



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

15 September 2016\*

(Rules on languages — Notices of open competition for the recruitment of administrators — Choice of second language from three languages — Regulation No 1 — Article 1d(1), Article 27 and Article 28(f) of the Staff Regulations — Principle of non-discrimination — Proportionality)

In Cases T-353/14 and T-17/15,

**Italian Republic**, represented by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

applicant,

supported by

**Republic of Lithuania**, represented by D. Kriauciūnas and V. Čepaitė, acting as Agents,

intervener in Case T-17/15,

v

**European Commission**, represented initially, in Cases T-353/14 and T-17/15, by J. Currall and G. Gattinara and, in Case T-17/15, by F. Simonetti, and subsequently by G. Gattinara and F. Simonetti, acting as Agents,

defendant,

APPLICATION, in Case T-353/14, based on Article 263 TFEU, for annulment of the notice of open competition EPSO/AD/276/14 to constitute a reserve list of administrators (OJ 2014 C 74 A, p. 4), and, in Case T-17/15, based on Article 263 TFEU, for annulment of the notice of open competition EPSO/AD/294/14 to constitute a reserve list of administrators in the field of data protection for the European Data-protection Supervisor (OJ 2014 C 391 A, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias (Rapporteur), President, M. Kancheva and C. Wetter, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 17 March 2016,

gives the following

\* Language of the case: Italian.

## Judgment<sup>1</sup>

### Background to the dispute

1 The European Personnel Selection Office (EPSO) is an interinstitutional body created by Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing EPSO (OJ 2002 L 197, p. 53). Under the third paragraph of Article 2 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), as worded prior to Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations (OJ 2004 L 124, p. 1), the institutions signing that decision entrusted to EPSO, by means of Article 2(1) thereof, the exercise of the powers of selection conferred under the first paragraph of Article 30 of the Staff Regulations and under Annex III thereto on their appointing authorities. In addition, according to Article 2(2) of that Decision, where the powers referred to in paragraph 1 are conferred on the appointing authority of a body, office or agency established by or in accordance with the Treaties, EPSO may exercise such powers at the request of the latter. Article 4 of the decision provides that even though, in accordance with Article 91a of the Staff Regulations, requests and complaints relating to the exercise of the powers conferred on EPSO are to be lodged with EPSO, any appeal in these areas is to be made against the European Commission.

2 On 1 March 2014, EPSO published the General Rules governing open competitions ('the General Rules') in the *Official Journal of the European Union* (OJ 2014 C 60 A, p. 1).

3 Point 1.3 of the General Rules, entitled 'Eligibility', under the heading 'Knowledge of languages', states the following:

'Depending on the competition you will be asked to demonstrate your knowledge of the official EU languages. As a general rule you will need a thorough knowledge of one official EU language and a satisfactory knowledge of another one. However, the competition notice may impose stricter requirements (this is the case, in particular, for linguist profiles). Unless otherwise stated in the competition notice the choice of second language will normally be limited to English, French or German.'

4 The footnote on page 7 of the General Rules stipulates that 'following the judgment given by the Court of Justice ... in Case C-566/10 P, *Italy v Commission*, the institutions of the [European Union] must state the reasons for limiting the choice of the second language to a small number of official EU languages'.

5 Furthermore, point 1.3 of the General Rules also states the following:

'When organising open competitions, EPSO applies the "General Guidelines on the use of languages in EPSO competitions" adopted by the College of Heads of Administration on 15 May 2013.

It has long been the practice to use mainly English, French and German for internal communication in the EU institutions and these are also the languages most often needed when communicating with the outside world and dealing with cases.

The second language options for competitions have been defined in the interests of the service, which require new recruits to be immediately operational and capable of communicating effectively in their daily work. Otherwise the efficient functioning of the institutions could be severely impaired.

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

To ensure equal treatment for all candidates, everyone — including those whose first official language is one of the three — must take certain tests in their second language, chosen from among these three. Assessing specific competencies in this way allows the institutions to evaluate candidates' ability to be immediately operational in an environment that closely matches the reality they would face on the job. None of this affects the possibility of later language training to enable staff to work in a third language, as required under Article 45(2) of the Staff Regulations.

...'

- 6 The guidelines referred to in paragraph 5 above are annexed to the General Rules (Annex 2), as can be seen from the footnote on page 8 of those rules.
- 7 In point 2.1.4 of the General Rules, entitled 'Fill in your online application', it is made clear that 'all parts of the ... application form, including the "talent screener", must be completed in English, French or German, unless otherwise specified in the competition notice.'
- 8 In point 3.1.1 of the General Rules, entitled 'EPSO: communication with candidates', paragraph 1 states the following:

'Your results and all invitations will be sent to you solely via your EPSO account in English, French or German.'

- 9 Point 3.1.2 of the General Rules, entitled 'Candidates: communication with EPSO', is worded as follows:

'Before contacting EPSO please check first that you have read thoroughly all information in the competition notice, in these general rules, and on the EPSO website, including the "Frequently Asked Questions" ...

Contact details can be found on the website ... In all correspondence to do with an application, candidates must quote their name as given in their application, the competition number, and their application number.

EPSO takes great care to apply the principles of the code of good administrative conduct ... However, under those same principles, EPSO reserves the right to cease any correspondence if that which it receives from a candidate is improper — i.e. repetitive, abusive and/or irrelevant.'

- 10 The Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the Public, annexed to Commission Decision 2000/633/EC, ESCS, Euratom of 17 October 2000 amending its Rules of Procedure (OJ 2000 L 267, p. 63), referred to in paragraph 9 above ('the Code of Good Administrative Behaviour'), provides, in Article 4 under the heading 'Correspondence', the following:

'In accordance with Article 21 of the Treaty establishing the European Community, the Commission shall reply to letters in the language of the initial letter, provided that it was written in one of the official languages of the Community.'

- 11 Annex 2 to the General Rules, entitled 'General Guidelines of the College of the Heads of Administration on the use of languages in EPSO competitions' ('the General Guidelines') states the following:

'It is confirmed that as a general rule the use of languages in EPSO competitions will be as follows:

— Stable elements on the EPSO website will be in all official languages.

- Competition notices, including competitions for linguists and competitions in connection with enlargement, as well as the general rules governing open competitions will be published in all official languages.
- The following tests will be in all official languages:
  - Admission tests (verbal and numerical reasoning).
  - Language comprehension tests for translator competitions.
  - Preliminary translation tests for lawyer-linguist competitions.
  - Intermediate interpreting tests (on computer) for interpreter competitions.
  - Competence tests (translation or interpreting) for linguist competitions.
- ...
- Assessment centres will be held in the candidates' second language only, chosen from English, French and German.

Similarly, calls for expressions of interest in selection procedures for contract staff organised by the Office will be published in all official languages.

Several factors justify limiting the choice of second language.

Firstly, the interests of the service require that new recruits should be immediately operational and capable of effectively performing the duties for which they were recruited in the field or role covered by the competition.

English, French and German are the languages most widely used in the institutions. Traditionally they are the languages used in meetings of members of the institutions. They are also the languages used most often for communication both in-house and with the outside world. This is borne out by statistics on the source languages of the texts translated by the institutions' translation services.

Given the institutions' actual language requirements for the purposes of internal and external communication, one selection criterion under the first paragraph of Article 27(1) of the Staff Regulations must be a satisfactory knowledge of one of these three languages, which must be tested by simulating a realistic working situation. Knowledge of a third language as provided for in Article 45(2) of the Staff Regulations cannot be a substitute for knowledge of one of the three languages at the time of recruitment.

Secondly, limiting the languages for the subsequent stages of competitions is justified by the nature of the tests involved. In line with Article 27 of the Staff Regulations, the appointing authorities of the institutions decided to modify the selection procedures by introducing from 2010 onwards methods of assessment based on competences so as to be able to predict better whether candidates are capable of performing their duties.

A substantial body of scientific research has shown that assessment centres, simulating real-life working situations, are the best predictor of real-life performance. As the most effective method of assessment, they are used worldwide. Given the length of careers and the degree of mobility within the institutions, this kind of assessment is crucial. With the help of a competency framework defined by the appointing authorities, a number of suitable exercises are chosen to assess the competences being sought. To ensure that candidates can be assessed fairly and can communicate directly with assessors

and the other candidates taking part in an exercise, applying this method requires, in particular, that the assessment centre be conducted in a lingua franca or, in certain circumstances, in the one main language of the competition. In the former instance, the lingua franca has to be chosen from the languages that candidates are most likely to know.

Given this premise, everything must be done to avoid discrimination between candidates; hence everyone has to be tested in their second language. But as that language must also be a lingua franca, the choice of second language must be limited. Since the traditional usage referred to above is still the current practice in-house, that choice has to be between English, French and German. The assessment centres do not involve assessing candidates' knowledge of the language; a satisfactory knowledge of one of the three as a second language is quite sufficient to be able to take the tests (this is in line with the minimum requirements laid down by Article 28 of the Staff Regulations). This level of language knowledge is not in any way disproportionate given the real needs of the service as described above.

Use of English, French or German as the chosen second language in the later stages of competitions does not entail any discrimination on the basis of mother tongue. It is not a restriction on the use of the mother tongue. The obligation on candidates to choose a second language (English, French or German) that is different from their first (normally mother tongue or equivalent) ensures that they can be compared on an equal footing. It should also be noted that possessing a sufficient knowledge of the second language depends essentially on a personal effort by candidates.

This requirement is, in any case, proportionate in view of the real needs of the service. Limiting the second language options reflects what languages people in Europe currently know. Not only are English, French and German the languages of several Member States of the European Union, they are also the foreign languages most widely known. They are the languages most often learned as foreign languages and the languages that people think are the most useful to learn. The actual requirements of the service thus seem to be a reasonable reflection of the language skills that candidates can be expected to have, especially since language knowledge in the strict sense (errors of grammar, spelling, or vocabulary) is not assessed in the competence tests. Limiting the choice of second language to English, French or German does not, therefore, pose a disproportionate barrier for people wishing to take competitions. Indeed, to go by the information available, it closely matches what people are used to and expect.

The relevant statistics bear out the conclusion that limiting the second language options for certain stages of competitions is proportionate and non-discriminatory. For instance, English, French or German were the most frequent choices when candidates were given the option of choosing their second language from among the 11 official languages in the major generalist EU-25 competitions for administrators and assistants in 2005. The statistics for competitions after the 2010 reform show no bias in favour of nationals of the countries where English, French or German are official languages. And the statistics for the AD 2010 round of competitions show that substantial numbers of candidates still chose one of the three as their second language.

For the same reasons, it seems reasonable to require candidates to choose one of these three for communicating with EPSO and filling in the talent screener.

Consequently, in seeking a balance between the interests of the service and candidates' abilities, certain tests should be held in a limited number of European Union languages, both to ensure that successful candidates possess adequate knowledge of a combination of languages that will enable them to carry out their duties effectively and so that selection methods based on an assessment of performance can be applied. Since the competition notices and guides for candidates are published in the 24 languages of the Union and since candidates can take the important first phase of competitions in whichever of those 24 languages they choose as their mother tongue, a fair balance would seem to have been found between the interests of the service and the principle of multilingualism and non-discrimination by language.



A case-by-case choice should therefore be made in line with the language arrangements adopted by the EPSO Management Board and the institutions' specific need to be able to recruit candidates who will be operational immediately.

Thus there are two possible general cases:

- First, general profiles or specific profiles where the main factor in selection, besides the general competences, is expertise or experience in a particular field or job. Here, the essential requirement is to be able to work and communicate in a multilingual context where the need to have a command of the languages most widely used in the institutions justifies limiting the choice of European Union languages in the selection procedure.
- Second, profiles where knowledge of one or more languages is of particular importance, for example linguists or other profiles where the selection procedures are organised by language. Here, besides assessment of the general competences as indicated above in the first scenario, other tests of specific competences have to be organised in the language(s) in question.

Even taking this approach, any decision limiting the number of languages in competitions should allow for consideration of the issue in the case of each individual competition so as to reflect the specific needs of the institutions as regards the profile(s) in question.'

- 12 On 13 March 2014, EPSO published in the *Official Journal of the European Union* the notice of open competition EPSO/AD/276/14 to constitute a reserve list of administrators (OJ 2014 C 74 A, p. 4). On 6 November 2014, EPSO published in the *Official Journal of the European Union* the notice of open competition EPSO/AD/294/14 to constitute a reserve list of administrators in the field of data protection for the European Data-protection Supervisor (OJ 2014 C 391 A, p. 1). These are the competition notices which the present actions seek to have annulled (together, 'the contested notices').
- 13 The introductory section of each of the contested notices states that the General Rules are 'an integral part' thereof.
- 14 The eligibility requirements for the competitions to which the contested notices relate include a thorough knowledge of one of the official languages of the European Union, referred to as 'language 1' of the competition, and a satisfactory knowledge of a second language, referred to as 'language 2' of the competition, to be chosen by the candidates from German, English or French. They make clear that language 2 must be different from the language chosen by the candidate as language 1 (part III, paragraph 2.3 of the contested notices).
- 15 Information concerning the limitation on the choice of language 2 to the three languages mentioned above is provided in paragraph 2.3 of part III of the contested notices. In that respect, notice of open competition EPSO/AD/276/14 states:

'In the light of the judgment [of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752)] the EU institutions wish to state the reasons for limiting the choice of the second language in this competition to a small number of official EU languages.

Candidates are informed that the second language options in this competition have been defined in line with the interests of the service, which require new recruits to be immediately operational and capable of communicating effectively in their daily work. Otherwise the efficient functioning of the institutions could be severely impaired.

It has long been the practice to use mainly English, French, and German for internal communication in the EU institutions and these are also the languages most often needed when communicating with the outside world and dealing with cases. Moreover, English, French and German are the most common second languages in the European Union and the most widely studied as a second language. This confirms what is currently expected of candidates for European Union posts in terms of their level of education and professional skills, namely that they have a command of at least one of these languages. Consequently, in balancing the interests and needs of the service and the abilities of candidates, and given the particular field of this competition, it is legitimate to organise tests in these three languages so as to ensure that all candidates are able to work in at least one of them, whatever their first official language. Assessing specific competencies in this way allows the institutions to evaluate candidates' ability to be immediately operational in an environment that closely matches the reality they would face on the job.

For these same reasons, it is reasonable to limit the language of communication between candidates and the institution, including the language in which applications are to be drafted. Furthermore, this ensures uniformity when comparing candidates and checking their application forms.

To ensure equal treatment for all candidates, everyone — including those whose first official language is one of the three — must take some tests in their second language, chosen from among these three.

None of this affects the possibility of later language training to enable staff to work in a third language, as required under Article 45(2) of the Staff Regulations.'

- 16 Notice of open competition EPSO/AD/294/14 essentially provides the same information.
- 17 Part IV of the notice of open competition EPSO/AD/276/14 makes provision for admission tests on computer. These involve tests of verbal reasoning (test a), numerical reasoning (test b), abstract reasoning (test c) and situational judgement (test d). In paragraph 3 of that part of the notice, it is stated that the language of tests (a) to (c) is language 1 of the competition, while the language of test (d) is language 2 of the competition.
- 18 Part IV of the notice of open competition EPSO/AD/294/14 also makes provision for admission tests on computer. These involve tests of verbal reasoning (test a), numerical reasoning (test b) and abstract reasoning (test c). In paragraph 3 of that part of the notice, it is stated that the language of tests (a) to (c) is language 1 of the competition.
- 19 Part V of the notice of open competition EPSO/AD/294/14 sets out the procedure for admission to the competition and for selection based on qualifications. It makes clear that a check for compliance with the general and specific conditions and selection based on qualifications will be carried out initially on the basis of the information given by candidates in the application form. Candidates' responses to the questions concerning the general and specific conditions are to be processed to determine whether they can be included in the list of candidates who fulfil all the conditions for admission to the competition, in accordance with what is set out in part III of notice EPSO/AD/294/14. The selection board will then screen the candidates who fulfil the conditions for admission to the competition concerned on the basis of their qualifications to identify those whose profile, particularly as regards their diplomas and professional experience, best matches the duties and selection criteria set out in notice EPSO/AD/294/14. This selection is carried out solely on the basis of the information provided by the candidates in the 'Talent Screener' tab, using the marking system set out in paragraph (1)(b) of part V of notice EPSO/AD/294/14.
- 20 The selection criteria taken into consideration by the jury in the selection process based on qualifications are set out in paragraph 2 of part V of notice EPSO/AD/294/14 as follows:
  - '1. A university degree in European law.

2. A university degree including specialisation in the field of data protection.
  3. Certified training in data protection ... in addition to the qualifications required for admission to the competition.
  4. Professional experience of at least one year and a half in data protection, acquired in the European institutions, a national data protection authority, or national public administration, in addition to the experience required for admission to the competition.
  5. Professional experience in drafting opinions, decisions or conclusions before the Court of Justice of the European Union in relation to European law on data protection.
  6. Professional experience in drafting reports on prior checks, consultations and complaints relating to data protection.
  7. Professional experience in drafting opinions relating to European law on data protection ...
  8. Professional experience in investigations or audits analysing compliance of personal data handling with the regulations in force.
  9. Professional experience in up-to-date information and communication technologies (ICT) in order to be able to assess their impact on data protection.'
- 21 The last stage of the selection procedures to which the contested notices relate involves an 'assessment centre' (part V of notice EPSO/AD/276/14; part VI of notice EPSO/AD/294/14).
- 22 In paragraph 3 of part V of notice EPSO/AD/276/14, it is stated that the language of the assessment centre is language 2 of the competition.
- 23 According to paragraph 2 of part VI of notice EPSO/AD/294/14, at the assessment centre, candidates will sit three types of tests aimed at assessing:
- their reasoning abilities, by means of a verbal reasoning test (test (a)), a numerical reasoning test (test (b)) and an abstract reasoning test (test (c)).
  - their specific competencies, by means of a structured interview on their competencies in the field (test (d)).
  - their general competencies by means of a case study (test (e)), a group exercise (test (f)), a structured interview test (g)).
- 24 Furthermore, paragraph 3 of part VI of notice EPSO/AD/294/14 states that the assessment centre languages will be language 1 of the competition for tests (a) to (c) and language 2 of the competition for tests (d) to (g).

### **Procedure and forms of order sought**

- 25 By application lodged at the Court Registry on 23 May 2014, the Italian Republic brought the action in Case T-353/14. It claims that the Court should:
- annul competition notice EPSO/AD/276/14;
  - order the Commission to pay the costs.



- 26 The Commission contends that the Court should:
- dismiss the action as unfounded;
  - order the Italian Republic to pay the costs.
- 27 By application lodged at the Court Registry on 15 January 2015, the Italian Republic brought the action in Case T-17/15.
- 28 By document lodged at the Court Registry on 30 April 2015, the Republic of Lithuania sought leave to intervene in the proceedings in support of the form of order sought by the Italian Republic. By order of 1 June 2015 the President of the Eighth Chamber of the General Court granted the Republic of Lithuania leave to intervene. The Republic of Lithuania lodged its statement in intervention on 13 July 2015.
- 29 In Case T-17/15, the Italian Republic claims that the Court should:
- annul notice EPSO/AD/294/14;
  - order the Commission to pay the costs.
- 30 The Republic of Lithuania supports the claim of the Italian Republic for the annulment of the contested notice in Case T-17/15.
- 31 The Commission contends that the Court should:
- dismiss the action as unfounded;
  - order the Italian Republic to pay the costs;
  - order the Republic of Lithuania to bear its own costs.
- 32 On a proposal from the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral part of the proceedings in the present cases and to join them for the purposes of that oral part. In the context of the measures of organisation of procedure under Article 89 of the Rules of Procedure of the General Court, the Court called upon the Commission to answer certain questions in writing. The Commission did so within the prescribed time-limit.
- 33 The main parties presented oral argument and their answers to the questions put by the Court at the hearing on 17 March 2015, which the Republic of Lithuania did not attend.

## Law

- 34 After the main parties presented their arguments at the hearing, the Court decided to join the present cases for the purposes of the final decision, pursuant to Article 68 of the Rules of Procedure.
- 35 In support of its actions, the Italian Republic relies on seven pleas in law, alleging (i) infringement of Articles 263, 264 and 266 TFEU; (ii) infringement of Article 342 TFEU and Articles 1 and 6 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59), as amended; (iii) infringement of Article 6(3) EU, Article 18 TFEU, Article 22 of the Charter of Fundamental Rights of the European Union, Articles 1 and 6 of Regulation No 1, Article 1d(1) and (6), the second paragraph of Article 27 and Article 28(f) of the Staff Regulations, and Article 1(2) and (3) of Annex III to the Staff

Regulations; (iv) infringement of Article 6(3) EU and the principle of the protection of legitimate expectations; (v) misuse of powers and infringement of the ‘substantive rules concerning the nature and purpose of competition notices’, particularly Article 1d(1) and (6), the second paragraph of Article 27, Article 28(f), Article 34(3) and Article 45(1) of the Staff Regulations, and infringement of the principle of proportionality; (vi) infringement of Article 18 TFEU, the fourth paragraph of Article 24 TFEU, Article 22 of the Charter of Fundamental Rights, Article 2 of Regulation No 1 and Article 1d(1) and (6) of the Staff Regulations; and (vii) infringement of the second paragraph of Article 296 TFEU, Articles 1 and 6 of Regulation No 1, Article 1d(1) and (6) and Article 28(f) of the Staff Regulations, Article 1(1)(f) of Annex III to the Staff Regulations and the principle of proportionality, as well as ‘distortion of the facts’.

- 36 It must be stated that, by those pleas, the Italian Republic challenges the legality of two aspects of the language rules for the competitions covered by the contested notices, as established, according to the Italian Republic, by those notices. It thus challenges the provisions of the contested notices which limit to German, English and French, first, the choice of the second language of those competitions and, secondly, the choice of the language which may be used in communications between candidates and EPSO.
- 37 Before examining, in the light of the pleas raised by the Italian Republic, the legality of the two aspects of the contested notices disputed by Italy, it is necessary to examine the plea raised by the Commission in its defence that each of the present actions is inadmissible, although it did not formally raise an objection of inadmissibility.

#### *Admissibility*

- 38 In its statements in defence, the Commission contends that, in the present case, the Italian Republic did not take into account the publication, in the *Official Journal of the European Union*, of the General Guidelines which part III of the contested notices merely implements, and that the Italian Republic never challenged, either as a primary or as a secondary claim, those General Guidelines. The Italian Republic’s complaints must therefore be rejected as inadmissible, ‘since the General Guidelines were not challenged in good time’.
- 39 In its replies, the Italian Republic argues that both the General Guidelines and the General Rules are acts of an internal nature, which do not fall within any category of acts which can be reviewed independently for the purposes of Article 263 TFEU. In that respect, the General Rules do not differ from the ‘guide to the competitions’ which preceded them. Their content, thus, has legally binding force only once it has actually been incorporated into a competition notice. More specifically, the General Rules published in series C of the *Official Journal of the European Union* do not identify their legal basis, something which is indispensable for secondary legislation with immediate binding effects. It submits that the General Rules do not have legally binding force independently of the competition notices to which they refer.
- 40 Furthermore, it is made clear in the General Guidelines that it is only ‘as a general rule’ that the second language of the candidates must be chosen from English, German and French. Accordingly, the Italian Republic concludes that, since the language rules for the competition covered by the notice are set down in that notice, it was not able to challenge the notice by seeking annulment of the General Guidelines.
- 41 In its rejoinders, the Commission contends that the criteria mentioned by the Italian Republic concern purely formal aspects and do not have any connection with the effects of the contested notices. It submits that there is only one set of legally binding regulations on the languages to be used in

competitions — totally independent of the contested notices — and these are the regulations in the General Guidelines and the General Rules. The contested notices are adopted ‘strictly in accordance’ with the General Guidelines and merely ‘confirm the provisions’ of those guidelines.

- 42 The Court infers from the arguments advanced by the Commission in its statements of defence, and elucidated in its rejoinders and at the hearing, that its plea of inadmissibility is based on the premiss that the contested notices are either measures which confirm or merely implement the General Rules and the General Guidelines. In order to reply to the Commission’s arguments, it is therefore necessary to examine the nature and legal scope of those texts.

#### The nature and legal scope of the General Rules and the General Guidelines

- 43 At the hearing, the Italian Republic submitted that the General Rules and the General Guidelines were mere communications which have a binding effect only as regards their author, that is to say, EPSO, by placing a limit on its discretionary power. The Italian Republic further claimed that, if the view were to be taken that the General Rules and the General Guidelines established binding rules, applicable in a general and abstract manner to the competitions organised by EPSO, they would amount to measures adopted by an authority which does not have the power to impose such rules.
- 44 For its part, the Commission explained at the hearing that, in adopting the General Rules and the General Guidelines, EPSO, on behalf of the institutions of the European Union, had defined clear, objective and foreseeable criteria relating to the choice of the second language in the competitions which it organised, for the purposes of paragraph 91 of the judgment of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752). EPSO adopted those measures relying on Articles 29 and 30 of the Staff Regulations and Annex III to the Staff Regulations which grant it the power to organise competition procedures. Moreover, those texts contain a brief assessment of the linguistic needs of the institutions.
- 45 On reading the General Rules and the General Guidelines, the Court notes that, as the Commission observed, the criteria concerning the choice of second language of the competitions organised by EPSO and the language of communication between the candidates and EPSO stem from those texts. It can be inferred from the General Rules that that choice must be made having regard to the practices in the EU institutions concerning internal and external communications and file management, the interests of the service and the needs arising from the organisation of competitions and the assessment of candidates (see paragraph 5).
- 46 The same applies for the General Guidelines. In particular, that text also makes reference to the interests of the service, the practices in the EU institutions, the actual needs of the services of those institutions, the nature of the tests which ensure that candidates are properly assessed, the language skills of the European public in general and, finally, the choices of languages made by candidates for competitions previously organised by EPSO (see paragraph 11 above).
- 47 Nevertheless, it must be stated that the above texts do not merely set out such criteria. The General Rules and the General Guidelines also include a series of assessments according to which the choice of the second language of the competitions organised by EPSO and the language of communication between EPSO and the candidates is to be limited to German, English and French. The Commission contends, in essence, that those assessments present the language rules which should, in principle, apply in those competitions, if the criteria set out in the General Rules and the General Guidelines were applied when they were adopted, without making any reference to particular competition procedures.

- 48 It is therefore necessary to answer the question whether, in the light of the assessments referred to in paragraph 47 above, the General Rules and the General Guidelines must be interpreted as establishing binding rules by laying down the languages to be used for all competitions organised by EPSO.
- 49 Such an interpretation of those texts cannot be accepted. In accordance with the case-law, in order to assess whether the texts in question are intended to establish such binding rules, it is necessary to examine their content (see, to that effect and by analogy, judgment of 20 May 2010, *Germany v Commission*, T-258/06, EU:T:2010:214, paragraph 27 and the case-law cited). In the absence of specific or new obligations being established, the mere publication of a communication is not sufficient to conclude that that communication constitutes a measure capable of producing binding legal effects (see, to that effect and by analogy, judgment of 20 May 2010, *Germany v Commission*, T-258/06, EU:T:2010:214, paragraph 31).
- 50 It is clear from the actual wording of those texts that, in publishing them, EPSO has not definitively decided on the language rules for all competitions which it is responsible for organising. In spite of the assessments referred to in paragraph 47 above, the General Rules and the General Guidelines expressly reserve the choice of the language rules for each competition to the competition notice which will be adopted when the procedure to which it refers is opened.
- 51 Thus, while point 1.3 of the General Rules states that the choice of the second language and of the language in which the application forms will be drafted ‘will normally be limited to English, French or German’, it nevertheless also states that that will be the case ‘unless otherwise specified in the competition notice’ (see paragraphs 3 and 4 above).
- 52 The General Guidelines are worded in similar terms. Although that text states that, as a general rule, the second language of the competitions and the language of communication between EPSO and the candidates will be English, French or German, it nevertheless also makes clear that, even in such a context, ‘any decision limiting the number of languages in competitions should allow for consideration of the issue in the case of each individual competition so as to reflect the specific needs of the institutions’ (see paragraph 11 above). Therefore, the view cannot be taken that the texts at issue in the present case create specific or new obligations, for the purposes of the case-law (see, to that effect and by analogy, judgment of 20 May 2010, *Germany v Commission*, T-258/06, EU:T:2010:214, paragraph 28 and the case-law cited).
- 53 Moreover, and in any event, the assessments referred to in paragraph 47 above cannot be interpreted as establishing language rules applicable to all competitions organised by EPSO, given that no provision has conferred on EPSO or the College of the Heads of Administration the power to establish such rules of general application or to adopt, in that regard, basic rules which a competition notice may avoid only in exceptional cases (see, to that effect and by analogy, judgment of 29 November 2011, *Birkhoff v Commission*, T-10/11 P, EU:T:2011:699, paragraphs 30 and 31 and the case-law cited).
- 54 In that regard, as was pointed out in paragraph 1 above, under Article 2(1) and (2) of Decision 2002/620, EPSO is to exercise the powers of selection conferred by the first paragraph of Article 30 of the Staff Regulations and by Annex III to the Staff Regulations on the appointing authorities of the institutions signing the decision at issue and of the bodies, offices or agencies of the European Union, on request by the latter.
- 55 None of those provisions or those relied on by the Commission (see paragraph 44 above) give EPSO the power to lay down general and abstract binding rules governing future competitions organised on the basis of the provisions of the Staff Regulations.



- 56 It is true that, under Article 7(1) of Annex III to the Staff Regulations, the institutions, after consultation of the Staff Regulations Committee, are to entrust EPSO with responsibility for taking the necessary measures to ensure that uniform standards are applied in the selection procedures for officials. However, first, in paragraph 2(a) and (b) of that article, it is made clear that, as regards the selection procedures for officials, EPSO's tasks are limited to organising open competitions and providing technical support for internal competitions organised by the institutions, at the request of the latter. Secondly, it must be noted that the above provision merely entrusts EPSO with responsibility for taking measures to implement uniform standards, and not responsibility for adopting general and abstract binding standards. In any event, even if that were to be the case, the Commission has not, either in its written pleadings or at the hearing, referred to a measure of the institutions by which, after consultation of the Staff Regulations Committee, they entrusted EPSO with responsibility for establishing general and abstract binding rules on languages to be used in competitions organised by EPSO.
- 57 Although the provisions referred to in paragraphs 54 to 56 do not give EPSO the power to lay down binding rules on the languages to be used for competitions which it organises, EPSO, for the purposes of ensuring equal treatment and legal certainty, is not precluded from adopting and publishing measures such as the General Rules and the General Guidelines setting out how it intends to make use, in certain circumstances, of the discretion which those provisions confer on it. Nevertheless, EPSO is bound by those texts only insofar as they do not depart from the rules of general application governing its powers and provided that, in adopting those texts, it does not give up the power conferred on it in the assessment of the needs of the institutions and bodies of the European Union, including their linguistic needs, when organising the various competitions (see, to that effect and by analogy, judgment of 8 March 2016, *Greece v Commission*, C-431/14 P, EU:C:2016:145, paragraphs 69 and 71 and the case-law cited).
- 58 In the light of the foregoing, the Court concludes that the General Rules and the General Guidelines must be interpreted as constituting, at most, communications, for the purposes of paragraph 91 of the judgment of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752), which set out criteria by which EPSO intends to choose the language rules for the competitions which it is responsible for organising.
- 59 It is in the light of those conclusions that the Court must examine the legal nature of the contested notices in order to rule on the admissibility of the present action.

#### The legal nature of the contested notices

- 60 As stated in paragraph 42 above, the Commission submits that the contested notices are measures which either confirm or merely implement the General Rules and the General Guidelines.
- 61 In that regard, it must be recalled, in the first place, that, as is apparent from the first paragraph of Article 263 TFEU, an action for annulment is available in the case of all measures adopted by the institutions of the European Union, whatever their nature or form, which are intended to have legal effects (see judgment of 6 April 2000, *Spain v Commission*, C-443/97, EU:C:2000:190, paragraph 27 and the case-law cited), that is to say, which bring about a change to the legal situation as it existed before they were adopted (see, to that effect, judgment of 29 June 1995, *Spain v Commission*, C-135/93, EU:C:1995:201, paragraph 21).
- 62 It is clear from that case-law that any measure not producing legal effects which are binding on and capable of affecting the interests of the individual, such as confirmatory measures and implementing measures, falls outside the scope of judicial review provided for in Article 263 TFEU (see, to that effect, order of 14 May 2012, *Sepracor Pharmaceuticals (Ireland) v Commission*, C-477/11 P, not published, EU:C:2012:292, paragraph 52 and the case-law cited).



- 63 More specifically, as regards confirmatory measures, it is clear from settled case-law that a measure is regarded as being a mere confirmation of an earlier individual measure where it contains no new factors by comparison with that earlier measure and was not preceded by any re-examination of the situation of its addressee (see, to that effect, judgments of 7 February 2001, *Inpesca v Commission*, T-186/98, EU:T:2001:42, paragraph 44; of 6 May 2009, *M v EMEA*, T-12/08 P, EU:T:2009:143, paragraph 47, and of 15 September 2011, *CMB and Christof v Commission*, T-407/07, not published, EU:T:2011:477, paragraph 89). Moreover, that case-law can be transposed to the case of measures which may not be regarded as individual measures (see, to that effect, judgment of 13 November 2014, *Spain v Commission*, T-481/11, EU:T:2014:945, paragraphs 28 and 29 and the case-law cited), such as a regulation or a competition notice (see judgment of 17 December 2015, *Italy v Commission*, T-295/13, not published, EU:T:2015:997, paragraph 76 and the case-law cited).
- 64 As regards implementing measures, the Court takes the view that such measures do not give rise to any rights or obligations for third parties, but arise in the context of the implementation of an earlier measure which is intended to produce binding legal effects, where all the elements of the rule expressed by that earlier measure have already been defined and adopted (see, to that effect, judgment of 20 November 2008, *Italy v Commission*, T-185/05, EU:T:2008:519, paragraphs 51 to 53 and the case-law cited; see also, to that effect and by analogy, opinion of Advocate General Cruz Villalón in *Commission v Parliament and Council*, C-427/12, EU:C:2013:871, point 63).
- 65 In the second place, it must be recalled that, by virtue of Article 1(1)(e) of Annex III to the Staff Regulations, a competition notice, such as the contested notices, must specify, in the case of a competition based on tests, what kind of tests they will be and how they will be marked. According to settled case-law, the terms of the competition notice constitute both the legal framework and the basis for assessment for the selection board. Furthermore, the essential function of a notice of competition is to give those interested the most accurate information possible about the conditions of eligibility for the post in question, so as to enable them to judge whether they should apply for it (see judgment of 17 December 2015, *Italy v Commission*, T-295/13, not published, EU:T:2015:997, paragraph 49 and the case-law cited).
- 66 Therefore, each competition notice is adopted with a view to introducing rules on the conduct of one or more particular competitions, the regulatory framework of which is laid down in that notice in accordance with the objective set by the appointing authority. It is that regulatory framework, set up, where appropriate, in accordance with the rules of general application on the conduct of competitions, which governs the competition procedure from publication of the notice in question until publication of the reserve list containing the names of the successful candidates in the competition concerned (see judgment of 17 December 2015, *Italy v Commission*, T-295/13, not published, EU:T:2015:997, paragraph 50).
- 67 In the light of the above, the Court holds that a competition notice, such as the contested notices, which, by taking into account the specific needs of the institutions or bodies of the European Union concerned, introduces the regulatory framework for a particular competition, including its language rules, and thus has independent legal effects, cannot, in principle, be regarded as a measure which confirms or merely implements earlier measures. Although the appointing authority, as appropriate, when carrying out its tasks of adopting a competition notice, must respect or apply rules set out in earlier measures of general application, the regulatory framework of each competition must, nevertheless, be established and specified by the relevant competition notice which thus explains the conditions of eligibility for the post or posts in question.
- 68 In any event and even if a competition may, in principle, be a measure which confirms or merely implements measures which preceded it, it is clear from the case-law cited in paragraphs 62 and 63 above that a measure may be viewed as confirming or merely implementing an earlier measure only if the latter is intended to have legal effects. As was pointed out in paragraphs 48 to 57 above, that is not the case with the General Rules and the General Guidelines.

- 69 It was concluded in paragraph 58 above that the General Rules and the General Guidelines must be interpreted as constituting, at most, communications, for the purposes of paragraph 91 of the judgment of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752), which set out criteria by which EPSO intends to choose the language rules for each of the competitions which it is responsible for organising.
- 70 In the light of the foregoing, the Court concludes that the contested notices constitute measures which have binding legal effects as regards the language rules for the competitions in question, and therefore constitute acts which are open to challenge. The fact that, when they were adopted, EPSO took into consideration criteria set out in the General Rules and in the General Guidelines, which the contested notices expressly refer to (see paragraph 13 above), cannot call into question that conclusion.
- 71 Therefore, the Court dismisses the Commission's plea of inadmissibility and will proceed with the examination of the present actions on the merits.

...

On those grounds,

THE GENERAL COURT (Eighth Chamber),

hereby:

- 1. Joins Cases T-353/14 and T-17/15 for the purposes of the judgment;**
- 2. Annuls the notice of open competition EPSO/AD/276/14 to constitute a reserve list of administrators and the notice of open competition EPSO/AD/294/14 to constitute a reserve list of administrators in the field of data protection for the European Data-protection Supervisor;**
- 3. Orders the European Commission to bear its own costs and to pay those incurred by the Italian Republic;**
- 4. Orders the Republic of Lithuania to bear its own costs relating to its intervention in Case T-17/15.**

Gratsias

Kancheva

Wetter

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]