Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 June 2012 [1]

Case C-566/10 P

Italian Republic
v
European Commission
Other party to the proceedings:

Hellenic Republic

(Appeal — Rules on languages — Notice of open competition for administrators and assistants — Publication in three official languages — Amendment in all the official languages — Choice of second language from three official languages — Regulation No 1 — Articles 1d, 27, 28 and 29(1) of the Staff Regulations — Articles 1(1) and (2) of Annex III to the Staff Regulations — Equal treatment — Statement of reasons — Principle of the protection of legitimate expectations)

I – Introduction

1. The European institutions do not yet have a Babelfish [2] that would make language barriers irrelevant, only Systran, a computer system for the limited translation of texts the use of which has been called into question in legal proceedings. [3] For the purposes of communication within their departments, therefore, the institutions have sought more recently to recruit staff with a knowledge of English, French or German as a *foreign language*. [4] Italy considers this to be an infringement of the European Union's rules on languages. It is therefore challenging the publication of notices relating to three such recruitment procedures.

2. Languages are known to be a highly sensitive issue. That is why Article 290 EC (now, after amendment, Article 342 TFEU) provides that the relevant rules are to be decided unanimously by the Council of the European Union and Article 22 of the Charter of Fundamental Rights of the European Union expressly recognises the principle of multilingualism. Accordingly, this appeal is concerned primarily with questions relating to discrimination on grounds of language and the principle of multilingualism. However, it also raises more formal questions concerning competition notices and alleges infringement of the principle of the protection of legitimate expectations and the obligation to state reasons.

1 — Original language: German.

2 — Adams, D., *The Hitchhiker's Guide to the Galaxy*, Chapter 6, London, 1979.

3 — See, in this regard, Case T-19/07 *Systran and Systran Luxembourg* v *Commission* [2010] ECR II-6083, and the appeal, still pending, in Case C-103/11 P.

4 — In addition to the competition at issue, see also, for example, Notice of Open Competitions EPSO/AD/230/12 (AD 5) and EPSO/AD/231/12 (AD 7) (OJ 2012 C 76A, p. 1, Section III.2.b).

II – Legal context

A – *Primary law*

3. Article 290 EC confers responsibility for laying down the rules governing languages on the Council:

'The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Statute of the Court of Justice, be determined by the Council, acting unanimously.'

4. In connection with the rules on languages, Article 22 of the Charter of Fundamental Rights of the European Union,[5] proclaimed in Nice on 7 December 2000 ('the Charter'), is also of interest:

'The Union shall respect cultural, religious and linguistic diversity.'

B – *Regulation No 1*

5. Articles 1 and 4 to 6 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community[6] provide, in the version applicable to the present case:

'*Article 1*

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

…

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.'

5 — OJ 2000 C 364, p. 1, solemnly proclaimed again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1, and OJ 2010 C 83, p. 389).

6 — OJ, English Special Edition 1952 to 1958, p. 63.

C – *The Staff Regulations*

6. The first subparagraph of Article 1d(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') contains a number of prohibitions on discrimination:

'In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited,'

7. The justification of different treatment is governed by Article 1d(6) of the Staff Regulations:

'While respecting the principle of non-discrimination and the principle of proportionality, any limitation of their application must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy. …'

8. Article 27 sets out the basic principles of recruitment policy:

'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.

No posts shall be reserved for nationals of any specific Member State.'

9. Article 28 contains minimum requirements applicable to the appointment of officials:

'An official may be appointed only on condition that:

…

(f) he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties.'

10. Article 29(1) governs the procedure for filling posts:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

…

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

…'

11. Among the rules on the content of vacancy notices laid down in Article 1(1) of Annex III, the details of the various types of competition procedures contained in subparagraph (a) and of the linguistic requirements contained in subparagraph (f) are of particular interest:

'[The notice of competition] must specify:

(a) the nature of the competition (competition internal to the institution, competition internal to the institutions, open competition, where appropriate, common to two or more institutions);

…

(f) where applicable, the knowledge of languages required in view of the special nature of the posts to be filled;

…'

12. Article 1(2) of Annex III governs publication:

'Notice of open competitions shall be published in the *Official Journal of the European Communities* not less than one month before the closing date for applications and, where applicable, not less than two months before the date of the tests.'

III – Facts

13. The Italian Republic is challenging two notices advertising a total of three competitions [7] published by the European Personnel Selection Office (EPSO). Initially the notices appeared only in the English, French and German editions of the Official Journal. The notice advertising the first two competitions was the subject of Case T-166/07; the notice advertising the third competition was challenged in Case T-285/07.

14. According to Section II.A of the relevant eligibility criteria, the purpose of the first two competitions was to draw up reserve lists to fill vacant posts in the European institutions. Section II.A of the third competition notice provided that the European Commission was not involved in the competition and would therefore not be recruiting any candidates from the reserve list.

15. The eligibility criteria relating to languages are contained in Section I.A.2 of Notices of Open Competition EPSO/AD/94/07 and EPSO/AD/95/07 and in Section I.A.3 of Notice of Open Competition EPSO/AST/37/07. Those sections required candidates to have a thorough knowledge of one of the official languages of the European Union and a satisfactory knowledge of another language, which had to be English, French or German.

16. Section I.B stated that the admission tests would be taken in the second language. Candidates were therefore required to indicate whether they wished to take the admission tests and the competition tests in English, French or German.

17. It was also stated that, to ensure that all general tests relating to the competition and all communication between candidates and the secretariat of the selection board were clearly understood on both sides, only English, French or German would be used for the invitations to the various tests and for all correspondence between EPSO and candidates.

18. On 20 June 2007 [8] and 13 July 2007, [9] EPSO published amendments to the above notices in *all the language versions* of the Official Journal. Those amendments referred to the original notices and for each competition set a new application period that was the same length as the original period. They also referred to the educational qualifications and experience required to take part in the competition, as well as to the content of the original notices.

7 — These are, on the one hand, Notice of Open Competitions EPSO/AD/94/07 to constitute a reserve pool from which to recruit Administrators (AD 5) in the field of information, communication and the media and EPSO/AST/37/07 to constitute a reserve pool from which to recruit Assistants (AST 3) in the field of communication and information (OJ 2007 C 45A) and, on the other hand, Notice of Open Competition EPSO/AD/95/07 to constitute a reserve pool from which to recruit Administrators (AD 5) in the field of information sciences (library/documentation) (OJ 2007 C 103A).

8 — OJ 2007 C 136A, p. 1.

9 — OJ 2007 C 160, p. 14.

IV – Proceedings at first instance

19. The General Court granted the Republic of Lithuania leave to intervene in support of Italy in Case T-166/07 and granted the Hellenic Republic leave to intervene in its support in Case T-285/07. It then joined the two cases for the purposes of the oral procedure and the judgment. By judgment of 13 September 2010 in Joined Cases T-166/07 and T-285/07 *Italy* v *Commission* (the judgment under appeal), the Court dismissed both actions.

V – Forms of order sought

20. Thereafter, the Italian Republic lodged the present appeal. It claims that the Court should:

— in accordance with Articles 56, 58 and 61 of the Rules of Procedure of the Court of Justice of the European Union, set aside the judgment of the General Court of the European Union of 13 September 2010 in Joined Cases T-166/07 and T-285/07 in its actions for annulment of the following notices:

1. Notice of Open Competition EPSO/AD/94/07 to constitute a reserve pool for 125 posts of Administrator (AD 5) in the field of information, communication and the media and

2. Notice of Open Competition EPSO/AST/37/07 to constitute a reserve pool for 110 posts of Assistant (AST 3) in the field of communication and information,

both published in the English, French and German editions of the *Official Journal of the European Union* of 28 February 2007, No C 45A;

3. Notice of Open Competition EPSO/AD/95/07 to constitute a reserve pool for [20] posts of Administrator (AD 5) in the field of information science (library/documentation), published in the English, French and German editions of the *Official Journal of the European Union* of 8 May 2007, No C 103A;

— itself rule on the dispute and annul the notices of competition referred to above;

— order the Commission to pay the costs.

21. The Hellenic Republic also claims that the Court should:

— set aside the judgment of the General Court of the European Union of 13 September 2010 in Joined Cases T-166/07 and T-285/07.

22. The Commission contends that the Court should:

— dismiss the appeal;

— order the Italian Republic to pay the costs.

23. The Republic of Lithuania, which was also a party to the proceedings at first instance, did not submit any observations on appeal. The other parties to the proceedings submitted written observations and presented oral argument at the hearing on 6 June 2012.

VI – Legal assessment

A – *Admissibility of the action before the General Court*

24. The Court of Justice assesses essential procedural requirements of its own motion.[10] Consideration must therefore be given to the initially surprising fact that, in Case T-285/07, judgment was given against the Commission even though it was not involved in the competition concerned.[11]

25. That fact is explained, however, by the rules which were adopted at the time when EPSO was set up. After all, Article 4 of Decision 2002/620/EC[12] expressly states that any appeal relating to the exercise of the powers conferred on EPSO are to be made against the Commission. The conduct of open competitions as referred to in the first paragraph of Article 30 of, and Annex III to, the Staff Regulations was transferred to EPSO in accordance with Article 2 of the aforementioned decision. The admissibility of the action is therefore not in question.[13]

B – *First ground of appeal*

26. By the first ground of appeal, Italy takes issue with the General Court's findings in paragraphs 41 and 42 of the judgment under appeal. These related to whether Article 290 EC, the legal basis of the rules governing languages, and Article 6 of Regulation No 1 allow the institutions to stipulate a knowledge of certain languages in vacancy notices. The Court held:

'41 Regulation No 1, which determines the languages to be used by the institutions, was adopted by the Council pursuant to Article 290 EC. Article 6 of that regulation expressly permits the institutions to stipulate in their rules of procedure which of the languages are to be used in specific cases, in the exercise of which power, moreover, they should be granted a degree of operational autonomy in order to ensure their proper functioning. …

42 Having regard to the foregoing, it must be concluded that the notices of open competition at issue do not infringe Article 290 EC, but were adopted on the basis of the power granted to the institutions and bodies of the Community by Article 6 of Regulation No 1.'[14]

27. Those findings are not consistent with the wording of the provisions in question.

28. In accordance with Article 290 EC, the rules governing the languages of the European Union institutions are to be determined by the Council, acting unanimously. They were so determined by Regulation No 1. According to Article 1 of that regulation, all official languages are at the same time working languages of the institutions. Article 6 authorises the institutions to stipulate in their rules of procedure which of the languages are to be used in specific cases.

10 — See Case C-362/06 P *Sahlstedt and Others* v *Commission* [2009] ECR I-2903, paragraph 22; Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 24; and Case C-408/08 P *Lancôme* v *OHIM and CMS Hasche Sigle* [2010] ECR I-1347, paragraph 52.

11 — See the introduction to Section II.A of Notice of Open Competition EPSO/AD/95/07. Furthermore, according to the introduction to Section II.A and Section II.A.1 of Notice of Open Competition EPSO/AD/94/07 and the introduction to Section II.A of Notice of Open Competition EPSO/AST/37/07, other institutions were also able to use the corresponding reserve lists.

12 — **Decision 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 a European Communities Personnel Selection Office** (OJ 2002 L 197, p. 53).

13 — See also, to this effect, the order of 16 December 2008 in Case T-285/07 *Italy* v *Parliament and Commission*.

14 — See also, to this effect, the judgment of 3 February 2011 in Case T-205/07 *Italy* v *Commission*, paragraph 20 et seq., and Case T-117/08 *Italy* v *EESC* [2011] ECR II-1463, paragraph 41 et seq.

29. As Italy rightly points out, competition notices do not constitute rules of procedure or a comparable legal act. Article 6 of Regulation No 1 is not therefore an appropriate basis for the notices at issue.

30. Consequently, the judgment under appeal is vitiated by an error of law in this regard. This does not mean, however, that Italy's action is successful to that extent.

31. On the contrary, it is not possible to establish an infringement of Article 290 EC or Article 6 of Regulation No 1 on any other ground. Those provisions do not directly determine which requirements may be laid down in a vacancy notice or which of the 23 official languages of the European Union are to be used. That vacancy notice cannot therefore infringe either Article 290 EC or Article 6 of Regulation No 1.

32. The first ground of appeal must therefore be rejected. The questions raised by Italy are nevertheless relevant to the assessment of the next three grounds of appeal.

C – *Second ground of appeal*

33. The second ground of appeal is directed against the arguments set out in paragraphs 52 to 58 of the judgment under appeal. Italy had raised the objection that, in accordance with Articles 1, 4 and 5 of Regulation No 1, the vacancy notices should have been published in full in all the official languages.

34. In paragraphs 52 and 53 of the judgment under appeal and in its settled case-law,[15] the General Court proceeds on the assumption that Regulation No 1 is not applicable to relations between the institutions and their officials and other servants, since it only lays down the language rules applying between the European Union and a Member State or a person coming under the jurisdiction of a Member State. Officials and other servants of the European Union, and candidates for such posts, fall solely within the jurisdiction of the European Union, as regards application of the provisions of the Staff Regulations, including those relating to recruitment within an institution.

35. As Italy and Greece rightly point out, however, that position is unconvincing. While it is true that Articles 2 and 3 of Regulation No 1 concern relations with the Member States and with persons coming under their jurisdiction, it is immediately questionable whether potential candidates in a competition fall outside the jurisdiction of their Member States by virtue of their capacity as such. Contrary to the view taken by the Commission, this is not an inevitable consequence of the jurisdiction of the Courts of the European Union over actions relating to such applications.

36. Regulation No 1 is based principally on Article 290 EC, the legal basis for the rules on languages *applicable to* the institutions of the European Union. Accordingly, Article 1 of the regulation governs the official and working languages of the institutions. There is nothing to indicate that such languages are to be confined to those that are used with persons external to the institutions.[16] A working language is typically a language in which the organisation concerned also works internally.

15 — Case T-118/99 *Bonaiti Brighina* v *Commission* [2001] ECR-SC I-A-25 and II-97, paragraph 13; Case T-203/03 *Rasmussen* v *Commission* [2005] ECR-SC I-A-279 and II-1287, paragraph 60; Case T-185/05 *Italy* v *Commission* [2008] ECR II-3207, paragraphs 117 and 118; and, subsequently, *Italy* v *EESC*, cited in footnote 14, paragraphs 51 and 52.

16 — See the Opinion of Advocate General Poiares Maduro in Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, point 31.

37. Contrary to the view taken by the Commission, Article 6 of Regulation No 1 also indicates that it applies to relations between the institutions and their employees. After all, that article does not authorise the institutions to stipulate in their rules of procedure whether the regulation is applicable at all but only *how* it is to be applied in specific cases. This means that Article 6 might be an appropriate legal basis if the institutions were permitted to determine the languages to be used for internal communications,[17] but it also confirms that Regulation No 1 is applicable to relations between the institutions and their employees.

38. The judgment under appeal errs in law on this point too. In order to determine whether it can be upheld on other grounds, it must therefore be examined whether the restricted publication of the vacancy notice was compatible with Articles 4 and 5 of Regulation No 1.

39. According to Article 4 of Regulation No 1, regulations and other documents of general application are be drafted in the official languages. Article 5 provides that the Official Journal is to be published in 'the official' languages.

40. It is true that, in *Kik* v *OHIM*, the Court of Justice inferred from those provisions and from Article 254(2) EC that an *individual decision* need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the European Union other than the person to whom it is addressed, for example a competing economic operator.[18]

41. By converse implication, however, this confirms that the regulations and other documents of *general* application referred to in Article 4 of Regulation No 1 must be drafted in all the official languages.[19] Indeed, this is the only interpretation that is compatible with the principles of legal certainty and non-discrimination.[20]

42. What is more, that interpretation is consistent with the evolution of the wording of Article 4 of Regulation No 1. Until it was amended as part of the most recent enlargement,[21] that article, like Article 5, expressly referred to the total number of official languages at the relevant time.[22] There is nothing to indicate that the amendments made on the occasion of the most recent enlargement were intended to restrict the use of the various official languages. Consequently, the reference to *the* official languages in Articles 4 and 5 of Regulation No 1 is to be construed as meaning the 23 official languages.

43. Admittedly, a notice of open competition is not a regulation, but – as Italy and Greece submit – it is none the less, unlike an individual decision, a document of general application. After all, it contains the closing dates for applications and the other conditions binding on each person wishing to take part in the competition.[23] For that reason alone, it must in principle be drafted in all the official languages.

17 — See also, to this effect, *Italy* v *EESC*, cited in footnote 14, paragraph 55.

18 — Case C-361/01 P [2003] ECR I-8283, paragraph 85.

19 — Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraph 34.

20 — *Skoma-Lux*, cited in footnote 19, paragraph 36.

21 — See Council Regulation (EC) No 1791/2006 of 20 November 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 1), document No 15 in the annex.

22 — See, most recently, Council Regulation (EC) No 920/2005 of 13 June 2005 **amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those regulations** (OJ 2005 L 156, p. 3), which, in both cases, refers to the 21 official languages.

23 — Case 188/73 *Grassi* v *Council* [1974] ECR 1099, paragraph 38; Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *van der Stijl and Cullington* v *Commission* [1989] ECR 511, paragraphs 51 and 52; and Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 13.

44. This is confirmed by Article 5 of Regulation No 1 in conjunction with Article 1(2) of Annex III to the Staff Regulations. According to the latter provision, notice of open competitions[24] is to be published in the Official Journal. Since, in accordance with Article 5 of Regulation No 1, the Official Journal is published in all the official languages, all acts whose publication is compulsory must also, in principle, be published in all the official languages.

45. However, the General Court's findings in paragraph 56 of the judgment under appeal are open to the interpretation that the institutions may derogate from the aforementioned provisions in the case of vacancy notices:

'In those circumstances, it is the responsibility of the institutions to choose the language to be used for internal communications, each institution being empowered to impose that choice on its officials and those who claim such status …. The choice of language for the external publication of a vacancy notice is also the responsibility of the institutions …'

46. That view is based ultimately on Article 6 of Regulation No 1.[25] If that article authorised the institutions to determine the languages to be used for internal communications, it might also authorise them to confine to those languages their communications to potential candidates who are required to have a knowledge of them.

47. As I have already said, a vacancy notice is not itself a legal act based on Article 6 of Regulation No 1.[26] The Commission has never formally determined the languages to be used for internal communications or the languages of vacancy notices on that basis. The mere practice of tending to use only certain languages for internal communications does not constitute such a determination. After all, it is not even clear what such a practice involves. It is impossible to determine the circumstances in which a particular language may be used.

48. Accordingly, Article 6 of Regulation No 1 cannot justify a derogation from Articles 4 and 5 of, in conjunction with Article 1(2) of Annex III to, the Staff Regulations.

49. The notices subsequently published in all the official languages did not remedy the inadequate publication of the original notices. They contained only some of the relevant information. In particular, they did not contain the language requirements. The reference to full publication in only three languages cannot replace full publication in the other official languages. As Greece points out, interested persons with no knowledge of the three languages in question would not initially have understood that they did not qualify for the competition and that the remaining content of the notices, which were available only in those three languages, was therefore of no interest to them.

50. Most importantly, however, there is no provision which would permit the institutions to derogate from full publication in all the languages as provided for by Articles 4 and 5 of, in conjunction with Article 1(2) of Annex III to, the Staff Regulations.

51. The notices should therefore have been published in all the languages. The question whether exceptions may be made in the case of competitions which are directed only at candidates with a particular mother tongue[27] need not be decided in the present case.

24 — According to Article 1(1)(a) of Annex III to the Staff Regulations, open competitions are competitions which are not internal to one or more institutions.

25 — See paragraph 41 of the judgment under appeal and *Italy* v *EESC*, cited in footnote 14, paragraph 55.

26 — See point 29 above.

27 — See, for example, OJ 2012 C 121A, which is available only in Bulgarian, and the corresponding information in OJ 2012 C 121, p. 38.

52. Since the judgment under appeal is vitiated by an error of law and, furthermore, cannot be upheld on any other grounds, the second ground of appeal is well founded. The judgment under appeal must be set aside.

53. I none the less consider it necessary to look also at the other grounds of appeal in order to establish legal certainty in relation to the practice to be followed by the institutions when holding competitions in future.

D – *Third ground of appeal*

54. By the third ground of appeal, Italy complains that the publication of competition notices in only three languages infringes the prohibition on discrimination on grounds of nationality laid down in Article 12 EC (now, after amendment, Article 18 TFEU) and the principle of multilingualism established in Article 22 of the Charter.

55. The issue here is not whether the publication of a notice of open competition in only three languages is incompatible with the prohibition on discrimination. It is common ground that even candidates who have a satisfactory knowledge of English, French or German do not necessarily consult the Official Journal in one of those three languages, but tend to look only at their own language version.[28] There is therefore a risk that such persons will not be aware of the vacancy notice in good time. Since an individual's mother tongue is closely bound up with his nationality, the foregoing is said to constitute discrimination on grounds of nationality. Accordingly, the original notices of 28 February 2007 and 8 May 2007 were not sufficient on their own.

56. In the present case, however, it must be clarified whether that original discrimination on grounds of nationality was effectively remedied by the subsequent publication of amendments in the other languages, as the General Court held in paragraphs 85 to 91 of the judgment under appeal. Since that substantial error differs from the formal infringement, already examined, of the obligation to publish in the Official Journal, the conclusion just reached cannot be directly transposed to the inadequate remedying of the failure to publish.[29]

57. Italy, on the one hand, disputes the assertion that that failure is remediable and, on the other hand, raises the objection that the subsequent notices did not contain all the information set out in the original notices.

1. Whether the inadequate publication of the notices is remediable

58. Italy bases its view that the inadequate publication of the notices is not remediable on the scheme of the rules governing actions for annulment. In accordance with Article 230 EC (now, after amendment, Article 263 TFEU), actions must be brought against competition notices in their original form.

59. On that view, however, the action would have been disposed of. After all, strictly speaking, the original notice no longer exists. It would have been revoked by the amendments published subsequently and replaced by new notices.[30] These would consist of a combination of the original notice and the new information, including in particular a new closing date for applications, and would have had to be challenged by way of a fresh action.

28 — *Italy* v *Commission*, cited in footnote 15, paragraph 148, and *Italy* v *EESC*, cited in footnote 14, paragraph 81.

29 — See point 49 above.

30 — See Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, paragraph 23 et seq.

60. I do not consider such a formalistic approach to be necessary, however. As the General Court has already held, the amendments did not alter the substance of the notices, at least in so far as their substance is disputed. [31]

61. If, by contrast, the dispute has not been disposed of, it must relate to the notice in the form in which it was actually effective. The amendments published subsequently must therefore be taken into account.

62. Furthermore, contrary to the view taken by Italy, the fact that procedural errors are remediable is, in principle, recognised in European Union law. [32] The remedial measure must put the beneficiaries – in this case, the potential candidates – in the position in which they would have been if the procedural error had not occurred. [33]

2. Remedy in the present case

63. In the present case, the defect in the original notices was not remedied. The new closing date set meant that potential candidates in whose mother tongue the notice was not published were subject to the same closing date as candidates in whose mother tongue the notice was published.

64. None the less, potential candidates who did not find out about the competitions until the subsequent publication of the amendments were *not* put in the position in which they would have been if the information contained in those amendments had been published with the competition notice. After all, those who found out about the competitions through the original notices had significantly more time to make special preparations for the competition. This meant that, in the case of competitions EPSO/AD/94/07 and EPSO/AST/37/07, they had a head start of almost four months and, in the case of competition EPSO/AD/95/07, more than two months. They were able to use that time, in particular, to refresh their technical and linguistic knowledge.

65. Consequently, the amendments to the notice were not capable of remedying the disadvantage to potential candidates whose mother tongue is not English, French or German resulting from the selective publication of that notice.

66. The General Court failed to identify that disadvantage. Its findings in paragraphs 85 to 91 of the judgment under appeal are therefore vitiated by an error of law. Accordingly, the judgment must be set aside on this ground also.

3. Full publication of the notice in the other languages

67. Italy also raises the objection that, in the case of each competition, the notice was not fully published in the other languages. In response to that submission, it must be conceded that potential candidates who could read the whole notice in their mother tongue had a slight advantage over other potential candidates who had to read it in a foreign language.

68. However, as the General Court rightly holds in paragraphs 90 and 99 of the judgment under appeal, that disadvantage was not of the same order of seriousness as discrimination on grounds of nationality.

31 — Paragraph 32 et seq. of the judgment under appeal.

32 — See Case C-109/10 P *Solvay* v *Commission* [2011] ECR I-10329, paragraph 56, and Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 51, concerning the remedying of procedural errors in antitrust proceedings pursued by the Commission, and Case C-334/90 *Marichal-Margrève* [1992] ECR I-101, paragraph 25, concerning the law governing customs proceedings.

33 — In the context of the law governing antitrust proceedings, see Cases C-109/10 P and C-110/10 P *Solvay* v *Commission*, both cited in footnote 32.

69. Persons affected by it who did not have a satisfactory knowledge of any of the three languages in which the notice was fully published, however, were not potential candidates. As the General Court rightly explains in paragraph 88 of the judgment under appeal, those persons did not have the necessary linguistic knowledge to take part in the competition.

70. In this regard, the competitions in the present case differ from the competitions that formed the subject-matter of the other judgments of the General Court cited by Italy, in which the notices were annulled. [34] After all, those decisions concerned competitions which did not require a knowledge of certain languages. In those cases, there could therefore have been potential candidates who did not understand any of the languages used, whereas the potential candidates in the competitions at issue here were required to understand one of those languages.

71. The General Court was therefore right to find in paragraph 85 of the judgment under appeal that the amendments remedied this inadequacy of the original notice. Whether it was permissible at all to require a knowledge of English, French or German rather than allowing other second languages can only be examined in the context of the next ground of appeal.

72. This part of the third ground of appeal is therefore unfounded.

E – *Fourth ground of appeal*

73. The fourth ground of appeal concerns the crux of the dispute, the choice of only three languages as possible 'second languages' for the competition. Italy takes the view that the reasoning on the basis of which the General Court held that the choice made by the Commission was not discriminatory and inappropriate infringes the prohibition on discrimination on grounds of nationality and the principle of multilingualism.

1. Prohibition on discrimination

74. In accordance with Article 12 EC, within the scope of application of European Union law, any discrimination on grounds of nationality is to be prohibited. That principle is also now enshrined in Article 21(2) of the Charter.

75. It is true that, in paragraphs 93 to 104 of the judgment under appeal, the General Court does not address the question whether restricting the choice of second language is capable of constituting such discrimination. It does, however, reach the correct conclusion that no such discrimination has taken place.

76. A restriction on the use of *first languages* in a competition held by one of the institutions would be discriminatory and would therefore need to be justified. Since the language in which a candidate is most competent is usually closely related to the candidate's nationality, such a restriction would be at least indirectly disadvantageous to potential candidates who have different mother tongues on account of their nationality. They would have to complete important parts of the competition in a foreign language, whereas competing candidates would be able to use their mother tongue.

77. In this regard, the prohibition on discrimination on grounds of language which is laid down in Article 1d(1) of the Staff Regulations, and now also in Article 21(1) of the Charter, is an expression of the general prohibition on discrimination on grounds of nationality. Also relevant would be the second paragraph of Article 27 of the Staff Regulations, which prohibits posts from being reserved for nationals of any specific Member State.

34 — *Italy* v *Commission*, cited in footnote 15, paragraph 148, and *Italy* v *EESC*, cited in footnote 14, paragraph 80.

78. In this case, however, it is the use not of a first language but of a *second* language which is restricted. The second language of potential candidates is clearly less closely related to nationality than the first language.

79. There are, admittedly, certain Member States in which one of the permitted languages enjoys a special status alongside other national languages.[35] It is reasonably likely, therefore, that some candidates from those States will have a particularly good knowledge of a permitted second language.

80. Unlike an individual's mother tongue, however, this level of knowledge of a second language derives not only from nationality but also from additional endeavours on the part of the State concerned, the family or the individual. Such knowledge differs at most only slightly from knowledge of foreign languages acquired in a particularly well-organised education system.

81. The potential advantage of a second language that enjoys special status in the home country cannot therefore constitute discrimination against candidates from other countries on grounds of their nationality.

82. This operates to the 'disadvantage' only of certain candidates from other Member States in which more than one official language of the European Union is spoken but none of these is one of the three preferred languages.[36] Such candidates may not be able to use their 'natural' second language in a competition. There is, however, no indication that this theoretical disadvantage has any practical impact on certain candidates.

83. For the overwhelming majority of potential candidates, the restriction of the choice of possible second languages does not make any difference in any event. The three languages, English, French and German, are by far the most common foreign languages in the European Union.[37] In nearly all the Member States, English is overwhelmingly the main foreign language learned; in only a few Member States is it predominantly French and only in primary schools in Luxembourg is it almost exclusively German. German and French clearly predominate as second foreign languages. Spanish, Swedish (in Finland) and Estonian (in Estonia – presumably among members of the Russian minority) are found occasionally, but to a considerably lesser extent.[38] It is thus relatively unlikely that there will be any candidates at all who have a significantly better knowledge of a foreign language other than English, French or German.

84. Restricting the choice of second language to those three languages cannot therefore be regarded as having the effect of discrimination on grounds of nationality.

2. Infringement of the principle of multilingualism

85. Italy also takes the view that restricting the choice of second language infringes the principle of multilingualism. In accordance with that principle, candidates for a post in the institutions can be expected to have at least one other language in addition to the language of their Member State, but it cannot be expected that that language should necessarily be English, French or German.

35 — These include Luxembourg (French and German), Belgium (Dutch, French and German), Ireland (Irish and English) and Malta (Maltese and English).

36 — One example is Finland, where Finnish and Swedish are used.

37 — Mejer et al., *Statistics in Focus* No 49/2010, Eurostat, p. 1, mention Russian as a third language after English and German but before French, but Russian is not an official language of the European Union.

38 — Mejer et al., op cit. (footnote 37), p. 4.

86. It is true that, at the time when the notices were published in 2007, the Treaty of Lisbon had not yet entered into force, so that the principle of multilingualism recognised in Article 22 of the Charter was not yet directly binding. According to the official explanations relating to the Charter,[39] however, that article was based on Article 6 EU, in force at the time, paragraph 3 of which required the European Union to respect the national identity of the Member States (that forms part of Article 4(2) TEU), and on Article 151(1) and (4) EC (now, after amendment, Article 167(1) and (4) TFEU), which required the Community to contribute to national and regional diversity and to respect and promote cultural diversity. The fourth subparagraph of Article 3(4) TEU now places special emphasis on that responsibility.

87. The principle of multilingualism is part of the cultural diversity[40] and national identity of the Member States. It is therefore based on the fundamental values of the European Union, which existed even at the time when the notices at issue were published.[41]

88. However, the principle of multilingualism does not require the European Union to use all the official languages in every situation,[42] nor does it contain any specific rules on the languages from which potential candidates for posts in the European Union may choose a second language. On this issue, it can operate effectively only in conjunction with the general principle of equal treatment.

89. In accordance with that principle, now also enshrined in Article 20 of the Charter, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[43] A difference in treatment is justified if it is based on an objective and reasonable criterion, that is if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.[44] In the making of that assessment, account must be taken of the relevant fundamental values of the European Union, such as the principle of multilingualism. If the measure is incompatible with such a fundamental value, it must pursue a particularly important aim in order to be justified.

90. By permitting only certain languages as second languages, the competitions at issue treat the various official and working languages of the European Union differently.

91. In paragraphs 93, 94 and 102 of the judgment under appeal, the General Court again bases the preference given to three languages on Article 6 of Regulation No 1, under which the institutions may stipulate which languages are to be used. As I have already pointed out, however, that power has not yet been exercised and cannot therefore justify the conditions governing the competition.[45] The judgment is therefore vitiated by an error of law in this respect also.

92. However, that error does not in itself call into question the conclusion reached. Even if the institutions have not formally established any internal working languages – as the Commission emphasises – the ability of their departments to communicate with each other internally is none the less an essential precondition for their operation. The institutions must therefore be able to select new staff according to whether they can fit into and work with existing departments. It is therefore of vital importance that they should have an understanding of the languages that are used as de facto internal working languages in those departments. There is no point in an employee having a perfect knowledge of several official languages if nobody else in the department understands him.

39 — OJ 2007 C 303, p. 17 (25).

40 — Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 33.

41 — See also in this regard my Opinion in *UTECA*, cited in footnote 40, point 93 et seq.

42 — *Kik* v *OHIM*, cited in footnote 18, paragraph 82.

43 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 23; Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 74; and Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* [2010] ECR I-8301, paragraph 55.

44 — *Arcelor Atlantique and Lorraine and Others*, cited in footnote 43, paragraph 47.

45 — See point 47 above.

93. That said, unless there are special circumstances that make it necessary to reduce the number of languages to one or only a few, it is in the interests of equal opportunity and multilingualism, where possible, to use all or at least several of the languages of the European Union.[46] How those languages are used in practice can then be decided on a case-by-case basis in the light of the capabilities of the staff concerned. Conversely, the institutions should confine themselves to a single language only in so far as special circumstances make this absolutely necessary – in the context of the deliberations of the Court of Justice, for example, the tradition since 1954 has been for judgments to be drafted internally only in French.

94. Since English, French and German are by far the most common foreign languages in the European Union,[47] the institutions are entitled to assume that knowledge of one of those languages as a foreign language facilitates efficient internal communications. No other language would open up greater potential for internal communication. Considered objectively, therefore, those three languages are sufficiently different from the other official languages to warrant selection as the only permitted second languages. Thus, even from the point of view of the principle of multilingualism, the principle of equal treatment is not infringed.

3. Article 1(1)(f) of Annex III to the Staff Regulations

95. Italy also relies on Article 1(1)(f) of Annex III to the Staff Regulations. However, that argument is not a permissible development of the pleas raised at first instance, but an entirely new submission which has not previously been put forward in these proceedings and is as such inadmissible on appeal before the Court of Justice.[48]

4. Conclusion on the fourth ground of appeal

96. The fourth ground of appeal is therefore unfounded in its entirety.

F – *Fifth ground of appeal*

97. By the fifth ground of appeal, the appellant accuses the General Court of having erred in its finding in paragraphs 110 to 115 of the judgment under appeal that the principle of the protection of legitimate expectations had not been infringed, in so far as it held that the Commission's long-standing recruitment practice had not given rise to a legitimate expectation on the part of potential candidates in relation to certain rules of the recruitment process.

98. The protection of legitimate expectations is one of the fundamental principles of the European Union. Any individual on the part of whom an institution of the European Union has promoted reasonable expectations may rely on that principle. If, however, a prudent and circumspect individual can foresee the adoption of a measure that is likely to affect his interests, he cannot rely on the aforementioned principle if the measure is adopted. Furthermore, individuals are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the European Union institutions in the exercise of their discretionary power will be maintained.[49]

46 — See, however, the Opinion of Advocate General Poiares Maduro in *Spain* v *Eurojust*, cited in footnote 16, points 55 and 56, which indicates a preference for the use of a single language.

47 — See point 83 above.

48 — See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 165, and Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 61.

49 — Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147; Case C-443/07 P *Centeno Mediavilla and Others* v *Commission* [2008] ECR I-10945, paragraph 91; and Case C-496/08 P *Angé Serrano and Others* v *Parliament* [2010] ECR I-1793, paragraph 93.

99. In the present case, the question whether the practice previously adopted for many years of permitting all the official languages to be used as second languages was capable of promoting reasonable expectations within the meaning of the aforementioned case-law can be left open. There is in any event no reason to assume that, when undertaking language training, prudent and circumspect potential candidates entertained the expectation that they would be able to continue to use all the official languages as second languages in European Union competitions. On the contrary, in the light of the steadily growing number of official languages, potential candidates were bound to expect that not all the official languages would have the same practical value as foreign languages. Furthermore, the statistics on foreign-language study show that English, French and German are overwhelmingly considered to be the most important official languages.[50] The vast majority of potential candidates were therefore in practice already prepared for the fact that those languages would be more important to their career development than others.

100. Consequently, this ground of appeal is also unfounded.

G – *Sixth ground of appeal*

101. By the sixth ground of appeal, the appellant submits that, by finding in paragraphs 126 and 127 of the judgment under appeal that the administration was not required, in the contested competition notices, to justify the choice of the three languages to be used, the General Court infringed Article 253 EC (now, after amendment, the second paragraph of Article 296 TFEU), which provides that all legal acts are to state the reasons on which they are based.

102. The statement of reasons required by Article 253 EC must, according to settled case-law, be appropriate to the nature of the measure concerned. It must disclose in a clear and unequivocal fashion the reasoning followed by the European Union institution which adopted the measure in such a way as to make the persons concerned aware of the fundamental reasons for the measure. This is the precondition that must be satisfied in order for them to be able to assert their rights and for the Court to be able to exercise its power of review. In accordance with that case-law, however, it is not necessary for details of all relevant factual and legal aspects to be given in the statement of reasons for the measure. After all, the question whether the statement of reasons for a measure meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, if the contested measure clearly discloses the essential objective pursued by the European Union institution, it would be excessive to require a specific statement of reasons for the various technical choices made.[51]

103. The General Court did not refer to those requirements in paragraph 125 of the judgment under appeal, but restricted its findings in that paragraph to the question whether the notices contained the information necessary for the *conduct* of the competition.

104. Italy is therefore right to complain that, in those findings, the General Court did not address its plea. The information which a competition notice must contain cannot be regarded as amounting to a statement of reasons.

105. However, the General Court went on to say, in paragraph 126 of the judgment under appeal, that restricting the second languages allowed to three did not require any justification, since it was common ground that that restriction served to meet the internal requirements of the administration. The General Court thus satisfied the conditions governing its obligation to *state the reasons on which its judgment is based* under Articles 36 and 53 of the Statute of the Court of Justice.

50 — See point 83 above.

51 — Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraphs 46 and 47.

106. Moreover, contrary to the view expressed by Italy, there are no grounds for objecting to the substance of that finding by the General Court with respect to the need to *state the reasons on which notices are based*. After all, the conditions governing a competition are clearly designed to identify those candidates that best meet the internal requirements of the recruiting institutions. Furthermore, English, French and German are widely known to be the most common foreign languages in the European Union and, consequently, the languages most suitable for use in internal communications between departments. There was therefore no need to give special emphasis to those factors in the competition notices.

107. It follows that this ground of appeal is also unfounded.

H – *Seventh ground of appeal*

108. Finally, the seventh ground of appeal alleges infringement of Article 1d(1) and (6), Article 28(f) and the second paragraph of Article 27 of the Staff Regulations in paragraphs 128 to 135 of the judgment under appeal. The General Court committed an error of law in finding that it is not for the relevant selection board alone to assess the language skills of the candidates.

109. Italy takes the view that the authority which issues the notice cannot make a preliminary selection of candidates on a purely linguistic basis. Moreover, the linguistic requirements of a competition are in principle subject to criteria different from those that apply to the technical qualifications of candidates.

110. However, the arguments which Italy adduces in support of that proposition, in particular the prohibition on discrimination on grounds of nationality, do not justify the application of any special conditions to the second language offered by candidates.[52] Apart from that, moreover, there are no readily apparent reasons why the selection board should be empowered to exclude candidates on the basis of their inadequate knowledge of certain second languages, when the institutions are prohibited from doing so when setting the conditions governing a competition.

111. Consequently, this ground of appeal is also unfounded.

VII – The judgment to be given by the Court of Justice

112. In accordance with the first paragraph of Article 61(1) of the Statute of the Court of Justice, if the appeal is well founded, that court must quash the decision of the General Court. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

113. Since the second and first parts of the third ground of appeal are well founded, the judgment under appeal must be set aside. At the same time, the examination of the second ground of appeal shows that the contested competition notices did not satisfy the requirements of Articles 4 and 5 of Regulation No 1 and Article 1(2) of Annex III to the Staff Regulations. Furthermore, the examination of the first part of the third ground of appeal made it clear that the subsequent publication of amendments to the competition notices was not capable of remedying any potential disadvantage to potential candidates whose mother tongue is not English, French or German. The state of the proceedings therefore permits final judgment to be given by the Court of Justice itself. Consequently, the notices too must be annulled.

52 — See point 74 et seq. above.

VIII – Restriction of the effects of the judgment

114. Finally, I should like to propose that the Court of Justice expressly restrict the effects of its judgment in order to avoid legal uncertainty.

115. In relation to actions brought by candidates, the Court has held that where, in an open competition for the purpose of constituting a reserve for future recruitment, a test is annulled, an applicant's rights will be adequately protected if the board and the appointing authority reconsider their decisions and seek a just solution in that case, without its being necessary to call into question the entire results of the competition or to annul the appointments made as a result thereof. That case-law is based on the need to reconcile the interests of the candidates put at a disadvantage by an irregularity committed in the course of a competition and the interests of the other candidates. The Court is required to take account not only of the need to restore the rights of the candidates who have been adversely affected but also of the legitimate expectations of the candidates already selected. [53]

116. In the present case, there is no need to decide which measures are necessary in order to remedy any possible disadvantage to potential candidates. There is a need, however, to take account of the legitimate expectations of the candidates already selected. Consequently, the lists of suitable candidates drawn up in the original competition, that is to say, including any appointments made on the basis of those lists, should not be called into question by these proceedings.

IX – Costs

117. Under the first paragraph of Article 122 of the Rules of Procedure of the Court, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

118. Under Article 69(2) in conjunction with Article 118 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. Since Italy has claimed that the Commission should be ordered to pay the costs of the proceedings and has been entirely successful in the second ground of appeal and the first part of the third ground of appeal, the Commission is to be ordered to pay the costs of the Italian Republic and its own costs in both sets of proceedings.

119. The first subparagraph of Article 69(4) of the Rules of Procedure provides that the Member States which intervene in the proceedings are to bear their own costs.

X – Conclusion

120. I therefore propose that the Court should rule as follows:

(1) The judgment of the General Court of the European Union of 13 September 2010 in Joined Cases T-166/07 and T-285/07 is set aside.

(2) Notices of Open Competition EPSO/AD/94/07, EPSO/AST/37/07 and EPSO/AD/95/07 are annulled.

(3) The validity of the lists of suitable candidates drawn up on the basis of those competitions is not be affected by this judgment.

53 — Case C-242/90 P *Commission* v *Albani and Others* [1993] ECR I-3839, paragraphs 13 and 14.

(4) The European Commission shall pay the costs of the Italian Republic and bear its own costs in both sets of proceedings. The Hellenic Republic and the Republic of Lithuania shall bear their own costs.