Analysis of the proposed reform of the Code of Conduct for Commissioners

President Juncker’s latest State of the Union address promised to reform ethics rules in the Commission and “strengthen the integrity requirements for Commissioners both during and after their mandate”. However, the Commission’s proposals for a reformed Code of Conduct for Commissioners leaves a lot to be desired.

This reform is an attempt to draw a line under the controversy after the hiring of ex-President Barroso by Goldman Sachs International in July 2016, which saw MEPs, the European Ombudsman, civil society organisations, and thousands of people asking the Commission to reform its ethics rules and effectively block its revolving doors.

The rules for ex-commissioners in the Code of Conduct for Commissioners are meant to concretise Article 245 of the European Treaty which obliges Commissioners to "behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits".

After the Barroso scandal there were serious questions asked about whether the code was fit for purpose. For instance, the European Ombudsman declared: “It is not enough to say that no rules were broken without looking at the underlying spirit and intent of the relevant Treaty article and amending the Code to reflect precisely that.”

A strong Code of Conduct with clear and efficient ethics rules is urgent to prevent further scandals, but also to change the current established culture that perceives revolving doors roles with clear conflicts of interest as natural and legitimate steps in policy-makers’ careers.

Juncker’s initiative to reform the Code is welcome but do the proposed changes actually address the Commission revolving doors problem? We analyzed the proposal in detail and compared it with the growing pile of cases from RevolvingDoorWatch.

The answer, in short is no. The Commission has failed to grab the opportunity to truly take up this challenge. Instead it has concentrated on small tweaks to the current rules, such as small extensions of notification period and rebranding the Ad-Hoc Ethics Committee. It is a too light response for a problem that seriously threatens citizens’ trust in EU policy-making.

The Code is set to be implemented in February 2018 with no public consultation. The Parliament, however, will have a role, albeit limited. We urge you now to keep pressure on the Commission to take
on the several recommendations made by the European Parliament in 2016 in the JURI report and in 2017 in the AFCO report.

In our view, a stronger Code of Conduct for Commissioners requires:

- A longer notification period of at least three years for ex-Commissioners and five for ex-Presidents of the Commission.

- An explicit and wide ban on lobbying EU Institutions.

- Tighter wording around exceptions to prevent the creation of loopholes.

- A truly independent Ethics Committee with the power to start its own enquiries, wide range of tools to assess new roles and ability implement its own conclusions, including applying sanctions when faced with non-compliance.

Beyond revolving doors issues we support:

- A wider list of administrative sanctions for non-compliance.

- More detailed financial interest disclosure.

- A procedure for addressing conflicts of interest that takes into consideration Commissioner’s role as members of the College of Commissioners and potential conflicts of interest of family members.

- Enshrining in the Code the commitment to ensure balance and representativeness in stakeholder engagement.

The notification period

The Commission’s current implementation of Article 245 TFEU commitment for ex-commissioners to "behave with integrity and discretion" when accepting new roles, has at its core a notification period. During this period (currently a mere 18 months), commissioners must notify the Commission when they are considering taking on a new role. The Commission can then – with the aid of the Ad-Hoc Ethics Committee – authorize the new role, impose certain limitations, or reject it if it does not comply with Article 245.

Through their work commissioners gain access to unrivaled networks of contacts, access, and insider know-how that can be very desirable for private industry and lobby firms. The purpose of setting a deadline for the notification period assumes that these expire as time passes – influence wanes, contacts disappear, inside politics change.
The Commission’s proposal is to extend the current notification period for ex-commissioners from one and a half years to two years in total.

While an improvement, this is still below the three years requested by MEPs in 2016 in the JURI report penned by MEP Pascal Durand, and again this year in the AFCO report authored by MEP Sven Giegold. It is also below the three year notification period demanded by the 63,000 petitioners who asked the Commission to block its revolving doors with big business.

This notification period also pales in comparison with for example Canada, where former cabinet ministers are banned for five years from lobbying roles, on top of other conditions.

President Juncker’s proposal is but a marginal extension and we must ask: would waiting six months more have made the new role of former Commissioner for the Digital Agenda, Neelie Kroes, at Uber and Salesforce, announced days after the 18 months notification period expired, more palatable?

As for ex-Commission presidents, who have wielded more responsibility and accrued greater influence, they must be held to a higher standard. Junckers' proposal of a three-year notification period for ex-presidents doesn’t reflect that; we support a five year notification period.

This sends a strong message that the culture of revolving doors will not be tolerated. We fear that Juncker’s proposal simply implies ‘we don’t mind revolving doors, but please wait a few months longer’.

The new code also introduces a range of exceptions, some of which are vaguely defined and threaten to create loopholes, or lead to misunderstandings in what roles ex-commissioners should or should not report.

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Article 11 (2) “Former Members shall inform the Commission with a minimum of two months’ notice of their intention to engage in a professional activity during a period of two years after they have ceased to hold office. For the purposes of the present Code, "professional activity" means any professional activity, whether gainful or not, other than any unpaid activity which has no link with the activities of the European Union and which does not give rise to lobbying or advocacy vis-à-vis the Commission and its services such as:

(a) charitable or humanitarian activities;
(b) activities deriving from political, trade unionist and/or philosophical or religious convictions;
(c) cultural activities;
(d) the mere management of assets or holdings or personal or family fortune, in a private capacity;
(e) or comparable activities.”

From the Draft Code of Conduct for Commissioners (emphasis added)
A more ambitious and clearer notification period should be extended to at least three years for ex-commissioners and five for ex-presidents. It should also require that all new roles taken within the notification period require authorisation, with no exceptions for paid roles.

**Lobbying ban for ex-commissioners**

| Article 11 (4) “Former Members shall not lobby Members or their staff on behalf of their own business, that of their employer or client, on matters for which they were responsible within their portfolio for a period of two years.” |
| Draft Code of Conduct for Commissioners |

The two year proposed ban on former commissioners from lobbying on issues pertaining to their previous portfolios lacks not just ambition, but clear conditions.

A lengthy notification period should be accompanied by a lobbying ban that takes into consideration the full extent of the commissioners’ responsibilities and access. That means the lobbying ban should go beyond the individual portfolios and include the role of each commissioner as members of the College of Commissioners.

On the positive side, we welcome the Commission’s attempt at defining lobbying. The previous set of rules did not, and we often found that in assessing new roles, a very limited interpretation was used that completely ignored the importance of indirect lobbying, that is providing advice on who, when, and how to lobby.

The current proposal refers to all activities that fall within the scope of the EU Transparency Register, a positive step. However, there is an ongoing discussion between the Commission, Council, and Parliament to reform the EU Transparency Register which includes a proposal to limit the activities in the Register to direct interactions with policy-makers.

A proper lobby ban would have no exceptions, be directed at all EU institutions, and include direct and indirect lobbying.

**A non-independent Independent Ethics Committee**

The new proposal from the Commission to reform the Code of Conduct includes “creat[ing] an Independent Ethical Committee replacing the current Ad hoc Ethical Committee, to reinforce its status, to strengthen scrutiny and to provide advice on ethical standards”. However, despite the proposed change of name to the “Independent Ethics Committee” the body's powers and purpose remain substantially unchanged.
This Independent Ethical Committee is to replace the current Ad-Hoc Ethics Committee (AHEC), a body made up of three members appointed by the Commission to provide internal advice on potential conflicts of interest arising from ex-commissioner’s new roles.

This ethics committee has increasingly moved to the centre of the Commission’s ethics discussions because it is the only body, beyond the College itself, with the responsibility to oversee the proper implementation of the Code of Conduct for Commissioners, particularly focusing on the implementation of Article 245.

Yet several problems have been raised in regard to its functioning, mostly relating to its lack of independence: it is too dependent on the Commission itself as it is not able to start its own inquiries or define the parameters of its investigations, and it can only advise rather than make decisions.

In effect, this means that the ethics system in place has relied on self-policing, which is reflected in the poor implementation of the rules. See for instance, that within the notification period for the Barroso II Commission, one in three ex-commissioners were allowed to take up problematic roles that raised concerns of conflicts of interest.

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Draft Code of Conduct for Commissioners

**Article 12 (1) “The Commission hereby establishes an Independent Ethical Committee. On request of the President, the Committee shall advise the Commission on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code.”**

Draft Code of Conduct for Commissioners

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**Article 11 (3) “The Commission shall examine the information provided in order to determine whether the nature of the planned activity is compatible with Article 245 of the Treaty on the Functioning of the European Union, and if the planned occupation is related to the portfolio of the former Member, it shall decide only after having consulted the Independent Ethical Committee.”**

Without prejudice to the possibility for the President to seek its opinion in cases of doubt, the Independent Ethical Committee does not need to be consulted where former Members intend to:

- (a) continue to serve the European interest in an Institution or Body of the European Union;
- (b) take up functions in the national civil service of a Member State (at national, regional or local level)
- (c) engage with international organisations or other international bodies dealing with public interests and in which either the EU or one or several of its Member States are represented;
- (d) engage in academic activities;
- (e) engage in one-off activities for a short duration (1 or 2 working days);
- (f) accept honorary appointments”

Draft Code of Conduct for Commissioners (emphasis added)
The Commission’s proposal entails a change of name for the committee, yet its purpose remains to be an advisory body to the Commission, which ultimately will still be the one with the power to make decisions.

Its role will still be to advise the president and the College of Commissioners when they deem it necessary. Indeed, the only situation when the president is obliged to seek the committee’s opinion is when the new role of an ex-commissioner within the notification period falls within the scope of that commissioners’ former portfolio. This was already the case in the last code of conduct. Yet, as previously, the College can simply choose to ignore that opinion, as has happened before.

Disconcertingly, the new proposal even extends the list of exceptions to this rule. Carve outs for public service roles are justifiable and already present in the previous Code. However, other exceptions such as excluding one-off activities for a short duration, are not only unnecessary, they risk creating loopholes.

Beyond the cases that fall within the notification period and that match the ex-commissioners’ former portfolios, it will still be entirely up to the president's discretion whether to even consult the ethics committee. This is also true for ethics problems dealing with conflicts of interest or lobby transparency during the public mandate.

This reinforces the system of self-policing but also limits ethical investigations to political will. President Juncker only decided to forward the Barroso case to the ethics committee two months after his new role at Goldman Sachs International was announced, and then mostly because there was a wave of criticism demanding action. It also meant that the problematic roles of ex-commissioner for Digital Agenda, Neelie Kroes, at Uber and Salesforce, and the role of ex-Trade Commission, Karel De Gucht, at ArcelorMittal, were never even considered by the committee.

We also note that in the preparatory phase of this proposal, President Juncker floated the idea of allowing external entities to lodge ethics complaints about commissioners directly. This would have been a particularly meaningful step, allowing for complaints from organisations like Corporate Europe Observatory – complaints usually overlooked by the President of the Commission – to be re-directed to the European Ombudsman office instead. However, this innovative idea has disappeared from the published proposal.

A far more effective proposal should widen the role of the ethics committee, transferring the ultimate decision-making responsibility on commissioners’ ethics from the College to the committee.

It should also include the ability for the committee itself to be able to start its inquiries when it deems it necessary, including following up on complaints from the public.
The silence over the composition of the proposed Independent Ethics Committee also puts its independence in doubt.

The current committee is made up of three members, two of each have close professional relationships with sitting commissioners: Dagmar Roth-Behrendt is currently a special adviser to Commissioner Andriukaitis (Health & Food Safety) and Heinz Zourek was a special adviser to Commissioner Moscovici up until the end of July, 2016. Before that he was Director General at Taxud (up until December 2015) and previously, at DG Enterprise.

While neither the professional path or personal ethics of these members are in question, both AHEC members can be assumed to have clear and close professional relationships with former and sitting commissioners, upon whom they might be asked to pass judgment. The Alliance for Lobby Transparency and Ethics Regulation (ALTER-EU), of which Corporate Europe Observatory is a member, has raised this in a complaint which has been taken up by the European Ombudsman and remains ongoing.

Let us not forget that in its previous composition, the Ethics Committee was led by ex-Commissioner Michel Petit, who himself went through the revolving door from the European Commission to become a corporate lawyer/lobbyist, with evidence that he was lobbying the EU Commission on behalf of its clients. Not only did the Commission nominate Petit to lead the Committee, it also re-appointed him in the face of criticism.

At the time, the European Ombudsman, who asked the Commission to replace Petit, declared:

[T]he concept of a conflict of interests seeks to ensure that no situation arises where a person could be influenced by private interests when carrying out a public function. It is the mere possibility of such influence occurring which the concept of a conflict of interest seeks to address. As such, if a person has a role representing private interests that could influence the manner in which he exercises his role on the Ad hoc Ethical Committee, that person should not be appointed to the Ad hoc Ethical Committee.

For the ethics committee to be truly independent it must be made up of members that are not former insiders from the EU institutions, and are unlikely to have had professional contacts with the individuals they must scrutinize. Members with a positive view of the revolving door based on personal experience should also not be considered.
While the Commission has previously valued committee members with experience of EU affairs, we consider that it would be far more appropriate for members to be drawn from national public life instead. This would help ensure a real independent perspective on what is and is not appropriate.

For too long it has been acceptable that politicians to make their own rules and then decide how to apply them. It is urgent to inculcate a new culture that prioritises independent oversight.

The Draft Code of Conduct now proposed fails to make explicit the need for the assessments conducted by the ethics committee to be thorough and use a variety of investigative tools such as demanding backing documents (ie work contract, terms of reference) or if needed, interviews.

In this regard, the only change is that now commissioners will have the opportunity to be heard if a potential new role looks likely to be rejected. According to this wording the remit of the investigations themselves are not changed, and the Ethics Committee can only speak in person with a commissioner who wishes to defend themselves against a negative opinion.

This might look technical, but it was a crucial determinant in the Barroso affair. The committee found that Barroso had acted without the “considerate judgment one may expect from someone having held the high office he occupied for so many years”. Yet the opinion goes on to say that there was no justification to the view that Barroso had broken Article 254 of the Treaty of the EU, which demands ex-commissioners to continue behaving with integrity and discretion towards the EU Institutions.

The Committee arrived at this conclusion after merely reviewing one letter from ex-President Barroso to President Juncker. Barroso was never interviewed or even asked for backing documents. The Committee never even probed what Barroso meant when he said he would not lobby on behalf of Goldman Sachs International, even though this was a crucial point in its decision not to prosecute Barroso.

It is not surprising then, that within less than one year of that opinion, we see media reports that Barroso is back in Brussels to lobby sitting Commissioner for Jobs, Growth, Investment and Competitiveness, Jyrki Katainen.

For the ethics committee to be independent it must be explicitly endowed with research and investigatory capacity to conduct full assessments. There should be an expectation that decisions from the committee are based on an assessment of all relevant documents (not just those submitted to it), and conducting wider research into the proposed employer as required.
Increased transparency of the ethics committee

We particularly welcome the proposed steps to increase transparency of the Independent Ethical Committee. Civil society organisations such as Corporate Europe Observatory, as well as the European Ombudsman, have long demanded that the Commission pro-actively shares the opinions of potential conflicts of interest. This would undoubtedly allow for better public scrutiny of the potential conflicts of interest. Right now these opinion are not pro-actively published by the Commission but can be released through access to documents requests, a process that can take a painstakingly long time.

This is indeed a positive step and we hope it is fully implemented with schedules for timeliness.

Beyond the revolving doors cases

We also note that the proposed alterations to the Code of Conduct go beyond the rules for ex-commissioners. We would like to highlight some measures, such as the declarations of financial interest, procedures for conflicts of interests, and engagement with stakeholders that we believe could be improved.

Sanctions

We welcome the addition of the referral to the Commission’s toolkit to deal with non-compliance of the Code for both current and former commissioners. We do however remember that in 2016 the Ombudsman recommended that the Commission should “include a range of sanctions to be imposed, at the administrative level, where there has been a breach of obligations either by a serving or a former Commissioner. A revised Code could also clarify the type of circumstances in which the Commission will apply those sanctions.”
The introduction of a reprimand is a very limited step towards meeting that challenge.

Conflicts of interest

Principle 6 “Members shall avoid any situation which may give rise to a conflict of interest or which may reasonably be perceived as such. A conflict of interest arises where a personal interest may influence the independent performance of their duties. Personal interests include, but are not limited to, any potential benefit or advantage to Members themselves, their spouses, partners or direct family members. A conflict of interest does not exist where a Member is only concerned as a member of the general public or of a broad class of persons.”

Draft Code of Conduct for Commissioners

Principle 6 introduces the much needed definition of a conflict of interest, which at last includes both actual and perceived lack of independence in Commissioners’ duties, in line with the OECD definition.

Procedure for Conflicts of Interest

Article 4: “The President shall take any measure he considers appropriate, in the light of the information referred to in paragraphs (2) and (3) or other available information, if necessary after consultation of the Independent Ethical Committee, such as:

(a) the reallocation of a file to another Member or to the responsible VicePresident. The President shall inform the President of the European Parliament in due time of any such reallocation.

(b) the request for the sale or placing in a blind trust of the financial interests referred to in Article 3(4)(a) where these give rise to a conflict of interest in the area of the Member's portfolio responsibilities.”

Draft Code of Conduct for Commissioners

Even though now there is a wide definition of conflicts of interest, we were disappointed to see that the procedures established to resolve such problems (Article 4 (4a) and (4b)) are limited to potential conflicts of interest that relate to the Commissioners’ portfolio. It is self-evident that the commissioner's role as a member of the college under the principle of collegiality should also be taken into consideration.

Article 3: Declaration of Interests

“(1) Members shall declare any financial or other interests or assets which might create a conflict of interest in the performance of their duties or are otherwise relevant for the performance of the duties. For the purposes of this Article, a Member’s interests can include the interests of spouses, partners and minor children. Each Member shall do so by submitting the completed declaration form set out in Annex 1, which sets out all the information that Members are required to declare under this Code, and shall assume responsibility for its content.”

Draft Code of Conduct for Commissioners

We welcome some of the changes introduced to the declaration of interests, including a “blink and you’ll miss it” difference as commissioners and candidates for the commission, will no longer have to declare only the financial interests that “create a conflict of interest”. A small tweak of the language now states that “Members shall declare any financial or other interests or assets which might create a
conflict of interest in the performance of their duties or are otherwise relevant for the performance of the duties.”

Yet, this ultimately still relies on the commissioners’ own assessment of potential conflicts of interest.

More clarity is also needed as to the conflicts of interest potentially created by direct family members that are not spouse/partner, or dependent children. A case in point, in the 2014 hearing for Miguel Arias Cañete, the Spanish nominee for Climate action and Energy Commissioner, substantial issues were raised about his own interests and those of his close family.

The form asks for spouse/ partners' professional activities but the code itself refers to family interests which potentially are rather different. At stake was the extent of involvement of Cañete's brother-in-law in two petroleum companies Petrolífera Dúcar SL and Petrologis Canaris SL in which Cañete had recently sold his shares.

The new code of conduct adds the requirement to declare the interests of minor children but does not clarify the mismatch between Article 2, defining what constitutes a conflict of interest, and Article 3.

We support the measures in the Parliament report on Commissioners’ declarations of interests – guidelines. In addition, we recommend:

- Specification of any professional EU lobby activities in past 10 years.
- Specification of any financial interests in EU lobbying in past 10 years.
- Details of all professional activities and financial interests of spouses and partners in past 10 years, alongside those of other family members where there is a financial or professional link.
- Additionally, if a file is allocated to another commissioner or other measures are put in place, because of the risk of a conflict of interest, these should be made public and there should be MEP scrutiny of the proposed arrangements. For example, special arrangements were put in place regarding Cañete, but we were not aware of any external oversight.

We also see it as a positive step that the president will now scrutinize these declarations but we would urge that these must also be examined by the ethics committee, in addition to the Parliamentary and Council checks.

Lobby meeting transparency

Article 7 (1) “Members and their members of Cabinet shall meet only those organisations or self-employed individuals, which are registered in the Transparency Register established pursuant to the Inter-institutional agreement on this matter between the European Parliament and the Commission of 16 April 2014 inasmuch as they fall under its scope.”

Juncker’s previously issued political guidelines – that Commissioners must not meet with unregistered
lobbyists and that they have to publicly list those meetings – are made more concrete in the new proposal.

This is a particularly good move, as it solidifies the necessity of following the rule, ensures it is kept even when the next College takes over, and gives teeth to the need to obey to the rule. On the downside, it is still not entirely explicit what happens when a Commissioner breaks the rule.

We further recommend that failure to do so should lead to internal inquiries and sanctions if necessary.

**Appropriate balance and representativeness in stakeholder meetings**

We also strongly support the new Code's incorporation of Juncker’s instruction to commissioners to “seek to ensure an appropriate balance and representativeness in the stakeholders they meet”.

This measure reflects the urgency in addressing the problem of corporate bias in the Commission. In 2016 the Alliance for Lobby Transparency and Ethics Regulation (ALTER-EU) analysed how this was put into practice and found that there were no implementation guidelines and that some commissioners continue to have an incredible bias towards businesses in their meetings. This includes Commissioner Elżbieta Bienkowska with 86.9 per cent of lobby meetings with corporate interests and Commissioner Gunther Oettinger with 83.2 per cent of his meetings with corporate interests (yet if we take absolute numbers, Oettinger had around five times as many meetings with business as Bienkowska).

Enshrining this in the Code of Conduct would ensure that commissioners are aware that it is their responsibility to ensure they maintain a balance in the representativeness of those they meet.

**The process to reform the Code of Conduct**

As the many scandals that have plagued the Commission have showed, a stricter ethics system is urgent but proper reform will require bigger steps than the ones the Commission has proposed.

We are disappointed to see that after so much public mobilization on the topic, so many petitions, position papers, reports from the Parliament, and inquiries from the Ombudsman, the Commission seems to want to implement this proposal speedily, without consultation of outside voices or even waiting for the conclusions of the current Ombudsman inquiry into the functioning of the Ad-Hoc Ethics Committee.

The European Parliament now has a chance to remind the Commission that it should continue to improve these proposals. We recommend that it can do so by supporting:

- A longer notification period of at least three years for ex-commissioners and five for ex-presidents of the Commission that covers.
- An explicit and wide ban on lobbying EU Institutions.
- Tighter wording around exceptions to prevent the creation of loopholes.
• A truly independent Ethics Committee with the power to start its own enquiries, define its own investigatory tools, and power to implement its own conclusions, including a wider range of sanctions when faced with non-compliance.

Beyond revolving doors issues we support:

• More detailed financial interest disclosure.

• A procedure for addressing conflicts of interest that takes into consideration Commissioner’s role as members of the College of Commissioners.

• Enshrining in the Code the commitment to ensure balance and representativeness in stakeholder engagement.