

Decision in the joint inquiry in cases 488/2018/KR and 514/2018/KR on the European Commission's appointment of a new Secretary-General

Decision

Case 488/2018/KR - Opened on 08/05/2018 - Recommendation on 31/08/2018 - Decision on 11/02/2019 - Institutions concerned European Commission (Maladministration found) | European Commission (Recommendation rejected) |

Case 514/2018/KR - Opened on 08/05/2018 - Recommendation on 31/08/2018 - Decision on 11/02/2019 - Institutions concerned European Commission (Maladministration found) | European Commission (Recommendation rejected) |

This complaint-based inquiry concerned the appointment of the European Commission Secretary-General, Martin Selmayr, in 2018.

Following an extensive inspection of Commission documents and written questions put to the Commission as part of the inquiry, the Ombudsman identified four instances of maladministration in the handling of the appointment and made a recommendation.

Following the Ombudsman's findings, the European Parliament in December 2018 passed a resolution calling on the new Secretary-General to resign.

The Commission's reply to the Ombudsman's recommendation presents no new information and does not alter the inquiry findings, which showed in detail how Mr Selmayr's appointment did not follow EU law, in letter or spirit, and did not follow the Commission's own rules.

The Ombudsman recommended that the Commission should develop a specific appointment procedure for its Secretary-General, separate from other senior appointments.

▫ Such a procedure should include the publication of a vacancy notice and the placing of the appointment on the College agenda in a timely manner.

▫ The Consultative Committee on Appointments, for future appointments of the Secretary-General, should also be broadened to include members from outside the Commission.

It is highly regrettable that the Juncker Commission chose not to implement this



recommendation. The Ombudsman looks forward to its implementation by the next Commission.

The Ombudsman closes her inquiry by confirming her findings and recommendation.

Background

1. On 21 February 2018, the European Commission announced that Mr Martin Selmayr, the then head of the private office (“*Cabinet*”) of the President of the Commission, would be appointed Secretary-General to replace Mr Alexander Italianer. Earlier that morning, Mr Italianer *formally* told the President that he would retire on 31 March 2018.

2. In the days and weeks that followed, a number of serious concerns were raised about the manner in which this appointment was made.

3. In this context, the European Parliament’s Committee on Budgetary Control carried out an initial examination including 195 questions put to the Commission [1]. In the same period, the Ombudsman also received a **number of complaints** about how the Commission had appointed its new Secretary-General, several of which were submitted by Members of the European Parliament (MEPs).

4. After examining the Commission’s responses to its questionnaires, Parliament adopted a resolution, on 18 April 2018, stating that the *“two-step nomination of the Secretary-General could be viewed as a coup-like action which stretched and possibly even overstretched the limits of the law”* [2].

5. After Parliament adopted its resolution, the Ombudsman opened her inquiry. In June 2018, the Ombudsman received the Commission’s reply to her questions [3]. Between June and August 2018, the Ombudsman inspected thousands of pages of documents eventually made available to her by the Commission [4].

6. On 31 August 2018, the Ombudsman issued her findings [5]. After setting out a detailed account of the facts, she identified four instances of maladministration, which can be summarised as follows:

1. The Commission held a selection procedure for Deputy Secretary-General not for the purpose of filling that role, but for the sole purpose of ensuring that Mr Selmayr would become eligible for reassignment as Secretary-General.

2. By keeping the retirement of Mr Italianer secret until the last moment, a situation of artificial urgency was created that facilitated the appointment of Mr Selmayr as Secretary-General. Yet despite the appearance of urgency, nothing would have prevented the Commission from launching a procedure to identify and evaluate candidates for Secretary-General before Mr



Italianer's retirement in late March.

3. A risk of a conflict of interest arose regarding the involvement of Mr Selmayr (and/or his subordinates in the President's Cabinet) in the decision-making leading to the creation of the Deputy Secretary-General vacancy and the approval of the vacancy notice for that position (a vacancy for which it was highly likely that Mr Selmayr knew he would apply, and later did so).

4. The committee of senior officials which interviewed Mr Selmayr for the Deputy Secretary-General post was not constituted in accordance with the applicable rules.

7. In light of these findings, the Ombudsman recommended that the Commission put in place a specific procedure for appointing a Secretary-General, separate from other senior appointments. This should include the publication of a vacancy notice and the placing of the appointment on the agenda of the College of Commissioners in a timely manner. She also recommended that the committee of senior officials that evaluates candidates for such positions be broadened to include members from outside the Commission. The purpose of these recommendations was to avoid errors like those identified in this case from reoccurring.

8. On 25 September 2018, the Commission convened an inter-institutional round table on senior management selection and appointments. No further meetings took place. To date, this round table discussion has not given rise to any concrete conclusions or actions by the Commission.

9. On 3 December 2018, the Commission provided its opinion [6] on the Ombudsman's findings and recommendations.

10. The complainants made comments on that opinion.

11. On 13 December 2018, Parliament passed a resolution in which it *"emphasises that Mr Selmayr must resign as Secretary-General and calls on the Commission to adopt a new procedure for appointing its Secretary-General, ensuring that the highest standards of transparency, ethics and the rule of law are upheld"* [7] .

The Ombudsman's assessment following her recommendation

12. The Commission's opinion on the Ombudsman's recommendation presents no new information and does not alter the inquiry findings, which showed in detail how Mr Selmayr's appointment did not follow EU law and did not follow the Commission's own rules [8] . The Ombudsman notes the following main points (a full assessment is contained in the annex to this decision):

1. Misuse of Deputy Secretary-General appointment procedure



13. The Commission opinion does not dispute the accuracy of the sequence of events set out in the Ombudsman's findings [9] . In fact, it ignores it completely. The Commission opinion refers only to a fact which is not relevant to the Ombudsman's findings, namely that the *announcement* of Mr Italianer to retire did not justify stopping the on-going selection procedure for a Deputy Secretary-General position. The Ombudsman's findings were not linked to this *announcement* , but rather to the fact that steps were taken to reassign Mr Selmayr to Mr Italianer's post *before* the Deputy Secretary-General selection had been completed. It was *this sequencing* which proves that there was no intention for Mr Selmayr to serve as Deputy Secretary-General.

14. The Ombudsman therefore maintains her finding that, **contrary to Article 4 of the EU Staff Regulations** [10] , the Deputy Secretary-General selection procedure did not serve the purpose of filling the post of Deputy Secretary-General.

2. Creation of artificial time constraint

15. The Ombudsman concluded that the artificial time constraint was created by keeping the retirement of Mr Italianer secret until the last moment and that this constituted maladministration. In its opinion, the Commission provided no evidence to support its position that efforts were made, until the last moment, to convince Mr Italianer not to resign. It also chose not to address the Ombudsman's finding that there was, *in any case*, sufficient time to complete a selection procedure for the position of Secretary-General before Mr Italianer retired on 31 March 2018.

16. The Ombudsman therefore maintains her view that a sense of urgency was artificially created which facilitated the appointment of Mr Selmayr as Secretary-General.

3. Conflicts of interest

17. The Ombudsman found that the Commission had failed to take appropriate measures to avoid the **risk of a conflict of interest** arising from the involvement of Mr Selmayr (and/or other members of the President's Cabinet under his authority) in the Commission's decision-making leading to 1) the creation of a vacancy for a post of Deputy Secretary-General and 2) the approval of the vacancy notice for that Deputy Secretary-General post (a vacancy for which it was highly likely that Mr Selmayr knew he would later apply).

18. The Ombudsman concluded that this was maladministration, as candidates should not be involved, in any form or **at any stage** , in the preparations or organisation of a selection procedure for which they apply. The Ombudsman found that this is not only a principle of good administration, it is also specified in law in **Article 11a of the Staff Regulations** .

19. In its opinion, the Commission does not deny - indeed it seems to confirm - that Mr Selmayr



did take part in the decision-making leading to the creation of a vacancy for the post of Deputy Secretary-General and in the approval of the vacancy notice for that newly vacant position.

20. The Ombudsman disagrees with the Commission's view that there is no legal requirement for senior officials to recuse themselves from such procedures. Article 11a of the Staff Regulations states that an official shall not deal with a matter in which directly or indirectly he has any personal interest such as to impair his independence. An official who intends to apply, or who is highly likely to apply, for a post, has a personal interest in the selection procedure for that post.

21. The Commission's reply to the Ombudsman appears to confirm that Mr Selmayr did in fact take part in the decision-making described above. As a result, there was not only a *risk* that a conflict of interest would arise. Rather, by taking part in the decision-making, a concrete conflict of interest *did arise*. The Ombudsman's finding of maladministration on this matter now reads:

A risk of a conflict of interest arose regarding the involvement of Mr Selmayr (and/or his subordinates in the President's Cabinet) in the decision-making leading to the creation of the Deputy Secretary-General vacancy and the approval of the vacancy notice for that position (a vacancy for which Mr Selmayr was highly likely to know he would apply and later did).

4. Composition of the Consultative Committee on Appointments

22. The Ombudsman found that the committee of senior officials who interviewed and assessed the candidates for the position as Deputy Secretary-General (namely, the Consultative Committee on Appointments or CCA) was not constituted in accordance with Rules of Procedure for that committee (since the Commission failed to appoint an alternate to replace Mr Selmayr when he eventually recused himself and his subordinates).

23. The Commission's representation of the relevant rules is incorrect. Article 10 of the CCA Rules of Procedure is designed to deal with the very specific circumstance of when a member of the committee is conflicted. Mr Selmayr, and his subordinates, had conflicts of interest as regards the various steps taken to fill the Deputy-Secretary General post. In that context, Article 10 *should* have been applied, and an alternate *should* have been chosen from the list of alternates. This was not done, and so a smaller pool of people were involved in CCA.

24. The Ombudsman therefore maintains that the CCA was not composed in accordance with the CCA Rules of Procedure.

5. Appointment procedure for Secretary-General

25. The Commission did not agree with the Ombudsman recommendation to publish a vacancy notice for the post of Secretary-General, thus leaving open the option that it would, in future,



again appoint a Secretary-General through a reassignment without allowing eligible staff to apply for the Secretary-General vacancy.

26. The Commission has stated to Parliament that the “ *the Secretary-General of the Commission is not an ordinary job* ”. It is a job which “ *requires not only special experience with regard to the functioning of the Commission, its working methods, its decision-making process and its inter-institutional role, but also a particular level of trust that the President can place in the Secretary-General* ” and that there is “ *only a handful of people at most who fulfil these special requirements* .” The Commission has also stated, in its replies to Parliament, that the function of Secretary-General is not a normal function at Director-General level. [11] As such, re-assigning a Director-General to the post of Secretary-General cannot ensure that the best person is appointed to the job. Only an open and fair selection procedure, where all eligible candidates can apply and be evaluated, can provide this reassurance. The Ombudsman therefore regrets the position taken by the Commission.

6. Changes to the Consultative Committee on Appointments

27. In her recommendation, the Ombudsman called on the Commission to broaden the Consultative Committee on Appointments to include members from outside the Commission and to use the CCA for future Secretary-General appointments.

28. The Commission does not agree.

29. The CCA currently consists of **six senior Commission staff** for appointment procedures for Deputy Secretary-General, a procedure which proved key to the double-appointment of Mr Selmayr. The Ombudsman notes that all of these senior staff members work closely together, tend to know each other well and very often also know the candidates. It is advisable to avoid any situations which can give rise to doubts as regards the objectivity and independence of a selection process. Broadening the membership of the CCA would help improve the legitimacy of the process, which is particularly important for a key post like that of Secretary-General.

Conclusions

Based on the inquiry, the Ombudsman closes these cases with the following finding :

The Ombudsman upholds her findings of maladministration and her recommendation to the Commission, as follows:

The Commission should develop a specific appointment procedure for its Secretary-General , separate from other senior appointments.

· Such a procedure should include the publication of a vacancy notice and the placing of the appointment on the College agenda in a timely manner.



· **The Consultative Committee on Appointments, for future appointments of the Secretary-General, should also be broadened to include members from outside the Commission.**

The complainants and the Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 11/02/2019

Annex:

1. Misuse of the Deputy Secretary-General appointment procedure

The Ombudsman's findings

30. Mr Selmayr was appointed Secretary-General after an unusual two-step procedure. This involved, first, the creation of a vacancy for a post as a Deputy Secretary-General, and a three-week procedure to fill that vacancy (only two candidates applied for the post, Mr Selmayr and one of his subordinates). After the second candidate withdrew from the selection procedure, Mr Selmayr was appointed Deputy Secretary-General (in the Commission meeting of 21 February 2018). Once he was appointed Deputy Secretary-General, he was, in the same meeting of 21 February, immediately reassigned to the position of Secretary-General (after Mr Juncker informed the College of Commissioners that the incumbent Secretary-General would resign).

31. The Ombudsman's inquiry revealed that the Deputy Secretary-General appointment procedure did not serve its stated purpose, namely to fill the Deputy Secretary-General



vacancy, but rather only served to ensure that Mr Selmayr would become legally eligible to be immediately reassigned as Secretary-General, without any procedure to identify candidates for the post of Secretary-General and to compare their merits.

32. The Ombudsman found that this procedure for the appointment of a Deputy Secretary-General was contrary to Article 4 of the EU Staff Regulations, which states that “ *no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations* ”.

The Ombudsman’s assessment of the Commission’s opinion

33. The Commission, in its opinion, stated that “ *[t]he assumption advanced by the European Ombudsman that “the sole purpose [of the Deputy Secretary-General selection procedure] was to make Mr Selmayr eligible for reassignment as Secretary-General” is wrong and is not supported by the facts* ”. The Commission further stated that “ *[t]he announcement of the previous Secretary-General of his intention to retire did not justify stopping an on-going, separate and independent selection procedure for a Deputy Secretary-General function.* ”

34. The Ombudsman has shown, in her recommendation, that President Juncker’s proposal to appoint Mr Selmayr as Secretary-General was initiated *before* the procedure for Mr Selmayr’s appointment as Deputy Secretary-General was concluded. It was initiated at the latest at lunchtime on 20 February, which was:

- *before* the second candidate in that procedure sent an email to DG HR withdrawing her candidature (the email was sent at 14:58 on 20 February);
- *before* the Consultative Committee on Appointments (CCA) had issued its opinion on Mr Selmayr’s candidacy for that post (this opinion was completed after 18:00 on 20 February);
- *before* Mr Selmayr was interviewed for the post by Mr Juncker and Mr Oettinger (this joint interview took place between 18.30 and 20:00 on 20 February); and
- *before* 20:04 on 20 February when instructions were issued from Mr Juncker’s Cabinet, to the Directorate-General for HR, to propose Mr Selmayr as Deputy Secretary-General at the Commission meeting the next morning.

35. This sequencing shows that Mr Juncker went through the procedure leading to the appointment of Mr Selmayr **as Deputy Secretary-General** *even though* he himself had, earlier, initiated the procedure for proposing Mr Selmayr **as Secretary-General** . This sequencing proves that the Deputy Secretary-General procedure did not serve its stated purpose, namely to fill a vacant post of Deputy Secretary-General, but rather only served to ensure that Mr Selmayr would become legally eligible to be reassigned to the post of Secretary-General at the meeting of 21 February. Indeed, the evidence suggests that there was never any intention for Mr



Selmayr to serve as a Deputy Secretary-General. The Ombudsman again recalls that Article 4 of the EU Staff Regulations states that “ *no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations* ”.

36. The Commission opinion does not dispute the accuracy of the sequencing established by the Ombudsman. In fact, it ignores it completely. Rather, the Commission opinion only refers to a fact which is not relevant to the Ombudsman’s findings. It states that the *announcement* of Mr Italianer to retire did not justify stopping the on-going selection procedure for a Deputy Secretary-General position. The Ombudsman agrees that the *announcement* of Mr Italianer to retire would not have, in itself, justified stopping the selection procedure for the appointment of a Deputy Secretary-General. However, the Ombudsman’s findings were not linked to this *announcement* , but rather to the fact that steps were taken to reassign Mr Selmayr to Mr Italianer’s post, which occurred *before* the Deputy Secretary-General selection had been completed. It was *this sequencing* which proves that there was no intention for Mr Selmayr to serve as Deputy Secretary-General. Rather, the intention was always to make him Secretary-General (and the Deputy Secretary-General procedure only served to make his reassignment to Secretary-General legally possible [12]).

37. The Ombudsman therefore maintains her finding that, contrary to Article 4 of the EU Staff Regulations, the Deputy Secretary-General selection procedure did not serve the purpose of filling the post of Deputy Secretary-General.

2. The creation of an artificial time constraint

The Ombudsman’s findings

38. In her recommendation, the Ombudsman established that the impending retirement of Mr Italianer was kept secret until the very last moment (that is until the Commission meeting of 21 February when Mr Selmayr was reassigned to the post of Secretary-General). The Ombudsman found that this secrecy was used to create an artificial sense of urgency.

39. The Ombudsman further found that *even if* Mr Italianer’s retirement had not been known until 21 February, nothing prevented the Commission from launching, on 21 February, an open selection procedure for the post of Secretary-General. Evidence indicates that such a procedure could have been completed well in time for the date of Mr Italianer’s retirement from the Commission (which occurred on 31 March 2018).

40. The Ombudsman concluded that the creation of an artificial time constraint constituted maladministration.

The Ombudsman’s assessment of the Commission’s opinion



41. In its opinion, the Commission stated that “ *[t]he Commission [...] rejects the observation that it would have created an artificial time constraint; on this point both the President and his former Head of Cabinet tried, until the very last day, to convince the former Secretary-General to stay on in his function, and it is only on 20 February 2018 that the retirement of the previous Secretary-General was communicated to the President of the Commission, when he informed the President about his intention to submit his retirement letter the next morning* ”.

42. The Ombudsman carefully inspected the Commission's files that were made available to her. She notes that she specifically asked the Commission for all communications to/from the President's Cabinet (which was headed by Mr Selmayr at the time) and to/from Mr Italianer related to the retirement of Mr Italianer. No evidence, for example in the form of emails or notes, has been provided by the Commission indicating that *any* efforts were made to convince Mr Italianer *not* to step down. On the contrary, documentary evidence points to the fact that Mr Juncker and Mr Selmayr knew, from at least mid-January 2018, that Mr Italianer would retire, and that planning to manage the succession was put in place.

43. Mr Juncker (and Mr Selmayr) knew of Mr Italianer's intention to retire for at least two years. By mid-January 2018 (at the latest), Mr Italianer confirmed to Mr Juncker, and to Mr Selmayr, that he would go ahead with his plans to retire. [13] Even on 20 February 2018, the Commission could have ensured that the retirement of Mr Italianer could be put on the agenda of the Commission meeting of 21 February. The Ombudsman notes that the Directorate-General for HR was informed of Mr Juncker's instructions to propose Mr Selmayr as Secretary-General before 13:23 on 20 February 2018. There was thus ample time to add this point to the agenda of the Commission meeting that took place on 21 February. This conclusion is proven by the fact that the proposal to make Mr Selmayr a Deputy Secretary-General was included on the agenda of the meeting of 21 February (the list of proposed appointees, circulated for that meeting, was modified to include the proposal to appoint Mr Selmayr) even though the proposal to make him Deputy Secretary-General was communicated to the Directorate-General for HR, by Mr Juncker's Cabinet, at 20:04 on 20 February.

44. The Commission stated, in its opinion to the Ombudsman that Mr Juncker has the right to add items to the agenda of Commission meetings at any stage. If an issue genuinely arises at the last minute, it is reasonable that it can be added to the agenda at the last minute. However, it is not true that Mr Juncker had knowledge of Mr Italianer's retirement at the last minute. Rather, he knew well in advance that Mr Italianer would retire. He certainly knew at lunchtime on 20 February when instructions were issued to the Directorate-General for HR to prepare the documentation regarding the reassignment of Mr Selmayr to the position of Secretary-General. This leads the Ombudsman to conclude that there was no practical obstacle preventing Mr Juncker from adding the point to the agenda and that the reason it was not added to the agenda, in good time, was to maintain secrecy with the aim of creating, artificially, a sense of urgency.

45. The Ombudsman also notes that the Commission has, in its opinion to the Ombudsman, chosen not to address her finding that *even if* Mr Italianer's retirement plans had not been



known until mid-February 2018, there was still sufficient time to complete a selection procedure under Article 29 of the EU Staff Regulations for the position of Secretary-General (before Mr Italianer retired on 31 March 2018). She notes that if it were possible to complete the selection procedure for the vacant Deputy Secretary-General position in the **three weeks** leading up to 21 February 2018, it would certainly have been possible to complete a selection procedure for the vacant Secretary-General position in the **five weeks** between 21 February and 28 March 2018 (which was the date of the last Commission meeting before Mr Italianer retired from the Commission on 31 March 2018).

46. The Ombudsman therefore maintains her view that a sense of urgency was artificially created. This was maladministration.

3. Conflicts of interest

The Ombudsman's findings

47. In her recommendation, the Ombudsman found that the Commission had failed to take appropriate measures to avoid the **risk of a conflict of interest** arising from the involvement of Mr Selmayr (and/or other members of the President's Cabinet under his authority) in the Commission's decision-making leading to 1) the creation of a vacancy for a post of Deputy Secretary-General and 2) the approval of the vacancy notice for that Deputy Secretary-General post (a vacancy for which Mr Selmayr would later apply).

48. The Ombudsman concluded this was maladministration, as candidates should not be involved, in any form or **at any stage**, in the preparations or organisation of a selection procedure for which they apply. The Ombudsman found that this is not only a principle of good administration, it is also a principle of law reflected in Article 11a of the Staff Regulations.

The Ombudsman's assessment of the Commission's opinion

49. In its opinion on the Ombudsman's findings, the Commission stated that "*[i]t is neither legally required nor practical – and therefore not Commission practice – for a senior official to recuse himself from contributing to the preparation of vacancy notices for posts for which he or she could conceivably intend to apply in the future*". The Commission further said that "*[i]t should also be noted that the vacancy notice adopted by the College in the present case and published on 31 January did not differ in substance from the vacancy notice previously published for the exact same function*".

50. As a preliminary point, the Ombudsman notes that the opinion of the Commission does not deny - indeed it seems to confirm - that Mr Selmayr did take part in the decision-making leading to the creation of a vacancy for the post of Deputy Secretary-General and in the approval of the



vacancy notice for that newly vacant position.

51. The Ombudsman disagrees with the Commission's view that there is no legal requirement for senior officials to recuse themselves from preparing vacancy notices for which they later apply. Article 11a of the Staff Regulations states that an official shall not deal with a matter in which directly or indirectly he has any personal interest in such as to impair his independence. An official who intends, or is highly likely, to apply for a post has a personal interest in the vacancy procedure for that post.

52. As regards the practicality of senior officials recusing themselves from such procedures, it was clearly entirely within the power of Mr Selmayr to recuse himself from the decision-making procedures in question. The fact that he did not do so was not because he could not do so, but simply because he chose not to do so. The Ombudsman bears in mind, in this context, that Mr Selmayr was aware, at the time of these decision-making processes, of the impending retirement of Mr Italianer (he was aware of this information from, *at least*, mid-January 2018). The Ombudsman also notes that, as a senior official, Mr Selmayr is legally presumed to know the EU Staff Regulations. As such, he would have been aware that he could not be reassigned to the post of Secretary-General from his then current position (he held, since July 2014, a director-level post in his basic career) and that he would not be legally eligible to be reassigned to the post of Secretary-General (once Mr Italianer formally announced his retirement) without first taking up a Director-General level post. The post of Deputy Secretary-General is a Director-General level post. Indeed, this explains why Mr Selmayr applied for the post of Deputy Secretary-General (given that the evidence in the file indicates that his ultimate intention was not to serve as a Deputy Secretary-General, but rather to take up the position of Secretary-General). [14]

53. As the Commission's reply to the Ombudsman appears to confirm that Mr Selmayr did in fact take part in the decision-making described above, there was not only a *risk* that a conflict of interest would arise. Rather, by taking part in the decision-making, a concrete conflict of interest *did arise*. The Ombudsman will thus make the necessary modification to her findings.

54. The Commission stated, in its opinion to the Ombudsman, that the Deputy Secretary-General vacancy notice did not differ in substance from the vacancy notice previously published for the same function. The Ombudsman notes that it is irrelevant, in terms of finding that the participation of Mr Selmayr in the vacancy procedure was a "*conflict of interest*", whether or not the text of the vacancy notice was actually changed in the decision-making procedure in which Mr Selmayr took part. The simple fact that he took part in the procedure for approving the vacancy notice for a position he would later apply for was a "*conflict of interest*".

55. It is in this context, however, noteworthy that the Commission chose not to mention, in its opinion on the Ombudsman's recommendation, that Mr Selmayr also took part in the decision-making for the *creation* of the vacancy for which he later applied (this vacancy arose when the Commission announced, on 31 January 2018, the appointment of an incumbent Deputy Secretary-General as Director-General for Justice and Consumers, with effect from 1 March 2018). (see, in particular, paragraphs 35 and 36 of the Ombudsman's recommendation



[15]).

56. The Ombudsman found that, to avoid even a risk of conflict of interest, Mr Selmayr should, as early as January 2018, have recused himself (and the President's Cabinet over which he had hierarchical control) from any involvement in the relevant decision-making processes creating the vacancy and approving the vacancy notice. The opinion of the Commission confirms that not only did Mr Selmayr not formally recuse himself from those processes, he actually took part in them. That participation constituted a conflict of interest.

4. Composition of the Consultative Committee on Appointments

The Ombudsman's findings

57. The Ombudsman established that the committee of senior officials who interviewed and assessed the candidates for the position as Deputy Secretary-General (namely, the Consultative Committee on Appointments or CCA) was not constituted in accordance Rules of Procedure for that committee (since the Commission failed to appoint an alternate to replace Mr Selmayr when he eventually recused himself and his subordinates from taking any further part in the procedure).

The Ombudsman's assessment of the Commission's opinion

58. The Commission, in its opinion, stated that “ *[t]he Consultative Committee on Appointments was composed in full compliance with all the applicable Rules of Procedure.* ” In the Commission's view, Article 10 of the CCA Rules of Procedure was not applicable in this case, as “ *[t]he replacement of the Head of the President's Cabinet in exceptional circumstances is specifically foreseen in Article 8(2), paragraph 2, of the same rules. This provision was introduced by the Commission in October 2015 and constitutes a subsequent rule specifically aimed at addressing the replacement of the Head of the President's Cabinet in the Consultative Committee on Appointments. It constitutes a *lex specialis* for the replacement of a specific person, i.e. the Head of the President's Cabinet, excluding the application of other general provisions, such as Article 10 of the Rules of Procedure* ”.

59. The Ombudsman disagrees with the Commission's representation of the relevant rules. Article 10 of the CCA Rules of Procedure is a *lex specialis* designed to deal with a very specific circumstance, namely where a member of the committee is conflicted. Mr Selmayr eventually took the view that he could take no further part in the procedure for the selection of Deputy Secretary-General (he took the view, albeit belatedly, that such participation would be a conflict of interest). He also considered that the replacements foreseen under Article 8 of the rules would also be conflicted (since they were under his hierarchical control). In that context, Article



10 of the rules should have been applied, and an alternate should have been chosen from the list of alternates. This was not done.

60. The Ombudsman therefore maintains her view that an alternate should have been appointed from the list of rapporteurs. Because this did not happen, the CCA was not composed in accordance with the CCA Rules of Procedure.

Further points raised by the Commission

1. Reassignments with posts

61. The Ombudsman concluded in her recommendation that a “*reassignment with post*” cannot be used to move an official holding a Director level post up to a Director-General level post without any procedure to compare the merits of eligible staff (see Annex II of the recommendation).

62. This conclusion was relevant for the inquiry. The Ombudsman found that Mr Selmayr held (in his basic career) a Director level post (thus one level **below** a Director-General level post). As a result, the fact that he became a Deputy Secretary-General (which is a Director-General level post) served to ensure that he would become legally eligible for a “*reassignment*” to the position of Secretary-General (once Mr Italianer formally announced that he would retire [16]).

63. In its opinion, the Commission disagreed with the Ombudsman. It stated that “*[t]he former Head of Cabinet of the President was – and still is – an official in the AD function group with the grade AD15. He would, therefore, have been eligible for a transfer to the function of Secretary-General in accordance with Article 7 without having been appointed to the function of Deputy Secretary-General*”(our emphasis).

64. The Ombudsman maintains her view that the appointment of Mr Selmayr to Deputy Secretary-General was needed in order to make Mr Selmayr legally eligible for reassignment as Secretary-General. This view is not only consistent with the case-law, it also explains the efforts to make Mr Selmayr Deputy Secretary-General in time for the meeting of 21 February, when the retirement of Mr Italianer was formally announced.

65. The Ombudsman further notes that her understanding of “*reassignments with post*” is entirely in line with Commission practice. The Ombudsman found that out of the 45 “*reassignments*” to Director-General in the Juncker Commission (including the previous Secretary-General), there is not a single example of a Director taking up the role of a Director-General through a “*reassignment with post*” procedure.

66. The Ombudsman also points out that the Commission’s statement contradicts the following statement that the Commission sent to the Ombudsman in June 2018 and then re-quoted in its opinion of 3 December: “*The person currently occupying the post fully meets these*



*requirements, as well as all the procedural conditions laid down in the EU Staff Regulations: as an AD15 official with eight years of senior management experience in the Commission and seven years of professional experience prior to joining the Commission,- **the person was fully qualified to be transferred to the Secretary-General post, after his appointment of Deputy Secretary-General** , by a decision of the College under Article 7(1) of the EU Staff Regulations ”* (our emphasis; footnotes left out).

2. The Ombudsman’s press release

67. In its opinion, the Commission takes issue with the wording of a press release which the Ombudsman published to inform the public of her recommendation in this inquiry. The Commission considers that a statement in the press release that “ *[t]he maladministration arose due to the Commission* **not following the relevant rules correctly either in letter or in spirit** ” (emphasis added by the Ombudsman), is misleading. In support of its view, the Commission states that the recommendation does not contain evidence that the relevant rules were not respected.

68. In her recommendation, the Ombudsman expressly stated that Article 4 of the EU Staff Regulations (see paragraph 75 of her recommendation and paragraphs 13 and 17 of this decision) and Article 11a of the EU Staff Regulations (see paragraphs 40 to 44 of her recommendation and paragraphs 25 and 28 of this decision) were not respected by the Commission during the selection procedure which led to Mr Selmayr being appointed as a Deputy Secretary-General. She also stated that the Commission did not act according to the rules of the Consultative Committee on Appointments (paragraphs 65 to 68 of her recommendation and paragraphs 36 to 38 of this decision).

69. The Ombudsman therefore considers that her press release accurately reflected the Ombudsman’s recommendation.

3. Mr Selmayr’s right to be heard

70. The Commission opinion argues that the Ombudsman did not hear Mr Selmayr.

71. The Ombudsman inquires into the administration of EU institutions, and not individuals. In this case, the Commission was heard, in writing and in several meetings between June and August 2018. As in every Ombudsman inquiry, it is the responsibility of the institution to obtain from its staff all relevant information before its response to the Ombudsman. If an inquiry involves the actions of specific staff or units (as they very often do), the institution may choose to consult with the relevant staff to prepare its response to the Ombudsman.

72. As regards Mr Italianer, should the Commission have considered it useful to contact Mr Italianer with a view to obtaining information to reply to the Ombudsman, it could have done so.



73. The Ombudsman's mandate covers EU institutions, bodies, offices and agencies. In this context, it is not normally necessary for her to identify individual officials in her recommendations and decisions. In the present case, however, she took the step of identifying three Commission officials in her recommendation, including Mr Selmayr and Mr Italianer [17] . This identification of three officials was necessary in order to ensure that her recommendation was clear and unambiguous. In order to comply with data protection rules, the Ombudsman informed these three officials of her recommendation prior to the publication of the recommendation.

[1] Details on Parliament's investigation are available here:

<http://www.europarl.europa.eu/committees/en/cont/subject-files.html?id=20180326CDT02181> [Link].

[2] European Parliament resolution of 18 April 2018 on the integrity policy of the Commission, in particular the appointment of the Secretary-General of the European Commission, P8_TA-PROV(2018)0117, available here:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0117&language=EN&ring=B8-20> [Link].

[3] The replies of the Commission to these questions is available here:

<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/97356/html.bookmark> [Link]

[4] <https://www.ombudsman.europa.eu/en/correspondence/en/99793>

[5] Available here: <https://www.ombudsman.europa.eu/en/recommendation/en/102651> [Link]

[6] The opinion of the Commission is available here:

<https://www.ombudsman.europa.eu/en/correspondence/en/107213> [Link].

[7]

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0531>

[8] At the Commission's midday press briefing of 4 September 2018, the Commission Chief Spokesperson said that: *"The Ombudsman neither contests the legality, nor the competence of the candidate"* . <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=1159943> [Link]

As regards the legality of the matter, the Ombudsman pointed out in her recommendation that she agreed with the European Parliament's assessment that the double-appointments "*stretched and possibly even overstretched the limits of the law*". Moreover, the recommendation noted that Article 4 of the EU Staff Regulations (see paragraph 75 of her recommendation) and



Article 11a of the EU Staff Regulations (see paragraphs 40 to 44 of her recommendation) had not been respected.

[9] For the details of this sequencing, see paragraph 34 below.

[10] Article 4 states that “ *no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations* ”.

[11] Reply to Parliament, Question 1, 4 April 2018, available here:

<http://www.europarl.europa.eu/cmsdata/141000/Commission%20replies%20CONT%2004042018.pdf> [Link].

[12] See Annex II of the Ombudsman’s recommendation, available here:

<https://www.ombudsman.europa.eu/en/recommendation/en/102651> [Link]

[13] See paragraphs 32 and 76 of the Ombudsman’s recommendation:

<https://www.ombudsman.europa.eu/en/recommendation/en/102651>

[14] The Ombudsman recalls that in its response to Parliament dated 4 April (available at

<http://www.europarl.europa.eu/cmsdata/141000/Commission%20replies%20CONT%2004042018.pdf> [Link]), the Commission stated (see the Commission’s answer to Question 11) that “ *the*

President had an understandable interest in guaranteeing the smooth functioning of the institution also in case Mr Italianer retired, and there were discussions and reflections on this matter since the second half of 2017 and more in detail as of early 2018. A transfer of Mr

Selmayr, a senior manager with the required grade and eight years of senior management experience in the Commission and who had the necessary trust of the President, to the position

of Secretary-General became one possible option in early 2018. To ensure that such a possible transfer would be in line not only with the law, but also with Commission practice, Mr Selmayr took part, as of 31 January 2018, in a full selection procedure for the position at the level of Director-General/Deputy-Director General ... ” (emphasis added).

[15] Available here: <https://www.ombudsman.europa.eu/en/recommendation/en/102651> [Link].

[16] See paras. 27-30 and Annex II of the Ombudsman’s recommendation. See also footnote 9 of this Decision.

[17] The third individual identified was Ms Paraskevi Michou. At the Commission’s midday press briefing of 4 September 2018, the Commission Chief Spokesperson **stated twice** that Ms Michou had applied for the post of Director General, whereas the Ombudsman notes that she **did not apply for the post but** was in fact reassigned at the initiative of President Juncker.