Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)

18 September 2012*

(Civil service — Open competition — Non-admission to the oral test following results obtained in written tests — Requests for review — Specific right of candidates to have access to certain information concerning them — Purpose and scope — Right of access to marked written tests — None)

In Case F-96/09,

ACTION under Articles 236 EC and 152 EA,

Eva Cuallado Martorell, residing in Augsburg (Germany), represented by M. Díez Lorenzo, lawyer,

applicant,

v

European Commission, represented by B. Eggers and J. Baquero Cruz, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber),

composed of M.I. Rofes i Pujol (Rapporteur), President, I. Boruta and K. Bradley, Judges,

Registrar: W. Hakenberg,

having regard to the written procedure,

having regard to Article 48(2) of the Rules of Procedure,

gives the following

Judgment

1 By application received at the Registry of the Tribunal on 26 March 2010, Ms Cuallado Martorell brought the present action, seeking in essence annulment, first, of the decision of the selection board in Competition EPSO/AD/130/08, organised by the European Personnel Selection Office (EPSO), not to admit her to the oral test and, secondly, of the decisions not to send her the marked written tests she had done and the personal evaluation sheets for those tests.

* Language of the case: Spanish.

Legal context

2 Article 91a of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'Any appeals relating to the areas in which Article 2(2) has been applied shall be made against the institution to which the Appointing Authority entrusted with the exercise of powers is answerable'.

3 Under Article 2 of Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing EPSO (OJ 2002 L 197, p. 53):

'1. [EPSO] shall exercise the powers of selection conferred under the first paragraph of Article 30 of the Staff Regulations and under Annex III thereto on the appointing authorities of the institutions signing this Decision. ...'

4 Article 4 of Decision 2002/620 establishing EPSO, relating to requests, complaints and appeals, provides:

'In accordance with Article 91a of the Staff Regulations, requests and complaints relating to the exercise of the powers conferred under Article 2(1) and (2) of this Decision shall be lodged with [EPSO]. Any appeal in these areas shall be made against the [European] Commission'.

5 Article 4 of Decision 2002/621/EC 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 EPSO (OJ 2002 L 197, p. 56), provides:

'1. The Head of [EPSO] shall exercise the powers conferred on the appointing authority under Article 90 of the Staff Regulations in respect of all requests or complaints relating to the tasks of [EPSO].

...'

6 On 22 May 2008 EPSO published in the *Official Journal of the European Union* (OJ 2008 C 125 A, Spanish language edition, p. 1) notice of open competition EPSO/AD/130/08 ('the notice of competition'), held in order to draw up a reserve list of lawyer-linguists (Grade AD7) with Spanish as their main language from which to fill vacant posts in the institutions of the European Union, in particular, the Court of Justice of the European Union, the European Parliament and the Council of the European Union.

7 When applying to enter open competition EPSO/AD/130/08 ('the competition'), candidates were required to choose between the 'Court of Justice' channel, where the number of successful candidates was limited to 25, and the 'Parliament, Council' channel, where the number of successful candidates was limited to 14.

8 Section A, Part I, of the notice of competition, entitled ‘Duties’, stated:

“‘Court of Justice” channel …	“Parliament, Council” channel Follow-up of the legislative procedure and checking legislative texts in Spanish which have already been translated and revised, for both linguistic and legal consistency with other language versions of the texts; checking the quality of the drafting and compliance with the formal rules on layout. Occasionally translating short legal texts, particularly from English or French.’

9 Section A, Part II, of the notice of competition concerned the conditions for admission to the competition. Point 1 stated, with regard to the qualifications required:

‘You must have a level of education which corresponds to completed university studies of at least four years’ duration attested by a degree in Spanish law …’.

10 Point 2 of Section A, Part II, of the notice of competition stated the following, with regard to knowledge of languages:

“‘Court of Justice” channel …	“Parliament, Council” channel (a) perfect command of Spanish (language 1); (b) thorough knowledge of English or French (language 2); (c) thorough knowledge of German, English or French (language 3), (must be different from language 2). (d) for the optional test (language 4), knowledge of one of the following languages (must be different from languages 2 and 3): [Bulgarian, Czech, Danish, German, Estonian, Greek, English, French, Irish, Italian, Latvian, Lithuanian, Hungarian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovak, Slovenian, Finnish or Swedish].

…

You must indicate your choice of languages for the various tests on the online registration form … and the application form. You will not be able to change your choice after the deadline for registration …’

11 Section B of the notice of competition, relating to competition procedure, stated inter alia:

‘3. Compulsory written tests – Marking

“Court of Justice” channel	“Parliament, Council” channel
…	(a) Correction of a legal text in Spanish containing errors of grammar, syntax, style and legal terminology. The purpose of this test is to check that you have a perfect command of the language you have chosen as language 1 and of legal terminology. This test will be marked out of 40 (pass mark: 20). Time allowed: Two and a half hours. (b) Translation into Spanish (language 1), without a dictionary, of a legal text in English or French (language 2), depending on your choice. This test will be marked out of 40 (pass mark: 20). Time allowed: two and a half hours. Test (b) will be marked only if you obtain the pass mark for test (a). (c) Translation into Spanish (language 1), without a dictionary, of a legal text in German, English or French (language 3, must be different from the language chosen for test (b)). This test will be marked out of 40 (pass mark: 20). Time allowed: two and a half hours. Test (c) will be marked only if you obtain the pass mark for tests (a) and (b).

4. Compulsory oral test ? Marking

If you obtain the pass mark for the compulsory written tests you will be admitted to the oral test.

Interview with the selection board in German, English or French (language 5) to enable it to assess:

— your general and legal knowledge; at this point, the board may take into account knowledge of languages other than those used in the written tests; your legal knowledge will be tested in Spanish;

— your ability to chair a meeting (‘Parliament, Council’ channel);

— your motivation and your ability to adjust to working as a European civil servant in a multicultural environment; if necessary, additional questions may be put to you in Spanish.

This test will be marked out of 100 (pass mark: 50).

5. Optional test

“Court of Justice” channel …	“Parliament, Council” channel The purpose of the optional test is to enable you to demonstrate the full range of your language knowledge. The marks you obtain will not affect the composition or the ranking of the reserve list. The aim is to help the institutions make the best use of the list when recruiting from it. Translation into Spanish (language 1), with a (non-electronic) dictionary, of a legal text in the language you chose from those listed at A.II.2(d) (language 4). This test will be marked out of 20. Time allowed: one hour. This test may be held at the same time as the compulsory tests, but will be marked only for candidates placed on the reserve list.’

12 Section D.4 of the notice of competition stated, with regard to requests from candidates for access to information concerning them:

‘Candidates involved in selection procedures have the specific right of access to certain information concerning them directly and individually, as described below. EPSO may accordingly provide candidates who so request with supplementary information relating to their participation in the competition. Candidates must send such requests in writing to EPSO within a month of being notified of their results in the competition. EPSO will reply within a month of receiving the request. Requests will be dealt with taking account of the confidential nature of selection board proceedings under the Staff Regulations (Annex III, Article 6) and in compliance with the rules on the protection of individuals with regard to the processing of personal data. Examples of the type of information which may be supplied are given in the Guide for Applicants, Section III.3.’

13 An annex was attached to the notice of competition, dealing with requests for review, appeal procedures and complaints to the European Ombudsman. That annex stated ‘If, at any stage of the competition, you consider that your interests have been prejudiced by a particular decision, you can take the following action:

— Requests for review

Within 20 days of the letter [from EPSO] informing you of the decision being sent to you online, send a letter stating your case to:

…

EPSO will forward your request to the chair of the selection board if it comes within the board’s remit. You will be sent a reply as soon as possible.

— Appeal procedures

— You can submit an appeal to the:

European Union Civil Service Tribunal

…

under Article 236 of the EC Treaty and Article 91 of the Staff Regulations …;

— or you can lodge a complaint under Article 90(2) of the Staff Regulations …, at the following address:

[EPSO]

…

The time limits for initiating these two types of procedure (see Staff Regulations …) start to run from the time you are notified of the act allegedly prejudicing your interests.

Please note that the appointing authority does not have the power to amend the decisions of a selection board. According to settled case-law, the wide discretion enjoyed by selection boards is not subject to judicial review unless the rules which govern the proceedings of selection boards have clearly been infringed.'

14 Section III.3 of the Guide for Applicants, published on EPSO's website ('the Guide for Applicants'), stated:

'…

(b) Those candidates who do not pass the written/practical test/tests and/or who are not among those invited to the oral test may ask to be sent their tests and the personal evaluation sheets for those tests drawn up by the selection board. Requests must be made within one month of the date of despatch of the letter by which the candidate is notified that his participation in the competition has ended.

…'

15 With regard to the procedure before the Tribunal, and especially legal aid which may be granted, Article 97(4) of the Rules of Procedure of the Tribunal provides:

'The introduction of an application for legal aid shall suspend the period prescribed for the bringing of the action until the date of notification of the order making a decision on that application or, in the cases referred to in the second subparagraph of paragraph 3, of the order designating the lawyer instructed to represent the applicant.'

Background to the dispute

16 The applicant applied to enter the competition. She chose the 'Parliament, Council' channel and was invited to attend the compulsory written tests, which took place on 28 November 2008 in Madrid (Spain).

17 In a letter of 14 May 2009, sent on behalf of the chair of the selection board for the competition, EPSO informed the applicant of the results she had obtained in compulsory written tests (a) and (b), which were 28/40 and 19/40 respectively, and stated that in view of the mark for test (b), which was below the pass mark of 20/40, the selection board had not marked compulsory written test (c).

18 On 14 May 2009 the applicant sent an e-mail to EPSO requesting information concerning the marking of her written test (b). Since she was only one mark short of the pass mark of 20 she wanted to make sure that there had been no mistake in the calculation. She therefore asked for a copy of her written test (b), showing how it had been marked and what mark had been awarded to her.

19 On 27 May 2009 the applicant submitted a request for review of her written test (b), and asked for her written test (c) to be marked and for her admission, if appropriate, to the oral test.

20 By letter of 2 July 2009, sent on behalf of the chair of the selection board for the competition, EPSO informed the applicant that her e-mail of 14 May 2009 had been considered to be a request for review of her written test (b), that, after reviewing that test, the board had decided to mark her written test (c), and that the result obtained in that test, namely18/40, had been below the pass mark of 20/40 required for her to be admitted to the oral test. That letter also stated that the applicant's paper in written test (b) had been sent to her.

21 In an e-mail of 4 July 2009, the applicant asked for information about the marking of her written test (c), since the mark she obtained was not far below the pass mark. She also asked for a copy of her written test (c) to be sent to her, showing how it had been marked and the mark that had been awarded to her and, if possible, for that test to be reviewed.

22 By letter of 10 July 2009 the applicant sent a reasoned request for her written test (c) to be reviewed, for a copy of that test and of the personal evaluation sheet for that test drawn up by the selection board to be sent to her, and she asked to be admitted, if appropriate, to the oral test.

23 After reviewing the applicant's written test (c), the selection board decided to confirm the mark of 18/40. That decision, the date of which is not clear, was notified to the applicant by a letter from EPSO dated 23 July 2009.

24 In a note dated 28 July 2009, entitled 'Complaint', the applicant made reference to Article 90(2) of the Staff Regulations, acknowledged receipt of the letter of 23 July 2009 and stated that she had asked, without success, for a copy of her written tests (b) and (c) and of the personal evaluation sheets showing how the selection board had marked those tests; she then reiterated those requests, adding that she wished to receive any additional information concerning her in connection with her participation in the competition. She also asked whether, if she obtained the necessary marks, she might be admitted to the oral test in the competition. The abovementioned note was regarded by EPSO as a request for documents and not a prior administrative complaint for the purposes of Article 90(2) of the Staff Regulations.

25 The applicant received an e-mail on 14 September 2009, reference 'EPSO/AD/130/0[8] – Your request for written tests (b), (c), and the evaluation sheet for written test (c)' ('the e-mail of 14 September 2009'). That e-mail stated that the documents in question, requested in the applicant's letter of 28 July 2009, were attached, and added that candidates were entitled to receive a copy of the original written tests but could not have access to their marked papers or the standard translation used by the markers. It is apparent from the file, however, that the documents in question were not attached to the e-mail.

26 On 18 November 2009 the applicant applied for legal aid under Article 95 of the Rules of Procedure, in order to bring an action before the Tribunal. By order of the President of the Tribunal of 2 March 2010 that application was granted.

27 After the application initiating proceedings had been lodged EPSO sent the applicant, by letter of 16 June 2010, the papers for written tests (a), (b) and (c), her written test scripts not showing the marks given by the selection board, and the personal evaluation sheets for tests (b) and (c).

Forms of order sought and procedure

28 The applicant claims that the Tribunal should:

— 'annul the decision taken on 14 September 2009, by which [EPSO] refused to send the applicant a copy of her [marked] written tests and a personal evaluation sheet stating the reasons why the board gave her the eliminatory mark of 18/40 in the last written test (c), and ignored her request for admission to the oral test in the competition …;

— annul the decision taken on 23 July 2009, by which [EPSO] upheld the eliminatory mark of 18/40 in the last written test (c), and refused her admission to the oral test in the competition …;

— annul the reserve list published following the competition, with retrospective effect from the date on which it was published;

— order the [European] Commission to pay the costs.'

29 The Commission contends that the Tribunal should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

30 After the defence had been lodged a second round of written pleadings was allowed by the Tribunal, limited however to the question of the admissibility of the action. Since the Tribunal considered that it was in a position to proceed to judgment without a hearing, the parties were requested, by letter from the Registry of 16 June 2011, to inform the Tribunal whether they agreed or not to the Tribunal's proposal to proceed to judgment without a hearing, in pursuance of Article 48(2) of the Rules of Procedure. The parties stated that they were in agreement with the Tribunal's proposal to proceed to judgment without a hearing.

Admissibility of the action

Arguments of the parties

31 The Commission contends that the action is inadmissible on the grounds, first, that the applicant failed to identify the contested act correctly and, secondly, that it is virtually certain that both the application for legal aid, lodged on 18 November 2009, and the application initiating proceedings, lodged on 26 March 2010, were brought out of time.

32 First, the applicant wrongly identified the e-mail of 14 September 2009 as being the act adversely affecting her, whereas the act which did adversely affect her was the selection board's decision, notified by EPSO's letter of 23 July 2009, confirming, following review, the mark of 18/40 in written test (c) and the decision not to admit the applicant to the oral test. The applicant should have challenged the latter decision which, having been taken by the selection board for the competition, could have been challenged directly before the Tribunal. In that event, the time-limit laid down in Article 91(3) of the Staff Regulations would have expired, in principle, three months and ten days from 23 July 2009, that is to say, on 2 November 2009.

33 Secondly, the Commission contends that the note of 28 July 2009, which the applicant entitled 'Complaint' within the meaning of Article 90(2) of the Staff Regulations, was no more than a request for documents, and did not have the minimum content required for a 'prior administrative complaint' within the meaning of the provisions of the Staff Regulations, which is why that note did not have the effect of suspending the time-limit of three months and ten days before the matter could be referred to the Tribunal.

34 Thirdly, the Commission contends that, even if the note of 28 July 2009 does meet the necessary conditions to constitute a complaint within the meaning of Article 90(2) of the Staff Regulations, the e-mail of 14 September 2009 cannot be regarded as the response to the complaint since it did not come from the appointing authority. In those circumstances, pursuant to the second subparagraph of Article 90(2) of the Staff Regulations, an implied decision to reject that complaint would be deemed to have been adopted four months later, that is to say on 28 November 2009, and so the applicant had three months and ten days within which to bring her action, namely until 10 March 2010. Since the action was lodged on 26 March 2010, it was brought after the time-limit expired.

35 Fourthly, the Commission is of the view that the application for legal aid, made on 18 November 2009, was premature, since it was submitted ten days before the expiry of the period of four months available to the appointing authority to respond to the alleged complaint, and did not have the effect of suspending the time-limit for the action at issue.

36 The Commission adds that even if the part of the action relating to access to information were held to be admissible, since a right of access to the procedural documents of a competition may exist independently of an application for annulment of a decision of a selection board, the claim relating to non-admission to the oral test, which is the main part of the action, would still be inadmissible.

37 Lastly, the Commission contends that there is no inconsistency between the inadmissibility it pleads and the fact that the applicant was granted legal aid by the President of the Tribunal. In that regard, the Commission recalls that legal aid is refused where the action in respect of which it is requested appears manifestly inadmissible, whereas in its written pleadings it merely states that, following an analysis of the various administrative stages, the action appears to it to be inadmissible, but does not claim that the inadmissibility is manifest.

38 The applicant counters by stating, first, that the action is directed against the e-mail of 14 September 2009 because that is chronologically the last decision taken by EPSO. Since that decision was taken following her complaint, it replaces the selection board's decision that had been notified to her by letter of 23 July 2009, and constitutes the act adversely affecting her.

39 Secondly, the applicant asserts that her note dated 28 July 2009 does indeed constitute a complaint within the meaning of Article 90(2) of the Staff Regulations. First, she gave it the title 'Complaint' and specifically stated that it was lodged in pursuance of Article 90(2) of the Staff Regulations, which demonstrates her intention to lodge a complaint within the meaning of the Staff Regulations. Secondly, it is clear from the wording of her note that its purpose was to challenge the selection board's decision that had been notified to her by letter of 23 July 2009 which was attached to the note. It is also clear from the wording of the note that the applicant was requesting that her written test (c) be reviewed and, consequently, that she be admitted to the oral test. Lastly, according to the applicant, she was not able to provide more detailed reasons in her note for her disagreement with the board's decision notified on 23 July 2009 since she had not managed to obtain a copy of her marked written tests and it was not until 16 June 2010 that EPSO had sent her the written tests (b) and (c) she had done, but there was no indication of how the selection board had marked them. Furthermore, if her note of 28 July 2009 was not a complaint within the meaning of the Staff Regulations, it would mean that the President of the Tribunal had granted her legal aid in order for her to lodge an action after the time-limit had expired.

40 Thirdly, the applicant observes that the e-mail of 14 September 2009 expressly refers to her requests of 28 July 2009, and its purpose was to provide a response to those requests. In that regard, the applicant adds that an e-mail on which the sender's e-mail address had the same domain name as that on EPSO's e-mails, which responded to what she had asked for in her complaint and which made express reference to that complaint, without however upholding her complaint, must be regarded as a rejection of her complaint. According to the applicant, the Commission cannot claim that she should have ignored the e-mail of 14 September 2009 and waited for the expiry of the time-limit of four months from her complaint of 28 July 2009, which would have constituted an implied rejection, with the risk of being time-barred from bringing the action in question as a result of failing to challenge the express rejection of her complaint in time. In any event, she ought to have been warned accordingly.

41 Fourthly, even if the e-mail of 14 September 2009 did not constitute rejection of her complaint, the applicant argues that the application for legal aid suspended the time-limit for bringing the action until the date of the notification of the order of the President of the Tribunal granting legal aid, namely 10 March 2010, the date on which the time-limit began to run again. Hence the action, lodged on 26 March 2010, was not out of time.

42 The applicant adds that, even if it were necessary to regard her application for legal aid, lodged on 18 November 2009, as being premature since it was submitted before 28 November 2009, the date on which the time-limit for a response to her complaint of 28 July 2009 expired, it is clear that the President of the Tribunal took account of that request at least before the expiry of that time-limit on 28 November 2009. It follows that the time-limit for bringing the action had been suspended between either 18 November 2009, or 28 November 2009 if the Tribunal were to consider that the e-mail of 14 September 2009 does not constitute rejection of her complaint, and 10 March 2010, the date of the order of the President of the Tribunal granting legal aid. It is clear that the judicial proceedings had begun, since not only had the application for legal aid been processed, but the President of the Tribunal had granted it, and he would not have done so if the time-limit for bringing the action in question had expired and therefore the action had been manifestly inadmissible.

Findings of the Tribunal

The acts adversely affecting the applicant

43 It should be noted as a preliminary point that both the administrative complaint and the legal proceedings must, according to Article 90(2) of the Staff Regulations, be directed against an act adversely affecting the applicant. According to settled case-law, the act adversely affecting a person is one which produces binding legal effects capable of affecting, directly and immediately, the interests of the applicant by bringing about a distinct change in his legal position (judgment of the Tribunal of 15 September 2011 in Case F-6/10 *Munch* v *OHIM*, paragraph 32 and the case-law cited).

44 As regards, in the first place, the decisions of a selection board, it is clear from settled case-law that the decision by which the selection board for a competition, after reconsidering an application at the candidate's request, refuses to admit a candidate to take part in the tests replaces the decision previously adopted by the selection board and cannot be regarded as merely confirming it (judgment of 11 February 1992 in Case T-16/90 *Panagiotopoulou* v *Parliament*, paragraph 20). Thus, where a candidate in a competition seeks review of a decision taken by a selection board, it is the decision taken by the latter after the review of the candidate's situation that constitutes the act adversely affecting him (judgment of 13 December 2006 in Case T-173/05 *Heus* v *Commission*, paragraph 19).

45 Therefore, the selection board's decision not to admit the applicant to the oral test, adopted following the request for review lodged by the applicant on 10 July 2009 and notified by letter from EPSO of 23 July 2009, replaced the board's original decision, notified by letter from EPSO of 2 July 2009, and constitutes in the present case the act adversely affecting her so far as non-admission of the applicant

to the oral test of the competition ('the decision not to admit the applicant to the oral test') is concerned. It is also the decision not to admit the applicant to the oral test, taken after reconsideration, which causes the periods for lodging a complaint and bringing an action to start to run, without there being any need to ascertain whether, in such a situation, that decision may be regarded as a purely confirmatory act (see judgment of 13 December 2007 in Case F-73/06 *Van Neyghem* v *Commission*, paragraph 39).

46 As regards, secondly, decisions refusing candidates access to information or documents, it should be pointed out that the notice of competition laid down a specific procedure in Section D.4 – which, where a candidate decides to follow it, replaces the procedure laid down in Article 90(1) of the Staff Regulations – which is characterised by very short time-limits and is designed to enable candidates to exercise their specific right of access to certain information concerning them directly and individually. By virtue of that right, 'EPSO may accordingly provide candidates who so request' with supplementary information relating to their participation in the competition. Such requests must be made within one month of candidates being notified of their results in the competition and EPSO undertakes to reply within one month of receiving the request. Section D.4 of the notice of competition refers to Section III.3 of the Guide for Applicants for examples of information that may be supplied to candidates. Section III.3(b) of that guide states that candidates who do not pass the written tests may ask for a copy of their written tests and the personal evaluation sheets for the tests showing the marking by the selection board.

47 The specific right afforded to candidates is designed to ensure that candidates who do not pass competitions can, without any breach of the secrecy of the selection board's deliberations, receive information and documents that will enable them to take an informed decision as to whether it is appropriate to challenge the decision to exclude them from the competition. To that end, the purpose of laying down very short time-limits, both for submitting a request for information or documents and for responding to it, is to enable the candidate in any event to have that information and those documents available at least one month before the expiry either of the time-limit for bringing an action before the Tribunal or of the time-limit for submitting a complaint to EPSO, whose director, under Article 4 of Decision 2002/621, exercises the powers conferred on the appointing authority.

48 It is clear from the above analysis that strict observance by EPSO of the specific right afforded to candidates, both as regards the substance of that right and in respect of the time-limit for responding, is the embodiment of the duties which stem from the principle of good administration, the public right of access to documents and the right to an effective remedy, in accordance with Articles 41, 42 and 47 of the Charter of Fundamental Rights of the European Union. It follows that failure on the part of EPSO to observe the specific right of candidates, in addition to the possibility that it might lead unsuccessful candidates to bring actions or complaints without having sufficient data, may constitute an administrative error capable of giving rise, where appropriate, to a candidate having a right to compensation.

49 In the present case, in her e-mail of 14 May 2009 the applicant asked for her written test (b) to be sent to her showing how it had been marked and the mark which the selection board had awarded her, and in her e-mail of 4 July 2009 she asked for her written test (c) to be sent to her, also showing how it had been marked and the mark which the selection board had awarded her. In addition to those two e-mails, on 27 May 2009 the applicant submitted an initial request for review, asking the selection board to reconsider its original decision regarding the marking of her written test (b) – a request for review in which the applicant was successful – and on 10 July 2009 she submitted a second request for review, regarding written test (c), following which the board upheld its marking of the test in question, as notified to the applicant by letter of 23 July 2009, but did not reply to her request for access to her marked written test (c) and the personal evaluation sheet for that test drawn up by the selection board.

50 It is therefore clear from the sequence of events that the period of one month which EPSO had in order to send the applicant, in reply to her e-mail of 14 May 2009, a copy of her test (b) and the personal evaluation sheet showing the marking by the selection board, expired on 14 June 2009, without any document having been sent to the applicant. As regards the communication of information regarding written test (c), the absence of a reply to the applicant's e-mail of 4 July 2009 and to the formal request contained in her request for review of 10 July 2009 can only be described as an implied refusal. It must be added, in that regard, that even though, in its letter of 2 July 2009 to the applicant, EPSO asserted that it had already sent her a copy of her paper in written test (b), and the e-mail of 14 September 2009 stated that her paper in written test (c) and the evaluation sheet for that test were attached, the fact remains that those documents were not sent to the applicant on the dates stated.

51 It follows that, as regards the requests for information and documents, both the implied decision not to send the information requested concerning test (b), which took place on 14 June 2009 ('the decision not to send written test (b)'), and the implied decision not to send the information requested concerning test (c), which was contained in the letter of 23 July 2009 ('the decision not to send written test (c)'), in so far as that letter does not address the question of sending the information requested, are acts adversely affecting the applicant.

52 Accordingly, the decision not to admit the applicant to the oral test, the decision not to send written test (b) and the decision not to send written test (c) are acts adversely affecting the applicant.

The applicant's compliance with the time-limits

53 In this regard, it should be noted first of all that, as the Court has held on a number of occasions, the legal remedy available regarding decisions of a competition selection board normally consists of a direct application to the European Union Court (see, inter alia, judgment of 14 July 1983 in Case 144/82 *Detti* v *Court of Justice*, paragraph 16 and the case-law cited). Indeed, a complaint against a decision of a selection board would appear to serve no purpose, since the institution concerned has no power to annul or amend decisions taken by a selection board. Consequently, an unduly restrictive interpretation of Article 91(2) of the Staff Regulations would merely result in a futile prolongation of the procedure (see, inter alia, judgment of 16 March 1978 in Case 7/77 *Ritter von Wüllerstorff und Urbair* v *Commission*, paragraph 8).

54 In the present case, since the decision not to admit the applicant to the oral test constitutes a decision of a competition selection board which, as such, is open to challenge before the Tribunal without a prior administrative complaint, the three-month time-limit for bringing an action laid down in Article 91(3) of the Staff Regulations, extended on account of distance by a single period of 10 days in accordance with Article 100(3) of the Rules of Procedure, began to run from the notification, on an unspecified date, of that decision by letter of 23 July 2009 and by 28 July 2009 at the latest, the date of the note entitled 'Complaint' in which the applicant acknowledged that she was aware of that decision, and expired on 7 November 2009. Since 7 November 2009 was a Saturday, the time-limit for bringing an action was extended automatically, under the first subparagraph of Article 100(2) of the Rules of Procedure, until Monday 9 November 2009.

55 The decision not to send written test (b) and the decision not to send written test (c) also constitute decisions of a competition selection board that are open to challenge before the Tribunal without a prior administrative complaint. Since the first of those decisions took place on 14 June 2009 and the applicant was apprised of the second decision by 28 July 2009 at the latest, the time-limit of three months and ten days for bringing an action before the Tribunal expired on 24 September 2009 and 7 November 2009 respectively, with the latter time-limit being extended until 9 November 2009 for the reasons given in the preceding paragraph.

56 Accordingly, the applicant could have made a direct application to the Tribunal by bringing an action no later than 24 September 2009 challenging the decision not to send written test (b), and an action no later than 9 November 2009 challenging the decision not to admit her to the oral test and the decision not to send written test (c).

57 That finding cannot be called into question by the wording of Article 97(4) of the Rules of Procedure, which provides that the introduction of an application for legal aid suspends the period prescribed for the bringing of the action until the date of notification of the order making a decision on that application, because in the present case the applicant did not apply for legal aid until 18 November 2009, that is to say, when the time-limits for bringing actions against all three of the abovementioned decisions of the selection board had already expired.

58 Secondly, it is also settled case-law that if the person concerned, instead of making a direct application to the European Union Court, invokes the Staff Regulations and makes an approach, in the form of an administrative complaint, to the appointing authority, the admissibility of the action brought subsequently will depend on that person's compliance with all the procedural requirements applicable to the prior complaint (judgment of 23 January 2002 in Case T-386/00 *Gonçalves* v *Parliament*, paragraph 35 and the case-law cited).

59 In the present case, the applicant contends that the note of 28 July 2009, entitled 'Complaint' and making express reference to the provisions of Article 90(2) of the Staff Regulations, constitutes a complaint within the meaning of those provisions.

60 According to settled case-law, a complaint does not need to take any particular form. It is sufficient that it clearly and precisely manifest the applicant's intention to challenge a decision taken concerning him (see, to that effect, judgments of 31 May 1988 in Case 167/86 *Rousseau* v *Court of Auditors*, paragraph 8; of 14 July 1988 in Joined Cases 23/87 and 24/87 *Aldinger and Virgili* v *Parliament*, paragraph 13; and of 16 February 2005 in Case T-354/03 *Reggimenti* v *Parliament*, paragraph 43). It is also clear from case-law that the administration must examine complaints with an open mind and it is sufficient, in order for it to consider that it is dealing with a complaint within the meaning of Article 90(2) of the Staff Regulations, that a plea has already been raised in the administrative procedure sufficiently clearly to enable the appointing authority to know the criticisms made by the person concerned of the contested decision (see judgment of 13 January 1998 in Case T-176/96 *Volger* v *Parliament*, paragraph 65).

61 The fact remains that, the aim of the pre-litigation procedure being to find an amicable settlement for a dispute arising at the time of the complaint, the appointing authority must be in a position to have a sufficiently detailed knowledge of the arguments which the person concerned is relying on against an administrative decision. It follows that the complaint must, in any event, contain a statement of the pleas and arguments relied on against the administrative decision against which the complaint is brought (see, to that effect, judgment of 7 March 1996 in Case T-146/94 *Williams* v *Court of Auditors*, paragraph 44).

62 In the present case, the Tribunal finds, first, that, as pointed out in paragraph 24 above, the note of 28 July 2009 is in two parts. In the first, the applicant requested the production of certain documents and additional information. In the second, she asked to be admitted to the oral test if she obtained the necessary marks.

63 The Tribunal also finds that, with regard to the second part of the note of 28 July 2009, in which the applicant, by asking to be admitted to the oral test, might be considered to be challenging the decision not to admit her to the oral test, the wording of the note in question does not contain a statement of any plea or argument in law or in fact supporting the request for amendment of that decision. Consequently, that part of the note of 28 July 2009 does not fulfil the minimum conditions required

by the case-law cited above in order to be regarded as a complaint within the meaning of Article 90(2) of the Staff Regulations, and EPSO was not in a position to provide a reasoned response to it.

64 In those circumstances, the application for annulment of the decision not to admit the applicant to the oral test is inadmissible. Since the application for annulment of the reserve list can succeed only in the event of annulment by the Tribunal of the decision not to admit the applicant to the oral test, that application must accordingly also be declared inadmissible.

65 The Tribunal finds, lastly, that, even though the applicant does not put forward any argument or plea in support of the requests forming the subject-matter of the first part of the note of 28 July 2009, the fact remains that it may be inferred from the actual wording of the note of 28 July 2009 that the applicant was complaining that she had not received the documents she had asked for several times, inter alia in her e-mail of 14 May 2009, concerning written test (b), and in her e-mail of 4 July 2009 and her request for review of 10 July 2009, concerning written test (c). It follows that, in view of the circumstances of this case, the first part of the note of 28 July 2009 should have been regarded by EPSO as being a complaint within the meaning of Article 90(2) of the Staff Regulations.

66 Since EPSO did not respond to the requests for the production of documents within the time-limits referred to in paragraph 50 above, the time-limits available to the applicant for lodging a complaint within the meaning of Article 90(2) of the Staff Regulations against the decision not to send her written test (b) and against the decision not to send written test (c) expired on 14 September 2009 and 28 October 2009 respectively.

67 Hence, the complaint lodged by the applicant on 28 July 2009 was admissible, both as regards the decision not to send written test (b) and as regards the decision not to send written test (c).

68 It should be noted in this connection that, following the lodging of the complaint of 28 July 2009, the requests for marked written tests (b) and (c) to be sent were the subject of an express refusal, notified in EPSO's e-mail of 14 September 2009.

69 Since, in addition, by its e-mail of 14 September 2009, EPSO did in fact refuse to send the applicant written tests (b) and (c) and the personal evaluation sheets she had asked for, requests which had already been the subject of the decisions not to send her written tests (b) and (c), there is no need to adjudicate on the claim for annulment of the decision sent by e-mail of 14 September 2009. It is settled case-law that formal claims directed against the dismissal of a complaint have the effect of seising the Tribunal of the act against which the complaint was made where dismissal of the complaint, as such, has no independent content, in so far as the decision dismissing the complaint merely confirms the contested decision (*Munch* v *OHIM*, paragraph 24 and the case-law cited).

70 It follows from all the above considerations that the action is admissible in so far as it seeks annulment of the decision not to send written test (b) and the decision not to send written test (c).

Merits

71 It should be noted, as a preliminary point, that the applicant's successive requests for EPSO to send her documents related to her test papers (b) and (c) and the evaluation sheets drawn up by the selection board for those tests, and also to the marking of those papers by the selection board.

72 As regards the requests to send written tests (b) and (c), in so far as they related to the applicant's test papers and the evaluation sheets for those papers drawn up by the selection board, EPSO did not act on them within the time-limits laid down in Section D.4 of the notice of competition, nor did it attach those documents to the e-mail of 14 September 2009; however a copy of the applicant's papers

and the evaluation sheets drawn up by the selection board for each of the tests were sent to her during the course of the proceedings, specifically by a letter from EPSO of 16 June 2010, and those documents appear in the case-file as annexes to the Commission's defence.

73 Hence, in the absence of a claim for damages, the action has no purpose as regards the decisions not to send written tests (b) and (c), in so far as those decisions constituted a refusal to send the applicant's papers and the evaluation sheets drawn up by the selection board for those papers. It should be added that, in so far as it is admissible, the present dispute is not a dispute of a financial character within the meaning of Article 91(1) of the Staff Regulations, and the Tribunal does not therefore have unlimited jurisdiction in this case, which prevents it from examining whether it is necessary for it, of its own motion, to order the defendant to pay compensation for the damage caused by the defendant's wrongful act (see, to that effect, judgment of 20 May 2010 in Case C-583/08 P *Gogos* v *Commission*, paragraph 44).

74 It only remains therefore to examine the applications for annulment of the decisions not to send written tests (b) and (c), in so far as those decisions constituted refusal to send those marked written tests.

75 In support of the action as a whole, the applicant raises a number of pleas: first, breach of the right of candidates to have access to certain information concerning them; second, breach of the obligation to state reasons and of the Commission's code of good administrative behaviour; third, breach of the principle of transparency; and fourth, breach of the principle of equal treatment. A fifth plea, alleging infringement of the rules governing the proceedings of the selection board and the relevant examination criteria, is relied upon only in support of the claim for annulment of the decision not to admit the applicant to the oral test, which was declared inadmissible in paragraph 64 above.

76 Hence, the Tribunal will confine its examination to the first four pleas raised in support of the action as a whole.

First plea: breach of the right of candidates to have access to certain information concerning them

Arguments of the parties

77 The applicant maintains that the fact that she was not sent her marked written tests (b) and (c) is a breach of the right of citizens of the European Union to have access to documents of the institutions of the European Union, enshrined in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). Such refusal is also contrary to Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants. Access to her marked written tests would have enabled the applicant to see what mistakes she had made and improve her performance in the future.

78 The Commission contends that the plea should be rejected.

Findings of the Tribunal

79 As regards the alleged infringement of Regulation No 1049/2001, it must be pointed out that the applicant did not follow the compulsory prior administrative procedure, laid down in Article 6 et seq. of that regulation, in order to obtain access to the documents that are the subject of the present dispute before bringing her action before the Tribunal, which renders the first plea inadmissible in so far as it alleges infringement of the abovementioned regulation.

80 In any event, it is appropriate to recall the settled case-law according to which Regulation No 1049/2001 constitutes a general rule which determines the general principles governing the exercise of the right of any citizen of the Union to have access to documents of the institutions concerned in all areas of the Union's activity, including that of the civil service (judgment of 17 May 2006 in Case T-93/04 *Kallianos* v *Commission*, paragraph 87). However, like any general rule, the right of access to documents thus provided for may be defined, extended or, on the contrary, limited or even excluded – according to the principle that a special rule derogates from the general rule (*lex specialis derogat legi generali*) – where there are special rules governing specific matters (judgments of 5 April 2005 in Case T-376/03 *Hendrickx* v *Council*, paragraph 55; of 14 July 2005 in Case T-371/03 *Le Voci* v *Council*, paragraph 122; and of 20 January 2011 in Case F-121/07 *Strack* v *Commission*, paragraph 65, which is the subject of two appeals pending before the General Court of the European Union, Case T-197/11 P and Case T-198/11 P).

81 Article 6 of Annex III to the Staff Regulations, Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants constitute, precisely, special provisions which derogate from those of Regulation No 1049/2001, since they govern access to specific types of documents, namely the candidates' papers for the written tests and the evaluation sheets drawn up by the selection board for those tests.

82 It follows that, even if the applicant had followed the procedure laid down in Article 6 et seq. of Regulation No 1049/2001, the provisions of that regulation would not apply in the present case.

83 As regards infringement of Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants, it is clear from the actual wording of those provisions that they do not allow candidates to request that their marked written tests be sent to them.

84 The candidates' marked written tests contain assessments of a personal and comparative nature with regard to the candidates and are therefore covered by Article 6 of Annex III to the Staff Regulations, relating specifically to the competition procedure, which provides that '[t]he proceedings of the Selection Board shall be secret'. As the Court of Justice has already had occasion to state, that secrecy was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the Union administration itself or the candidates concerned or third parties. Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates (judgment of 4 July 1996 in Case C-254/95 P *Parliament* v *Innamorati*, paragraph 24; see also judgments of 27 March 2003 in Case T-33/00 *Martínez Páramo and Others* v *Commission*, paragraph 44, and *Hendrickx* v *Council*, paragraph 56).

85 It follows that, since Regulation No 1049/2001 is not applicable in the present case and Article 6 of Annex III to the Staff Regulations, Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants do not require EPSO to send candidates their marked written tests, the first plea must be rejected as being in part inadmissible and in part unfounded.

Second plea: breach of the obligation to state reasons and of the Commission's code of good administrative behaviour

Arguments of the parties

86 The applicant maintains that by not sending her a copy of her marked written tests (b) and (c) EPSO did not comply with Article 296 TFEU or the second subparagraph of Article 25 of the Staff Regulations, in so far as the refusal decisions do not state the reasons on which they are based. EPSO also acted in breach of the Annex to the Commission Decision of 17 October 2000 amending its Rules

of Procedure (OJ 2000 L 267, p. 63), entitled 'Code of good administrative behaviour for staff of the European Commission in their relations with the public' ('the code of good administrative behaviour'), under which the Commission must reply to a letter addressed to it within 15 days, and a Commission decision must clearly state the reasons on which it is based and be communicated to the persons and parties concerned.

87 The Commission contends that the plea should be rejected.

Findings of the Tribunal

88 According to settled case-law, the requirement that a decision adversely affecting a person should state the reasons on which it is based is intended to provide the person concerned with sufficient details to allow him to ascertain whether or not the decision is well-founded and make it possible for the decision to be the subject of judicial review. In the case of decisions taken by a selection board in a competition, that obligation must be reconciled with observance of the secrecy surrounding the proceedings of selection boards pursuant to Article 6 of Annex III to the Staff Regulations. The obligation to state the reasons on which decisions of a selection board in a competition are based must therefore take account of the nature of the proceedings concerned, which, as a rule, involve at least two separate stages, the first being an examination of the applications in order to select the candidates admitted to the competition and the second being an examination of the abilities of the candidates for the posts to be filled in order to draw up a list of suitable candidates. The second stage of the selection board's proceedings involves tasks that are primarily comparative in character and is accordingly covered by the secrecy inherent in those proceedings. The criteria for marking adopted by the selection board prior to the tests form an integral part of the comparative assessments which it makes of the candidates' respective merits. Those criteria are therefore covered by the secrecy of the proceedings in the same way as the selection board's assessments. The comparative assessments made by the selection board are reflected in the marks it allocates to the candidates. Having regard to the secrecy which must surround the proceedings of a selection board, communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based, since the board is not required to identify the candidates' answers which were considered unsatisfactory or to explain why they were considered unsatisfactory (*Parliament* v *Innamorati*, paragraphs 23 to 31; *Martínez Páramo and Others* v *Commission*, paragraphs 43 to 52; judgment of 30 April 2008 in Case F-16/07 *Dragoman* v *Commission*, paragraph 63).

89 In the present case, it should be noted, first, that, as the ground for the refusal to send the applicant her marked written tests (b) and (c), the e-mail of 14 September 2009 refers to Article 6 of Annex III to the Staff Regulations, which provides that the proceedings of the selection board are to be secret; secondly, that, as is apparent from the case-law cited in the preceding paragraph, since the communication of marks obtained in the tests constitutes an adequate statement of the reasons, the board is not required to identify which of the candidates' answers were considered unsatisfactory; lastly, Section III.3 of the Guide for Applicants, a document which was available to the applicant, makes no provision for candidates to be sent their marked written tests. In those circumstances, the applicant cannot argue that she did not have sufficient information to allow her to ascertain whether or not the refusal to send her her written tests (b) and (c), of which she was made aware in the e-mail of 14 September 2009, was well-founded.

90 The applicant's argument that EPSO acted in breach of the code of good administrative behaviour cannot be accepted either, since that code is not applicable in the present case. In the first place, it is apparent from the actual title of that code that it applies to the staff of the Commission, and that it is meant to govern relations between the staff of that institution and the public. Secondly, it should be pointed out that that code states in the provision concerning its scope, that relations between the Commission and its staff are to be governed exclusively by the Staff Regulations.

91 In the present case, the applicant cannot claim that she is merely a member of the public so far as her relations with EPSO are concerned. First, it is clear from Article 4 of Decision 2002/620 that, under Article 91a of the Staff Regulations, requests and complaints relating to the exercise of the powers conferred under Article 2(1) and (2) of that decision are to be lodged with EPSO. Secondly, having taken part in the competition as a candidate, any request for information concerning her participation in that competition made to EPSO is governed by Annex III to the Staff Regulations, Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants.

92 The second plea must therefore be rejected as unfounded.

Third plea: breach of the principle of transparency

Arguments of the parties

93 The applicant submits that, according to Article 15 TFEU, transparency is a basic principle of the European Union and each of the Union's institutions and bodies must conduct their work as openly as possible. Moreover, the European Ombudsman has stated that recruitment procedures must be governed by the principle of transparency, and has made recommendations to the Commission to that effect. Lastly, EPSO itself, in its development programme published on its website on 11 September 2008 and intended to modernise its approach to staff selection, called for transparency in recruitment procedures. By refusing to send the applicant her marked written tests (b) and (c) EPSO acted in breach of the principle of transparency.

94 The Commission contends that this plea is unfounded.

Findings of the Tribunal

95 It should be recalled that Article 6 of Annex III to the Staff Regulations provides that the proceedings of the selection board are to be secret.

96 Hence, where a European Union institution refuses to send a candidate his marked written test that person cannot validly rely on the concept of transparency in order to call in question the applicability of Article 6 of Annex III to the Staff Regulations (*Le Voci* v *Council*, paragraph 124).

97 No doubt can be cast on that conclusion by the applicant's arguments concerning a hypothetical right of candidates in a competition to have access to their marked written tests, based on the Ombudsman's recommendation to the Commission of 18 October 1999, on acceptance of that recommendation by the Commission and on the Ombudsman's inquiry, commenced in 2005, which ended in a further recommendation to the Commission regarding the latter's obligation to provide information regarding the evaluation criteria to any candidates who request it.

98 In the first place, it is true that the special report from the Ombudsman to the European Parliament of 18 October 1999 (1004/97/(PD)GG), available on the Ombudsman's web-page, contains a recommendation to the Commission to the effect that, at the latest from 1 July 2000 onwards, the Commission should give candidates access to their own marked examination scripts upon request, and that press release 15/2000 of 31 July 2000, cited by the applicant, available on the Ombudsman's web-page states that '[t]he Commission accepted the Ombudsman's recommendation with effect from July 2000'. It is also true that in 2005 the Ombudsman opened own-initiative inquiry OI/5/05/PB concerning access to evaluation criteria established by EPSO selection boards in respect of written tests, an inquiry that was concluded by the same recommendation.

99 The fact remains, however, that, as is apparent from paragraphs 84 and 95 above, Article 6 of Annex III to the Staff Regulations pursues its own ends, justified by reasons of public interest, and concerns specifically access to the proceedings of the selection board. Under Section D.4 of the notice of competition and Section III.3 of the Guide for Applicants, the specific right of candidates to have access to information concerning them and relating to their participation in the competition is neither absolute nor unlimited but consists, for those candidates who have not passed the written tests, in the right to obtain a copy of their written test and the personal evaluation sheet for their written test showing the marking by the board.

100 In any event, the applicant's contention regarding a possible undertaking on the part of the Commission or EPSO to provide candidates in a competition with their marked written tests is not substantiated by any evidence.

101 As regards the argument concerning the transparency of recruitment procedures, which EPSO itself calls for in its 2008 development programme referred to in paragraph 93 above, inter alia in Action 13, it should be noted, without prejudice to its legal value, that, in that development programme, the question of transparency arises solely with regard to the inclusion in the competition procedure of structured interviews during the oral tests and with regard to the handling of reserve lists by the various institutions. In the case of Action 13 specifically, it merely states that the EPSO Management Board approved the inclusion in the competition procedure of a comprehensive feedback mechanism for candidates with the aim of reducing the number of complaints and appeals, but it did not define the specific content of the information to which candidates should have access.

102 Lastly, it is not possible for the applicant to rely on the judgment of 14 October 2008 in *Meierhofer* v *Commission* (Case F-74/07, set aside on appeal – but not as regards the finding that the statement of reasons for the decision was inadequate – by judgment of 12 May 2010 in Case T-560/08 P *Commission* v *Meierhofer*), in which the General Court annulled, on the ground that its statement of reasons was inadequate, the selection board's decision not to include the applicant on the reserve list, since the Commission had refused to produce, in addition to the individual eliminatory mark received by the applicant in the oral test, further details such as the intermediate marks used to calculate that mark and, where appropriate, the evaluation sheets. Suffice it to say that in *Meierhofer* v *Commission* it is the General Court itself which ordered further information to be produced, in the light of the particular circumstances of the case, which did not, as in the present case, concern refusal of access to information.

Fourth plea: breach of the principle of equal treatment

Arguments of the parties

103 The applicant argues that she was refused access to her marked written tests, whereas in other cases the Commission had sent them to the candidates, generally following a complaint made to the European Ombudsman, and she cites judgments of the European Union Courts in which reference is made to such tests being sent.

104 The Commission states that all the candidates in the competition were treated in the same way and that EPSO's general policy is not to send back marked papers since they are protected by the secrecy surrounding the proceedings of selection boards.

Findings of the Tribunal

105 It has been consistently held that there is a breach of the principle of equality where different situations are treated in an identical manner or where two classes of persons whose factual and legal situations are not essentially different are treated differently (see, inter alia, judgment of 25 October 2005 in Case T-368/03 *De Bustamante Tello* v *Council*, paragraph 69 and the case-law cited).

106 In the present case, the applicant does not claim that she was treated differently from the other candidates in the competition so far as access to the marked papers in the written tests is concerned, but differently from the candidates in other competitions who had had access to their marked written tests.

107 In support of her arguments, the applicant relies on two sets of examples. The first consists of examples of situations in which an institution provided a candidate with his marked written tests following intervention by the European Ombudsman, acting on a complaint sent to him by that candidate. The second is represented by a judgment of the Court of First Instance of the European Communities and two judgments of the Tribunal.

108 As regards the cases in the first set of examples, it should be noted that the applicant has not made a complaint to the Ombudsman. She cannot therefore seek to be treated by EPSO in the same way as candidates who have complained to the Ombudsman. As regards the second set of examples, the Tribunal finds that it is apparent from *Le Voci* v *Council* that although in that case, in order to follow the recommendation of the Ombudsman, to whom the candidate had made a complaint, the Council had sent the candidate a copy of his written test together with the marks, it did not undertake to disclose marked written tests in future on a systematic basis, as the scope of that decision of the Council was limited to that particular case, whilst in *Van Neyghem* v *Commission* and *Dragoman* v *Commission* the applicants, like the applicant in the present case, had been sent their written tests and the evaluation sheets drawn up by the selection board.

109 The fourth plea raised in support of the action must therefore be rejected since it is unfounded.

110 It follows from the above considerations that the action must be rejected in its entirety as being in part inadmissible and in part unfounded.

Costs

111 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88 of the Rules of Procedure, 'a party, even if successful, may be ordered to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought, especially if he has made the other party incur costs which are held to be unreasonable or vexatious.'

112 In the present case, although it is clear from the pleas and forms of order set out above that the applicant is the unsuccessful party and that the Commission has applied for her to be ordered to bear the costs, it is also apparent that although the applicant had asked on several occasions for information about her, concerning her written tests (b) and (c), following the procedure laid down in Section D.4 of the notice of competition, and had received several communications from EPSO stating that the documents requested were attached to them, EPSO did not grant the request for information until 16 June 2010, that is to say, when the applicant had already lodged her application. In doing so, EPSO failed to fulfil the obligation contained in the notice of competition to provide candidates who so request with supplementary information relating to their participation in the competition. Moreover, even though the information requested was not essential for drafting the complaint, it cannot be

excluded that if the applicant had received it in time she would have been in a better position to prepare her complaint and the application initiating proceedings, or that she may even have decided not to bring an action. In view of the particular circumstances of the present case, and since application of Article 88 of the Rules of Procedure is not confined merely to cases in which the administration has unreasonably or vexatiously caused an applicant to incur costs, the Commission must bear its own costs and be ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the European Commission to bear its own costs and those incurred by Ms Cuallado Martorell.**

Rofes i Pujol Boruta Bradley

Delivered in open court in Luxembourg on 18 September 2012.

W. Hakenberg
Registrar

M.I. Rofes I Pujol
President