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Criteria and instruments for the appointment of top-officials in the EU-member states and the EU-institutions – how ethical and meritocratic are we in practice?

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ABSTRACT

Purpose – Literature assumes that politicization is increasing in HRM policies in the public sector. This article will test this claim in the field of appointment procedures for top officials.

Aims – The article analyses appointment procedures for top officials in the European Union (EU) Member States and EU Institutions. It focuses on the ethical dimension of appointment procedures and how the different administrations and appointment committees manage conflicts of interest as regards political – (politicisation) and merit-based interests.

Design/Approach – The article draws on a research assignment for the European Parliament, following the appointment of a former Secretary General of the European Commission in February 2018 and the subsequent European Ombudsman enquiry and finding of maladministration. The research is based on a critical review of the existing literature on the appointment of top-officials, the assessment of European Commission and European Ombudsman documents, the review of appointment procedures in other international, European and national organisations and interviews with civil servants in international and European organisations, the EU institutions, and EU Member States.

Findings – The article finds that appointment procedures are highly opaque. Politicisation remains a complex challenge but can be attenuated if positions are published and committees improve the management of conflicts of interest.

Limitations – Because of the – often – complex nature of top-officials appointment procedures, it is difficult to get access to “real life facts”. Also in the case of appointment procedures in the European Commission, we were confronted with opaque decision-making processes and found it difficult to get a real picture of processes.

Practical Implications – The findings of this survey were presented to EU decision-makers and officials from various EU Institutions

Originality – Still, this study is based on – so far – unofficial documents and data that made it possible to get access to so far disclosed information.

KEY WORDS

appointment procedures, top officials, politicisation, merit-based appointments, conflicts of interest

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1 INTRODUCTION

Politicisation of public services remains an important topic and this issue is by no means unique to some countries and some (European Union) institutions. Rather, it appears to be a common problem across all of Europe and beyond.

The following discussion concerns the ‘ethical and practical dimension’ of appointment procedures for top officials in the Member States of the European Union (EU) and the EU Institutions. By ethical dimension, we mean an analysis of how principles and values (such as merit) are implemented and how conflicts of interests are managed in the appointment process. By practical dimension, we are interested to know how far legal principles and political objectives are implemented and enforced.

Our interest focuses on the selection of top officials, thus adding research insights into the appointment of top officials in various administrative and political contexts, such as the EU Member States and the EU Institutions. Our hypothesis is that “institutions matter” in the sense that the specific institutional context and the degree of openness and independency of processes determine the possibility to politicise the appointment process of top officials.

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Existing research has focused on the analyses of recruitment procedures on the national level (Bossaert et al.) and in EU Agencies (Egeberg, 2017). Generally, literature on political partisanship, patronage and politicisation (Aberbach & Putnam, 1981; Dahlström, 2012; Dahlström, Lapuente & Teorell, 2012; Dahlström & Holmgren, 2015; Kopecký, Meyer Sahling, Panizza, Scherlis, Schuster & Spirova, 2016; Meyer-Sahling, Mikkelsen, Ahmetovic, Ivanova, Qeriqi, Radevic, Shundi & Vlajkovic, 2015; Meyer-Sahling & Mikkelsen, 2016; Peters & Pierre, 2004) agrees on the relevance of political loyalty for politicians while paying only limited attention to other criteria for the selection of top officials such as experience, qualification, competence, technical and networking skills in a specific policy area etc. Overall, there is no research on the ethical dimension of appointment procedures, both in theory and in practice. Experts rarely 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? Where is the dividing line between acceptable forms of “politicisation” and the need for merit based and impartial approaches? Moreover, there is only limited research into the technical aspects of appointments of top officials and the ethical challenges this process implies. This can be considered somewhat surprising, given the importance of the topic of “politicisation” as such, and the transcendence of ‘scandals’ in terms of citizens’ trust in the institutions and in democracy in general. Indeed, existing research has focused on the power of top officials, but less on how this power is acquired and how ethical conflicts such as conflicts of interests are managed in the first place (Peterson, 2016).

2 METHODOLOGY

In the following we will discuss the main results of an empirical research project for the European Parliament (European Parliament, 2019) which we carried out between September 2018 and April 2019. This involved desk research and interviews on the basis of data received from the European Parliament, and documentation on appointment procedures in selected international, European and EU Member State organisations. A case study approach was adopted, focusing on different European Union institutions (European Commission, European Parliament, General Secretariat of the Council), international and European organisations (Council of Europe, European Free Trade Area Secretariat, World Bank, Organisation for Economic Cooperation and Development) and EU Member States (Denmark, Estonia, France, The Netherlands, United Kingdom). The study findings were presented to the meeting of the European Parliament Budgetary affairs committee and EU Commissioner Öttinger.

3 THE POPULARITY OF MEASURING POLITICISATION

Concepts of politicisation as such (Rouban, 2012) distinguish between three different variants, namely politicisation as a) civil servant participation in political decision making, b) control over nominations and careers and c) civil servants’ political attitudes and involvement (in political parties etc.).

This broad definition constrains the measurement of these variants in different countries, institutions, sectors and at different levels of government. Despite this, trends towards ever more benchmarking and quantification have also found their way into the measurement of politicisation. For example, according to van de Walle (2018) direct politicisation as perceived by central government top officials is highest in Portugal, Spain and Croatia. It is lowest in most Nordic countries, the Netherlands and Ireland. During the past years other researchers established “impartiality and merit system indexes” (Charron, Dahlström & Lapuente, 2015), integrity indexes (Mungiu-Pippidi, 2015) and correlated institutional configurations with corruption levels (Dahlström & Lapuente, 2017).

Despite these trends, measuring politicisation remains as problematic as measuring corruption. As argued below, it is even more complicated to measure the political influence in management procedures such as for dismissal, promotion, transfer to another position, or as regards the appointment of top officials. Notwithstanding, the OECD (2007) has tried to measure the influence of the political level on transfers to another position by using either promotions, dismissals or transfers to other positions, finding political involvement in one or several dimensions of human resource management to be a strong predictor of politicisation as such. However, because of the difficulty to measure the influence of the political level in the appointment process and the involvement in other Human Resources (HR) policies, this form of measurement was never repeated. For example, the fact that a politician is involved in appointments does not, per se, make HR management a politicised process. And even if the process is politicised, this is not necessarily problematic. All depends on the form of politicisation. As such, political acumen is essential for top officials to accomplish the political goals of their minister and to protect them from policy fiascos. On the other hand, Ministers motivated to manage and control the bureaucracy will arguably look for candidates with management and leadership competencies when recruiting top officials. Here, the means

used are “politicisation”, but the interest may be to find the best candidate based on skills and competence (Bach & Veit, 2017).

4 APPOINTMENT AND POLITICISATION OF TOP-OFFICIALS – A NECESSARY EVIL?

Already in 1981, Aberbach, Putnam and Rockman claimed that top officials 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. According to the authors, 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 top officials. Today, it is widely accepted that most political decisions are being influenced by the administration. From this perspective, politicisation is even an essential element of democratic systems. Moreover, the politicisation of appointment processes can be perfectly legal and legitimate, because democratic rule implies that the voters’ choices should actually be implemented by the selection of politically trustworthy top-bureaucrats. Therefore, in a democratic society, politicians have a legitimate interest in controlling what government organisations do. The basic idea is that neutral competence is not the only important virtue of the civil service in a democratic society. Neutrality can also be abused for political reasons. In addition, neutrality should be complemented by responsiveness to democratically elected leaders. Especially, since top officials assume positions with great responsibilities and impact on society, no wonder that politicians who are accountable to the parliament take an interest in appointments. As already mentioned, politicians depend on the technical knowledge and expertise of administrators. Also, the relationship between politicians and top officials should be based on trust, and politicians need to trust top officials carrying out their duties (House of Commons, 2016).

Therefore, literature widely agrees on the relevance of political acumen in the field of political decision-making. 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” (Bach & Veit, 2017). Therefore, in many cases ministers have the right to be involved during the selection process.

The problem with these arguments is that they underestimate the ethical dimension of decision-making in public policies. For example, while politicisation may be a normal feature of democratic systems, patronage, corruption and political abuse can easily be a classical reflex of (too) wide discretionary powers of politicians. Therefore, there should be constraints on the direct exercise of powers by ministers over top officials on account of the need to limit politicisation and retain the independence of the civil service. But where exactly should these constraints be implemented?

5 APPOINTMENT AND THE NEED FOR MERIT-BASED APPROACHES

In the EU Member States and amongst the EU Institutions, appointment procedures differ and are linked to very different administrative and political systems. However, all countries and EU institutions consider that appointment of top officials should be based on the principles of rule of law, impartiality and merit. No civil service regime implicitly allows for politicisation and responsiveness as enshrined principles. Even if responsiveness to political interests is seen as important, it is subordinated to the principles of rule of law, impartiality and merit. How can this be explained? Obviously, the main reason has to do with experiences made throughout history. In most countries, “for much of the nineteenth century (...) Public office was perverted into a private fiefdom as arrogance, greed, and opportunism prevailed over honor, openness and prudence” (Bowman & West, 2008:183). Therefore, Bekke & van der Meer (2001) and Rosanvallon (2015) define modern civil service systems 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.

Thus, already from a utilitarian point of view, too politicised and non-merit-based structures are open for criticism because they are less efficient and less effective than merit-based practices. Even more, 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 for citizens. Meritocracy also reduces corruption and opportunities for patronage and nepotism. Merit systems provide the necessary foundations to develop a culture of integrity, are linked to higher levels of trust and bring in better qualified professionals. When people are appointed for non-meritorious reasons, they may be less likely to see the position itself as legitimate, but instead as means to achieve

more personal wealth through rent-seeking behaviour. So, there is also a motivational quality about merit systems which reinforces public service. Another way that meritocracy reduces 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. 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 corruption risks. 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 (OECD, 2017b:35).

For all of these reasons, all countries and EU Institutions subscribe to the idea that appointment procedures should not be politicised. Exceptions only concern the appointment of top officials. Thus, for all countries and the EU institutions, the following considerations apply: Appointment systems are embedded in a system where nobody is above the law, whatever rank or condition and all are subject to the same law administered in the same courts (Bingham, 2010). Moreover, the merit principle requires staffing processes to be based on ability rather than social and/or political status. Thus, people involved in the recruitment and appointment process should be unmoved by certain sorts of consideration – such as special relationships and personal preferences (OECD, 2017b:12). However, such a rational position underestimates the growing (ethical) complexity of appointment procedures.

6 THE DESTANDARDISATION OF RECRUITMENT AND APPOINTMENT POLICIES – NEW FAIRNESS CHALLENGES ARISING?

Current trends in HR management have opened public employment for ever more diverse employment innovations. Whereas most governments agree that politics should not try to form the character or cultivate the virtue of its citizens, the increasing popularity of behavioural ethics (Wieland, 2010), the “affective turn in economics” (Priddat, 2010) and the popularity of nudging (as an instrument), destandardisation trends and the trend towards the delegation of own responsibilities to employees through different concepts such as engagement, life-long learning and competency-development show that current trends in HR policies are leading towards an individualisation and “psychologisation” of HR management (Godard, 2014).

These developments run counter to the above mentioned grand administrative tradition: For a long time, HR management in the public sector was dominated by rational, legal, standardised and technical approaches. Today, traditional HR management is in trouble, both theoretically and practically because it is challenged by ethical, financial and budgetary, behavioural, managerial narratives and developments in the neurosciences (Thompson, 2011). Currently, the discipline of HR management integrates new evidence, especially from the behavioural sciences. This is a reaction to the traditional focus in the field which was based on technical and legal ideas that ignored psychological aspects, although evidence existed since the Hawthorne Experiments that individual behaviour is largely influenced by justice and fairness perceptions, emotions and feelings, such as hope, fear, aspirations, expectations etc. Today, instruments such as nudging have become tremendously popular. For example, in the field of ethics, approaches that are based on laws and compliance-based approaches are believed to be ineffective since they guard only against intentional forms of unethical behaviour (and not unintentional forms). Disciplines like behavioural ethics explain why people overestimate their ability to do what is right and why they act unethical without meaning to (Bazerman & Tenbrunsel, 2011). This turn towards behavioural approaches can be explained as a counter-reaction and because of the shortcomings of traditional (bureaucratic) approaches. However, they are neither new, nor without problems.

In the past, national civil services always used common and standardised recruitment frameworks. Overall, people were recruited based on qualification (and diplomas). Most countries also installed merit-based recruitment systems that set common standards for civil servants to meet through, for example, standardised testing. These systems were designed to ensure a high degree of professionalisation (as opposed to politicisation) of the civil service, and to ensure that all applicants are provided with equal opportunities. While such systems responded to values of internal equity, professionalism and equal access, they were criticised because they underperformed in a context of competition for particular skill sets (OECD, 2017). Moreover, they underperform because they are based on skills and qualifications (ratings) that were achieved (and evaluated) in the past and not on the development of new (social and technical) skills and (soft) competences. Today, politicians and managers repeat the mantra that economic competitiveness depends crucially on the skills and investments in training of the workforce. Everywhere, governments, politicians and management experts agree upon the key role that skills, training and long-life-learning play in securing competitiveness and social cohesion. Within this discourse, it seems that skills are the answer to a whole set of economic and social problems. With the increasing importance of skills policies, the notion of skills has also become considerably broader and differentiated compared to the past. Today, the popular skills discourse uses very different notions like enlarging basic skills, employability skills,

adapting skills, key skills, management skills, future skills, IT skills and leadership skills (Payne, 2000). The term skills as such has also become indistinguishable from personal characteristics, traits, competences, behaviours and attitudes (OECD, 2017). Public administrations respond to the new challenges by a destandardisation and individualisation of recruitment policies and the alignment and finetuning of recruitment methods to specific skills needed (OECD, 2017). Increasingly, this is done by the introduction of more diverse and external recruitment practices, or separate practices, for example for top officials. Moreover, different public administrations increasingly design specific competency profiles for different categories of employees. Today, countries wish to develop employment policies and recruitment frameworks that are driven by individual qualities, skills and expertise (OECD, 2017) in order to match new skill requirements and competency developments. However, this trend towards different competency expectations, skill development ability and self-reliance on skill adaptation marks a clear departure from the traditional view of the compliant bureaucrat (OECD, 2017) and standardised recruitment policies. These trends challenge the fairness and merit-based recruitment systems and raise the question how individual skills - under decentralised and individualised conditions - are designed, evaluated and assessed (OECD, 2017). At present, destandardised recruitment systems are more vulnerable to integrity violations than standardised systems. During the last years, especially the decentralised and destandardised Central European civil services have been increasingly politicised and polarised (Itrich-Drabarek, 2015).

7 MERIT BASED APPOINTMENT OF TOP OFFICIALS AND THE CONCEPT OF POLITICISATION – A GREY ZONE

Still, 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 a lack of professional competence.” (Rouban, 2012:381).

Likewise, merit-based approaches and politicisation are not necessarily polar opposites as is occasionally assumed by the public administration literature. For example, research on recruitment of top officials shows that it is common for political leaders to prefer appointees who combine professional qualifications, competence, skills and political loyalty. For example, Kopecký et al. (2016) observes that many appointments combine political interests in the appointment process and professional interest in the 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” (Bach & Veit, 2017:6).

Overall, the different political and the administrative “interests” and “logics” present different arguments why certain forms of politicised appointment are also needed and even legitimate. According to Matheson (OECD, 2007), “the balance is right when the resulting behavior of the public service supports a perception of the legitimacy of government”. There are several areas in which we might look for evidence of legitimacy supporting behaviours:

First, the public service respects the constitution, rule of law and common interest. Public 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 (OECD, 2007).

Second, 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 (OECD, 2007). 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 (Bingham, 2010:4). 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 to more active tax investigations than ruling party supporters, (Rothstein & Teorell, 2015).

Third, the public service acts responsively. Responsiveness to 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 emphasising political criteria in the appointment of top officials (Dahlström, 2012; Dahlström, Lapuente & Teorell, 2012; Dahlström & Holmgren, 2015; Dahlström et al., 2017; Meyer-Sahling & Mikkelsen, 2016; Kopecky et al., 2016).

Often, appointment procedures for top officials are 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 abuse by political interests, and citizens need public service delivery that is based on competence, skills and

technical capacity. In most cases, politicians have a political interest in the choice of candidates. However, they also have an interest in the technical competence of the candidate. Politicians have an interest in political loyalty of candidates. However, they can also not neglect that the citizens want employment systems that guarantee observation of the fundamental values, administrative law principles and ensure a focus on effectiveness, efficiency and accountability. Most politicians accept that the purpose of appointment processes should be driven by the need to achieve good outcomes. Good people won't come forward to be considered for appointments if the appointment system appears irrational, biased or doesn't operate smoothly. The question then arises how to institutionalise appointment policies.

8 APPOINTMENT OF TOP OFFICIALS IN THEORY AND PRACTICE – DEVIATIONS FROM VALUES AND PRINCIPLES

Overall, the EU Member States have found very different ways to deal with the appointment of top officials and issues of neutral competency and responsiveness. As regards the EU Member States, Kuperus and Rode (2016) distinguish amongst five different appointment models for top officials (Kuperus & Rode, 2016:24). The question of political acceptance of top officials is mainly relevant to the highest-level positions, because they have to work directly with the minister(s). According to Kuperus and Rode (2016), the political involvement and influence during the selection and appointment of top officials is highest in Germany, Estonia, Spain, France, Italy, Hungary and Slovakia. It is lowest in Greece, Cyprus, Lithuania, Romania and Sweden. However, both authors also note that whether this theoretical framework fits the practical actions in the Member States is difficult to evaluate. In all countries and in the EU Institutions, appointment procedures are carried out in opaque and complex ways.

Despite the existing national and institutional differences, in all countries, 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.

Meyer-Sahling (2015) claims that the greatest challenges in the appointment process concern a) the opening of positions, b) the structure, formation and operation of selection boards, c) the conduct of personal interviews and d) the final selection from lists of candidates.

Most countries rely to a very large extent on the existing pool of civil servants to fill senior positions (Boyle & O’Riordan, 2014). 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 / competition, or internal recruitment / competition, or simply without any competition and through transfer, mobility policies or promotions is often unclear. Thus, also in those countries that provide for open recruitment procedures, 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.

Often, it is also practice nominating 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.

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 (Boyle & O’Riordan, 2014).

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 (Public Service Commission of Canada, 2008). 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 (Boyle & O’Riordan, 2014:2).

In the United Kingdom, exceptions to open competitions have been reformulated in 2018 (Civil Service Commission, 2018). These concern temporary appointments in cases of urgency, support for Government employment programmes for disadvantaged people, secondments, highly specialist skills, former civil servants

who were previously appointed on merit and on the basis of open and fair competitions, interchange with Northern Ireland and transfer of staff from other bodies. Similar to the case of Ireland, these exceptions seem to be quite general and are open to interpretation. Also, in the United Kingdom “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” (UK Institute for Government, 2013:6).

In September 2018, the European Commission (EC) organised an Inter-Institutional Round Table to discuss the need / scope of possible reform of the appointment of top officials in the EU institutions. To prepare for this meeting, the EP issued a survey on appointments of top officials during the years 2013 to 2018 in the EC, European Parliament (EP), Court of Justice of the European Union (CJEU), European Court of Auditors, European Economic and Social Committee, Committee of the Regions, European External Action Service (EEAS), European Ombudsman, European Data Protection Supervisor and the Council. The survey covered the posts of Secretary General (SG), Deputy Secretary General (DSG), Director General (DG) and Deputy Director General (DDG). The main survey findings concerning SGs and DSGs noted a total of 13 appointments upon publication of post whilst seven appointments were made without publication of post. Concerning DGs and DDGs, the data shows 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.

These few cases illustrate that recruitment and appointment processes are everywhere a highly opaque and intransparent 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 and opaque ways.

9 CONFLICTS OF INTERESTS IN SELECTION COMMITTEES OR BODIES

As already stated, appointment procedures are also linked to very different 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. Unfortunately, from a comparative point of view, very little is known as to the operation of these appointment committees, commissions, bodies etc. Overall, very little evidence exists as to their internal operations, budgets, rules of procedure and working styles.

In all countries and EU Institutions, some kind of body for recruiting or advising on the best candidates for senior civil service positions is used as the main tool in ensuring political neutrality and objectivity in the appointment of top officials. 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.

In all models, the crucial question is how to balance political interests of ministers / presidents with merit requirements and how to manage conflicts of interests.

Overall, Member States and the EC have chosen very different strategies:

Whereas some countries have established a pre-recruitment committee that pre-assesses and pre-selects a short(er) list of candidates for the further selection process, other countries have appointed some kind of selection commission or advisory board to the ministers, which carries out the selection process and chooses one or several final candidates. In another group of countries, there is an independent commission appointed to ensure independent and fair selection of top officials or a specific (internal / independent) body that oversees the selection process and guarantees its objectivity and professionalism. Finally, in few countries there is no selection committee for (some categories of) top officials at all.

Another distinction criterion is whether these bodies may be internal and self-regulated, or whether they are more external and independent. 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.

A very typical form of self-control is the appointment procedure for top officials in the EC. Pursuant to the Staff Regulations, the EC is the only decision-making body for the appointment of top officials 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 by other bodies that are entrusted with preparatory work. 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 either the directorate where the vacancy is published (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).

Like this, all of these procedures and/or actors are open for (political and individual) discretion as regards the selection of candidates. Ultimately, all depends also on the administrative, legal, cultural and political context in which the selection takes place. On the other hand, these internal procedures also have a number of advantages. Internal appointment procedures are likely to be more informal, flexible, speedier; communication channels are “short”, and members of appointment committees know each other. Asking for external and independent appointment may also add more bureaucracy, time delays and complexity to the whole process. 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. 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. Consequently, 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.

10 TOWARDS EXTERNAL AND INDEPENDENT SCRUTINY OF CANDIDATES?

Current appointment practices seem to be towards the establishment of more external committees (Rosenson, 2003). 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 depoliticize the process of ethics regulation” (Saint Martin, 2003). Another important argument for more independence in the selection process is its actual and perceived impartiality and freedom from political and bureaucratic bias (Saint Martin, 2003). 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, arguments in favour of the introduction of more transparent and independent structures seem to outweigh the critical points. One main reason for this is because the public increasingly tends to question practices where public institutions regulate their own ethical conduct. Increasingly, current 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” (Thompson, 2007). Current opaque practice and the use of (mainly) internal appointment committees are less satisfying since outside and independent bodies are better 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 (...) and help restore the confidence of the public in the ethics process” (Thompson, 2007:18). 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. 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”.

In theory, merit-based appointment processes should be the result of an open and transparent competition. Overall, opening employment opportunities to all interested persons may lead to higher levels of performance. 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 top officials may also be open for candidates from other

departments and organisations and from the private sector. The common view is that appointing outsiders – particularly from the private sector – straight to top official 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 appointments runs counter to the merit principle because internal appointments exclude a number of (potentially excellent) candidates. 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.

11 CONCLUSIONS

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” (OECD, 2017b:11). Governments have a duty to adhere to integrity principles and political leaders must lead by example (OECD, 2017b:12). How can this be done if politicians and top officials 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 toolboxes in the field of appointment 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 top officials is, by nature, an issue where personal, political and legal interests overlap, 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.

As already discussed, the appointment of top officials 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 (OECD, 2018; Bazerman & Tenbrunsel, 2011) 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.

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. 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.

Most likely, Jeremy Bentham would have commented on the practice of many top-appointment procedures, as follows: “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?” (Bentham, 1843).

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