

## **Decision of the European Ombudsman closing the own-initiative inquiry OI/15/2014/PMC into the way in which the European External Action Service (EEAS) handles allegations of serious irregularities involving the EU Rule of Law Mission (EULEX) in Kosovo**

Decision

**Case** OI/15/2014/PMC - **Opened on** 14/11/2014 - **Decision on** 04/12/2014 - **Institution concerned** European External Action Service ( No further inquiries justified ) |

After the Ombudsman's attention had been drawn to certain alleged serious irregularities affecting the EU Rule of Law Mission (EULEX) in Kosovo by an EULEX Prosecutor as well as by the media, the Ombudsman decided to open an own-initiative inquiry in order to assess whether the European External Action Service (EEAS) and EULEX had properly investigated or are properly investigating these allegations.

In order to ascertain what action needed to be taken by her, the Ombudsman inspected the EEAS's/EULEX's file concerning the matter. The inspection showed that EULEX had conducted a preliminary internal investigation and had recruited an external prosecutor to investigate the irregularities. In addition, the EEAS had appointed an experienced expert to review EULEX's mandate from a systemic point of view, with a particular focus on the allegations raised.

The Ombudsman noted that EULEX did not follow its standard procedure for investigating such allegations. She also found that the way in which the external prosecutor was recruited needed to be examined. However, given that the expert recently appointed by the EU High Representative has made it clear that these issues will form part of the review to be carried out by him, the Ombudsman took the view that there was no need for further action on her part at present.

## **The background to the inquiry**

1. In late October 2014, a prosecutor working for EULEX drew the Ombudsman's attention to alleged corruption, namely the taking of bribes, involving certain EULEX staff. Reports about these allegations were also published in the media. There were doubts as to whether EULEX and the EEAS had properly investigated the matter.



2. Given the serious nature of the allegations, the Ombudsman felt it her duty to become active. In fact, the independence and impartiality of the EU public administration, including its missions, is vital in terms of building trust on the part of citizens. Citizens' trust in the EU is at the heart of a well-functioning democracy.

3. The Ombudsman considered that the question as to whether **EULEX and the EEAS had properly investigated the above-mentioned allegations** constituted an issue of great public concern. She, therefore, decided to open an own-initiative inquiry [1] in relation to the EEAS [2] in order to assess whether EULEX and the EEAS have properly investigated or are properly investigating the allegation of serious irregularities.

4. When opening her inquiry, the Ombudsman made it clear that the aim of this inquiry was to ascertain whether the way in which EULEX and the EEAS have dealt with the alleged irregularities is in line with principles of good administration. The inquiry is thus focused on systemic and procedural aspects and does not address the question whether the alleged irregularities have taken place or not.

## The inquiry

### Inspection of the file

5. In order to ascertain what action needed to be taken by her, the Ombudsman asked to inspect the file of EULEX/the EEAS regarding the matter. The EEAS responded promptly and positively to this request.

6. On 18 November 2014, the Ombudsman's representatives examined the relevant EULEX/EEAS file, which contained documents showing how the alleged irregularities had been dealt with. In the days that followed, the Ombudsman's representatives asked the EEAS for further information and documents. The EEAS representatives duly complied with these requests and provided copies of further documents to the Ombudsman's representatives.

### Meeting with the external expert appointed by the EU High Representative

7. On 1 December 2014, the Ombudsman's representatives met with the external expert appointed by the EU's High Representative, who was given the mandate to review EULEX's mandate with a special focus on the alleged irregularities. The aim of the meeting was for the Ombudsman to get a better understanding of the expert's mandate.

## **Alleged failure properly to investigate the allegations of serious irregularities**



## Facts related to the case

8. The following core facts emerged from the inspection of documents carried out by the Ombudsman's representatives [3] and the meeting with the external expert.
9. The relevant allegations of irregularities within EULEX appear to have been set out first in a report that was submitted to EULEX in 2012 by a EULEX prosecutor. Neither EULEX nor the EEAS are in possession of this report. It is unclear what became of it.
10. In May 2013, EULEX started a preliminary internal investigation of the alleged irregularities, mainly focusing on a EULEX judge.
11. The EULEX Code of Conduct and Discipline provides for a procedure to be followed in cases where serious irregularities involving members of the staff of EULEX are brought to EULEX's attention. According to this procedure, the Internal Investigation Unit of EULEX is in charge of examining such allegations. This procedure was not followed in the present case. Instead, EULEX set up an *ad hoc* internal investigation task force (the 'Task Force') headed by the Head of Executive Division, who reported directly to the Head of Mission.
12. The Task Force set out the results of its examination in a report (which appears to be from late November or early December 2013) addressed to the Head of Mission. In this report, the Task Force proposed the recruitment and appointment of an external prosecutor to be charged with the task of conducting a pre-trial criminal investigation.
13. The special arrangement leading to the decision to recruit the external prosecutor was agreed among senior EULEX officials with a prosecutorial background, before being approved by the Head of Mission. The task of conducting the pre-trial criminal investigation was to be carried out jointly by the independent prosecutor and a prosecutor to be nominated by the Kosovar authorities.
14. It is not clear from the inspected documents how many candidates were considered for the external prosecutor post. Three persons with prosecutorial and human resources background carried out the selection procedure, two of whom had also been members of the Task Force. The selection panel was chaired by the Head of Executive Division.
15. The relevant declarations of conflict of interest state that no conflicts existed as regards this procedure.
16. The CVs of the persons concerned indicate that many of them had extensive experience in EU Common Foreign and Security Policy ('CFSP') missions. Some of them served together in the same mission during the same period of time.
17. In March 2014, a formal pre-trial criminal investigation, carried out jointly by the external



prosecutor appointed by EULEX and a Kosovar prosecutor, was opened into the alleged irregularities.

18. In mid-2014, the process of waiver of immunity of a former EULEX staff member was initiated, and subsequently partially granted, in order to conduct the pre-trial criminal investigation.

19. From the inspected documents, it was not possible to ascertain the exact scope of the pre-trial criminal investigation carried out by the joint prosecution team.

20. On 10 November 2014, the EU High Representative appointed an independent and experienced external expert to review the implementation of its mandate by EULEX, focusing in particular on the latter's handling of the corruption allegations.

21. At his meeting with the Ombudsman's services, the expert stated that he intended to identify all the allegations regarding the improper running of the EULEX mission, including those published in the media concerning alleged corruption, and then to assess how EULEX responded to these allegations.

22. According to the expert, his mandate directs him to identify systemic shortcomings in the EULEX Mission's operations, and to propose improvements. He will not investigate the merits of the alleged irregularities, but whether they have been properly handled by EULEX.

23. The expert stated that he intended to travel to Kosovo three times, with the intention of interviewing the persons concerned.

24. The expert also stated that he was planning to present a preliminary report to the European Parliament, or at least to have an exchange of views concerning his preliminary findings, in January 2015.

## The Ombudsman's assessment

25. When assessing whether EULEX and the EEAS have properly investigated or are properly investigating the alleged irregularities within EULEX, such as the taking of bribes by EULEX staff, the Ombudsman focuses on the **scope** of the investigations carried out so far by EULEX and the EEAS, the **procedures** used to carry out these investigations, and whether the investigations were carried out **independently and impartially**.

26. First, as regards the scope of the investigations carried out so far, the Ombudsman is not in a position to ascertain whether the concerns raised by one of the EULEX prosecutors in the 2012 report to EULEX about irregularities were fully covered by the preliminary investigation carried out by the EULEX Task Force. In order to answer this question, it would be necessary to examine this report. However, and as mentioned above, this report appears to have gone missing. Moreover, as the on-going pre-trial criminal investigation is evidently confidential, the



scope of that investigation is currently also unknown.

**27.** The Ombudsman concludes, nevertheless, that the fact that the immunity of one former member of EULEX was lifted suggests that the pre-trial criminal investigation covers allegations made against that person. It may well be the case also that other persons are being investigated in the context of the pre-trial criminal investigation.

**28.** The fact that the 2012 report about irregularities in EULEX can no longer be located is evidently an issue of great concern in itself. The Ombudsman notes, however, that the expert appointed by the EU High Representative has made it clear that he will examine in more detail the way in which EULEX responded to the reported irregularities. The Ombudsman trusts that the question of how such an important document could disappear, and whether EULEX ever contacted its author in order to obtain another copy of the report, will be examined by the external expert when looking at possible systemic shortcomings in the EULEX operations.

**29.** Second, as regards the procedures for looking into the matter, the Ombudsman notes that EULEX did not follow its standard procedure for dealing with reported irregularities. The EULEX Code of Conduct and Discipline provides that allegations of serious irregularities should be dealt with by the Internal Investigation Unit. Instead, in the present case, EULEX decided to set up an *ad hoc* Task Force headed by the Head of Executive Division. The Ombudsman understands that this step was taken due to the sensitivity of the allegations and their potentially criminal nature. The fact nevertheless remains that EULEX did not follow its standard procedure.

**30.** The Ombudsman acknowledges, however, that EULEX and the EEAS have taken steps to investigate the alleged irregularities and have cooperated well with the Ombudsman as regards her inquiry. In addition to that, the EU High Representative has appointed an external expert with a wide mandate to examine and identify shortcomings in EULEX operations. The Ombudsman welcomes this appointment. She trusts that this expert will also be able to examine the above-mentioned procedural issue.

**31.** Third, as regards the independence and impartiality of investigations, the Ombudsman notes that the EULEX Code of Conduct and Discipline does not provide for any sort of external reporting channel which would allow persons who wish to report potential irregularities within EULEX to turn to a person or authority outside EULEX itself [4] . Such a possibility would address the obvious dilemma that a potential whistleblower or citizens in general may not be convinced that allegations of serious irregularities concerning EULEX are properly and independently examined.

**32.** As regards the question of whether the investigations carried out so far have been carried out independently and impartially, having examined all the relevant documents in the file, the Ombudsman has no reason to doubt the professional integrity or conduct of the persons who have carried out, or who are currently carrying out, investigations into the matter. Their CVs show that they are professionals possessing qualifications that are more than adequate for the tasks assigned to them.



33. Nevertheless, the issue of the recruitment of the external prosecutor merits closer examination, particularly from the point of view of the public's perception. It emerged from the file inspected by the Ombudsman's representatives that two out of three members of the relevant selection panel, which was entrusted with selecting an independent external prosecutor, were also members of the Task Force which had conducted the internal investigation, including the Head of the Executive Division. The latter also appears to have been, at least from an administrative point of view, the direct line manager of certain persons at EULEX at which allegations of corruption were directed. What is more, the group of people working for CFSP Missions appears to be relatively small, with people regularly crossing each other's professional paths. It emerged from the relevant CVs inspected that two of the selection panel members had worked together in another Mission during the same period of time as the selected external prosecutor.

34. As the Ombudsman has underlined before, it is important to avoid not only actual or potential but also apparent conflicts of interest. In this regard, the Ombudsman again underlines that public trust in the administrative system is vital for the proper functioning of a democracy.

35. The persons involved declared that there were no conflicts of interest as regards the recruitment of the external prosecutor. The Ombudsman finds no reason to doubt these declarations. Nevertheless, without in any way wishing to imply that there were any such conflicts of interest in EULEX's handling of the matter, the Ombudsman considers that it would clearly be preferable if a decision, such as the recruitment of an independent prosecutor to investigate allegations of serious irregularities at EULEX, were to be taken by someone outside EULEX, for instance, by the EEAS. Again, this is an issue that is likely to be addressed by the external expert appointed by the EU High Representative.

36. To sum up, given that the criminal pre-trial investigation by the joint judicial team is on-going, that the external expert appointed by the EU High Representative is about to launch his own investigation, that this expert has made it clear that this investigation will cover the allegations of serious irregularities at EULEX, and that the Ombudsman has no reason to doubt that this expert will proceed to a review that is both thorough and rapid, the Ombudsman considers that **it is too early for her to come to a final conclusion on the question of whether the EEAS and/or EULEX have properly investigated/are properly investigating the allegation of serious irregularities affecting EULEX . In view of the above, the Ombudsman limits herself, at present, to making the above comments. However, she reserves the right to revisit the matter once the criminal investigation and/or the experienced expert have presented their conclusions .**

37. The Ombudsman is nevertheless confident that her inquiry has contributed both towards assisting in the efforts to examine the relevant allegations and to informing the public of the background of this matter

## Conclusion



Having conducted her own-initiative inquiry, the Ombudsman closes it with the following conclusions:

**Given that the criminal pre-trial investigation by the joint judicial team, as well as the review carried out by the external expert appointed by the EU High Representative, are still on-going, it is too early for the Ombudsman to come to a final conclusion as regards the question of whether the EEAS and/or EULEX have properly investigated/are properly investigating the allegation of serious irregularities affecting EULEX.**

**In view of the above, the Ombudsman limits herself, at present, to making the above comments. However, she reserves the right to revisit the matter once the criminal pre-trial investigation and/or the experienced expert have presented their conclusions.**

The EEAS will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 04/12/2014

[1] In accordance with Article 228 of the Treaty on the Functioning of the European Union, the Ombudsman is empowered to conduct inquiries on her own initiative in relation to the activities of the Union institutions, bodies, offices or agencies.

[2] In the framework of OI/12/2010/MMN, the Ombudsman concluded that she will address herself, as regards future inquiries, (i) to the Commission insofar as issues relating to budget implementation in civilian missions are concerned and (ii) to the High Representative/EEAS insofar as all other allegations of maladministration in relation to CSDP missions are concerned. Since the underlying matter falls under category (ii), this inquiry is directed at the EEAS.

[3] The EEAS' representatives identified as confidential all the documents of which copies were provided to the Ombudsman's representatives, in accordance with Article 5(2) of the European Ombudsman's Implementing Provisions, with the exception of press material and information pertaining to certain relevant court cases. Consequently, in accordance with Articles 13(3) and 14(2) of the European Ombudsman's Implementing Provisions, the Ombudsman cannot grant access to these documents to any person outside the Ombudsman's office. However, the present decision is based on information contained in these documents. The EEAS was informed and accepted that this information, which is also set out in the Ombudsman's report on the inspection that was carried out in this case, would be used by the Ombudsman for her analysis and conclusions.

[4] In fairness, it should be stressed that the Mission's Guidelines on Reporting Corruption provide for the possibility to turn to OLAF. However, these guidelines do not replace the Code of Conduct and Discipline, which contains the main rules applicable to EULEX's staff members, thus taking precedence over the Guidelines.