STUDY
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European Parliament

Appointment procedures in the EU institutions

Budgetary Affairs

Policy Department D for Budgetary Affairs
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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT D: BUDGETARY AFFAIRS

Appointment procedures in the EU institutions

STUDY

Abstract

This analytical study focuses on the legal and practical/ethical dimensions of the appointment of senior-level officials in the European Union (EU) institutions, and a selection of Member States and different European/international organisations. Focusing on the four instances of maladministration identified by the European Ombudsman with regard to the appointment of the new Secretary-General (SG) of the European Commission (EC), this study recommends inter alia that a special appointment procedure should be adopted for the appointment of the SG of the EC; amending Articles 7 and Article 29 of the Staff Regulations to improve their clarity and limit chances of misapplication/maladministration; for the Ombudsman to be capable of bringing a judicial review procedure; looking into the possible ways in which EU citizens and organisations may be involved in shaping the institutional policies on appointments; promoting the professionalisation of selection committees; addressing inefficiencies in appointment procedures and clarifying criteria (on exceptions, publication of vacancies etc.); enhancing the transparency of appointment procedures and strengthening independent monitoring of appointment procedures; broadening the choice of candidates; considering the introduction of external independent expertise in appointment procedures; a role for the European Parliament, e.g. pre-appointment hearings of SG; and clarifying existing conflict of interest requirements.

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LIST OF ABBREVIATIONS

CCA	European Commission Consultative Committee on Appointments
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CJEU	Court of Justice of the European Union
CONT	European Parliament Committee on Budgetary Control
DDG	Deputy Director General
DG	Directorate General / Director General
DSG	Deputy Secretary-General of the European Commission
EC	European Commission
EFTA	European Free Trade Area Secretariat
EP	European Parliament
EU	European Union
GSC	General Secretariat of the Council
OECD	Organisation for Economic Cooperation and Development
ReNEUAL	Research Network on EU Administrative Law
SG	Secretary-General of the European Commission
SLO	Senior-level officials
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToR	Terms of Reference
UN	United Nations
WB	World Bank

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EXECUTIVE SUMMARY

The European Parliament (EP) contracted Blomeyer & Sanz on 4 September 2018 to prepare an analytical study on appointment procedures of the most senior-level officials (SLO) in the European Union (EU) institutions.

This study aims to provide data and related analysis on the topic of senior-level officials appointment procedures in the EU institutions, to be used by the EP in developing contributions to improve the status quo.

This executive summary briefly presents the main findings and recommendations. The presentation is organised in line with the study's focus on the legal and the practical/ethical dimension of senior-level officials appointments.

Legal dimension

The problems of lack of transparency in the appointment of senior-level officials, as well as practices and decisions that can be seen as crossing legal and ethical boundaries, reach beyond the EC. The recent reform of the Staff Regulations (2013) towards greater transparency, more coherent and better implementation was the result of problems identified across many EU institutions and agencies. However, the reform remains work in progress. The EP faced severe criticism recently with regard to appointment procedures for some senior-level officials. There is no doubt that significant problems continue to occur, in the context of senior-level officials appointments, with regard to implementation of the Staff Regulations and more general rules of EU administration law and other legal principles applicable to the activities of the EU institutions. There is discernible perception, across the institutions themselves and in the media, that some of these principles and rules, as well as ethical requirements, are at the very least being stretched. The reform towards greater transparency mentioned above addressed these problems to some extent, but it is clear that more needs to be done. The analysis conducted in this study accompanies the current discussions across the major EU institutions, and in particular the EP and the EC, on revising appointment procedures.

The 'Legal Dimension' part of this study examined the applicable principles and rules, including the Staff Regulations, as well as codes of conduct of EU institutions, as they apply to appointments of SLOs. The legal framework, supplemented by policy statements and codes of conduct, is very comprehensive indeed. While there are some changes to substantive rules this study recommends, in part following the European Ombudsman's recommendation in the Selmayr case, the main source of focus ought to be greater clarity and better implementation of the existing rules, oversight, interinstitutional cooperation and coherence. Further, with regard to oversight, the study recommends greater involvement of staff members or groups within each institution, interinstitutional cooperation, the European Ombudsman, as well as to some extent also EU citizens and groups, in the oversight process. This involvement, the precondition to which is transparency of rules and their implementation, may also involve the ability to challenge some parts of the appointment process or decisions taken during and in conclusion of the process before the Court of Justice. This study aims to contribute to the debate on the deficit of democratic participation and oversight in EU decision making, while it also takes account of the need to preserve the autonomy of EU institutions to shape and implement their staff and employment policies.

Practical and ethical dimension

The current concern seems to be politicisation of senior appointments, and this issue is by no means unique to EU institutions. Rather, it appears to be a common problem across the Western European states of the 'old Europe' as well as the Central and Eastern European countries. The 'Practical and Ethical Dimension' part of this study contains an assessment of the academic literature on the subject as well as some recommendations based on comparative analysis of selected institutions and states on how this issue may be handled. Senior-level officials are involved in many crucial aspects of governance and are responsible for crucial decisions. Therefore, the appointment procedures of senior-level officials matter.

In the EU Member States and amongst the EU Institutions, appointment procedures differ and are also linked to very different administrative cultures, traditions and administrative and political systems.

The institutions reviewed by this study all consider that appointment of senior-level officials should be based on the principles of rule of law, impartiality and merit. There is also agreement on a series of preconditions for the appointment of senior-level officials:

- The ultimate responsibility for appointments remains with ministers;
- All appointments are made after advice from Human Resources (HR) experts, other senior-level officials, or an (internal/external/independent) board or committee;
- The composition of these boards, the basis on which members are appointed and how they are expected to fulfil their role also matters in the appointment processes;
- Increasingly, these boards are under pressure to become more "independent" and transparent to the public.

The greatest challenges in the appointment process concern:

- the opening of positions;
- the structure, formation and operation of selection boards;
- the conduct of personal interviews;
- and the final selection from lists of candidates.

In reality, in appointing senior-level officials, merit may play a role, but it is not the sole criteria.

While there is near universal agreement on the importance of political non-partisanship, this is not reflected by the existence of an apolitical process for senior-level officials appointments. Many authors even claim that politicisation has increased over the years. From the point of view of ministers, the appointment of senior-level officials is of great interest.

In all countries, the political level has an important role in the appointment of senior-level officials, although to varying degrees and through different mechanisms.

In all countries, an important issue concerns the degree to which ministers should be involved in the appointment process, in which stages of the process and whether they have a final say over appointments or whether any other (neutral) form of external monitoring of appointments is required.

Some kind of body for recruiting or advising on the best candidates for senior civil service positions is often used as the main tool in ensuring political neutrality and objectivity in the appointment of senior-

level officials. However, also here, practice differs; appointment procedures are often carried out in opaque and complex ways. Overall, little is known as to appointment committees in general.

Whereas in some countries, selection committees are internal bodies and ministers enjoy a great amount of discretion in decision-making, other countries have decided to create independent selection boards and introduce specific monitoring procedures. Both models raise important questions about how to best manage conflicts of interest and political discretion in the appointment process and combine this with the need for neutral expertise in the appointment process. Thus, the crucial question in all models is how to balance political interests of ministers/presidents with merit requirements.

Most institutions in the EU Member States are of the opinion that any internal form and self-regulation have the advantage that it is simpler, easier and less conflictual. In most cases these committees are neither fully independent bodies nor do they have important monitoring and enforcement powers.

Good arguments exist in favour of maintaining confidential and internal appointment practices. However, arguments in favour of the introduction of more transparent and independent structures outweigh the critical points.

Current trends in the field of appointment policies are indeed towards the introduction of more independent scrutiny and monitoring. In our study (and because of the great importance of culture, tradition and political context), we could not find best-practices. However, we took note of the interesting suggestion by the European Ombudsman to involve outside consultants in the appointment process and to arrange for mandatory assessment centres for candidates and/or to appoint external Commissioners of Appointment (following the UK model).

An alternative mode of appointment (in exceptional cases) could be to involve the EP in the appointment process. An EP committee may hold oral evidence sessions with the Commissioner's or President's preferred candidates for a small number of senior-level officials (Directors-General or only for the Secretary-General) in the form of pre-appointment hearings. Evidence suggests that most pre-appointment hearings are constructive and non-contentious. They provide enhanced transparency and credibility to the appointment process. Moreover, pre-appointment hearings are an opportunity to enhance trust. We suggest that the EP has no veto over the appointment process. However, it could recommend that an appointment is not made. In this case, Commissioners/Presidents may pause for reflection.

Recommendations

This study recommends a series of measures to enhance the appointment process of senior-level officials, including inter alia:

- A special appointment procedure should be adopted for the appointment of SG of the EC.
- Amending Article 7 as well as Article 29 of the Staff Regulations to improve their clarity and limit chances of misapplication and perhaps also maladministration.
- For the Ombudsman to be capable of bringing a judicial review procedure in order to have the CJEU confirm (or reject) the maladministration and decide on the legal consequences of the maladministration.

- Looking into the possible ways in which EU citizens and organisations may be involved in shaping the institutional policies on appointments and in challenging these policies or even individual decisions after they have been made.
- Addressing problems of expertise/improving capacity, in particular, the knowledge base of members of selection committees.
- Enhancing the efficiency, clarity and transparency or, more basically, addressing the lack of simplicity in administering the appointment procedure, e.g. criteria and justifications for the choice of internal and external (open) procedures.
- Improving the transparency levels of appointment procedures including increased monitoring and independent scrutiny of appointment procedures.
- Ensuring that the political level, e.g. a minister, can select from a shortlist of candidates put forward by a committee or an independent panel instead of being presented a single candidate.
- Considering a role for Parliament in the form of one of its Committees holding oral evidence sessions with the Commissioner's or President's preferred candidates for a small number of senior-level officials (DG) or only for the SG position in the (pre-appointment hearings).
- Adding to the already existing provisions on conflicts of interest an additional explanatory memorandum on managing conflicts of interest in the development phase of appointment of staff.

ZUSAMMENFASSUNG

Das Europäische Parlament (EP) hat am 4. September 2018 bei Blomeyer & Sanz eine analytische Studie über die Ernennungsverfahren für die höchstrangigen Beamten in den Institutionen der EU in Auftrag gegeben.

Mit dieser Studien sollen Daten und eine einschlägige Analyse zum Thema Ernennungsverfahren für hochrangige Beamten in den Institutionen der EU geliefert werden, die das EP heranziehen kann, um zu einer Verbesserung des Status quo beizutragen.

In dieser Zusammenfassung werden die wesentlichen Erkenntnisse und Empfehlungen dargelegt. Die Ausführungen sind den Schwerpunkten der Studie, die auf der rechtlichen, der praktischen und der ethischen Dimension der Ernennung hochrangiger Beamten liegen, entsprechend gegliedert.

Rechtliche Dimension

Das Problem, dass es bei der Ernennung hochrangiger Beamten an Transparenz mangelt und dass bei den Verfahren und Beschlüssen mitunter rechtliche und ethische Grenzen überschritten werden, betrifft nicht nur die Europäische Kommission. Aufgrund der Probleme, die in vielen Institutionen und Agenturen der EU ermittelt wurden, wurde das Statut der Beamten der Europäischen Union (nachstehend „Statut“) 2013 einer Reform unterzogen und auf diese Weise zu mehr Transparenz, Kohärenz und einer besseren Umsetzung beigetragen. Dieser Reformprozess ist jedoch noch nicht abgeschlossen. Das EP wurde im Hinblick auf die Ernennungsverfahren für bestimmte hochrangige Beamten scharf kritisiert. Im Zusammenhang mit der Ernennung hochrangiger Beamter bestehen zweifellos noch immer gravierende Mängel, etwa bei der Umsetzung des Statuts und allgemeinerer Bestimmungen der Verwaltungsrechtsvorschriften der EU und anderer Rechtsgrundsätze, die für die Tätigkeiten der Institutionen der EU gelten. In den Institutionen selbst und in den Medien besteht offenbar der Eindruck, dass einige dieser Grundsätze und Bestimmungen sowie die ethischen Anforderungen zumindest gedehnt werden. Mit der oben erwähnten Reform, mit der auf mehr Transparenz abgezielt wurde, wurden diese Probleme in gewissem Maße angegangen, aber es muss auf jeden Fall noch mehr getan werden. Diese Studie wurde vor dem Hintergrund der Diskussionen über die Überarbeitung der Ernennungsverfahren, die derzeit in den in den wichtigsten Institutionen der EU, insbesondere im EP und in der Europäischen Kommission, stattfinden, vorgenommen.

In dem Teil dieser Studie zur rechtlichen Dimension werden die anzuwendenden Grundsätze und Bestimmungen, etwa das Statut und die Verhaltensregeln der Institutionen der EU, die für die Ernennung hochrangiger Beamten gelten, untersucht. Der Rechtsrahmen, zu dem noch politische Erklärungen und Verhaltensregeln hinzukommen, ist wirklich sehr umfassend. Obwohl wesentliche Bestimmungen geändert werden, wird in dieser Studie empfohlen, den Schwerpunkt auf mehr Klarheit und eine bessere Umsetzung der bestehenden Bestimmungen sowie Überwachung, die Zusammenarbeit der Institutionen und Kohärenz zu legen. Mit dieser Empfehlung wird zum Teil der Empfehlung der europäischen Ombudsfrau im Fall Selmayr entsprochen. Was die Überwachung anbelangt, so empfiehlt die Studie eine stärkere Einbeziehung der Bediensteten oder Organisationen innerhalb aller Institutionen, interinstitutionelle Zusammenarbeit, eine stärkere Einbeziehung des Europäischen Bürgerbeauftragten sowie in gewissem Maße auch der Bürger und Organisationen in der

EU in den Überwachungsprozess. Die Voraussetzung für diese Beteiligung ist, dass die Bestimmungen transparent sind und auf transparente Weise umgesetzt werden. Diese Beteiligung kann die Möglichkeit umfassen, bestimmte Teile eines Ernennungsverfahrens oder Entscheidungen, die während und zum Abschluss des Verfahrens getroffen werden, vor dem Gerichtshof anzufechten. Mit dieser Studie soll zur Debatte über die mangelnde demokratische Beteiligung und Überwachung bei der Entscheidungsfindung in der EU beigetragen und dabei der Notwendigkeit Rechnung getragen werden, die Unabhängigkeit der Institutionen der EU bei der Gestaltung und Umsetzung ihrer Personal- und Beschäftigungspolitik zu wahren.

Praktische und ethische Dimension.

Die derzeitigen Bedenken betreffen offensichtlich die Politisierung der Ernennung hochrangiger Beamter, und dieses Problem betrifft keineswegs nur die Institutionen der EU. Vielmehr handelt es sich um ein Problem, das in allen westeuropäischen Staaten des „alten Europa" sowie in den Ländern Zentral- und Osteuropas anzutreffen ist. Der Teil dieser Studie über die praktische und ethische Dimension umfasst eine Bewertung der einschlägigen wissenschaftlichen Literatur und einige Empfehlungen, denen eine vergleichende Analyse ausgewählter Institutionen und Staaten im Hinblick auf die Frage zugrunde liegt, wie dieses Problem behoben werden könnte. Hochrangige Beamte sind an vielen wichtigen Aspekten der Verwaltung beteiligt und treffen schwerwiegende Entscheidungen. Daher sind auch die Ernennungsverfahren von großer Bedeutung.

Die Ernennungsverfahren in den Mitgliedstaaten der EU und den Institutionen der EU sind unterschiedlich und aus sehr unterschiedlichen Verwaltungskulturen, -traditionen und -systemen sowie politischen Systemen hervorgegangen.

Die Bediensteten sämtlicher im Rahmen dieser Studie überprüften Institutionen sind der Ansicht, dass die Ernennung hochrangiger Beamter auf den Grundsätzen der Rechtsstaatlichkeit, der Unparteilichkeit und der Verdienste beruhen sollte. Auch im Hinblick auf eine Reihe von Voraussetzungen für die Ernennung hochrangiger Beamter besteht Einigkeit:

- Die letztendliche Zuständigkeit für die Ernennungen verbleibt bei den Ministern;
- Vor jeder Ernennung werden Sachverständige für Personalressourcen, sonstige hochrangige Beamte oder ein (interner/externer/unabhängiger) Ausschuss konsultiert.
- Die Zusammensetzung dieser Ausschüsse, die Bedingungen für ihre Ernennung ihrer Mitglieder und die Erwartungen an sie im Hinblick auf die Wahrnehmung ihrer Funktion ist ebenfalls wichtig für die Ernennungsverfahren.
- Diese Ausschüsse stehen zunehmend unter Druck, unabhängiger und transparenter für die Öffentlichkeit zu werden.

Die größten Herausforderungen bei Ernennungsverfahren betreffen:

- die Ausschreibung von Positionen,
- die Zusammensetzung, die Bildung und die Funktionsweise von Auswahlausschüssen,
- die Durchführung persönlicher Anhörungen
- und die endgültige Auswahl aus einer Bewerberliste.

In der Realität könnten Verdienste bei der Ernennung hochrangiger Beamter eine Rolle spielen, sie sind jedoch nicht das einzige Kriterium.

Zwar herrscht weitgehend Einigkeit darüber, dass hochrangige Beamte in politischer Hinsicht unparteiisch sein müssen, jedoch wird dieser Überzeugung nicht mit unpolitischen Ernennungsverfahren für hochrangige Beamte Rechnung getragen. Laut mehreren Autoren sind die Ernennungsverfahren im Laufe der Jahre sogar zunehmend zu einem Politikum geworden. Für Minister ist die Ernennung hochrangiger Beamter von großem Interesse.

Die politische Ebene ist bei der Benennung hochrangiger Beamter in allen Ländern von Bedeutung, wobei diese Bedeutung von Land zu Land unterschiedlich groß und durch unterschiedliche Mechanismen bedingt ist.

Eine wichtige Frage in allen Ländern ist, wie sehr Minister in Ernennungsverfahren eingebunden werden sollten, ob und in welchen Phasen des Verfahrens sie im Hinblick auf Ernennungen das letzte Wort haben sollten und ob eine andere (neutrale) externe Überwachung der Ernennungen erforderlich ist.

Um für politische Neutralität und Objektivität bei der Ernennung hochrangiger Beamter zu sorgen, wird als wesentliches Instrument häufig ein Gremium für die Einstellung oder ein Beratungsgremium eingesetzt, das die Bewerber, die für hochrangige Beamtenstellen am besten geeignet sind, bestimmt. Auch hier gibt es Unterschiede in der Praxis: die Ernennungsverfahren laufen häufig undurchsichtig und komplex ab. Insgesamt ist über die Ernennungsausschüsse wenig bekannt.

In manchen Ländern sind die Auswahlausschüsse interne Gremien und die Minister können bei ihrer Beschlussfassung mit strengster Diskretion rechnen, während andere Länder beschlossen haben, unabhängige Auswahlausschüsse und spezielle Überwachungsverfahren einzurichten. Beide Modelle werfen die wichtige Frage auf, wie Interessenkonflikte und politische Diskretion im Ernennungsverfahren am besten zu handhaben sind und wie dabei der im Ernennungsprozess erforderliche neutrale Sachverstand sichergestellt werden kann. Die ausschlaggebende Frage, die sich im Hinblick auf alle Modelle stellt, ist also, wie ein Gleichgewicht zwischen den politischen Interessen von Ministern oder Präsidenten und den Anforderungen im Hinblick auf die Verdienste gefunden werden kann.

Die Bediensteten des Großteils der Institutionen in den Mitgliedstaaten der EU sehen den Vorteil interner Formen und der Selbstkontrolle darin, dass sie sich einfacher gestalten und durch weniger Meinungsverschiedenheiten gekennzeichnet sind. Diese Ausschüsse sind in den meisten Fällen weder vollkommen unabhängig, noch verfügen sie über bedeutende Überwachungs- oder Durchsetzungsbefugnisse.

Es gibt gute Argumente dafür, vertrauliche und interne Ernennungsverfahren beizubehalten. Die Argumente für die Einrichtung transparenterer und unabhängiger Strukturen sind jedoch stärker als die Kritikpunkte.

Der Trend im Bereich Ernennungsmaßnahmen geht gegenwärtig tatsächlich hin zur Einrichtung einer unabhängigeren Kontrolle und Überwachung. Im Zuge der Studie (und aufgrund der großen Bedeutung von Kultur, Tradition und politischem Kontext) konnten keine bewährten Verfahren ermittelt werden. Allerdings wird auf den interessanten Vorschlag der Europäischen Ombudsfrau

hingewiesen, externe Berater in das Ernennungsverfahren einzubinden, verpflichtende Assessment Center für Kandidaten vorzusehen und/oder dem Vorbild des Vereinigten Königreichs folgend externe Ernennungsbeauftragte einzusetzen.

Als alternative Methode für die Ernennung könnte (in Sonderfällen) das EP in Ernennungsverfahren eingebunden werden. Ein Ausschuss des EP könnte für eine kleine Zahl an hochrangigen Beamtenstellen (für Generaldirektorenstellen oder ausschließlich für das Amt des Generalsekretärs), mündliche Anhörungen vor der Ernennung mit den Bewerberinnen und Bewerbern, die der Kommissar oder der Präsident bevorzugt, durchführen. Es ist belegt, dass der Großteil solcher Anhörungen vor der Einstellung konstruktiv und unstreitig ist. Damit wird für ein transparenteres Ernennungsfahren gesorgt und seine Glaubwürdigkeit verbessert. Die Anhörungen vor der Ernennung stellen auch eine Gelegenheit dar, das Vertrauen zu stärken. Das EP sollte im Ernennungsverfahren kein Vetorecht haben. Jedoch könnte es von einer Ernennung abraten. In diesem Fall, könnten Kommissare bzw. Präsidenten sich Bedenkzeit nehmen.

Empfehlungen

In dieser Studie wird eine Reihe von Maßnahmen vorgeschlagen, um die Ernennungsverfahren für hochrangige Beamten zu verbessern. Unter anderem wird vorgeschlagen:

- ein besonderes Ernennungsverfahren für Generalsekretäre der Europäischen Kommission einzurichten;
- Artikel 7 und Artikel 29 des Statuts zu ändern, um sie klarer zu formulieren und um das Risiko einer missbräuchlichen Anwendung und etwaiger Missstände in der Verwaltungstätigkeit zu verringern;
- dem Bürgerbeauftragten die Möglichkeit an die Hand zu geben, ein gerichtliches Überprüfungsverfahren einzuleiten, damit der EUGH beurteilt, ob ein Missstand in der Verwaltung vorliegt und die rechtlichen Konsequenzen des etwaigen Missstandes beschließt;
- sich mit der Frage zu befassen, wie Bürger und Organisationen der EU in die Gestaltung der Ernennungsmaßnahmen der Institutionen und die Anfechtung entsprechender bestehender Maßnahmen oder sogar bestimmter bereits getroffener Entscheidungen eingebunden werden könnten;
- bestimmte Probleme im Hinblick auf Fachwissen und die Verbesserung von Kapazitäten, insbesondere der Wissensbasis der Auswahlausschüsse, in Angriff zu nehmen;
- die Ernennungsverfahren weniger komplex, d. h. effizienter, klarer und transparenter zu gestalten, etwa die Kriterien und Begründungen für die Wahl interner und externer (offener) Verfahren;
- das Maß an Transparenz von Ernennungsverfahren zu erhöhen, etwa mit mehr Überwachung und unabhängiger Kontrolle von Ernennungsverfahren;
- sicherzustellen, dass die Politiker, z. B. Minister, aus einer von einem Ausschuss oder einem unabhängigen Gremium vorgelegten Liste auswählen können, anstatt einen einzigen Bewerber präsentiert zu bekommen;

- in Erwägung zu ziehen, das Parlament einzubinden, indem einer seiner Ausschüsse für eine kleine Zahl an hochrangigen Beamtenstellen (Generaldirektorenstellen) oder ausschließlich für das Amt des Generalsekretärs mit den Bewerbern, die ein Kommissar oder der Präsident bevorzugt, mündliche Anhörungen vor der Ernennung durchführen kann;
- die bestehenden Bestimmungen über Interessenkonflikte um eine zusätzliche Begründung zur Bewältigung von Interessenkonflikten in der Vorbereitungsphase für die Ernennung von Bediensteten zu ergänzen.

NOTE DE SYNTHÈSE

Le Parlement européen a confié à Blomeyer & Sanz, le 4 septembre 2018, la préparation d'une étude analytique sur les procédures de nomination des fonctionnaires les plus hauts placés au sein des institutions de l'Union européenne.

Cette étude vise à apporter des données et une analyse sur la question des procédures de nomination des hauts fonctionnaires dans les institutions de l'Union, que le Parlement européen pourra utiliser pour l'élaboration de propositions contribuant à améliorer le statu quo.

La présente note de synthèse présente succinctement les principales conclusions et recommandations de l'étude. Sa structure suit l'angle de l'étude, axée sur l'aspect juridique et les aspects pratique et éthique de la nomination des hauts fonctionnaires.

Aspect juridique

Le problème du manque de transparence dans la nomination des hauts fonctionnaires, ainsi que les pratiques et décisions qui peuvent sembler avoir dépassé les limites juridiques et éthiques, ne concernent pas que la Commission européenne. La réforme récente du statut des fonctionnaires (2013) visant une plus grande transparence et une mise en œuvre plus cohérente et améliorée découlait de problèmes constatés dans plusieurs institutions et agences de l'Union, mais elle n'est pas achevée. Le Parlement européen a récemment fait l'objet de vives critiques pour des procédures de nomination de hauts fonctionnaires. De toute évidence, d'importants problèmes subsistent, lors de la nomination de hauts fonctionnaires, en ce qui concerne la mise en œuvre du statut des fonctionnaires et de dispositions plus générales de la législation relative à l'administration de l'Union ainsi que d'autres principes juridiques applicables aux activités des institutions de l'Union. Il est manifestement considéré, au sein des institutions elles-mêmes et dans les médias, que des libertés sont prises, voire plus, avec certains de ces principes et de ces dispositions, ainsi que certaines exigences éthiques. La réforme en vue d'une plus grande transparence mentionnée plus haut a, dans une certaine mesure, répondu à ces problèmes, mais il est évident que davantage d'efforts sont nécessaires. L'analyse réalisée dans cette étude accompagne les discussions en cours dans les principales institutions de l'Union, et notamment le Parlement et la Commission, au sujet de la révision des procédures de nomination.

Dans la partie de l'étude consacrée à l'«aspect juridique», les principes et les dispositions applicables, y compris le statut des fonctionnaires, ont été examinés, de même que les codes de conduite des institutions de l'Union, qui s'appliquent aux nominations de hauts fonctionnaires. Le cadre juridique, complété par les déclarations politiques et les codes de conduite, est vraiment très complet. Si l'étude recommande quelques modifications concernant des règles de fond, en suivant en partie les recommandations de la Médiatrice européenne dans l'affaire Selmayr, l'accent devrait toutefois être principalement mis sur une plus grande clarté et une meilleure application des dispositions existantes, la surveillance, la coopération interinstitutionnelle et la cohérence. En outre, pour ce qui est de la surveillance, l'étude recommande de donner un rôle accru aux membres ou aux catégories du personnel de chaque institution, à la coopération interinstitutionnelle et au Médiateur européen, ainsi que, dans une certaine mesure, aux citoyens et aux groupes de l'Union, dans la procédure de surveillance. Cette participation, pour laquelle il est indispensable que les règles soient transparentes

et appliquées, peut aussi consister à pouvoir contester, devant la Cour de justice, certains points de la procédure de nomination ou des décisions prises au cours ou à l'issue de la procédure. Cette étude a pour objectif de contribuer au débat sur le manque de participation démocratique et de surveillance dans le processus décisionnel de l'Union, et tient aussi compte de la nécessité de préserver l'autonomie qu'ont les institutions de l'Union pour élaborer et mettre en œuvre leurs politiques en matière de personnel et d'emploi.

Aspects pratique et éthique

Le problème actuel semble être la politisation des nominations des hauts fonctionnaires, ce qui est loin de ne concerner que les institutions de l'Union. Il semble au contraire s'agir d'un problème commun dans les États de la «vieille Europe» occidentale et dans les pays d'Europe centrale et orientale. La partie de l'étude consacrée aux «aspects pratique et éthique» comprend une évaluation des publications universitaires sur le sujet ainsi que certaines recommandations fondées sur une analyse comparative de la manière dont cette question est traitée par certaines institutions et certains États. Les hauts fonctionnaires interviennent dans plusieurs points essentiels de la gouvernance et sont responsables de décisions cruciales, d'où l'importance des procédures de nomination de ces hauts fonctionnaires.

Les procédures de nomination diffèrent selon les États membres et les institutions de l'Union, et sont également liées à une grande variété des cultures et traditions administratives et des systèmes politiques et administratifs.

Les institutions examinées par cette étude estiment toutes que la nomination des hauts fonctionnaires devrait se fonder sur les principes de l'état de droit, de l'impartialité et du mérite. Il y a également concordance quant à un ensemble de conditions préalables à la nomination de hauts fonctionnaires:

- les ministres sont responsables en dernier ressort des nominations;
- toutes les nominations sont décidées après consultation d'experts en ressources humaines, d'autres hauts fonctionnaires, ou d'un conseil ou comité (interne/externe/indépendant);
- la composition de ces comités, les critères de nomination de leurs membres et la manière dont ils devraient jouer leur rôle comptent également pour les procédures de nomination;
- une pression croissante est exercée sur ces comités pour qu'ils deviennent plus «indépendants» et transparents vis-à-vis du public.

Les principaux défis des procédures de nomination concernent:

- les ouvertures de poste;
- la structure, la constitution et le fonctionnement des comités de sélection;
- l'organisation d'entretiens individuels;
- la sélection finale à partir d'une liste de candidats.

En fait, le mérite peut jouer un rôle dans la nomination des hauts fonctionnaires, mais n'est pas le seul critère.

Si l'on constate un consensus quasi universel sur l'importance d'éviter la logique politique partisane, la procédure de nomination des hauts fonctionnaires n'est toutefois pas apolitique. De nombreux auteurs

avancent même que la politisation s'est accrue au fil des ans. Du point de vue des ministres, la nomination de hauts fonctionnaires revêt le plus grand intérêt.

L'échelon politique joue un rôle important dans la nomination des hauts fonctionnaires dans tous les pays, certes à des degrés divers et par le biais de mécanismes différents.

Dans tous les pays se pose la question du degré de participation des ministres à la procédure de nomination, des étapes de la procédure auxquelles cette participation intervient et de la question de savoir si les ministres ont ou non le dernier mot sur les nominations ou si une autre forme (neutre) de surveillance extérieure sur les nominations est requise.

Un organisme de recrutement ou de conseil sur les candidats les plus adéquats pour occuper des postes élevés dans la fonction publique est souvent utilisé comme outil principal permettant de garantir neutralité politique et objectivité dans la nomination de hauts fonctionnaires. Toutefois, là encore, les pratiques divergent; les procédures de nomination sont souvent menées de manière opaque et complexe. Globalement, on en sait peu sur les commissions de recrutement en général.

Si, dans certains pays, les commissions de sélection sont des organes internes et les ministres jouissent d'une vaste marge de manœuvre sur les décisions finales, d'autres pays ont au contraire décidé de créer des comités de sélection indépendants et de mettre en place des procédures de surveillance spécifiques. Ces deux modèles soulèvent d'importantes questions sur la manière de gérer au mieux les conflits d'intérêts et la marge discrétionnaire politique dans la procédure de nomination et combinent ces aspects avec la nécessité d'une expertise neutre dans la procédure de nomination. Dès lors, la question centrale qui se pose dans tous les modèles a trait à la manière de trouver un juste équilibre entre les intérêts politiques des ministres/des présidents et les exigences de mérite.

La plupart des institutions des États membres de l'Union estiment que toute forme interne et toute autoréglementation présentent comme avantages leur simplicité, leur facilité et le fait qu'elles soient moins sujettes aux conflits. Dans la plupart des cas, ces commissions ne sont pas des organes pleinement indépendants et ne disposent ni de pouvoirs de surveillance ni de pouvoirs d'exécution importants.

Il existe de bons arguments en faveur du maintien de pratiques confidentielles et internes de nomination. Toutefois, les arguments en faveur de la mise en place de structures plus transparentes et indépendantes l'emportent.

On constate actuellement une tendance à la mise en place d'un contrôle et d'une surveillance plus indépendants dans le domaine des politiques en matière de nomination. Dans le cadre de notre étude (et notamment en raison de la grande importance de la culture, de la tradition et du contexte politique), nous n'avons pu dégager de meilleures pratiques. Nous avons cependant pris acte de la suggestion intéressante formulée par la Médiatrice européenne d'associer des consultants externes à la procédure de nomination et de prévoir des centres d'évaluation obligatoire pour les candidats et / ou de nommer des responsables externes de recrutement (sur le modèle britannique).

Un autre mode de nomination (dans des cas exceptionnels) pourrait consister à associer le Parlement européen à la procédure de nomination. Une commission du Parlement européen pourrait procéder à des auditions préalables à la nomination des candidats favoris des commissaires ou du Président pour un certain nombre de hauts fonctionnaires (directeurs généraux ou uniquement secrétaire général).

Les données suggèrent que la plupart des auditions préalables à une nomination sont constructives et non problématiques. Elles permettent d'apporter davantage de transparence et de crédibilité à la procédure de nomination. En outre, les auditions préalables à une nomination représentent une opportunité de renforcer la confiance. Nous suggérons que le Parlement européen n'ait pas de droit de veto en ce qui concerne la procédure de nomination. Il pourrait cependant déconseiller une nomination. Dans ce cas, les commissaires/le Président pourraient réfléchir une nouvelle fois à la nomination en question.

Recommandations

La présente étude recommande une série de mesures pour renforcer la procédure de nomination des hauts fonctionnaires, et notamment:

- adopter une procédure spéciale de nomination pour la nomination du secrétaire général de la Commission européenne;
- modifier l'article 7 et l'article 29 du statut pour en améliorer la clarté et limiter les risques de mauvaise application voire de mauvaise administration;
- doter le Médiateur de la capacité de lancer une procédure de réexamen judiciaire pour que la CJUE confirme (ou infirme) la mauvaise administration et se prononce sur les conséquences juridiques de celle-ci;
- étudier les possibilités d'associer les citoyens et les organisations de l'Union à la définition des politiques institutionnelles relatives aux nominations et à la remise en question de ces politiques voire de décisions individuelles après coup;
- régler les problèmes d'expertise / améliorer les capacités, et notamment les connaissances des membres des commissions de sélection;
- renforcer l'efficacité, la clarté et la transparence de la procédure de nomination ou, plus simplement, simplifier la gestion de la procédure de nomination, en ce qui concerne par exemple les critères et les justifications du choix entre procédure interne et procédure (ouverte) externe;
- améliorer la transparence des procédures de nomination, y compris en en renforçant la surveillance et le contrôle indépendant;
- veiller à ce que l'échelon politique, par exemple un ministre, puisse choisir dans une liste restreinte de candidats présentée par une commission ou un comité indépendant au lieu de ne juger qu'un seul candidat;
- envisager d'attribuer un rôle au Parlement via la tenue d'une audition préalable à la nomination des candidats favoris du commissaire ou du Président pour un certain nombre de hauts fonctionnaires (directeurs généraux) ou uniquement pour le secrétaire général menée par l'une de ses commissions parlementaires;
- ajouter aux dispositions existantes en matière de conflits d'intérêts un exposé des motifs supplémentaire sur la gestion des conflits d'intérêts dans la phase de développement de la nomination.

SAMENVATTING

Het Europees Parlement (EP) heeft Blomeyer & Sanz op 4 september 2018 de opdracht gegeven om een analytische studie uit te voeren naar de benoemingsprocedures van de hoogste ambtenaren bij de instellingen van de Europese Unie (EU).

Deze studie is bedoeld om materiaal en bijbehorende analyses te verstrekken over de benoemingsprocedures van de hoogste ambtenaren bij de EU-instellingen en moet door het EP worden benut om de status quo te verbeteren.

In deze samenvatting worden kort de belangrijkste conclusies en aanbevelingen uiteengezet. Hierbij wordt de focus van de studie gevolgd, waarin de nadruk ligt op de juridische en praktische/ethische dimensie van benoemingen van de hoogste ambtenaren.

Juridische dimensie

Het problemen van gebrekkige transparantie bij de benoeming van de hoogste ambtenaren evenals praktijken en besluiten die mogelijk juridische en ethische grenzen overschrijden, komen niet alleen bij de Europese Commissie voor. De recente hervorming van het Statuut (2013) voor meer transparantie, meer coherentie en een betere tenuitvoerlegging was het resultaat van problemen die in veel EU-instellingen en agentschappen waren vastgesteld. De hervormingen zijn echter nog in volle gang. Het EP kreeg onlangs zware kritiek te verduren vanwege de benoemingsprocedure van een aantal hoge ambtenaren. Het lijdt geen twijfel dat zich nog steeds grote problemen voordoen bij de benoemingen van de hoogste ambtenaren, zowel wat betreft de uitvoering van het Statuut en algemene voorschriften van het bestuursrecht van de EU, als andere juridische beginselen die van toepassing zijn op de activiteiten van de EU-instellingen. Zowel binnen de instellingen zelf, als in de media heerst de opvatting dat een aantal van deze beginselen en voorschriften, maar ook ethische vereisten, vrij worden geïnterpreteerd. Met de eerder genoemde hervorming voor meer transparantie zijn deze problemen tot op zekere hoogte aangepakt, maar het is duidelijk dat meer werk verzet moet worden. De analyse die in het kader van deze studie is uitgevoerd, sluit aan bij de discussies die momenteel worden gevoerd in de grootste EU-instellingen, in het bijzonder door het EP en de EC, over de herziening van de benoemingsprocedures.

In het gedeelte "Juridische dimensie" van deze studie worden de toegepaste beginselen en voorschriften onderzocht, waaronder het Statuut, evenals de gedragscodes van de EU-instellingen, die van toepassing zijn op de benoeming van de hoogste ambtenaren. Het juridische kader, aangevuld met beleidsverklaringen en gedragscodes, is erg veelomvattend. Er worden in deze studie weliswaar enkele wijzigingen in de werkelijke regels aanbevolen, deels aan de hand van de aanbeveling van de Europese Ombudsman in de zaak Selmayr. Toch zou de meeste aandacht moeten worden besteed aan meer duidelijkheid en een betere uitvoering van de bestaande regels, toezicht, interinstitutionele samenwerking en coherentie. Verder wordt in deze studie aanbevolen, dat personeelsleden of groepen binnen elke instelling, de interinstitutionele samenwerking, de Europese Ombudsman en tot op zekere hoogte ook EU-burgers en -groepen meer te betrekken bij de toezicht procedure. Deze betrokkenheid, waarvoor transparante regels en de uitvoering daarvan vereisten zijn, kan ook bestaan uit de mogelijkheid om bepaalde delen van de benoemingsprocedure of besluiten die genomen zijn tijdens en bij de afronding van het proces aan te vechten bij het Hof van Justitie. Deze studie beoogt bij te dragen aan het debat over het tekort aan democratische participatie en toezicht in de besluitvorming van de EU. Tegelijkertijd wordt er ook rekening gehouden met de noodzaak voor de EU-instellingen om hun eigen personeels- en werkgelegenheidsbeleid te kunnen vormgeven en uitvoeren.

Praktische en ethische dimensie

Het huidige probleem lijkt de politieke benoeming van hoge ambtenaren te zijn, wat zeker niet alleen geldt voor de EU-instellingen. Het lijkt eerder een algemeen probleem te zijn in de West-Europese landen van het "oude Europa" en in de Midden- en Oost-Europese landen. Het gedeelte over de "praktische en ethische dimensie" van deze studie bevat enerzijds een discussie van de academische literatuur over het onderwerp en anderzijds een aantal aanbevelingen op basis van een vergelijkende analyse van geselecteerde instellingen en landen over de manier waarop dit probleem kan worden aangepakt. De hoogste ambtenaren zijn betrokken bij veel essentiële aspecten van het bestuur en zijn verantwoordelijk voor cruciale besluiten. Daarom zijn de benoemingsprocedures van deze ambtenaren van groot belang.

De benoemingsprocedures verschillen per lidstaat en per instelling. Ze zijn geworteld in uiteenlopende bestuurlijke culturen, tradities en administratieve en politieke systemen.

Alle instellingen die worden geëvalueerd in deze studie zijn het erover eens dat de benoeming van de hoogste ambtenaren gebaseerd moet zijn op de beginselen van de rechtsstaat, onpartijdigheid en persoonlijke verdiensten. Ook bestaat er overeenstemming over een aantal voorwaarden voor de benoeming van de hoogste ambtenaren:

- De eindverantwoordelijkheid voor benoemingen ligt bij ministers;
- Alle benoemingen worden uitgevoerd op basis van het advies van deskundigen op het gebied van human resources (HR), andere hoge ambtenaren of een (interne/externe/onafhankelijke) raad of commissie;
- De samenstelling van deze raden, de basis waarop leden worden benoemd en de manier waarop zij hun rol worden geacht te vervullen, zijn stuk voor stuk van belang in de benoemingsprocedures;
- Deze raden staan onder steeds grotere druk om "onafhankelijker" en transparanter voor het publiek te worden.

De grootste uitdagingen in de benoemingsprocedure hebben betrekking op:

- Het openstellen van nieuwe posities;
- De structuur, vorming en werking van selectiecommissies;
- Het voeren van sollicitatiegesprekken;
- En de uiteindelijke selectie met behulp van kandidatenlijsten.

In werkelijkheid kunnen persoonlijke verdiensten een rol spelen bij de benoeming van de hoogste ambtenaren, maar is het niet het enige criterium.

Ofschoon er bijna unanieme overeenstemming is over het belang van politieke neutraliteit, is er geen sprake van een apolitiek proces voor de benoeming van de hoogste ambtenaren. Veel auteurs beweren zelfs dat de procedure de afgelopen jaren meer afhankelijk van de politiek is geworden. Voor ministers is de benoeming van de hoogste ambtenaren van groot belang.

In alle landen speelt het politieke niveau immers een belangrijke rol bij de benoeming van de hoogste ambtenaren, zij het in uiteenlopende mate en via verschillende mechanismen.

In het algemeen, is een belangrijke vraag in hoeverre en in welke fases ministers betrokken moeten worden bij de benoemingsprocedure, of ze het laatste woord hebben over benoemingen of dat er een andere (neutrale) vorm van extern toezicht op benoemingen vereist is.

Vaak wordt er gebruikgemaakt van een bureau of instelling voor de aanwerving van, of advies over, de beste kandidaten voor hoge ambtenaarsposten als voornaamste instrument om politieke neutraliteit en objectiviteit te garanderen in de benoemingsprocedure. Maar ook hier verschilt de praktijk; benoemingsprocedures zijn vaak ondoorzichtig en complex. Over het algemeen is er weinig bekend over benoemingscommissies.

In sommige landen zijn selectiecommissies interne organen waarin ministers een grote beslissingsbevoegdheid hebben, terwijl andere landen besloten hebben om onafhankelijke selectiecommissies aan te stellen en specifieke toezichtsprocedures in het leven te roepen. Beide modellen werpen belangrijke vragen op over hoe belangenverstrengeling en politieke beslissingsbevoegdheid in de benoemingsprocedure het best kunnen worden aangepakt en hoe dit kan worden gecombineerd met de noodzaak van neutrale expertise. De hamvraag in alle modellen is dan ook hoe de politieke belangen van ministers/presidenten in evenwicht kunnen worden gebracht met de vereiste verdiensten.

De meeste instellingen in de EU-lidstaten zijn van mening dat een interne oplossing en zelfregulering als voordeel heeft dat ze sneller, gemakkelijker en minder conflictgevoelig zijn. In de meeste gevallen zijn deze commissies noch volledig onafhankelijk noch hebben ze beduidende toezichts- en handhavingsbevoegdheden.

Er bestaan goede argumenten om vast te houden aan vertrouwelijke en interne benoemingen. Tegelijkertijd zijn er ook argumenten voor de invoering van transparantere en meer onafhankelijke structuren als die zwaarder wegen dan de kritieke punten.

De huidige trends op het vlak van benoemingsbeleid wijzen inderdaad in de richting van meer onafhankelijke toetsing en monitoring. In het kader van deze studie (en gezien het grote belang van cultuur, traditie en politieke context) hebben we geen optimale werkmethoden gevonden. Wel was er de interessante suggestie van de Europese Ombudsman om externe consultants te betrekken bij de benoemingsprocedure en verplichte assessmentcenters te organiseren voor kandidaten, en/of externe benoemingscommissarissen aan te stellen (naar Brits model).

Een alternatieve benoemingsmethode kan (in uitzonderlijke gevallen) zijn om het EP te betrekken bij de benoemingsprocedure. Een commissie van het EP, kan hoorzittingen organiseren met mondelinge getuigenissen van de voorkeurskandidaten van de commissaris of de Voorzitter, en wel voor een klein aantal hoge ambtenaren (directeuren-generaal of alleen de secretaris-generaal) voorafgaand aan hun eventuele benoeming. Het woord "getuigenis" suggereert dat de meeste hoorzittingen voorafgaand aan een benoeming constructief en vrijwillig zijn. Hiermee wordt de benoemingsprocedure transparanter en geloofwaardiger. Bovendien bieden deze hoorzittingen de mogelijkheid om het vertrouwen te creëren. Wij stellen voor het EP geen vetorecht te geven over de benoemingsprocedure. Maar het zou wel een aanbeveling kunnen doen om niet over te gaan tot benoeming. In dat geval kunnen commissarissen of voorzitters een denkpauze inlassen.

Aanbevelingen

In deze studie wordt een reeks maatregelen aanbevolen om de benoemingsprocedure voor de hoogste ambtenaren te verbeteren, waaronder:

- Er moet een speciale benoemingsprocedure worden vastgesteld voor de benoeming van de secretaris-generaal van de EC.

- Wijziging van de artikelen 7 en 29 van het Statuut om de duidelijkheid ervan te verbeteren en de kansen op verkeerde toepassing of wanbeheer te beperken.

- De mogelijkheid voor de Ombudsman om een procedure voor rechterlijke toetsing in te leiden zodat het Hof van Justitie het wanbeheer kan bevestigen (of verwerpen) en kan besluiten over de juridische gevolgen.

- Onderzoeken van de manieren waarop EU-burgers en organisaties eventueel betrokken kunnen worden bij de invulling van institutioneel beleid over benoemingen en bij de aanvechting van dit beleid of zelfs van reeds genomen, individuele beslissingen.

- De aanpak van problemen in verband met expertise of de verbetering van de capaciteit onder de aandacht brengen, met name de basiskennis van leden van selectiecommissies.

- Het vergroten van de efficiëntie, duidelijkheid en transparantie, of nog eerder in het proces: het aanpakken van de ingewikkelde administratie van de benoemingsprocedure, bijv. criteria en motivaties voor de keuze voor interne en externe (open) procedures.

- De verbetering van de transparantie van benoemingsprocedures, waaronder meer controle en onafhankelijke toetsing van benoemingsprocedures.

- Waarborgen dat het politieke niveau, bijv. een minister, kan kiezen uit een shortlist van kandidaten die is ingediend door een commissie of een onafhankelijk panel in plaats van één enkele kandidaat voorgelegd te krijgen.

- Nadenken over een rol voor het Parlement: een van zijn commissies kan hoorzittingen organiseren met mondelinge getuigenissen van de voorkeurskandidaten van de commissaris of de Voorzitter voor een klein aantal hoge ambtenaren (directeuren-generaal of alleen de secretaris-generaal) voorafgaand aan hun eventuele benoeming.

- Aan de bestaande bepalingen over belangenverstrengelingen een aanvullende toelichting toevoegen over de beheersing van belangenverstrengelingen in de ontwikkelingsfase van de benoeming van personeelsleden.

1 INTRODUCTION

1.1 OBJECTIVES AND SCOPE

The European Parliament (EP) contracted Blomeyer & Sanz on 4 September 2018 to prepare an analytical study on appointment procedures of the most senior-level officials (SLO) in the European Union (EU) institutions.

This study aims to provide data and related analysis on the topic of SLO appointment procedures in the EU institutions, to be used by the EP in developing contributions to improve the status quo.

Looking first at the study objectives, the Terms of Reference (ToR) provide a very detailed list of nine content items ('Content of the study', ToR p. 2). These items were discussed at the kick-off meeting for this study with the EP (14 September 2018), allowing to structure the study in three dimensions, comprising a legal, practical and ethical or integrity dimension:

- The **legal dimension** of the appointment of the new Secretary-General (SG) of the European Commission (EC)[1]: The ToR ask for reflections on the legality of some of the aspects of the appointment, both with regard to the text and the spirit of the law. The ToR also ask for recommendations for improving the current legal provisions. Finally, the ToR note an interest in the status of administrative acts and conditions for revoking them. In the light of the recent European Ombudsman review of the appointment of the new SG, and other existing legal assessments[2], this study focuses on the three specific areas of (1) conflicts of interest in the context of SLO appointments (Art. 11 of the Staff Regulations), (2) the composition of the bodies in charge of assessing applications (the Consultative Committee on Appointments), and (3) exceptions to the principle of publication of vacancies (the use of Article 7 'reassignment with post without publication of the vacancy' and the related jurisprudence on urgency / seriousness). With regard to these three areas the Ombudsman considered the appointments of Deputy SG (DSG) and of the new SG to constitute 'maladministration'. In fact, the Ombudsman concluded that there were four cases of maladministration in the course of the two appointments. These are examined below in the Legal Dimension part. The fourth case of maladministration relates to the selection procedure for the DSG. In addition to these three areas, this study will also deal with the question of revoking administrative acts.
- The **practical dimension** of the appointment: The study reviews the practice of SLO appointment procedures, in selected EU institutions (EP, Council, EC), the Council of Europe (CoE), the European Free Trade Area Secretariat (EFTA) the World Bank (WB), the Organisation for Economic Cooperation and Development (OECD) and selected Member States (Denmark (DK), Estonia (EE),

[1] In fact, the process of appointing the new SG consisted in two consecutive appointments that took place within minutes from one another: the appointment of the Deputy SG and the appointment of the SG; the study reflects this fact and, following the approach of the European Ombudsman, addresses these as separate appointments, albeit linked by several fundamental common elements.

[2] Note that existing assessments of the legality of the appointment are available from the EP and the EC (e.g. EC answers to the follow-up questions of the Budgetary Control Committee (CONT) of the EP on the appointment of the new SG of the EC, dated 4 April 2018). Moreover, the appointment was subject to review by the European Ombudsman (Joint Complaints 488/2018/KR and 514/2018/KR on the European Commission's Appointment of a new Secretary-General).
This study does not intend to repeat the existing assessments. Neither would this add value nor would this be realistic: this study is due by 30 November 2018, and the Ombudsman estimates a total volume of materials of relevance to the case of up to 11,000 pages. European Ombudsman (2018), 9.

France (FR), The Netherlands (NL), United Kingdom (UK)), aiming to identify possible areas of improvement, both in the scenario of maintaining the current legal status for the appointment of SLOs in the EU institutions, but also with a view to a possible reformed legal framework.

- And directly related to the practice of appointment procedures, the **ethical dimension** of the appointment: Whilst the appointment might have been 'legally compliant', stakeholder positions (EP, Member States, civil society and academia) clearly suggest that the appointment was 'ethically deviant'. The ToR very rightly emphasize the relationship between the appointment and the 'reputation of the European Commission'. Existing research has clearly demonstrated the link between ethical behavior or integrity and citizen trust in institutions and in democracy[3]. The appointment of the new SG might have undermined the reputation of the EC at a rather critical point in time for the development of the EU (e.g. Brexit), and just one year before the next EP elections and renewal of the EC[4].

For the purposes of this study, SLOs are defined as positions comparable to the positions of SG, DSG, Director General (DG) and Deputy Director General (DDG) in the EU institutions[5].

Finally, at this stage it can already be noted that the study adds substantial value in terms of research insights into the appointment of SLOs. Our review of the literature confirms that there is only limited existing research into the practice of SLO appointments in the EU institutions. This can be considered somewhat surprising, given the importance of the posts and the transcendence of 'scandals' in terms of citizens' trust in the institutions and in democracy in general. Indeed, to date research has focused on the power of senior-level civil servants, but less on how this power is acquired in the first place[6]. Moreover, existing research has focused on merit-based recruitment in EU Agencies (confirming that administrations that don't recruit on the basis of merit are more prone to corruption)[7]. To the best of our knowledge, there is no academic literature on the appointment of the new SG[8].

[3] See for example for a qualitative approach, Allen, N. and Birch, S. (2015) *Ethics and integrity in British politics, How citizens judge their politicians' conduct and why it matters;* and for a quantitative approach: van der Meer, T. and Hakhverdian, A. (2016) *'Political Trust as the Evaluation of Process and Performance: A Cross-National Study of 42 European Countries' in Political Studies, 1-22 (Wiley Online Library).* For example, Warren (2018: 5) notes that democracies thrive when there is trust in the non-political, most notably the civil service, and when distrust is channelled towards the political such as legislatures. In cases of politicisation of the civil service there is a risk of distrust spilling over from the political to the non-political: '...we should not worry if citizens have low trust in the political institutions of a government, as trust would (on average) be misplaced. But we should worry if citizens generalize, distrusting even those parts of government that are designed to hold a public trust'. See Warren, M. (2018) 'Trust and democracy' in Uslaner, E. (ed.) *The Oxford Handbook of Social and Political Trust.*

[4] Eurobarometer 89, based on field work in March 2018 (Mr Selmayr was appointed in February 2018) reports an increase in trust in the EC from 42% trust in autumn 2017 to 46% trust in spring 2018. Note that distrust in the EC (down to 39% from 41%) has decreased less than for the EP (down to 39% from 42%).

[5] Note that this definition implies one important methodological constraint: How can we then compare systems with and without cabinet/political advisers. Often, system without cabinet systems have a more opaque and 'politicised' recruitment and appointment system. Whereas systems with a cabinet system have a more transparent system, but not for cabinet members and political advisors.

[6] See for example: Peterson, J. (2016) 'Juncker's political European Commission and an EU in crisis' in *Journal of Common Market Studies*, 6.

[7] Egeberg, A. (2017) Merit-based recruitment boosts good governance: How do European Union agencies recruit their personnel? in *International Review of Administrative Sciences* 0(0) 1-17.

[8] However, existing research has looked at power in the Juncker cabinet: 'One official with *cabinet* experience warned that 'people are afraid of Martin. He's a symbol of unaccountable power in the hands of people who are inexperienced and don't know the house'. Peterson, J. (2016) 'Juncker's political European Commission and an EU in crisis' in *Journal of Common Market Studies*, 17.

1.2 METHODOLOGY

This study was prepared on the basis of desk research and interviews/case studies.

- Desk research: Desk research aimed to establish first insights into the 'status quo' on SLO appointment procedures within the EU institutions and beyond. Annex 1 presents an overview of the literature considered for this study.
- Interviews/case studies: To verify the information gathered via desk research, a series of 'confirmatory' interviews/case studies were conducted:
  - ✓ EU institutions: EC, EP, GSC
  - ✓ Member States: DK, EE, FR, NL, UK
  - ✓ Other: CoE, EFTA, WB, OECD

  The cases were selected on the basis of the requirements noted in the ToR, exchanges with the EP, and first insights from the literature, most notably in terms of Member States considered to have developed a strong merit-based approach to the appointment of SLOs. For example, Bale (2017) notes DK, the UK and the Baltic States, especially EE, for its 'low degree of politicisation'[9].

1.3 REPORT STRUCTURE

The report is organised in the following sections:

- Section 2 – Introduction to the 'Selmayr case'
- Section 3 – Legal dimension
- Section 4 – Practical and ethical dimension
- Section 5 – Concluding considerations and recommendations

[9] Bale, T. (2017), *European Politics: a Comparative Introduction* 4th edition, Basingstoke: Palgrave Macmillan.

2 INTRODUCTION TO THE 'SELMAYR CASE'

This section briefly presents data on the appointment of the new SG of the EC and related developments. As noted in the introduction, considering the recent European Ombudsman review of the appointment of the new SG[10], and other existing legal assessments[11], this study will only revisit the appointment of the new SG to set the context for discussion, for example, it is important to refer to the 'Selmayr Case' since this triggered the EP's request for this study.

Introducing the case, the table below presents a chronology.

Table 1: Chronology

DATE (ALL 2018 EXCEPT NOTED)	EVENT
September 2015	SG Italianer indicates to President Juncker intention to retire after March 2018
21 February	Mr Selmayr is first appointed DSG and then SG (College of Commissioners meeting)
1 March	Mr Selmayr becomes SG
12 March	EP plenary debate on the appointment
20 March	CONT questionnaire to EC
25 March	EC reply to CONT questionnaire
27 March	CONT hearing with Commissioner for Human Resources
28 March	CONT 2nd questionnaire to EC
4 April	EC reply to CONT 2nd questionnaire
18 April	EP resolution on the integrity policy of the EC
5 May	Launch of Ombudsman enquiry
3 September	European Ombudsman issues recommendation on cases 488/2018/KR and 514/2018/KR on the EC's appointment of a new SG[12]
25 September	Inter-institutional round table
21 November	Joint Meeting, Committees on Budgetary Control, Legal Affairs, Petitions
26 November	EP SG announces reform proposals acknowledging that current procedures date back some 20 years (proposed reforms include always proposing three candidates for a SLO appointment, and promoting gender balance amongst SLOs, with recruitment procedures, where possible, to involve shortlists of candidates involving at least one woman)[13]
13 December 2019	European Parliament Resolution on the Activities of the European Ombudsman in 2017[14]
11 February 2019	European Ombudsman issues decision in cases 488/2018/KR and 514/2018/KR

At the EC's College of Commissioners' meeting on 21 February 2018, the EC appointed Mr Selmayr, the former Head of Cabinet of EC President Jean-Claude Juncker, to become DSG, and then SG. The EP debated the appointment at a plenary session in March, and in the same month followed up with

[10] European Ombudsman (2018), Recommendation of the European Ombudsman in joint cases 488/2018/KR and 514/2018/KR on the European Commission's appointment of a new Secretary-General.

[11] Existing assessments of the legality of the appointment are available from the European Parliament and the European Commission (e.g. Commission answers to the follow-up questions of the Budgetary Control Committee of the European Parliament on the appointment of the new Secretary-General of the European Commission, dated 4 April 2018). Moreover, the appointment was subject to review by the European Ombudsman (Joint Complaints 488/2018/KR and 514/2018/KR on the European Commission's Appointment of a new Secretary-General).

[12] European Commission (2018), Opinion of the European Commission on the European Ombudsman's recommendation, The EC response is available on: link to EC response.

[13] These announcements were made in the context of the annual discharge procedure of the EP (meeting of CONT of 26 November 2018, as of 18:35:45). The SG's proposals are noted in this report, however, a detailed review of the proposals was not possible as by the time of the proposals the research for this study had been completed.

[14] Whilst this Resolution was adopted after the completion of our research, for the sake of completeness it is worth noting the Resolution's call for the resignation of the new SG: 'Believes that the Commission failed to respect the principles of transparency, ethics and the rule of law in the procedure it used to appoint Martin Selmayr as its new Secretary-General; strongly regrets the Commission's decision to confirm Mr Selmayr as its new Secretary-General, disregarding the extensive and widespread criticism from EU citizens and the reputational damage caused to the EU as a whole; 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'.

detailed questions to the EC and a hearing, organised by the EP's Committee on Budgetary Control (CONT), with Commissioner Günther Oettinger, the Commissioner responsible for Human Resources. Following a critical EP resolution (18 April), the Ombudsman launched an enquiry into the appointment procedure (5 May). This resulted in the identification of four instances of maladministration concerning:

- **Article 11 of the Staff Regulations**: Failure to comply with Article 11a of the Staff Regulations, i.e. failure to recuse from DSG appointment procedure implies 'at the very least, a risk of a conflict of interests'[15]. EC failure on the account of ensuring compliance with Article 11a is the first instance of maladministration stated by the Ombudsman[16]. See section 3.2.3.7 'Impartiality and conflicts of interest' for a detailed discussion.
- **Article 10 of the Commission Decision on the Consultative Committee on Appointments**: The Ombudsman identifies the failure to ensure the adequate composition of the Consultative Committee on Appointments as the second instance of maladministration (in breach of Article 10 of the Commission Decision on the Committee)[17]. See section 3.2.3.6 'Composition of the Consultative Committee on Appointments' for a detailed discussion.
- **Article 4 of the Staff Regulations**: The Ombudsman considers that with regard to the entire procedure of DSG appointment that 'its sole purpose was to make Mr Selmayr eligible for reassignment as Secretary-General'[18]. This is identified as the third instance of maladministration and breach of Article 4 of the Staff Regulations: 'no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations'[19]. See section 3.2.3.3 'Purpose of specific appointments' for a detailed discussion.
- **Article 7 of the Staff Regulations**: Finally, the Ombudsman concluded that the use of Article 7 and its 'reassignment with post' procedure constituted maladministration in the case of appointment of Mr Selmayr to the post of SG of the Commission. First of all, the sense of urgency around the SG appointment was created artificially as the previous SG's resignation was kept secret. In any case, the Ombudsman argued, the EC ought to have launched a procedure to identify and evaluate potential candidates for the post of SG before the previous SG's retirement. Requirements that were established for the use of this procedure by the Court of Justice of the European Union (CJEU) include equivalence of the two posts. When there is no equivalence, and the post to which the person is being transferred is an important function where specific skills are required, and the decision will have important and general effects, the institution should institute a 'procedure' to ensure that the most competent person is appointed. The Ombudsman considered that there was no equivalence between the post Mr Selmayr held before his appointment to the post of DSG and the post of SG. In fact, argued the Ombudsman, there is no post within the EC that is equivalent as regards the required skills to the post of SG. Thus, according to the Ombudsman, the EC always should institute the

[15] European Ombudsman (2018), 18.
[16] Ibid, 19.
[17] Ibid, 23.
[18] Ibid, 24.
[19] Ibid, 24.

procedure described in T-373/04 *Guggenheim v. Cedefop* (procedure to identify the most competent person). See section 3.2.3.4 'Publication of vacancies versus transfer with post' for a detailed discussion.

Following up on the EP Resolution, the EC organised an Inter-Institutional Round Table on 25 September 2018 to discuss the need/scope of possible reform of the appointment of SLOs in the EU institutions. To prepare for this meeting, the EP issued a survey on practices with the appointment of SLOs during the years 2013 to 2018 in the EC, EP, CJEU, European Court of Auditors, European Economic and Social Committee, Committee of the Regions, European External Action Service, European Ombudsman, European Data Protection Supervisor and the Council.

The EP survey covered the posts of SG, DSG, DG and DDG. The following points briefly note the main survey findings:

- Concerning SGs and DSGs, the institutions noted a total of 13 appointments upon publication of post whilst seven appointments were made without publication of post (four in the EC, one in the EP, one in the European External Action Service (EEAS) and one in the European Economic and Social Committee)[20].
- Concerning DGs and DDGs, five institutions provided data, namely the EC, EP, CJEU, EEAS and the Council. The other institutions reported not having any DGs/DDGs or not having made any appointments during the period under review. The table below shows the 'aggregate' figures for DGs and DDGs (with data on DDGs only provided by the EC) for the five institutions. The data shows, inter alia, that whilst there was a total of 146 appointments, vacancies were only published on 85 occasions (58%); of these 85 'public' procedures, 75 procedures (88%) attracted more than one, but ten procedures attracted only one candidate (12%); regarding transfers, of the total of 85 transfers, only 19 involved the publication of a vacancy (22%); only 11 of 146 appointments were made from outside the institution (7%); and only 36 of 146 appointments (25%) involved an external assessment procedure, with only the EC (for 35 DDGs) and the Council (for one DG) recurring to external assessments.

[20] Note that the European Data Protection Supervisor did not provide data since it does not have any positions comparable to that of SG or DSG; the Council noted that the appointment of its SG was not subject to the Staff Regulations but rather subject to Art 240.2 of the TFEU.

Table 2: EP survey responses

SURVEY QUESTION	ANSWERS (DGS AND DDGS)
Nb of vacant posts?	94
Nb of appointments?	146
Nb of publications of vacant posts?	85
Nb of procedures with one candidate?	10
Nb of procedures with more candidates?	75
Nb of candidates appointed by promotion?	47
Nb of transfers?	85
Transfers with publication of vacancy?	19
Transfers without publication of vacancy?	66
Nb of candidates appointed directly after employment in a cabinet?	9
Nb of appointments from within the institution?	135
Nb of appointments from outside the institution?	11
Nb of appointments with external assessment procedure?	36

Finally, on 4 December 2018 a letter from Commissioner Günther Oettinger containing the EC's response to the European Ombudsman's recommendation on the matter was published[21]. In the letter the EC emphasised that it had been in full compliance of the Staff Regulations throughout the process of appointing its DSG and SG. Overall, the EC seems to have adopted a very literal and perhaps unnecessarily narrow interpretation of the Ombudsman's recommendation. The EC's point that the Ombudsman's Recommendation did not contest the legality of the SG appointment and the qualifications of the appointed person stands in stark contrast to the overall contents of the Recommendation and the Ombudsman's views on the matter made very clear in the Recommendation. Further, according to the EC, the Ombudsman's press release accompanying the Recommendation was misleading when it stated that the maladministration by the EC was due to it not following the relevant rules either in letter or in spirit, as no evidence of a violation of any rules was presented in the Recommendation. This argument does not seem to reflect the Ombudsman's findings. While, as noted in the letter, it is only the General Court or the Court of Justice of the European Union that can ultimately decide on whether the rules were violated or not, the Ombudsman presented quite a number of arguments, accompanied by evidence and analysis that spoke of violations of binding rules. The study deals with these findings below, in the 'Legal Dimension' part.

[21] European Commission (2018), Opinion of the European Commission on the European Ombudsman's recommendation, Link to EC response.

Finally, on 11 February 2019 the Ombudsman issued its decision on the case, considering the EC's response of December 2018. The Ombudsman considers the EC's response to have failed to genuinely engage with the Ombudsman's recommendation: '*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.*' [22] Consequently, the Ombudsman reiterates its recommendations (specific appointment procedure for the SG; timely publication of a vacancy notice and placing of the appointment on the agenda of the College; enlarging the membership of the Consultative Committee on Appointments, including members from outside the Commission), and closes the inquiry.

[22] European Ombudsman (2019), 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.

3 LEGAL DIMENSION

KEY FINDINGS

- The problems of lack of transparency in the appointment of SLOs, as well as practices and decisions that can be seen as crossing legal and ethical boundaries, reach beyond the EC. The recent reform of the Staff Regulations (2013)[23] towards greater transparency, more coherent and better implementation was the result of problems identified across many EU institutions and agencies. However, the reform remains work in progress. The EP faced severe criticism recently with regard to appointment procedures for some SLOs that were seen as being done 'through backroom political deals rather than a transparent recruitment process'.[24] There is no doubt that significant problems continue to occur, in the context of SLO appointments, with regard to implementation of the Staff Regulations and more general rules of EU administrative law and other legal principles applicable to the activities of the EU institutions. There is discernible perception, across the institutions themselves and in the media, that some of these principles and rules, as well as ethical requirements, are at the very least being stretched. The reform towards greater transparency mentioned above addressed these problems to some extent, but it is clear that more needs to be done. The analysis conducted in this study accompanies the current discussions across the major EU institutions, and in particular the EP and the EC, on revising appointment procedures.
- The 'Legal Dimension' part of this study examined the applicable principles and rules, including the Staff Regulations, as well as codes of conduct of EU institutions, as they apply to appointments of SLOs. The legal framework, supplemented by policy statements and codes of conduct, is very comprehensive indeed. While there are some changes to substantive rules this study recommends, in part following the European Ombudsman's recommendation in the Selmayr case, the main source of focus ought to be greater clarity and better implementation of the existing rules, oversight, interinstitutional cooperation and coherence. Further, with regard to oversight, the study recommends greater involvement of staff members or groups within each institution, interinstitutional cooperation, the European Ombudsman, as well as to some extent also EU citizens and groups, in the oversight process. This involvement, the precondition to which is transparency of rules and their implementation, may also involve the ability to challenge some parts of the appointment process or decisions taken during and in conclusion of the process before the Court of Justice. This study aims to contribute to the debate on the deficit of democratic participation and oversight in EU decision making, while it also takes account of the need to preserve the autonomy of EU institutions to shape and implement their staff and employment policies.

[23] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union. Some of the features of the reform are particularly relevant in the context of this study and are examined below.

[24] The EP Staff Committee, some trade unions and other officials were quoted by de la Baume, M. in "European Parliament accused of political stich-up over top posts", Politico, 27.12.2018, https://www.politico.eu/article/european-parliament-top-posts-klaus-welle-martin-selmayr-appointments-brussels/, accessed on 1 January 2019.

- The current concern seems to be politicisation of senior appointments, and this issue is by no means unique to EU institutions. Rather, it appears to be a common problem across the Western European states of the 'old Europe' as well as the Central and Eastern European countries[25]. The 'Practical and Ethical Dimension' part of this study contains an assessment of the academic literature on the subject as well as some recommendations based on comparative analysis of selected institutions and states on how this issue may be handled.

3.1 INTRODUCING THE LEGAL DIMENSION

When formulating the structure of Part Three of the study and its desired outcomes we took account of the work already done, by the EP and by the European Ombudsman[26], on the 'case' of the appointment of the EC's new SG. The EP's Resolution concluded that the EC's current practices in SLO appointments - practices that exhibit a clear preference for internal 'transfers with post', without publication of a vacant post - "may undermine the principle of equality of opportunities and the selection of the best qualified candidates". The Parliament called on "[...] all Union institutions to fill positions through such transfers only with proper notification of staff, in line with the case-law of the CJEU, and to give preference to open and transparent procedures aimed at selecting the best qualified candidates"[27]. The EP referred to the "tradition of non-publication" as an approach that reached its limits "[...] insofar as it does not correspond to the modern standards of transparency by which the Commission, the European Parliament and other EU institutions should abide"[28]. The EP expressed their concern, stating that "this way of proceeding with the appointment of the new Secretary-General could cast doubt on the preceding procedure for the appointment to Deputy Secretary-General insofar as it might not have served the purpose of filling this vacancy in the first place, but rather of allowing for the transfer of this post to the post of Secretary-General under Article 7 of the Staff Regulations without publication of the post". The EP considered that, "[...] although such a way of proceeding might satisfy purely formal requirements, it nevertheless runs against the spirit of the Staff Regulations and prevents competition for the post by any other eligible staff"[29]. Ultimately, the EP stated 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**"[30].

The European Ombudsman went further in her critical assessment of the EC's approach, and concluded that four instances of maladministration occurred in the process of appointment of Mr Selmayr to the post of DSG and the post of SG:

"1) Failure to take appropriate measures to avoid the risk of a conflict of interests arising from the involvement of Mr Selmayr and/or other members of the President's Cabinet in the decision-making leading to the creation of the vacancy and the approval of the vacancy notice for Deputy Secretary-General (a vacancy for which Mr Selmayr highly likely knew he would apply and later did).

[25] For an excellent account of the tendencies across a selection of European states see the special edition of Acta Politica (2016), 51.
[26] Recommendation of the European Ombudsman of 31 August 2018 in Joint Cases 488/2018/KR and 514/2018/KR on the European Commission's appointment of a new Secretary General, available at https://www.ombudsman.europa.eu/en/recommendation/en/102651.
[27] European Parliament Resolution of 18 April 2018, Findings, article 14.
[28] Ibid, article 13.
[29] Ibid, article17.
[30] Ibid. article 20.

2) Failure to ensure that the composition of the Consultative Committee on Appointments (CCA), for the selection of a Deputy Secretary-General, was in accordance with Article 10 of the CCA Rules of Procedure.

3) Holding a selection procedure for a Deputy Secretary-General, which did not serve its stated purpose to fill the vacancy, but rather only to ensure that Mr Selmayr would be eligible for reassignment as Secretary-General.

4) As the impending retirement of Mr Italianer was kept secret, a situation of urgency to fill the post of Secretary-General was created artificially. Even then, this should not have prevented the Commission from launching a procedure to identify and evaluate possible candidates for Secretary-General before Mr Italianer would retire"[31].

This study, including the 'Legal Dimension' part, goes beyond the work of the EP and the European Ombudsman's findings: while focusing on the key issues highlighted above (and in the ToR), it needs to take a step back and explore the appointment in the wider context. This approach can further contribute to the current understanding of what happened in the course of the appointment procedure, or rather two distinct appointment procedures, and what should and could have happened. Further, and more importantly, it can help shape a more cohesive framework of principles, rules and good practices in appointing SLOs as well as the framework of mechanisms and procedures for their coherent and effective implementation. Such a framework ought to be capable of meeting the current understanding of good administration and transparency, which this part explores.

The 'Legal Dimension' part examines the legal context of SLO appointments in the EU institutions. The context is explored starting from the most general principles and legal provisions (in primary and secondary EU law, as well as CJEU jurisprudence), through more detailed principles concerning good administration, democracy and transparency, to the detailed rules on appointments in the EU Staff Regulations and the EC and some other EU institutions' internal procedural rules, codes of conduct and guidelines. We wish to emphasize lack of uniform administrative law for the EU, in spite of the EP proposals and the Model Rules developed by the Research Network on EU Administrative Law (ReNEUAL)[32]. The four points of focus mentioned above (conflict of interest, the composition of bodies assessing applications, exceptions from publication of vacancies, as well as the matter of the purpose of the first appointment being other than filling the post), are assessed against these legal requirements. With regard to these four areas, the European Ombudsman concluded that the appointment of the new SG constituted 'maladministration' but the EC contests all of the Ombudsman's conclusions and claims no rules were broken. The study explores the nature of maladministration (as well as illegality – a narrower concept) and the legal implications of maladministration.

Further, the study deals with the overarching question of status of administrative acts and revoking administrative acts (as a corollary to the general principle of EU law – the rule of law). Analysis of Article 263 TFEU (judicial review of EU acts), especially the CJEU jurisprudence concerning review of EU acts, is

[31] European Ombudsman's Recommendation, Conclusions, article 101.
[32] Research Network on EU Administrative Law, http://www.reneual.eu/.

conducted in order to assess whether and on what conditions acts such as an appointment of the EC's Secretary-General, and especially the earlier appointment of the Deputy Secretary-General, can be revoked, reviewed and perhaps annulled.

In line with the rest of this study, the analysis of the legal context reaches beyond the principles, rules and practices applicable to the EC – to include comparisons with other EU institutions. The problems of lack of transparency in appointments of SLOs, as well as practices and decisions that can be seen as crossing legal and ethical boundaries, reach beyond the EC. The recent reform of the Staff Regulations (2013)[33] towards greater transparency, more coherent and better implementation was the result of problems identified across many EU institutions and agencies. Indeed, the reform remains work in progress. The EP faced severe criticism recently with regard to appointment procedures for some SLOs that were seen as being done "through backroom political deals rather than a transparent recruitment process"[34]. Pilar Antelo, chair of the EP's staff committee, expressed these concerns in a letter to the EP's President (published by Politico), also arguing that politicisation of SLO appointments demotivates other capable civil servants, and fuels Euroscepticism[35]. Eight of the people who Politico predicted would be appointed in this process were indeed appointed to senior management positions in the EP in early December 2018[36]. Whether the concerns expressed in Ms Antelo's letter with regard to the specific individuals are well-founded or not, there is no doubt that significant problems continue to occur, in the context of SLO appointments, with regard to implementation of the Staff Regulations and more general rules of EU administration law and other legal principles applicable to the activities of the EU institutions. There is discernible perception, across the institutions themselves and in the media, that some of these principles and rules, as well as ethical requirements, are at the very least being stretched. The reform towards greater transparency mentioned above addressed these problems to some extent, but it is clear that more needs to be done. The analysis conducted in this study accompanies the current discussions across the major EU institutions, and in particular the EP and the EC, on revising appointment procedures.

The 'Legal Dimension' part of this study examines the applicable principles and rules, including the Staff Regulations, as well as codes of conduct of some EU institutions, as they apply to appointments of SLOs. The legal framework, supplemented by policy statements and codes of conduct, is very comprehensive indeed. While there are some changes to substantive rules this study recommends, in part following the European Ombudsman's recommendation in the "Selmayr case", the main source of focus ought to be greater clarity and better implementation of the existing rules, oversight, interinstitutional cooperation and coherence. Further, with regard to oversight, the study recommends greater involvement of staff members or groups within each institution, interinstitutional cooperation,

[33] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union. Some of the features of the reform are particularly relevant in the context of this Study and are examined below.

[34] The EP Staff Committee, some trade unions and other officials were quoted by de la Baume, M. in "European Parliament accused of political stich-up over top posts", Politico, 27.12.2018, https://www.politico.eu/article/european-parliament-top-posts-klaus-welle-martin-selmayr-appointments-brussels/, accessed on 1 January 2019.

[35] Letter is available at: https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Tajani-appointments-1.pdf.

[36] The authors of this study received this information as well as a letter sent by Mr. Dieter Wils (Chair of the EP's Staff Committee) to the President of the EP on 19 December 2018, from Mr Wils. In his letter, Mr Wils calls on the President to stick to his commitment of improved transparency and credibility. He notes that 80% of the appointments in question were the result of behind-closed-doors trade-offs.

the European Ombudsman, as well as to some extent also EU citizens and groups, in the oversight process. This involvement, the precondition to which is transparency of rules and their implementation, may also involve the ability to challenge some parts of the appointment process or decisions taken during and in conclusion of the process before the Court of Justice. This study aims to contribute to the debate on the deficit of democratic participation and oversight in EU decision making, while it also takes account of the need to preserve the autonomy of EU institutions to shape and implement their staff and employment policies.

The current concern seems to be politicisation of SLO appointments, and this issue is by no means unique to EU institutions. Rather, it appears to be a common problem across the Western European states of the 'old Europe' as well as the Central and Eastern European countries[37]. The 'Practical and ethical dimension' part of this study contains an assessment of the academic literature on the subject as well as some recommendations based on comparative analysis of selected institutions and states on how this issue may be handled.

While the part is structured following the key categories of sources of principles and rules in the EU system, comparative remarks referring to principles or rules from beyond the EU system are included whenever relevant. The analysis in Part Three, including its recommendations, should be read together with Part Four (Practical and Ethical Dimension), where further comparative analysis is conducted and further recommendations are made.

3.2 LEGAL FRAMEWORK FOR THE APPOINTMENT OF SLO

What principles and rules do EU institutions need to follow when appointing SLOs? Is the appointment process to be subject to oversight? Can appointment decisions ever be revoked, or challenged in court and annulled? This part of the study explores the answers to these questions.

Administrative decisions, including appointments, function within the wider framework of administrative law and administrative procedure. No coherent catalogue of EU principles and rules of administrative law and administrative procedure exists. Administrative law of the EU remains scattered among a variety of primary and secondary sources of EU law, CJEU judgements, and non-binding sources: codes of conduct, communications, guidelines etc. Codification efforts have intensified recently. The ReNEUAL Network's 2014 Model Rules on EU Administrative Procedure[38] are notable, as are the EP's proposals for a catalogue of general principles of EU administrative law, either as a regulation or a non-binding instrument[39].

There are very specific and detailed rules that regulate SLO appointments in EU institutions. Some are applicable horizontally to all EU bodies, others are internal requirements for specific institutions. More generally, there are sources of administrative law that govern administrative practices and conduct of

[37] For an excellent account of the tendencies across a selection of European states see the special edition of Acta Politica (2016), 51.
[38] Research Network on EU Administrative Law, http://reneual.eu/index.php/projects-and-publications/reneual-1-0.
[39] See EP resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)); the 2015 Report for the JURI Committee 'The General Principles of EU Administrative Procedural Law (http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA(2015)519224_EN.pdf); the Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration, (2016) 0279 (http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0279#BKMD-9); and the European Parliament public consultation on general rules for an open independent and efficient European administration (2018): http://www.europarl.europa.eu/committees/en/juri/eu-administrative-law.html?tab=Introduction.

public administration and civil servants. Further, some fundamental principles of EU law contained in the Treaties or resulting from the CJEU case law constitute the legal foundation for any act of the EU institutions. While these more general sources largely concern the relationship between EU citizens and EU institutions (through various types of administrative actions and procedures), there is no doubt that at least some of the principles and rules applicable to those relationships extend to the internal workings of the EU institutions. Even if in relation to the appointment procedures these principles and rules may not generate individual rights enforceable before courts (as regards the general public), they nevertheless are binding upon each EU institution in its internal workings, and failure to observe them constitutes maladministration that, if it fulfills the criteria for illegality, may well constitute grounds for judicial review[40]. Administrative decisions that fail to comply with EU law (with the detailed rules on appointments and the more general sources of rules) may need to be revoked, and can also be challenged before the CJEU. The Court reviews the legality of the measures and can annul them.

The relevant principles and rules are examined below. **It is possible that, throughout the procedure for appointment of Mr Selmayr to the post of DSG of the EC and the subsequent immediate appointment to the post of SG, at least some of these principles and rules were broken**. Both the EP and the European Ombudsman concluded that maladministration occurred. The final determination of legality of the EC's conduct would need to be conducted by the CJEU, but it is unlikely that the Court will be in the position to make such a determination (for reasons specified below). The analysis of the legal context highlights the weaknesses in the system of oversight on the EU administration.

3.2.1 Primary sources: Treaty Articles and general principles of EU law. Common principles of public administration

The legal status of the two Treaties founding the European Union (the Treaty on European Union (TEU) and the TFEU) is similar to the legal status of many general principles of EU law[41]. The general principles expressly mentioned in the Treaties or in the Charter of Fundamental Rights of the European Union (CFREU) have the status of primary law sources. A number of principles are particularly relevant in the context of SLO appointments.

The 'heart and soul of the Union's values'[42] is the principle of the rule of law, enshrined in Article 2 TEU[43]. The rule of law entails that each EU action ought to have a legal basis in the Treaty (the principle of conferral), and its further corollary – the principle of legality - requires that all conduct of EU administration should follow the law.

Another important principle directly related to the rule of law is the principle of legal certainty – as confirmed by the CJEU in a number of cases in many different contexts[44]. A key concept that needs

[40] The ECJ held very early on, in the case of Algera (7/56, 3 – 7/57 Algera v. Common Assembly) that maladministration can lead to revoking of an administrative act, albeit under strict conditions.
[41] Tridimas, T. (2006), The General Principles of EU Law, Second Edition, OUP.
[42] The Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration, Recital 18.
[43] On the history of the rule of law in the EU system and the jurisprudence of the CJEU see for instance: von Danwitz, T. (2015), The Rule of Law in the Recent Jurisprudence of the ECJ, Fordham International Law Journal, Vol. 37, Issue 5, Article 7.
[44] See Craig, P. (2012), EU Administrative Law, Second Edition, OUP, at pp. 549 et seq., where some of these cases are analysed. Whenever relevant to this study, they shall be quoted below.

discussing in the context of legal certainty is the idea of legitimate expectations. Legitimate expectations lie at the foundation of rules concerning revocation of administrative acts, as well as the CJEU's approach to the review of those acts[45]. Once appointment decisions are made, legitimate expectations of the beneficiaries of these decisions need to be protected. Thus, appointment decisions, if legal, normally cannot be revoked. It should also be emphasised that, as Schonberg and Craig point out in their writings, respect for legitimate expectations fosters good governance and public trust in the administrative authorities, thus encouraging social participation in decision-making and rule compliance[46].

Each EU institution enjoys autonomy and independence in shaping its appointment policies and implementing them. However, in exercising this autonomy and independence EU institutions are under an obligation to not violate any of the fundamental principles of EU law, written sources of EU law such as the Staff Regulations, as well as their own internal procedural guidelines (the latter point – in line with the principle of legitimate expectations). Infringements of those principles or rules can result in annulment of an appointment decision, even at the cost of legitimate expectations[47].

In addition to the general principles mentioned above, Article 15 TFEU regulates the openness principle, requiring the Union institutions, bodies, offices and agencies to conduct their work as openly as possible in order to promote good governance and ensure the participation of civil society. Further, the third indent of paragraph 3 of the same provision requires all EU institutions, bodies, offices and agencies to ensure that their proceedings are transparent. The principle of openness is also regulated by Article 1 TEU, as one of the fundamental principles underlying the foundations of the EU: this provision stipulates that the Treaty marks a new stage in the process of creating an ever-closer Union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. The same openness requirement is contained in Article 10.3 TEU. Article 298 TFEU elucidates the principle of good administration for the EU institutions. It requires that EU institutions, bodies, offices and agencies should have the support of "open, efficient and independent European administration" in carrying out their mission. The EC has been at the forefront of reforms across the EU system aimed, among other objectives, at greater openness and transparency[48]. It is therefore disappointing that in appointing one of the most important EC's officials the level of openness and transparency was not satisfactory. The Ombudsman pointed to lack of openness in the stages before the procedure was commenced, during the appointment procedure and after the appointment took place. In fact, in the course of the 'Selmayr case', the EC may well have fallen short of a number of other general principles mentioned here. The more detailed description of this and other potential instances of maladministration in the 'Selmayr case' can be found below.

[45] An administrative act can be revoked by the EU institution it originated from, and if the institution refuses to revoke it the act can be challenged before the CJEU using the judicial review procedure (Article 263 TFEU).
[46] Schonberg, S. (2000), Legitimate Expectations in Administrative Law, OUP, p. 25, and Craig, P. (2012), EU Administrative Law, Second Edition, OUP, p. 554-555.
[47] See below, in the part exploring judicial review and its implications, for the explanation of the interplay of legitimate expectations and legality, as well as legality and maladministration.
[48] For an overview of the reforms of EU administration and governance initiated by the Commission, see below in the part on policy context. See also Wille, A. (2008), *Beyond the Reforms. Changing the Civil Service Leadership in the European Commission*, https://ecpr.eu/Filestore/PaperProposal/74ebf212-6b28-41a7-87cd-431bf9ba7df7.pdf, for an overview and background of the reforms in EU administration led by Commissioner for Administrative Reform – Neil Kinnock. Accountability and transparency were one of the main aims of the reform; and Bauer, M.W. (ed.) (2009), *Reforming the European Commission*, Routledge.

The abovementioned general principles applicable to the EU administration seem to all fit into the wider concept of 'good administration', which is now formally recognised as a fundamental right by the EU (Article 41 CFREU). The Code of Good Administrative Behaviour, proposed by the European Ombudsman in 1999 and accepted by the EP in 2001, is meant to "explain in more detail what the Charter's right to good administration should mean in practice"[49]. Both the Charter and the Code are examined in more detail below.

The general principles, as they apply to EU administration, can be grouped into four main categories:

1. Reliability and predictability (legal certainty);
2. Openness and transparency;
3. Accountability;
4. Efficiency and effectiveness[50].

These categories were established in the OECD/EU 1999 report on 'European Principles of Public Administration', written primarily in the context of the enlargement of the EU to cover Eastern and Central European states[51]. They signify the shared principles of public administration that are common to EU Member States and constitute the conditions of the European Administrative Space. The European Administrative Space "includes a set of common standards for action within public administration which are defined by law and enforced in practice through procedures and accountability mechanisms"[52]. These principles are also enshrined in the EP's 2016 proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration[53]. Further, they were reiterated in the Preamble to the ReNEUAL Model Rules of Administrative Procedure that sets out the principles, rules and best practices of administrative procedure for the EU Member States[54]. The Model Rules are a collaborative effort of administrative law and procedure scholars from all the EU Member States, with the support of the EP, the European Ombudsman, the European Law Institute, and the Association of the Councils of State and Supreme Administrative Jurisdictions (ACA-Europe).

The principles of public administration are indeed universal values that are accepted globally: for instance, the WB's approach to good governance also evolved towards acceptance of these principles[55].

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[49] As quoted by Mendes, J. (2009), Good Administration in EU Law and the European Code of Good Administrative Behaviour, EUI Working Papers, Law 09, p. 1.

[50] While the analysis above focused on the first three categories, the fourth category of efficiency and effectiveness is relevant in the context of this study and is mentioned whenever we examine the balance of interests between the need for openness, transparency and oversight of appointment procedures with the need for efficiency in the operation of EU bodies.

[51] OECD (1999), European principles for public administration, http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006804.pdf.

[52] OECD (1999), European principles for public administration, http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006804.pdf.

[53] European Parliament and European Council (2016), the Proposal for a Regulation of the European Parliament and of the Council for an open, efficient and independent European Union administration, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0279#BKMD-9.

[54] Herwig, C., Hofmann, H., Schneider, J-P. and Ziller, J. (2014), *ReNeual Model Rules on EU Administration Procedure.* http://reneual.eu/images/Home/BookI-general_provision_2014-09-03_individualized_final.pdf.

[55] Maldonado, N. (2010), *The World Bank's Evolving Concept of Good Governance and its Impact on Human Rights,* Doctoral Workshop on development and international organizations, Stockholm, Sweden, May 29-30.

3.2.2 The Charter of Fundamental Rights – the right to good administration and who can enforce it – introducing the issue of limited standing for individuals and organisations to challenge EU actions and the limited social participation in some aspects of EU decision-making

The Charter binds all the EU institutions, bodies, offices and agencies, as well as EU Member States when they are implementing EU law[56].

Even before the right to good administration found its way into the Charter, it was elaborated in numerous decisions of the CJEU. Thus, it is now a well-developed principle of EU law as well as a fundamental right[57]. In its case law, the CJEU fleshed out the requirements of good administration with the requirements of legality, proportionality, legal certainty, non-discrimination, the right to be heard[58], and the duty to act in good faith[59]. As mentioned above, the right to good administration was clarified and further elucidated in the European Code of Good Administrative Behaviour, proposed by the European Ombudsman in 1999 to the EU institutions and other bodies and agencies. The Code was intended to serve as a blueprint for the institutions' own codes of conduct, and indeed both the EC and the EP, as well as other EU institutions, took it into account when shaping and reforming their own codes of conduct. The Code is used by the European Ombudsman when making determinations of maladministration by EU bodies. The European Code of Good Administrative Behaviour, the European Ombudsman's activity, and some institutional codes are examined below.

Article 41 of the Charter regulates the right to good administration in the following words[60]:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

the obligation of the administration to give reasons for its decisions…"

The provision guarantees every person involved, among other aspects, the right to request from the administration the reasons for their decisions. This seems to be the corollary of the principle of the rule of law[61].

While the case law of the CJEU, decisions of the European Ombudsman, Staff Regulations, and internal rules of procedure and codes of conduct of EU institutions elaborate on many aspects of 'good

[56] Charter of Fundamental Rights, Article 51.
[57] See Slabu, E. (2017), The Right to Good Administration in the Court of Justice of the European Union Case Law, THE USV Annals of Economics and Public Administration, Vol. 17, Issue 1(25), 2017, and Mendes, J. (2009), Good Administration in EU Law and the European Code of Good Administrative Behaviour, EUI Working Papers, LAW 09.
[58] Ibid, 25.
[59] Schonberg, S. (2000), Legitimate Expectations in Administrative Law, OUP and case T-347/03 Branco v. Commission, [2005] ECR II-255.
[60] See Kaňska, K. (2004), Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights, European Law Journal, Vol.10, Issue 3, May, p. 296-326. On the evolution of the right to good administration see Craig, P. (2012), EU Administrative Law, Second Edition, OUP, and Nehl Hanns Peter (1999) Principles of Administrative Procedure in EC Law, Hart Publishing. See also Wakefield, J. (2007), The Right to Good Administration, Kluwer.
[61] See Mashaw, J.L. (2007-2008), Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 Geo.Wash.L.Rev. 99. See also C-367/95 P Commission v. Sytraval, [1998] ECR I-1719.

administration', there is no consensus on its exact features and their implications. As pointed out by Mendes, not all EU institutions followed the Ombudsman's European Code of Good Administrative Behaviour (for instance the EC's Code)[62]. As there is no legally binding catalogue of EU administrative principles, some aspects of the principle and right to good administration remain to be further clarified. While in most cases the principles of good administration concern conduct of an administrative body in specific proceedings involving specific individuals, it is uncertain how these principles operate and what rights they entail (if any) on EU citizens when purely internal issues of an organisational nature are at stake (such as is the case with appointments). There is no doubt that EU institutions are always obliged to follow the law, their own rules of procedure, and codes of conduct, whether it is their internal operation or in contacts with citizens. **What is particularly problematic in the context of this study is who can enforce the right to good administration when it comes to appointment decisions, thus when the principles of good administration are potentially not followed during an appointment procedure**. It is clear from the *Giuffrida* case[63] that an individual concerned can challenge an appointment decision. **Normally, the right can be enforced by persons involved in or affected by specific administrative proceedings and decisions. The question is: can anyone else challenge appointment decisions if procedures that led to them did not follow the principles of good administration?**

Mendes argues for a wider social participation in the EU decision-making - thus for an extension of civic engagement with EU institutions[64]. This postulate relates to a wider discussion within the EU fundamental rights context and the deficit of democratic participation. The discussion covers civic participation before administrative decisions are taken as well as after they have been taken[65]. The latter point concerns the problem of very narrow standing criteria for review of EU acts[66]. At the moment, individuals as well as interest groups, human rights organisations and other bodies representing more general interests cannot challenge administrative steps and decisions in cases in which they are not directly involved as party. They also cannot challenge any other sources of EU law and EU measures not addressed to them because they usually do not meet the criteria of individual and direct concern, and it is still difficult for them to meet the criterion of direct concern in the case of non-legislative measures, for judicial review under Article 263 TFEU. The issues related to revocation and judicial review of administrative measures are examined below.

[62] Mendes, J. (2009), Good Administration in EU Law and the European Code of Good Administrative Behaviour, EUI Working Papers, Law 09.
[63] Case 105/75 Judgment of the Court (First Chamber) of 29 September 1976 - Franco Giuffrida v Council of the European Communities.
[64] Mendes, J. (2011) Participation in EU Rule-Making: A Rights-Based Approach, OUP, 2011, p. 463.
[65] Mendes, J. (2011), Participation in EU Rule-Making: A Rights-Based Approach, OUP.
[66] Craig, P. (2012), EU Administrative Law, Second Edition, OUP, p. 318-320.

3.2.3 Staff Regulations, their reforms and their implementation: the EC's Senior Officials Policy and Rules of Procedure. Comparisons with other EU institutions' policies and rules of procedure[67]

The analysis now moves towards more detailed policies and legal rules applicable to appointments of SLOs. While the Staff Regulations[68] apply to EU institutions and agencies, including EC, EP, the Council of the EU and many others, each of these institutions enjoys autonomy with regard to implementation of the Staff Regulations, as long as the implementation is done within the framework set by the Staff Regulations. They have accordingly adopted their own rules of procedure[69]. Further, some have produced specific documents identifying policy priorities in, among others, appointments of SLOs. It should be emphasised at this point that, with the notable exception of the EC whose Compilation Document on Senior Officials Policy is addressed below[70], these documents and policies remain difficult to find. They are internal documents of each institution.

Staff Regulations were adopted in 1962 and have since been amended a significant number of times due to substantial advances and innovations in society[71], and reforms of EU administration and policy making[72]. We wish to emphasise the evolution of the Staff Regulations, and thus of the EU approach to appointments of civil servants (especially the increasing emphasis on transparency, impartiality, and merit). These amendments are often reflected in the individual institutions' rules of procedure[73] and policies. Following the reforms of 2014[74], the CJEU "administers a register of all the rules adopted by the appointing authority of each institution to give effect to (the) Staff Regulations, (…) including any amendments thereto. Institutions and agencies shall have direct access to that register and the full right to amend their own rules. Member States shall have direct access to it. Moreover, every three years, the Commission (presents) a report to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to these Staff Regulations".[75] The aims of the 2014 reform were greater transparency of legal rules governing staff issues and their practical implementation, and more coherent implementation of the Staff Regulations. A number of

[67] European Commission (2000), Rules of Procedure of the Commission, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000Q3614.

[68] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501

[69] See for instance the Council of the EU Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02009D0937-20150101, the EC Rules of Procedure (C(2000) 3614) (OJ L 308, 8.12.2000, pp. 26-34), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000Q3614, the EP Rules of Procedure, current as of July 2018, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20180731+RULE-004+DOC+XML+V0//EN&language=EN&navigationBar=YES.

[70] European Commission, Compilation Document on Senior Officials Policy, https://ec.europa.eu/info/sites/info/files/compilation-of-the-senior-official-policy-at-the-european-commission_en.pdf.

[71] Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, Recital 1. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20170101.

[72] EC's Guidelines of 18 September 1999, later confirmed and detailed in the EC's Decisions of 16 and 29th September and 8th December 1999. See also EC's Announcement of 23 January 2002 on the next steps in implementing the new senior staff policy (http://europa.eu/rapid/press-release_IP-02-124_en.htm#file.tmp_Foot_2).

[73] The EP Rules of Procedure are available at: http://www.europarl.europa.eu/sed/doc/news/flash/Rules%20of%20Procedure%20January%202017_en.pdf.

[74] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union.

[75] Article 110 of the Staff Regulations after the amendment. The EC adopted the first report in 2017: Report from the Commission to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM/2017/0632 final.

mechanisms helping to ensure uniform implementation of the Staff Regulations across various EU institutions and agencies were adopted over the years, and among those are:

"The use of rules adopted by agreement between the institutions of the Union;

The possibility for the institutions to empower one institution to adopt general implementing provisions applicable to all of them;

- The mandatory consultation of the Staff Regulations Committee prior to the adoption of general implementing provisions;
- Regular consultations between the administrative departments of the institutions and the agencies on the basis of Article 110(5) of the Staff Regulations"[76].

The potential for inter-institutional consultations, common rules and developing common approaches, in addition to the Commission's responsibility to compile a report of the implementing rules and any problems occurring, presents an excellent opportunity in the context of the matters covered by this study.

3.2.3.1 Legal force and scope

A crucial question is the binding effect of the Staff Regulations, rules of procedure and policy documents, and the legal consequences of an institution failing to follow them. This point goes back to the notion of legality as a basis for revocation of administrative decisions and for their potential judicial review, and to the notion of maladministration. The Staff Regulations are 'binding in their entirety and directly applicable in all the Member States'[77]. The EC's Rules of Procedure are also binding on the EC, as are the rules of procedure of other EU institutions[78]. The EC's Senior Officials Policy and other policy documents produced by EU institutions, on the other hand, are not binding. The EC's Senior Officials Policy's contents suggest that it is meant to elaborate on certain provisions of the Staff Regulations in the specific context of the EC's work[79]. The Policy includes the general guiding principles of the EC's approach to SLO appointments, as well as details of concrete steps in appointment procedures and the role of bodies and persons taking part in appointments. In spite of the non-binding nature of the Policy, the EC should follow it in line with the principle of legal certainty and legitimate expectations. The CJEU addressed non-binding guidelines of this nature in the *Giuffrida* judgement, where it emphasised the institution's moral obligation to follow its own guidelines[80].

As mentioned above, while Staff Regulations introduce requirements common to all the EU bodies and institutions as regards staff policies, each EU institution can determine the conditions for recruitment and appointments of staff members, including senior-level officials, independently as long as they operate within these general parameters. Each institution's autonomy as an employer is recognised in

[76] Report from the Commission to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM/2017/0632 final.
[77] Sole Article, Regulation No 31 (EEC), 11 (EAEC).
[78] Article 1 of the Commission's Rules of Procedure requires the Commission to act collectively according to the Rules.
[79] Article 10 of the Policy mentions that Vice-President for Personnel should be mandated to implement the policy and to adopt binding guidelines and provide progress reports.
[80] Case 105/75 Judgment of the Court (First Chamber) of 29 September 1976 - Franco Giuffrida v Council of the European Communities. Here the guidelines in question were contained in a memorandum drawn up by the Secretary General of the Council after an agreement with staff representatives.

Article 13.2 TEU and Article 298 TFEU. Independence of each EU institution in determining who should exercise the powers conferred by the Regulations on the appointing authority is regulated by Article 2.1 of the Staff Regulations, while Article 2.2 provides that exercise of some or all of the powers conferred upon the appointing authority, other than decisions relating to appointments, promotions and transfers, can be entrusted by an institution to another institution or to an inter-institutional body.

Beyond the legal rules and policies applicable to appointments, in some cases, as in the appointment of the SG of the EC, it seems that practice developed into a custom of 'the way things are done'. The analysis below delves into the practical arrangements and details of appointment procedures. Because of these practical implications, a number of times in the course of the analysis below the reference is made to Part 4 on the Practical Dimension of the study, comparative remarks contained there and the resulting recommendations, in order to avoid repetition. Further, as the scope of the Staff Regulations and the institutional rules of procedure is wide indeed, the analysis below follows the main points of focus of this study: concentrating on appointment of SLOs and specifically the points highlighted in the Terms of Reference.

3.2.3.2 General principles guiding appointments[81]

Both the Staff Regulations and the EC's Senior Officials Policy express the general principles guiding appointments in terms of focusing on merit and competence, although the Staff Regulations also mention efficiency and integrity. Both emphasise gender and geographical equality.

According to Article 27 of the Staff Regulations, "recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Union". The Senior Officials Policy explains the EC's priorities when appointing SLOs, specifying that the

"primary criterion for the appointment of SLOs is merit and competence relevant to the function. The emphasis placed on relevant qualifications and experience seeks to guarantee that officials who are appointed have adequate knowledge and skills in the policy area in which they are to be working. The selection shall therefore be primarily based on the comparison of the respective merits of the candidates. The assessment of merit involves not only taking account of the candidates' ability, efficiency and conduct within the service during their career to date, but also evaluating their capacity to carry out senior management duties (authority, leadership, ability to manage a team and to work in a multicultural, multilingual environment, etc.). The selection procedure includes tools to assess these qualities".

3.2.3.3 Purpose of specific appointments

According to Article 4 of the Regulations, "no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations. Vacant posts in an institution shall be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled". **Here the European Ombudsman noted that maladministration**

[81] Please refer to Part Four (Practical Dimensions) for a short analysis describing global and European (also EU) tendencies in focusing on merit when appointing SLOs, as well as the inevitable additional factors including political involvement in appointments. The Part also contains recommendations concerning ways in which political involvement and merit may be balanced out (4.2 – 4.4).

occurred, because according to the documents available to the Ombudsman it seemed that the appointment of the DSG was not in fact made for the purpose of filling this post, but in order to fill another post – that of the SG.[82] This type of maladministration was in fact the basis for the CJEU's decision to annul an appointment of a Council official in the *Giuffrida* case.[83] While in "*Giuffrida*" the true reason for the appointment was remedying an anomalous administrative position of an official and appointing the same official to the vacant post, it is the Ombudsman's conclusion that the appointment of Mr Selmayr to the post of DSG seems to have been done for the purpose of the later appointment to the post of SG. The results of the Ombudsman's investigations were presented in paragraphs 69 – 75 of the Recommendation. The Ombudsman used the EC's own documents concerning the appointment procedure to point out that the SG had only been promoted to DSG for a so-called direct transfer to SG, and that the current SG was never appointed to stay in the position of DSG. In its response[84], the EC contested this conclusion. The EC stressed that the appointment of DSG was an independent selection procedure, separate from the appointment of the SG. It is not within the scope of this study, nor is it within the scope of its authors' powers, to determine whether indeed the purpose of the DSG appointment was as characterized by the Ombudsman. Were the Ombudsman's conclusions proven correct, however, it would be a clear case of maladministration and, more specifically, a violation of binding rules.

This type of conduct is of course very difficult to assess in practice. While some interinstitutional cooperation may help in developing common standards as well as monitoring specific appointments, without a solid commitment of each EU institution to the notion of transparency and clear ethical standards, problems in this area are bound to occur in future.

3.2.3.4 Publication of vacancies versus transfer with post

The Staff Regulations prescribe two main avenues of appointing an official to a post at an EU institution, although each with a number of potentially different detailed arrangements.

Article 29 of the Staff Regulations sets out the principle that the "vast majority of officials are to be recruited on the basis of open competitions." As far as SLOs are concerned, as explained by the EC's Senior Officials Policy, vacancies that are published are filled through internal and possibly at the same time inter-institutional procedure such as promotion, transfer, internal competition or inter-institutional transfer (Article 29.1 (a) – (c) of the Staff Regulations), or external procedure (appointment of a candidate from outside the institution, Article 29.2 of the Staff Regulations)[85]. The EC's clearly stated preference is in line with a career-based civil service system which dominates most EU bodies: internal promotions are prioritised, and SLO vacancies are filled from among management grades in the EC and in other institutions. Further, the Senior Officials Policy provides that, as a rule, vacant functions of SLOs occupying the post of Director-General are to be published[86].

[82] European Ombudsman's Recommendations, No. 75.
[83] Judgment of the Court (First Chamber) of 29 September 1976. - Franco Giuffrida v Council of the European Communities. - Case 105-75.
[84] European Commission (2018), Opinion of the European Commission on the European Ombudsman's recommendation, Link to EC response.
[85] Commission's Senior Officials Policy, 4.
[86] Commission's Senior Officials Policy, 9.3.

Article 7 of the Staff Regulations applies to situations when, "acting solely in the interest of the service and without regard to nationality", an appointing authority in an institution can "assign each official by appointment or transfer to a post in his function group which corresponds to his grade". With regard to the use of Article 7, the EC's Senior Officials Policy explains that "if an official has the necessary skills and experience, the Commission may decide on the basis of Article 7 SR to transfer the official to another function without publication"[87]. This type of transfer with post is done without publishing the vacancy. It seems clear that this type of appointment ought rather to be an exception. Further, the CJEU developed a set of criteria for such transfers. The European Ombudsman concluded that the EC did not fulfil the criteria. **Further, it appears to the authors of this study that the EC's Senior Officials Policy is vague in this regard, and as it is written it does not follow the requirements set out in the CJEU case law and should thus be amended. Taking a step back and looking at the Staff Regulations in this regard, one can also conclude that articles 29 and 7 are not always precise. They are opaque, difficult to understand and interpret. Perhaps both the Staff Regulations and the EC's Senior Officials Policy need amendment towards more precise description of conditions of appointment and when transfers with post can be used. The CJEU jurisprudence on this issue, examined below, should be incorporated into these rules as far as it is possible.** Further evidence of the need for amendments and clarification are the recent appointments of SLOs in the EP, where the posts were advertised externally in order to, according to letters from Pilar Antelo and Dieter Wils to the EP President, shortcut internal rules on seniority and experience. This issue goes beyond the scope of this study, but clarification or amendment of the Staff Regulations would be needed in this regard. While attracting good quality external applicants may require relaxing of the seniority and experience conditions, it would be worth considering whether such relaxed conditions could only be applicable to external applicants, while the internal applicants would still need to satisfy the internal career progression rules[88].

While it seems clear that Mr Selmayr was appointed DSG using the first avenue (Article 29, publication, assessment, interview and appointment), and he was appointed SG using the second avenue (Article 7, reassignment with post), there is no common understanding between the EC, the EP and the Ombudsman as to the manner in which these two appointments did in fact and should have proceeded. The EC's ultimate point, as presented to the Ombudsman, was that Mr Selmayr was eligible for the Article 7 transfer with post **after** he was appointed DSG. The Ombudsman concluded that no such transfer was possible, because the criteria established for transfers without publication were not met in the circumstances of Mr Selmayr's appointment. In particular, the two posts between which the transfer took place were not equivalent. The dispute centres on the rapid progression of Mr Selmayr's career and his promotion, within the scope of one meeting of the EC, from the post of Head of the President's Cabinet to the post of SG of the EC. Here is the excerpt from the Ombudsman's Recommendations:

[87] Commission's Senior Officials Policy, 9.3.
[88] See Part Four (Practical Dimension), and specifically section 4.5 on further, also comparative, remarks and recommendations.

*"The Commission, in its replies to Parliament has referred to the possibility of "*reassigning*" an official with his or her post. It argues that when it reassigns an official with his or her post, there is no need to comply with the obligation, set out in Article 4 of the Staff Regulations, to issue a "*vacancy notice*".*

*The Ombudsman notes that case law covers three main categories of "*reassignment with post*", namely: 1) geographical reassignments; 2) reassignments when there is a serious and urgent need to move an official out of a job; and 3) a reorganisation of a service.*

*A geographical "*reassignment with post*" can be used where there is a need to move posts, and the persons occupying them, from one geographical location to another. Such geographical "*assignments of posts*" can occur without any post becoming vacant in the location where the person is reassigned.*

*"*Reassignments with post*" can be used, very exceptionally, where there is a very serious and urgent need to move a member of staff **out of a specific job**, such as when a person occupying a managerial post is under investigation for fraud, or where there is alleged harassment and it is necessary to take steps to protect the alleged victim. In those very serious and urgent cases, the institution is not required to have a vacancy before immediately "*reassigning*" the person concerned to another function. The vast majority of the case law relating to reassignments with posts concerns this type of reassignment, namely that a staff member is moved out of a job against his or her will, since in those case the jobholder concerned contests the decision of the Appointing Authority in court.*

*"*Reassignments*" can also be used to carry out regular staff mobility exercises or reorganisations of a service. In such cases, staff are moved, **with their posts**.*

*The EU courts have, however, established rules as regards this use of "*reassignments with post*". If a staff mobility exercise involves moving a person to an **important function where specific skills are required**, and that function is **different from the function that person previously held**, and where the decision has **important and general effects**, the institution should put in place a "*procedure*" allowing it to identify the **most competent** person to carry out that function.*

The appointment of a Secretary-General will have important and general effects.

*At the very least, a director-level post, such as the one held by Mr Selmayr in his basic career until February 2018, is not **equivalent** (in terms of importance, in terms of responsibilities and in terms of the skills needed) to the post of a Secretary-General.*

*Thus, it would not be consistent with the above outlined case-law to appoint a person who is at **director-level in his basic career,** to the post of Secretary-General, through a "*reassignment with post*", without any procedure to compare the merits of eligible staff with a view to identifying the most competent person.*

*Also the Commission, in its reply to the Ombudsman, now carefully qualifies its earlier statements to Parliament. Rather than insisting that Mr Selmayr was **always** eligible to be reassigned to the post of Secretary-General, it states that Mr Selmayr '*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" *(emphasis added)'*[89].

[89] The European Ombudsman's Recommendation, ANNEX II.

The Ombudsman referred to the criteria established by the CJEU in the cases: T-373/04, *Guggenheim v Cedefop*, T-51/01 *Fronia v. Commission,* T-339/03, *Clotuche v Commission* and Case T-118/04 and T-134/04, *Caló v Commission,* and concluded that the 'transfer with post' was not an adequate procedure because there was no equivalence between the posts Mr Selmayr held. In fact, according to the Ombudsman, it can be argued that that there is **no post** in the EC which is "*equivalent*", in terms of the skills required, to the post of SG. The EC has stated to Parliament that "*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 interinstitutional 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 EC has also stated, in answering EP, that the function of SG **is not a normal function at Director-General-level**. **It would thus seem consistent with the Court's ruling in *Guggenheim v Cedefop* for the EC always to carry out a "procedure" to identify the most competent person to carry out that role.**

The EC's reply to the Ombudsman's recommendation[90] contains a very strong contention that Mr Selmayr was always eligible to be reassigned to the post of SG: "as an AD15 official with eight years of senior management experience in the Commission and seven years of professional experience before joining the Commission". There clearly is a disagreement between the two EU bodies, the EC and the Ombudsman, about the content of the rules concerning transfers and about the equivalence of certain crucial positions in the EC. A further disagreement concerns the very nature of the position of the SG. The Ombudsman emphasises the very unique nature of this position, which also seems to have been confirmed by the EC, but there is no consensus on how this unique nature should, if at all, impact the appointment process. It would be desirable for the EC to reconsider this issue internally, but also in cooperation with other institutions. If one accepts that SG is a unique senior civil servant, then the next step would be to address the Ombudsman's recommendation for the SG appointment procedure to reflect this (see directly below).

3.2.3.5 A special appointment procedure for the Secretary-General?

We now come to the key recommendation of the European Ombudsman: that the EC should develop a specific appointment procedure for its SG, separate from other appointment procedures. This recommendation partly stems from the specific nature of the post. In general, the position of SG is a non-political head of civil service at a particular institution, whose task, in addition to being the head administrative authority in an institution, is also to interact with the political level in the institution[91]. The post combines the political functions with the management and organisational functions.

This specific nature is highlighted in the EC's own Rules of Procedure, Article 20 of which regulates the role and responsibilities of the EC's SG.

[90]European Commission (2018), Opinion of the European Commission on the European Ombudsman's recommendation, Link to the EC response.

[91] Kuperus, H. and Rode, A. (2016), *Top Public Managers in Europe. Ministry of the Interior and Kingdom Relations,* Top Public Managers in Europe, den Hague. http://www.eupan.eu/files/repository/20170206084104_TopPublicManagersinEuropemainreport.pdf.

"1. The Secretary General shall assist the President so that, in the context of the political guidelines laid down by the President, the Commission achieves the priorities that it has set.

2. The Secretary-General shall also help to ensure political consistency by organising the necessary coordination between departments at the start of the preparatory stages, in accordance, inter alia, with Article 23 of these Rules of Procedure.

He shall see that documents submitted to the Commission are of good quality in terms of substance and comply with the rules as to form and, in this context, shall help to ensure that they are consistent with the principles of subsidiarity and proportionality, external obligations, interinstitutional considerations and the Commission's communication strategy.

3. The Secretary General shall assist the President in preparing the proceedings and conducting the meetings of the Commission.

He shall also assist the Members chairing groups of Members set up under Article 3(4) of these Rules of Procedure in preparing and conducting their meetings. He shall provide the secretariat of these groups.

4. The Secretary-General shall ensure that decision-making procedures are properly implemented and that effect is given to the decisions referred to in Article 4 of these Rules of Procedure.

In particular, except in specific cases, he shall take the necessary steps to ensure that Commission instruments are officially notified to those concerned and are published in the Official Journal of the European Union and that documents of the Commission and its departments are transmitted to the other institutions of the European Union and to the national parliaments.

He shall be responsible for distributing written information that the Members of the Commission wish to circulate within the Commission.

5. The Secretary General shall be responsible for official relations with the other institutions of the European Union, subject to any decisions by the Commission to exercise any function itself or to assign it to its Members or departments.

In this context, he shall help to ensure overall consistency by providing coordination between departments during procedures involving other institutions.

6. The Secretary General shall ensure that appropriate information is given to the Commission concerning the progress made on internal and interinstitutional procedures".

The SG's position is of a political nature in that he or she must maintain the trust of the EC's President and of the other Commissioners. Further, the SG's role is inter-institutional – thus requiring trust of other EU institutions. It is also a position that requires management skills and leadership skills. As noted by the Ombudsman, to fulfill his function effectively, "the Secretary-General needs to be trusted by the President and other Commissioners, and by the civil service. For this trust to be maintained, the Secretary-General needs to be recognised as having legitimacy by both political and civil service sides of the Commission"[92]. One needs to note that the SG needs to be recognised as having legitimacy by the other EU institutions, especially the EP. Further, because of the very nature of the EU and the current democracy, transparency and legitimacy challenges it faces, the need for the SG to be recognised as

[92] European Ombudsman's Recommendation, article 86.

having legitimacy in the EU Member States and among the general public cannot be emphasised enough. While the EC and the Ombudsman both point out to the specific nature of the post, their views are shared more widely. The special role and the high position of the SG in the EU civil service has also been noted by the media. When commenting on the 'Selmayr case', news sources often referred to SG as top civil servant in Europe[93].

While the roles and responsibilities of the SG of the EP do not exactly match those of the SG of the Commission's, there are nevertheless many similarities and thus some comparative remarks concerning SG appointments are useful here.

Rule 222 of the Parliament's Rules of Procedure introduces the role of the SG:

> *"1. Parliament shall be assisted by a Secretary-General appointed by the Bureau.*
>
> *The Secretary-General shall give a solemn undertaking before the Bureau to perform his or her duties conscientiously and with absolute impartiality.*
>
> *2. The Secretary-General shall head a Secretariat the composition and organisation of which shall be determined by the Bureau.*
>
> *3. The Bureau shall decide on the establishment plan of Parliament's Secretariat and lay down regulations relating to the administrative and financial situation of officials and other servants."*

The SG of the Council of Ministers of the EU is also the SG of the European Council, attending all European Council meetings and organizing its activities. Under Article 23 of the Council of Ministers' Rules of Procedure:

> *"1. The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary-General appointed by the Council acting by a qualified majority.*
>
> *2. The Council shall decide on the organisation of the General Secretariat (…).*
>
> *Under its authority the Secretary-General shall take all the measures necessary to ensure the smooth running of the General Secretariat.*
>
> *3. The General Secretariat shall be closely and continually involved in organising, coordinating and ensuring the coherence of the Council's work and implementation of its 18-month programme. Under the responsibility and guidance of the Presidency, it shall assist the latter in seeking solutions.*
>
> *4. The Secretary-General shall submit to the Council the draft estimate of the expenditure of the Council in sufficient time to ensure that the time limits laid down by the financial provisions are met.*
>
> *5. The Secretary-General shall have full responsibility for administering the appropriations entered in Section II - European Council and Council - of the budget and shall take all measures necessary to ensure that they are properly managed. He or she shall implement the appropriations in question in accordance with the provisions of the Financial Regulation applicable to the budget of the Union."*

[93] See for instance Politico (https://www.politico.eu/article/martin-selmayr-became-eu-top-uncivil-servant/) or BBC (https://www.bbc.com/news/world-europe-45407247).

The EP SG and DSG appointment procedure recognizes the importance of the posts. While the Decision laying down the steps in the procedure for appointing senior officials (Bureau decision of 16 May 2000 amended on 18 February 2008) and Rule 222 of Parliament's Rules of Procedure specify that the SG is appointed by Parliament's Bureau, the Advisory committee on the appointment of senior officials (composed of the Secretary-General, the deputy Secretary-General, the Director-General for Personnel and an observer for equal opportunities, as well as the Director-General of the DG concerned) that normally assesses applications for senior posts, is not in charge of assessing applications for the SG and DSG. The applications for SG and DSG posts are assessed directly by the Bureau of the EP.

SGs are head civil servants in EU institutions, whose roles combine political cooperation and implementation with administrative and management duties. Because of their high position in the institutional structure and their responsibilities, their exposure to the media and the general public is greater perhaps than most other senior civil servants within the EU administration. Thus, it would be recommended that their roles, responsibilities as well as their appointment are subject to rules that have been established collectively by the EU institutions (this does not mean the rules are the same for each institution, but it may mean the same legal and ethical parameters, and perhaps also a common interinstitutional body in charge of assessing candidates). Further, in addition to the formal recognition of the importance of the SG post, EU institutions ought to consider establishing a special appointment procedure for this post. In line with the CJEU jurisprudence, the use of Article 7 of the Staff Regulations' 'reassignment with post' mechanism is not a proper manner of proceeding with appointing the SG.

3.2.3.6 Composition of the Consultative Committee on Appointments (CCA)

According to Article 2 of the Rules of Procedure for CCA, the following persons shall be permanent members of the CCA:

- "the Secretary-General in the Chair,
- the Director-General for Personnel and Administration,
- the Head of the President's Private Office,
- the Head of the Private Office of the Member of the Commission with special responsibility for Personnel and Administration,
- the Permanent Rapporteur".

By virtue of Article 3 of the Rules of Procedure for the CCA, in appointment procedures for DDG the CCA consists of the following[94]:

1. Secretary-General (chair);
2. Director-General of the recruiting Directorate-General;
3. Director-General for HR;
4. Head of Cabinet of President;

[94] Article 3 of Commission Decision of 07.02.2007 laying down the rules of procedure for the Consultative Committee on Appointments (CCA).

5. Head of Cabinet of Commissioner for HR;
6. Permanent Rapporteur (currently a Director in Directorate-General for HR); and
7. Rapporteur for the case (designated by the Secretary-General from a list of Rapporteurs comprised of existing senior managers).

With regard to appointments of DSG, Article 1 of the Rules of Procedure for CCA specifies that the "CCA shall examine all applications for a vacancy; it shall assess candidates as to their aptitude to exercise senior management functions and propose to the Appointing Authority a list of those candidates it considers most suitably qualified for appointment".

When appointment of DSG is being considered, the SG is also the DG of the recruiting Directorate-General. Thus, the required number of CCA members is six. Article 10 of the Rules of Procedure for CCA requires members of the CCA who, in a specific matter dealt with by the CCA, have a personal interest such as to impair their independence, within the meaning of Article 11 a (1) of the Staff Regulations, to neither participate in the deliberations nor vote on that matter. In these instances, they shall be replaced by a Rapporteur designated by the SG among the members on the list of Rapporteurs.

When Mr Selmayr recused himself from the CCA for the appointment of the DSG, the number was reduced to five, which is less than what the Rules of Procedure would appear to require. The Ombudsman saw maladministration here. However, in its response to the Ombudsman's recommendation, the EC refers to Article 8.2 paragraph 2 of the Rules of Procedure for CCA (enacted by the Commission in 2015), which constitutes *lex specialis* in relation to Article 10 and excludes the application of Article 10 in the matter of replacement of the Head of the President's Cabinet.

NOTE: This new provision is not in the online version of the Rules of Procedure for the CCA that was initially available to the authors of this study or indeed is available to the general public. A search on the EC's Register of Commission Documents only produces results for documents dated 2005 to 2008. It appears that the Ombudsman was aware of this provision, but did not consider it capable of affecting the requirement under Article 10 (see paragraph 67 of the Ombudsman's Recommendation). Upon request, the EC provided the authors of this study with the text of the Commission's minutes of the 2141st meeting held in Strasbourg on 6 October 2015, later also indicating that the amendment was a temporary measure and is no longer in force. The text of the amendment was as follows:

"When convening for matters referred to in Article 1(1) in the Rules of Procedure of the Consultative Committee on Appointments relating to a function of Director-General or their equivalent, the Head of the President's Cabinet may in exceptional circumstances be replaced by the Deputy Head or the Director of Coordination and Administration of the President's Cabinet.

In this case, the provision in Article 8(3) shall not be applicable."

The amendment does not seem to affect the number of persons required to be members of the CCA, as confirmed by the Ombudsman. **Please also refer to the analysis above, with regard to the EP's rules on assessment of SG and DSG applications, and the remarks on the need for the special rules and special procedure for the appointments of SGs more generally.**

3.2.3.7 Impartiality and conflicts of interest

The provision of the Staff Regulations concerning impartiality was amended in 2004, when Article 11A was added. This article reads:

"*1. An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests.*

2. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter.

3. An official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties"[95].

It was noted by the Ombudsman that "Mr Selmayr and/or other members of the President's Cabinet were involved in the decision-making process that led to 1) the creation of the vacancy for a Deputy Secretary-General and 2) the approval of the vacancy notice for the post of Deputy Secretary-General for which Mr Selmayr (and another senior member of the President's Cabinet) later applied. This created, **at the very least**, a risk of a conflict of interests"[96]. The EC response to the Ombudsman's recommendation notes that it is not practical for senior officials to recuse themselves from participating in preparation of vacancy notices for posts to which they may apply in future. It is also not EC practice. The clear discrepancy between the letter of the Staff Regulations (which are quite clear) and what is considered practical is a significant problem that needs addressing. Adherence to the letter of the law (Article 11A of the Staff Regulations) may indeed sometimes appear troublesome or impractical. This does not mean that one can simply disregard the legal requirements.

It seems that here a strict adherence to the Staff Regulations would prevent the unfortunate situation where the membership of the CCA was potentially unsatisfactory, and there was a risk of conflict of interest with regard to Mr Selmayr's late recusal from the CCA and from participation in planning and commencing the appointment process. Considering that the rules in this regard are quite clear, and considering the problem highlighted by the EC's response (practicality/letter of the law conflict), what is needed is perhaps another level of oversight. This issue of internal and external oversight is explored in the Practical Dimensions part, specifically section 4.6.

[95] Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.
[96] European Ombudsman's Recommendation, article 42.

3.2.4 Other sources of rules concerning good administration and their enforcement The role of the European Ombudsman:

This section briefly discusses the European Ombudsman's Code on Good Administrative Behaviour, institutional codes, and the role of the Ombudsman in ensuring good administration principles are followed by EU institutions[97]:

The history of the Code was mentioned above, when the right to good administration was examined. The Code, proposed by the European Ombudsman to all the EU bodies in 1999, was accepted by the EP in 2001, and since then most EU bodies adopted new Codes of Conduct or amended their existing Codes based on the Ombudsman's Code. As the leading public service principles that should guide European civil servants the Code lists commitment to the EU and its citizens, integrity, objectivity, respect for others and transparency. Lawfulness, absence of abuse of power, impartiality and independence, objectivity, legitimate expectations and consistency feature as the required standards of good administrative behaviour. They are further explored in the Code's provisions. The Code, similarly with Ombudsman's decisions, is not legally binding. However, it does express and further develops the right to good administration provided by Article 41 of the CFREU, and the latter is a legally binding provision on par with TEU or TFEU Treaty provisions. Thus, its legal force may well be more significant than its formal status would indicate. Further, the Ombudsman applies the Code when considering complaints of maladministration against EU bodies[98]. It must be pointed out that EU bodies did not always follow the Ombudsman's Code in its entirety, the EC being one of the examples in its Code on good administrative behaviour[99]. The differences between the two instruments are not relevant in the context of this study. What is relevant is what happened to the Code after it has been published, and whether it fulfilled its aims. The EU standards of good administration continue to develop; reforms are in progress. The current reform process was commenced in the aftermath of the Santer Commission's scandal, and the "First Report of the Committee of Independent Experts on allegations regarding fraud, mismanagement and nepotism in the European Commission" of 15th March 1999 referred to the common core of minimum standards of good administration[100]. The European Ombudsman's Code followed this Report. The Code was endorsed by the EP in 2001[101]. Ultimately, the Code was meant to be a blueprint for a formal codification of European administrative rules[102]. The EP proposed the Regulation on European Administrative Procedure (with the general principles of administrative procedure in the recitals)[103]. The Model Rules developed by the Research

[97] European Ombudsman (2002), The European Code of good administrative behaviour, https://www.ombudsman.europa.eu/en/publication/en/3510.
[98] Albeit not in every case – the Ombudsman did not mention the Code in her recommendation on the 'Selmayr case'. See J. Mendes (2009), Good Administration in EU Law and the European Code of Good Administrative Behaviour, for analysis of the actual use of the Code by the Ombudsman.
[99] European Ombudsman (2002), The European Code of Good Administrative Behaviour, https://ec.europa.eu/info/sites/info/files/code-of-good-administrative-behaviour_en.pdf.
[100] Committee of Independent Experts (1999), First report on allegations regarding fraud, mismanagement and nepotism in the European Commission, http://www.europarl.europa.eu/experts/pdf/reporten.pdf.
[101] European Ombudsman (2002), The European Code of good administrative behaviour, https://www.ombudsman.europa.eu/en/publication/en/3510.
[102] Mendes, J. (2009), *Good Administration in EU Law and the European Code of Good Administrative Behaviour,* EUI Working Papers, LAW 09, 2.
[103] Legislative Train Schedule (2018), Law of administration procedure, http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-eu-administrative-procedure.

Network on EU Administrative Law (ReNEUAL) are also notable[104]. So far no such formal harmonisation is in progress.

An assessment of desirability for any type of horizontal mechanism is not within the scope of this study. However, as the study points out to several instances of unclear and vague rules, and differences in standards and approaches of EU institutions, it may be advisable to revisit the EP's proposals.

The role of the European Ombudsman goes beyond the European Code of Good Administrative Behaviour. It has been crucial in bringing light to the 'Selmayr case'. Article 228 of the TFEU "empowers the European Ombudsman to conduct inquiries into maladministration in the activities of the Union institutions, bodies, offices, and agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. Every citizen of the Union has the right to complain to the Ombudsman. Residents, companies, and associations may also lodge complaints. This right is one of the fundamental rights of citizenship of the Union, guaranteed by the Charter of Fundamental Rights (Article 43). There is no requirement that the complainant must be personally affected by the maladministration or have any special interest in the case"[105].

It is regrettable that, having established four cases of maladministration, the Ombudsman can exert little more than political pressure on the EC to rectify what has happened. In the light of the fact that for the general public in the EU a complaint to the European Ombudsman is often the only available mechanism to rectify maladministration done in the context of general acts or purely internal, organizational acts (see below), it may be advisable to suggest for the Ombudsman to be capable of, for instance, bringing a judicial review procedure in order to have the CJEU confirm the maladministration and decide on the legal consequences of the maladministration.

3.2.5 Better implementation and enforcement, greater coherence. Interinstitutional cooperation and social participation in appointments of senior civil servants:

The ongoing reform of the system for implementation of Staff regulations, initiated in 2013, was mentioned above. The 2013 amendment of Staff Regulations[106] towards greater transparency, more coherent and better implementation was the result of problems identified across many EU institutions and agencies. Indeed, the reform remains work in progress. Significant problems continue to occur, in the context of SLO appointments, with regard to implementation of the Staff Regulations and more general rules of EU administration law and other legal principles applicable to the activities of the EU institutions. The 'Selmayr case' as well as the recent EP appointments[107] demonstrate a discernible perception, across the institutions themselves, in the view of the European Ombudsman and in the

[104] For the ReNEUAL Model Rules of EU Administrative Procedure, developed together with the European Law Institute, see: http://reneual.eu/index.php/projects-and-publications/reneual-1-0. article 17

[105] Quote from the Preamble to the European Code of Good Administrative Behaviour.

[106] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union. Some of the features of the reform are particularly relevant in the context of this study and are examined below.

[107] The EP Staff Committee, some trade unions and other officials were quoted by de la Baume, M. (2018), in "European Parliament accused of political stich-up over top posts", Politico, 27.12.2018, https://www.politico.eu/article/european-parliament-top-posts-klaus-welle-martin-selmayr-appointments-brussels/, accessed on 1 January 2019.

media, that some of these principles and rules, as well as ethical requirements, are at the very least being stretched. The reform towards greater transparency mentioned above addressed these problems to some extent, but it is clear that more needs to be done. The analysis conducted in this study should be seen as complementary to the current discussions across the major EU institutions, and in particular the EP and the EC, on revising appointment procedures.

3.3 Revoking administrative acts

Very early on in the evolution of the EU's administrative law, in accordance with the principles of rule of law, legal certainty and protection of legitimate expectations, the CJEU declared that favourable administrative decisions could not, as a general rule, be revoked retroactively (7/56, 3 – 7/57 *Algera v. Common Assembly)*[108]. The CJEU held that appointment decisions, if legal, were individual administrative measures and gave rise to individual rights. Since the decision in *Algera* the CJEU maintained this approach, holding that measures giving rise to subjective rights or other benefits could only be revoked retroactively in very limited circumstances. Those limited circumstances were explored in further CJEU cases and in academic writings.

First of all, the interested parties can decide to revoke the measure[109]. Applying this criterion to the 'Selmayr case', one could certainly imagine that the EC and Mr Selmayr himself decide to revoke his appointment.

An institution can also revoke an administrative act if it was based on fraud or deception by the beneficiary[110]. It can also revoke it if the measure was conditional and the conditions have not been met. A more controversial possibility of revoking an administrative decision, whether retroactively or prospectively, when there was a change of policy, has not been universally accepted by scholars[111].

Let us now come back to the initial point in the discussion on revocability of administrative decisions: the notion of legality and the related concept of maladministration. While the notion of maladministration was not defined in the TFEU, it was defined by the European Ombudsman in its 1997 Report: "maladministration occurs when a public body fails to act in accordance with a rule or a principle which is binding upon it"[112]. Administrative decisions as a matter of principle cannot be revoked **if they are legal**. Illegality implies possible, or even perhaps mandatory, revocation. However, because when administrative decisions are concerned, the notion of legality and its implications often conflict with another important consideration – individual justice related to legitimate expectations and legal certainty – the impact of illegality of administrative acts is not always certain. Indeed, in some cases such an illegal administrative decision may need to be retained because of the need to ensure individual justice. Further, the line between what is an illegal act and what is a legal act is not always clear[113].

[108] For the nature of an administrative act see Chiti, M.P. (2004), Forms of European Administrative Action, http://www.duke.edu/journals/lcp.
[109] Schonberg, S. (2000), Legitimate Expectations in Administrative Law, OUP, p. 79, and Craig, P. (2012), EU Administrative Law, Second Edition, OUP, p. 558.
[110] T-180/01 Euroagri Srl v. Commission (2004) ECR II-369.
[111] See Craig, P. (2012), EU Administrative Law, Second Edition, OUP, p. 559-561 for a more in-depth analysis.
[112] Quoted by Tsadiras, A. (2015), Maladministration and Life Beyond Legality: The European Ombudsman's Paradigm, International Law Review, 11, p. 5.
[113] Ibid. Craig, P. (2012) p. 562. The basis for our contention that maladministration was committed in the case of appointing Mr Selmayr to the post of Deputy Secretary-General and then immediately to the post of Secretary-General of the EC are the Recommendations of the European Ombudsman and the Resolution of the European Parliament (see analysis above).

The CJEU approach to these issues was developed in the following cases: *Algera, SNUPAT*[114], *Consorzio Cooperative d'Abruzzo*[115], *de Compte*[116], *Canal+*[117], *Conserve Italia*[118].

Revocation is possible only within reasonable time[119]. The CJEU maintains that if an act is illegal, whether it should be revoked will be a decision depending on the "comparison of the public interest with the private interest in question"[120]. Public interest in legal certainty, coherent policies and their implementation needs to be balanced against an individual's right to rely on final administrative decisions, legal certainty and legitimate expectations. The legitimate expectations cannot be relied on when the individual concerned contributed to the illegality of the contested decision[121]. **One would suggest that these issues are at least contemplated when a situation of an alleged misuse of power by an institution in appointing a SLO, possibly involving conflict of interest, occurs.**

While the remarks above relate to retrospective revocation of administrative decisions, the circumstances when decisions can be revoked prospectively are more liberal[122]. Nevertheless, as Paul Craig points out, a similar exercise balancing the public interest and the private legitimate expectations ought to be undertaken[123].

Revocation of an administrative act can also be the result of the **judicial review procedure,** regulated by Article 263 TFEU. The concept of judicial review, grounded in the principle of rule of law, is also founded in the duty of the CJEU established in Article 19 TFEU: to ensure that in the interpretation and application of the Treaty the law is observed. The procedure guards the principle of rule of law by allowing parties with sufficient standing, including in limited cases private individuals and interest groups, to challenge before the CJEU the validity of EU acts[124]. Review can concern any acts of EU institutions, agencies, bodies and offices (as long as these acts intend to produce legal effects *vis-à-vis* third parties)[125]. Appointment decisions of the EC certainly meet the criterion of producing legal effects, and appointment decisions have indeed been reviewed by the CJEU in the past (*Algera, Giuffrida*). The EP, the EC, the Council and the Member States of the EU are in the position of what scholars refer to as 'privileged applicants' in the procedure, with unlimited standing to ask for a review of an EU measure[126].

[114] Cases 42 and 49/59 SNUPAT v High Authority [1961] ECR 53.
[115] European Court of Justice (1987), Case 15/85 Consorzio Cooperative d'Abruzzo v. Commission [1987] ECR 1005. https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:61985CJ0015.
[116] Case C-90/95 P Henri de Compte v. EP, [1997] ECR I-1999.
[117] European Court of Justice (2002), Case T-251/00 Lagardere SCA and Canal+ SA v. Commission [2002] ECR II-4825. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000TO0251.
[118] European Court of Justice (2002), Case C-500/99 P Conserve Italia Soc Coop arl v. Commission [2002] ECR I-867. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000TJ0186.
[119] Case 15/85 Consorzio Cooperative d'Abruzzo v. Commission [1987] ECR 1005 – 2 years being too long.
[120] European Court of Justice (1961), Cases 42 and 49/59 SNUPAT, p. 87. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61959CJ0042.
[121] Case C-500/99 P Conserve Italia Soc Coop arl v. Commission [2002] ECR I-867.
[122] European Court of Justice (1978), Case 55/77 Herpels v. Commission [1978] ECR 585. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027
[123] Craig, P. (2012),p. 566.
[124] It also allows the interpretation of those acts to be challenged, but this issue is beyond the scope of this study.
[125] Court of Justice rulings, Case 22/70 Commission v. Council (ERTA) [1971] 263, or C-27/04 Commission v. Council [2004] ECR I-6649, Case C-57/95 France v. Commission (Re Pension Funds Communication) [1997] ECR I-1627.
[126] Chalmers, D., Davies, G., Monti, G. (2014), European Union Law, Third Edition, CUP, 443-444.

The grounds for review include, as per Article 263 TFEU:

- Lack of competence,
- Infringement of an essential procedural requirement,
- Infringement of the Treaties or any rule of law relating to their application,
- Misuse of powers.

As summarised by Chalmers, Davies and Monti, the grounds for review as established by Article 263 TFEU can be recategorised (unpacked) in the following way: "First, the EU institution in question must not exceed the power granted to it. Secondly, it must not abuse the discretion granted to it by a manifest error or assessment or an abuse of power. Thirdly, there must not be a breach of process. Finally, there must be no breach of the substantive obligations imposed by EU law. This comprises not just explicit provisions of EU law, but also fundamental rights and general principles of law such as legal certainty, non-discrimination and proportionality"[127].

The situation that constitutes the basis for the present study has been assessed as exhibiting the signs of misuse of power, thus the analysis below focuses on this particular ground for review. The CJEU started dealing with cases of maladministration related to administrative appointments very early on. The judgement in the joined cases 7/56 and 3 – 7/57 *Dineke Algera v. Common Assembly of the European Coal and Steel Community,* already mentioned above, confirms that administrative acts concerning appointments that have been adopted illegally can be revoked. However, the CJEU also held in *Algera* that "the unlawful nature of an individual administrative measure entails its complete nullity only in certain circumstances (…). The adoption of an administrative measure creates a presumption as to its validity. That validity can be set aside only by means of annulment or withdrawal[128]". Further, in case 105/75 *Franco Giuffrida v. Council of the European Communities* the ECJ dealt with an appointment which it saw as maladministration and misuse of power because the appointment process (contrary to the aims of any recruitment procedure) was organised for the "sole purpose of remedying the anomalous administrative status of a specific official and of appointing that official to the post declared vacant". The decision was nullified by the CJEU.

The possibility of review and annulment of appointment decisions, as with other administrative decisions, exists across EU Member States as well as in international organisations. For instance, the CoE's Staff Regulations foresee a complaints procedure (Article 59) and an appeals procedure (Article 60). This is also open to external candidates. Appendix XI includes the Statute of the Administrative Tribunal. In the past, there have been cases of annulment of appointments; see case Appeals Nos. 530 and 531/2012 (Françoise PRINZ (II) and Alfonso ZARDI (II) v. Secretary General)[129], concerning the appointment of a Director. The CoE was obliged to repeat the appointment procedure. Interestingly, in the meantime, the selected candidate was asked to fill the post in an interim manner with a salary increase to compensate for the annulment; this decision was also subject to a case in front of the

[127] Chalmers, D., Davies, G., Monti, G. (2014), European Union Law, Third Edition, CUP, 428.
[128] European Court of Justice (1957), Cases 7/56 and 3 – 7/57, V.1, p. 60. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61956CJ0007.
[129] Council of Europe (2012), Administrative tribunal, https://rm.coe.int/appeals-nos-530-and-531-2012-francoise-prinz-ii-and-alfonso-zardi-ii-v/1680770175.

Tribunal, again with an annulment of the Council of Europe decision (see case Appeal No. 540/2013 (Staff Committee (XIV) v. Secretary General))[130].

One can assume that there may have been merit in a challenge to the appointments of the DSG and the SG of the EC (based on the Ombudsman's recommendation). This challenge was not brought by any of the privileged applicants. As far as non-privileged applicants (individuals or interest groups) are concerned, as mentioned above, their standing to challenge EU measures has been limited. The Treaty requirements of individual concern and direct concern, the former interpreted very strictly by the CJEU in the *Plaumann* case[131], meant practically a virtual impossibility of challenging an EU measure[132]. While the Lisbon Treaty amended Article 263 TFEU and eliminated the requirement of individual concern for regulatory (non-legislative) measures, the position of individuals and interest groups remains difficult when attempting to challenge administrative decisions such as appointments. In fact, it is impossible to challenge such a decision, unless perhaps one is a potential candidate or an actual candidate for the same position. A mere assertion or fact of damage to the rule of law, damage to the general principles and rules governing the functioning of the EU and its institutions, would not suffice to legitimise any particular EU citizen or an EU organisation or association to challenge an appointment made by the EC.

While institutional autonomy must be observed, legitimate expectations of the newly appointed SLOs must be protected, and institutions must be allowed to function effectively without hindrance of unnecessary oversight, certain important positions such as the SG of the EC may require such participation and oversight. Here, again, the postulates presented by Mendes should be emphasised. As mentioned above, Mendes argues for wider social participation in the EU decision-making[133]. This postulate relates to a more general discussion within the EU fundamental rights context and the deficit of democratic participation. As noted by Mendes, as well as Craig, access to EU institutions and the right to be heard is often only attributed to those who were unfavourably affected by administrative decisions (thus – to those who were individually and directly concerned by these decisions – as per the CJEU jurisprudence mentioned above)[134]. In other respects, and especially with regard to public participation in EU decision-making, various EU institutions developed different standards, but overall public participation is quite pervasive across policy sectors and indeed is "an inbuilt and reflexive feature of the European polity"[135]. In fact, it is the EC that is most commonly mentioned as the EU body welcoming social and civic input into its decision and policy making – through various consultations, use of external expert reports, etc.

[130] Council of Europe (2013), Administrative tribunal, https://rm.coe.int/168077017f.
[131] European Court of Justice (1963), Case 25/62 Plaumann & Co. v. European Commission. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:1963:17
[132] For a comprehensive overview of the rules on standing in judicial review proceedings and further literature see Craig, P. (2012), EU Administrative Law, Second Edition, OUP, 305 et seq.
[133] Mendes, J. (2011), Participation in EU Rule-Making: A Rights-Based Approach, OUP, 463; and Mendes J., (2009), Participation and Participation Rights in EU Law and Governance, in H.S.H. Hofmann and A.H Tuerk (eds.) Legal Challenges in EU Administrative Law. Towards an Integrated Administration, Edward Elgar, 257 – 287. Mendes' concerns are shared by Craig (Craig, P. (2012), especially pp. 289 et seq).
[134] Mendes, J. (2009), 257 ; Craig, P. (2012), 289 et seq.
[135] Mendes, J. (2009), 262.

In addition to the European Ombudsman's recommendations concerning reforms of the appointment procedure of the EC, it is worth looking into the possible ways in which EU citizens and organisations may be involved in shaping the institutional policies on appointments and in challenging these policies or even individual decisions after they have been made. It should be noted at this point that any such change to the standing rules in the judicial review proceedings will be difficult, considering how strictly the limited standing rules are observed by the Court. Thus, perhaps a more realistic option for the moment would be to explore participation and oversight before the appointment decisions are made. One such option could be involvement of independent experts in the work of the CCAs and greater use of external bodies in appointments (this suggestion is further explored, assisted by comparative information, in Part Four of the study on Practical Dimension, specifically section 4.6).

As the first step, the greater participation of the EP (as a democratically elected body) in appointing such crucial civil servants may be required.

Revoking administrative acts in France

According to Law 84/16 on the statute of the public service (Article 25, 3rd paragraph),[136] *'(...) appointment of the employments mentioned at the first paragraph are essentially revocable, both for officials or non-officials'*. The revocation of the SLO functions is *ad nutum*, it is left at the appreciation of the appointment authority[137].

The revoking act, concerning the employments to the discretion of the government, is an administrative act which is subject to appeal for abuse of authority in front of the administrative judge attached eventually of a request of interim (CE, 15 January 2003, ord. 241256). But the Council of State relates that 'the interest of the service' justify that 'the government *[can]* at every moment remove the appointed person from his functions' (CE, 28 April 2003, 241192), even if he has been appointed to this employment for a period of time fixed by the legislation and regulation (CE, 16 May 2012, 350049). Finally, the appointment to a position at the discretion of the government 'does not have the character of a right-creating decision' (CE, 14 May 2014, 363529)[138].

[136] ´Loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat´.
[137] Montay B. (2013), Le pouvoir de nomination de l'Executif sous la Ve République.
[138] Feedback from Montay B. (2013), Lecturer in Public Law at the University Paris II Panthéon-Assas.

4 PRACTICAL AND ETHICAL DIMENSION

KEY FINDINGS

SLOs are involved in many crucial aspects of governance and are responsible for crucial decisions. Therefore, the appointment procedures of SLOs matter.

In the EU Member States and amongst the EU institutions, appointment procedures differ and are also linked to very different administrative cultures, traditions and administrative and political systems.

The institutions reviewed by this study all consider that appointment of SLOs should be based on the principles of rule of law, impartiality and merit. There is also agreement on a series of preconditions for the appointment of SLOs:

- The ultimate responsibility for appointments remains with ministers;
- All appointments are made after advice from Human Resources (HR) experts, other SLOs, or an (internal/external/independent) board or committee;
- The composition of these boards, the basis on which members are appointed and how they are expected to fulfil their role also matters in the appointment processes;
- Increasingly, these boards are under pressure to become more "independent" and transparent to the public.

The greatest challenges in the appointment process concern:

- the opening of positions;
- the structure, formation and operation of selection boards;
- the conduct of personal interviews;
- and the final selection from lists of candidates.

In reality, in appointing SLOs, merit may play a role, but it is not the sole criteria.

While there is near universal agreement on the importance of political non-partisanship, this is not reflected by the existence of an apolitical process for SLO appointments. Many authors even claim that politicisation has increased over the years. From the point of view of ministers, the appointment of SLOs is of great interest.

In all countries, the political level has an important role in the appointment of SLOs, although to varying degrees and through different mechanisms.

In all countries, an important issue concerns the degree to which ministers should be involved in the appointment process, in which stages of the process and whether they have a final say over appointments or whether any other (neutral) form of external monitoring of appointments is required.

Some kind of body for recruiting or advising on the best candidates for senior civil service positions is often used as the main tool in ensuring political neutrality and objectivity in the appointment of SLOs. However, also here, practice differs; appointment procedures are often carried out in opaque and complex ways. Overall, little is known as to appointment committees in general.

Whereas in some countries, selection committees are internal bodies and ministers enjoy a great amount of discretion in decision-making, other countries have decided to create independent selection boards and introduce specific monitoring procedures. Both models raise important questions about how to best manage conflicts of interest and political discretion in the appointment process and combine this with the need for neutral expertise in the appointment process. Thus, the crucial question in all models is how to balance political interests of ministers/presidents with merit requirements.

Most institutions in the EU Member States are of the opinion that any internal form and self-regulation have the advantage that it is simpler, easier and less conflictual. In most cases these committees are neither fully independent bodies nor do they have important monitoring and enforcement powers.

Good arguments exist in favour of maintaining confidential and internal appointment practices. However, arguments in favour of the introduction of more transparent and independent structures outweigh the critical points.

Current trends in the field of appointment policies are indeed towards the introduction of more independent scrutiny and monitoring. In our study (and because of the great importance of culture, tradition and political context), we could not find best-practices. However, we took note of the interesting suggestion by the European Ombudsman to involve outside consultants in the appointment process and to arrange for mandatory assessment centres for candidates and/or to appoint external Commissioners of Appointment (following the UK model).

An alternative mode of appointment (in exceptional cases) could be to involve the EP in the appointment process. An EP committee may hold oral evidence sessions with the Commissioner's or President's preferred candidates for a small number of SLOs (Directors-General or only for the Secretary-General) in the form of pre-appointment hearings. Evidence suggests that most pre-appointment hearings are constructive and non-contentious. They provide enhanced transparency and credibility to the appointment process. Moreover, pre-appointment hearings are an opportunity to enhance trust. We suggest that the EP has no veto over the appointment process. However, it could recommend that an appointment is not made. In this case, Commissioners/Presidents may pause for reflection.

This section discusses the practical and ethical dimension of the appointment of SLOs, and comprises seven sub-sections:

- Appointing SLOs between political interests and merit based requirements;
- The role of the political level in the appointment process;

- Determinants of selection by the political level - what do they want, and why;
- Finding the right level of political involvement;
- Criteria for internal or external recruitment;
- Composition of the structures in charge of selection / assessment;
- Conflicts of interest.

4.1 Appointing SLOs between political interests and merit based requirements

This study considers appointments to SLOs in public administrations in the Member States, the EU institutions and other European and international organisations. It does not consider the appointment of political advisors although, in some countries, political advisors constitute a significant number of staff.

The institutions reviewed by this study all consider that the appointment of SLOs should be based on the principles of rule of law, impartiality and merit. There is also agreement on a series of preconditions for the appointment of SLOs:

- The ultimate responsibility for appointments remains with ministers;
- All appointments should be governed by the overriding principle of merit;
- All appointments are made after advice from Human Resources (HR) experts, other SLOs, or an (internal / external / independent) panel, board or committee.

With regard to the last point, the composition of these boards, the basis on which members are appointed and how they are expected to fulfil their role differs widely. Increasingly, selection boards or committees are under pressure to become more transparent to the public. However, also here, practice differs; appointment procedures are often carried out in opaque and complex ways.

In appointing SLOs, merit may play a role, but it is not the sole criteria. Often, holders of public office also have other opportunities to exercise their authority. The dangers of nepotism and patronage are only examples of other motives.

Holders of public office use their political discretion in various ways in the appointment process. While there is near universal agreement on the general principle of political non-partisanship, this is not reflected by the existence of an apolitical process for SLO appointments. Many authors even claim that politicisation has increased over the years[139].

However, it is difficult to clearly identify political influence in the appointment process. It is even more difficult to measure political influence in management procedures such as for dismissal, promotion or even transfer to another position. Notwithstanding, the OECD[140] has measured the influence of the political level in arrangements to transfers to another position by using either promotions, dismissals or transfers to other positions, finding political involvement in one or several dimensions of human

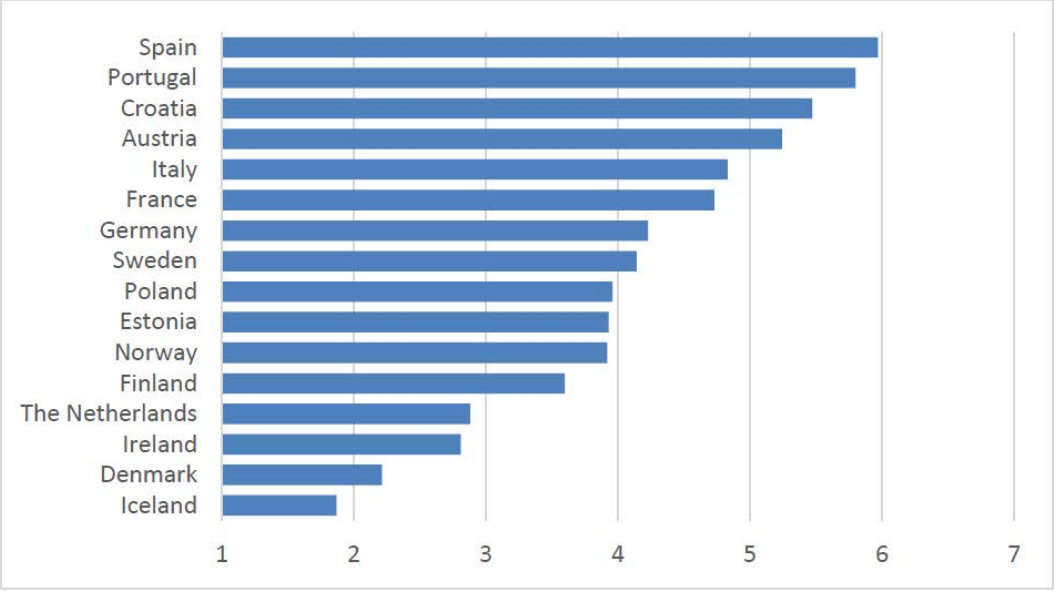
[139] Rouban, L. (2012), Politicization, in: Guy Peters and Jon Pierre (eds.), The Sage Handbook of Public Administration; Dalmström, C. (2012), Politics and Administration, in: Guy Peters and Jon Pierre (eds.), The Sage Handbook of Public Administration; Diamond, P. (2019), The end of Whitehall, Palgrave Policy Essentials.
[140] Matheson, A. et al. (2007), Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities Between Ministers and Senior Civil Servants, OECD Working Papers on Public Governance.

resource management to be a strong predictor of political involvement and politicisation as such. However, this form of politicisation is difficult to measure. On the other hand, it is important to differentiate between the influence of the political level in the appointment of SLOs and the involvement in other HR policies. Note that the fact that a politician is involved in appointments does not, *per se*, make that appointment a political process. In reality, there is wide diversity in the level of involvement by politicians, interests and means of politicians in the appointment process and different ways to influence in the appointment of SLOs. One of the first comparative studies on the political involvement in senior staffing[141] evaluated the role of the political level in appointing, promoting, dismissing and transferring SLOs in a selected number of countries. The study concluded that existing differences are linked to the diversity of constitutional, legal, political and administrative systems:

"Appointment is the most powerful personnel instrument that politicians can wield – although appointing political sympathisers does not guarantee they will follow a party line, just as administrative appointment does not necessarily prevent the courting of political favour. Potentially, influence could also be exerted through management procedures such as for dismissal, promotion or even transfer to another position. In most cases the power of dismissal rests with the same body that makes appointments. In Westminster systems, transfer is sometimes used to move senior public servants who for one reason or another are not able to work effectively with a particular minister. This is sometimes referred to as when the face doesn't fit"[142].

In all countries, the political level has an important role in the selection of SLOs, although to varying degrees and through different mechanisms.

Figure 1 – Perceived direct politicisation



Source: Van de Walle, S. (2018), Explaining variation in perceived managerial autonomy and direct politicization in European public sectors

[141] Matheson A.,OECD, (2007).
[142] Matheson A.,OECD, (2007).

According to van de Walle direct politicisation as perceived by central government top public managers is highest in Portugal and Spain as well as in Croatia. It is lowest in most Nordic country as well the Netherlands and Ireland[143]. The fact that Germany and Sweden have similar perceived levels of politicisation shows that the institutional structure as such is not decisive for the level of politicisation. As already noted, appointment procedures are also linked to very different administrative cultures, traditions and administrative and political systems. This link can be best seen between, on the one hand, countries with more traditional (bureaucratic) systems who prefer more internal appointment systems, and on the other hand, more private-sector types of civil services who opt for more external and independent appointment structures.

In both scenarios, there are no clear criteria when and why appointments should be made as a result of an open/external recruitment process or as a result of internal competitions, mobility policies or "job shuffling" with only one suggested candidate.

In the following, we will discuss these challenges. The analysis of our study is "inevitably somewhat speculative for two reasons. First, day-to-day practice can differ strikingly from constitutional, legal or administrative theory – and without other survey data, it is hard to know how closely reported behaviours reflect reality"[144].

Permanent Secretaries in Denmark

In Denmark, the senior-most public employees are the Permanent Secretaries, ensuring the direct interface between the political level (ministers) and the civil service.

Permanent secretaries are appointed by the Ministers, purely on merits and not by their political affiliation. *'They are recruited on formal merits and a documented ability to deliver political advice without regard to the incumbent minister's party affiliation'*[145]. It is even considered *'unfair to consider political affiliation when recruiting positions within the public administration'*[146]. In practice, *'the strong merit tradition has so far meant that politically motivated appointments in the permanent civil service have been extremely rare'*[147].

The procedure of appointment of Permanent Secretaries has been modified during the last decades. Until 1977, the relevant Minister presented his own candidate and the Government appointed the candidate to the position. Since 1977, the Government considered that this procedure did not ensure sufficient competition, and established the Cabinet Committee of Appointments, presided by the Prime Minister's Office. The Cabinet prepared a short list of names, and one of them was selected. There are no legal regulations on how this procedure should be run. There are several steps in the procedure of appointing permanent secretaries:

[143] Van de Walle, (2018), Explaining variation in perceived managerial autonomy and direct politicization in European public sectors, in International Review of Administrative Sciences, 82:516-35.
[144] Matheson A.,OECD, (2007).
[145] Christiansen, P.M., et als., 'Does politics crowd out professional competence? The organisation of ministerial advice in Denmark and Sweden', West European Policies, 2016, vol. 39, p. 1238,
[146] Hustedt, T. (2013) Paper for the ECPR Conference, Bordeaux, 4-7 September, 2013, Panel 'Contested Administrations: Conflict Resolution and Public Managers on 'Formal regulation as a mean to solve conflicts in ministerial advisory domains – developments in ministerial advisers Public Service Bargains in Germany, UK and Denmark', p.12.
[147] Hustedt, T. (2013) Paper for the ECPR Conference, Bordeaux, 4-7 September, 2013, Panel 'Contested Administrations: Conflict Resolution and Public Managers on 'Formal regulation as a mean to solve conflicts in ministerial advisory domains – developments in ministerial advisers Public Service Bargains in Germany, UK and Denmark', p. 12.

1) In case of a vacancy, one person from each Ministry is placed for the SLO position. Being the Danish system based in merit, the candidates are prepared for applying to the post.
2) The Prime Minister Office and the Minister of Finance look at the potential candidates and they make a list. From that list, they short-list and then they ask the candidates if they are interested.
3) The Cabinet Committee of Appointments has two levels:

- Before its meeting, conversations between relevant Ministers take place;
- The Cabinet Committee of Appointments meets and select the best candidate. They submit their proposal to the Government.

Although this procedure is not regulated by law, the tradition ensures that there is always more than one name on the competition. This rule introduces flexibility, which was not the case when it was regulated by law, before 1977[148]. External candidates can apply for the position of permanent secretary.

4.2 The role of the political level in the appointment process

According to Meyer-Sahling, J.-H. et al (2015), the greatest challenges in the appointment process concern:

- the opening of positions;
- the structure, formation and operation of selection boards;
- the conduct of personal interviews;
- and the final selection from lists of candidates.

"Because the appointments are the responsibility of ministers for which they are accountable to Parliament, it would be surprising if ministers did not want to take a close interest in the process and have confidence in the people that they appoint. It would rightly be a matter for criticism if they didn't. Ministers should want and ensure that good people from a wide range of backgrounds representative of society are appointed to carry out the responsibilities that they are given. The purpose of the processes we follow should be driven by the need to achieve good outcomes. Equally, it is important that the public have confidence in the system for appointing people and that the processes are efficient, transparent and fair. Good people won't come forward to be considered for appointments if the appointment system appears irrational, blatantly biased or doesn't operate smoothly"[149].

Overall, the EU Member States have found very different ways to deal with the issue of neutral competency and responsiveness to the elected officials. For example, Kuperus and Rode (2016) distinguish amongst five different appointment models for SLOs.

According to the authors, "*the majority of countries (13) use model No. 2, where the minister makes a formal appointment decision from a shortlist of candidates. In six more countries the minister makes a formal appointment decision for the highest-level official (model No. 2.1) and in two Member States on the*

[148] Source: Interview with Prof. Jorgen Gronnegaard Christensen, Department of Political Science and Government, University of Aalborg, 23 November 2018.
[149] House of Commons, (2016), 2.

lowest-level official appointments (No. 2.2). In this way, the selection committee selects one to three of the most professionally suitable candidates, and politicians can make the final decision from the shortlist to assure that they have no major disagreements with the selected candidate. In addition, in some countries (NL, UK) ministers and/or secretaries of state are consulted during the recruitment and selection process in determining the professional profile the candidate should have. In six Member States politicians can choose someone of political confidence as the highest-level official of their own choice following few legal rules and conditions for the candidates. In these countries, this is the way to guarantee political acceptance and the ability for senior-level officials and politicians to work together. In two of these countries (FR, IT), where politicians appoint the highest level of top-official, formal political appointment is sufficient for the lower level"[150]. Finally, model 3 applies only to the appointment of SLOs of lower ranks and model 4 only to Greece and Cyprus[151].

Table 3: SLO appointment models: Who appoints SLOs at each level?

NO.	SHORT DESCRIPTION OF THE MODEL	MEMBER STATES
1.	**Political appointment:** Candidate has to be in agreement with political aims of the government; appointment term is often linked with the term of Minister in charge, and the SLO can be dismissed at any time.	**Used only for the highest level of SLO:** DE, ES, FR, IT, HU, SK
2.	**Formal political appointment:** Minister(s) takes the final appointment decision from a shortlist of candidates selected/recommended. *2.1. Only for the highest level SLO* 2.2. *Only for the lowest level SLO*	BE, CZ, EE, IE, HRV, LU, MT, AT, PT, SI, FI, UK, EC BG, DK, LV, NL, RO,SE FR, IT
3.	**Appointment by the higher-level civil servant:** A higher-level civil servant, the future direct boss of the SLO appoints the candidate.	**Used only for the lower levels of SLO positions:** BG, ES, LV, NL, HU, PL, RO, SK
4.	**Appointment by a Selection Commission:** A selection committee selects and appoints the candidate.	GR, CY
5.	**No appointment:** There is no appointment, just a regular selection or promotion process	DE, LT

Source: H. Kuperus and A. Rode, Top Public Managers in Europe, 2016.

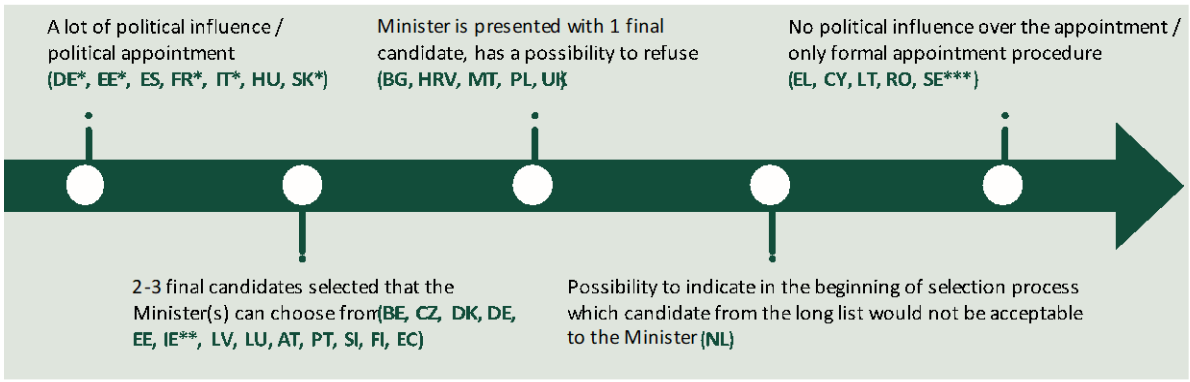
The question of political acceptance of selected SLOs is mainly relevant to the highest-level positions, because they have to work directly with the minister(s). As we will see later on, the involvement of the

[150] Kuperus, H. and Rode, A. (2008), *Top Public Managers in Europe. Management and Working Conditions of the Senior Civil Servants in European Union Member States.* Study commissioned by the French EU-Presidency. Maastricht: EIPA.
[151] Ibid.

political level (e.g. minister(s)) can take place at different stages of the appointment process and differs per country[152].

"The scale below shows the level of political involvement and influence during the selection and appointment of top-officials, according to the legislation in the Member States and the official information provided by the country representatives. Whether this theoretical framework fits the practical actions in the Member States was difficult to evaluate"[153].

Figure 2 – Scale of political influence during selection & appointment of Top Public Managers



Source: H. Kuperus and A. Rode, Top Public Managers in Europe, 2016

Senior-level officials in the Netherlands

The following paragraphs outline the appointment process of SLOs in the Netherlands. Interview feedback suggests that the process is merit-based and that there is little room for political influence. The central civil service organisation 'ABD Bureau' plays an important role in this. For the appointment of SLOs there is a greater role for ministers, which could imply political interest. However, the respective minister is always shadowed by the minister of interior and ministers are not always members of the same political parties considering that governments in the Netherlands are always coalitions. Arguably this could function as a control mechanism to avoid political appointments.

- Opening of the vacancy
  - The ABD Bureau writes in collaboration with the originator and with input from relevant stakeholders a vacancy. Subsequently the vacancy is published on the website of the ABD Bureau for the duration of 2 weeks.
  - The ABD Bureau looks for potential candidates through internal and external networks. A long-list is created.

[152] 't Hart, P. and Wille, A. (2006), *Ministers and top officials in the Dutch Core executive: Living together, growing apart?* Public Administration 84:121–46; Cortazar, J.,Fuenzalida, J. andLafuente, M. (2016), *Merit Based Selection of Public Managers: Better Public Sector Performance?*, Inter American Development Bank, Washington D.C., IDB-TN-1054; Christiansen, P.M. et als (2016), Does politics crowd out professional competence? The organisation of ministerial advice in Denmark and Sweden', West European Policies, 2016, vol. 39, p. 1238.; Kerby, M. (2009), *Worth the wait: Determinants of ministerial appointment in Canada, 1935–2008.* Canadian Journal of Political Science 42:593–611; Boyne, G.,Oliver, J. John, P. and Petrovsky, N. (2010), *Does political change affect senior management turnover? An empirical analysis of top-tier local authorities in England.* Public Administration 88:136–53; Ennser-Jedenastik, L. (2016), *The party politicization of administrative elites in the Netherlands.* Acta Politica 51, p.451–71.

[153] Kuperus, H. and Rode, A. (2016).

- The Director-General (DG) of the ABD Bureau discusses the vacancy, job profile and possible candidates with the minister or secretary of state from the originator's ministry.
- The DG subsequently discusses the same issues during the SLO-Monitor-meeting with the Minister of Interior and the Prime-Minister in attendance of the secretary-general of General Affairs. The DG of the ABD Bureau ensures there is follow-up on what was discussed during these meetings.

- First phase
  - The ABD Bureau organises interviews with candidates who will be tested on compliance with the SLO profile as well as the profile required for the respective job.
  - The DG of the ABD discusses candidates internally and only short-lists those that comply with the requirements.
  - The ABD Bureau presents the short-listed CVs to the originator.
  - The originator indicates who it wants to select for orientation talks. The ABD Bureau can be present during these meetings and the DG of the ABD will be briefed on the outcome of these meetings.
  - The DG can request the involvement of an existing 'Top Management Group'[154] to lead the talks, which is obligatory in case someone from outside the public service is approached. In case the position is for a Secretary General (SG), one or more SGs will be approached for this. The ABD Bureau will be briefed on the outcome.
- Pre-selection
  - After the first talks are concluded, the DG of the ABD submits a proposal to the Pre-selection Committee SLO in order to determine a selection list. The SG of the originator's ministry is added to the committee. In case the position concerns a SG, another SLO manager is added to the committee. The Pre-selection Committee SLO issues a recommendation within a week.
  - The ABD Bureau informs at this stage the candidates of the labour conditions and the applicability of 7-year term.
- Selection list
  - The DG and the originator's ministry decide on a selection list on the basis of the recommendations of the Pre-Selection Committee SLO. This can include two or more candidates. The list will also be send to the originator's minister and the Minister of Interior.
- Assessment, labour conditions and security assessment
  - The final candidate will be asked to do a (development) assessment.
  - The ABD Bureau will agree with the candidate on the labour conditions and entry date. This will be agreed upon with the originator's ministry.

[154] Within the Dutch Senior Civil Service, the Top Management Group (TMG) consists of secretaries-general, directors-general, inspectors-general and some equivalent positions.

- SLO positions are confidence positions which means they fall under the Law on Security assessments. The ABD Bureau will ask the Dutch intelligence services to issue a declaration of no objection.

- Selection phase
  - The originator's ministry will initiate the selection process in line with departmental procedures. The respective ministry can only include pre-selected candidates.
  - The selection committee is chaired by a SG. The DG of the ABD Bureau is always part of the committee, as well as a SLO of another department.
  - Apart from the selection committee, also a support committee with an advisory role is established.
  - Briefings of both committees are sent to the DG of the ABD. The DG can ask for further references.
  - The originator's minister and the Minister of Interior have a final conversation with the candidate. They can request the DG of the ABD to call for other candidates.
  - On the basis of article 30 of the Law for Works Council (in Dutch: Wet op de ondernemingsraden) a recommendation is asked to the Works Council on the proposed candidate.

Appointment

- The Minister of Interior and the originator's Minister inform the Council of Ministers on the selected candidate. A CV is sent to the Council of Ministers. The candidate can only be proposed if the intelligence services have issued a declaration of no objection.
- A press release is issued by the Council of Ministers;
- A first appointment as a SLO requires a royal decision.

4.3 Determinants of selection by the political level - what do they want, and why

In all countries, an important issue concerns the degree to which ministers should be involved in the appointment process, in which stages of the process and whether they have a final say over appointments or whether any other (neutral) form of external monitoring of appointments is required.

The main models of political involvement in the selection of SLOs are:

- Minister selects and appoints a SLO according to different criteria (such as party membership, political acumen, education, experience, competence, equal opportunity and skills);
- Minister is presented with one candidate or a shortlist of candidates and can decide on the choice of candidate/influence the choice of candidates;
- Minister has a legal possibility to refuse the selected candidate, but must give a reason for the objection;
- Minister can be involved in determining the required criteria for the selection of candidates in the job- and competency profile;
- Minister can see the long list of candidates and indicate if there is any person he / she would not be able to work with;

- Minister is invited as a member of the selection body in the pre-selection and / or final selection of candidates;
- Selection committee selects one candidate and the minister officially accepts this appointment by the committee.

Not only because of the importance of SLOs, ministers take an interest in the selection of these people. Therefore, in many cases ministers have the right to be consulted and involved during the selection process. From the point of view of ministers, the appointment of SLOs is of great interest, often also from a personal point of view: *"Top officials are involved in many crucial aspects of governance — from the highest courts, ministries, agencies, inspectorates, court of auditors, central banks etc. (….) Crucial decisions affecting the health of communities, the preservation of the national heritage, the liberty of individuals and the prosperity of companies are taken by appointees. In short, public appointments matter"*[155].

However, two arguments are opposed to each other:

- First, the case put forward here by those in favour of stronger ministerial involvement is that as ministers are accountable to parliament for the working of their departments, they should have a significant say in the recruitment and appointment process.
- Second, critics argue that Ministers have an interest that SLOs - at least partly - share political opinions and strategic targets. Because of this, patronage and politicisation are a classical reflex to these motivations. Therefore, there should be constraints on the direct exercise of powers by ministers over civil servants on account of the need to avoid politicisation, nepotism, patronage and retain the independence of the civil service. Critics also point to the fact that politicisation has increased during the last years. The latter argument is supported by empirical studies that point to links between politicisation, corruption and impartiality and good governance. Thus, critics also address what is perhaps the most crucial question in politicisation research: Does partisan loyalty drive out other (meritocratic, representative, diversity, equal opportunity etc.) criteria of recruitment? Are Ministers more likely to promote political loyalists rather than candidates with relevant professional experience?

Generally, literature on political partisanship, patronage and politicisation[156] agrees on the relevance of political loyalty for politicians while paying only limited attention to other criteria for the selection (or deselection) of SLOs such as experience, qualification, competence, technical skills, networking

[155] House of Commons, (2016).

[156] Aberbach, J. D., Putnam, R. D., & Rockman, B. A. (1981), *Bureaucrats and politicians in Western Democracies.* Cambridge: Harvard University Press; Dahlström, C. (2012), *Politics and Administration*, in: Guy Peters/Jon Pierre (eds.), The Sage Handbook of Public Administration; Dahlström, C., Lapuente, V., and Teorell, J. (2012), "The Merit of Meritocratization: Politics, Bureaucracy, and the Institutional Deterrents of Corruption." *Political Research Quarterly*, Vol. 65(3), p. 656–68; Dahlström, C. and Holmgren, M. (2015), *The Politics of Political Appointments*, University of Gothenberg, Working Paper 2015:4; Kopecký, P., Meyer Sahling, J.-H., Panizza, F., Scherlis, G., Schuster, C. and Spirova, M. (2016), *Party Patronage in Contemporary Democracies: Results from an Expert Survey in 22 Countries from Five Regions.* European Journal of Political Research, Vol. 55(2), p. 416–431; Meyer-Sahling, J.-H., Mikkelsen K.S., Ahmetovic, D., Ivanova, M., Qeriqi, H., Radevic, R., Shundi, A. and Vlajkovic, V. (2015), *Improving the Implementation of Merit Recruitment Procedures in the Western Balkans: Analysis and Recommendations.* Danilovgrad: ReSPA Publications. ISBN-13 9780853583189; Meyer-Sahling, J.-H., and Mikkelsen, K.S. (2016), "Civil Service Laws, Merit, Politicization, and Corruption: The Perspective of Public Officials from Five East European Countries". Public Administration, Vol. 94(4): 1105–1123; Peters, B.G. and Pierre, J., eds. (2004), Politicization of the civil service in comparative perspective: The quest for control. London, NY: Routledge.

skills in a specific policy area etc. "Thus, empirical knowledge about the complex criteria ministers use to select their closest subordinates still is very limited"[157].

In the literature, there is wide agreement about the relevance of political acumen in the field of political-decision-making: "*ministry officials, particularly at the top levels, are deeply involved in political decision-making and bargaining processes; they need to know the realities of the political process and take political implications into account when providing advice to ministers (…). In particular, ministers expect officials to consider the ramifications of policy proposals and problems in parliament and the media, with a special focus on the avoidance of problems for the minister (…). Hood and Lodge (2006) argue that this type of competency includes the ability to assess the situation from the viewpoint of political leadership, to anticipate political risks and the potential for failure, and to spot political coalitions or ways to overcome existing cleavages to create coalitions supporting government policies"*[158].

Another aspect of growing importance is the need for diversity in the appointment process. For example, the EC's "*Compilation Document on Senior Officials Policy*" states that one of the main criteria in the appointment process is that "*the objective of the equal opportunities policy is ultimately to achieve a broad balance between the sexes at all grades (…). In making appointments to senior management posts, the Appointing Authority will, in principle, give priority to women where it finds, after conducting an assessment that candidates are of equal merit. This option will not be exercised automatically, but will constitute one aspect of the Appointing Authority's powers of discretion*". In this context, it is worth noting the recent proposals to strengthen gender balance in appointment processes made by the EP's SG[159].

As elaborated above, political acumen is essential for SLOs to accomplish the political goals of their minister and to protect them from policy fiascos and blame. At the same time, an important part of SLOs' job is to effectively manage their department. Ministers motivated to control the bureaucracy will arguably look for candidates with management and leadership competencies when recruiting SLOs. The study of Kopecký et al. (2016) generally confirms this expectation of a connection between control as motive for political appointments and the professional qualifications of candidates. Another aspect is that ministers and their departments are under constant media attention, which means that "*no minister wants to run the risk of negative media exposure resulting from unprofessional work by his department because personnel recruitment disregarded professionalism on political grounds (….). Ministers simply cannot afford to appoint party loyalists while disregarding other qualifications (….). To effectively manage their department internally and to assert their department's position vis-à-vis other departments, state secretaries need substantial policy knowledge as well as familiarity with ministerial decision-making procedures (…)"*[160].

[157] Bach, T., Veit, S. (2017), *The Determinants of Promotion to High Public Office in Germany: Partisan Loyalty, Political Craft, or Managerial Competencies?* Journal of Public Administration Research and Theory,doi:10.1093/jopart/mux041, pp.1-16; Vol. 28 (2), 254-269.
[158] Bach, T and Veit, (2017), 2.
[159] The SG's announcements were made in the context of the annual discharge procedure of the EP (meeting of CONT of 26 November 2018, as of 18:35:45).
[160] Bach, T. and Veit, S. (2017), 6.

Senior-level officials in Estonia

The Estonian Civil Service Act requires public competitions, organised by the 'Civil Service Committee for Selection of Top Managers' for the recruitment of the following SLOs: secretary general and deputy secretary general of a ministry, director of a government office, and the directors general of an executive agency and inspectorate.

The Secretary of State, a secretary general of a ministry and the director of the Office of the President of the Republic may be recruited without a competition. Moreover, the 'Civil Service Committee for Selection of Top Managers' does not assess applications of SLOs of the Chancellery of the Parliament, the Office of the President of the Republic, the National Audit Office, the Office of the Chancellery of Justice and the Supreme Court. The employment of SLOs of these agencies is organised in respective constitutional institutions.

The chairman of the Committee for Selection of Top Managers is a State Secretary and the composition thereof shall be determined by the Government of the Republic. At the moment the members of the committee are the State Secretary, three Secretary Generals of ministries, one expert in the management of personnel, the head of Tax and Customs Board and the secretary of the committee.

The committee is assisted/served by the structure unit (The Competence Centre of Top Managers) of the State Chancellery (5 persons, one of them is the secretary of the committee). The role of the committee is to find best candidates for the vacant posts and perform public competitions.

According to § 17 of the Estonian Civil Service Act, upon organising a public competition, a vacant post or arising vacancy shall be published on the central web page of the authority and civil service. The deadline for candidates to submit applications shall not be shorter than 14 calendar days from the date of publication of the competition announcement on the central web page of the civil service. The competition announcement shall include at least a brief description of functions, requirements for the candidate and the term of service upon appointment to the post for a specified term. The announcement of vacancy may be published in other places as well[161].

4.4 Finding the right level of political involvement

So far, our discussion focused on the determinants and criteria chosen by political leaders in the appointment of SLOs.

In the following, we will address another important issue: What is the 'right' level of political involvement of ministers in the appointment process? The involvement of ministers can take many forms:

- They may be informed about the appointment process from the beginning to the end;
- They may have the right to "design" the final shortlist of candidates;
- They may want to sit on the selection panel itself and be involved in interviews;
- They have a veto power on the final decision who to appoint.

[161] Pesti Cerlin, Tiina Randma-Liiv. (2018). Towards a Managerial Public Service Bargain: the Estonian Civil Service Reform.

Consultation and involvement of ministers do not necessarily mean that ministers have decision-making power on the appointment as such but also about specific aspects of the appointment process such as the terms of advertisement of posts and the composition of the selection committee. The involvement of ministers may also change case-by-case. For example, in the case of the United Kingdom, rules of procedures as regards the involvement of ministers allow for very flexible roles but also far-reaching influence of ministers. Thus, they differ from case to case:

The Involvement of Ministers in the UK (Civil Service Commission, Recruitment Principles, April 2018)

39. Where the relevant Minister has an interest in an appointment, the Chair of the panel must ensure that the Minister is consulted on and agrees the final role and person specification and the terms of advertisement. The Minister should also agree the composition of the selection panel, in particular to ensure that there is sufficient external challenge from outside the Civil Service.

40. The Minister may ask to be kept in touch with the progress of the competition throughout. Any views the Minister may have about the expertise, experience and skills of the candidates must be conveyed to the selection panel.

41. The Minister may meet each of the shortlisted candidates, to discuss his or her priorities and the candidates' approach to the role, and feed back to the panel views on any issues the Minister wants the panel to test at interview. Meetings between the Minister and candidates must be attended by a representative of the Civil Service Commission. The Minister may not be a member of a selection panel and may not add or remove candidates from a competition.

42. The panel must assess the merits of the candidates using the best possible evidence and testing any issues raised by the Minister. The panel must recommend the best candidate for appointment.

43. If not satisfied with the panel's recommendation the Minister may ask the panel to reconsider, setting out the reasons. The panel may revise its order of merit; the reason for this must be recorded, and the panel must obtain the approval of the Board of the Commission before any appointment can be made.

Permanent Secretary competitions

44. This section of the Recruitment Principles applies to the appointment of all posts at Permanent Secretary grade (SCS Pay Band 4). The requirements of paragraph 39 to 41 (but not 42 and 43) apply equally to such appointments.

In addition: Permanent Secretary competitions must be chaired by the First Civil Service Commissioner (or nominee), who will be responsible for ensuring that Ministers, including the Prime Minister, are fully involved in competitions in which they have an interest and that their views are relayed to the panel, and taken into account. The relevant Minister must be involved at each stage and be able to raise any concerns about the selection process, or about candidates, with the First Commissioner. The Prime Minister must be kept informed about progress and have the opportunity to feed in views.

45. The panel must assess the merits of the candidates using the best possible evidence and testing any issues raised by the Minister or the Prime Minister. This should include assessing whether the candidates can work effectively with the Minister and fulfil the role of Principal Accounting Officer.

46. The panel must decide which candidates are appointable, i.e. which candidates meet the published criteria for the role and would, in the panel's judgement, do the job well. It is for the panel alone to make this judgement. The names of the appointable candidates should then be put forward to the Prime Minister in a panel report from the First Civil Service Commissioner summarising the selection process and the panel's assessment of the candidates.

47. The Prime Minister must take the final selection decision from the appointable candidates, in consultation with the Head of the Civil Service and the First Civil Service Commissioner. As required by the 2010 Act, the selection decision must be made on merit, assessed against the published criteria for the role. Before making the final selection, the Prime Minister may meet the appointable candidates. If (s)he does so, (s)he must meet all the appointable candidates and must do so with the First Civil Service Commissioner (or nominee) present.

In many countries, the preferred model is that ministers would take the final selection choice from a shortlist of candidates. Here, the crucial point is that ministerial selection power would come into play only after a merit-based assessment process has been terminated by an (independent) committee. Note that another model exists in those countries where external and independent auditors/commissioners have a final say in the appointment process.

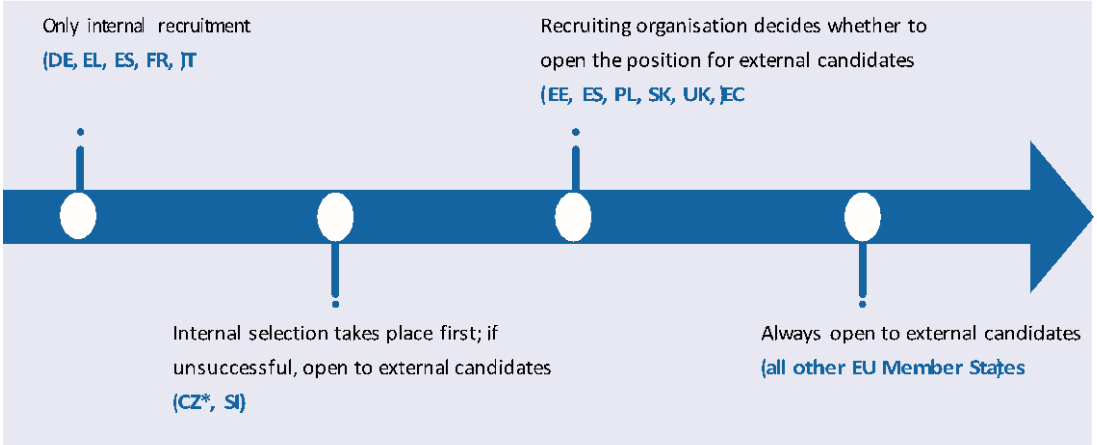
4.5 Criteria for internal or external recruitment

In theory, merit based appointment processes should be the result of an open and transparent competition. Overall, it is assumed that opening employment opportunities to all interested persons may lead to higher levels of performance. However, in practice, there "is no consistent message from international practice that opening out employment opportunities at senior levels beyond the civil service results in better performance. Most countries still rely to a very large extent on the existing pool of civil servants to fill senior positions"[162]. Moreover, most countries restrict employment opportunities only to few candidates. The answer to the question, when and whether a position should be filled through open recruitment/open competition, or internal recruitment / competition, or simply without any competition and through transfer, mobility policies or promotions is often vague and unclear.

Overall, countries with a classical bureaucratic system (and little mobility amongst careers and between the public and the private sector) have a preference for internal recruitments (and, if existing, competitions). In other countries with more open administrative systems, recruitments of SLOs may also be open for candidates from other departments and organisations and from the private sector.

[162] Boyle R. and O'Riordan J., (2014), 3.

Figure 3 – A scale of open and closed recruitment systems for Top-Officials positions



Source: H. Kuperus and A. Rode, Top Public Managers in Europe, 2016

However, also in those countries that provide - (according to Kuperus and Rode) - for open recruitment procedures, the reality is different: Often, vacancies may only be published internally, or recruitments and selections are a result of internal shuffling, mobility policies, and promotions. Moreover, even if positions are open to external candidates, they are often filled with internal candidates.

As a consequence, this makes recruitment and appointment processes everywhere a highly opaque and complex procedure. Overall, there is a clear danger that general merit recruitment procedure becomes severely discredited in the eyes of citizens and future applicants if positions are opened exclusively in specific cases and as a result of unclear, vague and opaque ways.

Council of Europe – external recruitment

Council of Europe data allows some insight into recruitments of Directors General/Directors during 2014-2017[163]. The data suggests a substantial number of external applications. The author of this case study report is familiar with details concerning one of the posts (Director of Internal Oversight). This vacancy was filled with an internal candidate. The previous director retired, but was an external candidate. Moreover, the Council of Europe presents biographic information on its Directors General on its webpages. This confirms that of the three current Directors General, two were internal candidates whilst one was external.

Interview feedback suggests a substantial number of external appointments at the start of the current Secretary general's mandate, however, more recently senior-level posts were rather filled with internal candidates.

	A6 - DIRECTORS	A7 – DIRECTORS GENERAL
Number of procedures	13	5
Average number of applications per procedure	121	115

[163] Data facilitated by the Council of Europe for the purpose of this Study.

For example, in Ireland vacancies may be filled without competition if there is a clear "business case". The business case is defined as recruitment needs in cases of shortage of expertise, if previous attempts to staff the position were unsuccessful, in case of retaining talents, effects of restructuring measures, unexpected departures, or when relationships with ministers are breaking down[164]. According to a report from Boyle and Riordan from the Irish Institute for Government, *"the criteria used to decide whether a post should be filled through mobility rather than go to open recruitment (….) are in need of clarification. It is recommended that the rationale for the choice is as clear as possible, and that the number of posts filled through mobility is regularly monitored. Use of mobility to fill senior level posts should not restrict the overall number of posts subject to open competition"*[165].

In Canada an audit carried out by the Public Service Commission in 2008 found that of the sample of 348 appointments assessed, 107 were non-advertised[166]. They also found that a higher proportion of non-advertised than advertised posts were unsatisfactory or in need of improvement with regard to the process used to fill the posts. According to the audit's conclusions, the reason many un-advertised processes were deemed either unsatisfactory or in need of improvement was due to the need for improvement in either the assessments or the rationale given for choosing a non-advertised appointment process: "Rationales for the choice of non-advertised processes were either missing or did not meet organisational (…) policy requirements. It was often unclear why a non-advertised appointment process was chosen over an advertised one"[167].

In the United Kingdom, exceptions to open competitions have been reformulated in 2018.[168] These concern:

1. Temporary appointments in cases of urgency;
2. Support for Government employment programmes for disadvantaged people;
3. Secondments;
4. Highly specialist skills;
5. Former civil servants who were previously appointed on merit and on the basis of open and fair competitions;
6. Interchange with Northern Ireland;
7. Transfer of Staff from other bodies.

Similar to the case of Ireland, these exceptions seem to be quite general and are open to interpretation.

[164] Boyle R. and O'Riordan J., (2014).
[165] Ibid, 2.
[166] Public Service Commission of Canada (2008), Government-wide audit of executive (EX) appointments, http://publications.gc.ca/collection_2008/psc-cfp/SC3-134-2008E.pdf.
[167] Boyle R. and O´Riordan J., (2014), op cit.
[168] Civil Service Commission, (2018), Recruitment Principles.

Council of Europe – exceptions to publishing a vacancy

The Council of Europe's staff regulations (Appendix II Article 25) allow for exceptions[169]: 'where particular circumstances so require, the Committee of Ministers shall decide otherwise on a proposal by the Secretary General'. The article suggests that the Secretary General requires approval by the Committee of Ministers in case of not publishing a vacancy. Interview feedback suggests that it is only on very rare occasions that a vacancy is only published internally, and this is explained with specific competences such as in-depth knowledge of the institution (for example the appointment of the Director of the Directorate of Programme and Budget).

In the EC, the ***general rule*** is that senior management posts are filled from among the management grades in the EC or in other institutions. The EC continues to attach a ***high level of priority to internal promotions***. Publishing a post internally as a first step therefore remains the rule. A procedure other than the competition procedure may be adopted by the Appointing Authority for the recruitment of SLOs (DG or their equivalent in grade AD 16 or AD 15 and D or their equivalent in grade AD 15 or AD 14) and, in exceptional cases, also for recruitment to posts which require special qualifications.

However, ***there are situations*** where ***a case can be made*** for recruiting from the outside. In such cases, the stages laid down in Article 29.1 of the Staff Regulations must first have been gone through ***in accordance with the jurisprudence***.

Considerations before filling a vacancy

Article 29

1. Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by:

(i) transfer, or

(ii) appointment in accordance with Article 45a, or

(iii) promotion within the institution

(b) whether requests for transfer have been received from officials of the same grade in other institutions, and/or

(c) if it was not possible to fill the vacant post through the possibilities mentioned in points (a) and (b), whether to consider lists of suitable candidates within the meaning of Article 30, where appropriate, taking into account the relevant provisions concerning suitable candidates in Annex III and/or

(d) whether to hold a competition internal to the institution, which shall be open only to officials and temporary staff as defined in Article 2 of the Conditions of Employment of Other Servants of the European Union; or follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.

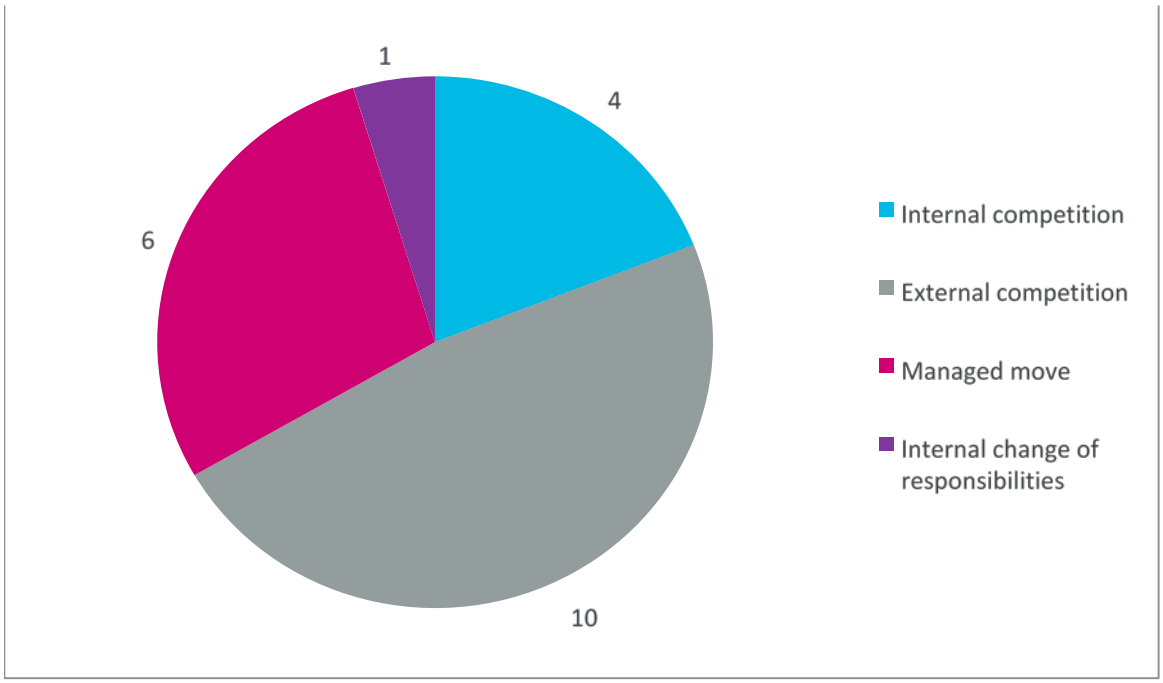
[169] Council of Europe (2017), Staff Regulation, https://publicsearch.coe.int/Pages/result_details.aspx?ObjectID=090000168078170a#k=#s=21.

As can be seen, this procedure is cumbersome and language used is vague, unclear and allows for a lot of flexibility in how to proceed. Overall, the rules in place do not offer clear criteria for when to follow an open competition for SLOs.

Overall, priority is given to internal competitions, managed moves or promotions. The situation is different as far as more junior officials are concerned. However, also here, exceptions exist. While maintaining the principle that the vast majority of officials are to be recruited on the basis of open competitions, the appointing authority may decide, by way of derogation from point (d) and only in exceptional cases, to hold a competition internal to the institution which shall also be open to contract staff as defined in Articles 3a and 3b of the Conditions of Employment of other Servants of the European Union. That latter category of staff shall be subject to restrictions with regard to that possibility as laid down in Article 82(7) of the Conditions of Employment of Other Servants of the European Union and with regard to the specific tasks it was entitled to perform as contract staff.

Also in the United Kingdom (and while the Government is committed to use external recruitment to enable the appointment of SLOs with a more diverse range of experience and expertise) "the reality is that fewer than half (10 of 21) of appointments to lead Whitehall departments and other devolved administrations since 2010 have been made following an external competition"[170].

Figure 4 – Departmental permanent secretary appointments since May 2010



Source: UK, Institute for Government, 2013, 20. Annual reports of the Civil Service Commission, 2009-2012; Correspondence with the Civil Service Commission. The data records appointments to lead Whitehall departments and the Scottish and Welsh Governments. Other permanent secretary grade appointments (including the position of Cabinet Secretary) are not captured here.

[170] UK Institute for Government, (2013), 6.

Very often, the criteria as to when to use which procedure, are also (sometimes) arbitrary and (often) not clear. In some cases, open competitions and public advertisements are not applied because of the higher costs involved in these cases. Therefore, we can conclude that open competitions seem to remain an exception.

The Organisation for Economic Cooperation and Development – selection procedure

The selection procedure for OECD officials, including Directors, is described step-by-step in the Staff Rules, Regulation 7. There are several officials involved in the procedure, the Head of Human Resources and the Secretary-General, as well as two bodies, the Selection Panel and the Management Review Board.

Firstly, according to Instruction 107/3, candidates present their applications to OECD following a publication of the position which has to take place 'at least three weeks before the selection procedure is initiated'. The Regulations 6 states that only nationals of Members of the Organisation are eligible to be appointed as OECD officials[171].

Secondly, according to Instruction 107/4, a short-list of candidates, based on their applications, is 'drawn up by the hiring Director in agreement with the Head of HRM' and needs to be approved by the Secretary-General. The candidates may in some cases be requested to take a written examination and/or other tests.

Thirdly, according to Instruction 107/5, the short-listed candidates are invited for an interview with a Selection Panel. As stated in Instruction 107/6, following an assessment of all the candidates, the Panel then lists 'those candidates considered as suitable for selection for the vacant functions.' This means in practice that all such listed candidates have successfully completed the standard selection procedure and 'may therefore be selected for the performance of other identical or comparable functions.' As per Instruction 107/7, the selection decision itself is then taken, at the Director level, by the Secretary-General, 'after consultation with the hiring Director and the Head of HRM.'

According to Instruction 107/5, the composition of the Selection Panel is 'drawn up by the Hiring Director, in agreement with the Head of HRM.' For positions at the Director level, the Secretary-General acts as a safeguard and has to approve the panel composition.

Fourthly, Instruction 107/8 states that '[b]efore any offer of appointment is made to a selected candidate, the hiring Directorate or Service in consultation with the HRM Service checks the professional references of this candidate.'

The Staff Rules in Instruction 107/10 also mention a medical examination of the selected candidate. The Medical Officer of the Organisation verifies that the candidate satisfies 'the standards of medical fitness required for the exercise of the functions he will be called upon to perform.'

Fifthly, the "relevant advisory body" is consulted on the regularity of the procedure prior to the selection decision, as stated in Instruction 107/8. For the Director selection, Instruction 107/19 a) states that this refers to the Management Review Board. Instruction 107/20 a) describes the composition of the Board. It is chaired by a Deputy Secretary-General and other members consist of

[171] That said, Regulation 6 also includes a long list of exceptions from this rule following the OECD Council decisions.

the other Deputy Secretaries-General, the Executive Director of the International Energy Agency (IEA) or its Deputy Executive Director, for cases concerning functions within the IEA, the Executive Director, the Chief of Staff and the Head of HRM. According to 107/20 b), 'a member of the Executive Directorate acts as Secretary to the Board.'

Instruction 107/23 gives the Management Review Board the ability to 'request any person to attend part of a meeting to obtain any supplementary information useful for the consideration of a case.' The Instruction further describes the functioning of the Board by stating that it 'may deliberate either under a written procedure or in a meeting. A meeting shall be decided at the Chair's initiative or at the request of any member of the Board. The advisory opinion delivered shall be adopted by a majority vote. In case of equal votes, the Chair shall have the casting vote.'

Lastly, as Rule 7/1 a) states, '[t]he Secretary-General provides for a competitive standard procedure for the selection of officials to fulfil functions within the Organisation.' The Secretary-General also takes the selection decision, using the list of names drawn by the Selection Panel and after consultation with the hiring Director and the Head of HRM. Regulation 7 a) also highlights that '[i]n selecting officials, the Secretary-General shall give primary consideration to the necessity to obtain staff of the highest standards of competence and integrity.'

OECD interview feedback highlighted the positive impact that the Management Review Board had on the selection procedure. The members of the Board are generally very active, rigorous in their review and exercise their power to return a list of selected candidates to the Selection Panel if they deem it necessary, be it with regards to the composition of the list of selected candidates or with regards to the reasoning used by the Selection Panel in the selection. Most of the time, their opinions are provided in writing rather than in person, which reduces the risk of them being influenced by one another. Furthermore, it is helpful that they see every recruitment and have an overall perspective to ensure balance across the full executive pool as well.

OECD member countries have contradictory views on the Management Review Board. On one hand, they welcome the added rigour of the process, on the other hand they are keen to know quickly the outcome of the selection procedures where the candidates of their nationality are involved. The issue of involving very senior officials in the selection procedure is that this often causes delays, due to their limited time availability and as they are expected to read every decision in detail. That said, one of the contributions of the Board has been an increased acceptance by the member countries of the selection decisions at the senior-most levels.

4.6 Composition of the structures in charge of selection/assessment

4.6.1 The nature and composition of selection committees

Some kind of body or committee for recruiting or advising on the best candidates for SLO positions are often used as the main tool in ensuring political neutrality and objectivity in the recruitment process of SLOs.

Besides this, the nature and composition of selection committees differ in the Member States and amongst the EU institutions. Still, we believe it is possible to classify the different systems into typologies and models.

For example, whereas in some countries, selection committees are internal bodies and ministers enjoy a great amount of discretion in decision-making, other countries have decided to create independent selection boards and introduce specific monitoring procedures. Both models raise important questions about how to best manage conflicts of interest and political discretion in the appointment process and combine this with the need for neutral expertise in the appointment process.

However, the crucial question in all models is how to balance political interests of ministers / presidents with merit requirements.

According to the study of Kuperus and Rode (2016), Member States have chosen several strategies:

In five Member States (DK, IE, CY, NL, EC) there is a **pre-recruitment committee** that pre-assesses and pre-selects a short(er) list of candidates for the further selection process. In Denmark, the pre-recruitment committee is only used for recruiting Permanent Secretaries, while in Cyprus there is a pre-selection committee for certain types of SLOs. The pre-selection mainly takes place on the central level, with the exception of the EC, where the recruiting Directorate General sets up a pre-selection panel to examine all applications and to determine a list of best-qualified candidates to the post to be put forward for further consideration by the central committee.

After pre-selection, the next step in the selection process is either selection on the ministers' level (DK) or through another round of selection on the central (IE, EC) or decentralised level (NL), to come up with a short list of final candidate(s).

Furthermore, in most of the other Member States there is **some kind of selection commission or advisory board to the ministers**, which carries out the selection process and chooses one or several final candidates. The table below shows the types of selection committees in the EU Member States.

Table 4: SLO selection committees or bodies in the EU Member States

PRE-SELECTION COMMITTEE	CENTRALISED SELECTION COMMITTEE	SELECTION PROCESS IS DECENTRALISED TO MINISTRIES	NO SELECTION COMMITTEE
DK (level 1+) IE CY (level 2) NL (levels 1+&1) EC	BE, CZ, EE, IE, ES (level 2), FR (level 2), HRV, CY, MT, PL (level 1+), PT, RO, EC	BG, DK (level 1&2), DE, EL, LV, LU, HU (level 2), AT, PL (level 1&2), SK, FI, SE	ES (level 1+&1) FR (level 1) HU (level 1+&1)
	Mixed model		
	IT, NL, LT, SI, UK		

Kuperus and Rode distinguish between Level 1 + (Secretary General/Permanent Secretary/Secretary of State), 1 (Director General/Head of Department), 2 (Director), 3 (Head of Unit/Head of Division), 4/5 (Senior Officials). Source: H. Kuperus and A. Rode, Top Public Managers in Europe, 2016

In 12 Member States (BG, DK (level 1 & 2), DE, EL, LV, LU, HU (level 2), AT, PL (level 1 & 2), SK, FI, SE) the selection committee is organised on a **decentralised administration level**. In several of these countries there are official guidelines for selection committees and recruitment criteria that help each administrative unit to execute the selection process according to the national standard.

Further, in 13 Member States (BE, CZ, EE, IE, ES (level 2), FR (level 2), HR, CY, MT, PL (level 1+), PT, RO, EC) the selection process is centralised with a **centralised selection committee.**

In several other countries (IT, LT, NL, SI, UK) **a mixed selection process** takes place, where the selection process starts on the central level, e.g. through a centrally organised examination (IT, LT) or by organising a central selection commission, and in later stages moves to the particular organisation where the vacant position is located. In NL, SI and the UK the central body monitors the process through all stages of the selection.

In several countries, there is **an independent commission** appointed to ensure independent and fair selection of SLOs. In HR, CY, EE, IE, MT, PT and SI there is a recruitment and selection commission that is independent of the central government level, which conducts CV screening, tests and / or interviews, and comes up with the (short) list of final candidates. In IT and LT this first selection stage takes place through **central assessment**. In CY, this independent commission (Public Service Commission) is also the appointing body.

In other countries (GR, SI, UK) there is **a specific (internal / independent) body that oversees the selection process** and guarantees its objectivity and professionalism. For example, in GR there is an internal council in each ministry supervising the selection process. And in the UK, there is an independent Civil Service Commission which is ultimately responsible for approving appointments, and consists of members appointed through open competition coming from the private, public and voluntary sectors. Furthermore, in SI there is the Officials Council which is composed of 12 elected or appointed members for a term of six years. The Officials Council appoints a special selection committee which, on the basis of standards of professional qualifications, selects the suitable candidates for the particular civil service position.

Finally, in three Member States there is **no selection committee for (some categories of) SLOs** (ES, FR, HU). In these countries, there are two different selection processes for the higher- and lower-level positions.

To summarise, in a growing number of countries the selection process for SLOs is centralised and differs from that of other civil servant groups. This is mostly the case in countries that have created specific senior civil services. Otherwise, recruitment and appointment processes are either centralised, decentralised, or fragmented. In many countries, specific appointment bodies or committees have been introduced in order to prepare decisions for the minister. These bodies may be internal and take forms of self-regulation, or more external and independent.

The European Free Trade Association – selection procedure

The EFTA Secretariat's Human Resources Services are responsible for assessing applications of directors in cooperation with the Secretary-General and the Deputies Secretary General:

1. All vacancies are advertised for at least 30/45 days;
2. Candidates from each EFTA country can submit their applications;
3. Around ten candidates are shortlisted according to their qualifications;
4. Shortlisted candidates are invited for individual interviews (usually a 90 minutes interview, where a personality assessment previously entered is also discussed). A semi-structured panel interview assesses past experience, motivational fit, technical competence and the required behaviours for the position in question. The panel is normally composed by two staff from the Human Resources department and another management representative or specialist in a specific topic.
5. Following the interview there is a one-hour written assessment which addresses topics important to the position;
6. Based on a holistic approach, the most suitable candidate is selected. The Secretary General makes the final decision.

A very typical form of self-control is the appointment procedure for SLOs in the EC. Pursuant to Article 29 of the Staff Regulations the EC is the only decision-making body for the appointment of SLOs and therefore the Appointing Authority. Appointment proposals are put forward by the Commissioner for Personnel and Administration in agreement with the President and the Member of the Commission with responsibility for the policy corresponding to the function at stake (portfolio Commissioner). The Appointing Authority is assisted or advised by other bodies that are entrusted with preparatory work:

- *Consultative Committee on Appointments (CCA):* The CCA was established in 1980. The CCA acts as an advisory body in the procedure for the appointment of SLOs. Its role is to act as an interviewing and evaluation board which can recommend a shortlist of candidates to the Commissioners who are responsible for proposing an appointment. The rules on its membership are set out in the EC's decision adopting the CCA internal rules of procedures. Its membership is as follows:
    - For the appointment of SLOs to occupy the post of DG: the SG (Chair), the DG for Human Resources and Security, the Head of Cabinet of the President, the Head of Cabinet of the Commissioner for Budget and Human Resources, the Permanent Rapporteur, the Rapporteur for the case.
    - For the appointment of SLOs to occupy the post of D: the DG for Human Resources and Security (Chair), a DSG, the recruiting DG, the Head of Cabinet of the Commissioner for Budget and Human Resources, the Permanent Rapporteur, the Rapporteur for the case.

  In both configurations, the CCA may be assisted by HR experts, independent experts or other persons. It should be noted that the DG of DG Budget participates as observer in CCA interviews

with candidates for posts of Resource Directors. This DG is also kept informed by the DG concerned throughout the appointment procedure.

- *Permanent Rapporteur to the CCA:* The function of Permanent Rapporteur to the CCA was created in 2000. The Permanent Rapporteur is a Principal Advisor attached to DG Human Resources and Security. The Permanent Rapporteur to the CCA acts under the joint authority of the Chair of the CCA and the DG for Human Resources and Security. His / her role is to focus all efforts to promote the successful career development of all senior officials (e.g. mobility across several posts which provide a good mixture of policy and management experience, exploiting best the particular talents of officials). This person should have confirmed skills and experience in human resource management.

The General Secretariat of the Council – assessment centres and selection

The GSC uses an external assessment centre selected following a public procurement exercise. The GSC recently conducted five senior management appointments at the same time. Based on the experience, it was decided that candidates did not have a clear enough idea of how the interview and assessment centre would be conducted. In the interests in fairness, and to help candidates prepare, the GSC is preparing a guide for candidates invited to interview.

Generally, there are three stages within the selection process. The first stage consists of a first round of interviews and ends by a selection board selecting a smaller number of candidates. Stage two is dedicated to a day of testing in an external assessment centre. Third stage consists of a second interview with candidates having passed the assessment centre.

The selection board carrying out the interviews is composed of 4-6 managers. During a second interview, an observer from the external assessment centre may be present.

The external assessment centre draws up an evaluation report which is forwarded to the selection board before the second interview and in itself is not eliminatory. The candidate will be able to see the evaluation of the assessment centre once the selection process is finished.

During the process of choosing a successful candidate, the Appointing Authority should be assisted by an advisory selection board that is supported by the assessment centre.

Generally, in many Member States a higher-level or an immediate manager is present in the selection committee (BG, EE, EL, CY, LT, HU, MT, NL, AT, SI, SK, SE). In the EC, the members of the panel occupy at least the same function as the one for which the selection will take place. In several countries the highest-level civil servant – two permanent secretaries (from the Prime Minister's Office and the Ministry of Finance) (DK), State Secretary (EE), Secretary General (NL), or the Head of the Civil Service (PL) – take part in the pre-recruitment committee (DK) or selection committee.

Furthermore, the candidates for the selection committees are chosen from:

- The directorate where the vacancy is (DE, RO, EC);
- A neutral directorate/department/other ministry (DE, EL, NL, EC);
- Private or non-governmental sector (can be experts in a certain area or HR) (BG, EE, IE, EL), and may include a person with proven legal expertise (BG, EE);

- A representative of the HR unit / personnel department (BG, DE, EL, PL);
- A representative of the Ministry of Public Administration or a similar institution (EL, HR, RO);
- Representatives of the trade unions (BG) or appointees of the trade union for public employees (AT);
- Member appointed by employee representation (AT).

Often, it is also practice to nominate one independent or external expert into the selection committees. The choice of criteria who should become an independent expert highly differ and range from competence to political donors, office holders, friends, family members and academics. Often, there is also concern of conflicts of interests of "independent" committee members who are politically active fulfilling the role of independent panel members or senior independent panel members. This way of selection of independent members is likely to increase public distrust of these persons, because of perceived links to the selection body concerned, the appointing department or the governing party.

4.6.2 Internal versus external monitoring of the selection and appointment process? Advantageous and Disadvantageous

"Is it objected against the régime of publicity, that it is a system of distrust? This is true; and every good political institution is founded upon this base. Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it? (…) What remains, then, to overcome all these dangerous motives? what has created an interest of superior force? and what can this interest be, if it be not respect for public opinion—dread of its judgments—desire of glory?—in one word, everything which results from publicity?"[172].

Unfortunately, from a comparative point of view, very little is known as to the operation of these – relatively opaque – appointment committees, commissions, bodies etc. Also, little evidence exists as to their internal operations, budgets, rules of procedure and working styles. Because of this, arguments against or in support of specific (independent) forms of appointment bodies and/or committees or the creation of independent watchdogs are more based on 'faith' than on empirical evidence[173].

Overall, the public increasingly tends to question practices where public institutions regulate their own ethical conduct. More and more it seems that any form of self-regulation causes suspicion. In particular the challenge facing appointment committees is how to ensure their credibility with the public.

[172] Bentham, J. (1843).
[173] Saint Martin, D. (2003), 197.

Table 5: Self-regulation or independent forms of appointment committees? – main differences

INTERNAL (SELF-REGULATION) APPOINTMENT COMMITTEES	INDEPENDENT SELECTION COMMITTEES
Members are internal experts, Holders of Public Office, officials, HR experts or elected/nominated, mostly Minister/President with advisory (and decision-making) role	Members are independent experts, important advisory or decision-making role of minister/president in selection and appointment process
Internal oversight. Members oversee their peer's compliance with recruitment and appointment rules	External oversight. Commission oversees Holders of Public Office' compliance with ethics rules
Can be an office, or committee, or appointment body, presidential office within own organisation	Independent with own budget
Duties can include: • HR experts advising colleagues on procedures • Creating awareness for violations of CoI, rules on appointments	Duties can include: • investigating complaints • own inquiry • determining penalties • issuing advisory opinions • issuing reporting statements
Exist in most EU countries and in EU institutions	Pure models do not exist: US, Canada, Australia, to a lesser extent IE and UK

Therefore, principles of ethics cast suspicion on any process in which holders of public office discipline themselves. *"No one should be the judge in his own cause. This maxim has guided judges of controversies and makers of constitutions since ancient times. It expresses fundamental values of due process and limited government, providing the foundation for the separation of powers, judicial review"*[174]. We also agree that the current opaque practice and use of (mainly) internal appointment committees is not satisfying since only outside and independent bodies are able to oversee and to monitor appointment procedures in a fair and impartial way. Outside bodies would also "be likely to reach more objective, independent judgments. It could more credibly (…) enforce institutional obligations without regard to political or personal loyalties. It would provide more effective accountability and help restore the confidence of the public in the ethics process"[175]. Consequently, most other professions and most other institutions have come to appreciate that self-regulation of ethics is not adequate and have accepted at least a modest measure of outside discipline. "The internal censure will not be sufficient to secure probity, without the assistance of external censure. That a secret policy saves itself from some inconveniences I will not deny; but I believe, that in the long run it creates more than it avoids"[176].

[174] Thompson, D.S. (2007), *Overcoming the Conflicts of Ethics in Congressional Ethics, Paper Prepared for the Panel on "Congressional Ethics Enforcement"*, Woodrow Wilson International Center, Washington, D.C., January 16.
[175] Ibid, 18.
[176] Bentham, J. (1843).

Current practice seems to be towards the establishment of more external committees[177]. The "move toward a more external form of appointment procedures for top-officials is designed to enhance public trust and confidence in the procedures (…). It is intended to depoliticise the process of ethics regulation"[178]. Contrary to this, "there is much confusion and exaggeration surrounding the fears and promises linked to independent" scrutiny[179]. Another important argument for more independence in the selection process is its actual and perceived impartiality and freedom from political and bureaucratic bias[180]. An additional advantage that should appeal to all stakeholders: an outside body would reduce the time that any stakeholder would have to spend in the appointment process.

However, often, holders of public office are very reluctant to accept independent experts to judge their selection choices. This does not mean that the Member States and the different institutions are not willing to establish any form of scrutiny. However, so far evidence is missing as regards the claimed superior outcomes of independent appointment committees. We acknowledge that there is also much confusion and exaggeration linked to independent appointment committees who - realistically - have two types of power to fulfil their mandate: the power to initiate an inquiry and the power to issue reports. Internal procedures like those in the case of the EC's CCA also have a number of advantages. Appointment procedures are likely to be more informal, flexible, more speedy, communication channels are "short" and members of appointment committees know each other. On the other hand, asking for external and independent appointment would be a sign of distrust and add more bureaucracy, time delays and complexity to the whole process.

While we agree that good arguments exist in favour of maintaining confidential and internal appointment practices, we also believe that those arguments in favour of the introduction of more transparent and independent structures outweigh the critical points made: Overall, we agree with Bentham: internal appointment procedures too easily create suspicion. In "Essays on Political Tactics" Jeremy Bentham (1843) claimed: "Suspicion always attaches to mystery". Yet Bentham calls publicity "the fittest law for securing the public confidence".

4.6.3 A best practice model? The UK model of a Commissioner for public appointments

Despite the fact that little is known as to appointment commissions and appointment committees, there seems to be a trend towards the introduction of more of these external bodies. However, in most cases these committees are neither fully independent bodies nor do they have important monitoring and enforcement powers. Most institutions in the EU Member States are of the opinion that any form of self-regulation has the advantage that it is simpler, easier and less conflictual. However, increasingly, countries agree upon the need to add more independent scrutiny into the process, for example, by the way of adding outside consultants into the appointment process and by arranging for mandatory assessment centres for candidates. Especially the latter instrument seems to enjoy growing popularity. We have also taken note that the Ombudsman considers this a good practice: 'On 15 February 2018,

[177] Rosenson, B. (2003).
[178] Saint Martin, P. (2003).
[179] Ibid.
[180] Saint Martin, P. (2003).

Mr Selmayr took part in the day-long assessment by the outside consultant (which is a good practice other EU institutions could examine)'[181].

In Europe, however, the best known example for independent monitoring of appointment procedures is the UK commissioner for public appointments. This position exists since 1995 when Lord Nolan reviewed the system in 1995 and decided that a Commissioner for Public Appointments should be appointed, to establish a Code of Practice for public appointments and regulate the system according to that Code. In addition, the Nolan report argued that "the main weakness" in the public appointments regime was "the absence of effective external scrutiny" with "no mechanism for the regular review of the work of individual departments and no means of identifying failures of system or practice"[182]. While the Nolan report concluded that ministers should remain accountable for public appointments, it did recommend a set of checks and balances on this exercise of ministerial power:

- All public appointments should be governed by the overriding principle of appointment on merit;
- Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit. The range of skills and background which are sought should be clearly specified;
- All appointments should be made after advice from a panel or committee which includes an independent element;
- Each panel or committee should have at least one independent member and independent members should normally account for at least a third of membership;
- A new independent Commissioner for Public Appointments should be appointed;
- The Public Appointments Commissioner should monitor, regulate and approve departmental appointments procedures;
- The Public Appointments Commissioner should publish an annual report on the operation of the public appointments system;
- Departmental Public Appointments Units should be placed under the control of the Public Appointments Commissioner;
- All Secretaries of State should report annually on the public appointments made by their departments;
- Candidates for appointments should be required to declare any significant political activity (including office-holding, public speaking and candidature for election) which they have undertaken in the last five years;
- The Public Appointments Commissioner should draw up a code of practice for public appointments procedures. Reasons for departures from the code on grounds of 'proportionality' should be documented and capable of review.

[181] European Ombudsman (2018), 20.
[182] House of Commons (2016).

However, it was also decided that the Commissioner is not responsible for making appointments himself. Rather he provides information about the availability of public appointments and deals with the procedures for responding to queries relating to appointments that fall outside his remit, for example civil service or judicial appointments. The running of the appointments process is the responsibility of the relevant Government department.

As already discussed, the role of the Commissioner is subject of continuous debates. At present, the functions of the Commissioner for Public Appointments are as follows:

1) The Commissioner shall, in the manner the Commissioner considers best calculated to promote economy, efficiency, effectiveness, diversity and equality of opportunity in the procedures for making public appointments, exercise the Commissioner's functions with the object of maintaining the principle of selection on merit in relation to public appointments.
2) The Commissioner shall prescribe and publish a code of practice on the interpretation and application by appointing authorities of the principle of selection on merit for public appointments and shall adopt and publish from time to time such additional guidance to appointing authorities as the Commissioner shall think fit.
3) The Commissioner shall audit public appointment policies and practices pursued by appointing authorities to establish whether the code of practice is being observed by appointing authorities.
4) The Commissioner may require appointing authorities to publish such summary information as may be specified relating to selection for public appointment.
5) The Commissioner may from time to time conduct an inquiry into the policies and practices followed by an appointing authority in relation to any public appointment or description of public appointment.
6) The Commissioner may recruit and train public appointment assessors for the purpose of advising and assisting an appointing authority in relation to any public appointment.
7) For the purposes of paragraphs (3) and (5), appointing authorities must provide the Commissioner with any information the Commissioner reasonably requires.

While we believe that the position of the Commissioner could very well serve as an example for other EU Member States and the EU institutions, we are also aware about the fact that appointment procedures are linked to very different administrative structures and traditions. Not all countries allow for a strong role for an executive body in the appointment of SLOs. Therefore, we remain cautious as to the suggestion of taking this model as a best practice. However, the case clearly illustrates that current trends in the field of appointment policies are towards the introduction of more independent scrutiny and monitoring.

4.6.4 Pre-Appointment Hearings? A role for the EP in appointing the SG?

In the future, the responsible committee in the EP (e.g. CONT) may hold oral evidence sessions with the Commissioner's or President's preferred candidates for a small number of SLOs (DGs) or only for the SG position, in the form of pre-appointment hearings. The purpose and objectives of these hearings can be defined as:

- scrutiny of the quality of political decision-making, which is a proper part of political (ministerial) accountability to Parliament;
- providing public reassurance and enhancing public trust in the institutions that those appointed to key positions have been selected on merit;
- providing public evidence on the skills and competences of the candidate; and
- enhancing the appointee's legitimacy and demonstrate that he/she is fit in undertaking his or her function[183].

Evidence, for example in the UK, suggests that most pre-appointment hearings are constructive and non-contentious[184]. They provide enhanced transparency and credibility to the appointment process. Moreover, pre-appointment hearings are an opportunity to enhance trust.

We suggest that the EP has no veto over the appointment process. However, it could recommend that an appointment is not made. In this case, Commissioners / Presidents may pause for reflection.

4.7 Conflicts of interest

4.7.1 Introducing the discussion

This section discusses aspects related to the ethical dimension of the appointment of the new SG.

The Ombudsman enquiry very clearly confirmed that all preparatory steps to appoint the new SG were 'window dressing' or to create an appearance of complying with procedures ('causing' the vacancy of DSG by moving the incumbent DSG to DG Migration and Home Affairs, the appointment procedure for DSG (note that the EC acknowledges that Mr Selmayr's DSG application was only to comply with requirements for eligibility as SG)[185], with the application of another senior member of the President's Cabinet that later withdrew the application. The Ombudsman considered with regard to the entire procedure of DSG appointment, that 'its sole purpose was to make Mr Selmayr eligible for reassignment as Secretary-General'[186]. This is identified as the third instance of maladministration and breach of Article 4 of the Staff Regulations: 'no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations'[187]. The Ombudsman enquiry also pointed to a series of other deficiencies:

- Mr Selmayr failed to recuse himself in January 2018 from decision-making on the vacancy for DSG;
- Following his (late) recusal, no substitute for Mr Selmayr was appointed to the Consultative Committee on Appointments;
- The handling of documentation related to the appointment was deficient, e.g. possibly relevant emails between the EC Spokesperson's Service and journalists could not be found[188],

[183] House of Commons, (2018), 11.
[184] Ibid.
[185] European Ombudsman (2018), p.19 'In its replies sent to Parliament, the Commission stated that Mr Selmayr applied for the post of Deputy Secretary-General in order to ensure that his transfer as Secretary-General "would be in line not only with the law, but also with Commission practice". This statement itself indicates that he participated in the selection procedure for Deputy Secretary-General for the sole purpose of becoming eligible for reassignment as Secretary-General.'
[186] European Ombudsman (2018), 24.
[187] Ibid, 24.
[188] Ibid, 10.

and there were no minutes/attendance record of the meeting of the President's Cabinet endorsing the move of Ms Michou[189].

Impartiality and fairness, in the sense of non-political partisanship in public administration, is a precondition in all countries and EU institutions for ensuring that all people are treated fairly and in an impartial manner. "These values are important to the level of justice and continuity in public administration – arguably a significant determinant of how much trust citizens place in their system of government"[190].

Therefore, in practice, in their quest for legitimacy, democratic regimes find themselves having to balance three conflicting values that can be in some tension:

- the need for fair and merit based recruitment and appointment procedures;
- the request for non-politically partisan public service delivery; and
- the responsiveness of SLOs to the policies of the government of the day.

Consequently, an appointment process of SLOs is a conflict of interest per se: Whereas political involvement in administration is essential for the proper functioning of a democracy, public services need protection against being misused for political interests and citizens need public service delivery that is based on competence, skills and technical capacity.

In order to solve this conflict, in "Politics as a Vocation" (1919) the sociologist Weber suggested that a clear division between politics and administration would be the ideal solution. However, Weber himself warned against the danger that politicians abuse public administrations for their political self-interest and career civil servants might dominate politicians through their superior knowledge, technical expertise and longer experience.

It is therefore easy to say that a completely apolitical appointment process is in some way the ideal, and that any evidence of political involvement is a departure from a preferred path. Likewise, it is too easy to suggest that "politicisation" is describing best the reality.

In reality, the merit-based appointment of SLOs is rarely the only consideration. For example, Rouban (2012) distinguishes between three different variants of politicisation that go beyond the politicisation of recruitment and appointment procedures:

- Politicisation as civil servant participation in political-decision making;
- Politicisation as control over nominations and careers;
- Politicisation as civil servants' political attitudes and involvement (in political parties etc.)[191].

According to Rouban, there is considerable confusion surrounding the discussions about politicisation. "*The first misunderstanding has to do with the fact that politicization can be perfectly legal and legitimate, because democratic rule implies that the voter's choices should actually be implemented (…). Another source of confusion comes from the fact that the politicization of appointments does not necessarily imply*

[189] Ibid, 17.
[190] Matheson A., OECD, (2007)
[191] Rouban L., (2012), 381.

a lack of professional competence. Politicization generally seems to be linked to the idea of an amateurish administration"[192].

On the other hand, vast research evidence shows that non-meritocratic structures are linked to corruption, inefficiency, poor performance and low quality of governance. Because of this, in many countries, appointment systems are criticised because of the misuse of personal interests and political patronage for appointments. Thus, recruitment and appointment procedures take place in a politicised sphere, which should - ideally - not be politicised. However, it should be added at this point that merit recruitment and politicisation are not necessarily polar opposites as is occasionally assumed by the public administration literature[193]. Rather, work on party patronage has shown that it is common for political leaders to prefer appointees who combine professional qualifications and political loyalty[194].

4.7.2 How to manage conflicts of interest

"How would we know if the balance between fair and non-politically partisan public service delivery and the responsiveness of public servants to the policies of the current executive was about right? We could make the connection with public trust – but this is a rather slippery issue as trust is capable of many meanings and is very resistant to precision"[195]. According to Matheson (OECD, 2007), "the balance is right when the resulting behaviour of the public service supports a perception of the legitimacy of government"[196]. There are several areas in which we might look for evidence of legitimacy supporting behaviours:

- *The public service respects the constitution, rule of law and common interest*. Public service institutions do not have authority over political institutions, but they do act as a quasi-constitutional constraint on those institutions. Legitimacy derives from adherence to constitutional and legal requirements, regardless of the implications for the elected government[197].
- *The public service acts impartially*. Moving one step up the hierarchy, a demonstrable concern for the collective interest from the public service provides assurance that non-elected public officials do not exert power arbitrarily in their own interests, to support their friends, to harm their enemies, or act with impunity to deny citizens basic rights (for instance by unlawful detention, or denial of benefits), also provides a lasting legitimacy for governments.[198] Impartiality in this sense is a widely recognised aspiration of the public sector. However, many commentators have associated this with representativeness on the basis that impartiality is all but impossible in practice without this[199]. Legitimacy in this sense can be undermined by arrangements which allow the public service and the public powers and resources they administer, to be used as party political tools – for example if political opponents are subjected

[192] Ibid.
[193] Peters, B. G. and Pierre, J., eds. (2004a), Politicization of the civil service in comparative perspective: The quest for control. London, NY: Routledge; Peters, B.G., and Pierre, J. (2004b), *Politicization of the civil service. Concepts, causes, consequences.* In Politicization of the civil service in comparative perspective, ed. B. Guy Peters and Jon Pierre, 1–13. London, NY: Routledge.s
[194] Kopecky P., et al. (2016); Meyer Sahling J-H, et al. (2015).
[195] OECD, (2005).
[196] Matheson A. OECD, (2007).
[197] Ibid.
[198] OECD, (2000).
[199] Matheson A. OECD, (2007).

to more active tax investigations than ruling party supporters, or if permits or licenses for trade go only or mainly to the party faithful[200].

- *The public service acts responsively*. Responsiveness to the elected officials is now widely seen as a legitimate way of being responsible to the citizens. This is most readily but perhaps most dangerously achieved by emphasizing political criteria in the selection, retention, promotion, rewarding and disciplining of public servants[201].

Most countries are seeking to establish structures and processes for ensuring that the public service respects the first two points while also acting on the grounds of responsiveness. However, some countries may focus more on responsiveness than on the first two points. From this starting point, various conflicts of interests are to be dealt with:

- **The need to balance merit with other competences and skills:** Strictly speaking, appointment based on merit as the sole criteria means that an independent panel should put forward a choice of (possibly internal and external) candidates that are chosen on the basis of merit (e.g. rational criteria), and in a non-partisan way. However, SLOs should also be able to demonstrate political acumen and political skills and combine this with technical knowledge and competence. Finding a candidate who fulfills all of these criteria may be possible, but difficult. After all, it may be necessary to balance the importance of certain skills and competence against others. However, this balancing brings in a subjective aspect.
- **Public versus political interest**: The task of SLOs is to dedicate their work to the public interest. However, the quality of the relationship between SLOs and ministers is 'crucially important' and greater influence for the minister in appointing the latter 'increases the chances of the relationship working successfully', also for the public interest.
- **Impartiality versus accountability**: There is also a more fundamental question of principle that appointment systems need to address. If ministers are accountable to Parliament for their department, then their SLOs should be fully accountable to them. As a consequence, it should be stated that, if ministers are accountable for everything their civil servants do, they should also be able to recruit, appoint and dismiss them.
- **Conflicts between internal versus external recruitment and open versus closed recruitment objectives**: Often, the reality is that only few appointments have been made following an external competition – to which candidates from outside the civil service can apply. In most cases, competitions are won by serving civil servants and also because competitions are filled through internal competitions, to which only civil servants can apply. The common view is that appointing outsiders – particularly from the private sector – straight to SLO positions is not sensible. Private sector candidates do reasonably well lower down the hierarchy, but they have rarely experience of how to manage public policies. Moreover, many candidates are still appointed through 'managed moves' where the civil service leadership – often at the request of ministers – move officials horizontally without any formal process or competition. This trend where internal appointments are preferred against external

[200] Ibid.
[201] Ibid.

appointments runs counter to the merit principle because internal appointments exclude a number of (potentially excellent) candidates.

- **Transparency requirements and opaque decisions on internal moves and promotions**: There is no research on the appointment of internal candidates as a reaction to internal promotions, mobility requests or transfers. Nor is there clarity about the rationale for the use of these mechanisms/instruments. For example, internal appointments are often made in order to fill an unexpected vacancy, or to quickly replace people exiting a position for various reasons. This requirement to quickly fill vacant positions may be in contradiction with the need for due (selection) process and transparency requirements.

To conclude, conflicts of interests abound in the appointment of SLOs. Overall, the different political and the administrative "interests" and "logics" present different arguments why certain forms of appointment are needed and even legitimate, or, according to administrative theory, should be avoided and kept to a minimum.

Table 6: Conflicting political and administrative interests and logics

INTEREST OF POLITICIANS	SOCIETAL INTEREST, ROLE OF PUBLIC ADMINISTRATION
Cooperation between political and administrative level: Politics and Administration cannot and should not be separated. **Politicisation is legitimate:** Politicisation of appointment process can be perfectly legal and legitimate, because democratic rule implies that the voters´choices should actually be implemented by the selection of politically trustworthy bureaucrats. **Politicisation and responsiveness**: In a **democratic** society, politicians have a legitimate interest in controlling what government organizations do. The basic idea is that neutral competence is not the only important virtue of the civil service in a democratic society. The neutrality should be complemented by responsiveness to democratically elected leaders. **Political Importance of SLOs**: SLOs assume positions with great responsibilities and impact on society, no wonder that politicians who are accountable to the parliament take an interest in appointments, it would be strange if politicians are not interested in the people they appoint. **Relying on knowledge and trust relations**: Politicians depend on the technical knowledge and expertise of administrators. Therefore, the relationship between politicians and SLOs is based on **trust**: Politicians need to trust SLOs in carrying out their duties. **Need to control the appointment**: Politicians have a natural desire to control the appointment of SLOs with whom they work together.	**Separate Politics and Administration**: Politics and Administration should be separated (Wilson, Weber, Taylor, Goodnow) as a shield against patronage and politicisation. **Appointment in the name of the public interest**: Politicisation may favour the interest of one person, or a group of persons, or the majority of people (voters), but not necessarily the general interest and the protection of minorities. **Need to keep politicisation to a minimum. Other values and principles prevail**: As long as people believe that public administration should be based on the rule of law, the principle of impartiality and merit, the following considerations apply: • "when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that there, every man, whatever his rank or condition, is subject to the ordinary law of the realm and amendable to the jurisdiction of the ordinary tribunals. Thus no one is above the law, and all are subject to the same law administered in the same courts".[202] • The Merit principles requires staffing processes to be based on ability (talent, skills, experience, competence) rather than social and/or political status or connections. • To act impartiality is to be unmoved by certain sorts of consideration – such as special relationships and personal preferences. It is to treat people alike irrespective of personal relationships and personal likes and dislikes (…). This goes also for decisions about recruitment to the civil service, implying that it should be based on the merits and qualifications….Things like money, political or

[202] Bingham T., (2010), 4.

Politicians have a legitimate interest to influence selections in order to be able to better implement own political ideas. **Behavioural Ethics and "Impartiality Bias" in Appointments**: Complete impartial evaluation of person X about the merits of a person Y is impossible. Impartiality is an impossible ideal because the particularities of context and affiliation cannot and should not be removed from moral reason. There is always some bias in the appointment procedure of SLOs, especially if the Minister has decision-making discretion. Politicisation of appointments does not necessarily imply a lack of professional **competence (merit) of candidates**. Instead, politicians may want to select candidates who combine expertise, political acumen and partisanship. The term politicisation generally seems to be linked to the idea of an amateurish administration, which is often not the case. **Value change** Aberbach and Putnam and Rockman (1981) claim that SLOs continuously move away from the classical ideal type of the neutral/impartial weberian civil servant towards managers and hybrid personalities which bridge the boundaries between politics and administration. There is a tendency towards 'bureaucratisation of politics' and '**politicisation of administration**" as technical expertise becomes ever more important and politicians rely on advice from SLOs. Today the importance of public administration and SLOs can be seen by the fact that most political decisions are being influenced by the administration.	family connections, ethnicity, religion, age, sex, social class etc. are to be irrelevant….for the decisions made[203]. **Historical argument**: As of the 19th century, principles of modern civil service systems could also be defined as depersonalised systems which differ from traditional modes of government by the way of introduction of merit principles which were adopted – as a moral guardian to democracy – and which should shield employees from politically inspired employment actions. These systems were introduced as a reaction to the negative effects of politicized spoils systems. **Utilitarian argument**: • A civil service selected and managed based on merit, as opposed to political patronage and nepotism, presents many benefits: Hiring people with the right skills for the job generally improves performance and productivity, which translates into better policies, and better services which make for happier, healthier and more prosperous citizens and societies. • Meritocracy is also shown to reduce corruption. • Having merit systems in place reduces opportunities for patronage and nepotism, which, in extreme cases, can be serious forms of corruption. • Merit systems provide the necessary foundations to develop a culture of integrity and public ethos. • Merit is linked to good Government and trust. • Meritocratic systems bring in better qualified professionals who may be less tempted by corruption. • Meritocracies create an esprit de corps which rewards hard work and skills. When people are appointed for non-meritorious reasons, they may be less likely to see the position itself as legitimate, but instead as a means to achieve more personal

[203] Rothstein, B. and Teorell, J. (2015), *What is Quality of Government? A Theory of Impartial Political Institutions,* Göteborg, unpublished Paper, 17-19, November.

	wealth through rent-seeking behaviour. So, there is also a motivational quality about merit systems which reinforces public service. • Another way that meritocracy has been shown to reduce the risk of corruption is by providing long-term employment. This tends to promote a longer-term perspective to decision making which reinforces the employee's commitment to their job and makes it less tempting to engage in a short-term opportunism presented by corruption. Conversely, if people know that their job will not last long, they may be more easily encouraged to use their position for personal gain during the short time they have. • The separation of careers between bureaucrats and politicians is also shown to provide incentives for each group to monitor each other and expose each other's conflicts of interest and risks for corruption. Conversely, when the bureaucracy is mostly political appointments, loyalty to the ruling party may provide disincentives for the bureaucracy to blow the whistle on political corruption (and elected officials may be also more willing to take action on corruption within the bureaucracy)[204].

[204] Dahlström C., (2012); Dahlström C., Lapuente V., and Teorell J., (2012); Dahlström C., and Holmgren M., (2015); Dahlström C., et al. (2017); Meyer-Sahling J-H., and Mikkelsen K.S., (2016); Kopecky P., et al. (2016).

4.7.3 The need to manage conflicts of interest – what to learn from the 'Selmayr case'?

It is possible to act legally while at the same time violating ethical rules. It is also possible to violate rules without doing so knowingly or intentionally. In both cases, this is likely to destroy trust, and it will be difficult to restore trust, also in both cases.

The 'Selmayr case' damaged public trust in the EU Institutions. However, it is possible that Mr Selmayr did not knowingly violate any rules and his actions were deliberate decisions and not based on ill intent. It is also possible that other individuals involved in the process acted with ordinary beliefs and convictions because they convinced themselves that they acted in full conformity with ethical norms. Such a scenario illustrates three challenges: The first means that legal instruments may be ineffective in addressing the violation of integrity. Second, it illustrates that our understanding of conflicts of interest rests on the assumptions that conflicts of interests and ethical violations are the results of knowingly violating ethical standards. Third, what matters is personal and institutional awareness of potential conflicts of interest.

For a long time, ethically good or acceptable behavior was defined in terms of rationality and law obedience. From the ethical point of view, applying the law or superiors' orders is usually not problematic. It is still a very relevant guideline for public officials, as it highlights the importance of the rule of law and loyalty to democratically elected government. However, already many years ago experts arrived at the conclusion that, in reality, work in the public sector is paradoxical, individual, value-laden, emotional, pluralistic, political and unpredictable. Even if the rules were applied in the 'Selmayr case', the whole appointment process took place in an opaque, emotional, value-laden process in which various personal and institutional interests collided.

Still, even if we start from the assumption that ethical rules were not knowingly violated, this is not an excuse. When it comes to influencing trust, the process of decision making in appointment procedures is just as important as the final decision when the nomination is published. Drivers of trust are "a range of qualities and attributes that have been shown to inspire trust – in particular reliability, integrity, responsiveness, fairness and openness"[205]. Governments have a duty to adhere to integrity principles and political leaders must lead by example[206]. "When government leaders adhere to the broadly defined values of integrity, they demonstrate to citizens that they, and therefore government institutions, can be trusted (…)"[207]. How can this be done if politicians and SLOs may violate ethical standards from time to time without intention and as a deliberate intention? Of course, the answer is not easy and there is no time here to enter into discussions about the effectiveness of ethics management and the institutionalisation of conflict of interest policies. However, it shows that we need to broaden the existing tool-boxes in the field of ethics policies and include instruments and tools from the field of behavioural ethics.

Since the field of conflicts of interest is dominated by legal and rational (intentional) approaches, but the appointment of SLOs is, by nature, an issue where personal, political and legal interests overlap,

[205] OECD, (2017b), 11.
[206] Ibid, 12.
[207] Ibid, 35.

there is great insecurity about the right regulatory mix, the role of self-regulation, the effectiveness of instruments and approaches, the definition of good quality of law, the right density of regulation and the relationship to other political, psychological and economical instruments and approaches etc. The EU staff regulations refer to conflicts of interests in the recruitment phase in Art. 11.

RIGHTS AND OBLIGATIONS OF OFFICIALS

Before recruiting an official, the appointing authority shall examine whether the candidate has any personal interest such as to impair his independence or any other conflict of interest. To that end, the candidate, using a specific form, shall inform the appointing authority of any actual or potential conflict of interest. In such cases, the appointing authority shall take this into account in a duly reasoned opinion. If necessary, the appointing authority shall take the measures referred to in Article 11a(2).

This Article shall apply by analogy to officials returning from leave on personal grounds.

Article 11a

An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests.

Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter.

An official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties.

As already discussed, the appointment process of SLOs constitutes a complex matter and the management of conflicts of interest requires judgments about complex political, legal, personal and psychological issues. Therefore, it is doubtful whether only regulatory instruments are effective in these situations where non-pecuniary conflicts of interests play an important role. Publications on behavioural ethics[208] illustrate that laws and guidelines only guard against intentional conflicts of interests. Yet, many forms are unintentional, a product of bounded ethicality and the fading of ethical dimensions of a problem.

For example, as regards the appointment of the best candidate, often, it is genuinely difficult to decide between two candidates, or where there were two candidates of similar overall quality but with different packages of skills and expertise. After all, there may be a choice between 'apples and pears', in which either could do the job effectively. It could also make sense to take a decision to choose one candidate for other than merit-based reasons. For example, because of personal reasons, common networks etc. Consequently, the confusion of public and personal interests, and the resulting decision in the appointment process, generally escapes disapproval, or may even be tolerated.

[208] OECD, (2018); Bazerman M. and Tenbrunsel A. (2011).

While we do not believe that it is easy to manage conflicts of interest in the appointment of SLOs, we believe that a number of very practical steps should be taken that may lead to a better prevention of conflicts of interest.

Unfortunately, from a comparative point of view, very little is known as to the discussion of conflicts of interest in appointment committees, commissions, bodies etc. Again, the fact that so little is known is linked to the opaque operation of these committees. Mostly, rules of procedures of appointment committees provide for an obligation to discuss conflicts of interest. Moreover, members of committees must recuse from being a member of these committees if they face any sort of conflicts of interest. However, in reality, little is known as to whether the chair discusses conflicts of interest at all and whether members of committees recuse themselves - and if so, when.

It is therefore no surprise that the Ombudsman criticised the handling of conflicts of interests also in the 'Selmayr case'*:*

"It is clear that Mr Selmayr and/or other members of the President's Cabinet were involved in the decision-making process that led to 1) the creation of the vacancy for a Deputy Secretary-General and 2) the approval of the vacancy notice for the post of Deputy Secretary-General for which Mr Selmayr (and another senior member of the President's Cabinet) later applied. This created, ***at the very least****, a risk of a conflict of interests. The Ombudsman therefore takes the view that Mr Selmayr's recusal from the selection procedure, made on 12 February, came too late and was unavoidable at that stage in any event. To avoid any risk of a conflict of interests, Mr Selmayr should, as early as January 2018, have recused himself, and perhaps the President's Cabinet over which he had hierarchical control, from any involvement in the relevant decision-making processes. As, in early January 2018, President Juncker had apparently encouraged Mr Selmayr to take an interest in becoming Secretary-General, and as Mr Selmayr was aware of the importance of becoming Deputy Secretary-General in order to enable his reassignment to the post of Secretary-General, any involvement by Mr Selmayr in any of the arrangements to fill the posts of Deputy Secretary General or Secretary-General would inevitably be problematic. However,* ***even if*** *Mr Selmayr had not decided to apply for the position of Deputy Secretary General before his application on 12 February, the Commission should have taken appropriate measures once Mr Selmayr had applied for the post to avoid any risk of a conflict of interests. Having noted that Mr Selmayr had not recused himself from the relevant decision-making processes, it should have relaunched the selection procedure without the involvement of the President's Cabinet. The fact that the Commission did not take such steps constitutes* ***maladministration"***[209]***.***

We therefore draw several conclusions from the 'Selmayr case' for the management of conflicts of interest in appointment committees:

- The mere fact that Mr Selmayr was member of the CCA created a conflict of interests. This case also raises serious doubts about the question whether internal appointment committees (and where most persons involved know each other personally) constitute the right forum for an appointment process to take place.

[209] Ombudsman report on the 'Selmayr case'.

- The mere fact that people know each other increases the risk that members of the committee tolerate breaches in the selection process. Even if members of selection committees may be highly critical, and disapprove of breaches of integrity, this may not prevent them from tolerating conflicts of interest if colleagues are involved. As it seems, nobody suspected that Mr Selmayr could have a conflict of interests. And nobody raised a concern about the existence of potential conflicts of interest, also not at the last meeting of Commissioners, when Mr Selmayr was appointed. Again, this case suggests that there is a need for a more independent and external appointment committee.

The General Secretariat of the Council – handling conflicts of interest

The administration sends all selection board members a note before the appointment process begins, reminding them of their confidentiality obligations and highlighting the need to declare any conflicts of interest. The GSC has members of boards declaring such potential conflicts. The board then deliberates if the declared issue is really a conflict of interest (sometimes board members, correctly, err on the side of caution). If so, the board can consider whether an adjustment is made to the procedure, for example, by the board member not participating in assessing a particular candidate. On several occasions, a board member did not participate in assessing a particular candidate.

There have been cases where the conflict of interest was so serious that the selection board recommended to the Appointing Authority to change the composition of the board. In other cases, the board member informed the Appointing Authority directly since the conflict of interest was obvious.

5 CONCLUDING CONSIDERATIONS AND RECOMMENDATIONS

5.1 Legal dimension

The study was conducted in the context, and following the findings, of the European Ombudsman's Recommendation on the 'Selmayr case' and the earlier Resolution of the EP. Replicating the work already done by these two institutions and reassessing their findings was not deemed productive or indeed necessary. Both suggested maladministration, and this study took this finding as its starting point.

The study explored the nature of maladministration, as well as the legal consequences of maladministration in the EU legal system, including the potential outcomes of a judicial review procedure. It also dealt with the possible political consequences, in terms of damage to the reputation of the specific institution, damage to inter-institutional relations and trust, and damage to the reputation of the EU. Two key points need to be addressed, in the light of the findings of this study as well as the EP's and the EU Ombudsman's work on the 'Selmayr case'. They are as follows:

- How to avoid maladministration? One can look at internal, institutional measures such as strengthening legislative and regulatory parameters of the institution's actions (amending Staff Regulations, tightening guidelines, introducing an additional level of internal oversight). One should also look at external measures in the form of external (for instance EP) oversight, as well as improving access to judicial remedies.
- If the Treaties and secondary legislation specify legal consequences of maladministration, which they do indeed, why in the light of clear signs of maladministration in the case of appointment of the EC's new SG, and the earlier appointment of the DSG, the only consequences were of a political nature? Are the requirements for institutional autonomy enshrined in the Staff Regulations tailored towards too great of an autonomy for the institutions? Should they be amended? Are the legal consequences and the parameters of application of legal consequences of maladministration not regulated precisely enough? Or perhaps access to remedies and mechanisms for rectification of maladministration are regulated too narrowly so that these mechanisms are inaccessible to those with an interest in these remedies and mechanisms? While access to remedies for maladministration is not problematic if a specific group or an individual was directly mistreated, it is a much more complex and difficult matter, and in most cases, it is simply impossible, if the maladministration was of an internal, institutional nature, where no one specific was adversely affected. **What suffered was rule of law, accountability, democracy, and, following from those, reputation of the EC and the EU.** What is at stake here goes beyond judicial review of EU acts, as indeed the study demonstrated this mechanism is not available to most within the EU.

In the process of addressing these questions, we also looked at the European Ombudsman's final recommendations:

- That "the Commission should develop a specific appointment procedure for its Secretary-General, separate from other senior appointments", that "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",

- that the CCA, for future appointments of the SG, should also be broadened to include members from outside the EC.

And we found these suggestions well-founded. Our recommendations for improving the current legal provisions are based on:

- Need for greater adherence to the existing legal requirements;
- Amendments to the existing legal requirements;
- Comparative analysis of other EU institutions;
- Comparative analysis of the selected Member States of the EU;
- Comparative analysis of international organisations;
- Research and policy papers (OECD, WB etc.) reporting on the trends among states.

The Legal Dimension part explored the procedure for appointment of the EC's SG, and the European Ombudsman's assessment of this procedure in the 'Selmayr case'. We also looked at the features of the SG's position that make it unique. Based on our analysis, we recommend **that a special appointment procedure should be adopted for the appointment of SG of the EC**.

Due to the specific nature of the SG's post, and in line with the CJEU jurisprudence, we concluded that the use of Article 7 of the Staff Regulations' 'reassignment with post' mechanism is not a proper manner of proceeding with appointing the SG.

Irrespective of whether or not our recommendation concerning the use of Article 7 in appointing the Commission's SG is acted upon, we recommend **amending Article 7 as well as Article 29 of the Staff Regulations to improve their clarity and limit chances of misapplication and perhaps also maladministration**.

We explored the general principles of EU law applicable to public administration, pointing out a variety of sources of these rules. We pointed to attempts to harmonise the general principles and rules of administrative procedure in the EU. While an assessment of desirability for any type of horizontal mechanism is not within the scope of this study, Part Three points to several instances of unclear and vague rules, and differences in standards and approaches of EU institutions. Thus, it may be advisable to once again consider **introducing such a horizontal mechanism on administrative procedure, even if its scope only extends to general principles**.

It is regrettable that, having established four cases of maladministration, the European Ombudsman can exert little more than political pressure on the EC to rectify what has happened. In the light of the fact that for the general public in the EU a complaint to the European Ombudsman is often the only available mechanism to rectify maladministration done in the context of general acts or purely internal, organizational acts (see below), it may be advisable to suggest **for the Ombudsman to be capable of, for instance, bringing a judicial review procedure in order to have the CJEU confirm (or reject) the maladministration and decide on the legal consequences of the maladministration**.

In addition to the European Ombudsman's recommendations and our study's recommendations concerning reforms of the appointment procedure of the EC, it is worth **looking into the possible ways in which EU citizens and organisations may be involved in shaping the institutional policies on appointments and in challenging these policies or even individual decisions after they have been made**. It should be noted at this point that any such change to the standing rules in the judicial review proceedings will be difficult, considering how strictly the limited standing rules are observed by the Court. Thus, perhaps a more realistic option for the moment would be to explore participation and oversight before the appointment decisions are made. One such option could be involvement of independent experts in the work of the CCAs and greater use of external bodies in appointments. As the first step, the greater participation of the EP (as a democratically elected body) in appointing SLOs may be required.

5.2 Practical and ethical dimension

Our study concludes that the greatest challenges in the appointment process concern:

- the opening of positions;
- the structure, formation and operation of selection committees;
- the conduct of personal interviews;
- and the final selection from lists of candidates are consistently subject to problems of bias.

On this basis, we suggest the concerned institutions consider the following recommendations:

- **Problems of expertise/Improving capacity, in particular, the knowledge base of key participants:** This study finds that countries need to make sure that members of selection committees have adequate knowledge to implement the merit-based - appointment procedure. It is obvious that the level of knowledge, in particular, the perceived knowledge of members of selections committees, is associated with the quality of the recruitment procedure and its outcomes. Problems of adequate procedural expertise may be exacerbated if members of committees change, or are replaced and because of a general lack of effective guidelines and training for committee members. Moreover, a lack of adequate information and transparency may also undermine the capacity of HR departments, members of Parliament and oversight institutions to engage more proactively in monitoring the procedure. Members of selection committees form an inner core of actors whose knowledge is essential for the quality of the appointment process. The investment in the skills, knowledge and competences of key participants of the appointment procedure will be essential for improving the quality of implementation. The study could not generate enough evidence how ministers and members of selection committees receive support in order to operate effectively. Supportive measures should range from guidelines for interviewers, training in the field of value dilemmas, conflicts of interest and the assessment of competencies, and policies to train and, ideally, certify the members of selection committees.
- **Problems of efficiency:** One of the greatest difficulties is the lack of efficiency, clarity and transparency or, more basically, the lack of simplicity in administering the appointment

procedure. In many countries, many derogations and exemptions exist before an external advertisement is approved. Moreover, criteria and justifications for the choice of internal and external (open) procedures are unclear. Moreover, complex and long examination systems are widely criticized and argued to undermine the effectiveness of implementation more generally.

- **Improve monitoring and transparency:** National and EU-Institutions greatly differ as to the amount of transparency, openness, monitoring and independent scrutiny in the appointment process. We suggest that improving the transparency levels of appointment procedures typically requires some form of increased monitoring and independent scrutiny of appointment procedures. Various options are available. Monitoring can occur via the appointment of one or several independent, external experts from academia, civil society and international organisations on selection panels. Ideally, these experts should come from outside the appointing institutions[210]. Another example could be the appointment of a centralized, independent appointment "watchdog" who monitors and evaluates appointment procedures for SLOs. As regards this model, the UK model of a Commissioner for Appointments could play a role model function. If properly selected and trained, all forms of independent advice/control could play an important watchdog role during the appointment process. A third alternative concerns the open disclosure, publication, documentation and possibly (audio) recording of appointment processes. However, overall, the inclusion of independent experts is an important measure to monitor appointment processes and to increase impartiality.
- **Single candidate versus pools of candidates**: There is also widespread misunderstanding about the existing scope for ministerial influence over appointments of SLOs. In theory, the minister should be able to select from a shortlist of candidates put forward by a committee or an independent panel. However, in reality, panels propose only one single candidate whom the minister (or Prime Minister/President) can accept or veto. Evidence shows that the presence of the minister in a committee 'distorts the panel', and that civil servants on the panel naturally defer to the minister's view[211]. In practice, ministers often have more influence than the official story allows. "But such influence is often exercised through opaque and undocumented channels. Selection panels are known to take active steps to avoid the possibility of a veto – to the point of avoiding recommending a candidate likely to be opposed by the minister. Selection competitions are also run in circumstances where it is more or less known in advance who the successful candidate will be. Managed moves offer another mechanism for undocumented ministerial influence. On the specific proposal of allowing ministerial choice from a shortlist of 'appointable' candidates, a common concern is that this would undermine the principle of civil service impartiality"[212]. Proposing only one candidate represents a

[210] Note in this context that the Ombudsman recommended creating specific appointment procedure for SG, different from procedure for other senior appointments: '*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*' (European Ombudsman (2018), p.17).
[211] Ireland, Institute for Government, (2013).
[212] Ibid.

significant value conflict with the interpretation of the notion of merit. By defining this as meaning that jobs must be offered to 'the best of all' – as opposed to 'a suitable', available, 'an appointable' – candidate, the appointment process should explicitly exclude the possibility of ministers to choose only one shortlisted candidate.

- **Managing internal expertise:** The problem of insufficient expertise may be most relevant for ad hoc members of commissions such as heads of departments and divisions, general directors and ministers who are infrequently involved in the management of the appointment process. In theory, they are supposed to be mentored on-the-job by the representatives of personnel units and central civil service units. In practice, it is often not possible to do this satisfactorily due to a lack of time, informal understandings between institutions and the seniority of managers relative to the delegates of personnel units.

  The problem of insufficient procedural knowledge is aggravated by the inclusion of internal ad-hoc nominated experts or experts from other administrations and bodies on selection committees. While their inclusion is meant to strengthen external oversight and, impartiality, these experts (if not experts in the field of recruitment and appointment) may lack adequate information with regard to the management of the appointment procedure itself. Overall, the "lack of qualified and competent selection commissions is one of the major obstacles to better implementation"[213].

  One of the *"most fundamental criticisms towards selection commissions is that they are occasionally insufficiently impartial. The presence or absence of bias in selection commissions is, naturally, difficult to measure precisely. However, (…) commissions frequently start the recruitment process with a preferred candidate in mind. (…). It may also result from attempts by politicians and other outside actors to informally influence the course of the procedure before the commission has started its work, for instance, at the time when commissions are formed"*[214].

  Again, the composition of selection commissions has some influence on the propensity of bias in appointment processes. Introducing independent and external expertise in committees could minimize "the power of recruiting institutions and selection commissions to select 'their' candidate from outside the civil service"[215].

  However, improving the knowledge base of ministers will also be a means to improve the impartiality of the process. In particular, measures should be considered to engage ministers in information sharing about the benefits of merit recruitment for institutional performance and citizen trust. Initiatives of this kind can be implemented in the context of individually designed coaching activities for ministers. Similar measures could also be introduced for other SLOs who are members of appointment committees.

- **Other areas for improvement:** *"In sum, the development of monitoring capacity will be crucial for the improvement of the quality of merit recruitment in the future. Internal audits and inspections*

[213] Meyer Sahling J-H., et al. (2015).
[214] Ibid.
[215] Ibid.

and parliamentary oversight together with external monitoring by NGOs play a central role in generating information about the advantages of merit recruitment for the performance of public administration and about the disadvantages of low merit standards, bias and informalism in staffing the civil service"[216].

Finally, the development of better audit- and monitoring capacities is critical, as it provides means for a more effective appointment process. Next, better information, training, guidelines and coaching for committee members and ministers is associated with a better overall functioning of the recruitment procedure. Overall, in many cases transparency of processes should be enhanced and existing rules in place simplified. As regards the latter, it is vital that criteria on internal and open competitions be clarified and exceptions to open-competitions and published vacancies justified and explained.

- **A role for Parliament:** In the future, the EP, via one of its Committees, may hold oral evidence sessions with Commissioner's or President's preferred candidates for a small number of SLOs (DG) or only for the SG position in the form of pre-appointment hearings. The purpose and objectives of these hearings can be defined as:
  - scrutiny of the quality of political decision-making, which is a proper part of political (ministerial) accountability to the EP;
  - providing public reassurance and enhancing public trust in the Institutions that those appointed to key positions have been selected on merit;
  - providing public evidence on the skills and competences of the candidate;
  - and enhancing the appointee's legitimacy and demonstrate that he / she is fit in undertaking his or her function[217].

  Evidence, for example in the UK, suggests that most pre-appointment hearings are constructive and non-contentious[218]. They provide enhanced transparency and credibility to the appointment process. Moreover, pre-appointment hearings are an opportunity to enhance trust.

  We suggest that the EP has no veto over the appointment process. However, it could recommend that an appointment is not made. In this case, Commissioners / Presidents may pause for reflection.
- **Conflicts of interest in the staff regulations**: In order to avoid cases similar to the 'Selmayr case' from happening again, we suggest to add to the already existing provisions on conflicts of interest an additional explanatory memorandum that includes the following provisions for managing conflicts of interest in the development phase of appointment of staff:
  - No individual who intends to be an applicant for a position may be involved in drafting the documentation relating to the post or the information for candidates. Where it is

[216] Ibid.
[217] House of Commons, (2018).
[218] Ibid, 11.

found that a person subsequently applies for a position where he/she has been involved in the drafting and preparation process, the process shall be recommenced without that person's involvement. Thus, the responsibility for avoiding potential or actual conflicts of interest begins with the committee member. However, it is up to the chair of the committee to discuss conflicts of interest as an agenda item in the committee. Moreover, all members of the committee must be made aware of all existing rules and codes and the chair shall be required to brief the committee members prior to each meeting as to the main provisions in place. Before the start of the meeting, each committee member will be asked to confirm that no conflicts of interest exist.

- All interviews must be conducted by a panel. The composition of the selection panel/committee should be as follows:
  i. consist of a minimum of five people;
  ii. reflect a gender and nationality balance wherever possible - the composition of the panel will be monitored to assess how regularly this is achieved;
  iii. Members should declare if they already know a candidate;
  iv. Members should be willing and able to attend all interviews for the duration of the recruitment process, to maintain consistency and to ensure fair treatment of all candidates;
  v. At least one member should have received training in appointment policies;
  vi. At least two members of the committee / panel, should undertake the task of shortlisting. Where the panel has an external member, that person should take part in the shortlisting wherever practicable;
  vii. Shortlisting decisions should be based on evidence that the applicant has met the requirements of the person specification;
  viii. A candidate should not be involved on any form or at any stage in the preparation or organisation of an appointment procedure;
  ix. A candidate should not be a member of a selection committee or a recruitment board;
  x. As soon as it becomes clear that a vacancy will arise, an appointment procedure should be launched in order to avoid time constraints and hasty recruitments.

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ANNEX A – DATA COLLECTION FORMAT

Table 7: Contents for 'case study' institutions/interview guide

THEME	QUESTION
Law - general	What is the legal basis for the appointment of SLO and since when is this in force? If the legal basis was recently reformed, or future reform is planned, what triggered this, e.g. any specific challenges/weaknesses? Can you identify any areas requiring improvements?
Law – conflicts of interest	Please describe the legal framework with regard to dealing with conflicts of interest and the appointment of SLO, e.g. is this dealt with in relevant law on appointment of SLO or in separate law on conflicts of interest? How are conflicts of interest defined? How are conflicts of interest identified? What are consequences to conflicts of interest affecting appointment of SLO? Can you identify any areas requiring improvements?
Law – structures in charge of assessing SLO applications	Please describe the legal framework with regard to the structures in charge of assessing SLO applications. Does the law require assessment centres similar to the ones in place for the EU? What is their role? Who delivers this function? Does the law require Consultative Committees on Appointments similar to the ones in place for the EU? What is their role? Who delivers this function? Is there any structure/role similar to EC College of Commissioners? Can you identify any areas requiring improvements?
Law – publication of vacancies (exceptions)	Please describe the legal framework for the publication of vacancies. Are there any exceptions to publication? What are the conditions? Who decides on this and can this be challenged? Can you identify any areas requiring improvements?

Law – revoking administrative acts	What are conditions for revoking the appointment of an SLO? What remedies are in place for the SLO? Can you identify any areas requiring improvements?
Practice – conflicts of interest	Have there been any cases of conflicts of interest affecting the appointment of SLO and how have they been dealt with?
Practice – structures in charge of assessing SLO applications	How is the balance between merit and political responsibility ensured? How is a wide choice between candidates ensured? How is gender balance ensured?
Practice – publication of vacancies (exceptions)	What has been the practice with regard to non-publication of vacancies, e.g. does this represent an exception? Has non-publication been challenged?
Integrity - transparency	Is the work of the Assessment Centres public? (if not, why?)
	Is the work of the Selection Boards public? (if not, why?)
	Is the decision-making public? (if not, why?)

This analytical study focuses on the legal and practical / ethical dimensions of the appointment of senior-level officials in the European Union (EU) institutions, and a selection of Member States and different European / international organisations. Focusing on the four instances of maladministration identified by the European Ombudsman with regard to the appointment of the new Secretary-General (SG) of the European Commission (EC), this study recommends inter alia that a special appointment procedure should be adopted for the appointment of the SG of the EC; amending Articles 7 and Article 29 of the Staff Regulations to improve their clarity and limit chances of misapplication / maladministration; for the Ombudsman to be capable of bringing a judicial review procedure; looking into the possible ways in which EU citizens and organisations may be involved in shaping the institutional policies on appointments; promoting the professionalisation of selection committees; addressing inefficiencies in appointment procedures and clarifying criteria (on exceptions, publication of vacancies etc.); enhancing the transparency of appointment procedures and strengthening independent monitoring of appointment procedures; broadening the choice of candidates; considering the introduction of external independent expertise in appointment procedures; a role for the European Parliament, e.g. pre-appointment hearings of SG; and clarifying existing conflict of interest requirements.

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