

Brussels, 18 November 2020

**Note to the attention of Mr. Johannes Hahn,
Commissioner in charge of Budget and Human Resources**

**Subject: application of the benefit of Article 50 of the Staff Regulations to the former
Director-General of OLAF**

It is with amazement, not to say consternation, that a significant number of colleagues have approached us about the Commission decision of last 11 November, granting as from next 1 December on, the benefit of article 50 of the Staff Regulations to the former Director-General of OLAF, currently assigned to a post of Senior Adviser with DG BUDG.

In particular, our attention was drawn to the fact that this is the first time in years this happens, since the Commission has decided to use this procedure which, to our knowledge, has never been used by the Juncker Commission.

Thus, such a decision is indeed astonishing in several respects, and in view of the media and political reactions that it will not fail to provoke.

These controversies and attacks are all the more predictable given, on the one hand, the tasks of the Director-General of OLAF, carried out in the past by Mr Kessler, in a particularly stormy context which characterized the end of his mandate and, on the other hand, given his secondment in the interest of the service as Director of the Italian Customs and Monopolies Agency and, finally, given the gravity of the litigation he initiated against our Institution regarding the decision to waive his immunity at the request of the Belgian Federal Public Prosecutor's Office.

In this regard, once again we would like to welcome the appointment of Mr Itälä as the new Director-General of OLAF, which has put an end to the extremely damaging controversies and tensions, in particular with the COCOBU, the EP, and with the OLAF Supervisory Committee, that have so heavily affected Mr. Kessler's mandate.

A conflict between Mr Kessler and the OLAF Supervisory Committee, which was referred to the European Parliament and which had a major impact on our colleagues in the OLAF Secretariat at the time. These colleagues had been called upon to perform their duties under impossible conditions, which led us to react firmly by addressing ourselves firstly to Vice-President Georgieva ([link](#)), then to Mr Oettinger, Commissioner in charge of Budget and Human Resources at the time ([link](#)), and thereafter eliciting a strong reaction from Mr Kessler.

Conflicts and controversies so acute that the press did not hesitate to qualify them as a real "institutional battle" (*Eu logos*)

Controversies, which will undoubtedly be revived by the decision to grant Mr Kessler the benefit of Article 50 of the Staff Regulations.

Recall of the facts

Historical criticisms surrounding the use of Article 50

Indeed, it must be recalled that recourse to Article 50 has in the past aroused very strong criticism from the supervisory authorities, the European Parliament, the press and the staff representatives.

These criticisms had focused both on the motivations and the significant costs arising from this measure given the importance of the allowances to be paid in view of Annex IV of the Staff Regulations equal to the salaries of colleagues AD14-AD16 who may be affected by the application of Article 50 of the Staff Regulations².

By way of example, the reports of the committees of independent experts of the European Parliament which contributed to the fall of the Santer Commission had already expressed very clear criticisms of the Commission's decision to grant the generous benefits offered by Article 50 to members of the senior management at the time, when other procedures should have been carried out to verify their responsibilities. Similarly, in other cases, it had been denounced that this granting of Article 50 had been an act of nepotism and a scandalous and staggering "golden handshake" at the expense of the European taxpayer.

It was precisely in order to avoid such controversy that the Commission had confirmed that it had decided not to use Article 50, citing the very significant budgetary costs arising from such a measure, the criticisms of this use of public money and the harmful consequences for the reputation of our Institution and our public service.

The very special nature of OLAF's Director-General job

These considerations are all the more relevant given the extremely sensitive nature of any measure affecting the Director-General of OLAF or any colleague who has performed these tasks in the past.

In such cases, for any administrative decision going beyond the ordinary framework, as is the case for granting the benefit of Article 50, a particularly clear and solid motivation is required, above all to avoid malicious speculation as to the real reasons behind it.

In order to assess the political and media repercussions that may derive more specifically from the granting of the benefit of Article 50 to Mr Kessler, we must not forget that this decision fits into an already heavily controversial and very widely publicized framework (

[Euractiv](#) ; [Politico](#) : [28/07/2017](#) ; [23/07/2016](#) ; [27/05/2016](#) ; [10/03/2016](#) ; [euobserver](#) ; [Le Monde](#) ; [Libération](#) ; [Midi-Pyrénées](#)) which should be briefly recalled below.

And this, without in any way questioning or commenting on the qualities, professional choices and expectations of our colleague.

The ongoing dispute between Mr Kessler and the Commission

It should be recalled that in 2014 in the case concerning former Commissioner Dali, the Belgian Federal Public Prosecutor's Office had transmitted to the Commission a request for the waiver of immunity concerning Mr Kessler as a defendant, due to indications of illegal and criminally reprehensible telephone tapping punishable in Belgium by a two-year prison sentence.

On the one hand, it goes without saying that, in the context of these criminal proceedings, to our knowledge still ongoing, Mr Kessler fully enjoys the presumption of innocence.

On the other hand, when on 2 March 2016 the Commission finally granted this request, Mr Kessler immediately brought an action to the General Court challenging the Commission's decision. He denounced in particular that this decision was not only vitiated by several serious flaws, but also of a nature as to call into question the independence and the proper functioning of OLAF and, thanks to the investigative work of OLAF, the protection of the EU budget.

These are questions of the utmost importance going well beyond the case in question.

After a first judgment of the General Court of 24 October 2018 confirming Mr Kessler's right to be heard ([case T-29/17](#)), subsequently annulled by a judgment of the Court of last 18 June ([case C-831/18 P](#)) we are still awaiting a judgment on the merits before the referring court.

However, it should be noted that, by rejecting the application of the interim measures presented by Mr Kessler, by his order of 20 July 2016, the President of the General Court of the Union has already confirmed that the protection of the specific status of Director-General of the OLAF requested by Mr Kessler:

"(...) would mean conferring on him the impunity for any act committed in the performance of his duties, without him ever being prosecuted by national judicial authorities. However, without entering into the examination of the fumus boni juris, this thesis clearly cannot be accepted. On the one hand, the applicant cannot reasonably demand that his immunity from jurisdiction be maintained for purely statutory and policy reasons, although he himself expressly admitted that this immunity existed in the sole interest of the institutions, of the Union and was only intended to prevent impediments to the proper functioning of the latter (...)" ([case T-251/16 R](#)).

In any event, a final decision by the Community judge is all the more important given the questions of principle that arise and also the seriousness of the allegations made against our institution.

Thus, we can only hope that Mr Kessler does not withdraw his appeal as he just did on last 22 September for another appeal related to the same decision of the Commission of 2 March 2016 concerning the request for waiving the jurisdictional immunity accorded to him ([T-](#)

[251/16](#)).

The very virulent controversies that characterized the end of Mr Kessler's mandate as Director-General of OLAF and his secondment in the interest of the service to the Italian Customs and Monopoly Authority

In October 2017, Mr Kessler finally resigned from his post as Director-General of OLAF before the end of his mandate and he was transferred at the same time to DG BUDG with a post as Senior Advisor specially created for him.

Without transition, he had been immediately seconded from the same post in the interests of the service as Director of the Italian Customs and Monopoly Agency, with simultaneous abolition of the post of Senior Advisor upon the departure of the person concerned.

These decisions had given rise to new controversies.

Criticism had focused in particular on the Commission's decision to grant Mr Kessler the benefit of secondment in the interests of the service, which had not only given him the hope of acquiring the 10 years' seniority required for the granting of the Community pension, but had also required the Community budget to pay the difference between the salary of an AD 16 civil servant and the emoluments received as Director of the Italian Customs and Monopolies Agency.

The political reactions had been more than virulent... ([il Dolomiti](#))

Suffice it to recall that Ms Ingeborg Gräßle, at the time chair of the EP Budgetary Control Committee (COCOBU), came to assert that through these decisions:

"The Commission wants to make sure Kessler doesn't open his mouth for ten years!"
([Spiegel](#))

... Just like those of the staff and their representatives

By way of example, our colleagues from the FFPE had denounced that: ([lire](#))

« le succès de la manœuvre devrait permettre à M. Kessler de compléter 10 ans de fonction publique européenne, qui ouvrent droit, comme chacun sait, à une retraite de fonctionnaire européen » en s'interrogeant « autant sur la dimension éthique que juridique de cette éblouissante séquence, qui pose avec une singulière acuité la question d'un potentiel conflit d'intérêts et malmène singulièrement le droit de la fonction publique européenne » en posant la question de savoir si cette décision n'était pas un véritable détournement de procédure et même « l'équivalent en droit de la fonction publique européenne de ce que le droit de la fonction publique française appelle une "nomination pour ordre", c'est-à-dire une illégalité majeure, au point qu'elle a pour effet de rendre l'acte de nomination inexistant ». Et, en conclusion, de savoir « quel exemple l'Institution donne-t-elle au personnel dans son ensemble et en particulier aux plus modestes? »

Quelques mois plus tard, le nouveau gouvernement italien avait décidé de retirer à M. Kessler son mandat de Directeur de l'Agence italienne des douanes et monopoles. M. Kessler avait alors demandé sa réintégration dans les rangs de la magistrature italienne en

tant que « *sostituto procuratore della repubblica* » à Bolzane.

The fleeting return of Mr Kessler to the ranks of the Italian judiciary had produced new controversies

By way of example, in a press article a prosecutor from the Italian Court of Auditors ([lire](#)) had qualified Mr Kessler with the title of "The Seconded" denouncing his feat of becoming the "*first European civil servant fulfilling the duties of Italian magistrate*".

Stressing that this fleeting return to the ranks of the Italian judiciary would have been aimed solely at fulfilling the eligibility condition for applying for the post of European Public Prosecutor. Application which would have been effectively submitted by Mr Kessler and which turned out to be unsuccessful.

In February 2019, Mr Kessler had thus requested to be reinstated at the Commission, where he had once again been appointed Senior Advisor at DG BUDG. He had stressed in particular that he was going to be in charge of very important cases concerning customs fraud and in particular those related to customs duties on Chinese products ([Trentino](#)).

This would be the job that the Commission has just taken away from him through the application of Article 50.

However, this decision is all the more surprising given that, even if the Commission had decided to definitively withdraw the employment linked to these tasks - which would indeed be rather surprising, given both their importance and that the problem of customs fraud is far from having been resolved - it would then have been perfectly possible to assign Mr Kessler to another post corresponding to his grade.

The Commission could thus have continued to benefit from Mr Kessler's skills until his retirement rather than paying him such large compensation without receiving any benefit in return.

The need to ensure full clarity regarding the granting of the benefit of Article 50

In view of the foregoing, we fully share the fears expressed by colleagues regarding the fact that the granting to Mr Kessler of the very generous benefits offered by Article 50 of the Staff Regulations will give rise to new controversies and speculations involving, once again, the reputation and image of our Institution and of our European public service.

Conclusion

No one can deny that Article 50 offers particularly favorable conditions at a considerable cost to the Community budget.

In this case, this "unexpected resurrection" of Article 50 will allow the payment to our colleague of allowances exceeding a total amount of 6 times³ the monthly wage of an AD16 European civil servant without any obligation to perform any task in return.

In the past, the Commission had tried to justify the recourse to the Article 50 by citing the savings obtained by no longer having to pay in the future the emoluments to

colleagues who were the subject of it.

On the contrary, in the present case, the “savings” obtained by the Commission correspond to a little over half a month's salary by renouncing our colleague's service for 7 months while paying him such allowances - it is appropriate to repeat it again - without getting any benefit in return!

In this regard, we do not want to believe and it should be firmly denied the legal interpretations according to which the application of the benefits of Article 50 would allow our colleague to be thereby extended until he is 66 years old and that 'it would then be a question of allowances for a total amount of 15 times the monthly wage of an AD16 civil servant!

This while **R&D** had to apply to the General Court to have the Commission's decision declared illegal (*lien*) to improperly apply Article 42c of the Staff Regulations to put colleagues into compulsory retirement against their will, overnight and without any compensation, several years before they turned 65!

You would agree with us that this is a decision and a "gesture of generosity"... at the expense of the taxpayer... absolutely unexplainable...! Except, of course, if one would imagine - *quod non* - that by applying by analogy the conditions imposed by the Staff Regulations for the application of Article 42c, the Commission might have considered Mr Kessler's competences to be so “*obsolete*” and that it was therefore appropriate to part with them because of “*organisational needs linked to the acquisition of new competences within the institution*”.

In any case, we fully share the concerns that the use of public money to pay out such compensation will be particularly unpopular given the sacrifices currently being imposed on European citizens. This at a time when the Commission is called upon to take up historic challenges and needs to be able to count on unwavering support from public opinion.

In a context of tough budget negotiations and a health crisis that will generate unprecedented economic consequences, how can the Commission choose to ignore all the rules of prudence by once again opening the door to the controversies systematically aroused by the use of Article 50 all the more predictable in the present case and thus playing into the hands of the enemies of our Institution and of our public service?

As far as we are concerned, we can only agree with the question asked at the time by our colleagues of the FFPE, in their aforementioned communication: “ *What example is the Commission setting for staff as a whole and especially those at the bottom of the pyramid?*”

It must be remembered that our administration constantly invokes budgetary constraints to refuse staff representation's requests to increase the reclassification possibilities for our fellow Contract Agents, who sometimes have to wait almost a decade for a reclassification, whereas for each colleague this represents a benefit of a few dozen euros!

The Commission certainly has solid arguments to present to answer our questions and dispel our fears.

We are also eagerly awaiting them in order to be able to give an answer to those colleagues who have already expressed their disgust.

Cristiano Sebastiani,
President

CC.:

Ms U. von der Leyen, President of the European Commission
Ms G. Ingestad, Director-General of DG HR
Mr V. Itälä, Director-General of OLAF
Mr G-J Koopman, Director-General of DG BUDG
Mr G. Kessler, DG BUDG
The staff

¹ **Article 50**

A senior official as defined in Article 29(2) may be retired in the interests of the service by decision of the appointing authority.

Such retirement shall not constitute a disciplinary measure.

An official thus retired who is not assigned to another post corresponding to his grade shall receive an allowance calculated in accordance with Annex IV.

² **Annex IV**

An official to whom Article 41 or Article 50 of the Staff Regulations is applied shall be entitled

(a) for three months, to a monthly allowance equal to his basic salary;

(b) for a period varying with his age and length of service in accordance with the table shown in paragraph 3, to a monthly allowance equal to:

— 85 % of his basic salary from the fourth to the sixth month;

— 70 % of his basic salary for the next five years;

— 60 % of his basic salary thereafter.

The allowance shall cease from the day on which the official reaches the age of 66 years.

Where the official has started to draw a pension under the pension scheme provided for in the Staff Regulations, he shall, for the purposes of Article 72 of the Staff Regulations, be treated in the same way as an official who has remained in the service until the age of 66 years

³. Based on publicly available information ([lien](#)), Mr Kessler would have been retired automatically on June 30, 2021, the last day of the month in which he will turn 65.