



Critique of flawed study on regulating EU conflicts of interest

ALTER-EU Steering Committee (February 2008)

ALTER-EU welcomes the European Commission's initiative to more ambitiously address conflicts of interest and other ethics issues, including the announcement that a Communication on these issues will be launched in spring 2008. We would however wish to express strong reservations about the study "Regulating Conflicts of Interest for Holders of Public Office in the European Union" which was published on 11 December 2007.¹ The study includes a number of useful recommendations but overall we regard it as a missed opportunity. We regret that the Commission awarded the task of producing this comparative study to a consortium of academics that are so clearly ideologically prejudiced against further regulations to prevent or discourage conflicts of interest. Due to the serious limitations and flaws in methodology and argumentation, it would be ill-advised for the Commission to shape its reform agenda on the basis of this study.

Summary of limitations and flaws of the study:

- The report does not assess the effectiveness of various forms of regulation, only if some form of regulation exists. This means the authors have failed to address the "effectiveness of the existing rules" which was part of the mandate given by the European Commission.
- The report does not include any mention of concrete cases of conflicts of interest and how these could have been prevented.
- Assessment of Commission's rules only covers Commissioners, not high-level officials and other staff.
- The authors are seriously biased against stricter forms of regulation, such as the models developed in the US, Canada and new EU Member States.
- The study exaggerates the costs and burdens that emerge from regulating against conflicts of interest.
- The authors recommend a model for regulating conflicts of interest which would in some respects mean a step backwards for the Commission, for instance on 'post-employment' (revolving doors) issues. This moreover contradicts the recommendation made elsewhere in the study that the Commission should step up its rules on this specific field.

Limitations and methodology problems

The study, carried out for the European Commission by the European Institute of Public Administration, compares conflicts of interest regulation in the 25 Member States of the European Union, plus Romania, Bulgaria, Canada and the United States of America as well as the different EU institutions. The study, however interesting the extensive comparison of different regulatory systems is, suffers from some serious problems.

Most importantly, the authors fail to analyse the quality of different regulations. They only compare whether there is a regulation or not and whether it is binding or voluntary. The

specific content of the rules and the question if they are adequate to the real problems are not considered. The report therefore has a level of abstraction that makes its recommendations of very questionable value. The authors have failed to address the “effectiveness of the existing rules” which was part of the mandate given by the European Commission.²

The study stays on a level of abstraction which is not helpful for developing sound recommendations. It assesses the ‘regulation density’, which indicates which types of conflicts of interest issues are addressed (regardless of *how* these are addressed), and concludes that the Commission is doing better than most governments and other EU institutions. ‘Regulation density’ is however a very ambiguous concept as it does not show whether the institution has taken *effective* regulatory action to prevent conflicts of interest.

The study does not anywhere deal with concrete cases of conflicts of interest that have emerged at the European Commission or elsewhere in the EU and how these could have been prevented. On the issue of revolving doors, the authors state that, in contrast to other EU institutions, the European Commission “regulates post-employment (and establishes specific ad hoc committees in this area)”.³ This simply gives too much credit to the Commission: in practice the Commission has not yet acted adequately to prevent post-employment conflicts of interest. It is not enough to look at whether there are rules, but the important question is *which rules* and if they are *adequately solving the problems* that exist. Numerous examples of problematic cases have surfaced in the last years, for instance a number of high-level chemical industry lobbyists that went through the revolving door to take up key positions in the European Commission’s DG Enterprise and Industry, some even working in the Chemicals Unit that was responsible for the REACH dossier.⁴ There are also examples of Commissions officials going through the revolving door and taking up corporate (lobbying) positions on the fields for which they were responsible while in public office.

It is also very problematic that the authors in their assessment of the European Commission seem to have only studied the rules in place for the Commissioners, despite the fact that these rules do not apply to Commission staff, including high-level officials. This means that for the European Commission everything that happens below the level of the Commissioners themselves is not within the scope of the study. This is a very serious limitation as many problems and debates within the last few years concern that level, like conflicts of interest of ‘special advisers’, unbalanced high level groups or expert committees, or high-ranking staff going through the “revolving door” and becoming lobbyists. The reality is that the Commission’s current conflicts of interest regulations are sketchy at best and have not prevented real world conflicts of interest from happening.

The Commission in its press release on the release of the study refers to the fact that the study concludes “that most of the European institutions are regulated more intensively than institutions at national level. The European Commission and the European Investment Bank have the most comprehensive ethical rules of the EU institutions.”⁵ In our opinion, this only underlines how under-regulated many types of conflicts of interest still are in most Member States (with the notable exception of a number of New Member States). The authors correctly point out that conflicts of interest are seriously under-regulated at the European Parliament. But using the report’s

conclusions as an argument for preserving the status quo at the Commission would be misguided and could be interpreted as a sign of complacency.

Prejudiced against regulation

The authors seem strongly prejudiced against the use of regulatory measures to prevent conflicts of interest, such as disclosure requirements and ethics committees. The arguments presented to justify this skepticism (primarily privacy concerns and costs considerations) are too weakly developed to be taken seriously. The authors, in fact, seem far more passionate about how to avoid “over-regulation” than about what would be the most effective measures to prevent or at least discourage conflicts of interest. At numerous points in the report, the authors warn against “over-regulation”⁶ while the reality is that there is not a single EU country or EU institution that is anywhere near to being ‘over-regulated’ on the field of conflicts of interest.

The study fails to give any indication of the extent of ethical violations of Holders of Public Office, nor whether there has been an increase or decrease. It only cites there is little empirical evidence. Still, in their “Conclusions and Recommendations” the authors claim that “there is no evidence that conflicts of interest are increasing as such”.⁷ Further, they claim to have proven “that more regulations do not necessarily lead to less Col (conflicts of interest) and corruption.” However the actual methodology of the study doesn’t allow for such conclusions as it focuses only on ethics rules and there is no analysis of real cases of conflicts of interest throughout the paper. Nor does the study include any empirical evidence of regulations leading to more or less cases of conflicts of interest.

The authors also claim that “as this study shows, too many and too restrictive rules may become counterproductive”; in fact the study does not include a single example of conflicts of interest regulation being counter-productive. The study does not include any empirical evidence of regulations leading to more or less cases of conflicts of interest. Also the conclusion that “asking for the introduction of more and stricter rules would send the wrong signal and would (possibly) be even counter-productive” is merely the opinion of the authors, but nowhere have they convincingly shown that this would be the case. Still, the authors take the liberty to make sweeping recommendations, for example that new measures should be introduced “only after having carried out a careful cost-benefit analysis”.

It remains unclear on what evidence the “Conclusions and Recommendations” are based. It seems they reflect an underlying political opinion of the authors rather than being deriving from the study.

Scaremongering about costs and bureaucracy

The study’s claims that the establishment of independent monitoring committees would be very costly and create bureaucracy are both unconvincing and problematic. On the basis of these claims, the authors propose that “a careful impact-assessment and cost-benefit analysis” should be carried out.⁸ Elsewhere in the report this is stated even more generally: “Strict conflicts of interest regimes [...] are quite costly in terms of bureaucratic and financial burdens”, they authors claim. (p 143) The real world costs of running independent ethics committees mentioned in the report are actually rather limited. In

Canada, which has a relatively extensive set of ethics regulations in place, costs were around 5 million Canadian dollars in 2006-2007. This is not an amount that should cause any concern, let alone be used as an argument against new initiatives. This is particularly clear when considering the multitude of advisory committees already existing within the European Commission system and the many new ones that are established every month, without any impact-assessment let alone costs being a limiting factor.⁹

Preventing conflicts of interest is of such crucial importance for the functioning and credibility of the European Commission that independent monitoring should not be blocked by costs concerns that do not stand up to critical scrutiny.

Flawed conclusions about US, Canada and CEE experiences

The authors clearly have a strong preference for self-regulation and take a very negative position towards the mandatory rules around conflicts of interest that have been developed in the US and Canada. The study quotes a large number of critics, but hardly any proponents and concludes that “most US and Canada administrations and legislators are increasingly criticising the potential negative impact of too tight rules and requirements in registers and tight post-employment rules [...].¹⁰ This is hardly a fair description, but reflects that the authors are highly biased in their assessment of the US and Canadian experiences. It is remarkable that positive assessments of the US regulatory model are mentioned only very briefly (page 107), whereas outspoken critics and opponents are covered and quoted in length (pages 107-116, and elsewhere in the study). The study fails to mention that in 2007 the new US “Honest Leadership and Open Government Act” further tightened the ethics rules outlined in the Lobbying Disclosure Act of 1995. These reforms were approved by overwhelming majorities in both the Senate and the House of Representatives (by 411 to 8 votes). The authors should have acknowledged the fact that the new law has in fact been very effective in strengthening public trust in the political process.

On the basis of their biased assessment of academic literature and neglecting the mainstream political debate in the US about ethics regulation, the authors state that they “would not advise implementing these models”.¹¹ This conclusion is not based on empirical evidence and thus unjustified.

The authors also indicate that they consider Latvia, Bulgaria, Poland and Romania to have ‘over-regulated’ on conflicts of interest issues. These remarks by the authors are peculiar and problematic as they have not actually assessed the effectiveness of the laws in place in these countries. We would assume that these laws, while not solving every problem, have helped prevent real world cases of conflicts of interest from emerging. Astonishingly, the authors recommend that “(some of) the new Member States should move away from the concentration on more regulatory activity”, without providing examples of where the regulation has had counter-productive effects. This recommendation is not based on any empirical evidence, but merely the personal political preference of the authors. A less prejudiced assessment of the regulatory solutions developed in these new EU Member States might have led to an entirely different set of conclusions and recommendations.

Unwarranted cynicism

The authors take a remarkably cynical perspective, repeatedly and at length quoting scholars who argue that tighter regulations and disclosure requirements create more violations and scandals, thus undermining public trust in public institutions. “A strong focus on ethics, too strict approaches, too much publicity and too many rules may also undermine public trust”,¹² they argue, adding that “a better balance is needed between effective rules and standards and the need to avoid too much scrutiny and suspicion”.¹³

We find this a very awkward argumentation: the regulations and transparency mechanisms are introduced to prevent or at least discourage conflicts of interest; if this leads to scandals being uncovered, this means that real world problems are being solved. We have no doubt that effective rules and disclosure is a pre-condition for creating trust in the EU institutions, including in the Commission.

Contradictory Recommendations

The study includes a number of valuable recommendations. It rightly emphasizes the importance of “a credible monitoring and control mechanism”¹⁴ and criticises the current self-regulatory approach at the European Commission, for instance the fact that breaches of the Code of Conduct of Commissioners are ultimately decided on by the Commission President. The authors, correctly, question whether the Commission President is able to play this role as independent arbitrator.¹⁵ The authors also “consider it advisable that the EU institutions have their own ethics committees that have the authority to advise both about general issues and about specific cases” and conclude that the Commission’s “existing Ad-hoc Committee has a too limited role”.¹⁶ For registers, the authors “propose the establishment of independent monitoring officers whose task would be to report annually (and publicly) on the received data”.¹⁷

A very sensible recommendation is moreover that there is not one model for solving conflicts of interest problems and the Commission should introduce its own ethics regime that fits the specifics of the institution. The same goes for the study’s recommendation that “more concentration should be given to implementation issues” and the proposal to dedicate “increased effort in the training of Holders of Public Office”, aimed at enhancing knowledge of the rules.

However, as a conclusion, the study recommends the ‘moderate approach’ (model 2),¹⁸ which includes some rules on conflicts of interest as well as financial disclosure, but a weak ethics monitoring system, absence of post-employment rules and few or no limits on side-jobs. This model might mean a small improvement for those institutions with the weakest regulation in place (such as the European Parliament), but it would mean preserving the status quo at the Commission. It is remarkable that the authors recommend the Commission to adopt a model that it would actually be a step backwards on some key conflict of interest issues, such as ‘post-employment rules’. This contradicts the recommendation elsewhere in the report that the Commission should regulate around ‘post-employment’ conflicts of interest. But at the same time, the authors recommend only to regulate revolving doors in the first year after an official leaves public office.¹⁹ That is clearly insufficient.

For ALTER-EU this model, a model with inadequate or absent post-employment rules and with a weak monitoring system, as outlined in the study, would be entirely unacceptable.

Concluding remarks

The authors correctly point out that "high-trust countries need different rules than "low-trust" countries with a high level of corruption".²⁰ While we do not assume levels of corruption at the Commission to be high, there is no doubt that public trust in the European Commission is rather low; in this respect the Commission is in fact a low-trust institution. The authors of the study fail to recognize just how important it is for the Commission to improve its regulations around conflicts of interest, as a contribution to improving public trust.

¹ The study is online at

http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf

² "Regulating Conflicts of Interest for Holders of Public Office in the European Union", December 2007, page 15.

³ Idem, page 64.

⁴ See "Toxic Lobby - How the chemicals industry is trying to kill REACH", Greenpeace 2006.

<http://www.greenpeace.org/raw/content/international/press/reports/toxic-lobby-how-the-chemical.pdf> The European Commission has denied there were any conflicts of interest in the cases, after which Greenpeace filed a complaint to the European Ombudsman. <http://www.greenpeace.org/raw/content/eu-unit/press-centre/policy-papers-briefings/ombudsman-letter-070529.pdf>

⁵ European Commission press release "New study examines ethical rules and standards for public officials", 11 December 2007:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1901&format=HTML&aged=0&language=EN&guiLanguage=en>

⁶ "Regulating Conflicts of Interest for Holders of Public Office in the European Union", December 2007, page 57.

⁷ Idem, page 138.

⁸ Idem, page 9.

⁹ The Commission's online register of expert groups, for instance, includes more than 1200 diverse advisory groups. <http://ec.europa.eu/transparency/regexpert/>

¹⁰ "Regulating Conflicts of Interest for Holders of Public Office in the European Union", December 2007, page 112.

¹¹ Elsewhere, the authors argue that "these examples in the US (and partly in Canada) suggest that European administration may learn from these experiences while avoiding too many rules, too much bureaucracy and too burdensome reporting requirements, etc." [page 113]

¹² "Regulating Conflicts of Interest for Holders of Public Office in the European Union", December 2007, page 109 and page 111.

¹³ Idem, page 120.

¹⁴ Idem, page 141.

¹⁵ Idem, page 102.

¹⁶ Idem, page 142

¹⁷ "Regulating Conflicts of Interest for Holders of Public Office in the European Union", December 2007, page 142

¹⁸ Idem, page 143, the model is described on page 134.

¹⁹ Idem, page 141.

²⁰ Idem, page 138.