

## **Decision of the European Ombudsman on complaint OI/5/2004/MHZ against the European Personnel Selection Office**

Decision

**Case** OI/5/2004/MHZ - **Opened on** 23/04/2004 - **Decision on** 25/10/2005

Strasbourg, 25 October 2005

Dear Mr X,

On 9 April 2004, you made a complaint to the European Ombudsman against the European Personnel Selection Office (EPSO) concerning Open competition EPSO/A/18/04.

At the moment of your complaint, you were not a citizen of the European Union and you were not resident in the territory of a Member State of the European Union. It thus appeared that you were not entitled to complain to the Ombudsman. However, I considered that the issues raised by your complaint should be dealt with by me in an own-initiative inquiry.

On 23 April 2004, therefore I forwarded your complaint to the Director of EPSO, informing him that I had decided to inquire on my own initiative into the issues raised therein. On 4 August 2004, EPSO sent an opinion, which I forwarded to you with an invitation to make observations. No observations on EPSO's opinion appear to have been received from you.

On 25 May 2005, I asked EPSO for further information concerning your case. On 28 June 2005, I received EPSO's answer in French and on 19 July 2005, the English translation. On 21 July 2005, I forwarded the translation to you with an invitation to send me your observations.

No observations on EPSO's reply to my request for further information appear to have been received from you.

EPSO had informed me in its opinion that, following the enlargement of the European Union on 1 May 2004, it would not object to your complaint being handled as such, rather than as an own-initiative inquiry. In these circumstances, I decided to deal with your case henceforth as a complaint, rather than as an own-initiative inquiry.

In accordance with your request, I have treated your complaint confidentially.

For your information, given that the subject-matter of your complaint was closely related to the



subject-matter of two other complaints lodged with the Ombudsman (case 0935/2004/MHZ (OI/03/2004/MHZ), concerning Open competitions EPSO/A/16/04 and EPSO/A/17/04, and case 1024/2004/MHZ (OI/04/2004/MHZ), concerning also Open competition EPSO/A/16/04 and Open competition EPSO/B/22/04), certain aspects of my inquiries were conducted jointly with these other cases. This has not, however, affected the confidentiality of your case.

I am writing now to let you know the results of the inquiries that have been made.

## **THE COMPLAINT**

The complainant, a citizen of Lithuania, became aware of EPSO'S announcement concerning open competition EPSO/A/18/04, to constitute a reserve pool from which to recruit administrators A7 and A 6 in the specialized fields of public health and food safety, which was scheduled to be published on 21 April 2004.

He noted that one of the conditions for the candidates was citizenship of one of the 15 EU Member States (hereinafter the "old Member States") on the date of the publication of the notice of competition (i.e., on 21 April 2004). He took the view, therefore, that the exclusion of EU new citizens from that competition just 10 days before the enlargement would be particularly discordant with the spirit of enlargement and, on 9 April 2004, he lodged a complaint with the European Ombudsman.

The complainant alleged that EPSO acts contrary to the purposes of the enlargement by limiting access to Open competition EPSO/A/18/04 to citizens of old Member States just before the enlargement.

The complainant claimed that EPSO should explain its reasons for excluding from the competition candidates from new Member States.

## **THE INQUIRY**

### **The opinion of EPSO**

The Ombudsman forwarded the complaint to EPSO. EPSO's opinion can be summarised as follows:

First, EPSO put forward the general lines of its recruitment policy in light of enlargement.

EPSO stressed that the establishment of its work programme and consequently the launching of open competitions are closely linked to the recruitment needs of the institutions within the framework of enlargement.

EPSO remarked that it organises competitions on the basis of its own work programme, subject to the Management Board's approval. EPSO's work programme concerning the organisation of open competitions until 2007 was approved unanimously by EPSO's Management Board on 3



March 2003, according to Article 6 (f) of the Decision of 25 July 2002 on the organisation and operation of EPSO (1) .

EPSO also pointed out that its work programme complies with Council Regulation 401/2004 (OJ L 67, 5.3.2004, p. 1) which, on the occasion of the 2004 accession, introduced special temporary measures for recruitment of officials of the European Communities, that shall remain in force until 31 December 2010. EPSO argued that Council Regulation No 401/2004 requires that, during the transitional period, competitions should also be held for the recruitment of officials having one of the 11 official languages of the old Member States as their main language. EPSO maintains that, considering the duration of the transition period (until 31 December 2010) and the principles governing recruitment (Article 27 of the Staff Regulations), it is necessary to continue to launch general competitions that do not specifically target nationals from the new Member States.

EPSO distinguished two waves of enlargement competitions. The first wave should cover the most urgent needs of the institutions, while the second wave should cover more specific profiles.

The first wave started in 2003 and is ongoing. First, EPSO launched a call for expression of interest to recruit auxiliary agents coming from accession countries. Afterwards, still in 2003, EPSO launched competitions for heads of unit (A5/A4-A/9 and A3-A\*12) in the field of information, press and public relations and heads of unit (A3-A\*12 and A5/A4-A\*9) in the fields of law, macro/microeconomics/statistics, auditing/financial management and European public administration. In July 2004, a competition for administrators in the field of research was published. Once the first wave of competitions is over, the institutions will define their priorities for recruitment through the organisation of the second wave of competitions. Following these priorities, EPSO will plan more specialised open competitions, which should take place before the end of 2010 and will be mostly designed to cover the recruitment needs of the institutions in the framework of enlargement. These second-wave competitions should initially be of a more general nature (similar to the first-wave competitions) and subsequently of a specific nature, focusing on certain specialised fields (like EPSO/A/18/04)).

Secondly, EPSO considered Open competition EPSO/A/18/ referred to by the complainant.

That competition was organised before the enlargement date and was therefore held not under Regulation No 401/2004, but in accordance with the normal legal framework of open competitions.

On 5 March 2004, EPSO's Management Board approved EPSO's work programme for the year 2004. The competition in question was launched according to the timetable established in this programme.

On 21 April 2004, the notice of Open competition EPSO/A/18/04 was published in the Official Journal (2004/C/96 A/01). Competition EPSO/A/18/04 was organised to constitute a reserve pool from which to recruit Administrators A7/A6 in the specialized fields of public health and



food safety. According to point A.II. 4 of the notice of competition, candidates had to fulfil all the eligibility conditions (set out in the points A.II.1,2,3 of the notice of competition) on the date of the publication of the notice of competition (i.e., on 21 April 2004). Therefore, candidates had to be citizens of one of the Member States of the European Union on that date.

Finally, EPSO concluded that it did not discriminate against citizens of the new Member States and that the timetable for launching open competitions by EPSO was determined according to (a) requests made by the institutions, (b) EPSO's organisational capacity and (c) was approved by its Management Board.

EPSO also pointed out in its conclusions that it does not object to the complaint no longer being treated as an own-initiative inquiry, given that the complainant is now an EU citizen.

#### **The complainant's observations**

A copy of the opinion was forwarded to the complainant. No observations were received from him.

#### **Further inquiries**

After careful consideration of EPSO's opinion, it appeared that further inquiries were necessary.

*The Ombudsman's letter of 25 May 2005*

By letter to EPSO dated 25 May 2005, the Ombudsman requested further information concerning his own-initiative inquiries into possible maladministration in the recruitment procedures referred to by the complainant, namely Open competitions EPSO/A/16/04 and EPSO/B/22/04 and also in the recruitment procedures in relation to Open competitions EPSO/A/17/04 and EPSO/A/18/04.

The Ombudsman also drew EPSO's attention to certain considerations that could be relevant to the circumstances of the case. In particular, the Ombudsman referred to the provisions of the Vienna Convention on the Law of Treaties of 23 May 1969 and to the decision of the Court of First Instance in Case T-115/94 *Opel Austria* (2) .

He recalled that, according to Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "first Vienna Convention") (3) and Article 18 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986 (hereinafter the "1986 Vienna Convention"), a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty or provided that such entry into force is unduly delayed.

The Ombudsman also noted that, in case T-115/94 *Opel Austria* , the Court of First Instance held that the principle of good faith is a rule of customary international law whose existence is recognised by the International Court of Justice and is therefore binding on the Community and that that principle has been codified by Article 18 of the first Vienna Convention (4) . The Court also held that the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the



Community legal order (5) . The Court found, furthermore, that, in a situation where the Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force (6) .

Furthermore, in considering the possible significance of the above judgment in the present context, the Ombudsman recalled the progressive development of the recognition by the European institutions of the rights of individuals as citizens, and not just as economic actors. He also recalled the established case-law concerning European citizenship and rights.

The Ombudsman pointed out that, regardless of whether the citizens from the accession countries could rely on the legal principle of legitimate expectations as regards the opportunity to participate in competitions to constitute reserve list that would remain valid after 1 May 2004, it is indisputable that, for the citizens from new Member States, the competitions for posts in EU institutions represent one of their very first experiences how European institutions function and of how they respect their rights and help them to realise their aspirations.

The Ombudsman reminded EPSO of its responsibility to carry out its functions in a way that avoids giving the impression that citizens of the new Member States are not being treated on an equal footing as those in the old Member States.

The Ombudsman also pointed out that, as far as he was aware, EPSO had not organised competitions after enlargement in the fields of IT and food safety, and that, according to Council Regulation 401/2004, EPSO had the power to organise competitions limited to candidates from new Member States until 31 December 2010.

As regards the competition for specialist in fields of research (EPSO/A/17/04), the Ombudsman noted that, on 22 July 2004 (i.e., about three months after the closing date of competition EPSO/A/17/04 for candidates only from old Member States) a similar competition (EPSO/AD/24/04) was launched primarily for candidates from the new Member States. The Ombudsman also noted, however, that candidates who had registered for the earlier competition EPSO/A/17/04 could also apply for the new competition and that these candidates from the old Member States thus had the chance to participate in two competitions, whereas candidates from new Member States could participate only in one competition.

Finally, the Ombudsman asked EPSO to inform him whether it plans to draw up a timetable for new competitions in the field of IT, in the fields of public health and food society and in the field of research, and whether such competitions would be intended only for nationals from the new Member States. In this respect, the Ombudsman pointed out that, in his view, the existence or establishment of a precise timetable for future competitions in these fields could not only assist appointing authorities of the institutions to comply with their obligation to recruit officials on the broadest geographical basis from among nationals of EU Member States (7) but would also



contribute to reinforcing citizens' confidence in the European institutions at a time when the Union is at a key point in its development.

*EPSO's reply*

In its reply, EPSO made, in summary, the following comments:

EPSO establishes and implements a timetable of open competitions on the basis of the institutions' declarations as to their needs and requirements. Such a programme is regularly updated and can be consulted on the EPSO's website by all interested candidates.

One of EPSO's principal tasks since 2003 has been to organise competitions for the recruitment of nationals of the new Member States either by language, in the case of competitions for linguists, or by citizenship in other fields. In this respect, EPSO took the view that the number of open competitions for citizens of the new member states already organised and the fact that many more are planned and will be published in the near future clearly shows that there has been no discrimination against them.

EPSO also pointed out that, given the scale of the recruitment, the simultaneous launching of all the competitions for the new Member States for the various function groups and different fields of European policy (including IT field) does not seem possible. For that reason, the Council established a seven-year transitional period to achieve the goals spelled out in Regulation EC, EURATOM No 401/2004 of 23 February 2004. Under Article 2 of Regulation 401/2004, during the above transition period the competitions for the recruitment of officials having as their main language one of the eleven official languages of the old Member States must also be organised. In this way, the principle laid down in the Staff Regulations concerning the recruitment on as broad geographic basis as possible will be respected.

As regards competitions EPSO/A/17/04 and EPSO/AD/24/04, EPSO stated that, while in the first of these candidates had to be citizens of one of the then 15 Member States, the second one sought to recruit nationals from one of the 10 new Member States. Accordingly, only candidates with dual nationality (i.e., having the nationality both of an EU-15 Member State and of an EU-10 Member State) were eligible for both competitions. Therefore, point A of the notice of competition EPSO/AD/24/04, which stated that candidates already registered for competition EPSO/A/17/04 could also register for competition EPSO/AD/2004, referred only to candidates with dual citizenship. Since the tests for both competitions were to be held on the same day, the candidates were asked to select via their EPSO profile the competition for which they wished to be registered, at the moment when they confirmed their candidature.

*The complainant's observations*

A copy of this reply was forwarded to the complainant. No observations were received from him.

## **THE DECISION**

### **1 Timetable of competitions**

1.1 On 5 March 2004, EPSO's Management Board, acting on the basis of Article 6 (f) of the Decision of 25 July 2002 on the organisation and operation of EPSO (8), approved EPSO's work programme for the year 2004, including, *inter alia*, the timetable for Open competition



EPSO/A/18/04.

On 8 March 2004, Regulation 401/2004 (9) , introducing special temporary measures for recruitment of officials of the European Communities after the date of accession, entered into force.

On 21 April 2004, the notice of competition EPSO/A/18/04 was published in the Official Journal (2004/C/96 A/01). For that competition a condition of eligibility was that candidates must be citizens of one of the Member States of the EU on 21 April 2004.

On 1 May 2004, the Treaty of Accession to the European Union 2003 entered into force and ten new Member States joined the European Union.

The complainant alleges that EPSO acted contrary to the purposes of the enlargement by limiting the access to Open competition EPSO/A/18/04 to citizens of old Member States just before the enlargement.

The complainant claims that EPSO should explain its reasons for excluding from the competition candidates from new Member States.

1.2 EPSO states that the timetable for the launching of open competitions by EPSO was determined according to (a) requests made by the institutions, (b) EPSO's organisational capacity and (c) was approved by its Management Board.

EPSO also points out that the competitions in question were organised before the enlargement date and were therefore not held under Regulation 401/2004 but were organised instead according to the normal legal framework of open competitions.

EPSO puts forward that specialised competitions like EPSO/A/18/2004 for nationals from new Member States only should take place at some time before the end of 2010.

1.3 In its reply to the Ombudsman's request for information about a timetable for new competitions in the field of IT, in the fields of public health and food society, and in the fields of research intended only for nationals from the new Member States, EPSO explains that the timetable for all open competitions is regularly updated and published on its website. EPSO emphasises, however, that this timetable is established and implemented on the basis of the needs and requirements of the institutions. The Ombudsman understands, therefore, that EPSO is not ready to inform him of a timetable for new competitions in the field of IT, in the fields of public health and food society, and in the fields of research intended only for nationals from the new Member States.

1.4 On the basis of his inquiries so far into this complaint, the Ombudsman notes the following facts : (1) only a few days before the date of enlargement and almost one year after the signature (on 16 April 2003) of the Treaty of Accession to the European Union, eligibility for the competition in question was denied to the citizens of the accession countries, who were to





become EU citizens from the date of entry into force of the Treaty of Accession (i.e., 1 May 2004); (2) The tests for the competition in question and the constitution of reserve lists took place after 1 May 2004.

1.5 The Ombudsman recalls that the Court of Justice has ruled on several occasions that citizenship of the Union is destined to be the fundamental status of nationals of the Member States (most recently in Case C-148/02 *Carlos Garcia Avello v Belgian State* (10) ). This status enables nationals of the Member States who find themselves in the same situation to enjoy (within the scope of the EC Treaty) the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.

1.6 In the context of the above judgment, the Ombudsman considers it undeniable that the rights of citizenship resulting from the Treaty of Accession of the Union constitute a major benefit accruing to citizens of the new Member States which joined the Union following its latest enlargement.

1.7 Moreover, the Ombudsman points out that, for citizens from new Member States, competitions for EU posts represent one of their very first experiences with respect to the functioning of the European institutions and to how these institutions respect their rights and help them realise their aspirations.

1.8 The Ombudsman therefore considers that EPSO has a responsibility to carry out its functions in a way that avoids giving the impression that citizens of the new Member States are not being treated on an equal footing with those of the old Member States and suggests that it could be useful for EPSO to reflect on this point in the context of future enlargements of the Union. A further remark will be made below in this regard.

1.9 However, the Ombudsman recalls that, according to established case-law (11) , the appointing authority enjoys wide discretion in establishing the conditions required for a post.

1.10 On the basis of the available evidence, the Ombudsman takes the view that it is unlikely that further inquiries could establish that, in determining the closing date for eligibility to participate in the competitions in question, EPSO had as an objective the exclusion of citizens of the new Member States or that it otherwise acted outside the limits of its legal authority.

1.11 In these circumstances, and taking into account EPSO's response to the further inquiries that have already been made, the Ombudsman considers that no useful purpose would be served by prolonging his inquiry into the present complaint. The Ombudsman therefore considers that no further inquiries are justified and closes the case.

## **2 Conclusion**

For the reasons stated above, the Ombudsman considers that no further inquiries are justified. The Ombudsman therefore closes the case.

The Director of EPSO will be informed of this decision.





## FURTHER REMARK

The Ombudsman considers that EPSO has a responsibility to carry out its functions in a way that avoids giving the impression that citizens of the new Member States are not being treated on an equal footing with those of the old Member States and suggests that it could be useful for EPSO to reflect on this point in view of future enlargements of the Union.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Decision of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of EPSO 2002 OJ L197 p.56.

(2) Case T-115/94 *Opel Austria v Council* (1997) ECR II-39.

(3) United Nations Treaty Series, Vol. 788, p. 354.

(4) Case T-115/94 *Opel Austria* , paragraph 91.

(5) Case T-115/94 *Opel Austria* , paragraph 93.

(6) Case T-115/94 *Opel Austria* , paragraph 94.

(7) Article 27, Staff Regulations of Officials of the European Communities.

(8) Decision of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of EPSO 2002 OJ L197 p.56.

(9) According to Council Regulation 401/2004 (OJ L 67, 5.3.2004, p.1) of 23 February 2004, starting after the date of accession until 31 December 2010 vacant posts may be filled by appointment of nationals from new Member States. Until 31 December 2010, general competitions shall also be held for the recruitment of officials having one of the 11 official languages of the old Member States as their main language. Such general competitions shall simultaneously cover all these languages.



(10) Case C-148/02, *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, paragraphs 22 and 23.

(11) See Case T-54/91 *Antunes v. European Parliament* (1992) II-01739, paragraph 39, and Case T-249/01 *Boixader Rivas v European Parliament* (2003) II-00749, paragraph 29.