

## **Recommendation of the European Ombudsman in case 1333/2015/MDC concerning the decision of the European Personnel Selection Office (EPSO) to exclude the complainant from a competition on the grounds that his diploma was not relevant**

Recommendation

**Case** 1333/2015/MDC - **Opened on** 07/10/2015 - **Recommendation on** 17/07/2017 - **Decision on** 23/05/2018 - **Institution concerned** European Personnel Selection Office ( Maladministration found ) |

*The complainant in this case was excluded in 2013 from a competition to recruit administrators in the field of audit run by the European Personnel Selection Office (EPSO). He was excluded on the basis that his academic qualifications were not sufficiently relevant to the post advertised. The complainant pointed out that several candidates who had been admitted to the 2010 edition of the same competition had diplomas that were the same as, or less relevant than, his diploma. He argued that if the other candidates' qualifications were sufficient in 2010 then his diploma should be sufficient also in 2013. EPSO rejected this and argued that the 2013 competition was a new competition and not a re-run of the 2010 competition.*

*Following her inquiry, the Ombudsman agreed with the complainant. She found that the 2013 competition was the same competition as that originally run in 2010 and that the same criteria regarding qualifications should apply in 2013 as in 2010. The Ombudsman found maladministration by EPSO and recommended that EPSO ask the Selection Board to revise its decision on the complainant's qualifications and admit him to the competition .*

### **The background to the complaint**

1. in 2010 the complainant took part in Open Competition EPSO/AD/177/10 - AUDIT - Administrators [1] . He was excluded from the selection process on the basis of his results in the admission tests. In 2013, , in view of the outcome of the *Pachtitis* case [2] , EPSO announced that it would re-run the EPSO/AD/177/10 competition. All candidates excluded from competition EPSO/AD/177/10 on the basis of their results in the admission tests were invited to sit new tests. The complainant passed the admission tests of Open Competition EPSO/AD/177/10 - AUDIT 2013 - Administrators (the '2013 edition').

2. On 3 October 2013, the Selection Board (the 'Board') informed the complainant that he could not be admitted to the Assessment Centre phase of the competition because he did not fulfil the specific condition relating to the diploma which candidates had to possess [3] .



3. On that same day, the complainant requested a review of the decision of the Board. He contended that his diploma ( *Sciences Po ECO-FI* ) was a Master's degree and was certainly relevant to the duties since, among other things, **it had been considered relevant by three selection boards as well as the Appointing Authority in respect of three other audit competitions** [4] ; and two persons who had participated in other EPSO audit competitions (A/11/03 and AD/126/08) had been recruited on the basis of that diploma.

4. Almost five months later, the complainant received a reply to his request for review which confirmed the Board's decision not to admit him to the Assessment Centre phase. Citing case-law, the Board stated that it enjoys wide discretion in determining (on a case-by-case basis) whether a diploma corresponds to the level required by the Staff Regulations and the Notice of Competition (the 'Notice'). It added that the criteria laid down in the Notice were applied to all candidates to ensure equal treatment. The Board went on to state that "[i]n order to determine whether [the complainant's] diploma was relevant to the duties and whether it was sufficiently so, the Selection Board assessed the content of [his] diploma and took into particular consideration in that regard the subject areas studied. (F-53/07 Iordanova/Commission, ground 38). The Board ... confirmed that [the complainant does] not fulfil the specific conditions linked to Diplomas/Qualification as mentioned in the notice of competition. [His] diploma Pharmacy is considered to be in a field not relevant to the duties and although [his] 'Diplôme de Master' from IEP Paris Sciences PO, contains some subjects that might be considered as related to the duties, it was not considered to be sufficiently relevant in light of the criteria applied by the Board. Moreover, [he does] not have any professional training or professional qualification of an equivalent level relevant to the duties. " The Board concluded that no mistake had occurred.

5. The complainant made a complaint under Article 90(2) of the Staff Regulations (the 'Article 90(2) complaint') to EPSO on 13 May 2014. His complaint was based on several arguments, including the argument that two other selection boards, of two other identical audit competitions in which had he participated, had considered his diploma relevant and sufficient. Although he had informed the Board of this in his request for review, the Board did not give any reasons to justify why it had assessed his diploma differently.

6. In his Article 90(2) complaint, the complainant asked the Board to withdraw its decision and to readmit him to the competition. Among other things, the complainant argued that neither the Notice nor the Guide to candidates shed light on the criteria that applied. Nor did the Board provide any information about the precise criteria it applied and the method it used to evaluate his diploma. He therefore questioned whether candidates were treated equally. An analysis of the diplomas of the admitted candidates showed that two such candidates were graduates of *Sciences Po* . Others had diplomas in economics, finance or business. Moreover, some candidates in the 2010 edition had less relevant qualifications than he had. For instance, one had a Ph.D. in neurobiology. He therefore alleged a breach of the principle of equal treatment between candidates.

7. The complainant also alleged a breach of the obligation to give reasons for the decision.



8. The complainant alleged that the Board committed a manifest error of assessment when it decided that his diploma did not fulfil the conditions relating to qualifications listed in the Notice.

9. On 15 September 2014, EPSO rejected the Article 90(2) complaint. It considered that the Board had not committed a manifest error of assessment in the complainant's case. Before examining the applications, the Board had decided that it would accept diplomas only where the majority of the subjects studied directly concerned the audit field and the nature of the duties mentioned in the Notice only. In so doing, it acted within its discretionary powers. The Board decided that the complainant's diploma was not sufficiently relevant to the field of the competition, in view of the diploma's title and the content of the studies as described in the complainant's application form. The Board acted within its discretionary powers and in accordance with the applicable case-law.

10. EPSO considered that the Board's decision (especially that on the request for review) contained sufficient reasons in accordance with the applicable case-law. EPSO stated that the complainant assumed that the Board took a decision to consider *Sciences Po* diplomas to be inadmissible. This was not the case. The Board's decision was based on an individual analysis of the content of the complainant's university studies, in the light of the criteria mentioned in the Notice, as interpreted and specified by the Board.

11. EPSO also considered that there was no breach of the principle of equal treatment when the Board decided upon which candidates to admit on the basis of their diplomas. EPSO stated that the competition at issue was a competition based on *tests*, which does not involve a selection based on qualifications (unlike competitions based on *qualifications and tests*). EPSO therefore considered the complainant's allegation unfounded. EPSO added that even if other candidates were wrongly admitted to the competition, because of a wrong application of the Notice, this would not constitute a breach of the principle of equal treatment which the complainant could rely on to contest the decision rejecting his application.

12. While admitting that the conditions for admission to Competitions EPSO/AD/206-207/11 and EPSO/AD/177/10-13 were formulated in substantially identical terms, and that in such a case, a board which wishes to depart from a previous appraisal must give specific reasons for its decision, EPSO considered that the Board had fulfilled its obligation to provide detailed reasons for its decision not to admit the complainant.

13. On 20 May 2015, the complainant sent an e-mail to the Director of EPSO, asking him to reconsider his decision rejecting the complainant's Article 90(2) complaint so that he could be re-admitted to the 2013 edition of the Competition, in view of the judgment of the Civil Service Tribunal in case F-1/14 [5]. He stated that the judgment established that the Board's decision of 14 February 2014 was tainted by a procedural defect due to the Board's failure to provide sufficient reasons to candidates who had already been admitted to other EPSO Audit competitions.

14. EPSO replied that it could not take the complainant's request into consideration since the judgment to which he referred did not have retroactive effect.



### The inquiry

15. The Ombudsman opened an inquiry into the complaint and identified the following issues:

1) The Selection Board in Open Competition EPSO/AD/177/2010 - AUDIT 2013 - failed to give sufficient reasons for its decision to exclude the complainant from the Assessment Centre phase of the competition. This failure was not remedied by the Board's reply to his request for review.

2) EPSO did not handle the complainant's Article 90(2) complaint properly since the facts should have led it to re-examine the documents he submitted and to reach a completely different conclusion. The complainant argued, among other things, that the Selection Board appeared to have adopted a much stricter attitude towards the assessment of diplomas in the 2013 edition than it had in the 2010 edition.

3) EPSO refused to readmit the complainant to the Assessment Centre phase of the competition despite the judgment of the Civil Service Tribunal in Joined Cases F-1/14 and F-48/14 *Kakol v Commission* [6] (concerning another candidate who participated in the same competition as the complainant and whose grievances were very similar to those of the complainant), in which the Tribunal annulled the decision of the Selection Board on the candidate's request for review.

4) The complainant believed that EPSO should readmit him to the Assessment Centre phase of the competition.

16. In the course of the inquiry, the Ombudsman received the opinion of EPSO on the complaint and, subsequently, the comments of the complainant in response to EPSO's opinion. The Ombudsman also held a meeting with EPSO and subsequently inspected two documents which EPSO had referred to during the meeting. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

17. For reasons which will become clear, the Ombudsman will focus on EPSO's handling of the Article 90(2) complaint.

### EPSO's handling of the Article 90(2) complaint

## Arguments presented to the Ombudsman

18. The **complainant** argued that by virtue of Article 1(2) of Decision 2002/621/EC on the organisation and operation of EPSO [7], one of EPSO's tasks is to organise competitions " *on the basis of harmonised criteria* ". EPSO should therefore be in a position to check the evaluation criteria used and, above all, the validated diplomas/qualifications. In view of the significant difference between the diplomas and nationalities of the candidates admitted to the 2010 and the 2013 [8] editions of the Competition at issue, it is evident that EPSO failed to ensure internal consistency between the conditions applied in the two editions of that Competition. It also failed to ensure external consistency with previous and subsequent audit competitions since the complainant's same diplomas (as well as those of other candidates who



were not admitted to the 2013 edition) were considered sufficient in other audit competitions.

**19.** These differences also signify that EPSO breached the principle of equal treatment since it assessed the same diploma differently in respect of different candidates in the same competition. EPSO declared that the complainant's diploma in economics and finance from the *IEP Paris Sciences Po* was not relevant to an audit competition. However, several other admitted candidates held an equivalent diploma in economics or finance. According to the complainant, several candidates whose names appears on the reserve list of the 2010 edition held identical diplomas (granted by the same "*grande école*") to the complainant's. One of them had even chosen the same optional subjects. Moreover, the sole French candidate whose name appears on the reserve list of the 2013 edition held a diploma equivalent to that of the complainant granted by the *IEP Bordeaux*.

**20. EPSO** first set out its understanding of the respective roles of EPSO and the selection boards with regard to competitions.

**21.** EPSO stated that by virtue of the decisions governing the establishment and organisation of EPSO, (Decisions 2002/620/EC and 2002/621/EC), EPSO is responsible for organising competitions to meet the institutions' recruitment needs in line with the profiles they indicate. The Director of EPSO, as the Appointing Authority, defines in the Notices of Competition the profiles of the posts to be filled and, on this basis, the rules and conditions for each competition procedure. EPSO stated that "[i]t is in this context - i.e. in defining the eligibility criteria and the procedural rules of competitions - that EPSO has to ensure that "uniform standards are applied in the selection procedures" and that competitions are organised "on the basis of harmonised criteria", in conformity with Article 7 of Annex III to the Staff Regulations and Article 1(2) of Decision 2002/621/EC. On the other hand, the assessment of candidates' eligibility in individual competitions is the exclusive remit of each competition's selection board. "

**22.** EPSO referred to the wide powers of discretion enjoyed by selection boards in determining whether the qualifications and professional experience of a candidate correspond to the level required by the Staff Regulations and the competition notice. It added that, according to case-law, those powers must be exercised independently and free of all interference and external pressure, whether from institutions – including EPSO –, staff committees, candidates, or third parties. " *Considering this independence of the selection boards, case law accepts that two boards may interpret differently admission criteria drafted in the exact same terms in subsequent competitions, as long as there is room for interpretation in applying these criteria (225/87, Belardinelli v Court of Justice, paragraph 22).* "

**23.** EPSO stated that in the context of the administrative complaint procedure under Article 90(2) of the Staff Regulations, the Director of EPSO as the Appointing Authority carries out an administrative review of decisions taken by selection boards against which candidates have lodged complaints. Referring to the judgment of the Court of Justice in Case *Kolivas v Commission* [9], EPSO stated that the discretion of selection boards is not exempt from a review of legality, the purpose of which is to ascertain whether a manifest error or misuse of powers occurred in the exercise of the discretion or whether the limits of the discretion have



been manifestly exceeded. " *However, in [the complainant's] case, a detailed analysis of his file in the administrative complaint procedure led EPSO to the conclusion that there was no evidence of an error of assessment or misuse of powers committed by the Selection Board in its evaluation of the complainant's application .* "

**24.** The **complainant** contended that the 2010 and 2013 editions of Competition EPSO/AD/177 were not different competitions. Rather, the 2013 "edition" was a re-run of the 2010 competition with the same selection board, and the same conditions applied. Since the eligibility conditions were not interpreted in an identical manner in both "editions", candidates holding the same diplomas were treated differently. The complainant considered that Article 1(2)(c) of Decision 2002/621/EC confers on EPSO the role of assisting selection boards in the conduct of a competition, " *in that it is responsible for developing the selection methods and techniques* ". He contended that it was ironic that " *EPSO deploys huge efforts to develop standard pre-selection tests used in selections for tasks that have nothing in common (nuclear safety - audit - communications ADs) but would be willing to accept as a good administrative practice that an administrative act (diploma) could have a variable value towards the administration (selection for one administrative profile).* "

**25.** The complainant pointed out that the Selection Board had admitted to the competition other candidates who held his " *exact same diploma* " [10] . Accordingly, the complainant rejected as " *void* " the Board's position that the field of economics and finance was not the same as the field of audit and that therefore, his degree was not relevant in view of the criteria applied by the Board.

The Ombudsman's assessment

**26.** The Ombudsman agrees with EPSO's statement that the discretion of selection boards is not exempt from a review of legality and that in the context of Article 90(2) complaints, EPSO must ascertain whether, among other things, the selection board has committed a manifest error in the exercise of its discretion.

**27.** The Ombudsman will focus on the complainant's argument that the Selection Board appears to have adopted a much stricter attitude towards the assessment of diplomas in the 2013 edition than it had in the 2010 edition, thereby breaching the principle of equal treatment.

**28.** The Ombudsman asked EPSO to clarify its statement that, before examining the applications, the Selection Board had decided that it would accept diplomas only where the majority of the subjects studied directly concerned the audit field and the nature of the duties mentioned in the Notice. However, it was not clear if the Board had taken that decision prior to examining the applications of candidates who had passed the admission tests of the 2010 edition or only prior to examining the applications of candidates who participated in the 2013 edition. In other words, EPSO was asked to clarify if the Selection Board, when examining the qualifications of the other admitted candidates in EPSO/AD/177/10 (that is, the 2010 edition), applied the same strict interpretation that it applied to the complainant in the 2013 edition. The Ombudsman pointed out that it is arguable that competition EPSO/AD/177/10 (2013 edition)





and EPSO/AD/177/10 (2010 edition) are the same competitions and not separate competitions, since the former was a re-run of the latter. The Notice was identical and the competition was open only to those who had taken part in the 2010 editions and failed the admission tests. Therefore, the Selection Board should have interpreted the eligibility criteria in an identical manner.

29. In response, EPSO said that the 2010 and 2013 competitions were considered to be separate competitions, rather than editions of the same competition. It argued that candidates had been informed that the 2013 edition would be considered to be a new competition. As proof of this, EPSO sent the Ombudsman copies of two letters which had been sent to a candidate in Open Competition EPSO/AD/177/10-LAW. One was dated 24 June 2010. It included an enclosure entitled "Important message to candidates of Open Competition EPSO AD/177/10." That message stated as follows: *" On 15th June, the Civil Service Tribunal of the European Union issued its ruling in case F-35/08, Pachitis/Commission, which principally concerned the authority of the European Personnel Selection Office to set admission tests... EPSO has also decided, in agreement with its Management Board, that should the ruling Pachitis/Commission be confirmed on appeal, all candidates excluded from open competition EPSO/AD/177/10 on the basis of their results in the admission tests ... would be invited to new tests in a subsequent competition, for the same profiles, and to which they alone would be admitted. "*

30. The other letter was sent on 11 April 2012. It stated as follows: *" The European Institutions, via EPSO's Management Board, have decided that, in March 2013, the AD5 generalist cycle will be replaced by competitions launched exclusively for the candidates of EPSO/AD/177/10, EPSO/AD/178/10 and EPSO/AD/179/10 who were excluded from the selection process on the basis of their results in the admission tests ... Precise organisational details have yet to be finalised, but you may rest assured that the Institutions intend to ensure that your chances of success are broadly the same as in the original selections... "*

31. It is not clear how these letters prove that candidates had been informed that the 2013 edition would be considered to be a new competition.

32. Although the first part of the letter dated 11 April 2012 might lead one to think that the new competitions were different from the 2010 editions, the letter goes on to state that *" Precise organisational details have yet to be finalised, but you may rest assured that the Institutions intend to ensure that your chances of success are broadly the same as in the original selections "*.

33. In the end, with regard to Competition EPSO/AD/177, the precise organisational details resulted in the fact that **no new Notice of Competition was published but a corrigendum to the original Notice was published** . That corrigendum **did not introduce any changes** to Section II (DUTIES) or Section III ( **ELIGIBILITY** ) of the original Notice.

34. Moreover, the complainant has submitted evidence to show that the 2013 edition was a re-run of the 2010 edition. In a letter which EPSO sent to the complainant on 20 December 2012, EPSO stated *"... please find below further information on the re-run in 2013 of the*



*EPSO/AD/177/10 competition .” The complainant also informed the Ombudsman of a number of replies, posted on-line by EPSO staff members, to questions put to them by candidates, such as the following replies: “ EU Careers - Mar 25, 2013: ... Dear... The competition must be conducted on the 2010 rules and selected languages. **This competition is a re-run, not a new competition** ”; “ EU Careers - Jun 18, 2013: ... only the documents indicated in the application in 2010 may be considered by the Selection Board ”; and “ EU Careers - mar 27, 2013 : ... The notice of Competition published in 2010 indeed still applies to this competition .”*

**35.** EPSO has not contested the complainant’s statement that the Selection Board’s interpretation of the eligibility conditions in the 2013 edition of Competition EPSO/AD/177 was stricter than in the 2010 edition. If in fact there were two separate competitions, rather than two editions of the same competition, then EPSO would not have needed to respond to this point. However, the Ombudsman takes the view that these were not separate competitions and EPSO has not contested the claim that the eligibility conditions were interpreted more strictly in 2013 than in 2010.

**36.** Since the 2013 edition was a re-run of the 2010 edition, the Selection Board could not adopt a stricter interpretation of the selection criteria than it did with regard to the 2010 edition without breaching the principle of equal treatment.

**37.** By arguing that these were separate competitions, EPSO avoided having to examine whether the Selection Board had adopted a stricter approach to its assessment of the candidates’ diplomas in the 2013 edition than it had in the 2010 edition. Thus, EPSO avoided examining whether the Selection Board had breached the principle of equal treatment. However, as the Ombudsman does not accept that there were two separate competitions, it is herfinding that EPSO did not carry out its administrative review (the Article 90(2) complaint) properly. It is the Ombudsman’s finding that EPSO was wrong to have concluded that there was no evidence that the Selection Board had committed a manifest error of assessment in its evaluation of the complainant’s application.

**38.** In view of the foregoing, the Ombudsman finds that EPSO’s failure to carry out its administrative review properly constituted maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

**39.** In view of the Ombudsman’s finding, it is not necessary to analyse the other issues which the complainant raised in his complaint.

## **Conclusion**

## **Recommendation**

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to EPSO:

**EPSO should ask the Selection Board to revise its decision not to admit the complainant**





**to the Assessment Centre phase of the 2013 edition of the competition in question. The Selection Board should bear in mind that the 2010 and 2013 editions of Open Competition EPSO/AD/177/10 should not be considered to be separate competitions. It should therefore interpret the eligibility conditions for the 2013 edition in the same manner as it interpreted them in the 2010 edition.**

EPSO and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, EPSO shall send a detailed opinion within three months of the date of this recommendation.

Emily O'Reilly

European Ombudsman

Strasbourg, 17/07/2017

[1] Competition EPSO/AD/177/10 was organised in order to draw up a reserve list from which to recruit administrators in various fields, among them, the field of audit.

[2] Judgment of the Civil Service Tribunal of 15 June 2010, *Pachitis v Commission*, F-35/08, ECLI:EU:F:2010:51. In its judgment, the Civil Service Tribunal (and the General Court, which confirmed the Tribunal's judgment) criticised EPSO's pre-selection method (also used in competition EPSO/AD/177/10 (2010 edition)) on the basis of mis-allocation of powers between EPSO and the Selection Board.

[3] " *You must have a level of education which corresponds to completed university studies of at least three years' duration attested by a diploma relevant to the duties, or professional training/a professional qualification of an equivalent level relevant to those duties .* "

[4] His diploma was considered relevant and sufficient in the audit Competitions EPSO/AD/206-207/11 and EPSO/AD/126/08. Moreover, in Competition EPSO/A/11/2003, another candidate who was admitted to the competition held the same diploma. By way of example, the complainant cited a letter sent to him by the Chairperson of the Selection Board in EPSO Competition EPSO/AD/206-207/11 (Field: Audit) in reply to the complainant's request for review of that Selection Board's decision considering that he did not fulfil the specific condition relating to the diploma which candidates had to possess. Following the request for review, the Selection Board of that competition ( **whose Notice of Competition listed the same duties and qualification criteria as those listed in the Notice concerning Competition AUDIT EPSO AD/177/2010 at issue in this case, according to the complainant** ), decided that he did " *indeed satisfy the qualification criteria* ". He was therefore admitted to the Assessment Centre phase.



[5] Judgment of the Civil Service Tribunal of 22 January 2015, *Kakol v Commission* , F-1/14 and F-48/14, ECLI:EU:F:2015:5, paragraphs 48, 49 and 53. It should be noted that, in the course of this inquiry, the General Court hearing the appeal against the judgment of the Civil Service Tribunal in the *Kakol* case, overturned that judgment (see judgment of the General Court of 13 September 2016, *Commission v Kakol* , T-152/15 P, ECLI:EU:T:2016:466).

[6] Judgment in *Kakol v Commission* , F-1/14 and F-48/14, cited above, ECLI:EU:F:2015:5.

[7] 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 the European Communities Personnel Selection Office, OJ 2002 L 197, p. 56.

[8] In the 2010 edition, many types of diplomas were accepted and 8 or 9 French candidates were admitted, whereas in the 2013 edition the diplomas accepted were mainly those in economics, finance or law and only 1 French candidate was admitted.

[9] Judgment of the Court of Justice of 16 June 1987, *Kolivas v Commission* , 40/86, ECLI:EU:C:1987:286.

[10] The complainant reiterated that the sole French candidate whose name appears on the reserve list of the 2013 edition held a diploma in Economics and Finance which was equivalent to that of the complainant and was granted by the *IEP Bordeaux* . Two other French candidates admitted to the 2010 edition held the same diploma as the complainant.