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From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
Subject:	European Ombudsman Complaint 380/2020/VB - Alleged irregularities in the selection procedure for a European Prosecutor - Approval of a letter

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Delegations will find attached the text of the letter.

**ANNEX**

Brussels, ... July 2020  
Ms Emily O'Reilly  
European Ombudsman  
1, avenue du Président Robert Schuman  
CS 30403  
F - 67001 Strasbourg Cedex  
France

**Subject: Alleged irregularities in the selection procedure for a European Prosecutor –  
Complaint 380/2020/VB**

Dear Ms O'Reilly,

Thank you for the letter from your services dated 5 June 2020 regarding Complaint 380/2020/VB and the alleged irregularities in the selection procedure for a European Prosecutor.

As part of your inquiries you first addressed a request for information to the European Commission on 23 March 2020. The latter replied to your request on 11 May 2020. In light of that reply, you have decided to involve the Council in the inquiry open on the matter.

In the letter to the Council, you requested an answer to two specific questions. The first is as to why the Selection Panel refused to notify the reasoned opinion to the Complainant and the second regards the possibility of a review of "the Selection Panel's eligibility decision."

These questions will be addressed in turn. The Council wishes however first to make the following preliminary remarks.

## **Preliminary remarks**

First, the procedure for selection of the European Prosecutors consists of several stages in which Member States, the Selection Panel and the Council are called upon to act.

In that regard, Article 16 of Regulation 2017/1939 (EPPO Regulation) on the appointment and dismissal of the European Prosecutors holds a central position in that regard. It provides:

"1. Each Member State shall nominate three candidates for the position of European Prosecutor from among candidates:

- (a) who are active members of the public prosecution service or judiciary of the relevant Member State;
- (b) whose independence is beyond doubt; and
- (c) who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters.

2. After having received the reasoned opinion of the selection panel referred to in Article 14(3), the Council shall select and appoint one of the candidates to be the European Prosecutor of the Member State in question. If the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council.

3. The Council, acting by simple majority, shall select and appoint the European Prosecutors for a non-renewable term of 6 years. The Council may decide to extend the mandate for a maximum of 3 years at the end of the 6-year period".

It follows that the EPPO Regulation vests the Council with decision making powers only at the third stage of the procedure, that is to say after, first, the nomination by each Member State of three candidates for the position of European Prosecutor and, second, after having received the reasoned opinion of the Selection Panel referred to in Article 14(3) of EPPO Regulation.

At that stage of the procedure, the Council is empowered to select and appoint one of the candidates to be the European Prosecutor of the Member State in question.

Second, the subject matter of the inquiry appears to relate to proceedings of the Selection Panel by which the latter allegedly considered the complainant ineligible for the post of European Prosecutor.

It appears clearly therefore that no act of the Council is challenged by the complainant or subject is matter of your inquiry.

It follows that the contested act concludes the second stage of the procedure during which the Council has no powers to act.

Third, the Council and the Selection Panel are separate autonomous legal entities. In that regard, Council Implementing Decision (EU) 2018/1696 of 13 July 2018 lays down the operating rules of the Selection Panel.

Recital 4 of Council Implementing Decision (EU) 2018/1696 on the operating rules of the Selection Panel provides that "the operating rules of the selection panel should ensure that the selection panel has the necessary independence and impartiality to carry out its work."

It follows from the above that the Selection Panel is independent from the Council in carrying out its functions, in particular in forming a reasoned opinion about the eligibility and merits of the candidates nominated by the Member States for the post of European Prosecutor and providing it to the Council.

Moreover, neither the Council nor the staff of the General Secretariat of the Council have any powers to review or assess the eligibility or merits of the candidates nominated by the Member States, or to interfere in any other manner pending the proceedings before the Selection Panel.

Finally, the decisions of that panel as to the eligibility of candidates are binding upon the Council. The EPPO Regulation or the provisions implementing it do not provide for any possibility for the Council to review those decisions.

We take the opportunity to inform you that the Commission tabled on 26 of June 2020 a Proposal for a Council Implementing Decision amending Council Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Council Regulation (EU) 2017/1939 (COM(2020) 279 final; 2020/0133 (NLE); Council document ST 9110/20). This Proposal does not affect the eligibility criteria.

### **Regarding the first question**

Regarding your first question, please note that the Council is informed about the list and identity of the candidates only at the time where it is notified the reasoned opinions drawn up by the Selection Panel.

Thus, the Council was not aware of the fact that one of the candidates challenges the Selection Panel's proceedings until it has received your letter, that is on 5 June 2020.

Having said that, your inquiry appears to concern the second phase of the procedure which starts from the moment the Selection Panel receives from the Member States the list of nominated candidates and lasts until the evaluation of their eligibility and the final assessment of the merits of suitable candidates. As indicated above, that phase of the procedure falls within the exclusive remit of the Selection Panel.

It follows that the Council is not in a position to know the grounds for refusal to communicate to the Complainant the reasons why it considered him ineligible.

A question to that effect could be usefully addressed to the Selection Panel itself.

The Council takes the opportunity to draw your attention to a distinction that the Council Implementing Decision (EU) 2018/1696 on the operating rules of the Selection Panel operates between the selection procedure for the European Chief Prosecutor and that for the European Prosecutors. While Rule VI.1 of that decision requires the Selection Panel to proactively inform the candidates for the European Chief Prosecutor who do not fulfil the eligibility requirements of the reasons, no such obligation is provided in Rules VI.2 and VII.2 with regard to the selection procedure for the European Prosecutors.

**Regarding the second question**

In response to the second question, it should be noted that Rule VI.1. of Council Implementing Decision (EU) 2018/1696 foresees the possibility to lodge a complaint within the meaning of Article 90(2) of the Staff Regulations to the Council in the selection procedure for the post of European Chief Prosecutor. Conversely, Rules VI.2 and VII.2 of that decision do not provide for the possibility of a similar review in procedures for appointment of the European Prosecutors under Article 16 of the EPPO Regulation.

This does not prevent the candidates from seeking other remedies under national or EU law in order to request a judicial review of acts intervening at different stages of the selection procedure.

In conclusion, since the questions you asked in your letter of 5 June 2020 concern the internal proceedings of the Selection Panel with respect to the Maltese candidates, the Council is not in a position to provide any detailed information in that regard.

Yours sincerely,

Chair of the  
Permanent Representative Committee

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