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Commission reply to the European Ombudsman

Complaints ref. 488/2018 and 514/2018

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**Replies of the Commission to questions of the European Ombudsman on the appointment of the new Secretary-General
- Complaints 488/2018/KR and 514/2018/KR**

I. Background

The letter of the European Ombudsman of 5 May 2018 to the President of the Commission is based on two complaints, which were submitted by the Dutch D'66 (ALDE group) and the French Socialists (S&D group) delegations of the European Parliament, concerning the decision of the College of Commissioners of 21 February 2018 on the appointment of its new Secretary-General. The complainants express doubts regarding the legality of this decision. In the framework of the examination of the complaints, the European Ombudsman has asked the Commission to reply to seven additional questions.

The Commission has already provided detailed information on this matter in its replies to the Budgetary Control Committee of the European Parliament of 24 March¹ and 4 April 2018² in particular confirming the legality of the decision by reference to the Staff Regulations as interpreted by the EU jurisdictions' case law and to the Commission's Rules of Procedure. These replies represent the position of the Commission on the questions raised by the European Parliament.

The Commission would like to make clear from the outset the following nine points and principles that underpin the decision taken on the appointment of the new Secretary-General:

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 law³ 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.

¹https://ec.europa.eu/commission/news/european-commission-confirms-appointment-mr-selmayr-secretary-general-decided-full-compliance-all-legal-rules-2018-mar-24_en

²https://ec.europa.eu/commission/news/european-commission-replies-follow-questions-european-parliaments-budgetary-control-committee-appointment-its-new-secretary-general-2018-apr-04_en

³ 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.

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 Commission⁴ 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 Regulations⁵. In addition, prior to this appointment, the new 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 Staff Regulations were fulfilled. The three previous Secretaries-General were appointed on the basis of the same procedure.

⁴ 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)

⁵ 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

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. Commissioner Oettinger has launched a proposal to organise an interinstitutional round table on this matter.

II. The replies of the Commission

1. The Parliament resolution states that the appointment "could be viewed as a coup-like action which stretched and possibly even overstretched the limits of the law". How has the Commission reflected on this characterisation of the manner in which the appointment was made and what, if any, lessons has it learned from the affair overall?

A coup is defined as "*a sudden, violent, and illegal seizure of power from a government*" where "*the illegal and overt seizure of a state by the military or other elites within the state apparatus occurs.*" The Commission does not understand how a decision of the College of Commissioners, proposed by the President and supported unanimously by all the Members of the Commission, can be compared with such a "*coup-like action*". In appointing the new Secretary-General, the Commission respected all the rules to the letter and in their spirit at all times and acted in the interest of the institution.

In proposing the new Secretary-General to the Commission, President Juncker wanted to ensure that the work of the institution continues smoothly and efficiently. He also wanted to avoid any possibility of the appointment becoming the object of negotiations between Member States and/or political parties that could have resulted from leaving this post vacant following the retirement of the previous Secretary-General. He also needed a trustworthy and knowledgeable person in this role, someone whom the College can rely on and who could take over the post immediately and effectively. The need not to disrupt the work of the Commission at this crucial moment in the mandate, and to deliver high level quality proposals is of essence for the institution and for the completion of its priorities and the programme on the basis of which it was elected by the European Parliament.

Like with any other senior management appointments, the Commission exercised confidentiality and discretion in taking its decision. The three previous Secretaries-General were all appointed on the basis of the same procedure.

The Commission is ready to consider in future the possibility to accompany important senior management appointments with detailed technical briefings by experts from the Human Resources Directorate-General who can explain the relevant provisions of the Staff Regulations and other pertinent Commission rules to the press.

2. The Commission did not answer several of Parliament's questions on how this appointment may have damaged the trust in the EU as a whole. Would the Commission now, in hindsight, like to reflect on and set out its view on whether it has damaged trust in the EU? Does it consider that the widespread criticism of the manner in which the appointment was made was justified?

The Commission answered clearly, honestly, comprehensibly to all of the European Parliament's questions on the matter.

Concerning the question on trust in the EU, the Commission does not agree that citizens' trust towards the EU has been affected, neither is this assumption supported by the latest Eurobarometer surveys. 67% of EU citizens support the EU and are convinced that their country has benefitted from EU membership⁶. In particular, trust in the European Commission has increased by 4 percentage points compared to last year with a larger percentage of people expressing their trust in the European Commission (46% tend to trust versus 39% who tend not to trust)⁷.

The Commission does not consider that the criticism expressed about the appointment of the new Secretary-General was justified. On the contrary, the criticisms were based on a series of unfounded allegations, incorrect information and, in general, on disputing the Commission's prerogative to appoint its senior managers. The Commission is ready to assume all its political responsibilities; but it will not accept that an internal procedure, made in full compliance with the EU Staff Regulations, as interpreted by the EU jurisdictions' case law and with the Commission's Rules of Procedure, can be considered as damaging the trust in the EU. The Commission acted within its competences, applied the rules and decided unanimously on the appointment of the new Secretary-General.

⁶http://www.europarl.europa.eu/pdf/eurobarometre/2018/oneyearbefore2019/eb89_one_year_before_2019_eurobarometer_en_opt.pdf

⁷ Flash Eurobarometer, survey conducted 17-26 March 2018, available at:
<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2180>

3. While it is important that senior Commission management positions are not the object of negotiations between Member States or political parties, but rather decisions for the College of Commissioners, how will the Commission in future ensure these decisions are based on the principles of transparency, equality, qualifications and merit?

The rules in place are very clear – where a post needs to be filled, the Staff Regulations allow the appointing authority (in the case of senior management posts the appointing authority is the College of Commissioners) to choose between two options:

- the organisation of a selection procedure pursuant to Article 29(1) of the Staff Regulations;
- a transfer in the interest of the service pursuant to Article 7(1) of the Staff Regulations

The Staff Regulations do not establish an order of preference between the two options and there is no reference in the case-law⁸ to the fact that one procedure would be the norm and the other the exception. Both options are of equal legal standing and are alternative procedures. In all the cases and irrespective of the procedure chosen, the Commission always takes into account the skills, qualifications, experience and merits of the official concerned.

The Commission believes that the procedures in place are robust enough. In line with its commitment to the goal of a European Public Administration of excellence, it is open to constructive discussion about the application of the existing legal framework. The Commission therefore stands ready to assess whether and how the application of the current rules and procedures could 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. Commissioner Oettinger has launched a proposal to organise an inter-institutional round table. This will allow for discussions on how to guarantee the excellence and independence of the EU civil service working for the benefit of and in the common interest of EU citizens.

⁸ 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.

4. Does the Commission agree with the statement in the Parliament resolution that "appointments to high-level posts such as that of Secretary-General should be made independently of other appointments, thereby avoiding any suspicion of nontransparent package deals or trade-offs based on privileged information"? Can the Commission comment on this statement?

There are no such things as “*package deals*” or “*trade-offs*” when it comes to senior management appointments. This would go against the Staff Regulations and the objective of deciding appointments exclusively on the basis of merits and qualifications. Whenever the Commission adopts a set of individual senior management decisions, each of them is – without exception – always subject to the relevant procedural provisions. The Commission does not see a reason for excluding appointments to certain functions from being decided alongside other decisions. The same rules apply to all appointments; the number of decisions that the College has to take every day and in its weekly meetings, does not change, affect or undermine the quality and the substance of each decision.

The Commission also refutes the notion of "*trade-offs*" referring to appointments of senior managers. Each decision is based on the specific merits, on the qualifications of each individual concerned and on the needs of the institution. The Commission is especially attentive to respect the rules and procedures governing the rights of the candidates for the different posts.

In addition, the Commission does not agree with the fact that appointments are based on "*privileged information*". In accordance with normal practice, and in order to safeguard the necessary degree of confidentiality, senior management appointments at Director-General and Deputy Director-General level, at the Commission are, without exception, presented directly to the College on the same day that the Commission decides on them. The involvement of the Members of the Commission, in preparing the different proposals, depends on their respective portfolios – all Members of the Commission concerned are consulted on decisions on senior management in their respective areas of responsibility before they are submitted to the Commission for decision.

It is the prerogative of the President to add items to the College agenda when he deems necessary – in line with Article 6(5) of the Rules of Procedure of the Commission, the Commission may, on a proposal of the President, discuss any topic which is not foreseen on the agenda and it does so on a regular basis. The College of Commissioners consists of experienced politicians who are aware of this prerogative of the President and every Member of the Commission may intervene, express an opinion and ask for the postponement of an item if they so wish during the College meeting.

5. *The Juncker Commission is a political executive, deriving its legitimacy from the European parliament elections, and is supported by an independent civil service. While this is comparable to how many EU Member States governments are structured, can the Commission comment on how it manages the working relationship between the political (that is, the Commissioners and their cabinets) and civil service sides at senior levels?*

A political Commission means that politicians, the Members of the College, pursue policies within the framework of the Treaties based on the Commission's political priorities; express their political judgment and take responsibility for the decisions taken; and is accountable to the European Parliament.

In carrying out their mission, the Members of the Commission can rely on the support of an open, efficient and independent European administration as provided for in Article 298 of the Treaty on the Functioning of the European Union. The Commission administration and its staff members assist the Members of the Commission in the preparation and performance of its tasks, and in the implementation of its priorities and the political guidelines laid down by the President (Article 21, first paragraph, of the Rules of Procedure).

Political action is framed by rules requiring every Commission official and the Members of the College, to act independently and always pursue the general interest of the European Union.⁹

There are clear rules and ethical standards that frame the work of the Commission. According to the Staff Regulations, their implementing rules, the Financial Regulation and the Code of Good Administrative Behaviour, Commission staff is obliged to be independent, impartial, objective and loyal in its relations with the public and while assisting and tendering advice to their superiors. Commission staff is responsible for carrying out instructions, the authority conferred upon them and their duties, and for conducting themselves solely with the interests of the Union in mind. The Staff Regulations also provide for rules in case staff members disagree with internal instructions they may have received.

In addition, there are rules that define the relationship between the Cabinets and the services, notably Article 19 of the Rule of Procedure. The principles governing working relations between the Members of the Commission, their Cabinets and the services of the Commission are laid down in the enclosed Communication on the “Working Methods of the European Commission 2014-2019” (C(2014) 9004), and notably in its Annex 4 point 1.3 which confirms that the final responsibility in a political Commission will always rest with the politicians: “*A close personal relationship based on trust and the mutual provision of information must be established between each Member of the Commission and the Director(s)-General concerned. The Member of the Commission issues general guidelines or gives instructions to the Director-General, in accordance with the College's priorities. The Director-General, for his/her part, advises the Member of the Commission on the files relating to his/her portfolio and informs him/her of any subjects of relevance to the*

⁹ Article 11 of the Staff Regulations

implementation of the priorities or the management of his/her services. He/she is accountable to the Member of the Commission and the College for proper implementation.”

6. *Citizens would expect that the EU civil service gives independent advice, while being necessarily aware of the political environment in which it works. How does the Commission ensure that, when somebody switches from a senior political role to senior management of the independent civil service, that citizens can be reassured about the impartiality of the permanent civil service?*

The Commission has a highly qualified civil service which works in the interest of 500 million European citizens.

There are no "*political roles*" in the staff of the Commission: all staff in the Commission, working in the Cabinets or in the different services, is subject, in their day-to-day work, to the same rules and high ethical standards which require them to act independently in the best interest of the Union. The rules and standards in place are applied to all staff without exceptions; all staff has the same duties and obligations.

The rules are embodied in the Staff Regulations, their implementing rules and in other documents such as the Financial Regulation, and the Code of Good Administrative Behaviour. They include rules on independence towards external influence, potential conflicts of interest, gifts and honours received, external activities while working for the EU and employment after having worked for the EU, on relations with the public and obligations to tender good and objective advice to superiors as well as provisions holding individual staff members accountable for their actions.

The Commission will always seek to ensure compliance with the abovementioned rules. Commission staff has to follow at least one Ethics and Integrity training course. The general public can file a complaint if they feel a Commission official has breached the Code of Good Administrative Behaviour. Commission decisions are under permanent public and institutional scrutiny. In addition, the Investigation and Disciplinary Office (IDOC) of the Commission and the European Anti-Fraud Office ensure that (former) officials and other agents respect the Staff Regulations by conducting administrative inquiries and disciplinary procedures in a fair, transparent and timely manner.

7. *The Commission has acknowledged failures in communications in relation to this appointment. What actions does the Commission intend to take in the future in order to improve its handling of valid and legitimate questions from the media, mindful that such exchanges are frequently the only way that citizens get answers to their concerns.*

The Commission recognises the importance of open and transparent communication and remains fully committed to provide answers to the questions of the media and the general public. It acknowledges that media has an important role in providing information to the public, especially when it comes to EU policies. For that reason, the Commission organises a daily midday briefing which is broadcast live and where over 1100 accredited journalist can ask any question related to EU policies. This is a unique service and proof of our commitment to openness and transparency.

The Commission also places utmost importance to providing answers to citizens' concerns. That is why, since 2014 the Commission has been organising Citizens' Dialogues in all EU Member States where Members of the Commission are responding directly to questions and ideas expressed by citizens. This Commission has significantly stepped up its effort in communicating with the public, reaching out to over 17 million people via 727 Citizens' Dialogues (including 10 Facebook Live Dialogues) in 285 locations in the EU.

While Commission is always ready to further strengthen its communication with the media and the general public and to be more clear and pedagogic when explaining technical and legal procedures, the Commission considers that there was no failure in communication in relation to the appointment of the new Secretary-General. Instead, in a negative campaign, false information was disseminated, incorrect explanations of the appointment procedure and the requirements for the post were published and personal information that is protected on the basis of the EU Staff Regulations and EU rules on data protection was used illegally. The Commission will therefore continue to set the record straight, correct misinformation and defend the appointment of the new Secretary-General which was done in full respect of all existing rules and procedures.