



Reports of Cases

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

16 September 2013*

(Civil service — Open competition — Competition notice EPSO/AD/204/10 — Selection on the basis of qualifications — Elimination of candidates without specific examination of their degrees and diplomas and professional experience)

In Joined Cases F-23/12 and F-30/12,

ACTIONS brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

Jérôme Glantenay, a former member of the temporary staff of the European Commission, residing in Brussels (Belgium), and eight other officials, other servants, former servants and seconded national experts of or at the European Commission, whose names are listed in an annex,

applicants in Case F-23/12,

and

Marco Cecchetto, a member of the contract staff of the European Commission, residing in Rovigo (Italy),

applicant in Case F-30/12,

represented by C. Mourato, lawyer,

v

European Commission, represented by J. Currall and G. Gattinara, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

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

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2013,

gives the following

* Language of the case: French.

Judgment

- 1 By applications lodged at the Tribunal Registry on 20 February 2012 as Case F-23/12 for Mr Glantenay and eight other applicants whose names are listed in an annex, and on 5 March 2012 as Case F-30/12 for Mr Cecchetto, the applicants seek annulment of the decisions of the selection board in open competition EPSO/AD/204/10 to reject their respective applications.

Legal context

Rules applicable to competitions

- 2 Article 27 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'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.

...'

- 3 Article 29(1) of the Staff Regulations provides:

'Before filling a vacant post in an institution, the Appointing Authority shall ...

...

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.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.'

- 4 According to Article 5 of Annex III to the Staff Regulations, relating to competitions:

'After examining [the files of candidates who satisfy the conditions laid down in Article 28(a), (b) and (c) of the Staff Regulations], the Selection Board shall draw up a list of candidates who meet the requirements set out in the notice of competition.

Where the competition is on the basis of tests, all candidates on the list shall be admitted to the tests.

Where the competition is on the basis of qualifications, the Selection Board shall, after determining how candidates' qualifications are to be assessed, consider the qualifications of the candidates appearing on the list provided for in the first paragraph.

Where the competition is on the basis of both tests and qualifications, the Selection Board shall state which of the candidates on the list shall be admitted to the tests.

On completion of its proceedings, the Selection Board shall draw up the list of suitable candidates provided for in Article 30 of the Staff Regulations; the list shall wherever possible contain at least twice as many names as the number of posts to be filled.

The Selection Board shall forward this list to the appointing authority, together with a reasoned report by the Selection Board including any comments its members may wish to make.'

Provisions of open competition notice EPSO/AD/204/10

- 5 The European Personnel Selection Office (EPSO) published, in the *Official Journal of the European Union* of 28 October 2010 (OJ C 292 A, p. 1), notice of open competition EPSO/AD/204/10, as amended (OJ C 318 A, p. 1), to establish a reserve list of 40 successful candidates from which to fill vacant posts as grade AD 6 administrators in the area of the management of the Structural Funds/Cohesion Fund ('the competition notice').
- 6 Section IV of the competition notice, entitled 'A[dm]ission to the competition and invitation to the assessment centre', states:

'1. Procedure Initially, compliance with the general and specific conditions will be checked on the basis of the information given in your [online] application form. The selection based on qualifications will be made on the same basis.

- (a) Your answers to the questions relating to the general and specific conditions will be processed to determine whether you can be included in the list of candidates who fulfil all the conditions for admission to the competition.
- (b) For the candidates on that list, the selection board will then carry out a selection on the basis of qualifications to identify those whose profile (particularly diplomas and professional experience) best matches the duties and selection criteria set out in the competition notice. There are two stages in this selection process:

- according to the importance attached to each criterion set out in the annexes, the selection board will set a weighting (1 to 3) for each corresponding question. The first selection based on qualifications will be made on the basis of the answers ticked under the "Talent Screener" tab of the online application form and the weighting of each of the questions. The online applications of the candidates who obtain the highest number of points will then go through to a second selection stage. The number of files to be examined at this stage will be approximately three times the number of candidates who will be invited to the assessment centre [in this case 360],
- in the second selection stage, the selection board will examine candidates' answers and, based on their profile, will award 0 to 4 points for each answer; the points are then multiplied by the weighting for each question. The selection board will then draw up a list of candidates in the order of the points awarded. The number of candidates invited to the assessment centre ... will not exceed three times the number of successful candidates indicated in the competition notice [in this case 120].

2. Verification of information given by candidates Following the assessment centre session, and in the light of the results, EPSO will verify the information given by candidates in their online applications for compliance with the general conditions and the selection board will do the same as regards the specific conditions and selection criteria. If verification shows that the information given is not borne out by the appropriate supporting documents, candidates will be disqualified. [sic]

7 The annex to the competition notice provides:

'4. Selection criteria As part of the selection on the basis of qualifications, the selection board will take into consideration the following: ...

2. Additional training in one of the following fields:

- regional development,
- employment, training and education,
- rural development and agriculture,
- fisheries.

3. Relevant professional experience in management, audit and control and in the assessment of programmes and projects backed by the Structural Funds/Cohesion Fund, as well as those supported by the EAFRD and EFF.

4. Professional experience as described in point 3 above going beyond the 3 years required.

5. Professional experience in one of the areas in which the funds concerned play a role, in particular:

- transport, environmental, telecommunications and energy infrastructures,
- the development of urban and rural areas,
- capital expenditure,
- research, innovation and technology transfers,
- facilitating businesses' access to bank lending and financial services,
- employment, training and education,
- rural development and agriculture,
- fisheries.

6. Experience of conducting negotiations within a national or international organisation.

7. Experience in academic research or teaching in one of the following fields:

- regional development,
- employment, training and education,

- rural development and agriculture,
- development and reconversion in the fishing industry.

8. Publications on one or more of the following subjects:

- regional development,
- employment, training and education,
- rural development and agriculture,
- development and reconversion in the fishing industry.

9. A Master's degree related to the professional experience referred to in point 3 above.

10. A PhD related to the professional experience referred to in point 3 above.'

8 The online application form for open competition EPSO/AD/204/10 which candidates had to complete in order to apply contained, under a tab entitled 'Talent Screener', nine questions, each divided into two sections, as follows (English version):

'Question 2a:

Have you had any additional training in any of the following fields: — regional development; — employment, training and education; — rural development and agriculture; — fisheries?

Question 2b:

If so, please give the name of the establishment which provided the training, the field and length of training, and the title of the diploma/qualification obtained. Please also give a detailed description of the course content.

Question 3a:

Do you have any relevant professional experience in the management, audit, and monitoring or evaluation of programmes and projects backed by the Structural Funds/Cohesion Fund, the European Agricultural Fund for Rural Development (EAFRD), or the European Fisheries Fund (EFF)? ...

Question 3b:

If so, please give your employer's name and the length of professional experience. Please give a detailed description of the experience and of your duties.

Question 4a:

Do you have professional experience, as specified in point 3 of the annex to the competition notice, beyond the 3 years required in that point [that is, in the field of applying rules and administrative procedures, devising, administrating and implementing programmes and/or investment projects funded with public and private funds or loans, acquired after the diploma giving access to the competition was obtained]?

Question 4b:

If so, please give your employer's name and the length of professional experience. Please give a detailed description of the experience and of your duties.

Question 5a:

Do you have any professional experience in any of the areas in which the Funds concerned play a role, in particular: — transport, environmental, telecommunications and energy infrastructures; — urban and rural development; — capital expenditure; — research, innovation and technology transfers; — business access to loans and financial engineering; — employment, training and education; — rural development and agriculture; — fisheries? ...

Question 5b:

If so, please give your employer's name and the length of professional experience. Please give a detailed description of the experience and of your duties.

Question 6a:

Do you have any experience of negotiations within a national or international organisation?

Question 6b:

If so, please indicate the national or international organisation which you represented, the parties involved, the purpose of the negotiations, and the role that you played therein.

Question 7:

Do you have any experience of academic research or teaching in any of the following areas: — regional development; — employment, training and education; — rural development and agriculture; — development and reconversion in the fishing industry?

Question 7b:

If so, please give the name of the establishment, the duration, and the subject that you taught or on which you conducted research.

Question 8a:

Have you published any works on one or more of the following fields: — regional development; — employment, training and education; — rural development and agriculture; — development and reconversion in the fishing industry?

Question 8b:

If so, please indicate the forums, dates, titles and/or relevant publication details.

Question 9a:

Do you hold a Master's degree related to the professional experience described in point 3 of the annex to the competition notice?

Question 9b:

If so, please indicate the exact title of your qualification, the name of the establishment that awarded it, and the date on which it was awarded.

Question 10a:

Do you hold a PhD related to the professional experience described in point 3 of the annex to the competition notice?

Question 10b:

If so, please indicate the exact title of your qualification, the name of the establishment that awarded it, and the date on which it was awarded.'

Provisions establishing the powers of EPSO and the European Commission

- 9 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 European Economic and Social Committee, the Committee of the Regions and the Ombudsman of 25 July 2002 establishing EPSO (OJ 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. ...'

- 10 Article 4 of Decision 2002/620, 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 against the Commission.'

Background to the dispute

- 11 The applicants applied to be candidates in open competition EPSO/AD/204/10.
- 12 On 14 December 2010, EPSO appointed as members of the selection board in open competition EPSO/AD/204/10 ('the selection board'):
- Mr L. Nigri, chairman;
 - Ms A. Serizier, Mr D. Levieil and Ms C. Combette, full members nominated by the administration;
 - Mr D. Rapacciuolo, Mr J.-Ph. Raoult and Mr C. Scano, full members nominated by the Staff Committee;
 - Mr M. Schelfhout and Mr P. Nicolas, alternate members nominated by the administration;
 - Ms P. Stendera-Bzdela and Ms L.Casanovas, alternate members nominated by the Staff Committee.
- 13 On 20 January 2011, following the withdrawal of Mr P. Nicolas, Mr E. Bokias was appointed as an alternate member of the selection board, nominated by the administration.

- 14 At meetings held on 7, 11, 14, 15, 16 and 24 February 2011 and 2 and 3 March 2011, the members of the selection board determined the weighting for each of the criteria laid down in the competition notice and reproduced in question form under the ‘Talent Screener’ tab in the online application form (the ‘preparatory meetings’).
- 15 On 24 February 2011, following the withdrawal of Mr C. Scano and Ms L. Casanovas, Mr F.J. Alvarez Hidalgo and Ms M.F. Negru were appointed as full member and alternate member respectively, nominated by the Staff Committee.
- 16 On 17 March 2011, following the withdrawal of Ms A. Serizier and Mr M. Schelfhout, Ms C. Sauvaget and Mr E. Rodriguez were appointed as full member and alternate member respectively, nominated by the administration.
- 17 On an unspecified date between 3 March and 13 April 2011, the selection board carried out the selection based on qualifications provided for in Section IV of the competition notice.
- 18 In the first selection stage, for each positive answer ticked in response to the first part of each of the nine questions under the ‘Talent Screener’ tab in the application form, the selection board awarded the number of points corresponding to the weighting for that question, as established at the preparatory meetings. At the end of that exercise, the selection board defined a points threshold that allowed as near as possible to 360 candidates to be selected, a figure corresponding, as stated in the competition notice, to three times the number of candidates to be invited to the assessment centre. In the light of the number of points obtained by the candidates, the threshold was fixed at 16, which meant that only 316 candidates were admitted to the second stage of the selection procedure based on qualifications.
- 19 In the second stage, after considering the relevance of the qualifications and professional experience entered by the candidates in response to the second part of the nine questions under the ‘Talent Screener’ tab, the selection board multiplied the number of points obtained in the first stage for each answer ticked by the candidates by a coefficient of between 0 and 4. At the end of that operation, the selection board invited to the assessment centre a number of candidates not exceeding three times the number of successful candidates indicated in the competition notice.
- 20 By letters of 13 April 2011, EPSO informed Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and Ms Venckunaite and Ms Załęska that, because they had obtained a total number of points below the threshold of 16 fixed by the selection board in the first stage of the selection procedure based on qualifications, for each of the criteria listed in the annex to the competition notice and after weighting, their applications had been rejected, and had not been considered in the second stage of the selection based on qualifications provided for in the competition notice.
- 21 By a letter of 13 April 2011, Ms Cruceru was informed that her name was not included in the list of candidates admitted to sit the tests at the assessment centre because, at the end of the two stages of the selection based on qualifications, she had obtained only 27 points, fewer than the 34 points awarded to the last candidate invited to the assessment centre.
- 22 On 20 April 2011, because EPSO had realised that the number of permanent members appointed was greater than that required, Mr D. Rapacciuolo agreed to stand down from the selection board.
- 23 On 29 April 2011 EPSO appointed ‘an additional group of non-permanent members of the selection board’, namely Mr G. Groppi and Mr Pipiliagkas as full members nominated by the Staff Committee, and Mr M. Robert and Mr J. Perez Escanilla as alternate members nominated by the Staff Committee. According to the Commission, the new appointments were the result of the withdrawal of Mr D. Rapacciuolo, Mr F.J. Alvarez Hidalgo, Ms M.F. Negru and Ms P. Stendera-Bzdela.

- 24 On 25 May 2011, following the withdrawal of Mr J. Perez Escanilla, Mr I. Sotirchos was appointed as an alternate member nominated by the Staff Committee.
- 25 On 27 May 2011, the list of members of the selection board was published.
- 26 The applicants, except for Mr Kalamees and Ms Załęska, submitted requests for a review of the selection board's decisions to reject their respective applications; all of the requests were rejected.
- 27 The applicants each lodged a complaint under Article 90(2) of the Staff Regulations against the selection board's decision to reject their application. Those complaints were rejected by the appointing authority by decisions adopted between 9 and 25 November 2011.

Procedure and forms of order sought

- 28 In Case F-23/12, the applicants claim that the Tribunal should:
- before ruling, order the Commission to produce all the reports of the meetings of the EPSO Heads of Unit in relation to competition EPSO/AD/204/10 and all the minutes of the selection board's meetings held between 9 December 2010 and 27 May 2011;
 - annul the selection board's decisions to reject their applications;
 - order the Commission to pay the costs.
- 29 In Case F-30/12, the applicant claims that the Tribunal should:
- order that the present case be joined with Case F-23/12 *Glantenay and Others v Commission* on account of the connection between them;
 - pending judgment, order the Commission to produce all the reports of the meetings of the EPSO Heads of Unit in relation to competition EPSO/AD/204/10 and all the minutes of the selection board's meetings held between 9 December 2010 and 27 May 2011 in relation to competition EPSO/AD/204/10;
 - annul the selection board's decision to reject his application;
 - order the Commission to pay the costs.
- 30 By order of the President of the Second Chamber of the Tribunal of 22 May 2012, Cases F-23/12 and F-30/12 were joined for the purposes of the written procedure, the oral procedure and the final judgment.
- 31 The Commission submitted a single defence common to both cases. In that document it claims that the Tribunal should:
- dismiss the actions as, in part, manifestly inadmissible and, in part, unfounded in law;
 - order the applicants to pay the costs.
- 32 During the hearing, in reply to a question from the Tribunal, the applicants stated that they wished to submit a new head of claim seeking annulment of all the results of the competition or, at the very least, to extend their pleadings, that request having already been mentioned in their applications.

The request for measures pending judgment

- 33 In their applications the applicants request the Tribunal, pending judgment, to order the Commission to produce all the reports of the meetings of the EPSO Heads of Unit in relation to competition EPSO/AD/204/10 and all the minutes of the selection board's meetings held between 9 December 2010 and 27 May 2011. However, in the light of the documents which the parties enclosed with their written submissions, and the measures of organisation of procedure ordered, the Tribunal considers that it has sufficient information to rule on the action and has decided that there is no need to agree to the applicants' request.

The claims for annulment of all the results of the competition

- 34 Under Article 35 of the Rules of Procedure, only the form of order set out in the originating application may be taken into consideration and consequently, unless the subject-matter of the dispute is to be changed, as a matter of principle, a party may not submit fresh claims or extend the subject-matter of existing claims in the course of the proceedings (see, to that effect, the judgment of 8 July 1965 in Case 83/63 *Krawczynski v Commission*). Only where there is a new factor capable of affecting the subject-matter of the action, such as, in particular, the adoption during the proceedings of an act repealing and replacing the contested act, may an applicant amend his claims (see, to that effect, the judgment of 3 March 1982 in Case 14/81 *Alpha Steel v Commission*, paragraph 8).

- 35 In the present case, it must be noted that although the applicants stated, when setting out the pleas in law supporting their actions, that they considered that all the results of the competition must be called into question, that cannot, contrary to their contention, be understood to mean that they set out in their applications claims for annulment directed against all the results of the competition.

- 36 Consequently, and considering moreover that according to consistent case-law the subject-matter of the dispute must be sufficiently clear and precise to enable the defendant to prepare its defence (order of 28 September 2011 in Case F-66/06 *Kyriazi v Commission*, paragraph 42), the claims for annulment of all the results of the competition must be regarded as having been raised for the first time during the hearing. Since no new factor capable of affecting the subject-matter of the action had arisen to justify the belated formulation of those claims in the course of the proceedings, they must be dismissed as inadmissible.

The claims for annulment of the selection board's decisions to reject the applicants' applications

- 37 In support of their claims against the selection board's decisions to reject their applications ('the contested decisions'), the applicants formally rely on three pleas in law, alleging:

- 'infringement of essential procedural requirements relating to the possibly late date on which the selection board was constituted ... and the considerable fluctuation in its composition over time';
- a 'plea of illegality, infringement of Articles 27 and 29[1] of the Staff Regulations, Article 5 of Annex III to the Staff Regulations and point IV.1.b) *ab initio* of the competition notice, [and a] consequent error of assessment';
- 'breach of the principle of equal treatment between candidates during the selection based on qualifications'.

- 38 It must be noted, as regards the first plea, that the applicants raise three complaints all relating to the rules governing the composition and functioning of competition selection boards. Consequently, the first plea must be understood as alleging not just a procedural defect, but more widely the infringement of the rules governing the establishment and functioning of the selection board.

- 39 As regards the second and third pleas, it is clear from the applicants' written pleadings that, apart from the complaint relating to a manifest error of assessment, the pleas must be understood as raising an objection of illegality of the competition notice. The arguments put forward by the applicants to support those two pleas essentially aim to contest the lawfulness of the competition notice in that it provides, in the first stage of the selection based on qualifications, for certain candidates to be eliminated solely on the basis of the number of answers ticked in response to the first part of the nine questions set out under the 'Talent Screener' tab in the application form, without the selection board checking the truth of those statements or verifying the relevance of their qualifications and professional experience. Moreover, in reply to a question from the Tribunal, the applicants confirmed that the second and third pleas formed only one single plea raising an objection of the illegality of the competition notice.
- 40 Lastly, it must be noted that, during the hearing, the applicants raised a new plea in law alleging infringement of the competition notice in that, whereas the notice, in their opinion, required the selection board to select 360 candidates to take part in the second stage of the selection procedure based on qualifications, it only selected 316. Consequently, and in the light of the background to this case, that plea will be considered before the plea alleging, by way of a preliminary objection, that the competition notice was illegal.
- 41 It follows from the foregoing that the pleas in law raised by the applicants to support their claims for annulment must therefore be understood as alleging:
- a breach of the rules governing the composition and functioning of the selection board;
 - manifest error of assessment;
 - infringement of the provisions of the competition notice;
 - the illegality of the competition notice by an objection.

The first plea in law, alleging a breach of the rules governing the composition and functioning of the selection board

- 42 First of all, the applicants observe that the selection board was not constituted when it began the selection based on qualifications, nor even when the weighting for the selection criteria was decided.
- 43 In that regard it must be noted that, although a selection board responsible for assessing candidates in a competition must necessarily be constituted before the selection of candidates begins, it must be regarded as constituted once all of its members have been nominated by the appointing authority for the first time. Although the composition of that selection board may have to change as a result of the resignation of some of its members, that fact is not capable of having a retroactive effect on the date on which the selection board is to be regarded as having been constituted.
- 44 In the present case, it is apparent from the documents before the Tribunal that the appointing authority nominated all the members of the selection board for the first time on 14 December 2010. The weighting for the selection criteria was determined at preparatory meetings and the selection procedure based on qualifications was carried out between 3 March and 14 April 2011. Consequently, the first complaint put forward by the applicants in support of the first plea in law must be rejected as having no factual basis.
- 45 Secondly, the applicants complain that EPSO was late in publishing the final composition of the selection board, which occurred after the selection board had adopted the contested decisions.

- 46 On that point, it must be noted that, even if the appointing authority is under an obligation to publish the composition of each competition selection board before the tests begin, compliance with that obligation would not constitute an essential procedural requirement violation of which could have the result that the decisions taken by a selection board should be annulled, unless it were such as to have influenced those decisions or denied the candidates a safeguard. Moreover, knowledge of the identity of the members of a competition selection board is not likely to influence a candidate's chances of success, since candidates are selected on the basis of the criteria laid down in the competition notice, and not according to the identity of the selection board's members. Furthermore, although publication of the list of members of a selection board is intended to allow the candidates to make sure that none of the members of the selection board before whom they appear has a conflict of interests, the applicants do not claim that such a conflict of interests existed in the present case. In addition, and more generally, the late publication of the list of members of a selection board is not capable of denying the candidates a safeguard, since it is always possible for them to invoke any conflict of interests in a subsequent action against that selection board's decision not to include them in the reserve list.
- 47 In any event, it is sufficient to note, in order to reject the second complaint, that in the present case EPSO was not required, either under the Staff Regulations or under the competition notice, to publish the composition of the selection board.
- 48 Thirdly, the applicants state that, during the selection based on qualifications, the composition of the selection board did not contain sufficient members or, at the very least, was not stable.
- 49 In that regard, although it has been held that, in order to ensure consistent and objective marking for candidates in an oral test, and having regard to the comparative nature of competitions, it was necessary for all the members of the selection board to be present or, at the very least, for a certain stability to be maintained in the composition of the selection board (see, in particular, the judgments of 29 September 2010 in Case F-5/08 *Brune v Commission*, paragraph 41, and Case F-41/08 *Honnefelder v Commission*, paragraph 36), it must be pointed out that the maintenance of such stability does not appear necessary, in order to ensure respect for the principle of equal treatment, for written tests. A selection board member who was not present when the other members of the selection board examined a candidate's script may, if he considers it necessary, examine that script subsequently in order to compare it with others and, consequently, play an active part in its assessment (see, to that effect, the judgment of 26 January 2005 in Case T-267/03 *Roccatto v Commission*, paragraph 38).
- 50 Given that in the present case the online application forms were capable of being examined *a posteriori*, if necessary, by a member of the selection board who was absent when his colleagues examined them, it must be held that the maintenance of a certain stability in the composition of the selection board, as required for the oral tests, was not necessary. Consequently, the third complaint put forward by the applicants to support the first plea in law must be rejected as unfounded.
- 51 It follows from the foregoing that the first plea in law must be rejected in its entirety.

The second plea in law, alleging a manifest error of assessment

- 52 It must be recalled that, pursuant to Article 35(1)(e) of the Rules of Procedure, the application must state the pleas in law and the arguments of fact and law relied on. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for a plea to be admissible, that the essential matters of law and fact relied on are stated coherently and intelligibly in the application itself, to enable the defendant to prepare his defence and to enable the Tribunal to give judgment in the action without having to seek further information, if appropriate (judgment of 10 November 2011 in Case F-18/09 *Merhzaoui v Council*, paragraph 43). In the present case, although the applicants rely on a manifest error of assessment, they do not, however, specify in what respect the

author of the contested decisions, namely the selection board, caused such a defect of substantive legality. Consequently, the second plea in law must be rejected as inadmissible in the absence of sufficient information.

The third plea in law, alleging infringement of the competition notice

- 53 During the hearing the applicants raised a fresh plea in law alleging that the selection board had infringed the competition notice by admitting only 316 candidates to the second stage of the selection procedure, whereas under the terms of the notice the number should have been 360.
- 54 As a preliminary point, it must be recalled that Article 43(1) of the Rules of Procedure prohibits the introduction of new pleas after the first exchange of written pleadings unless they are based on elements which come to light in the course of the procedure (*Merhzaoui v Council*, paragraph 36). Given that in the present case the applicants base their plea on an element which came to light in the courts of the procedure, namely that only 316 candidates were admitted to the second phase of the selection procedure based on qualifications, that plea must be regarded as admissible.
- 55 As for the validity of the plea, it must be pointed out that, first, although the competition notice provides that the number of files examined in the second stage of the selection procedure based on qualifications will be three times the number of candidates to be invited to the assessment centre, it makes clear that that figure is not mandatory, but will correspond to it 'approximately'. Second, it expressly follows from the competition notice that the number of candidates invited to the assessment centre 'will not exceed three times the number of successful candidates' indicated in the competition notice. Therefore, given that the number of files examined in the second stage of the selection procedure based on qualifications depends on the number of candidates that can be invited to the assessment centre, it is clear that the intention of the competition notice was, implicitly but necessarily, to indicate a non-mandatory number of files to be examined in the second stage of the selection procedure.
- 56 That finding is borne out by the fact that the selection procedure based on qualifications is designed in such a way that the number of candidates admitted to the second stage of that selection procedure depends on a threshold which cannot be precisely established until all the candidates are known, since that threshold depends on their number and how many points they obtain in the light of their responses to the first part of each question under the 'Talent Screener' tab of their online application form.
- 57 Consequently, the third plea in law must be rejected as unfounded.

The fourth plea in law, alleging, by way of a preliminary objection, the illegality of the competition notice

– Arguments of the parties

- 58 The applicants essentially claim that the provisions of the competition notice relating to the first stage of the selection procedure based on qualifications were unlawful since they led to the elimination of candidates solely on the basis of the number of questions ticked under the 'Talent Screener' tab of the online application form. The elimination of candidates without specific examination of their qualifications and diplomas by the selection board infringes, first, Article 27 of the Staff Regulations, which provides that the purpose of competitions is to recruit persons of the highest standard of ability and efficiency, as well as Article 5 of Annex III to the Staff Regulations (as interpreted by the case-law), which provides that the selection board must specifically consider the qualifications held by candidates; second, the division of powers between the appointing authority and the selection board laid down in

Annex III to the Staff Regulations; and third, the principle of equal treatment, in that the contested provisions of the competition notice mean that candidates with the same qualifications and experience as other candidates admitted to the second stage are eliminated at the end of the first stage solely because, as a result of the lack of clarity, they were considered not to satisfy the conditions required.

- 59 The applicants also maintain that the selection criteria to which the questions relate are not clear. The English version of the online application form uses the term ‘Master’s’, whereas the French version refers to the term ‘maîtrise’. Moreover, the form uses the terms ‘teaching’ and ‘publications’ which are ambiguous.
- 60 In its defence, the Commission considers that the plea is inadmissible in its entirety on the ground that, since the applicants did not contest the competition notice by way of an action brought in good time, they can no longer challenge its legality by an objection. The Commission also states that the plea of infringement of the division of powers between the selection board and the appointing authority is inadmissible on the ground that it was not raised by the applicants at the pre-litigation stage. In their complaints, the applicants referred only to allegations relating to the substantive legality of the contested decisions, and not to any allegation relating to the procedural legality of those decisions, the category to which the contested plea belongs since it concerns the power of the selection board.
- 61 As to the substance, the Commission points out, regarding the claim that the selection method used infringed Article 27 of the Staff Regulations, that it has a wide discretion to decide how to organise competitions. It considers that the elimination of certain candidates on the basis of the number of questions ticked concerning their qualifications and professional experience constitutes an appropriate selection method, since it allows the targeted selection of candidates in a very specific field. Furthermore, the use of that method was necessary in the present case because, given the large number of candidates who had registered for the competition, the selection board could not be expected to examine all the candidates’ files at the very beginning of the selection procedure. It was true that the selection procedure did, in essence, involve the risk that some of the best candidates would be eliminated because they had not ticked certain questions for which they nevertheless satisfied the criteria. However, in the Commission’s opinion, the candidates were in the best position to assess whether they should tick certain questions, given that it was, in any event, up to them to interpret the questions as well as their qualifications and professional experience flexibly. As for the fact that the selection board did not check the relevance of the candidates’ statements until the second stage of the selection based on qualifications, the Commission considers that this did not affect the legality of the selection method, since the fact remained that as a result of those checks, a person who had wrongly ticked some of the questions could not hope to be invited to the assessment centre. As regards the applicants’ arguments relating to the selection board’s exercise of its powers, the Commission points out that the contested decisions were indeed adopted by the selection board and that the board exercised its powers by deciding on the weighting of the questions and by calculating the points for the answers given by the candidates.
- 62 As for the applicants’ claims concerning a possible infringement of the principle of equal treatment, the Commission maintains that that allegation is unfounded since, unlike the candidates admitted to the second stage, the applicants did not fulfil the conditions required in order to do so.
- 63 As regards the lack of clarity of some of the criteria, the Commission disputes that they were ambiguous. Although the online application form used the term ‘maîtrise’ in the French version, there could be no doubt, in reading the competition notice, that the term referred to a specialised diploma awarded for postgraduate studies. The same applied for the term ‘teaching’. The applicants could infer from the fact that the online application form did not specify that the teaching had to be academic, whereas the required research experience did, that the teaching referred to was not necessarily confined to universities. As for the requirement relating to publications, the applicants did not explain why that was confusing.

64 Lastly, the Commission argues that even if the competition notice were unlawful, the contested decisions should not be annulled, since the procedural irregularity to which the present objection of illegality related would not be capable of rendering those decisions unlawful unless it were proved that they might have been materially different if that irregularity had not occurred. In the present case, the applicants had not shown that if the selection board had specifically examined their files, they would have been admitted to the second stage of the selection procedure based on qualifications.

– Findings of the Tribunal

65 As regards, first of all, the objection of inadmissibility raised by the Commission against the plea in law in its entirety, on the ground that the applicants had not contested the competition notice in good time, it need only be pointed out, in order to reject that objection, that, in an action against a decision of a selection board in a competition, an applicant is entitled to rely on irregularities occurring in the course of the competition, even if the origin of those irregularities may be found in the wording of the competition notice itself (see, to that effect, the judgment of 11 August 1995 in Case C-448/93 P *Commission v Noonan*, paragraph 17). As long as the applicants' applications had not been rejected by the selection board, they could not be sure whether they had an interest in bringing proceedings against the competition notice, so that they cannot be criticised for not having contested the competition notice within the time-limits provided for in Articles 90 and 91 of the Staff Regulations.

66 Next, as regards the objection of inadmissibility directed against the plea that the first stage of the selection based on qualifications infringed the rules on the division of powers between the selection board and the appointing authority, it must be noted that, under the correspondence rule, the judicial action must not alter the cause of action of the complaint, and the concept of 'cause of action' must be given a broad interpretation. As regards claims for annulment, the 'cause of action of the dispute' must be understood as the applicant's challenge to the substantive legality of the contested decision or, in the alternative, the challenge to its procedural legality (see, in particular, the judgment of 1 July 2010 in Case F-45/07 *Mandt v Parliament*, paragraph 119).

67 In that regard, the Commission considers that the abovementioned plea is inadmissible on the ground that it alleges that the author of the measure had no power to adopt it and that it is therefore akin to a complaint of a defect of procedural legality, whereas the defects raised by the applicants in their complaints were solely in the nature of defects of substantive legality.

68 However, it must be declared that the ground on which the Commission bases its argument is incorrect. The applicants do not in any way dispute the selection board's power to adopt the contested decisions, but maintain, essentially, that the appointing authority could not lay down a selection method based solely on the number of questions ticked by candidates concerning their qualifications and professional experience, without requiring the selection board specifically to examine the relevance of those qualifications and experience. Viewed in that way, it must be stated that the applicants' plea relates to the substantive legality of the contested decisions rather than their procedural legality. Consequently, the objection of inadmissibility raised by the Commission may be rejected, since it is not in dispute that the applicants raised in their complaints a defect of substantive legality at the very least, without there even being any need to consider, for each of those complaints, whether they contain a claim relating to the procedural legality of the contested decisions.

69 As regards the validity of the plea in law, it must be recalled that the purpose of organising a competition is to fill vacant posts within the institutions and that, as follows in particular from the first paragraph of Article 1 and Article 4 of Annex III to the Staff Regulations, it is therefore the appointing authority's task to draw up the competition notice and, for that purpose, to decide on the

most suitable method for selecting candidates, in the light of the requirements attaching to the posts to be filled and, more generally, of the interests of the service (see the judgment of 27 September 2006 in Case T-420/04 *Blackler v Parliament*, paragraph 45).

- 70 However, it must be noted that the exercise by the appointing authority of that discretion, regardless of the number of people likely to apply for the competition in question, is necessarily circumscribed by the need to observe the rules in force and general principles of law. It follows that the method chosen by the appointing authority must, first, aim to recruit persons of the highest standard of ability and efficiency, in accordance with Article 27 of the Staff Regulations, second, in accordance with Article 5 of Annex III to the Staff Regulations, reserve for an independent selection board the task of determining, case by case, whether the diplomas submitted or the professional experience presented by each candidate correspond to the level required by the Staff Regulations and the notice of competition (*Blackler v Parliament*, paragraph 23), and, third, result in the consistent and objective selection of candidates.
- 71 In the present case, the method of selection based on qualifications used by the appointing authority in the competition notice for the first stage consisted of asking the applicants, by means of a questionnaire, whether they considered that they satisfied a series of conditions relating to their education and professional experience, and then, on the basis of the answers given by all the candidates, fixing a threshold below which candidates with insufficient positive replies, counted in the form of points and after weighting, were eliminated. The Tribunal considers that such a method, designed in that manner, infringes the provisions of the Staff Regulations and the general principles governing competitions.
- 72 It is clear from the first and third paragraphs of Article 5 of Annex III to the Staff Regulations that where selection is on the basis of qualifications, it is for the selection board to assess whether the candidates' diplomas and experience meet the requirements set out in the competition notice (see, to that effect, the judgments of 14 December 2011 in Case T-361/10 P *Commission v Pachtitis*, paragraph 43, and Case T-6/11 P *Commission v Vicente Carbajosa and Others*, paragraph 58). However, with the selection method for the first stage, the selection board merely has to determine the weighting for each question, then to count the number of points obtained by each candidate, and, finally, depending on the number of people still in the running in that first stage and the number of points they have obtained, to determine the points threshold required in order to be admitted to the second stage of the selection procedure based on qualifications.
- 73 The selection method does not, on the other hand, require the selection board to carry out any checks on the relevance of the candidates' qualifications and professional experience. Such a method necessarily implies that those candidates are not selected according to the relevance of their diplomas or professional experience, but on the basis that they possess them, which does not constitute a sufficiently objective factor to guarantee that the best candidates will be chosen, or even that the selection made will be consistent.
- 74 Moreover, it must be noted that according to the selection method used by EPSO in this case, the number of points that a candidate had to obtain in order to have his file examined in the second stage depended on the number of points of the other candidates. Consequently, a candidate could find himself eliminated simply because other candidates had ticked certain questions as a result of interpreting the criteria too much to their own advantage, misunderstanding the questions or assessing the value of their diplomas or professional experience incorrectly, since each question asked called for a highly subjective assessment by the candidate of the relevance of his diplomas and professional experience (see, in particular, as regards the delicate assessments sometimes required in order to evaluate the relevance of a diploma or professional experience, the judgment of 24 April 2013 in Case F-73/11 *CB v Commission*, paragraphs 50 to 52). In that respect, it must therefore also be held that the selection method does not adequately guarantee objective and consistent marking.

- 75 On that point, it must be made clear that the selection method used by EPSO in this case is different from those applied in other competitions which have come before the courts and have not been annulled. Even though in some competitions applications are rejected before the first tests for reasons relating to the relevance of the stated qualifications and professional experience, the fact remains that in those competitions, the decisions to eliminate certain candidates are taken by the selection board after it has specifically considered the relevance of the stated qualifications and professional experience. In competitions where the veracity of the candidates' claims is not checked until the end of the competition, some candidates may, admittedly, also be admitted to the first tests on the basis of incorrect declarations, but it must be pointed out that in those competitions, the number of candidates likely to be admitted to the first tests is not limited, so that any mistakes or fraud by those candidates can have only a minimal impact on the other candidates, unlike the competition at issue here.
- 76 Consequently, it must be held that, in providing for some candidates to be eliminated on the ground that their diplomas and professional experience are not sufficiently relevant without the selection board specifically examining that relevance, the provisions of the competition notice relating to the first stage of the selection procedure based on qualifications wrongfully restrict the rights and powers of the selection board, and that they must therefore be regarded as unlawful.
- 77 Since the selection board's decisions to reject the applications of Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and of Ms Venckunaite and Ms Załęska from the competition procedure were adopted on the basis of the provisions of the competition notice relating to the first stage of the selection procedure based on qualifications, they must be annulled. Contrary to the Commission's claims, the unlawfulness, raised by way of an objection, of an act on the basis of which a decision was adopted consequently renders that decision unlawful.
- 78 Although claims for annulment must be rejected in a situation where it is obvious that if a decision is annulled, a fresh decision identical to the first will necessarily have to be adopted (judgments of 4 February 2010 in Case F-15/08 *Wiame v Commission*, paragraph 27, and, by analogy, of 29 September 2011 in Case F-114/10 *Bowles and Others v ECB*, paragraph 64), in the present case there is nothing to prove satisfactorily that if the contested decisions were annulled, fresh decisions identical to the first would necessarily be adopted. Given, in particular, that the points threshold to be reached was fixed on the basis of the replies of the other candidates, it is possible that, if the selection board had examined the relevance of the qualifications and professional experience of all the candidates, as it should have done, Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and Ms Venckunaite and Ms Załęska would have obtained a greater number of points than the threshold fixed.
- 79 As regards Ms Cruceru, it must be noted that she does not claim that the unlawfulness of the first stage of the selection procedure based on qualifications or the lack of clarity of some of the selection criteria affected her chances of success in the second stage of the selection procedure based on qualifications. Furthermore, when questioned on this subject by means of measures of organisation of procedure, she stated that the only plea effective in her case was the first, that is, infringement of the rules governing the establishment and functioning of the selection board. Since that plea has been rejected, the action must consequently be dismissed as far as it concerns her.
- 80 In any event, it must be pointed out that although some candidates may wrongly have ticked questions when they did not actually fulfil the required conditions, that fact is not capable of having affected Ms Cruceru's chances of success, since, in the second stage, the selection board checked the relevance of the candidates' answers and was thus able to neutralise any errors committed by the candidates in that respect. Conversely, if, as a result of that alleged lack of clarity, candidates answered certain questions in the negative even though they fulfilled the conditions required, that fact will only have had the effect of reducing the number of points obtained by the other candidates and, consequently, of lowering the points threshold required to be invited to the assessment centre. Given that

Ms Cruceru does not claim at any point in her application or even in her complaint that that lack of clarity affected her own answers, it must be held that the alleged lack of clarity did not disadvantage her.

- 81 It follows from the foregoing that the actions of Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and of Ms Venckunaite and Ms Załęska must be upheld and Ms Cruceru's action must be dismissed.

Costs

- 82 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. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that that party is not to be ordered to pay any.
- 83 It follows from the grounds set out above that the applicants' claims have been upheld solely in respect of Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and of Ms Venckunaite and Ms Załęska and have been dismissed as regards Ms Cruceru. That being so, the Commission must be ordered to bear nine tenths of its own costs and to pay those incurred by Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and by Ms Venckunaite and Ms Załęska, and Ms Cruceru must be ordered to bear her own costs and to pay one tenth of the costs incurred by the Commission.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

- 1. Annuls the decisions of the selection board for open competition EPSO/AD/204/10 to reject the applications of Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and of Ms Venckunaite and Ms Załęska from the competition procedure without examining them in the context of the second stage of the selection based on qualifications laid down in the competition notice;**
- 2. Dismisses the remainder of the actions in Cases F-23/12 and F-30/12;**
- 3. Declares that the European Commission is to bear nine tenths of its own costs and orders it to pay those incurred by Messrs Bonagurio, Cecchetto, Gecse, Glantenay, Gorgol, Kalamees and Skrobich and by Ms Venckunaite and Ms Załęska;**
- 4. Declares that Ms Cruceru is to bear her own costs and orders her to pay one tenth of the costs incurred by the European Commission.**

Rofes i Pujol

Boruta

Bradley

Delivered in open court in Luxembourg on 16 September 2013.

W. Hakenberg
Registrar

M.I. Rofes i Pujol
President

ANNEX Davide Bonagurio, member of the contract staff, residing in Brussels (Belgium), **Irina Cruceru**, national expert on secondment, residing in Brussels, **Attila Gecse**, official, residing in Brussels, **Błażej Gorgol**, official, residing in Brussels, **Alar Kalamees**, member of the temporary staff, residing in Tallinn (Estonia), **Krzysztof Skrobich**, member of the temporary staff, residing in Brussels, **Indre Vencunaite**, member of the contract staff, residing in Brussels, **Magdalena Załęska**, national expert on secondment, residing in Brussels.