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European Ombudsman  
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Brussels, **03 DEC. 2018**

**Subject: Complaint by delegations of the European Parliament,  
ref. 488/2018/KR and 514/2018/KR**

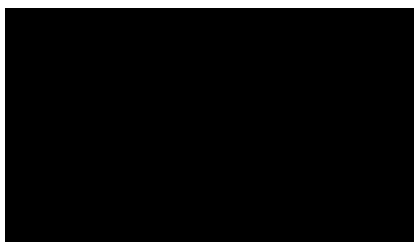
Dear Ms O'Reilly,

Thank you for your letter of 31 August 2018 to President Juncker regarding the above-mentioned case.

I am pleased to enclose the Commission's comments. Translations into Dutch and French will be sent shortly.

The Commission remains at your disposal for any further information you may require.

Yours sincerely,



Enclosures

**Opinion of the European Commission on the European Ombudsman's recommendation**

- **Complaint by delegations of the European Parliament, ref. 488/2018/KR and 514/2018/KR**
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The European Commission notes that the Recommendation of the European Ombudsman of 31 August 2018 on the European Commission's appointment of a new Secretary-General does not contest the legality of the appointment procedure and recognises the qualifications of the senior official appointed by the Commission.

The European Commission also takes note of the European Ombudsman's acknowledgement "*that the Commission must be allowed some flexibility in the organisation of its own administration.*" It would like to add however in this regard that, like any other institution of the Union, the Commission is not only "*allowed some flexibility*", but acts autonomously within the limits of the powers conferred on it in the Treaties and within the framework of the applicable law. This includes the power to decide on its internal organisation, its rules of procedure and the exercise of its appointing authority powers under the Staff Regulations.

The Recommendation of the European Ombudsman results from the examination of approximately 11,000 pages of documentation that the European Commission gave access to. Unfortunately, it includes a number of incorrect findings which the Commission would like to clarify.

The European Ombudsman's reading of the EU Staff Regulations and of other relevant rules is not accurate. The European Commission acted in full compliance with the EU Staff Regulations, as interpreted by the case law of the European Union Courts, and with its Rules of Procedure. The Commission notes well that the transfer of an official under Article 7(1) of the EU Staff Regulations in the interest of the service, which has been decided for senior management positions at Director-General or equivalent level in 49 cases by this Commission and in 59 cases under the previous Commission and has also been applied with regard to the three previous Secretaries-General, is singled out in the present case by the European Ombudsman.

The decision to appoint the new Secretary-General was taken by the College of 28 Commissioners unanimously, and the person currently occupying the post fully met all demanding requirements for the job. The Commission therefore firmly rejects the observation made by the Ombudsman that it would have manipulated the rules in any way. The Commission also 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. These facts could have been confirmed by the former Secretary-General and by the former Head of Cabinet of the President. The Commission notes that the European Ombudsman did not hear these two persons who could have explained and confirmed these facts.

The Commission also contests, and regrets, the wording of a *press release* put out by the European Ombudsman in order to publicise its Recommendation<sup>1</sup>. The press release uses a statement that is not found in the actual Recommendation and which yet made all the headlines: “*The maladministration arose due to the Commission not following the relevant rules correctly either in letter or in spirit*” [emphasis added]. This is misleading because in none of the 107 points made in the Recommendation there is evidence that the relevant rules were not respected. The Commission regrets this contradiction between a recommendation that is one of the formal instruments at the disposal of the European Ombudsman based on the Treaty as well as the European Ombudsman’s Statute, and communication via a press release. The Commission also notes that it is only the European Court of Justice or the General Court that could rule on the respect of the relevant rules in case a Commission decision was legally challenged, which was not the case in the present case.

The European Commission would like to clarify some facts and legal elements that the European Ombudsman refers to in support of her Recommendation. In particular, it seems necessary to clarify the possibilities offered by Article 7 of the EU Staff Regulations as a number of the European Ombudsman’s findings are based on a clear misunderstanding of this Article. The European Ombudsman states that “*in order to be fully eligible [for a post of Secretary-General, the former Head of President’s Cabinet] first had to apply to become Deputy Secretary-General*”. This is wrong.

Article 7(1) of the EU Staff Regulations states: “*The Appointing Authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his function group which corresponds to his grade*”.

The Ombudsman’s observation in point 30 of the Recommendation contesting that the former Head of Cabinet of the President had the necessary grade for the transfer to the Secretary-General post goes against the standing law. As an AD15 official holding a senior management function for 8 years in the Commission, the former Head of Cabinet of the President was eligible for the post of Secretary-General and therefore eligible for a transfer by a decision of the Commission using the procedure of Article 7(1) of the EU Staff Regulations. The 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.

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<sup>1</sup> “*Commission should develop new procedure for appointing its Secretary-General*”, available at: <https://www.ombudsman.europa.eu/en/press-release/en/102716>.

For the sake of clarity, the Commission would like to repeat the elements of its reply of 15 June 2018 to the European Ombudsman's additional questions that sets out nine points and principles that underpinned the decision on the appointment of the new Secretary-General and that explains why the appointment corresponds to normal practice:

*“1. The Commission took the decision to appoint the new Secretary-General on 21 February 2018, as part of a series of senior management appointments, by unanimity of all 28 Members of the College. In doing so, the Commission acted in full compliance with the EU Staff Regulations, as interpreted by the EU jurisdictions’ case law<sup>2</sup> and with its Rules of Procedure.*

*2. President Juncker made the proposal to appoint the new Secretary-General in agreement with Commissioner Oettinger and after consultation with First Vice-President Timmermans. Both of them gave their agreement to the proposed appointment.*

*3. In accordance with normal practice, and to safeguard the necessary degree of confidentiality, the proposed appointment was presented directly to the College on the same day that the College took the decision. It is a prerogative of the President to add items to the College agenda, in line with Article 6(5) of the Rules of Procedure of the Commission. The principle of collegiality was fully respected.*

*4. The Secretary-General of the Commission is a position that requires extensive experience with regard to the functioning of the Commission, its working methods, its decision-making process and its institutional role. As foreseen in Article 20 of the Commission’s Rules of Procedure, the Secretary-General also needs to assist the President and the College as a whole, so that, in the context of the political guidelines laid down by the President, the Commission achieves the priorities that it has set itself. He or she must therefore have the full trust of the President and of the entire Commission.*

*5. 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<sup>3</sup> 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<sup>4</sup>. In addition, prior to this appointment, the new*

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<sup>2</sup> See for example joined cases 161 and 162/80, Carbognani and Zabetta v. Commission, points 19 et seq. and case F-24/12, BN v. Parliament, point 46.

<sup>3</sup> As the General Court has found, being Head of Cabinet qualifies as gaining management experience within the Commission (Case T-118/04 and T-134/04, Caló v Commission, para. 212-213).

<sup>4</sup> Formal requirement for appointment to a Director-General level function is to have the grade of AD14 or above (with a minimum of two years in the grade for AD14 officials) and a minimum of two years of management experience as a senior manager at Director level or above.

*Secretary-General underwent a full selection procedure, as required by Commission rules for the appointments of Directors-General and Deputy Directors-General, including participation in a full day Assessment Centre, an interview, assessment and opinion by the Consultative Committee on Appointments; an interview with the Commissioner in charge of Budget and Human Resources and with President Juncker before being appointed by the College unanimously on 21 February.*

*6. In order to guarantee the seamless functioning of the institution, it is in the interest of the Commission to avoid situations where the function of the Secretary-General becomes vacant. It should be noted that since the appointment of Emile Noël as the Commission's first Secretary-General, the position of Secretary-General has never been vacant. In the case of the appointment of the new Secretary-General, all the conditions for using the transfer procedure of Article 7(1) of the EU Staff Regulations were fulfilled. The three previous Secretaries-General were appointed on the basis of the same procedure.*

*7. The retirement of the previous Secretary-General was communicated to the President of the Commission on 20 February 2018, when he informed the President about his intention to submit his retirement letter the next morning. On the same day, Commissioner Oettinger was informed by the President about this intention and that consequently the President would propose that his Head of Cabinet be transferred to the post of Secretary-General. Commissioner Oettinger expressed his full agreement. The President also consulted First Vice-President Timmermans on his proposal on 20 February who gave his agreement.*

*8. The Commission's Spokesperson's Service replied factually, to the best of its knowledge and comprehensively to all the questions received on this procedure. The Commission is ready to consider the possibility to accompany senior management decisions with technical briefings where experts from the Human Resources Directorate-General could explain legal or technical procedures to the press.*

*9. The Commission stands ready to reassess, together with the other EU institutions, how the application of the rules and procedures can be improved in the future. In doing so the principle of transparency must be reconciled with the need to ensure that senior management decisions adopted by the Commission do not become the object of negotiations between Member States and/or political parties. This could call into question, with regard to the Commission, the supranational spirit of the European Public Administration and the goal of having highly qualified senior managers. Commission Oettinger has launched a proposal to organise an interinstitutional round table on this matter."*

In line with this reply, Commissioner Oettinger convened an interinstitutional round table on 25 September to which the European Ombudsman was invited as well. The round table comforted the Commission in its view that the way in which the institutions implement the rules is both adequate and fit for purpose. The EU Staff Regulations, supplemented by

established case law, provide a solid framework within which each Institution has the autonomy to organise its departments and assign its staff in the interest of the service so as to make the best use of their talents.

***Concerning the instances of alleged maladministration, the Commission would like to reply with the following observations:***

**On the first instance of alleged maladministration concerning the risk of a conflict of interest during the appointment procedure.**

It 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 same reasoning applies to procedures to appoint other senior managers. The possibility to apply for vacant senior management posts exists for all senior managers across the Commission fulfilling the eligibility criteria, be they currently assigned to a Directorate-General, the Cabinet of the President or any other Cabinet. This possibility is inherent to the process and the Members of the College as Appointing Authority are obviously aware of it when they decide on a transfer or a vacancy notice such as in the present case.

It 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.

The former Head of Cabinet of the President did explicitly recuse himself from the entire selection process. He did so in writing, by note of 12 February 2018, addressed to the Consultative Committee on Appointments, when he decided to apply for the post of Deputy Secretary-General, thus avoiding even the *appearance* of a potential conflict of interest. This note was part of the documents inspected by the European Ombudsman. It is attached to this reply.

Contrary to what the European Ombudsman suggests, the European Commission thus took all the appropriate measures to avoid not only a potential conflict of interests but also any appearance of a potential conflict of interest.

**On the second instance of alleged maladministration concerning the composition of the Consultative Committee on Appointments.**

Contrary to what the European Ombudsman suggests, the Consultative Committee on Appointments was composed in full compliance with all the applicable Rules of Procedure.

The European Ombudsman correctly refers in point 65 of its Recommendation to Article 10 of the Consultative Committee on Appointments' Rules of Procedure stating that a member of the Committee with a personal interest such as to impair his or her independence in a specific matter dealt with by the Committee, shall neither take part in the deliberations nor vote on that matter. In such cases, the rules require that the member in question "*shall be*

*replaced by a Rapporteur designated by the Secretary-General among the members on the list of Rapporteurs”.*

However, Article 10 of the Consultative Committee on Appointments’ Rules of Procedure was not applicable in the selection procedure for the Deputy Secretary-General. The 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.

When the former Head of Cabinet of the President recused himself from the procedure on 12 February 2018, he also recused the entire Cabinet of the President. This means that his replacement as member of the Consultative Committee on Appointments on the basis of Article 8(2), paragraph 2 of the Consultative Committee on Appointments’ Rules of Procedure, was not possible. The Committee was therefore composed in full compliance with the applicable Rules pursuant to Article 3.2 without the presence of the Head of the Cabinet of the President.

**On the third instance of alleged maladministration concerning the purpose behind the selection procedure for the Deputy Secretary-General.**

The 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.

As stated above, the former Head of Cabinet of the President was already eligible for the post of Secretary-General without having to go through any intermediary step of being appointed Deputy Secretary-General first. As an AD15 official holding a senior management function for 8 years in the Commission, he was eligible for the post of Secretary-General and could have been transferred by a decision of the Commission using the Article 7 procedure. Article 7(1) of the EU Staff Regulations states: “*The Appointing Authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his function group which corresponds to his grade*”. The 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.

While, as has already been communicated to the European Parliament, it is not the Commission’s practice to transfer Directors in grade AD15 to Director-General posts under

Article 7, legally this is entirely possible and the Commission could have decided to do so in view of the specific circumstances of the case<sup>5</sup>.

The new Secretary-General was appointed to the function of Deputy Secretary-General and would have served in that function had the College not unanimously agreed to his subsequent transfer to the function of Secretary-General. The 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.

**On the fourth instance of alleged maladministration concerning the urgency of the appointment and the use of the Article 7 transfer procedure.**

The Ombudsman's conclusion that the urgency of the Secretary-General's appointment was "*artificial*" is based on a fundamental misunderstanding of the autonomous concept of transfer on the basis of Article 7(1) of the EU Staff Regulations known in the case law as "*reassignment with the official's post*".

No exceptional circumstances are required to reassign an official with his/her post. In particular, the concept of there being a serious and urgent situation is certainly not a necessary condition for an Article 7(1) transfer. The Commission has always stressed that transferring the former Head of Cabinet of the President to the function of Secretary-General was in the best interest of the service and was possible because it is a function which corresponds to the function group and grade he had at the time and still has.

The Commission would also like to insist: (1) on the specificities of the role of the Secretary-General and its importance from a political and administrative point of view in implementing the agenda of the President of the Commission and therefore, on the necessity to have a fully operational Secretary-General at all times; and (2) on the fact that 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.

***Concerning Annex II of the European Ombudsman's Recommendation***, the European Commission cannot share the analysis of what constitutes a "*vacant post*" and "*reassignment with post*" – the analysis being based on an interpretation of the rules set out in Articles 4, 7 and 29 of the EU Staff Regulations that contradicts the constant case-law of the European Union Courts. Some of the elements developed in Annex II are along the lines of the analysis previously developed by the European Parliament, which the Commission already commented upon in its answers to the Parliament on 4 April 2018. As the Commission explained in those answers, the EU Staff Regulations allow for two types of transfer: reassignment with post on the basis of Article 7 and transfer properly called on the basis of Articles 4, 29 and 7. Article 7(1) is the legal basis for an autonomous concept of transfer,

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<sup>5</sup> See reply to question 49 of European Parliament questionnaire of 24 March 2018.

which is known in the case law as “*reassignment with the official’s post*”<sup>6</sup> and does not give rise to a vacant post.

Contrary to the reasoning in Annex II of the Recommendation, no exceptional circumstances are needed to use the procedure of reassignment of an official with his/her post. Indeed, this type of transfer is standing practice by all institutions in all grades and function groups. Furthermore, the EU Staff Regulations do not establish an order of precedence between these two types of transfer, and the case law does not contain any reference either that one procedure would be the norm and the other the exception. It should also be noted that the three categories of reassignment of an official with his/her post that have been analysed by European Union Courts have not been considered as exhaustive.

It is therefore for the Appointing Authority to decide which type of transfer it deems appropriate in order to best ensure the interest of the service, on condition that the staff member’s assignment is in the interest of the service and in conformity with the principle of assignment to an equivalent post (defined by the EU Staff Regulations as a post in his function group that corresponds to his grade)<sup>7</sup>.

This is the decision that the Commission took in the present case based on what it considered to be in the best interest of the service and in line with its responsibility for the continuity of service.

It is wrong to see a contradiction with the Guggenheim case of 2004<sup>8</sup> mentioned by the Ombudsman in Annex II of the Recommendation. This case concerned a very specific situation, where a whole series of individual decisions of transfers of several persons had to be taken in the context of a reorganisation of an Agency that gave rise to the creation of a new category of administrative functions in that Agency and consequently to a number of new assignments. Only in the specific circumstances of that very case, the General Court considered that due to the very particular circumstances ((a) many parallel individual decisions to be taken (b) in a complex reorganisation matter (c) with an impact on global governance) a reassignment with the official’s post without organising an internal call for interest was not in the interest of the service. This case-law establishes therefore an exception, clearly not the norm and does not apply in a case involving a single individual decision and a single post which has always existed in an institution.

With respect to the ***Recommendation as to how the Secretary-General should be appointed in future***, the European Commission does not see any reason why the appointment should be carried out independently from the appointment of any other Director-General. The Commission also rejects any suggestion which might impinge on the President’s prerogative

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<sup>6</sup> See for example joined cases 161 and 162/80, *Carbognani and Zabetta v. Commission*, points 19 et seq. and case F-24/12, *BN v. Parliament*, point 46.

<sup>7</sup> See for example Case 69/83, 23 June 1984, *Lux v Court of Auditors*, point 17 and case F-24/12, 19 June 2014, *BN vs Commission*, point 47.

<sup>8</sup> Case T-373/04, *Guggenheim v. Cedefop*.

to organise the meetings of the College and to decide on its agenda including his right to add items to the agenda at any stage.

In the context of the interinstitutional round table convened on 25 September 2018 by Commissioner Oettinger, the Commission discussed, with the other institutions, the application of the current rules and procedures in all the institutions and how these might be improved in the future. As said above, these discussions comforted the Commission in its view that the way in which the institutions implement the rules is both adequate and fit for purpose. This should allow all institutions to guarantee the excellence of the European Union's civil service, supporting the respective institutions in their work for the European Union interest and being independent from any government, authority, organisation or person outside the institution.

Annex: Note of 12 February 2018



EUROPEAN COMMISSION  
Office of the President Mr Jean-Claude Juncker

Head of Cabinet

Brussels, 12 FEB. 2018

**NOTE FOR THE ATTENTION OF  
MR HENK POST, PERMANENT RAPPORTEUR TO THE CCA**

**Subject: Selection Procedure COM/2018/292**

I intend to apply for the function of Deputy Secretary General published under reference COM/2018/292.

Given my current post and the role it implies as a permanent member of the CCA for senior management selection procedures at this level as well as my responsibilities in relation to the Secretariat General, it is essential to avoid even the appearance of any potential conflict of interest.

The normal provisions for deputising or replacement allowed by the CCA Rules of Procedure are not really adequate in this instance in light of my position as hierarchical superior to the replacements foreseen.

I would therefore ask DG HR to take whatever measures it considers necessary and appropriate in order to ensure that the various steps in this procedure can be carried out without my involvement or that of any other member of staff in the President's Cabinet.

Martin Selmayr