Silence is Golden, but not Mandatory

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Last week, European Commissioner Breton received a slap on the wrist from the commission's officials. After he (politically unwise) criticized the process of electing Ursula von der Leyen as the EPP's leading candidate on X (formally Twitter), the Commission's Secretary General did not mince his words in reminding him of his obligations under EU law and the potential sanctions for violating them. In this post, I argue that one cannot construe the duties of the Members of the Commission as a prohibition of political expressions of any kind.

What happened?

On March 7, a post on X by Thierry Breton, European Commissioner for the Internal Market, made headlines. In response to the current Commission's President Ursula von der Leyen's nomination as the European People's Party's (EPP) lead candidate (*Spitzenkandidatin*) in the upcoming elections to the European Parliament, he tweeted via his personal account:

> *Despite her qualities, Ursula von der Leyen is outvoted by her own party. The real question now is: "Is it possible to (re)entrust the running of Europe to the EPP for another 5 years, or 25 years in a row?" The EPP itself does not seem to believe in its candidate.*

Last week, POLITICO obtained an email circulated by the Commission's Secretary General among the Commissioners reminding them that "members of the Commission must behave with integrity and discretion … and that they shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their independence." The email went on to recall the sanctions of a potential failure to comply with these obligations as set out in Art. 245 of the Treaty on the Functioning of the European Union (TFEU), i.e. for a commissioner to be removed from office or deprived of their pension or other benefits.

Duties of Members of the Commission

These duties are set out, in broad terms, in the Treaties. Art. 17(3)(3) of the Treaty on the European Union (TEU) and Art. 245(1) TFEU require Members both to act in complete independence and – rather tautologically – to refrain from "any action incompatible with their duties".

In order to specify the content of these vague provisions, the Commission adopted a Code of Conduct for its Members by way of a decision in 2018. The Code of Conduct is chiefly concerned with the Commission's internal organization and is therefore, in principle, not legally binding. It does, however, constitute a voluntary commitment of the Members of the Commission to abide by the rules set out therein. The Court of Justice of the EU (CJEU) has previously accepted that such undertakings, even if they primarily serve as a measure of internal organization, can confer obligations onto the Commission. Arguably, the CJEU would therefore rely on the specifications set out in the Code of Conduct if it was called upon to interpret Arts. 17(3)(3) TEU and 245(1) TFEU.

Among the obligations arising from primary law, as specified in the Code of Conduct, two are of importance in assessing Breton's comment: the *duty of independence* and the *duty of restraint*.

The duty of independence

Arts. 17(3)(3) TEU and 245(1) TFEU only specify the independence requirement through an explicit prohibition of Member States to influence Commissioners. This would suggest that "independence" within the meaning of these provisions is confined to freedom from outside constraints. However, a comprehensive

systematic interpretation must also consider the Arts. 9 and 10(4) TEU, from which the CJEU has inferred a right of political parties at the European level to equal treatment. The Commission and its Members must therefore ensure, both in their actions and in their remarks, that all political parties have equal opportunities to succeed in elections to the European Parliament.

This reading is confirmed by the judgment of the Court of First Instance in *Kvaerner Warnow Werft*. In this case, the applicant challenged a Commission's decision on the ground that outgoing President Santer and Commissioner Bonino took part in the vote although they had been elected to the European Parliament and had already expressed their intent to take up the mandate. The Court held that this was in itself insufficient to prove the loss of independence, thus implicitly recognizing that political involvement on a larger scale could violate the duty of independence. More generally, the Court held in *Commission v Cresson* that Members of the Commission must "ensure that the general interest of the [Union] takes precedence at all times … over personal interests." From these judgments, one can reasonably conclude that the CJEU will only consider a loss of independence in the event of a conflict of interests, i.e. when a member's personal opinions could have a real impact on the way in which they act in their institutional capacity.

In Breton's post, the criticism of the EPP's manner of nominating a *Spitzenkandidatin* and an underlying personal tendency against the party's current electoral campaign is evident. However, in the elections to the European Parliament, the Commission is confined to a passive role: the organization is primarily entrusted to the Member States (see Art. 8 of the EU's Electoral Act) while the results are certified by the European Parliament itself (see Art. 12 of that Act). The Electoral Act itself can only be amended through a special legislative procedure set out in Art. 223(1) TFEU without the involvement of the Commission. The EU law's institutional framework therefore does not grant the Commission any powers which would enable it to influence the outcome of the elections. It is therefore unlikely that Breton will have a conflict of interest in his capacity as a member of the Commission.

His comment is thus insufficient to question his independence.

The duty of restraint

The duty of restraint can be inferred from the catch-all prohibition of "any action incompatible with their duties" under Arts. 17(3)(3) TEU and 245(1) TFEU. The CJEU has interpreted these provisions vaguely as an obligation of Commissioners "to conduct themselves in a manner which is beyond reproach".

More concretely, the Code of Conduct sets out in Art. 2(5) that Commissioners "shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their independence, their integrity or the dignity of their office", which they are also required to protect under Art. 2(2). Art. 5(1) accordingly imposes an obligation to "act and express themselves with the restraint that their office requires".

For the specific context of upcoming elections to the European Parliament, Art. 10(2) explicitly allows for Members of the Commission to stand as candidates, subject to prior information to the President (Art. 10(3)) and the prohibition to use the Commission's human or material resources for activities linked to the electoral campaign (Art. 10(5)).

Under Art. 10(6), Members who are not standing for election shall abstain from statements on behalf of any political parties of which they are members. Recital 14 recalls, however, that individual rights (which include the freedom of expression as guaranteed in Art. 11(1) of the Charter of Fundamental Rights of the EU) must be considered in the application of the Code of Conduct. Accordingly, Art. 10(6) clarifies that it "is without prejudice to the right of Members to express their personal opinions."

Therefore, several factors must be considered to determine whether Breton's post is in violation of his duty of restraint.

The first is the account from which the post was sent. Breton used an account in his name ("@Thierry-Breton"). While the account's headline features the

description "Commissaire européen", it is not attached to Breton's institutional capacity (see in contrast, the European Council President Charles Michel's institutional profile "@eucopresident"). The Commission President's Guidelines on Ethical Standards for Members standing in European elections (p. 4) urge Members not to use their title or the Commission's visual identity in activities linked to their electoral campaign. However, since Breton is not standing as a candidate in the upcoming elections, this standard is not applicable to him. In contrast, it would seem unreasonable to require him to remove his title from the headline of his personal profile for one occasional statement linked to the elections.

The second factor is the compatibility of Breton's statement with the duty of collegiality. Art. 5(1) of the Code of Conduct requires Members to be loyal towards the Commission and to refrain from communicating divisions within the body of commissioners regarding the Commission's policies (see also Art. 5(2) and (4)). However, Breton's post was not a comment on the *current* Commission but on the EPP's electoral campaign and, moreover, deliberately respectful to Ursula von der Leyen ("despite her qualities").

Lastly, the content and phrasing of the post must not adversely affect the dignity of the office of the Commissioner. Given the Commission's inherently political role within the EU's institutional framework, the contention that its Members should abstain from commenting on topical aspects of European politics altogether is difficult to justify. Instead, the more suitable approach is to allow for political discourse while insisting on moderation in the way Members express their personal opinions. It is true that Breton's post criticizes the EPP's nomination process and its electoral campaign more broadly. However, the sober language, the rhetorical question and the hedging of its final statement ("does not *seem* to believe", emphasis added) sufficiently moderate the post so as not to harm the dignity of the office of Commissioner.

While Breton's post clearly illustrates his political tendencies, the measured expression of his opinion in a personal capacity, in my opinion, does not violate his duty of restraint.

Conclusion

Breton has faced major political backlash (for the French President Emmanuel Macron's reaction, see here). From a legal point of view, however, the expression of political opinions in itself is not incompatible with the duties of Members of the Commission (even if they refer to fellow Members). Commission President Ursula von der Leyen is, subject to compliance with her own duties as a Member of the Commission, free to respond through political statements of her own (or by requesting Breton's resignation under Art. 17(6) TEU). Yet, I argue that Breton's tweet did not violate the obligations of a Member of the Commission and thus cannot be subject to the sanctions under Arts. 245(2) and 247 TFEU, as indicated by the Commission's Secretary General.

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