

Decision of the European Ombudsman closing his inquiry into complaint 2172/2011/ER against the European Personnel Selection Office (EPSO)

Decision

Case 2172/2011/ER - **Opened on** 02/12/2011 - **Decision on** 19/12/2012 - **Institution concerned** European Personnel Selection Office (Critical remark) |

The background to the complaint

1. The present case concerns an alleged unfair exclusion from an open competition organised by the European Personnel Selection Office (EPSO).
2. The complainant is a Slovenian citizen who took part in Open Competition EPSO/AD/190/10 for Heads of Unit in the field of translation [1] .
3. On 28 April 2011, EPSO invited the complainant to participate in the written tests. On this occasion, it also provided him with a link which allowed him to access the instructions concerning the written tests.
4. On 13 May 2011, the complainant took the written tests in Brussels.
5. According to the instructions given to candidates on 28 April 2011 and on the test date, the test consisted of two main parts. In part a), candidates had to carry out a linguistic and quality assessment of a text in the language they indicated as 'first source language' (the complainant indicated English) translated into their main language (Slovenian in the complainant's case). In part b), candidates had to carry out a linguistic and quality assessment of a text in the language they indicated as 'second source language' (German in the complainant's case) translated into Slovenian. The instructions to candidates stated that the assessment of their performance in written test a) was based on the following criteria: (i) "[the candidate's] *ability to spot the errors and indicate to which categories the errors belong and* (ii) [the candidate's] *linguistic and quality assessment of the translated text written in [her or his] first source language*".
6. On 19 August 2011, EPSO informed the complainant that it had excluded him from the competition since he had failed to perform one of the tasks required for written test a). Specifically, EPSO pointed out that he did not write the linguistic and quality assessment of the



translated text in his first source language. As a consequence, the Selection Board decided not to mark his written test a). The complainant's written test b) was not marked either, since the Notice of Competition excluded the correction of test b) for candidates who did not obtain a pass mark in test a) [2] .

7. On 24 August 2011, the complainant asked EPSO to review its decision. He emphasised that, due to the limited time available and the extremely high number of mistakes in the translated text, he was only able to mark the corrections and to add comments to the text. However, he was not able to write the linguistic and quality assessment.

8. On 16 September 2011 and again on 11 October 2011, EPSO confirmed its decision. It emphasised that the complainant failed to write a continuous text assessment in about 400 words in the first source language, as required by the instructions to candidates. Upon request, EPSO also provided a copy of the complainant's written test a) and the relevant evaluation sheet.

9. On 19 October 2011, the complainant submitted a complaint to EPSO, in accordance with Article 90(2) of the Staff Regulations. EPSO replied to the complainant on 30 April 2012, dismissing his complaint.

10. Also on 19 October 2011, the complainant submitted the present complaint to the Ombudsman.

The subject matter of the inquiry

11. On 2 December 2011, the Ombudsman opened an inquiry into the following allegation and claim [3] :

Allegation

EPSO wrongly excluded the complainant from the competition following the written tests.

Supporting arguments:

(i) EPSO decided, for no valid reason, not to award any marks to the complainant's written test a).

(ii) EPSO did not make a separate assessment of written test a) on the basis of the different evaluation criteria identified in the Notice of Competition (and on the evaluation sheet), nor did it inform the candidates of the respective weightings of the evaluation criteria.

(iii) By providing additional instructions to candidates assessing the quality of a translation, EPSO acted in breach of the Notice of Competition.



Claim

EPSO should award to the complainant the marks he merits for his written test a).

The inquiry

12. On 2 December 2011, the Ombudsman opened an inquiry into the complainant's allegation and claim, and requested EPSO to provide an opinion. On 18 January and 21 February 2012, the complainant sent further correspondence to the Ombudsman, in which he clarified that his complaint had to be understood as containing a further supporting argument, namely, argument (iii). EPSO was therefore asked also to address this third argument in its opinion. On 2 May 2012, EPSO's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 9 May and on 29 June 2012.

The Ombudsman's analysis and conclusions

Preliminary remarks

13. In his complaint, the complainant asked the Ombudsman to (a) appoint an independent linguistic expert in order to assess his written test a), so as to certify that it was impossible within the given time to write an extensive assessment of at least 400 words, and (b) compare the complainant's performance in test a) with those of candidates who wrote the required assessment.

14. In his letter opening the present inquiry, the Ombudsman informed the complainant and EPSO that, whereas it is not beyond his competence to recommend to an institution that it appoint a third party to give an opinion, he is not, as such, vested with powers to appoint experts to reassess the conclusions of Selection Boards or of EPSO. The Ombudsman then stated that he would consider what relevant measures can be taken, should he find instances of maladministration corresponding to the complainant's allegations. The Ombudsman notes that, in his observations on EPSO's opinion, the complainant maintained his request. This request will therefore be examined in the context of the substantive assessment carried out by the Ombudsman below.

A. Allegation that EPSO wrongly excluded the complainant from the competition following the written tests and related claim

Arguments presented to the Ombudsman



15. In his complaint to the Ombudsman, and in his further correspondence dated 18 January 2012, the complainant alleged that EPSO unfairly excluded him from Open Competition EPSO/AD/190/10. In support of his allegation, the complainant put forward the following arguments: (i) EPSO decided, for no valid reason, not to award any marks to his written test a), (ii) EPSO did not make a separate assessment of written test a) on the basis of the different evaluation criteria identified in the Notice of Competition (and on the evaluation sheet), nor did it inform the candidates of the respective weightings of the evaluation criteria, and (iii) by providing additional instructions to candidates assessing the quality of a translation, EPSO acted in breach of the Notice of Competition.

16. In his letter opening the present inquiry, the Ombudsman noted that the instructions to candidates made clear that candidates were required to perform two tasks: (i) to spot and correct mistakes directly on the translated text and (ii) to write an assessment, consisting of a continuous text of about 400 words. Consequently, the evaluation sheet reported two different evaluation criteria: 1) the ability to spot errors and indicate the category to which they belonged and 2) the linguistic and quality assessment of the translated text written in the candidate's first source language. The Ombudsman then pointed out that, in these circumstances, it was difficult to understand how failure to comply with one of the criteria could automatically result in a zero assessment of the other. In this regard, the Ombudsman requested EPSO specifically to refer, in its opinion, to the commitments that it had undertaken following the Ombudsman's own-initiative inquiry OI/5/2005/PB.

17. In its opinion, EPSO referred to the Ombudsman's decision in own-initiative inquiry OI/5/2005/PB, according to which EPSO undertook to propose that Selection Boards use, and provide candidates with, a model of an evaluation sheet containing (a) the evaluation criteria set out in the published notices of competition (including the various aspects that may be evaluated by the Board for each criterion) and the level of performance attained (ranging from excellent to insufficient), and (b) in addition to the total mark, the partial marks awarded by the Board for each criterion specified in the Notice of Competition.

18. EPSO then mentioned the measures it adopted to enhance the transparency of selection procedures, in line with the recommendations made by the Ombudsman. EPSO stressed that "*selection boards act and make decisions in complete independence and, as confirmed by settled case law, enjoy wide discretion concerning the choice of correction methods and establishment of the scoring criteria prior to the tests*". Moreover, EPSO pointed out that, following a reform of the competition procedure, candidates are now provided with two documents, namely, the Notice of Competition and the Guide to Open Competitions, which inform them in detail of the nature of the different tests and exercises that make up a competition.

19. As regards the complainant's case, EPSO stated that the Selection Board decided not to mark his written test a) because he failed to write the linguistic and quality assessment in the 'first source language', as required by the Notice of Competition and by the instructions given to candidates. According to EPSO, the contents of the complainant's test paper could not be considered as constituting the required written assessment since "*the comments appearing in the complainant's test paper were written in his main language, Slovenian, with the exception of*



a few words and/or incomplete phrases in his first source language, English ".

20. EPSO then pointed out that the Selection Board used objective marking criteria drawn up prior to the tests, but also stated that the assessment as to the suitability of candidates is of a comparative nature. Since such proceedings are covered by secrecy, they cannot be disclosed. According to EPSO, communicating to the complainant the marks he obtained would constitute a sufficient statement of reasons for the Selection Board's decision. However, the Selection Board informed the complainant of its decision and of the reasons supporting it. Moreover, the complainant received a copy of his test a).

21. In reply to the Ombudsman's statement referred to in paragraph 16 above, EPSO submitted that, in the complainant's case, "*the Selection Board decided not to mark his written test a), so no assessment was made*". EPSO stressed that the decision of the Selection Board was in line with the applicable case-law, as a Selection Board has the power to determine that a candidate has infringed the rules of the competition, in particular, the provisions of the Notice of Competition, and to exclude him from the competition on this ground.

22. As regards the complainant's third argument, according to which EPSO overstepped the limits imposed by the Notice of Competition, EPSO noted that the Selection Board decided to exclude him from the competition without marking his test on the ground that he failed to provide a linguistic and quality assessment in his first source language. In this regard, EPSO pointed out that this requirement had been clearly stated in the Notice of Competition, in the instructions to candidates attached to the invitation to the written tests, and on the test paper itself.

23. In light of the above reasoning, EPSO concluded that (i) the Selection Board acted within the limits of its discretion, and in compliance with the applicable legal provisions, when it decided to exclude the complainant from the competition without marking his written test a), and (ii) no infringement of the Notice of Competition had occurred.

24. In his observations, the complainant addressed and further developed all the arguments he had put forward in support of his allegation. With regard to the first argument, the complainant stated that EPSO failed correctly to address the Ombudsman's statement referred to in paragraph 16. In this regard, he pointed out that EPSO's reply, according to which "*in [the complainant] 's case the Selection Board decided not to mark his written test a), so no assessment was made*", is contradictory and does not properly address the matter.

25. As regards his second argument, the complainant stated that EPSO did not address the issue that, according to the instructions to candidates, candidates "*will be marked both on the errors that [they] spot and on [their] overall assessment*".

26. In this respect, the complainant also argued that EPSO did not provide a reasonable justification as to why it failed to inform candidates (i) of the respective weightings of the individual parts of test a), namely, to carry out a linguistic and quality assessment of a translated text and to write a continuous text of 400 words in this regard, and (ii) that failing to complete



one of those parts would lead to automatic exclusion from the competition, without having the other part marked.

27. In relation to his third argument, namely, that the Selection Board acted in breach of the Notice of Competition by providing candidates with additional instructions requiring them to write a text of 400 words in English, the complainant stated that EPSO did not address this argument in its opinion. In this regard, the complainant pointed out that the Notice of Competition stated that the purpose of the written tests was to " *verify the candidate's ability to evaluate the quality of the translated text* ", not to assess his or her ability to write in English. According to the complainant, any other skills, such as a candidate's knowledge of English, should be verified through specific tests. He also stated that he received the instructions only on the very day of the tests.

28. The complainant finally commented on EPSO's view that he failed properly to complete the first part of test a), because he merely commented on the translated text in his main language, Slovenian, with the exception of a few words and/or incomplete phrases in his first source language, that is to say, in English. In this regard, the complainant explained that the Slovenian words and expressions he used were not comments, but rather proposed improvements of the original Slovenian text, while the words in English constituted the actual assessment. Moreover, he stated that the way he carried out the test was in conformity with the requirements laid down by the Notice of Competition. Since this document did not specify how many words had to be used for the assessment, or that the assessment had to be in the form of a continuous text, the complainant considered that EPSO went beyond the limits laid down in the Competition Notice in requiring candidates to write a continuous text of 400 words in English.

The Ombudsman's assessment

29. The Ombudsman recalls that the Court of Justice of the EU has consistently held that Selection Boards have wide discretion with regard to the detailed content of the tests which form part of a competition. It is not for the Court of Justice to criticise that content unless a Selection Board oversteps the limits of the Notice of Competition or is not consistent with the purposes of the test of the competition [4] . In view of this, the Ombudsman considers that his task is limited to ascertaining whether the Selection Board's assessment was vitiated by a manifest error of assessment. The Ombudsman's role is not to substitute his own assessment for that of the Selection Board [5] .

30. In the present case, the Ombudsman's assessment will therefore focus on whether EPSO's Selection Board committed a manifest error of assessment in not marking the complainant's written text a) and thus excluding him from the competition.

31. The Ombudsman first notes that the Notice of Competition did not specify how written test a) would be organised. However, the instructions to candidates sent by e-mail before the test date and again distributed on the day of the written test made it clear that candidates were requested not only to spot and correct mistakes directly on the translated text but also to write a



separate assessment, consisting in a continuous text of about 400 words. This requirement does not appear to be in contradiction with the information provided in the Notice of Competition, since the instructions to candidates merely specified how the test would be structured. Therefore, the complainant's objections that EPSO acted in breach of the Notice of Competition by providing candidates with additional instructions and that it informed candidates of the detailed structure of the test only on the very day of the test are not convincing.

32. In the case at hand, it is not disputed by the complainant that he did not write a continuous text assessing the quality of the translated text. However, the complainant argued that EPSO should consider the comments he wrote in English on the text to be his actual assessment. Given that it is not in dispute that these comments consisted of some words only, EPSO's view that the complainant's annotations did not meet the requirement of a continuous text would appear to be reasonable.

33. However, the Ombudsman also has to assess the Selection Board's decision not to award to the complainant any points for his written test a), given that he did not write a continuous text assessing the quality of the translation.

34. To start with, such a decision appears difficult to reconcile with the wording of the instructions to candidates, which made it clear that candidates "*will be marked both on the errors that you spot and your overall assessment*". In line with this statement, the evaluation sheet also listed two different evaluation criteria: (i) the ability to spot errors and indicate to which category they belong and (ii) the linguistic and quality assessment of the translated text written in the candidate's first source language.

35. The Ombudsman therefore considers that the decision to award no points at all for written test a) because the candidate did not complete one of the two required exercises is not in line with the Notice of Competition, the instructions to candidates and the commitments made by EPSO. Indeed it is difficult to understand how the failure to comply with one of the evaluation criteria specified on the evaluation sheet could automatically authorise the Board to award zero points with regard to the other. This consideration is strengthened by the fact that the two criteria seem to be designed to be assessed separately in relation to the two required tasks.

36. It is true that, when exercising its discretion to organise competitions, EPSO may decide to instruct the Selection Board, in the notice of competition, to proceed to the correction of a test only if a candidate obtains a sufficient number of points in another one. Indeed, this happened in the present case with reference to the complainant's written test b) which was only to be marked in case a candidate obtained a sufficient number of points in written test a). However, if EPSO wished the Selection Board to proceed in such a way, this would, in view of the severity of this consequence, clearly have had to be spelt out in the Notice of Competition, as this was indeed the case in relation to written test b).

37. The Ombudsman furthermore recalls that, following his own-initiative inquiry OI/5/2005/PB on transparency in EU recruitment procedures, EPSO undertook to propose to Selection Boards that, in the case of written tests, they use a model evaluation sheet, obtainable by candidates



upon request, which contains (a) the evaluation criteria set out in the published notices of competition (including the various elements eventually evaluated by the Board for each criterion) and the level of performance attained (ranging from excellent to insufficient), and (b), in addition to the global mark, the partial marks.

38. However, and despite the fact that the different selection criteria were identified both in the Notice of Competition and in the evaluation sheet, the Selection Board did not provide a breakdown of the applicant's performance and instead decided not to award any points to the complainant's test a).

39. The Ombudsman therefore concludes, without needing to appoint an external expert as suggested by the complainant in paragraph 13 above, that, by failing to provide a separate assessment for the two parts of test a), EPSO's Selection Board's committed a manifest error of assessment. This constitutes an instance of maladministration.

40. When the Ombudsman finds that there has been an instance of maladministration, if feasible, he makes a friendly solution proposal or a draft recommendation to the institution concerned. In the present case, the Ombudsman however notes that Open Competition EPSO/AD/190/10 has already been closed, and a reserve list established. In these circumstances, the Ombudsman considers that making a draft recommendation would not serve a useful purpose. Therefore, he will make a critical remark below.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

Principles of good administration require that Selection Boards respect the provisions of the Notice of Competition and of the instructions to candidates when marking candidates' tests. In the present case, the Selection Board decided not to mark the complainant's written test a) on the grounds that he did not complete one of the two tasks that test consisted of, even though such an eventuality was not provided for in the Notice of Competition or in the instructions to candidates. This constitutes an instance of maladministration in EPSO's activities.

EPSO and the complainant will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 19 December 2012



[1] Notice of Competition EPSO/AD/190/10 (AD9), OJ 2010 C 242/A, p. 1.

[2] Point V.2 of the Notice of Competition.

[3] As specified in paragraph 12, argument (iii) was raised by the complainant only after the inquiry had been opened.

[4] Joined Cases T-285/02 and T-395/02 *Vega Rodríguez v Commission* [2004] ECR-SC I-A-333 and II-1527, paragraph 35.

[5] See the Ombudsman's decisions closing his inquiries into complaint 1370/2010/(KM)BEH, paragraph 40, complaint 1592/2009/ELB, paragraph 29, and complaint 2965/2008/(VL)BEH, paragraph 20.