



Decision in case 380/2020/VB on alleged irregularities in the selection procedure for the European prosecutor of one EU Member State

Decision

Case 380/2020/VB - Opened on 23/03/2020 - Decision on 28/04/2021

The case concerned the selection procedure for appointing a European prosecutor, part of the 'College' of the European Public Prosecutor's Office (EPPO). The complainant is an unsuccessful candidate, who considered that there were irregularities in the selection procedure and the ad hoc 'selection panel's' opinion to exclude his candidature for the position. In addition, the complainant did not receive a reply to concerns he raised.

In the course of the inquiry, the Ombudsman's inquiry team took the view that there was a lack of clarity around possible review procedures and made a proposal for a solution and a suggestion for improvement to the Council of the EU. The Council rejected the proposals.

The selection procedure for the posts of European prosecutors lacks any mechanism providing for acts or omissions of the selection panel to be reviewed. There is clearly an accountability vacuum and **the Council has missed an opportunity to enhance public trust in and the legitimacy of the selection procedure for these important posts**. The solution proposal and suggestion for improvement would have helped address these shortcomings.

As the selection panel is not an EU body, which can be subject to an inquiry of the Ombudsman, and both the Council and Commission have refused to take responsibility for the actions of the panel, the Ombudsman considers that no further inquiries are justified and closes the case.

Background to the complaint

1. The European Public Prosecutor's Office (EPPO), established by the EPPO Regulation [1], is responsible for investigating, prosecuting and bringing to court financial crimes concerning the European Union budget. [2]

2. The College of the EPPO [3] consists of the European Chief Prosecutor and one European prosecutor per participating Member State [4]. The EPPO Regulation states that each Member State shall nominate three candidates for the position of European prosecutor. These candidates should be (i) active members of the public prosecution service or judiciary, (ii) independent beyond doubt and (iii) possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States and have relevant



practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters. [5]

3. The Council of the EU selects and appoints one of the candidates to be the European prosecutor of the Member State in question after having received the reasoned opinion of an ad hoc 'selection panel'. [6] The selection panel interviews the nominated candidates and assesses them on the basis of the requirements of the EPPO Regulation. It formulates an opinion on the candidates' qualifications to perform the duty of European prosecutors and ranks them on the basis of its order of preference, which is not binding on the Council. If the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European prosecutor, its opinion is binding on the Council.

4. The complainant was one of the candidates nominated by a national authority for the position of European Prosecutor. In December 2019, he was interviewed by the selection panel, which subsequently expressed a negative opinion on his candidature, considering that it was not in line with certain mandatory requirements for the post.

5. The complainant contacted the selection panel taking issue with its opinion and raising concerns about the fairness of his interview. On 24 February 2020, he also submitted a complaint to the Ombudsman about this matter.

6. On 27 February 2020, the complainant received a reply from the chair of the selection panel, informing him that the panel considered that he did not have relevant practical experience of financial crime investigation and of internal judicial cooperation in criminal matters, which are mandatory requirements under the EPPO Regulation. The reply referred to Council Implementing Decision on the operating rules of the selection panel [7], and stated that there is no basis for the selection panel to reconsider its opinion concerning the appointment of European prosecutors. It added that the complainant would receive the 'reasoned opinion' of the selection panel regarding his application once the procedure was concluded.

7. In his correspondence with the Ombudsman's Office, the complainant noted that he had not received a reasoned opinion from the panel and that this prevented him from challenging the panel's opinion. The complainant also pointed out that the reply did not address any of the issues that he had raised about how his interview had been conducted. The inquiry

8. The Ombudsman opened an inquiry into the complaint and asked the European Commission and the Council of the European Union to reply to the following aspects of the complaint:

1) The lack of a procedure to request a review of the negative opinion of the selection panel concerning the eligibility of candidates for the posts of European prosecutors.

2) The reasons why the selection panel's 'reasoned opinion' could not be communicated to the complainant before the conclusion of the selection procedure.



3) The failure to reply to the complainant's claims about the alleged irregularities that affected his interview.

9. In the course of the inquiry, the Ombudsman received the replies of the Commission and the Council on the complaint and, subsequently, the comments of the complainant in response to those replies.

10. In the course of the inquiry, the Ombudsman's inquiry team also made a proposal for a solution and suggestions for improvement to the Council to address some of the issues raised in the complaint. The Council rejected the proposals. The complainant then submitted his comments.

The lack of a review procedure

Arguments presented to the Ombudsman

11. The Commission stated that the selection panel is completely independent and impartial in carrying out its functions. The Commission's only role in the procedure is to make staff available as the panel's secretariat to provide it with administrative support.

12. It noted that the EPPO Regulation establishes a selection procedure in which both the Member States and the Council have responsibilities. Selection for the posts of European prosecutor is a competence of the Council. It added that the selection procedures for European prosecutors are not based on an open call for candidates but on the nominations of national governments. Consequently, the exclusion of a candidate from a selection procedure does not affect their individual rights, as they do not have individual rights as candidates in the context of the selection procedure.

13. The Commission added that, while Council Implementing Decision on the operating rules of the selection panel envisages the possibility to lodge an administrative complaint [8] to the Council in the selection procedure for the post of European Chief Prosecutor, it does not establish a similar possibility in relation to the selection procedures for the posts of European prosecutors. The Commission concluded that, in principle, there should be remedies under national law to seek action against the nominating Member State, and to provide judicial protection to the complainant.

14. The Council, for its part, also referred to the fact that Council Implementing Decision on the operating rules of the selection panel foresees the possibility to lodge an administrative complaint to the Council only in the context of the selection procedure for the post of European Chief Prosecutor. It added that this does not prevent candidates for the posts of European prosecutors from seeking remedies under national or EU law in order to request a judicial review.

15. The Council stated that, in accordance with the EPPO Regulation, it has decision-making powers only at the last stage of the selection procedure. It took the view that the Ombudsman's inquiry concerned the proceedings of the selection panel, which is a stage of the procedure in which the Council has no power to act. As such, the inquiry did not concern



an act of the Council.

16. The Council further stated that it and the selection panel are separate autonomous legal entities [9] . The selection panel is independent from the Council in carrying out its functions and, in particular, in drawing up a reasoned opinion about the eligibility and merits of candidates, and providing this to the Council. The Council does not have any powers to review or assess the eligibility or merits of the candidates nominated by the Member States or to interfere in any other manner in the proceedings of the selection panel.

17. The Council noted that negative opinions of the panel regarding the eligibility of the candidates are binding upon it, and that neither the EPPO Regulation nor the provisions implementing it provide for any possibility for the Council to review these opinions.

18. The complainant argued that the institutions' replies leave him in a legal limbo. This is not in line with the principles of legal certainty and 'legitimate expectations', he said. The complainant agreed with the Commission that the selection procedures for the posts of European prosecutors are the responsibility of the Council. He argued that the Council, by focusing on the differences between the selection for the European Chief Prosecutor and for European prosecutors, undermined the purpose of the College of Prosecutors and the spirit of the EPPO Regulation.

19. He took the view that the Council is ultimately responsible for the overall selection of the European prosecutors and only its decision is final. The complainant argued that, if the selection panel were an autonomous entity, the Ombudsman would be able to scrutinise its deliberations and decisions. Otherwise, EU institutions would be able to escape the Ombudsman's scrutiny simply by creating new separate entities.

The proposal for a solution and suggestion for improvement

20. The Ombudsman's inquiry team took the view that while the selection panel is independent from the Council, this is not sufficient for it to be considered a separate EU body that could be subject to an Ombudsman inquiry. For this reason, it was appropriate to address the Council, which is the 'appointing authority' in the selection procedure for the posts of European prosecutors.

21. The Ombudsman's inquiry team proposed, as **a solution** , that the Council take action to ensure that the arguments raised by the complainant were adequately addressed.

22. The Council rejected the proposal for a solution, reiterating its position that the selection panel is an entity distinct from the Council, and that the Council is not responsible for its proceedings and operations. It stressed that the panel's negative opinions concerning the eligibility of candidates are binding on the Council and that, consequently, it cannot review them. Its staff does not have access to the deliberations or other documents of the selection panel [10] . The Council said that it therefore cannot address the arguments raised by the



complainant, as it has no knowledge of the grounds for his rejection or of any correspondence between the complainant and the panel.

23. The Ombudsman's inquiry team also made a **suggestion for improvement** concerning the lack of a clear review mechanism for requesting a review of the selection panel's opinions in the selection procedure for European prosecutors. It argued that it would be good administration to have such a mechanism in place and that where the selection panel issues a negative opinion, it should inform candidates properly of their right to request a review of that decision and, ultimately, to complain to the Ombudsman or to bring an action before the Court.

24. The Council also rejected this suggestion. It noted that the rules on legal remedies against acts and omissions of the selection panel are contained in the EPPO Regulation, which is a legislative act of general application. Amending these rules would be a matter for the EU legislator, and thus outside the mandate of the Ombudsman to suggest. The Council added that both the EPPO Regulation and Council Implementing Decision on the operating rules of the selection panel were adopted on the basis of proposals from the Commission and that the Council cannot unilaterally amend them.

25. The complainant reiterated that he had not been given any possibility to contest the decision to exclude his candidature as ineligible. He added that "*what ensued is an exercise which causes anxiety and distress to a European citizen, wherein EU institutions pass the buck with no respect to basic European values and principles which they should be safeguarding*".

The Ombudsman's assessment

26. The selection procedure for the posts of European prosecutors lacks any mechanism providing for acts or omissions of the selection panel to be reviewed.

27. The selection panel informed the complainant that there is no provision under the applicable rules by which it could reconsider its opinion concerning the appointment of European prosecutors. In the context of this inquiry, the Commission stated that the selection procedure is the responsibility of the Council. The Council took the view that it cannot be held responsible for the actions of the selection panel, as the panel is a separate and independent legal entity. There is clearly an accountability vacuum.

28. Against this background, the Ombudsman regrets that the Council rejected her inquiry team's proposal for a solution and suggestion for improvement. She considers that the Council has missed an opportunity to enhance public trust in and the legitimacy of the selection procedure for the posts of European prosecutors.

29. While the selection panel is independent from the Council, this is not sufficient to qualify it as a separate body under EU law. Actions or omissions of the selection panel itself cannot be directly subject to judicial review or to an inquiry by the Ombudsman. The Ombudsman takes the view that, even if the selection panel is functionally independent, the Council, as



appointing authority, remains the main EU institution ultimately responsible for the panel. In light of this, she considers that the Council could have taken action to ensure that the complainant's claims were addressed. For instance, the Council could have, without calling into question the panel's independence, asked it to address the complainant's concerns and to review its opinion about the eligibility of his candidature.

30. Regarding the suggestion for improvement, the Ombudsman considers that implementing this would not require any amendment to legislative acts. As such, the Council could have followed up on this suggestion.

31. The EPPO Regulation does not exclude the possibility of establishing a review mechanism for the selection procedure for the posts of European prosecutors. Council Implementing Decision on the operating rules of the selection panel, which is a legal act but not a legislative act within the meaning of EU law [11], does not exclude that possibility either. Consequently, the Council could have introduced a review mechanism without amending any of the existing rules; for instance, by asking the selection panel to deal with requests for review received from candidates and to make them aware of this possibility. If the Council maintained the view that the legal act in question would need to be amended, it could have informed the Commission which could have considered the need to make a proposal.

32. However, given the clear rejection by the Council of the suggestion and solution proposal, the Ombudsman considers that no further inquiries into this matter are justified. The panel's reasoned opinion and the failure to reply to the complainant's claims

Arguments presented to the Ombudsman

33. The Commission noted that the selection panel is completely independent and impartial in drawing up a 'reasoned opinion' about the eligibility and merits of the candidates nominated by Member States. The Commission argued that the panel's decision to send the reasoned opinion to the candidates once the selection procedure has been finalised is an autonomous decision outside the responsibility of the Commission.

34. The Commission stated that the selection procedure for the posts of European prosecutors is the responsibility of the Council and, consequently, it could not address the complainant's claims.

35. The Council said that it is informed about the list and identities of the candidates only when it is notified of the reasoned opinions of the selection panel. It was not aware that one of the candidates challenged the panel's proceedings until the Ombudsman contacted it. It is not aware of the grounds for the refusal to communicate to the complainant the reasons why the panel considered him ineligible. It argues that the Ombudsman should ask the panel directly about this.

36. The Council added that Council Implementing Decision on the operating rules of the selection panel states that the selection panel should proactively inform candidates for the post of European Chief Prosecutor that it considers that do not fulfil the eligibility



requirements of the reasons for its position. However, there is no similar obligation in the context of the selection procedure for the posts of European prosecutors.

The Ombudsman's assessment

37. Following the Council's decision appointing the 22 European prosecutors [12] , the complainant indicated to the Ombudsman that he had not yet received the reasoned opinion of the selection panel.

38. The Ombudsman notes that the information received by the complainant from the chair of the selection panel contained an explanation of the reason why he was not considered eligible for the post. This letter could therefore be considered a reasoned opinion. However, as the chair informed the complainant in that letter that he would receive the panel's reasoned opinion once the procedure was concluded, it is regrettable that the complainant did not receive this.

39. As previously pointed out, the Ombudsman considers that the selection panel is not an EU body, which can be subject to an inquiry of the Ombudsman. Consequently, as the Council refused to take responsibility for the actions of the panel, the Ombudsman considers that no further inquiries into these issues are justified.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified into this complaint.

The complainant, the Council and the Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 28/04/2021

[1] Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), EUR-Lex - 32017R1939 - EN - EUR-Lex (europa.eu) .

[2] Additional information on the EPPO can be found on the website of the EPPO, Home | European Public Prosecutor's Office (europa.eu) .

[3] More information on the College of the EPPO:
<https://www.consilium.europa.eu/en/infographics/college-of-the-european-public-prosecutor-s-office-ep>
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[4] Currently, 22 Member States participate in the EPPO, Members | European Public Prosecutor's Office (europa.eu) .

[5] EPPO Regulation, Article 16(1).

[6] Article 14(3) of the EPPO Regulation states: "*The selection panel shall comprise twelve persons chosen from among former members of the Court of Justice and the Court of Auditors, former national members of Eurojust, members of national supreme courts, high level prosecutors and lawyers of recognised competence. One of the persons chosen shall be proposed by the European Parliament .*"

[7] Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), EUR-Lex - 32018D1696 - EN - EUR-Lex (europa.eu) .

[8] Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Article 90(2), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501>

[9] The Council referred to Recital 4 of Council Implementing Regulation (EU) 2018/1696, which provides that '*The operating rules of the selection panel should ensure that the selection panel has the necessary independence and impartiality to carry out its work*' .

[10] The Commission is responsible for the panel's secretariat.

[11] https://eur-lex.europa.eu/summary/glossary/nonlegislative_acts.html .

[12] Council Implementing Decision (EU) 2020/1117 appointing the European Prosecutors of the European Public Prosecutor's Office, EUR-Lex - 32020D1117 - EN - EUR-Lex (europa.eu) .