

ORDER OF THE GENERAL COURT (First Chamber)

25 October 2022 (*)

(Civil service – Appointment of the European Delegated Prosecutors of the European Public Prosecutor’s Office – Candidates nominated by [confidential] 1 Confidential data omitted. – Refusal by the College of the European Public Prosecutor’s Office to appoint the applicant – No dispute between the Union and one of its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS – Article 270 TFEU – Manifest lack of jurisdiction)

In Case T-603/21,

WO, represented by V. Vitkovskis, lawyer,

applicant,

v

European Public Prosecutor’s Office, represented by L. De Matteis and J. Castillo García, acting as Agents,

defendant,

THE GENERAL COURT (First Chamber),

composed, at the time of deliberations, of H. Kanninen, President, M. Jaeger and O. Porchia (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the written part of the procedure,

having regard to the order of 23 February 2022, *WO v European Public Prosecutor’s Office* (T-603/21 R, not published, EU:T:2022:92),

makes the following

Order

- 1 By his action based on Article 270 TFEU, the applicant, WO, seeks annulment of Decision No 28/2021 of the College of the European Public Prosecutor’s Office (‘the College of the EPPO’) of 21 April 2021 rejecting a candidate for the position of European Delegated Prosecutor of the European Public Prosecutor’s Office in [confidential] (‘the contested decision’).

Background to the dispute

- 2 On 12 October 2017, the Council of the European Union adopted Regulation (EU) 2017/1939

implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ 2017 L 283, p. 1). Under Articles 1 and 8 thereof, that regulation establishes the EPPO as a body of the European Union and sets out rules concerning its functioning.

- 3 According to Article 8(2) of Regulation 2017/1939, concerning the structure of the EPPO, that body is to be organised at a central level and a decentralised level.
- 4 According to Article 2(4) of Regulation 2017/1939, 'staff of the EPPO' is defined as the personnel at the central level who supports the College, the Permanent Chambers, the European Chief Prosecutor, the European Prosecutors, the European Delegated Prosecutors and the Administrative Director in the day-to-day activities in the performance of the tasks of the EPPO under that regulation.
- 5 The tasks and functions of the European Delegated Prosecutors are defined in Article 13 of Regulation 2017/1939.
- 6 As regards their appointment, under Article 17(1) of Regulation 2017/1939, each Member State participating in enhanced cooperation on the establishment of the EPPO must nominate candidates for the posts of European Delegated Prosecutors, which the College of the EPPO is to appoint upon a proposal by the European Chief Prosecutor for a renewable term of five years. Article 17(2) of that regulation provides that, from the time of their appointment as European Delegated Prosecutors until dismissal, the European Delegated Prosecutors are to be active members of the public prosecution service or judiciary of the respective Member States which nominated them, and their independence is to be beyond doubt and they are to possess the necessary qualifications and relevant practical experience of their national legal system.
- 7 On 16 November 2020, the College of the EPPO adopted Decision No 13/2020 laying down rules on the procedure for the appointment of European Delegated Prosecutors. Under Article 1 of that decision, the European Chief Prosecutor is to assess, based on the documents provided by the Member State concerned, whether the European Delegated Prosecutor nominated by the competent national authority meets the eligibility criteria foreseen by Article 17(2) of Regulation 2017/1939. According to Article 3 of that decision, if the information provided in accordance with Article 1 of that decision is not sufficient to conclude whether the person nominated meets the eligibility criteria, the European Chief Prosecutor is to ask a working group of European Prosecutors nominated by the College of the EPPO to gather additional information in order to assess the compliance with those criteria. Under Article 2 of that decision, if the European Chief Prosecutor concludes that the person nominated meets the eligibility criteria, he or she is then to propose the appointment of that person as a European Delegated Prosecutor to the College of the EPPO, which, according to Article 4 of that decision, is to decide.
- 8 Article 96 of Regulation 2017/1939, which relates to general staff provisions, provides, in the first subparagraph of paragraph 1 thereof, that the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Union ('the CEOS'), as well as the rules adopted by agreement between the institutions of the European Union for giving effect to the Staff Regulations and the CEOS, apply to the European Chief Prosecutor and the European Prosecutors, the European Delegated Prosecutors, the Administrative Director and the staff of the EPPO, unless otherwise provided for in that regulation.
- 9 In respect of the staff of the EPPO, Article 96(2) of Regulation 2017/1939 provides that that staff is to be recruited according to the rules and regulations applicable to officials and other servants of the European Union.

- 10 In the present case, the applicant applied for the post of European Delegated Prosecutor of the EPPO for [confidential].
- 11 On 23 December 2020, [confidential] nominated four prosecutors to act as European Delegated Prosecutors of the EPPO, including the applicant.
- 12 On 3 February 2021, the College of the EPPO adopted Decision No 7/2021 appointing three European Delegated Prosecutors in [confidential], which did not include the applicant.
- 13 By a note of 14 April 2021, the working group responsible for ascertaining the applicant's situation, in accordance with Article 3 of Decision No 13/2020, as referred to in paragraph 7 above, was of the opinion that his candidature should be rejected.
- 14 On 21 April 2021, the College of the EPPO adopted the contested decision.
- 15 On 31 May 2021, the applicant sent a letter to the EPPO requesting a review of that decision.
- 16 On 15 June 2021, the College of the EPPO replied to the applicant that it was maintaining the contested decision.

Forms of order sought

- 17 In the application, the applicant sought, first, annulment of the contested decision and, second, an order that the EPPO must pay him the sum of EUR 60 000 by way of compensation for the damage resulting from the infringement of the protection of his personal data, the unfair appointment procedure and the contested decision.
- 18 In the reply, the applicant stated that he was withdrawing the second head of claim in his application.
- 19 By letter lodged at the Court Registry on 31 May 2022, the applicant reiterated that he was withdrawing the second head of claim and requested that the costs relating to that withdrawal be borne by the EPPO.
- 20 By letter lodged at the Court Registry on 27 June 2022, the EPPO informed the Court that it took note of the applicant's discontinuance in part relating to the second head of claim and requested that the Court order the applicant to pay the costs relating to that discontinuance in part. In its rejoinder, it reiterated its request relating to those costs.
- 21 The applicant claims that the Court should:
- annul the contested decision;
 - order the EPPO to pay the costs.
- 22 The EPPO contends that the Court should:
- declare the action inadmissible;
 - order the applicant to pay the costs, including those relating to the partial discontinuance.

Law

- 23 Under Article 126 of the Rules of Procedure of the General Court, where it is clear that the Court has no jurisdiction to hear and determine an action or where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Court may, on a proposal from the Judge-Rapporteur, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.
- 24 In the present case, the Court considers that it has sufficient information from the documents before it and has decided, pursuant to Article 126 of the Rules of Procedure, to give a decision on the action without taking further steps in the proceedings.
- 25 At the outset, it is important to recall that the applicant brought the present action, seeking the annulment of the contested decision, under Article 270 TFEU.
- 26 It follows from the wording of Article 270 TFEU that the jurisdiction provided for therein extends to any dispute between the European Union and its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS.
- 27 In that regard, on the basis of Articles 17 and 96 of Regulation 2017/1939, the EPPO argues that the applicant does not fall within the category of officials or servants of the European Union and that the present action must be dismissed as inadmissible.
- 28 The applicant contests that its action is inadmissible. In order to justify the application of Articles 90 and 91 of the Staff Regulations, the applicant relies on various documents emanating from the EPPO relating to the appointment of European Delegated Prosecutors, which refer to the recruitment or employment procedures, the selection procedure and the employment of those persons. He adds that, in the EPPO's defence, it conceded that Articles 5, 123 and 124 of the Staff Regulations applied to European Delegated Prosecutors.
- 29 In the present case, in order to determine whether the applicant was right to bring an action on the basis of Article 270 TFEU against the contested decision, it is necessary to examine whether the dispute between him and the EPPO concerning that decision is a dispute between the European Union and its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS.
- 30 In that respect, it should be borne in mind that the notion of a dispute between the European Union and its servants has been given a wide definition by the case-law, with the result that disputes concerning persons who have the status neither of officials nor of employees, but who claim that status, are also examined within that framework (see judgment of 5 October 2004, *Sanders and Others v Commission*, T-45/01, EU:T:2004:289, paragraph 45 and the case-law cited). This applies to persons who are candidates for a post for which the conditions of appointment are laid down in the Staff Regulations or the CEOS.
- 31 Concerning the EPPO, it should be noted that not all provisions of the Staff Regulations are applicable to it per se. It is apparent from Regulation 2017/1939 that it is the provisions of that regulation which determine the extent to which certain provisions of the Staff Regulations or the CEOS apply to the European Delegated Prosecutors.
- 32 Article 96(1) of Regulation 2017/1939 provides that the Staff Regulations and the CEOS apply to the European Chief Prosecutor and the European Prosecutors, the European Delegated Prosecutors, the Administrative Director and the staff of the EPPO 'unless otherwise provided for in this

Regulation’.

- 33 It is useful to point out that, in accordance with the provisions of Article 2(4) and Article 13 of Regulation 2017/1939, as referred to in paragraphs 4 and 5 above, European Delegated Prosecutors are not members of the staff of the EPPO.
- 34 As regards their appointment, which is at issue in the present case, Article 17 of that regulation, as recalled in paragraph 6 above, lays down a specific procedure with special rules. As the EPPO correctly points out, that procedure consists of two stages. During the first stage, each Member State participating in enhanced cooperation is to nominate its candidates for the post of European Delegated Prosecutors. During the second stage, the College of the EPPO is to appoint the European Delegated Prosecutors of each Member State.
- 35 Article 17 of Regulation 2017/1939 guarantees that, at the end of the appointment procedure, only the Member States participating in enhanced cooperation on the establishment of the EPPO will have European Delegated Prosecutors for each of those States, appointed by the College of the EPPO in order to perform their functions at a decentralised level. It enables those Member States, prior to that appointment, to nominate candidates who, in view of their obligation to be active members of the public prosecution service or judiciary of the Member State nominating them, in principle have the nationality of that State.
- 36 Article 17 of Regulation 2017/1939 thus lays down a *sui generis* procedure which is different from that applicable to the recruitment of the staff of the EPPO, it being specified that the latter is to be recruited, in accordance with Article 96(2) of Regulation 2017/1939, according to the rules and regulations applicable to officials and other servants of the European Union.
- 37 The *sui generis* nature of the procedure for appointing European Delegated Prosecutors may be explained by the fact that it concerns persons called upon to exercise, in the context of the enhanced cooperation on the establishment of the EPPO, a high-level responsibility within the institutional system of the European Union and, specifically, at a decentralised level, in accordance with Article 8(2) of Regulation 2017/1939.
- 38 In that context, as regards the applicant’s arguments referred to in paragraph 28 above, the fact that the various documents on which he relies refer to the ‘recruitment and/or employment procedures’, the ‘selection procedure’ and the ‘employment’ of European Delegated Prosecutors is insufficient for the purpose of demonstrating that Articles 90 and 91 of the Staff Regulations are applicable in the present case.
- 39 It is important to add that it is not until after the European Delegated Prosecutors have been appointed, pursuant to Article 17 of Regulation 2017/1939, that they are to be engaged, in accordance with Article 96(6) of that regulation, as special advisers under Articles 5, 123 and 124 of the CEOS. It follows from that paragraph that only the European Delegated Prosecutors’ pay and employment conditions fall within the scope of the CEOS and within the competence of the EPPO’s authority empowered to conclude contracts. The situation is different for the conditions and procedures leading to their appointment.
- 40 It should be noted that, contrary to what the applicant claims, the EPPO has not acknowledged that Article 5(5) of the Staff Regulations, which provides that identical conditions of recruitment and service career are to apply to officials belonging to the same function group, is applicable to European Delegated Prosecutors. The EPPO referred to Article 5 of the CEOS, which contains a definition of ‘special adviser’, a status which covers European Delegated Prosecutors, in order to

emphasise that, under Article 124 of the CEOS, Article 5 of the Staff Regulations was not applicable by analogy to special advisers.

41 As those conditions and procedures for the appointment of European Delegated Prosecutors are not laid down in the Staff Regulations or in the CEOS, disputes that relate to those conditions and procedures cannot therefore be regarded as disputes between the European Union and one of its servants for the purposes of Article 270 TFEU.

42 The Court therefore manifestly lacks jurisdiction to hear and determine the present action against the contested decision under Article 270.

43 In addition, it is important to point out that, according to the case-law, it is for the applicant to choose the legal basis of its action and not for the EU judicature itself to choose the most appropriate legal basis (see judgment of 24 October 2014, *Technische Universität Dresden v Commission*, T-29/11, EU:T:2014:912, paragraph 24 and the case-law cited). It is not possible to regard the present action against the contested decision as brought on the basis of Article 263 TFEU, since the applicant has expressly invoked Article 270 TFEU.

44 That said, even if it were to be held that the applicant intended, by his application, also to bring his action against the contested decision under Article 263 TFEU, which, moreover, he does not claim in his written pleadings lodged in the present case, it is sufficient to note that, under the sixth paragraph of Article 263 TFEU, an action for annulment must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

45 In addition, in accordance with Article 60 of the Rules of Procedure, the procedural time limits are to be extended on account of distance by a single period of 10 days.

46 According to settled case-law, the time limits under Article 263 TFEU are a matter of public policy and are not subject to the discretion of the parties or the Court (judgment of 23 January 1997, *Coen*, C-246/95, EU:C:1997:33, paragraph 21; orders of 19 April 2016, *Portugal v Commission*, T-550/15, not published, EU:T:2016:237, paragraph 22; and of 30 April 2019, *Romania v Commission*, T-530/18, EU:T:2019:269, paragraph 24).

47 Since it is common ground that the contested decision was notified to the applicant on 5 May 2021, the applicant was required to bring his action within a period of 2 months and 10 days following that date. Therefore, as the EPPO correctly points out, the application he lodged on 14 September 2021 was out of time.

48 It should be noted that, even if the letter of 15 June 2021 from the European Chief Prosecutor were open to challenge, the applicant also lodged his application against that measure out of time for the same reasons as those set out in paragraphs 44 to 47 above.

49 The present action is therefore, in any event, manifestly inadmissible.

50 It follows from all of the foregoing that the action must be dismissed.

Costs

51 As regards the head of claim in the application seeking compensation, which was withdrawn, Article 136(1) of the Rules of Procedure provides that a party who discontinues or withdraws from

proceedings is to be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance. Pursuant to Article 136(2) of the Rules of Procedure, at the request of the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

- 52 Notwithstanding the applicant's claim that the EPPO should be ordered to pay the costs relating to his discontinuance (see paragraph 19 above), it should be noted that, in the circumstances of the present case, in which, in particular, the Court does not have jurisdiction to hear and determine the application brought by the applicant under Article 270 TFEU and in which, in any event, the applicant has himself acknowledged that he had not provided information to demonstrate the alleged damage and the causal link between that damage and the contested decision, he must be ordered to pay the costs relating to that discontinuance, in accordance with the form of order sought by the EPPO.
- 53 It should be added that, under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 54 Since the applicant has been unsuccessful in his claims for annulment, he must be ordered to pay the costs, in accordance with the form of order sought by the EPPO.
- 55 As regards the costs relating to the interim proceedings, which were reserved in the order of 23 February 2022, *WO v EPPO* (T-603/21 R, not published, EU:T:2022:92), the applicant must also be ordered to pay those costs.
- 56 It follows from all the foregoing that the applicant must be ordered to pay all the costs, including those relating to the interim proceedings.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby orders:

- 1. The action is dismissed.**
- 2. WO shall pay the costs, including those relating to the interim proceedings.**

Luxembourg, 25 October 2022

E. Coulon

H. Kanninen

Registrar

President

* Language of the case: English.