

Brussels, 6 July 2020

TO THE EUROPEAN OMBUDSMAN

COMPLAINT ABOUT MALADMINISTRATION

1. Complainant

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2. Against which European Union (EU) institution or body do you wish to complain?

The European Commission

3. What is the decision or matter about which you complain? When did you become aware of it?

On July 3 2020, the Croatian Democratic Union (*Hrvatska demokratska zajednica* or HDZ, literally Croatian Democratic Community) published and circulated an electoral campaign video featuring the EU Commission President, Ursula von der Leyen.

In this video, available inter alia on the HDZ's Twitter channel, EU Commission President Ursula von der Leyen opens a sequence of short clips recorded by a

selection of national political leaders who - like the EU Commission President - belong to the European Popular Party (EPP).

Von der Leyen - as well as each and every other contributor to the video - state in rapid succession “Sigurna Hrvatska” (a safe Croatia), the motto depicting the electoral programme of HDZ, the Croatia’s ruling party and member of the EPP.

I’ve become aware of the existence of the video on July 4 2020 when it was published by HDZ on its Twitter account and was subsequently re-Tweeted and profusely commented across the Twittersphere.

On July 5, the EU Commission the EU Commission Chief spokesman made reference to HDZ’s above-mentioned video, by declaring in a Tweet the following statement:

“The President recorded a short sound bite for use in a video involving a number of EPP politicians. It was meant as a contribution in her personal capacity. Regrettably, this was not made clear in the final version of the video”.

This complaint argues that the EU Commission President - and the EU Commission as a whole - committed maladministration by:

- failing to abstain from making a public statement on behalf of HDZ / EPP in breach of Article 9 and Article 10 of the Code of Conduct;
- failing from monitoring the EU Commission President in the exercise of her prerogative under Article 13 of the Code;
- failing to mitigate the consequences stemming from such breaches through a swift withdrawal of the video in cause as well as by acknowledging the present instance of maladministration (rather than the infelicitous attempt at presenting it as a ‘personal’ opinion of the President).

4. What do you consider that the EU institution or body has done wrong?

The abovementioned video featuring the participation of EU Commission President Ursula von der Leyen constitutes a political endorsement to a national political party in the course of a parliamentary campaign (scheduled on 5 July 2020).

By failing to abstain from making a public statement on behalf of HDZ (a national political party belonging to the same European political party she belongs to - the EPP), the president of the EU Commission appears to have acted in full breach of Article 9 (3) of the Code of Conduct of EU Commissioners¹. This provision states: “Members shall abstain from making public statements or interventions on behalf of any political party or organisation of the social partners of which they are members, *except when standing for election/participating in an election campaign in accordance with paragraph (2)*. This is without prejudice to the right of Members to express their personal opinions. Members so participating in electoral campaigns shall undertake to refrain from adopting a position in the course of the campaign that would not be in line with the duty of confidentiality or infringe the principle of collegiality”.

Neither of the two exceptions to the prohibition of participation in national politics during the term of office apply in the present circumstances:

(1) Declared intention to participate election in national politics during the term of office

Contrary to what is foreseen in Article 9(2) of the Code, the President has not expressed her “intention to participate” in a national election campaign nor the role she expected to play in the campaign. Should she have intended to “play an active role in the election campaign”, she must have withdrawn from the work of the Commission for the entire period of active implication and at least for the duration of the campaign. When withdrawing from the work of the Commission, the President should have been granted ‘unpaid electoral leave’ by the President (!) herself and might not have used the Commission’s human or material resources during that period - *quid non*. The President should have also duly informed the President of the European Parliament of the granting of this leave - *quid non* - and of which Member will take over the relevant responsibilities during the period of leave, *quid non*. The same provision indicates that - “in other instances” - the President could have judged “the envisaged participation in the election campaign compatible with the performance of the Member’s duties”. However, being the interpretation and enforcement of the Code of Conduct the sole prerogative of the President

¹ COMMISSION DECISION of 31 January 2018 on a Code of Conduct for the Members of the European Commission (2018/C 65/06).

the latter circumstance defies the purpose and effect of the entire provision.

(2) Personal opinion

The political endorsement to HDZ by Ursula von der Leyen does not qualify as a “personal opinion” within the meaning of Article 9(3). Suffice is to notice that it was recorded and delivered from Ursula von der Leyen’s office, in the Berlaymont building, by using the institutional title (subtitle of the video) as well as the setting traditionally employed by the EU Commission President in her public addresses to EU citizens. This was expressly acknowledged by the EU Commission Chief Spokesman.

Similarly, should the EU Commission’s president participation in the Croatian parliamentary election qualify as “participation in European politics during the term of office” - due to the fact that the video portrayed other EU political leaders belonging to the same European political party -, her behavior should also be considered under Article 10 of the Code of Conduct. In particular, under Article 10(1), “Members may participate in European politics as members of European political parties or organisations of the social partners at European level provided that this does not compromise their availability for service in the Commission and the priority to be given to their Commission duties over party commitment”. Needless to say, this assessment being reserved to the sole authority of the EU Commission President was not performed in the present circumstances, nor the exceptions foreseen under paragraphs (3) and (4) find application (insofar as they refer to the sole EU Parliament elections).

In the present circumstances, by failing to prevent the EU Commission President from breaching her ethics duty under Article 9(3) of the Code of conduct as well as Article 10(1) and (3), the EU Commission itself has committed maladministration. This has been impliedly acknowledged by the EU Commission Chief Spokesman, Eric Mamer, in his Tweet on July 5, notably by the use of the adverb “regrettably”.

Moreover, despite the public outcry caused by the video, the EU Commission failed to take swift action to resolve any conflict that arose as a result of such an instance of maladministration.

But there is more.

This infelicitous episode unveils the structural limits of the EU Commission oversight system that was set up - and only recently reformed - to ensure the respect of the Code of Conduct of EU Commissioners.

Who guards the guardian: the de facto lack of applicability of the Code of Conduct to the President of the EU Commission

Under Article 13(1) of the Code,

“The President, assisted by the Independent Ethical Committee, shall ensure the proper application of this Code of Conduct”.

This begs the question of the applicability of the Code to the Commission President’s own conduct. Thus, inter alia, how can the President determine whether her political participation is - or is not - compatible with the performance of her duties as Member of the Commission under Article 9(2)? How can the President determine whether her political “participation in European politics” may “not compromise their availability for service in the Commission and the priority to be given to their Commission duties over party commitment” under Article 10(1)? How can it realistically be expected that the President may be enforcing the Code against her own behavior? How to ensure that the EU Commission President may “express a reprimand” against herself “and, where appropriate, make it public” under Article 13(3)?

Lack of independent, autonomous oversight mechanism

The Independent Ethical Committee established by the EU Commission to receive “advice on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code” cannot self-task and autonomously determine the respect of the Code of Conduct. Rather its operation can only be triggered “on request of the President”, under Article 12(1) of the Code (“on request of the President, the Committee shall advise the Commission on any ethical question related to this Code and provide general recommendations to the Commission on ethical issues relevant under the Code”).

No temporary suspension procedure

Under the current system of oversight over the respect of the Code of Conduct it is not possible for any party to ask for the temporary suspension of an action (or omission) by a Commission’s member, even when it is:

- in manifest breach of the Code

- this may cause immediate and irreversible damage.

What, in your view, should the institution or body do to put things right?

The EU Commission President should have immediately asked HDZ to withdraw its video and publish a statement (not a Tweet) to acknowledge the breach of the Code of Conduct.

While this would have not entirely remedied the damage caused², it would have had the merit to:

- mitigate the damage caused, notably in terms of perception of independence and integrity of the EU Commission President and her college vis-à-vis the Croatian's ruling party
- publicly acknowledged the maladministration committed by the EU Commission.

Instead, the EU Commission chief spokesman made the infelicitous attempt at qualifying the EU Commission's take on the Croatian parliamentary elections as a "contribution in her personal capacity". For the reasons mentioned above, the EU Commission President failed to take any measure that could have allowed to qualify her contribution as "personal". This confirms the maladministration of the EU Commission in the present circumstances.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes, a complaint has been sent to the EU Commission (and is attached to the present complaint).

However, while prior administrative approaches remain a mandatory condition for a complaint to be admissible, this complaint draws your attention to the following:

² The consequences and damage stemming from the political endorsement by the EU Commission President to a national political party in the absence of an expressed authorization and ensuing "withdrawal from the work of the Commission for the entire period of active implication and at least for the duration of the campaign" are not immediately identifiable. They could however be inferred from the rationale behind the rules governing a EU Commissioners' participation in national politics during the term of office. This is to prevent the emergence of a conflict of interest between the exercise of a Commission member's prerogatives, notably that of ensuring the application of EU law, and his/her proximity to a national political party whose political conduct might conflict with EU law.

- prior administrative approaches seem justified when a complaint deals with private interests, not when - like in the present circumstances - they advance the public interest.
- prior administrative approaches seem even less justified when a complaint is directed - as in the present circumstances - towards the opening of a strategic inquiry questioning the suitability and adequacy of the EU Commission oversight system of the Code of Conduct of the EU Commissioners.

Should the EU Ombudsman declare this complaint inadmissible due to the absence of (or limited) prior administrative approach, its office would prevent - not favour - the application of the principle of good administration by the EU institutions, thus defying its own statutory mission. This appears all the more so when the underlying oversight system of the Code of conduct of EU Commissioners is neither independent nor autonomous in its design and operation.

Has the object of your complaint already been settled by a court or is it pending before a court?No

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it? Yes

Sincerely yours,

A handwritten signature in black ink, appearing to be 'A. B. A.', written in a cursive style.