

Proposal of the European Ombudsman for a friendly solution in the inquiry into complaint 1756/2013/AN against the European Commission

Solution - 16/10/2013

Case 1756/2013/ZA - **Opened on** 16/10/2013 - **Decision on** 07/12/2015 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The post-secondary education system of the Wallonia-Brussels Federation comprises "full exercise post-secondary education centres" (*établissements d'enseignement supérieur de plein exercice*) and "social promotion education centres" (*établissements d'enseignement de promotion sociale*). The former are the "traditional", full-time post-secondary institutions, while the latter are institutions meant to provide life-long education at secondary and post-secondary level to people who do not follow traditional education because, for instance, they wish to combine work and studies. Post-secondary social promotion education may be attested to by diplomas which are **equivalent** to those delivered by traditional post-secondary education ("equivalent diplomas"), or by diplomas which are **specific** to it ("specific diplomas"). Specific diplomas are issued in cases in which the studies they attest to either do not exist in the traditional system or are different than those dispensed in the latter.

2. The complainant holds a specific diploma delivered by an institute for continuous training and social promotion education. He was successful in a call for expression of interest (the 'Call') which aimed at establishing a reserve list for contract agents in the EU Delegations. The complainant subsequently applied for a vacancy corresponding to his profile in the Commission and was selected. However, the Commission eventually refused to employ him, arguing that his diploma was ineligible, since it did not amount to a post-secondary education diploma, as requested by the Call and the legal provisions applicable to contract agents.

3. The complainant challenged this position and stated that under Belgian law, his diploma was a post-secondary one.

4. The Commission maintained its view and argued, first, that the case-law of the Court of



Justice requires national diplomas to be construed in light of national provisions. The Decree on social promotion education [2] (the "Decree") applicable in the Wallonia-Brussels Federation provides that only bachelor's, master's and specialisation degrees delivered by institutions of social promotion education can be considered equivalent to those granted by traditional post-secondary education institutions. Since the complainant's diploma was not one of those three, the Commission concluded that it was not equivalent to a post-secondary diploma. The Commission also referred to a certificate issued by the competent authorities of the Wallonia-Brussels Federation which stated that traditional education institutions do not offer an equivalent programme to the one the complainant had followed. Thus, the Commission concluded, his diploma necessarily could not be equivalent to a traditional one.

5. In his complaint, the complainant highlighted that the post-secondary education institution which delivered his training and diploma was duly approved and recognised by the Belgian authorities. Moreover, his diploma was a post-secondary one, which was clearly apparent from the certificate issued by the Wallonia-Brussels Federation authorities. Finally, the Article of the Decree quoted by the Commission did not exist on the date of closure for applications to the Call, which was the date when applicants needed to fulfil the eligibility conditions.

The inquiry

6. The Ombudsman opened an inquiry into the complainant's allegation that the European Commission wrongly considered that the complainant's diploma was ineligible, and his claim that the Commission should revoke its decision, declare the complainant eligible and either (i) offer him an equivalent post or (ii) adequately compensate him for the damage he has suffered in terms of loss of income, loss of professional experience and moral damage.

7. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman's friendly solution proposal takes into account the arguments and opinions put forward by the parties.

Alleged wrong decision of ineligibility and related claim

Arguments presented to the Ombudsman

8. In its opinion, the Commission stated that the Wallonia-Brussels Federation differentiates between equivalent diplomas, which have legal effects, and specific diplomas, which do not. The Commission took as a starting point the fact that, according to the certificate issued by the Wallonia-Brussels Federation authorities, the complainant's diploma is " *a specific [diploma] to the social promotion education* " and is not equivalent to one delivered by traditional post-secondary education.



9. The Commission acknowledged its error in previously referring to an Article of the Decree which was not in force at the time of the facts. The Commission did not apologise for its mistake. However, the Commission argued that, in any event, the Article in force at the relevant moment [3] also distinguished between equivalent diplomas and specific diplomas. This Article needs to be read in conjunction with the law defining post-secondary education in the Wallonia-Brussels Federation [4] , which only refers to traditional education and to social promotion education leading to equivalent diplomas. Since the complainant's studies were manifestly attested to by a specific diploma, they are thus not covered by the legal definition of post-secondary studies. The Commission concluded that it could not take into account a specific diploma which the national authority does not consider equivalent to a traditional one.

10. The complainant maintained its point of view. He noted that the distinction the Commission invoked between the legal effects of equivalent and specific diplomas is not based on any legal provision and is not mentioned in the certification issued by the Wallonia-Brussels Federation concerning his diploma. On the contrary, the latter certifies the post-secondary nature of his diploma, regardless of its additional classification as "equivalent" or "specific". Moreover, the law defining post-secondary education in the Wallonia-Brussels Federation quoted by the Commission does not apply to the complainant's case, because it only concerns traditional post-secondary education and social promotion post-secondary education leading to equivalent diplomas, and the complainant's studies do not fall in either of the two categories.

The Ombudsman's preliminary assessment leading to the friendly solution proposal

11. Article 82(2), letter d), indent i) of the Conditions of Employment of Other Servants (CEOS) provides that recruitment as a member of the contract staff in function group III requires at least "*a level of post-secondary studies attested by a diploma*" [5] . The Commission's General Implementing Provisions concerning the procedures of employment of contract agents [6] provides that an agent in function group III must at least possess a post-secondary diploma. Finally, Chapter A, point 3 ("*Admission criteria and general conditions*") of the Call reproduced the provisions of the CEOS.

12. It follows that **none of the legal texts applicable to the selection procedure the complainant took part in required a specific type of post-secondary studies (traditional or social promotion ones) or a specific category of diploma attesting them (equivalent or specific)** .

13. According to settled case-law of the EU Courts concerning competitions [7] , the requirement of a degree as a condition for admission to the competition is necessarily to be construed in light of how such a degree is defined in the legislation of the Member State in which the candidate completed the studies on which he/she relies. This case-law is applicable by analogy to the recruitment following the competition, as in this case. According to it, assessing and recognising the value of post-secondary diplomas lies outside the remit of the European Union and falls exclusively under the competence of Member States. Therefore, the



principles of subsidiarity and sincere cooperation would require that national decisions concerning the recognition and value of diplomas are duly respected.

14. In the complainant's case, the competent national authorities issued a certificate about the complainant's diploma stating the following (the Ombudsman's translation from the original French):

"... (2) *The Institute* [where the complainant studied] *is a post-secondary education centre of social promotion. This centre is recognised by the Ministry of the Wallonia - Brussels Federation* ...

(3) *The [complainant's] diploma ...is specific to the social promotion education. It corresponds to a post-secondary level of education . The diploma is called "specific" because the programme leading to it is only organised by the social promotion education centres. There is thus no corresponding (or equivalent) programme organised by the full time post-secondary education centres. "* (emphasis added)

15. The Commission's refusal to accept the complainant's diploma focused on the fact that the complainant's diploma is not equivalent to a traditional education one. However, the Commission neither needs, nor is empowered to request such equivalence once the Belgian authorities have clearly and unequivocally certified that the complainant's diploma corresponds to a **post-secondary** level of education , that is, to the level of education required by the Call and relevant EU provisions.

16. The fact that traditional education institutions in Belgium do not offer a similar programme of studies does not render his studies "less" post-secondary in the given legal context. Moreover, **the only thing the Call and EU law require was for the complainant's diploma to be post-secondary, and the Belgian authorities have certified it was.**

17. In that regard, the Ombudsman cannot understand why the Commission searched for new arguments in the Belgian law in order to support its position taking into account that the Belgian competent authorities had already clarified the value of the complainant's diploma in light of their own national law.

18. In light of the above, the Ombudsman makes the preliminary finding that the Commission has rejected the complainant's diploma on the basis of an eligibility requirement that was not established in the Call or relevant EU law. This is an arbitrary administrative behaviour which amounts to maladministration. This is aggravated by the fact that the Commission's services initially refused the complainant's recruitment on the basis of a legal text that was not applicable, and failed to apologise for such an error.

19. Given that the instance of maladministration can still be corrected, the Ombudsman therefore makes a corresponding proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman.

The proposal for a friendly solution



Taking into account the above findings, the Ombudsman proposes that the Commission revokes its decision and expressly declares the complainant eligible for positions of that level and either (i) offers him an equivalent one which might become available or, if that is not possible (ii) adequately compensates him for the damage he has suffered in terms of loss of income, loss of professional experience and moral damage .

Emily O'Reilly

European Ombudsman

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] *Decret organisant l'enseignement de promotion sociale* issued by the French Community of Belgium on 16 April 1991. The Commission quoted Article 47.

[3] Article 45, which reads: "*Les sections de l'enseignement supérieur de promotion sociale de type court sont sanctionnées :*

1° soit par des diplômes correspondant à ceux délivrés par l'enseignement supérieur de type court et de plein exercice;

2° soit par des diplômes spécifiques à l'enseignement supérieur de promotion sociale de type court.

Les unités de formation de l'enseignement supérieur de promotion sociale de type court sont sanctionnées par des attestations de réussite."

[4] Article 1 of the *Decret définissant l'enseignement supérieur, favorisant son intégration dans l'espace européen de l'enseignement supérieur et refinançant les universités* issued by the French Community of Belgium on 31 March 2004. The Article reads: "*Ce décret a pour objet l'enseignement supérieur de plein exercice, au sens de la loi du 7 juillet 1970 relative à la structure générale de l'enseignement supérieur, organisé ou subventionné par la Communauté française. Celui-ci comprend l'enseignement universitaire et l'enseignement supérieur hors université dispensé comme enseignement de plein exercice. Les études correspondantes organisées par les établissements de promotion sociale qui délivrent des titres et grades équivalents à ceux délivrés par l'enseignement supérieur de plein exercice sont également visées par ce décret*".

[5] There is an alternative requirement under indent (ii) of the same Article, which is, however, not applicable in the present case.



[6] Decision C(2004)1313 of 7 April 2004.

[7] See, by analogy, Case C-108/88 *Jaenicke Cendoya v Commission* [1988] ECR 2739, paragraphs 49, 550 and 51, and Case T-2/ 90 *Ferreira de Freitas v Commission* [1991] ECR II-103.