

**Comments by the European Personnel Selection Office on a proposal for a solution
made by the European Ombudsman**

**Complaint by Mr [REDACTED] concerning Open Competition EPSO/AD/374/19
ref. 1656/2021/DL**

The proposal

On the basis of the inquiry into Mr [REDACTED] complaint against EPSO, the European Ombudsman made the following proposal for a solution:

‘The European Personnel Selection Office (EPSO) should reconsider the complainant’s administrative complaint and, in doing so, take account of recent EU case - law and take the necessary measures to address the negative impact that the language regime set out in the notice of competition had on the complainant’s status as a candidate.’

The Ombudsman asked EPSO to inform her of any action taken in relation to this proposal.

Facts

The complainant took part in open competition EPSO/AD/374/19-4, organised by EPSO to establish a recruitment reserve for EU staff in the field of financial rules applicable to the EU budget.

The competition included an ‘Assessment Centre’ phase with tests, which could be taken in English, French, German and Italian only.

In the course of the year 2020, the complainant participated in the Assessment Centre tests.

In January 2021, EPSO informed the complainant that his results in those tests were not sufficient to be placed on the reserve list of successful candidates.

In April 2021, the complainant made an administrative complaint to EPSO, asking it to review the decision not to place him on the reserve list. EPSO rejected the administrative complaint on 13 September 2021.

Dissatisfied, the complainant turned to the Ombudsman on 16 September 2021¹.

On 24 September 2021, the complainant wrote to EPSO asking it to revise the decision taken in response to his administrative complaint of 27 April 2021, ‘so [that he] can participate in new assessment centre tests for the competition EPSO/AD/374/19’. In his message, he referred to the ruling of the General Court of 8 September 2021 in the case T-554/19. This ruling annulled the Notice of Competition EPSO/AD/374/19 on the grounds that the language regime used in the selection procedure did not comply with EU law - an issue which the complainant had also raised in his administrative complaint to EPSO.

¹ Complaint ref. 1656/2021/DL.

On 6 December 2021, EPSO informed the complainant that it could not admit his request to revise the decision taken in response to his administrative complaint. Furthermore, EPSO confirmed that the annulment of the Notice of Competition EPSO/AD/374/19 did not call into question the results of the competition, and consequently it had no impact on the complainant's legal situation in the context of the competition EPSO/AD/374/19.

The Ombudsman was informed of EPSO's above reply in connection with Mr [REDACTED] complaint of 16 September 2021. Not convinced by EPSO's reply to the complainant, the Ombudsman made the solution proposal referred to above.

Comments

In reply to the Ombudsman's proposal to reconsider Mr [REDACTED] administrative complaint in the light of the rulings in the cases T-554/19 *Spain v Commission*, and T-202/17, *Calhau Correia de Paiva v Commission*, EPSO would like to clarify the following:

The appeal procedures against decisions taken in application of the Staff Regulations are governed by Articles 90-91a of the Staff Regulations. These Articles do not foresee the possibility for a decision taken in reply to an administrative complaint under Article 90(2) to be revised by the same authority that took the decision – in the present case, EPSO.

This follows from the principle of legal certainty, which aims to ensure that situations and legal relationships governed by European Union law remain foreseeable. To that end, it is essential that the European Union institutions observe the principle that they may not alter measures which they have adopted and which affect the legal and factual situation of persons, so that they may amend such acts only in accordance with the rules on competence and procedure.²

Furthermore, according to the jurisprudence of the EU Courts, an act adversely affecting a complainant may be the subject of only one administrative complaint.³ For this reason, EPSO could not admit the complainant's request of 24 September 2021 as a new administrative complaint against his exclusion from competition EPSO/AD/374/19.

Pursuant to Article 91 of the Staff Regulations, decisions taken in reply to an administrative complaint under Article 90(2) may be challenged by means of a judicial appeal to the Court of Justice of the European Union.

It is an undisputed fact that the complainant did not lodge an appeal with the Court of Justice to challenge EPSO's decision of 13 September 2021 taken in response to his administrative complaint. He omitted to do so notwithstanding the fact that he clearly became aware of the ruling in the case T-554/19, *Spain v Commission* well before the appeal deadline against the said decision expired.⁴

² Joined cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV, *Ireland et al. v Commission*, ECLI:EU:T:2012:134, paragraph 62.

³ Case T-66/05, *Sack v Commission*, ECLI:EU:T:2007:370, paragraphs 36-37; joined cases F-69/07 and F-60/08, *O v Commission*, ECLI:EU:F:2009:128, paragraph 45.

⁴ He must have acquainted himself with the ruling no later than on 24 September 2021, as evidenced by his request to EPSO made on the same date.

It is settled case-law that a decision which has not been challenged by its addressee within the applicable time limits becomes definitive with regard to him.⁵

Considering the above, EPSO is of the opinion that the decision of 13 September 2021 taken in response to the complainant's administrative complaint has become final and may no longer be altered.

Furthermore, with regard to the question of the impact of the rulings in the cases T-554/19 *Spain v Commission*, and T-202/17, *Calhau Correia de Paiva v Commission* on the complainant's situation and legal status, EPSO would like to clarify the following:

Although a judgment annulling a legal act has *erga omnes* authority as regards both its operative part and its *ratio decidendi*, it may under no circumstances entail the annulment of another act, which was not challenged before the Court but is alleged to be tainted by the same illegality.⁶

The only purpose of the grounds of the judgment that explain the precise reasons for the illegality found by the Court is to determine the exact meaning of the operative part of that same judgment. The authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings, and with regard to whom the judgment cannot therefore have decided anything whatsoever.⁷

It follows that an annulment ruling creates no obligation for the EU institutions to re-examine, at the request of interested parties, identical or similar decisions allegedly affected by the same irregularity as the annulled measure, but addressed to individuals other than the applicants in the Court case that gave rise to the annulment ruling.⁸

In the light of the above, EPSO considers that it has no legal basis to reconsider the complainant's administrative complaint in the light of the *Spain* and *Correia de Paiva* case law. Furthermore, it takes the view that doing so would be incompatible with the principle of legal certainty.

EPSO therefore regrets to inform the Ombudsman that it is not in a position to accept the proposal for a solution.

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EPSO trusts that it has provided the Ombudsman with all the necessary information concerning this complaint.

⁵ Case C-361/14 P, *Commission v McBride et al.*, ECLI:EU:C:2016:434, paragraph 55.

⁶ Case C-310/97 P, *Commission/AssiDomän Kraft Products et al.*, EU:C:1999:407, paragraph 54.

⁷ *Ibid.*, paragraph 55.

⁸ *Ibid.*, paragraph 56.