removal by the EUEOA where it becomes apparent that they mislead inquiries into their probity.

B. Further enhancements to consider

17. As part of the EUEOA's activities, and where necessary, the EUEOA be empowered to report on the independence from capture of EU Agencies over which it has jurisdiction. Such a power would enable the EUEOA to provide assessment not only on the activities of individuals. Where the activities of individuals form a discernible pattern (within, for example, an EU Agency) – a pattern which points to evidence of wider failures within those agencies to combat conflicts of interest and, which in turn, evidence the capture of those agencies – the EUEOA can play a meaningful role in exposing and correcting those failures.

18. That the EUEOA be permitted – within the bounds of EU law – to be given unfettered discretion as to how to perform its functions.[143] As an example, ss 18 and 19 of the Australian *Financial Regulator Assessment Authority Act*[144] are cited (an oversight authority created in Australia to improve the efficacy of the

[141] For example with a provision that states: wherever the intent of a provision, or its interpretation is in question, those questions are to be addressed by, wherever possible, enlivening those provisions deemed "core principles''.

[142] See details in fn 141, above.

[143] See Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 512.

[144] *Financial Regulator Assessment Authority Act,* 2021 (Cth).

Australian financial system regulators, in light of their observed failings to take to task misconduct, in the Australian financial industry):

18 Powers

The Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

19 Independence

Subject to this Act and to other laws of the Commonwealth:

(a) the Authority has complete discretion in the performance of the Authority's functions and the exercise of the Authority's powers; and

(b) the Authority is not subject to direction from anyone in relation to:

(i) how a particular assessment will be undertaken; or

(ii) the content of a report to the Minister.

19. Again, with respect to the Australian legislation,[145] reference is made to ss 20 and 21, which direct employees of agencies under the jurisdiction of the Australian Financial Regulator Assessment Authority (FRAA) to cooperate with the FRAA. This includes a requirement to provide information requested, produce any document requested, or answer any questions asked. Crucially, the Australian legislation (in s 21) does not provide an exemption for the provision of information where that information is subject to legal professional privilege.

20. We recommend that a member of the EUEOA be empowered to convey information to an enforcement agency, such as a police force or a prosecutorial authority, where necessary, as is the case with the Australian FRAA, members of which are empowered to make such reports by ss 44 of the Act.[146]

21. In a recent development put forth by the United Kingdom's House of Commons House of Lords All Party Parliamentary Group (APPG) on Personal Banking and Fairer Financial Services, the recommendation was made that an oversight authority over the UK's financial industry regulators be created along the lines of the Australian FRAA. However, and crucially, in an advance on the Australian model, the APPG recommends that a UK oversight authority be invested with the power to appoint or dismiss, jointly with HM Treasury, the Chair and Chief Executive of the Financial Conduct Authority. This is a development which bears consideration, in the event that the EUEOA discerns patterns of failures to combat conflicts of interest, and the existence of revolving doors, within specific EU agencies.

22. That regard be paid to "institutional isomorphism" in the creation of the EUEOA.[147] This would entail harnessing how *organisations incorporate operational structures, policies and practices which are similar within a*

[145] Ibid.

[146] Ibid.

[147] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 515.

particular field.[148] Specifically, in the establishment of the EUEOA, and in its initial operations, regard should be had for the utility of receiving guidance and direction from an existing EU Agency which has an established track-record in driving ethical conduct, such as the EU Ombudsman.

23. Regard should be had for the recruitment, where necessary, of personnel with specialised skills (for example, forensic accountants, where the need arises for investigations into complex financial information).

    23.1. Accumulation of such specialised skills must, however, be balanced with an awareness that an excessive concentration of particular skills within an agency can give rise to its own risks to efficacy. Prioritising certain skills at the expense of others can lead to homogeneity in the composition of the board, or in the composition of the personnel within the Agency. That, in turn, may lead to over- or under-valuing divergent perspectives.[149]

24. It should be mandatory that gifts to members, or contributions to political parties whose members are also members of the EUEOA, be declared. So too, investments or proposed investments in regions of the EU represented by individuals who are also members of the EUEOA Board, should be declared.[150] Whilst Australia's ASIC register is, in our view, a good start, it is, in our view, insufficient. While most of the gifts declared relate to the costs of meals, or conference attendance (where an ASIC Commissioner has been invited to speak), others relate to the provision of membership of the Qantas Airways Chairman's Club. The Qantas Chairman's Club is a much sought-after accolade in Australia, and is by invitation only. In such instances it would be preferable, in our view, for such gifts to be disallowed. So too, in our view, any gifts or other forms of gratification to members of the EUEOA represent a risk to independence, and bring with them the possibility of a form of *slow-burn* corruption and the undermining of the independence of members of the EUEOA. It would be preferable, therefore, for the EUEOA to have, as a point of departure, a default policy disallowing gifts or other forms of gratuity.

    24.1. Within these confines it may be deemed acceptable for a limited list of gratuities to be acceptable (provided they are declared). For example, it may be viewed that, on balance, it is preferable to allow members, and in particular board members of the EUEOA to attend conferences and be served meals, where their attendance is for the purposes of explaining the work of the EUEOA, disseminating information about the EUEOA and, in so doing, informing the EU's citizenry about the EUEOA's work.

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[148] Ibid., at 515, citing Paul Mazzola, "Power and Influence in the US Investment Banking Industry – a Case Study of Lehman Brothers", *Doctor of PhilosophyThesis*, School of Accounting Economics and Finance, University of Wollongong, 2018, at 54.

[149] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 522.

[150] In Australia, gifts to employees and or senior office-bearers of the Australian Securities and Investments Commission must be declared and made available for public scutiny on a publicly available regsiter (see: ASIC "Gifts, benefits and hospitality register", (31 October, 2022), available at: <https://asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/gifts-benefits-and-hospitality-register/>. Accessed 7 November, 2022).

25. Consideration should be given to budgetary comfort and security for the EUEOA. That is to say, budget cuts represent one potential future method by which to undermine the efficacy of the EUEOA, or limit its future investigative capacity.[151] Consideration should therefore be given to how this element of Agency independence can be assured.

    25.1. One potential method would be to enshrine in legislation various checks-and-balances the effect of which would be to make it difficult to cut the EUEOA's budget; and that without compliance with such procedures, the EUEOA's budget will be maintained at whatever it was in the previous year, plus an additional amount equivalent to the consumer price index (CPI) for inflation.

26. Consideration should be given to EUEOA's purpose and the adoption of a Statement of Philosophy.

    26.1. In respect of a Statement of Purpose: research indicates that a strong mandate, if translated into a Statement of Purpose, can increase effectiveness within an organisation.[152] A review of Purpose Statements found that these generally contain three elements: (1) a long-term and comprehensive vision of the future of the organisation; (2) the central tasks and duties that may reference external stakeholders (e.g., regulators, government, and the general public); and (3) the organisation's philosophy and values that intend to guide attitudes, behaviour and decision-making.[153]

        26.1.1. This must be balanced with the risk that Statements of Purpose which include references to external stakeholders, or to internal philosophy and values, carry with them the risk of facilitating regulatory capture. This can occur where particular stakeholders are favoured above others, or where philosophy or value statements can favour particular ideological biases.[154]

        26.1.2. Those risks can, in turn, be mitigated by, for example, incorporating external stakeholders and providing philosophy and values statements within the bounds of actual and perceived independence; and in respect of external stakeholders, focusing on expected interactions with

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[151] See for example the experience in Australia, with Federal government budget cuts to ASIC criticised at the time as an attempt by the Federal government to stymie ASIC's enforcement capacity and efficacy (Anonymous, "$26M funding cut to hobble ASIC, experts say," *UNSW News*, 25 May, 2018, published electronically, available at: <https://www.unsw.edu.au/news/2018/05/-26m-funding-cut-to-hobble-asic--experts-say>). See also: The Centre for Public Integrity, "Accountability Deficit: the $1.4 billion funding cut of accountability institutions," in Briefing Paper, October 2020, op cit.; Georgia Wilkins, "Budget cuts spark fears of muzzled watchdogs," *Sydney Morning Herald*, 14 November, 2014, available at: <https://www.smh.com.au/business/budget-cuts-spark-fears-of-muzzled-watchdogs-20141103-11fwc5.html>.

[152] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 520, citing Susanne Braun, Jenny S. Wesche, Dieter Frey, Silke Weisweiler & Claudia Peus, "Effectiveness of mission statements in organizations - A review", *Journal of Management and Organization*, Vol. 18, no. 4 (July, 2012) at 430.

[153] Susanne Braun, Jenny S. Wesche, Dieter Frey, Silke Weisweiler & Claudia Peus, "Effectiveness of mission statements in organizations - A review", (July, 2012), op cit., at 431.

[154] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 520/1.

them.[155] Specifically, in a Statement of Purpose, the Board of the EUEOA should ensure that particular stakeholders, or their objectives, do not enjoy any measure of favouritism.

26.1.3. In addition, the Board Statement of Purpose can further mitigate the risk of capture by including a desirable public perception goal – such as being trustworthy.[156]

26.1.4. Research indicates that the creation of a Statement of Purpose, with the involvement of the board and the personnel of the EUEOA, may be expected to correlate to more effective purpose statements.[157]

Bart and Bontis found that perceived awareness and involvement of the Board regarding the purpose statement predicted commitment to the purpose by members of the organisation, and was positively correlated with the organisation's performance. Furthermore, other research in the public sector suggests that low involvement of organisational members in the construction of a purpose statement may have a negative effect. The research suggests that when organisational members have low involvement, they may have a perception that the purpose statement is intended to meet an external need, rather than guiding internal attitudes, behaviours and decision-making.[158]

27. Consideration should be paid to the value of staggered appointments of tenure to the Board of the EUEOA, in order to:

27.1. prevent capture – including ideational and ideological capture – by ensuring that evaluations and decisions of the EUEOA "are not dominated by one Board member's views, or by collective but narrow views, while at the same time preserving continuity and collective memory and experience"[159]; and

27.2. regulatory/supervisory agencies have an observed life cycle. This presents a danger that the EUEOA can become just another layer of bureaucracy, and decline in efficacy over time.[160]

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[155] Ibid., at 520, citing Susanne Braun, Jenny S. Wesche, Dieter Frey, Silke Weisweiler & Claudia Peus, "Effectiveness of mission statements in organizations - A review", (July, 2012), op cit., 436.

[156] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 521, citing John A Pearce & Fred David, "Corporate mission statements: The bottom line", *Academy of Management Perspectives*, Vol. 1, no. 2 (May, 1987), at 112.

[157] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 521, citing Chris Bart & Nick Bontis, "Distinguishing between the board and management in company mission", *Journal of Intellectual Capital*, Vol. 4, no. 3 (2003), at 555.

[158] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 521, citing Chris Bart & Nick Bontis, "Distinguishing between the board and management in company mission", (2003), op cit., at 373 and Stuart W. Davies & Keith W. Glaister, "Spurs to Higher Things? Mission Statements of UK Universities", *Higher Education Quarterly*, Vol. 50, no. 4 (October, 1996), at 273.

[159] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 524.

[160] See for example the work of Nobel Laureate, Marver Bernstein: Marver H. Bernstein, "The Life Cycle of Regulatory Commissions", in *Regulating Business by Independent Commission*, 1955, at 87.

By old age, regulatory agencies were observed to decline into debility, in a process that Graham describes as 'administrativitis'. As McCraw stated, agencies begin with 'determination and youthful exuberance [but] pass inexorably into middle-age and finally senescence'. This problem can, at least partly, be addressed by the staggering of board appointments, and limiting the tenure of each appointee.[161]

28. Consideration should be given to requiring board members to engage in annual re-certification, including declarations of conflicts of interest, during their six-year tenure. In our view, this would be an important step to take to ensure that board members are not distracted from their purpose – not only at the start of their tenure – but during their tenure.

29. Consideration should be given to the utility of conducting hearings or inquiries in public, including hearings or inquiries that may be convened to examine allegations against an individual. If Constitutionally permissible, this forms an important adjunct to transparency and *Sunshine.*[162] It also serves to reinforce deterrence. In analysing[163] proposed amendments to the *National Anti Corruption Commission Bill,*[164] which would only allow for public hearings in exceptional circumstances, the Australian Centre for Public Integrity[165] argues forcefully that public hearings are essential. The reasons they provide are as follows:[166]

- *Expose corruption. Exposing corruption to the public is a core objective of integrity commissions, as corruption flourishes in the dark. Without public hearings, the public would only know that an investigation took place once an investigation report was tabled in Parliament or a successful prosecution occurred, sometimes years after the fact;*
- *An effective investigation tool. During public hearings, current witnesses give new information, and new witnesses come forward with information that may be key to the investigation;*
- *Act as a deterrent to others that may be considering engaging in corrupt conduct;*
- *Ensure investigations are conducted fairly by providing public scrutiny of integrity commissions' operations;*
- *Giving individuals a public platform to speak to allegations made against them;*
- *Increasing public trust in government and the public sector by demonstrating to the community that allegations of corruption are being properly investigated;*
- *Public hearings educate the public sector about corruption, which can help prevent future corrupt conduct and encourage public servants to report allegations to the integrity commission.*

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[161] Andrew Schmulow, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority", (25 September, 2021), op cit., at 526, citing G.A. Graham, *Morality in American Politics*, 1952 at 194, and Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn*, 1986 at 44.

[162] See § 16.8 of this document, above.

[163] Centre for Public Integrity, "Research Update" 12 October, 2022, by email (copy in possession of the writer).

[164] *National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill* 2022 (Australia).

[165] An Australian not-for profit organisation whose board is comprised of retired judges and current academics. The Centre for Public Integrity has as its mission to produce proposals to combat corruption and protect the integrity of accountability institutions.

[166] Centre for Public Integrity, "Research Update" 12 October, 2022, op cit.

29.1. They also provide responses on this question from Australia's former Chief Justice:

> *... seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. ....*
>
> *The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.*
>
> *... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.*

29.2. The Centre for Public Integrity has issued a briefing paper in which it finds a correlation between anti-corruption commission efficacy and public hearings, by way of comparative analytical data across two Australian states.[167]

C. Responses to key provisions in the Commission response[168]

30. In its Response to the EUP Resolution the Commission has welcomed certain provisions, and queried and rejected others.

31. We provide responses to certain key provisions of the EC Response.

32. First in respect of the Independent Ethical Committee established by the Code of Conduct of 31 January 2018 (CIEC), and the query raised as to whether, in light of the existence of the CIEC, an EU Ethics Oversight Authority is needed?

32.1. We respectfully disagree with the EC Response. We are of the view that the EUEOA proposal goes far further than the CIEC.

32.1.1. It establishes a general advisory function.[169] This will enable proactive advice. We are of the view that part of the advantage gained here, is that a proactive, not simply reactive, approach

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[167] Centre for Public Integrity, "Public hearings shine light on corruption. Sunlight is the best disinfectant," Briefing Paper, April 2022, available at: <https://publicintegrity.org.au/wp-content/uploads/2022/04/Briefing-paper-public-hearings-expose-corruption.pdf>.

[168] "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," in *Documentation Gateway*, European Parliament Legislative Observatory, 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), available at: <https://oeil.secure.europarl.europa.eu/oeil/spdoc.do?i=56974&j=0&l=en>.

[169] Alberto Alemanno, "Towards an EU Ethics Body," *SSRN Papers*, (20 November, 2020), op cit., at 26.

will drive cultural change, towards higher ethical probity across the institutions over which an EUEOA has oversight.

32.1.2. It presents, for the first time in the EU, a consolidated approach to ethics enforcement, as opposed to the current, federated position in which each institution judges itself. A proposal for a unified voice on ethical matters.

This leaves a legal vacuum, because there is no common legal basis defining a minimum level of requirements for these categories of people working for EU agencies, in relation to the risk of conflict of interest and 'revolving door' situations. The task of setting applicable rules is left to each individual agency.[170]

The EU legal framework for managing the risk of 'revolving door' situations sets out very limited obligations for EU institutions and bodies (including EU agencies) to monitor compliance of current and former staff with the 'revolving door' requirements. It does not define the manner in which such monitoring could take place or the tools that could be used for that purpose. In consequence, most agencies do not engage in any such monitoring activity … and undeclared 'revolving door' cases and breaches of restrictions imposed on departing staff in relation to their new jobs are likely to remain undetected.[171]

32.2. Moreover, this proposal presents, in our view, a jurisprudentially more hygienic and robust framework; one that will also bring with it greater prospects for legitimacy, popular support, and confidence by the citizenry in the institutions of government and in the EU Project. It does so by removing the deficiencies in the current regime in which institutions are called upon to judge themselves. By creating a mechanism by which truly independent investigations are performed, trust is engendered, and the EU Project strengthened.

32.2.1. The same argument applies *mutatis mutandis* to the advantage that flows from the establishment of an EUEOA which, for the first time in the EU, and in an independent fashion, will investigate MEPs. Currently MEPs are required to judge one another.[172]

32.2.2. By creating an EUEOA with powers of investigation and instigation, the gaps created by the current system – in which only OLAF and the EUO have investigative powers – can be filled. In particular, these relate to OLAF's power, which while inclusive of investigation, is limited to matters of "serious misconduct".[173] As such, under the current system, misconduct which is deemed not sufficiently serious, falls through the cracks. In addition, only OLAF and the EUO

[170] European Court of Auditors, *Annual report on EU agencies for the financial year 2021*, (2021), available at: <https://www.eca.europa.eu/Lists/ECADocuments/AGENCIES_2021/AGENCIES_2021_EN.pdf>, at 52, § 2.34.
[171] Ibid., at 53, § 2.35.
[172] See: The Greens/EFA in the European Parliament, "Time to Guarantee Ethics and Integrity in The EU. Ending Conflicts of Interest," in *News*, 4 July, 2019, available at: <https://www.greens-efa.eu/en/article/news/time-to-guarantee-ethics-and-integrity-in-the-eu>.
[173] Alberto Alemanno, "Towards an EU Ethics Body," op cit., at 12.

have the power to instigate an investigation – and then only in limited circumstances. Moreover, under the current system third parties cannot instigate an investigation.[174]

32.2.3. This speaks to identified shortcomings[175] in the current regime (that relate to poor enforcement),[176] as well as the potential advantage which the establishment of an EUEOA represents.

32.2.4. As such, we are of the view that to regard an EUEOA as a superfluous layer of bureaucracy, when an CIEC is already operational, is to mis-characterise the nature, objectives and remit of the proposed EUEOA, relative to those of the CIEC, with the resulting false equivalence.

32.2.5. The current regime – which includes, but is more extensive than – the CEIC has evidenced demonstrable points of failure. These are brought to light in findings by, *inter alia*, the Court of Auditors[177] and the EUO.[178] The deficiencies that these entities point to are ones we regard as serious.

32.2.5.1. These include a pervasive inadequacy, under the current regime, to monitor and combat the revolving door.[179] The Court of Auditors' Report observes that, between 2019 and 2021, of 40 agencies assessed, only 20 had considered a revolving door case during that period;[180] six agencies had infringed procedural rules in managing a revolving door regime;[181] only nine of 40 had gone beyond the legal minimum when handling revolving door situations;[182] and 659 board members departed employment at the EU's various agencies, activating only 25 assessments[183] – most of which arose only because individuals self-reported.[184]

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[174] Ibid.

[175] See details regarding 24 alleged breaches of the code of conduct of the EUP, without any of those alleged breaches attracting sanctions. The Greens/EFA in the European Parliament, "The EU Ethics Body. A New Institution Fighting Intransparent Lobbying and Conflicts of Interest" in *News*, 12 January, 2021, available at: <https://www.greens-efa.eu/en/article/news/the-eu-ethics-body>.

[176] Alberto Alemanno, "Towards an EU Ethics Body," op cit., at 11 ff.

[177] European Court of Auditors, Annual report on EU agencies for the financial year 2021, op cit.

[178] European Ombudsman, "Decision on how the European Commission manages 'revolving door' moves of its staff members (OI/1/2021/KR)," (16 May, 2022), available at: <https://www.ombudsman.europa.eu/en/decision/en/155953>.

[179] European Court of Auditors, Annual report on EU agencies for the financial year 2021, op cit., at 50 ff.

[180] Ibid., at 56, § 2.38.

[181] Ibid., at 57, figure 2.10.

[182] Ibid.

[183] Ibid., at 58, figure 2.11.

[184] Ibid., at 59, § 2.42.

32.2.5.2. The EUO Decision[185] expressly states its concern is with the revolving door phenomenon, which it identifies as serious, corrosive, and highly damaging to public trust.

32.2.5.3. The Decision was based on an assessment of 100 EC revolving door files. These files related to employees who had sought, and obtained, permission to work for third parties, post their employment with the EC. As part of that approval process, they had restrictions placed upon their employment – conditions laid-down to mitigate conflicts of interest and the provision of sensitive information (*ring-fencing*). The EUO findings were that these conditions could be neither monitored, nor enforced.

32.2.5.4. So concerned with the current situation is the EUO, that in its decision it advocates for a blanket interim ban on approvals of post EC employment, to remain in force until the identified failures in the regime can be addressed.

32.2.5.5. In our view, establishing an EUEOA, along the lines of the EU Resolution, would address the EUO's concerns.

32.2.5.6. Moreover, the Decision supports measures of transparency which comport well with the approach chosen in the proposal for an EUEOA.

32.2.5.7. That in, for example, 2019, the EC rejected approximately one per cent of notifications for post-employment activity.[186]

32.2.5.8. Recommends that bespoke risk assessments be conducted of intended jobs, relative to the applicant's tasks and responsibilities while employed by the EC.[187] We are of the view that such bespoke enquiries would benefit if they were conducted by an Agency with on-going (not just *ad hoc*) responsibility for such matters, and able to build capacity, experience and expertise in conducting such enquiries. An EUEOA, with a permanent secretariat, would be such a solution.

32.2.5.9. The current regime, reliant as it is on EU case law, requires a conflict of interest, or a *perceived* conflict of interest, to be identified, in order to prevent post EC employment by a current EC employee. However, the interpretation of what constitutes a conflict, or indeed a *perceived* conflict, is subject to a wide degree of discretion, implemented as it is across a wide array of EC institutions.[188] This leads to inconsistencies and unfair

[185] European Ombudsman, "Decision on how the European Commission manages 'revolving door' moves of its staff members (OI/1/2021/KR)," (16 May, 2022), op cit.
[186] Ibid., at fn 16.
[187] Ibid., at § 33.
[188] Ibid., at § 37.

outcomes. It also opens the door to a *race to the bottom*[189] culture taking root. That is to say, a culture in which EC institutions seek to be competitive with one another, by offering interpretations which are the most generous in favour of the employee. In our view, this is likely to be more so the case where board members or other high officials, are the ones submitting the notifications of post EC employment.

32.2.5.10. Evidence that those entities that currently manage revolving door conflicts (CIEC and the various EC institutions) have applied a *too soft* approach, over and above failures to monitor and enforce. For example,[190] in her review of 100 cases of employees seeking authorisation for post EC employment activity, the EUO found only two had been rejected. The position with renewals of authority, the EUO found to be even worse.[191]

32.2.5.11. That in itself is not instructive. It may be that the rate of rejection (two out of one hundred), if independently assessed, would be found to be fair and balanced.

32.2.5.12. However, seen within the context of other findings in the Decision,[192] it becomes apparent that the very small number of rejections speaks to a wider pattern – that of inadequate enforcement.

32.2.5.13. The Decision highlights the disutility of the current regime's reporting cycle: in the Commission's Annual Reports.[193] The Commission's response was that it would not find it feasible to publish this information more often. In light of this response, combined with the underlying deficiency (information made available too slowly / too seldom), it would be sensible, in our view, to establish an EUEOA with the remit necessary, and the resources, to publish details of its decisions on an on-going basis, and as and when they are made. This would address the Ombud's specific instruction to publicise information on adoption of a decision.[194]

33. In respect of the Commission's Response regarding the 'Meroni Doctrine', we query this conclusion.[195]

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[189] "… the progressive degeneration of standards or elimination of regulations (in a market, business, etc.) due to the pressures of competition; (more generally) a progressive or deliberate deterioration of standards." Oxford English Dictionary, online edition, accessed 10 November, 2022, available at: <https://www.oed.com>.

[190] European Ombudsman, "Decision on how the European Commission manages 'revolving door' moves of its staff members (OI/1/2021/KR)," (16 May, 2022), op cit., at § 38.

[191] Ibid., at § 47.

[192] Ibid., at § 39.

[193] Ibid., at § 52.

[194] Ibid., at § 56.

[195] This paragraph and its sub-paragraphs are authored by Professor Marta Simoncini, Assistant Professor in Administrative Law, Dipartimento di Scienze Politiche, Libera Università Internazionale degli Studi Sociali Guido Carli (Luiss).

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

33.1.1. The European Commission correctly identifies the constitutional concern behind the Meroni doctrine, which is the protection of institutional prerogatives as conferred by the Treaties. However, the European Commission embraces a broad interpretation of what should not be delegated, to ensure the required institutional balance of power.

33.1.2. The Meroni doctrine allowed agencies to exercise only "clearly defined executive powers" and forbad the delegation of "discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy", and thereby unlawfully shifting responsibilities.[196] In *Romano*, the Court of Justice excluded the possibility that agencies could adopt "acts having the force of law", making clear that they could only adopt non-binding decisions.[197] This has however left open the possibility that agencies may adopt binding acts in individual cases.[198] In the *ESMA short-selling case*,[199] the Court of Justice (CJEU) held that as long as objective criteria and circumscribed conditions guide the exercise of executive powers and make them amenable to judicial review, delegation could involve some "margin of discretion" when a "high degree of expertise" is required to pursue the objective of financial stability.[200] If delegation is necessary for tasks[201] to be performed, according to the CJEU, two sets of reasons justify the possibility to confer them on an EU agency: the changed framework of the Treaties, which recognised that EU agencies' acts, including acts

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[196] 10/56 *Meroni & Co., Industrie Metallurgiche, S.A.S., v High Authority of the European Coal and Steel Community*, (13 June, 1958), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61956CJ0010&from=FR>, at 173.

[197] 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, (14 May, 1981), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0098>, at § 20.

[198] See M. Chamon, EU Agencies : Legal and Political Limits to the Transformation of the EU Administration (Oxford University Press , 2016), at 255.

[199] C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of European Union and European Parliament*, ECLI:EU:C:2014:18, availabvle at <https://curia.europa.eu/juris/document/document.jsf;jsessionid=46EE1F7AF7340F9C4B037353A395E6AB?text=&docid=146621&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=53424>.

[200] Ibid., §§ 55; 85.

[201] See T. Tridimas, 'Financial supervision and agency power: Reflection on ESMA', in N. Nic Shuibhne and L.W. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012), at 55, 59–65.

of general application, can be challenged in courts;[202] and the legislative context which conferred on ESMA powers "circumscribed by various conditions and criteria".[203]

33.1.3. The result is that powers must be exercised pursuant to the essential principles and rules fixed in the enabling provisions of the relevant EU legislative acts. Insofar as EU agencies exercise their tasks within the appropriate priority-setting and the policy choices made by EU legislative acts, no significant transfer of responsibilities may occur.[204] In addition, the *ESMA short-selling case* pointed to the need to ground EU agencies' powers in solid accountability mechanisms. Effective guarantees of institutional supervision and judicial review should thus be in place, ready to remedy possible abuses.[205]

33.1.4. To be compatible with the Meroni doctrine, the actions of the EUEOA should therefore be grounded on a detailed legislative framework, which should clarify:

(a) the legal basis for the delegation of powers;

(b) whether the delegation of powers complies with the proportionality principle;

(c) the technical nature of the matter, requiring specialised expertise;

(d) the criteria and the conditions for the exercise of powers;

(e) the existence of an adequate accountability framework, including both supervision by the relevant EU institutions, and judicial protection.

33.1.5. Decisions on ethical matters may thus be compatible with the Meroni doctrine, to the extent that they do not involve the adoption of policy choices, which should be reserved for EU institutions. The legislative framework under which EUEOA is established should thus define and circumscribe the mandate of the Agency, so as to protect the prerogatives of the EU institutions. The capability to adopt individual sanctions, in particular, could not be conferred on the EUEOA, unless the discretionary elements of evaluations are defined by the competent institutions, and completely removed from the EUEOA's competence.

33.1.6. Nonetheless, "**on-the-spot-checks**" and "**records-based investigations**", mentioned in **§ 16 of the EU Resolution** do not, as such, seem to conflict with the Meroni doctrine. Investigation

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[202] C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of European Union and European Parliament*, op cit., §§ 79-80.

[203] Ibid., §§ 46-51.

[204] See M. Simoncini, Administrative regulation beyond the non-delegation doctrine: a study on EU agencies, (Hart Publishing, 2018), at 31.

[205] See M. Chamon, "EU agencies between Meroni and Romano or the devil and the deep blue sea," *Common Market Law Review*, (2011), no. 48, 1055, at 1059–60; M. Simoncini, "Legal boundaries of European Supervisory Authorities (ESAs) in the financial markets. Tensions in the development of true regulatory agencies," *Yearbook of European Law*, (2015), no. 34, at 319.

tools and the collection of information are, in fact, not covered by the Meroni doctrine – which is concerned with the capability to adopt binding decisions and rules.

33.1.7. The case of the European Aviation Safety Agency (EASA) represents a useful comparison. In fact, EASA cannot impose fines and periodic penalty payments on the legal or natural persons to whom the Agency has issued a certificate, but can only request the Commission to do so.[206] Nonetheless, EASA has significant inspection powers to access relevant records, and to enter relevant premises, in cooperation with the Member States,[207] which scope is regulated by delegated acts of the Commission.[208]

33.2. For these reasons we respectfully disagree with the Commission's assessment of the impact of the Meroni doctrine. See also analysis of the Meroni doctrine at **§ 47.1 below.**

34. In respect of the Commission's Response to **§ 5 of the EU Resolution**,[209] we respectfully disagree. Because the envisaged EUEOA would have oversight of ethics issues, including the revolving door to, and then lobbying activity by, third parties, it would make more sense to house this function under an EUEOA. The duplication of Secretariat resources would then not be duplicated, if the Secretariat was subsumed into that of the EUEOA.

35. In respect of the Commission's Response to **§§ 16 and 24 of the EU Resolution**,[210] we respectfully disagree. The Commission argues that the EUEOA should not have investigative powers, but states: "… should work on the basis of information provided by the Members, by the Members' institutions or open sources. The body could also have the competence to ask for additional information from a Member or the EU institutions." This strikes us as a *distinction without a difference.* If receiving valid information about conflict-of-interest breaches from "open sources" requires further investigation, then the Agency assumes an investigative role. It strikes us as immaterial whether investigations are launched on own initiative or later (thanks to a tip-off) – they nonetheless are investigations.

35.1. Because of an identified advantage in creating an Agency with a proactive remit, we are of the view that an EUEOA with the power to initiate investigations, would be preferable.

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[206] Art. 84, Regulation 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.

[207] Art. 83, Regulation 2018/1139.

[208] Art. 62 (13), Regulation 2018/1139.

[209] "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), op cit., at 5.

[210] Ibid., at 6.

36. We note the Commission's Response[211] in respect of an existing sanctions regime, and the adequacy thereof. Evidence suggests that the current sanctions regime – whilst conceivably adequate – is not meaningfully enforced. But over and above that, and quite separate from discussion on the adequacy of the existing regime or the adequacy of the enforcement thereof, it is not unwarranted that a newly created Agency would require tools – including tools that already exist elsewhere in the EC. As such we do not share the Commission's view that the EUEOA should be created without sanctions power.

37. Regarding the Commission's response[212] in respect of publicity, we note that there seems to be a misunderstanding of the envisaged role of the EUEOA. While the EUEOA would fulfil an advisory role, it would also seek to make recommendations, and drive adherence and compliance with strictures on conflicts of interest, by raising awareness of these issues (a preventative role[213]). As such we are of the view that, in the Commission providing a response (based on an assumption that the EUEAOA's activities are confined to advisory only), the Commission overlooks some key aspects of the EUEOA's intended purpose. We are of the view that, if the role of the EUEOA is contemplated in its full, intended extent, then the publication of recommendations is necessary.

    37.1. Moreover, where privacy considerations are enlivened, a balance can easily be struck by redacting whatever information cannot be placed into the public domain.

    37.2. Indeed, the EUO Decision[214] specifically directs the Commission as follows:

> *The purpose of making public information on post-service activities is to ensure transparency so that businesses, civil society organisations and the public are aware of any restrictions and can monitor whether they are complied with. Information that is public may also serve the purpose of deterring former senior officials from engaging in those prohibited activities. Making the information public in a more timely manner would thus be more effective as a deterrent and as a means of monitoring if the decision is complied with.*
>
> *…the Ombudsman reiterates her suggestion that the Commission should make public information on all the cases assessed, and that it does so upon adoption of the decisions, rather than publishing an annual report including information on some specific cases only.*[215]

    37.3. As such we respectfully disagree with the Commission's response in respect of publication of decisions. We are of the view that this is necessary for the EUEOA to fulfil its role; that data privacy protection issues can be managed, that a nine-person board is capable of making balanced

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[211] Ibid.

[212] Ibid., at 7.

[213] "Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," in *Docuemntation Gateway*, European Parliament Legislative Observatory, 2020/2133(INI), (16 September, 2021), available at: <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1675358&t=d&l=en>.

[214] European Ombudsman, "Decision on how the European Commission manages 'revolving door' moves of its staff members (OI/1/2021/KR)," (16 May, 2022), op cit., at § 54 and 56.

[215] Original text in bold.

assessments, and adequately balancing issues that arise, where the publication of findings could be "inappropriate";[216] and that such an approach would comport with the recommendations made by the EUO.

38. In respect of the Commission's response to the intended scope, specifically that the scope is too broad, the need for resources would be too great, it would entail duplication, and provide little value in most cases, we respectfully disagree.[217]

    38.1. The value of an EUEOA cannot be ascertained prior to its creation and its opportunity to acquire a track-record. But its potential value can be surmised by reference to the importance and credibility of the reasons advanced for its creation. We are of the view, particularly in light of the findings concerning the revolving door by the Court of Auditors Report,[218] and for the other reasons advanced elsewhere in this paper, that the case for the creation of an EUEOA is a strong one.

    38.2. A too heavy workload is not indicative of a too broad remit, but rather the lack of adequate resources. As alluded to elsewhere the Resolution calls for the EUEOA to be adequately resourced. Moreover, if after an EUEOA is established it finds itself facing a heavy workload, that may indicate the existence of a significant and extensive regulatory issue that had previously been left unaddressed.

    38.3. As concerns duplication of functions, we refer the reader to § 34, above.

39. We query the Commission's response[219] concerning human resources, and its assessment that a new body would not provide value as it would be remote from the work of the person concerned, and would be incapable of assessing the risks. We are not privy to details of how proximity to a person's work affects this assessment, and would welcome further details. We do note, however, that an individual assessed for potential conflicts of interest should be assessable – indeed it would comport better with the principles of natural justice – by independent assessors. To achieve that would involve a degree of remoteness by the assessors to the assessed.

    39.1. We query whether such a body would not be capable of assessing risks. Other, remote bodies, such as the EUO, assess risk in their assessments of efficacy in the current revolving door regime. We would

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[216] To use the word used by the Commission in its response. "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), op cit., at 7.

[217] Ibid., at 7.

[218] European Court of Auditors, "Special report: The ethical frameworks of the audited EU institutions: scope for improvement", No 13/2019, § 16.

[219] "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), op cit., at 7.

welcome from the Commission any studies or evidence-based analysis it may have that correlates the capability to assess risk, and supervisory remoteness.

40. In respect of the Commission's response to the issue of staff regulations,[220] we refer to our analysis at § 32.1.2 and § 32.2.2, above.

41. In respect of the Commission's response to the issue of board size (**§ 25 of the EU Resolution**),[221] we respectfully disagree. While a reduction in size would, indeed, achieve efficiencies in operation, it is difficult to do so, while maintaining both the current ratio (one-third EC; one-third EUP; one-third EU Authorities), and an unequal number.

    41.1. A reduction of each estate from three to two members equals six;

    41.2. The only level at which the ratios between the three estates can be maintained, whilst maintaining an uneven number, is one representative from each estate, equalling a board of three people. We are of the view that this would be too small.

42. In respect of the Commission's response to the issue of board composition, and in particular the exclusion of a representative of the Commission (**§ 30 of the EU Resolution**),[222] we respectfully disagree with the Commission's response. We are of the view that if the EUEOA is to be independent, and be *perceived* as independent, then it is necessary to exclude the Commission.

    42.1. Moreover, if the EUEOA is to assess a potential conflict of interest by an employee of the Commission, then it becomes all the more important that the EUEOA be independent of the Commission.

43. We find, on balance therefore, that the proposal in its current form may benefit from further enhancements, as provided in B above "Further enhancements to consider", in "IV Analysis of key provisions of the proposed EUEOA". Notwithstanding those suggestions, we are of the view that the proposal in its current form is comprehensive, foresightful, fit for purpose, well-designed, -thought-out, and -planned. As such, and by reference to other initiatives elsewhere, we are of the view that the current proposal would constitute a global benchmark.

[220] Ibid., at 8.
[221] Ibid., at 8.
[222] Ibid., at 8.

V. Legal analysis of the proposed EUEOA

A. Legal analysis

44. While the European Commission supports the creation of an independent ethics body common to all EU institutions — as originally stated by President von der Leyen in her Political Guidelines for the Commission — it expressed some policy and legal concerns regarding its impact upon the autonomy and independence of all institutions and their Members.[223] This section intends to address those concerns.

45. First, the European Commission acknowledges that the proposed Ethics Body would not entail the amendment of the substantive ethics rules, which would continue to apply as they are currently formulated, across different legal sources, from the Treaties to rules of procedure and codes of conduct. While it expressly rejects the possibility to establish "a single set of operational ethical rules applicable to the Members of all institutions", it does "not rule out discussions on a set of common principles in line with the Treaty provisions applicable to the different institutions".

46. Second, the Commission expresses its concern regarding the risk of "interference between the body and the work of the European Anti-Fraud Office (OLAF), the European Public Prosecutor's Office (EPPO), the European Ombudsman, the European Court of Auditors or the CJEU".[224] Against this backdrop, it proposes that the body's mandate be limited to "a clearly defined list of competences delegated by the participating institutions".[225]

    46.1. On this point, it must be remembered that the proposed scope and mandate of the EUEOA would cover the adherence of ethical conduct by members and staff, and possible conflicts of interest, both during and after the mandate or service, as well as the duties of independence and confidentiality. As such, the establishment of the EUEOA would not overlap with any of the existing institutions. By replacing the Commission, Parliament and staff authorities, the EUEOA would merely receive the same mandate these institutions already have, without encroaching upon OLAF, EPPO, the

[223] "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), op cit.
[224] Ibid., at 3.
[225] Ibid.

Ombudsman, CoA or CJEU. In particular, EPPO has drastically reduced the scope of action of OLAF, whose action remains supportive and therefore complementary to the former.[226]

47. Third, the Commission contests the possibility of entrusting the EUEOA with decision-making powers, in addition to its advisory authority. This statement however seems to lack a full grasp of the proposal put forward by the Parliament.

47.1. Contrary to the reading of the Meroni doctrine offered by the Commission, the EU institutions are not limited – in their delegation of powers to a new EU ethics body – to the competences they already exercise. Rather they are entitled to foresee and entrust new competences to such a new body, including investigatory as well as sanctioning powers, as compared with – but not limited to – the ones currently enjoyed by existing EU ethics bodies. The only caveat to such a possibility resides in the EU institutions themselves already enjoying, yet not necessarily exercising, such powers.[227] While investigatory powers are inherent to the procedural autonomy of each EU institution – yet must be exercised within the limits established by the Charter of Fundamental Rights (Art. 52) – sanctioning powers are not. Therefore, a legislative act is needed to grant the body the necessary competence to autonomously sanction. However, such a sanctioning power would have to be exercised within the limits established by the Treaty, which entrusts, for instance, solely the Commission the possibility to go to Court against one of its (former) members, or to its President to dismiss a Commissioner.[228] This suggests that while some sanctioning powers could be delegated from EU institutions to the EUEOA – notably in relation to reputational, temporary and financial sanctions[229] – the EUEOA will still not be able to pursue irreversible sanctions. For the latter, the Treaty foresees (to take again the example of the Commission), that solely the President of the Commission can act in case of individual dismissal,[230] or, the Commission must go before the EU Court of Justice, when the sanction sought is compulsory retirement,[231] or removal from a post.[232] When it comes to the Parliament, irreversible sanctions are foreseen not in the Treaties themselves, but in the Rules of Procedure, which entrusts

[226] Article 101(3) of the EPPO Regulation.

[227] This means that an IIA may enable – as a matter of principle – the European Parliament to delegate the enforcement of ethics standards to an oversight system that might not entail the sole participation of MEPs. This is true insofar as the EP already enjoys such a competence, despite not having exercised it.

[228] Article 245 and Article 247 TFEU.

[229] With the exception of loss of the pension right for Commissioners, for which Article 245 TFEU expects the Court, upon the request of the Council of the Commission, to decide.

[230] Article 17(6) TEU.

[231] Article 247 TFEU.

[232] Article 245 TFEU.

the enforcement of these sanctions to the Conference of Presidents,[233] and ultimately the Parliament itself.[234]

48. Fourth, the Commission considers that the proposed "**interinstitutional agreement (IIA) based on Article 295 TFEU is not an appropriate legal basis** for the establishment of the EU ethics body." It argues that (i) "an interinstitutional agreement under this provision can only be concluded between the Parliament, the Council and the Commission"; and (ii) "[u]sing this legal basis would exclude all other institutions (except for the Council), agencies and bodies from joining at a later stage and concern issues, which affect Members of all EU institutions in the same way". This however does not reflect current legal practice:

    48.1. An IIA concluded between two, or more, EU institutions[235] can set out the **basic arrangements** for their cooperation, to ensure that the ethical regime applicable to the respective EU institution, members and staff, is upheld.

    48.2. Such an IIA could then contain a clause allowing two or more institutions, offices, bodies and agencies of the EU to entrust the monitoring of respect for ethical standards to an interinstitutional body (IIB), similar to the Staff Regulations, which allow the EU institutions to outsource tasks to the EPSO.[236] Other interinstitutional bodies where a similar method has been used are the Publications Office of the EU,[237] the European Administrative School,[238] and the Computer Emergency Response Team (CERT).

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[233] Rule 176(6) Rules of Procedure EP (early termination of an office).

[234] Rule 21 Rules of Procedure EP (early termination of an office).

[235] While Art. 295 only refers to the European Parliament, the Council, and Commission, the general principle of sincere cooperation between all institutions suggests that an IIA could be concluded with institutions not expressly mentioned in Art. 295 TFEU. For a precedent, see: 2000 Proposal for an Agreement between the European Parliament, 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, Brussels 29.1.2000.

[236] See Art. 2(2) of the Staff Regulations ("However, one or more institutions may entrust to any one of them or to an inter-institutional body the exercise of some or all of the powers conferred on the Appointing Authority other than decisions relating to appointments, promotions or transfers of officials"). This provision was originally introduced in the Staff Regulations through Council Regulation No 3947/92, OJ L 404/1.

[237] 69/13/Euratom/ECSC/EEC: Decision of 16 January 1969 setting up the Office for Official Publications of the European Communities, *OJ L 13/19*, as amended by Decision 80/443/EEC, Euratom, ECSC: Decision of 7 February 1980 amending the Decision of 16 January 1969 establishing the Office for Official Publications of the European Communities, *OJ L 107*, *25/04/1980, at 44–46*. See also: 2000/459/EC, ECSC, Euratom: Decision of 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 of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities, *OJ L 183*, *22.7.2000, at 12–15*, as replaced by 2009/496/EC, Euratom: Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union, *OJ L 168, 30.6.2009, at 41–47.*

[238] See 2005/118/EC: Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the Ombudsman of 26 January 2005 setting up a European Administrative School (*OJ L 37, 10.2.2005, at 14–16*)

48.3. Interinstitutional bodies are typically entities which do not form an integral part of any of the institutions, and which are designed to carry out tasks common to the institutions. One of the oft-cited advantages of these bodies is that they ensure a coherent practice throughout the institutions (which would be especially relevant for an interinstitutional ethics body), without affecting their institutional autonomy.[239]

48.4. The actual setting-up of an interinstitutional body would then be realized through an **arrangement** (like is the case, for instance, with the Computer emergency response team for the Union's institutions, bodies and agencies, CERT-EU) among the relevant institutions[240]. Another option being the adoption of a **joint decision** by the institutions involved (as is the case for, e.g., the European Administrative School, the Publications Office of the European Union[241] and the EPSO).[242] When it comes to decisional authority of an IIB, each EU institution would commit – in the same arrangement or joint decision – to replace its pre-existing dedicated body – where one exists – with a new one, and define the modalities for transition from the old to the new regime.

49. To proceed in accordance with the EU Resolution's proposal for ensuring an ethical EU administration, appears as the legally most appropriate option and practically also one of the most promising ones. This since the institutions and bodies mentioned in Art. 13 TFEU would come under the purview of the EUEOA on a voluntary basis, and their institutional autonomy – and institutional balance – would therefore not be breached. Moreover, this delegation and institutional set-up would enable other EU bodies, such as the EU

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aimed at providing professional training to the staff of the signatory institutions (i.e. the European Parliament, the Council, the European Commission, the Court of Justice of the European Union, the European Court of Auditors, the European Economic and Social Committee, the European Committee of the Regions and the European Ombudsman) and 2005/119/EC: Decision of the Secretaries-General of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions and the Representative of the European Ombudsman of 26 January 2005 on the organisation and running of the European Administrative School, *OJ L 37, 10.2.2005, at 17–20*.

[239] See European Commission, Communication on a new type of Offices for managing support and administrative tasks at the European Commission, COM (2002) 264 final, at 6.

[240] See, e.g.: Arrangement between the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, the European Court of Auditors, the European External Action Service, the European Economic and Social Committee, the European Committee of the Regions and the European Investment Bank on the organisation and operation of a computer emergency response team for the Union's institutions, bodies and agencies (CERT-EU), *OJ C 12, 13.1.2018, at 1–11*.

[241] Decision 2009/496 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union, *OJ L 168, 30.6.2009, at 41–47*.

[242] See Decision 2009/496, ibid.; Decision 2005/118 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the Ombudsman setting up a European Administrative School, *OJ 2005 L 37/14*; Decision 2002/620 of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman establishing a European Communities Personnel Selection Office, *OJ 2002 L 197/53*.

agencies, to subject themselves to the EUEOA's scrutiny on a voluntary basis. In any event, failing to do so, the EU legislature would have the competence to bring these bodies under the mandate of the EUEOA, but only through legislation.[243]

50. Fifth, the Commission argues that the body "should only have **explicitly defined competences** so as to guarantee: [i] on the one hand to respect the institutional balance and independence of each institution as set out in the Treaties and, [ii] on the other hand, to limit the tasks of the body to a workable number of areas".

    50.1. As a matter of principle, the proposed ethics body would be set up based on IIA, which would pool, into one single, permanent oversight body, the task of ensuring the respect of certain ethics standards and obligations, and to do so both for members and staff.

51. When it comes to staff, the EUEOA would not entirely replace the present staff disciplinary procedure. Its competence would rather be limited solely to monitoring and enforcement of ethical obligations, notably those revolving around conflicts of interests,[244] imposed on staff. The body would therefore not be responsible for the enforcement of other professional obligations, such as the prohibition on sexual and psychological harassment, the duty of residence, or the rules governing running for political office. The latter would remain in the present disciplinary system, despite the fact these professional obligations are equally subject to the disciplinary proceedings of Annex IX of the Staff Regulation. To make this happen, the IIA will need to rely on an enabling clause foreseen in the Staff Regulations – either under Article 9 (1)(a), or Article 2 (2) – to entrust the EUEOA with the power to enforce respect for ethical obligations, such as conflicts of interests,[245] while leaving the respect of non-ethical obligations, such as political office, residence, and freedom of expression, to the present system.

52. When it comes to **post-term of office activities of the Members of the institutions, the Commission** notes that this would require clarification on what basis the Parliament would consult the body on post-mandate activities of its former Members, since the Parliament does not seem to have specific rules for notifying and evaluating post-mandate activities of its former Members. In the absence of specific rules, the body could not be invested with authority to verify compliance with non-existing provisions.

    52.1. However, the vast majority of ethical breaches do not fall under the competence of these bodies, and consequently call for a dedicated, and generalised, investigative remit for the EUEOA to operate on. Thus, for instance, where the Appointing Authority or OLAF becomes aware of evidence of failure by staff, they may launch administrative investigations to verify whether such failure has occurred.[246]

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[243] This would however require the adoption of a legislative act based on an autonomous legal basis, so as to amend the foundational legislative act of each agency.

[244] Art. 11 and 11a of the EU Staff Regulations.

[245] See: Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovakia & Hungary v. Council*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, § 73.

[246] Art. 86 Staff Regulations.

OLAF can do the same vis-à-vis members too, yet its competence to investigate is limited to "serious misconduct", which does not include all ethical standards breaches. This leaves open an entire category of misconducts by members that, by failing to qualify as "serious", may escape the investigatory powers of OLAF, and an initiative by the Commission and Parliament (or each Institution's President) vis-à-vis its own members.

52.2. The Commission contests the possibility to invest the body with the authority to verify compliance with the **mandatory** transparency **register,** as well as with the Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, and the same decision for its Directors-General. It argues that Article 6 (4) of the Interinstitutional Agreement on a mandatory transparency register establishes a Secretariat, composed of staff from the Parliament, the Council and the Commission, with the ability to carry out investigations.

52.3. While this is factually correct, this does not prevent a possibility for the three signatory institutions to the proposed IIA to amend the Interinstitutional Agreement on a mandatory transparency register, so as to entrust its enforcement to the newly established body.

52.4. The Commission also opposes the possibility to entrust the EUEOA with the **power to initiate investigations** on its own initiative, as well as conduct "on-the-spot and records-based investigations **based on information** it has collected or that it has **received from third parties**, such as journalists, the media, NGOs (non-governmental organisations), whistle-blowers, civil society or the European Ombudsman."[247] Its concern is that by doing so, the EUEOA might encroach upon the competences of existing bodies, such as the national judicial authorities, the European Public Prosecutor's Office (EPPO) — competent in case of suspicions of criminal behaviour — the European Anti-Fraud Office (OLAF) – which can investigate irregularities affecting the EU budget, as well as serious breaches of professional duties — and the European Ombudsman – which can launch inquiries in cases of behaviour that would constitute maladministration.

52.5. As described above, the mandate conferred upon the EUEOA, and that of existing specialised bodies, are complementary and not overlapping – being based on the principle of *lex specialis*.

53. When it comes to the sanctioning power to be conferred on the EUEOA, the Commission recalls that, with regard to its Members, there is **already** a robust ethical framework in effect which establishes **provisions for sanctions.**

53.1. Yet the current practice suggests that this is not the case. An excursus of enforcement practices suggests that only a few cases have led to the imposition of penalties for members of EU

[247] "Follow-up to the European Parliament non-legislative resolution on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body," 2020/2133(INI), 'Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body,' (18 February, 2022), op cit., at 5.

institutions.[248] This can be explained by the limited – or even absent[249] – power of investigation regarding breaches of ethics standards by the EU institutions themselves, combined with limited coordination with national authorities.

53.2. If the very limited sanctions at the disposal of the different institutions are never or seldom applied, this questions the overall effectiveness of the EU ethics framework.

B. Conclusion to the legal analysis

54. This White Papers concludes that there is a case for the creation of a single, permanent, and independent EU ethics body to be established to reduce the risk of unethical behaviour to a minimum. It demonstrates that it is legally feasible under EU law to set up such a body by pooling together existing monitoring, investigatory, sanctioning as well as advisory powers.

55. As it belongs to the European Commission to prepare and adopt a proposal for the establishment of an EUEOA, and having addressed the legal issues that arise, we hope that the present study might dispel some concerns the Commission has expressed in its own response to the EU Resolution.

[248] See, e.g.: for the Commission: Jan-Pieter Kuijper, Misteps by Commissioners: Legal or Political Sanctions? in F. Amtenbrink (2019) *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*, Cambridge University Press; for the European Parliament, Advisory Committee of the conduct of Members, Annual Reports from 2015-2018 (during the 2014-19 legislative term, the Advisory Committee dealt with a total of 26 MEPs involved in potential breaches of the Code of Conduct, however none of them was sanctioned).

[249] The Parliament has no power of investigation over its own members who are accountable to their voters, and enjoy free mandate. See European Court of Auditors, "Special report: The ethical frameworks of the audited EU institutions: scope for improvement", op cit., § 16. Yet insofar as citizens do not have access to information to judge their representatives, be that due to missing checks on the veracity of financial interests, or to incomplete information on lobbying meetings, this accountability does not exist.

VI. Author's biographies

A. Associate Professor Andy Schmulow

Dr Andy Schmulow is an internationally recognised deep subject-matter expert on Twin Peaks financial system regulation; regulating to compel better conduct in retail markets; and methods to compel better, more effective regulatory oversight, in particular with respect to conduct.

In 2019 he was invited by the World Bank and CGAP to lead the development of a transformational consumer financial well-being indicator framework for the South African government. In 2017 he was invited by South Africa's National Treasury to serve on their Independent Committee of Experts to advise on the drafting of the Conduct of Financial Institutions Bill. In 2018 he was invited to provide research findings to the Australian Royal Commission of Inquiry into Misconduct in the Banking, Insurance and Superannuation Industry (FSRC / Hayne Royal Commission), leading to Recommendation 6.14 of the FSRC Final Report: establish a Regulator Board of Oversight. This recommendation has subsequently been reflected in the *Financial Regulator Assessment Authority Act*, given Royal ascent on 23 June 2021. He is the Founder and CEO of Clarity Prudential Regulatory & Consulting, Pty Ltd, and a Senior Advisor to Datta Burton and Associates. He is a Senior Lecturer in the School of Law, at the University of Wollongong, Australia. In 2020 he was invited to become a Member of the Secretariat to the House of Commons House of Lords All Party Parliamentary Group for Personal Banking and Fairer Financial Services.

His input is sought by regulators, parliamentarians, members of government, policy-makers, central bankers and academics internationally. He has been admitted as an Advocate of the High Court of South Africa, and as an Australian Legal Practitioner in the Supreme Court of Victoria. He holds various honorary positions: as a Visiting Associate Professor in the Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg, and as a Visiting Researcher in the Centre for International Trade, Sungkyunkwan University, Seoul. He is the co-editor of the *Cambridge Handbook of Twin Peaks Financial Regulation* (June 2021). This volume is the world's first book-length, multi-disciplinary, cross-jurisdictional and internationally comparative analysis of Twin Peaks and hybrid Twin Peaks regimes. His research has been published in world-leading peer-reviewed journals, and cited in reports issued by government inquiries and central banks.

B. Jeff Hauser

Jeff Hauser is the founder and director of the Revolving Door Project. The Revolving Door Project (RDP) scrutinizes the executive branch of the United States to ensure that its officeholders serve the public interest, rather than work to entrench corporate power or seek personal advancement.

Hauser is regularly cited by a broad array of media outlets, including *The New York Times*, *The Wall Street Journal*, *The American Prospect*, *Bloomberg News*, *Politico*, *Washington Post*, and *The Intercept*.

Before founding the Revolving Door Project in 2015, Hauser spent more than three years leading the AFL-CIO's political media and economic policy outreach, as well as orchestrating the labor federation's communications strategy for their immigration reform campaign. Hauser brings a wide variety of expertise in politics and the progressive movement, learned from running a congressional campaign, and as the deputy campaign manager of the Coalition for Comprehensive Immigration Reform (CCIR, since renamed America's Voice).

It was Hauser's frustration as a young trust-buster in the George W. Bush-era Department of Justice (DOJ) that taught him the power of the executive branch, and provided the zeal for reform that is now funnelled into the Revolving Door Project. In addition to the AFL-CIO, CCIR, and DOJ, Hauser has worked at MoveOn.org, served as executive director of Majority Action and Accountability Now, and as campaign manager of Shulman for Congress. His first jobs in politics were working for Wes Clark's 2004 presidential campaign, and then serving as political director for the National Jewish Democratic Council from 2004 until early 2007.

Hauser is a graduate of Harvard College (1995) and the New York University School of Law (2001).

C. Professor Alberto Alemanno

Alberto Alemanno is Jean Monnet Professor of European Union Law and Public Policy at HEC Paris and visiting professor at the College of Europe in Bruges, and at the School of Public Policy at the University of Tokyo. His research has been centred on how the law may be used to improve people's lives, in particular through the adoption of power-shifting reforms countering political, social, health, and economic disparities of access within society. Due to his commitment to bridge the gap between academic research and policy action, he has pioneered innovative forms of academic and civic engagement in the EU transnational space via the non-profit The Good Lobby.

Alberto is also permanent visiting professor at the College of Europe, Bruges, where he teaches participatory democracy, at the University of Tokyo School of Public Policy, the School of Transnational Governance at the European University Institute in Florence, as well as scholar at The Rutgers Institute for Corporate Social Innovation.

He has been named Young Global Leader by the World Economic Forum, Ashoka fellow, Social Innovator of the Year by the Schwab Foundation for Social Entrepreneurship and Innovation, as well as European Young Leader by Friends of Europe for his work aimed at filling the gap between academic research and policy realities.

He regularly publishes in Le Monde, The Guardian, Bloomberg, Politico Europe and his work has been featured in The Economist, The Financial Time, Nature and Science. Alberto is known not only for being a prolific scholar and active public interest lawyer but also for being a creative and passionate teacher having first embraced iTunes U, then pioneering Coursera with a Massive open online course devoted to the functioning and impact of the European Union, which has reached over 300,000 learners from all over the world.

Originally from Italy, Alberto is a graduate of Harvard Law School, the College of Europe and holds a PhD in International Law & Economics from Bocconi University.