



European Economic  
and Social Committee

JUR – Legal Service

Brussels, the 13 April 2022  
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**For the attention of the Service to Members Unit**

**Subject: Note of the Legal Service on the MEMO on the EESC involvement in the establishment of an independent inter-institutional EU Ethics Body**

On Thursday 07 April 2022, at 20:45, the Legal Service received a memo from the Member's Service to be sent to Ms Christa SCHWENG, President of the EESC, concerning the creation of a new interinstitutional EU ethics body. The request asked for the comments and suggestions of the Legal Service, and stated that the Memo was going to be sent to the Team of the Secretary General by Monday the 11 April. Due to the complexity and length of the documents, this delay was obviously impossible for the Legal Service.

The Legal Service issues the following comments in response to your request:

**Concerning point 1: Subject of the request**

1. In accordance with the letter sent on the 18.03.2022 by Ms Ursula FON DER LEYEN, President of the European Commission (the EC), to Ms Christa SCHWENG, President of the European Economic and Social Committee (the EESC), the Commission would like *"to hear from each institution and advisory body, ideally by the end of April, its views on taking part in interinstitutional discussions on a possible future joint agreement to establish an ethics body common to all EU institutions, the European Economic and Social Committee and the Committee of the Regions"*. Therefore, a simple reply to the President of the EC is requested. At this stage, neither an analysis of the documents nor an explanation of the position of the EESC seem to be necessary.
2. The initiative originates in Resolution P9\_TA(2021)0396 of the European Parliament (the EP), of 16 September 2021, on "Strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body" (2020/2133(INI)) (the Resolution).
3. The European Commission (the EC) issued a Note (SP(2022)54-0) on the follow-up to the above-mentioned Resolution in which it welcomes the Resolution and supports the creation of an independent ethics body common to all EU institutions. However, the EC also expressed criticisms in its comments,

stating that some elements “*require further analysis and clarification*”, other “*give rise to concern*” or even “*seem not to be compatible with the Treaties*” (point 5, *in fine*, of the EC document).

4. At the administrative level, the services of the EESC were informed by the services of the Commission at a very early stage in a meeting held at the Berlaymont on the 30 september 2021.

**Concerning point 2: Sensitive aspects**

5. In the view of the Legal Service, it is not clear to what these “sensitive aspects” refer to. Are they sensitive for the EP, for the EC, for all the European institutions or for the EESC? It should be clear whether these are the remarks of the EC, or the remarks of the services of the secretariat of the EESC.
6. In fact, in the view of the Legal Service, not all of these elements are “sensitive aspects” for the EESC. These are some of the elements of the Resolution that were not acceptable for the EC, but this is not necessarily the case for the EESC. For instance, the legal basis is something that is important for the EC, because depending on it the EC would be more or less implicated in the procedure, but it is not that important for the EESC. It is more the matter of a discussion between the EP and the EC (and maybe the Council as well), but not for the Committee.
7. The Legal Service is of the view that it should be very clear in the Memo what are the elements that the EESC considers to be problematic. In our opinion there should be no confusion between the comments of the EC and the comments of the services of the EESC.
8. In that sense, concerning the problematic elements of the Resolution, the Legal Service agrees with the analysis of the EC on the following critical points:
  - a) “*The design of the body touches upon sensitive aspects of the institutional balance between EU institutions. An interinstitutional ethics body must respect the institutional autonomy and the particularities of each institution as well as the functions of its Members.*”
  - b) “[...] *paragraph 40 of the resolution [...] refers to the body’s competence to make proposals for the development and periodic update of a common ethical framework for the EU institutions, including common rules.*” According to the EC, “[...] *a single set of operational ethical rules applicable to the Members of all institutions is not feasible...*”
  - c) The EC states that it is important that “*the decision-making powers for the application of ethical rules would remain within the respective institutions (paragraph 3)*” and that “*this aspect is crucial for respecting the institutional autonomy established by the Treaties [...]*”
  - d) The EC “*does not agree with the proposal in paragraph 9 of the resolution to possibly entrust the body with decision-making powers at a later stage*” and it recalls that “*an administrative body with decision-making powers over the Members of the institutions is not provided for in the Treaties*”.
  - e) The EC “*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*”.

- f) *"In view of the Commission, the body should only have explicitly defined competences where the body would add real value", and should not have "broad areas of competence", as referred in paragraphs 9 and following. "[...] the Commission considers that more clarity is needed, concerning both the body's competences and the necessary distinction between different areas of intervention".*
- g) *In relation with the mandatory Transparency Register, the EC considers that "wider transparency issues, covered in the specific interinstitutional agreement, should not be part of the competences attributed to the body". "The Commission considers that there is no need for additional scrutiny as this would risk adding additional administrative layers without added value". It is important to note that the EESC decided not to participate in such register.*
- h) *Concerning "the power to initiate procedures and to conduct investigations [...] based on information it has collected or that it has received from third parties", the EC considers that "requesting information directly from national administrations such as tax authorities or private entities like banks would require a proper legal basis for legislation, since it would interfere with the privacy of the Members of the institutions, possibly their families, and directly concern third parties".*
- i) *In accordance to the EC, "[...] investigative powers should remain reserved for [...] existing bodies", referring to the "well-established and sound legal framework that entrusts existing bodies with investigative powers [...] already in place", meaning: the "National judicial authorities [...] the European Public Prosecutor's Office (EPPO) [the] European Anti-Fraud Office (OLAF) [and] the European Ombudsman".*
- j) *"The Commission considers that making all cases public (paragraph 34) is not in line with the advisory character of the body. The body should exclusively advise and allow the institutions to address a situation. A general publication of all opinions or recommendations can in addition be inappropriate in many situations since ethical advice can concern personal issues [...]"*
- k) *The EC has strong doubts about the inclusion of all ethical staff matters covered by the Staff Regulations and the CEOS within the competences of the body (paragraphs 5, 6 and 7), as "It would generate a heavy workload for the body and the institutions and risk delaying procedures or meeting statutory deadlines. It would require significant resources and duplicate structures without real added value in most cases".*

*"[...] in the vast majority of cases, an external body would not provide added value as it would be distant from the daily work [...] and would not have the appropriate means to evaluate the actual risks of conflict of interest".*

*It "could create in certain instances a risk for the institutional autonomy of the respective institutions established by the Treaties who bear responsibility for the management of their staff."*

*"[...] the Staff Regulations have put in place a comprehensive set of rules and procedures in the field of ethics and disciplinary action, which is applicable to the staff of all EU institutions, bodies, offices and agencies. In addition, in case of serious breaches of their obligations, staff members can be subject to investigations by the European Anti-Fraud Office (OLAF), the European Public Prosecutor (EPPO), national authorities or internal services responsible for inquiries. They can be subject to disciplinary proceedings and sanctions as well as to criminal sanctions by national courts in case of*

*criminal offences. Under this well-established system, the body would ultimately have a limited role."*

- l) Concerning the protection of whistleblowers, the EC recalls that *"such measures are already set out in the Staff Regulations and in implementing measures to be adopted by all institutions. The reporting channels are established by the Staff Regulations. There should be no overlap or duplication of tasks with existing bodies"*.
9. Apart from these problematic elements of the Resolution highlighted by the EC, the Legal Service considers that there are other elements that may also be problematic for the EESC and its members, such as, for example:
- m) Applicable rules (paragraph 5). If the EESC was to participate in the new EU ethics body, the applicable rules should also include the EESC RoP, the EESC CoC and the EESC Members' Statute. It should be clarified that, as the EESC decided not to participate in the Transparency Register, such interinstitutional agreement will not be applicable to the Committee.
  - n) Revolving doors rules (paragraph 10). The EESC being a consultative body composed of members coming from civil society organisations and going to these organisations after their membership at the EESC, the same rules on revolving door rules applicable to members of institutions having executive or legislative powers should not be applicable to EESC members.
  - o) Transparency Register (paragraph 14). The EESC decided not to participate in the Transparency Register. If, against the advice of the EC, authority over the obligations imposed by such a register was finally to be given to the EU ethics body, the EESC should be allowed to continue opting out.
  - p) Merge of the functions of existing organs responsible for ethics (paragraph 19). That would require the modification of the RoP and the CoC, and would imply the end of the EESC Ethical Committee.
  - q) Binding advice for the EU ethics body in its position on the same matter (paragraph 20). As members of the institutions have different legal statuses, this could be problematic for members of certain institutions or bodies, such as the EESC members. Advice given to a commissioner in a specific issue, like for instance "revolving doors", cannot be binding if applied to a member of the EESC.
10. It is also important to bear in mind that if, according to the EC, *"[...] a single set of operational ethical rules applicable to the Members of all institutions is not feasible..."* (see point b), the task assigned to the EU ethics body will be very difficult to implement, as they would have to apply different rules to members with different statuses. A consistent application of these rules may prove to be very difficult, as these rules may not be consistent between them and may change at any time depending on the will of the different institutions and bodies.

### **Concerning point 3: Main elements**

- 11. The few bullet points are not in fact the main elements of the proposal, but just a combination of EP's and EC's proposals. It is not clear for the Legal Service what is actually meant by these bullet-points.
- 12. The positive aspects of the Resolution could possibly be included here. In the view of the Legal Service those will be the following:



- i. A single independent EU ethics body could better ensure the consistent and full implementation of ethics standards across the EU institutions to guarantee that public decisions are taken with a view to the common good and citizens' trust in the EU institutions (paragraph 1). This is the principle and the assumption of the Resolution, and it is not possible not to agree with it.

However, this principle will be difficult to put in practice without "*a single set of operational ethical rules applicable to the Members of all institutions*", something the EC considers not to be feasible (see points b and 10).

- ii. Setting the objective that the institutions of the European Union meet and apply the highest standards of independence and integrity is also an important element.
- iii. In this sense, the Resolution is a step towards the institutions of the EU being open and beyond reproach on ethics, transparency and integrity, which is a necessity if Europeans are to have faith in the Union (paragraph 11).
- iv. The EC states that "*The establishment of an interinstitutional ethics body will be an additional component of the existing ethical framework and help consolidate and strengthen trust in the EU institutions and in the people serving them*".

13. Other positive aspects of the Resolution are the following:

- v. Consistent interinstitutional definition of terms. This is the case, for example, of the term "conflict of interest" (paragraph 11), that could be aligned with the OECD Guidelines for Managing Conflict of Interest in the Public Service (whereas N).
- vi. The creation of a common EU public portal with relevant information on ethical rules, reports on best practices, studies, and statistics (paragraph 15).

#### **Concerning point 4: EESC Ethical Committee opinion**

14. In the view of the Legal Service, present at the Ethical Committee meeting of 28 March, the Ethical Committee was not sufficiently briefed on the issue, and therefore it cannot be considered that it expressed an informed opinion on the subject.
15. For instance, to the best of our knowledge, the members of the Ethical Committee were not aware of the fact that creating a new EU ethics body would imply dissolving the EESC Ethical Committee. The EC, for example, states that "[...] *the Commission is ready to consider ending the operation of its own [Independent Ethical] Committee and entrusting its tasks to the new body [...]*". The Legal Service is not sure about the existence of a similar willingness at the EESC concerning its own Ethical Committee. This is a political decision that would have to be carefully meditated and eventually will have to be adopted by the Members at the Assembly.
16. Concerning the size of the body, paragraph 25 of the EP Resolution proposes a body composed of 9 members. The EC proposes instead that "*such a body should rather be composed of 5 Members, allowing it to function in an effective and efficient manner*". Concerning the composition of the body, it seems that in any of these two proposals these posts are, in principle, to be filled with members of the EESC. However, the Legal Service wonders whether this could be the subject of negotiation or not.

17. The members of the EESC Ethical Committee expressed their interest on the fact that members of the EESC could participate in the new body. Therefore, the EESC will have to decide what a stance to take on the subject, and whether to consider this as an eventual element of the negotiation.

**Concerning point 5: Recommendations**

18. Recommendations should be in line with the comments expressed hereinbefore. There are positive aspects of the proposal but, in the opinion of the Legal Service, there are also some elements that would need to be clarified and corrected if the new EU ethics body is to add value to the current situation.
19. The President of the EC is just asking the EESC *"its views on taking part in interinstitutional discussions on a possible future joint agreement to establish an ethics body common to all EU institutions, the European Economic and Social Committee and the Committee of the Regions."*
20. Therefore, the Legal Service considers that it is maybe too soon to *"agree on the principle of establishing such a body"* (the new EU ethics body).
21. On the contrary, the Legal Service agrees with the requesting service on the importance to underline that *"such an EU Ethics Body should take into account the differences between the roles and status of the different institutions and their Members"*.
22. In the view of the Legal Service, the recommendations could be more restrained, and limited to just three elements:
- *welcome this initiative, in line with its commitment to foster ethics and integrity and to better ensure the consistent and full implementation of ethics standards;*
  - *agree to participate in interinstitutional discussions on a possible future joint agreement to establish an ethics body common to all EU institutions, the European Economic and Social Committee and the Committee of the Regions;*
  - *underline that it is important that such an EU ethics body, if created, should take into account the differences between the roles and status of the different institutions and bodies and their members.*

(signature)