Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 22 January 2020 [1]

Case C-114/19 P

European Commission
v

Danilo Di Bernardo

(Appeal – Civil service – Open competition – Non-inclusion on the reserve list – Conditions relating to qualifications and minimum of three years' professional experience – Possibility of supplementing an inadequate statement of reasons before the court – Conditions – Action for annulment)

I. Introduction

1. By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 29 November 2018, in *Di Bernardo* v *Commission* (T-811/16, not published, EU:T:2018:859; 'the judgment under appeal'), annulling the decision of 10 August 2016 of the selection board in the open competition on the basis of tests EPSO/AST-SC/03/15 not to include Mr Danilo Di Bernardo on the reserve list for the recruitment of secretaries/clerks at grade SC 1 in the field of financial support ('the decision at issue').

2. This case will afford the Court of Justice an opportunity to clarify its case-law on the Commission's obligation, under the second paragraph of Article 296 TFEU, to provide an adequate statement of reasons in the administrative decisions it adopts in respect of individuals, in particular in the context of a competition. The Court will also have occasion to address the question of whether the General Court is bound to take into consideration additional information provided by the Commission during annulment proceedings in order to 'supplement' the reasons given for an administrative decision of that nature.

II. Background to the dispute

3. The facts, as apparent from the judgment under appeal, can be summarised as follows.

[1] Original language: French.

4. The substantive dispute concerns the competition referred to above, the notice of which was published by the European Personnel Selection Office ('EPSO') in the *Official Journal of the European Union* of 8 January 2015 (OJ 2015 C 3A, p. 1; 'the competition notice').

5. The competition notice has three annexes, each of which sets out the nature of the duties and the qualifications and professional experience required for one of the three fields of the competition notice, that is to say, administrative support, financial support and secretarial support.

6. Section II of the competition notice, entitled 'Duties', states as follows:

'The secretaries and clerks (AST SC function group) carry out clerical and secretarial tasks, office management and other equivalent tasks requiring a certain degree of autonomy. The specific duties to the fields sought are described in the annexes.'

7. Point 1, entitled 'Nature of the duties', of Annex II to the competition notice describes the nature of the duties to be performed by successful candidates in the field of financial support and provides as follows:

'The institutions are looking for staff to carry out support tasks in the field of budget and financial management.

The position concerned is that of financial support agent. These agents provide financial administrative support within the departments or units of the institutions.

The tasks are varied and may include:

– handling budget implementation files in compliance with financial rules in force (administrative monitoring of invitations to tender, preparation of contracts, monitoring of related transactions, etc.),

– bookkeeping,

– checking invoices,

– recording and monitoring of validation of transactions (commitment proposals, payment orders, recovery orders, data relating to contracts and contractors, etc.),

– handling invoicing and collection schedules,

– handling financial files, including correspondence, filing and archiving.

These duties require a thorough knowledge of IT tools such as word-processing, spreadsheets, and the use of accounting software.'

8. The competition eligibility requirements are defined in Section III of the competition notice. In addition to the general conditions set out in point 1 of Section III of the competition notice, point 2 of that section contains specific eligibility requirements including those relating to professional experience, and refers to the corresponding annexes.

9. The condition concerning the qualifications required in the financial support field is addressed in point 2 of Annex II to the competition notice which requires, inter alia, 'secondary education attested by a diploma giving access to post-secondary education, followed by at least three years' professional experience mostly related to the nature of the duties.'

10. Section VI of the competition notice, entitled 'Verification of the information given by candidates', states as follows in the first and third paragraphs:

'Following the assessment tests, the information given by candidates in their online application will be verified against the supporting documents they have provided; this will be done by EPSO for the general conditions, and by the selection board for the specific conditions.

…

If verification shows that the information given in your online application form is not borne out by appropriate supporting documents, you will be disqualified from the competition.'

11. On 21 January 2015, the defendant on appeal, Mr Di Bernardo, applied to participate in the competition at issue in the financial support field.

12. Mr Di Bernardo took part in the admission and assessment tests established by the competition notice and submitted the supporting documents evidencing his qualifications and professional experience, as required by point 1 of Section V of the competition notice.

13. By email of 14 September 2015, EPSO informed Mr Di Bernardo that the selection board wanted fuller information about the professional experience he had mentioned in entries 2, 5 and 6 on his application form. The selection board wanted in particular to obtain documents signed by his previous employers describing in detail the duties he performed as part of his professional experience, and copies of his employment contracts, clearly indicating the start and end dates of those contracts.

14. By email of 15 September 2015, Mr Di Bernardo sent additional supporting documents relating to entries 2, 5 and 6 on his application form.

15. By email of 17 September 2015, EPSO replied to Mr Di Bernardo, stating that the selection board was 'asking him to send a detailed description of the tasks signed by his employer for entries 2, 5 and 6'.

16. By email of 18 September 2015, Mr Di Bernardo stated that he did not have any such descriptions for entries 5 and 6 on his application form. He indicated that the Italian company that had employed him had been wound up and that he was not in a position to provide those documents. He then submitted copies of the Italian national collective agreements (contratto collettivo nazionale di lavoro), which contained an official description of the duties associated with various employment contracts, including his own, as well as two letters from the Italian company in question and an employment contract with that company.

17. By another email of 18 September 2015, Mr Di Bernardo sent EPSO a detailed description of the duties relating to the professional experience indicated in entry 2 on his application form.

18. By letter of 27 October 2015, EPSO informed Mr Di Bernardo of its decision not to include him on the list of successful candidates, on the grounds that he did not satisfy all the eligibility criteria established in Annex II to the competition notice. Specifically, it informed him that the professional experience referred to in entries 1 to 7 on his application form did not amount to the minimum of three years mostly related to the nature of the duties as indicated in point 2 of Annex II to the competition notice.

19. By email of 4 November 2015, Mr Di Bernardo requested a review of the selection board's decision.

20. By email of 6 April 2016, Mr Di Bernardo contacted EPSO to find out what stage his request for review had reached, more than five months after it was filed.

21. By email of 8 April 2016, EPSO informed Mr Di Bernardo that the review procedure was still taking place.

22. By letter of 8 July 2016, EPSO issued a response to Mr Di Bernardo's request for review.

23. By email of 14 July 2016, Mr Di Bernardo observed to EPSO that the response of 8 July 2016 manifestly did not reflect the facts of his situation.

24. By letter of 10 August 2016, the selection board confirmed to Mr Di Bernardo that the 8 July 2016 response had been sent as the result of an administrative error, and informed him that that letter, that is to say, the letter of 10 August 2016, was the real decision made by the board following the request for review, by which the board confirmed its initial decision not to include him on the list of successful candidates.

25. By the decision at issue, the board informed Mr Di Bernardo that after a review, it was confirming the decision it had notified by letter of 27 October 2015. It stated that, before beginning its work, it had defined certain selection criteria, so that it could assess whether the candidates' qualifications and professional experience actually corresponded to the competencies required for the posts to be filled. The board informed Mr Di Bernardo that, 'after examining the supporting documents submitted to evidence [his] professional experience mentioned in entries 2, 5 and 6 of [his] application form, [it had] found that those documents did not confirm that [his] professional experience in question [had] been mostly related to the nature of the duties, as required by the competition notice'.

III. The procedure before the General Court and the judgment under appeal

26. By a document received at the Registry of the General Court on 18 November 2016, Mr Di Bernardo brought an action seeking annulment of the decision at issue, compensation for his loss and that the Commission be ordered to pay the costs.

27. In its defence of 3 February 2017, the Commission sought an order dismissing the action and ordering Mr Di Bernardo to pay the costs.

28. In its judgment of 29 November 2018, the General Court annulled the decision rejecting Mr Di Bernardo's application, on the grounds that it did not adequately state reasons and rejected the remainder of the forms of order sought in the application.

29. In support of his action against the board's decision, Mr Di Bernardo advanced two pleas in law, the first alleging that it was vitiated by manifest errors of assessment, and the second alleging infringement of the obligation to state reasons, in particular because he had never been informed of the selection criteria established by the board to assess whether candidates satisfied the eligibility requirement at issue.

30. The General Court began its analysis by examining the second plea in law, taking the view that the existence of an adequate statement of reasons in the decision at issue was a precondition for examining the first plea in law.

31. That court noted in paragraph 35 of the judgment under appeal that, according to settled case-law, the purpose of the obligation to state the reasons on which an adverse decision is based is to provide the person concerned with sufficient information to ascertain whether the act was well founded or whether it was vitiated by a defect which might permit its legality to be contested and to enable the EU courts to review the legality of the decision being contested.

32. That court also noted in paragraphs 37 and 38 of the judgment under appeal that, according to settled case-law, it was only where the contested decision contained at least the initial elements of a statement of reasons before it was appealed that the authority was entitled to provide additional information during the proceedings and discharge its obligation to state reasons. In the present case, the General Court found that the statement of reasons for the decision at issue that was communicated to Mr Di Bernardo before that decision was appealed was neither adequate nor completely lacking, describing it as an 'almost complete' lack of a statement of reasons. It took the view that an 'almost complete' lack of a statement of reasons, in the same way as a 'complete lack of a statement of reasons', could not be remedied by reasons communicated after the decision was appealed.

33. In its analysis, in paragraphs 41 to 45 of the judgment under appeal, of the contents of the decision not to place a candidate on the reserve list, as supplemented by the considerations that the board expressed in the review decision, the General Court observed that the board provided only extremely brief reasons for the decision at issue rejecting Mr Di Bernardo's request for review. Besides the fact that the contents of the candidate selection criteria were not specified, this was apparent from the fact that the board merely stated that only three entries in Mr Di Bernardo's application form were irrelevant, that is to say, entries 2, 5 and 6, but gave no helpful indication about the rest of his application form.

34. In response to the argument that, given the board's workload, Mr Di Bernardo merely needed to request additional individual explanations from the board, the General Court found in paragraphs 46 and 47 of the judgment under appeal that, given the stage of the competition at which the decision at issue had been adopted, it was untenable to argue that the board was in a position that entitled it to give only brief reasons for the decision to disqualify his application.

35. In paragraphs 49 and 50 of the judgment under appeal, that court then examined the contents of the request for review and, after summarising those contents, noted, first, that the board could not decline to give specific explanations to Mr Di Bernardo at first instance solely on the grounds that he had not expressly requested individual explanations. According to that court, since he did not know the selection criteria on the basis of which any such request for individual explanations would in principle have to be based, the mere fact that the applicant at first instance disputed the finding reached by the board in the decision to reject Mr Di Bernardo's application was in any event sufficient for it to be found that he had requested individual explanations.

36. The General Court took the view in paragraph 51 of the judgment under appeal that the decision at issue was vitiated by a failure to state reasons such that it failed to provide sufficient information in order, first, to enable Mr Di Bernardo to understand the reasons for that decision and to assess its legality and, secondly, to enable the EU courts to review its legality. The General Court observed that, at the time he lodged the application, Mr Di Bernardo was in fact unaware of the reasons that had led the jury to reach the decision at issue and the method it had used.

37. In paragraph 53 of the judgment under appeal, it applied the case-law according to which the decision at issue must contain at least the initial elements of a statement of reasons before it is appealed, and found that the reasons given in the decision at issue were extremely brief and incomplete, and that Mr Di Bernardo was accordingly unable to understand why the jury had concluded that he did not have the necessary professional experience. That being so, the General Court noted that during the proceedings before the General Court the Commission had only gradually provided the reasons for the decision at issue, necessary in order to assess its legality. The General Court noted that the Commission had submitted the selection criteria at a very advanced stage of the written phase of the proceedings, that is to say, annexed to its reply, and thereby deprived Mr Di Bernardo of any opportunity to put forward his arguments on the basis of those criteria. The General Court found that the selection criteria were nevertheless vital to determining whether the board had exceeded its discretion when analysing Mr Di Bernardo's professional experience.

38. It agreed with Mr Di Bernardo that he had not been in a position to advance, in the application, any plea in law alleging that the jury had infringed the competition notice, because he had not been informed of the selection criteria in good time. The General Court stated that it was nevertheless apparent from the wording of the competition notice that experience in the field of administrative support could, in principle, be taken into consideration, at least in part, as relevant experience.

39. It found that Mr Di Bernardo had correctly claimed that he could not effectively dispute the board's assessment of certain entries on his application form. It observed that, on the basis of the letter of 27 October 2015 and the decision at issue, Mr Di Bernardo could not reasonably be expected to know whether at least some of his professional experience had been recognised as relevant by the board and, if any had, which part, given that the Commission had acknowledged in its pleadings that Mr Di Bernardo had 31 months' relevant professional experience related to financial support.

40. The General Court upheld the second plea in law and annulled the decision at issue, and it was not necessary to examine Mr Di Bernardo's first plea in law.

IV. Procedure before the Court of Justice and forms of order sought

41. The Commission lodged this appeal on 8 February 2019 and it was lodged at the Registry of the Court of Justice on 14 February 2019. The Commission claims that the Court of Justice should:

– set aside the judgment under appeal;

– refer the case back to the General Court;

– reserve the costs incurred at first instance and on appeal.

42. Mr Di Bernardo filed a response on 24 May 2019, which was lodged at the Registry of the Court of Justice on 27 May 2019, in which he claimed that the Court should:

– dismiss the appeal;

– order the Commission to pay the costs.

43. By decision of 20 June 2019, the President of the Court of Justice held that it was not necessary to lodge a reply.

V. Legal analysis

A. Preliminary remarks

44. Before examining the various grounds of appeal, it should be recalled that, under the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, appeals are limited to points of law. That condition is satisfied in the present case, since the Commission is alleging, in essence, that the General Court infringed EU law by (B.) imposing excessive requirements as regards the statement of reasons for a decision adopted by it and by (C.) disregarding that court's obligation to take into consideration of its own motion the additional information supplied by the Commission in the annulment proceedings in order to 'supplement' the reasons for that decision. I will examine those grounds of appeal in that order, since the legal question underlying the second ground only arises if the General Court's assessment, that the decision at issue does not satisfy the requirements of the obligation to state reasons under EU law, is to be confirmed.

45. There are very divergent assessments of the facts in this case, in particular of the data in Mr Di Bernardo's application file and whether they are relevant for adoption of the decision at issue. It must nevertheless not be overlooked that, according to the distribution of competences between the two EU courts in relation to appeal proceedings, it is not for the Court of Justice to put in issue the assessment of the facts carried out by the General Court.[2] Nor may the analysis change the subject matter of the dispute by addressing aspects other than those that have been advanced,[3] such as whether the criteria set out in the evaluation matrix prepared by EPSO are appropriate for selecting suitable candidates and/or whether Mr Di Bernardo meets those criteria on the basis of his professional experience. The Court of Justice must therefore confine itself to examining the points of law referred to in the preceding paragraph.

B. The first ground of appeal

1. Arguments of the parties

46. By its first ground of appeal, the Commission alleges that the General Court erred in law, in paragraphs 41 to 53 of the judgment under appeal, when it defined the extent of the selection board's obligation to state reasons for refusing to include a candidate on the reserve list. It claims

[2] Judgment of 22 May 2008, *Evonik Degussa* v *Commission* (C-266/06 P, not published, EU:C:2008:295, paragraph 71).

[3] Judgment of 22 September 2016, *Pensa Pharma* v *EUIPO* (C-442/15 P, not published, EU:C:2016:720, paragraph 53).

that the General Court did not take the legal and factual context of the decision at issue sufficiently into consideration, whereas the adequacy of a statement of reasons must be assessed having regard to that context rather than to the wording of the decision alone.

47. First, according to the Commission, the selection criteria were not as important in terms of the obligation to state reasons as the General Court considered them to be in paragraphs 41, 45 and 50 of the judgment under appeal, as confirmed by the fact that Mr Di Bernardo at no time sought to know what they were.

48. Secondly, according to the Commission, the fact that in its refusal decision the board mentioned only the documents supporting Mr Di Bernardo's professional experience corresponding to entries 2, 5 and 6 on the application form does not in any way 'suggest', contrary to the General Court's finding in paragraph 43 of the judgment under appeal, that the board found the professional experience indicated by Mr Di Bernardo in the other entries to be relevant. On the contrary, its refusal of Mr Di Bernardo's application implies that the board found that he did not satisfy the requirement of 36 months' relevant professional experience after examining the professional experience referred to in the seven entries on his application form as a whole.

49. Thirdly, the General Court wrongly found, in paragraph 48 of the judgment under appeal, that the request for review indicated that Mr Di Bernardo was unaware of the reasons why his professional experience was insufficient.

50. Fourthly, the General Court wrongly found, in paragraphs 46 and 47 of the judgment under appeal, that the Commission could not rely on its case-law according to which, in a competition with a large number of candidates, it is permissible for the board initially to give only brief reasons for the refusal to select a candidate. Although the present case did indeed concern a competition with a large number of candidates, giving full reasons for the decision at issue would not have represented an unreasonable burden on the board, according to the General Court, given the stage at which the decision at issue was made.

51. Fifthly, in contrast to the General Court's finding in paragraph 50 of the judgment under appeal, the selection board cannot be required to disclose the selection criteria relating to documented qualifications where it has not received a request to do so, and would otherwise infringe the secrecy of the board's proceedings.

52. Sixthly, to find, as the General Court does in paragraphs 49 to 51 of the judgment under appeal, that an imprecisely worded request for review, such as that submitted by Mr Di Bernardo, obliges the board to provide detailed explanations for each entry would transfer to the selection board the burden of proving the professional experience required by the competition notice. That burden of proof in fact lies with the applicants, as can be seen from the competition notice which states that 'the information given by candidates in their online application will be verified against the supporting documents they have provided'.

53. Lastly, in paragraphs 53 to 55 of the judgment under appeal, the General Court, according to the Commission, confused the requirement to state reasons with the question of whether that statement of reasons is well founded, which goes to the substantive legality of the decision. According to the Commission, that confusion is indicated by the fact that, in paragraph 53 of the

judgment under appeal, the General Court found that the selection criteria were vital to determining whether the board had 'exceeded its discretion' when it analysed professional experience.

54. In response to the first ground in law, Mr Di Bernardo argues that the General Court did not extend the obligation to state reasons when it found that there was an 'almost complete' lack of a statement of reasons in the decision at issue.

55. First, the Commission has no grounds for claiming that the decision at issue was sufficiently reasoned before it was appealed. Indeed, according to the applicant, the statement of reasons for refusing to include him on the list of successful candidates, which merely reproduced the wording of the condition relating to professional experience, is in a standard form. The additional clarification, in the response to the request for review, that the supporting documents provided by the applicant did not confirm that the professional experience he referred to in entries 2, 5 and 6 on his application form was relevant, is likewise inadequate, since he was not informed of the selection criteria or given any information about the board's assessment of the other professional experience referred to in entries 1, 3, 4 and 7 of the application form.

56. Secondly, the General Court correctly found that the selection criteria communicated were not such as to supplement the statement of reasons of the decision at issue, since they were communicated at the stage of the reply, that is to say, at too late a stage in the proceedings to enable the person concerned to react to them on a basis of the principle of equality of arms.

57. Thirdly, the fact that Mr Di Bernardo did not request to be informed of the selection criteria does not affect the fact that the statement of reasons was inadequate. The author of an act is responsible for providing the reasons for the decision without waiting for the addressee to ask for them.

58. Fourthly, Mr Di Bernardo disputes the Commission's assertion that the selection criteria were 'completely irrelevant in terms of complying with the obligation to state reasons'. Since it is clear from the reasons in the decision at issue that the board applied those criteria in order to assess whether the applicant's professional experience was relevant, nothing can justify the fact that he was not informed of them. Furthermore, contrary to the Commission's claim, the secrecy of the proceedings of the board does not prevent the selection criteria from being communicated.

59. Fifthly, the scope of the statement of reasons must also be assessed on the basis of the interest which the addressee may have in receiving explanations. Mr Di Bernardo was disqualified from the competition after passing all the tests, which means that he had a reasonable hope of his name being on the list of successful candidates. That is why he was entitled to know the precise reasons for being disqualified from the competition. Moreover, the fact that there were a large number of candidates is merely a circumstance that allows the board, initially, to give only brief reasons for its decisions. According to Mr Di Bernardo, it does not relieve the board of the requirement to provide a relevant statement of reasons when, as in the present case, it receives a request for review. Furthermore, according to the Commission's reply to the measure of organisation of procedure applied for by the General Court, only seven applicants' requests for review were rejected in the relevant field of the competition (financial support). At that stage, the board's workload was not remotely comparable to its workload at the time it was examining all the candidates' applications.

60. Sixthly, the argument that the board examined all the entries on the application form in detail concerns how effectively the defendant's application was examined and is irrelevant to whether the decision at issue contained an adequate statement of reasons. In addition, the information in the case file gives reason to doubt that the board really did carefully examine the defendant's situation. On the one hand, the applicant alleges, the board first mistakenly reduced by 10 months a period of professional experience that it had found to be partly related to the nature of the duties. On the other hand, Mr Di Bernardo notes that he only received a response to his request for review nine months after he made it. Seventhly, according to Mr Di Bernardo, the Commission's arguments directed against paragraphs 54 and 55 of the judgment under appeal are ineffective since those paragraphs relate to grounds included for the sake of completeness.

2. Assessment

61. I would note that, contrary to the Commission's claims in its appeal and as I will set out below in this Opinion, the General Court did take the legal and factual context of the decision at issue properly into consideration when it analysed the action for annulment. Indeed, the General Court emphasised at the outset the importance of the obligation to state reasons for any adverse decision, noting that it has the dual purpose of enabling interested parties to know the purported justification for the measure taken so as to be able to defend their rights and of enabling the courts of the European Union to exercise their jurisdiction to review the legality of the decision in question.[4] The General Court also stated that the extent of the obligation to state reasons must be determined, in each case, not only having regard to the decision being challenged but on the basis of the specific circumstances of that decision.[5] Those findings cannot be challenged on appeal, since they are based on settled case-law of the Court of Justice that the General Court has made its own. It is in the light of those principles that I must examine how the General Court applied EU law.

62. I note that the General Court focused its attention on examining the statement of reasons of the decision at issue, whilst having regard to the various exchanges of correspondence between EPSO and Mr Di Bernardo, specifically the requests to Mr Di Bernardo to submit supporting documents, and ultimately reached the conclusion that the reasons on which EPSO relied in rejecting his application were 'extremely brief and incomplete'. It reached that conclusion, in paragraphs 41 to 44 of the judgment under appeal, on the basis of a meticulous examination of the decision at issue. In my view that finding is correct, since EPSO gave no explanation whatsoever of the reasons why the board had concluded that Mr Di Bernardo did not have the professional experience required to perform the duties of secretary in the field of financial support.

63. Given the many exchanges that sought, quite clearly, to clarify whether the selection criteria had been complied with, it was reasonable to expect that EPSO would provide more precise indications to justify its decision not to include Mr Di Bernardo's name on the list of successful candidates. EPSO nevertheless merely informed him by letter of 27 October 2015 that the professional experience referred to in entries 1 to 7 on his application form did not amount to the minimum of three years mostly related to the nature of the duties indicated in point 2 of

[4] Judgments of 2 October 2003, *Thyssen Stahl* v *Commission* (C-194/99 P, EU:C:2003:527, paragraph 144); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 462); and of 28 June 2018, *EUIPO* v *Puma* (C-564/16 P, EU:C:2018:509, paragraph 64).

[5] Judgments of 21 June 1984, *Lux* v *Court of Auditors* (69/83, EU:C:1984:225, paragraph 36); of 13 December 1989, *Prelle* v *Commission* (C-169/88, EU:C:1989:640, paragraph 9); and of 12 November 1996, *Ojha* v *Commission* (C-294/95 P, EU:C:1996:434, paragraph 18).

Annex II to the competition notice. EPSO confirmed its decision by letter of 10 August 2016, following Mr Di Bernardo's request for review, although without giving any more precise information.

64. It seems obvious to me that this practice does not satisfy the requirements for a statement of reasons to be adequate, because merely repeating the selection criteria contained in the competition notice does not enable the person concerned to know the reasons given for the decision in question and, where applicable, to defend his rights.[6] The General Court correctly found that to be so, establishing in paragraph 48 of the judgment under appeal that Mr Di Bernardo 'was unaware of the reasons why his professional experience was found to be insufficient'. Careful reading of the correspondence between EPSO and Mr Di Bernardo confirms that finding. As he did not know the more specific selection criteria established by the board, Mr Di Bernardo was not in a position to determine whether the board had applied them fairly in his case and, in particular, whether those criteria unlawfully restricted the governing provisions of the competition notice. The General Court therefore did not err in finding that Mr Di Bernardo's ability to defend himself was limited.

65. In addition, I believe that the practice in question also prevents the courts of the European Union – which only become aware of the details of the procedure at the court proceedings stage and even then only on the basis of the information provided by the parties – from exercising their jurisdiction to review the legality of the decision concerned. I will address in the context of examining the second ground of appeal whether and, as the case may be, to what extent, an inadequate statement of reasons is a procedural defect which can nevertheless be rectified during the contentious proceedings.

66. In the light of the foregoing, it seems plain to me that the General Court correctly attached considerable significance to the more specific selection criteria,[7] since they appreciably influenced the decision at issue. As can be seen from the letter of 10 August 2016, EPSO seems to have stated that the board had established selection criteria not contained in the competition notice that it planned to use in the competition.[8] It should be recalled in that regard that, despite its discretion, the selection board has a duty to comply with the terms of the competition notice as published, which implies that it must proceed on the basis of objective criteria known to each of the candidates.[9] In specific terms, EPSO referred implicitly to an evaluation matrix prepared by the board before the tests, but nevertheless did not explain the principles on the basis of which that evaluation matrix had been prepared or how it was intended to be used.

67. As we learnt during the proceedings before the General Court, at the stage of the reply, those criteria consisted in essence of a list of occupations divided into three categories depending on their relevance. It seems to me that the criteria contained in the evaluation matrix were intended

6 See, to that effect, judgment of 8 March 1988, *Sergio* v *Commission* (64/86, 71/86, 72/86, 73/86 and 78/86, EU:C:1988:119, paragraphs 50 and 51), from which it can be seen that the authority does not discharge its obligation to provide an adequate statement of reasons for its decisions in the context of a competition if it confines itself 'to outlining the criteria laid down in the notice of competition' and does not state 'the specific, well-defined criteria adopted by the selection board'.

7 For greater clarity, it should be specified that the General Court and the parties in the proceedings use the expression '(selection) criteria' to mean the 'evaluation matrix' drawn up by the board and which functions as explained in this Opinion.

8 The decision of 10 August 2016 contains the following text '… Before beginning its work, *the board defined a number of selection criteria basing itself on the specific requirements described in the competition notice. Those requirements are defined* and the nature of the duties is described having regard to the competencies required for the post to be filled and in the interests of the service. *The selection criteria defined in the context of the* EPSO/AST-SC/03/15 *competition* and *the emphasis placed on certain elements relating to professional experience* therefore reflect in essence the current recruitment needs of the institutions for which the competition is being held. … As mentioned in the letter of 27 October 2015 informing you of your results, the board is of the view that you have not been able to prove that you *satisfy all the eligibility requirements*' (my italics).

9 See, to that effect, judgment of 13 October 2017, *Brouillard* v *Commission* (T-572/16, not published, EU:T:2017:720, paragraph 35).

to serve as guidelines for the board, to help it to exercise its discretion when evaluating the applications. EPSO's requests for information, seeking to determine whether his professional experience was relevant to the financial support role and the response contained in the decision at issue clearly show that the board did in fact apply those criteria to Mr Di Bernardo, with the effect that a considerable part of that professional experience was not recognised. [10] Since he did not have the minimum relevant experience, because his professional experience was rather more in the field of administrative support, Mr Di Bernardo's application was not selected.

68. This means that, despite the serious consequences that application of the selection criteria had for Mr Di Bernardo, EPSO prevented him from learning what they were and, once he knew them and if applicable, from providing more targeted information on the aspects at issue. The scope of the statement of reasons must also be assessed by reference to the interest which the addressees of the measure may have in obtaining explanations. [11] As the General Court very correctly observed in paragraph 53 of the judgment under appeal, it was not until 'during the [annulment] proceedings' that the Commission 'only gradually' provided the statement of reasons of the decision at issue, necessary in order to assess whether it was lawful. It was therefore at a very late stage that Mr Di Bernardo was able to formulate an opinion on his allegedly insufficient professional experience. The General Court therefore committed no error of law whatsoever when it found that EPSO should have communicated the selection criteria in good time, that is to say, in the competition notice, in the letter of 27 October 2015 or, in any event, in its letter of 10 August 2016 responding to the request for review. [12] That approach was in my view all the more necessary since the request for review must be interpreted as a request to be given individual explanations, as the General Court noted in paragraph 51 of the judgment under appeal. The Commission's claim that Mr Di Bernardo did not at any time seek to know what the selection criteria were should accordingly be rejected, since that argument amounts to questioning EPSO's obligation to the applicants in the competition.

69. The Commission's reasoning reveals not only a disregard for its obligation to give reasons, but is also illogical, since Mr Di Bernardo cannot reasonably be criticised for not expressly requesting information about something of which he was not aware. If it was to discharge its obligation, EPSO should have explained to Mr Di Bernardo the selection criteria not contained in the competition notice and why his professional experience did not meet the requirements for the posts of secretaries/clerks at grade SC 1 in the field of financial support.

70. The argument put forward by the Commission, that the General Court wrongly found, in paragraphs 46 and 47 of the judgment under appeal, that the Commission could not rely on its case-law according to which, in a competition with a large number of candidates, it is permissible for the board initially to give only brief reasons for the refusal to select a candidate, [13] should also be rejected. As that court properly observed, the board in fact made its decision after all the applicants had taken part in the admission tests and the evaluation tests, including the tests of competencies. Once the tests of competencies had been marked, the list of potential successful candidates had already been drawn up. At that stage, the board's main task should have been to check that the applicants also satisfied the conditions relating to their professional experience as

[10] According to the information provided by Mr Di Bernardo, he had 20 years' professional experience in the field to which the competition notice referred, whereas EPSO recognised only 31 months. The professional experience required according to the competition notice was 36 months.

[11] Judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraph 120).

[12] It should not be forgotten, however, that the letter of 8 July 2016 to Mr Di Bernardo contained a response to his request for review that manifestly did not reflect the facts of his situation. That letter should therefore, in principle, also be regarded as a missed opportunity to provide an adequate statement of reasons.

[13] Judgment of 12 July 1989, *Belardinelli and Others* v *Court of Justice* (225/87, EU:C:1989:309, paragraph 7).

established in the competition notice. It would seem however that EPSO deferred that task to the very last stage of the selection procedure, thereby raising doubts as to whether that procedure was organised rationally.

71. From that perspective, I do not believe that any criticism can be levelled against Mr Di Bernardo given that the organisation of a competition is exclusively EPSO's responsibility. It follows that EPSO must bear the consequences of that organisation, including any increased workload. As regards that workload, as Mr Di Bernardo states, it nevertheless appears that only seven applicants' requests for review were rejected in the relevant field of the competition. The task of examining those applicants' complaints therefore could not have involved a huge increase in the workload. The General Court therefore correctly found that EPSO could not plead a likely overload of work in order to escape its obligation to give proper reasons for its decision not to include Mr Di Bernardo on the list of successful candidates in the competition.

72. The Commission's argument that the General Court disregarded the secrecy surrounding the board's proceedings when, in paragraph 50 of the judgment under appeal it imposed an obligation to disclose the selection criteria, likewise cannot prosper. As emerges from the case-law of the Court of Justice,[14] the secrecy of the proceedings of the selection board does not preclude the objective selection criteria – here, the requirements relating to professional experience – being communicated to the candidates. That argument should therefore be rejected.

73. I do not concur with the Commission's criticism of paragraphs 49 to 51 of the judgment under appeal, that an imprecise request for review obliging the board to provide detailed explanations for each entry would transfer the burden of proving the professional experience required by the competition notice to the selection board. First, that allegation is based on the false premiss that EPSO should be exempt from any obligation to communicate the selection criteria at an initial stage of the competition, which I believe is incompatible with the requirement for transparency required by the case-law.[15] Secondly, the allegation disregards the fact that Mr Di Bernardo had requested a review unaware that the selection board had developed more specific selection criteria that were not in the competition notice. EPSO should have taken the opportunity to clarify the import of those criteria, for example by explaining why the activities more closely linked to administrative support were not considered to be relevant, instead of merely confirming its initial decision. Such an approach would have provided Mr Di Bernardo with the necessary clarifications and would have enabled him better to understand the board's reasoning. That approach does not in the slightest involve a reversal of the burden of proof, but on the contrary is intended to ensure that the administrative action is effective.

74. In respect of the Commission's allegation that the General Court, in paragraphs 53 to 55 of the judgment under appeal, confused the requirement to state reasons with the question of whether that statement of reasons is well founded, I note, first, that it is not always easy in practice to draw a clear distinction, above all in a case such as this, in which EPSO merely stated, without any precise explanation, that Mr Di Bernardo's professional experience did not amount to the minimum of three years mostly related to the nature of the duties in the field of financial support. Indeed, it is not inconceivable that a succinct, vague statement of reasons of that kind could be analysed from both those points of view. First, it can in my view be regarded as inadequate in its extent and the breadth of its arguments, particularly given the importance of EPSO's decision to Mr Di Bernardo as an applicant in the competition, which is the subject matter of these proceedings. Secondly, such a statement of reasons can in my view be regarded as

[14] Judgment of 4 July 1996, *Parliament* v *Innamorati* (C-254/95 P, EU:C:1996:276, paragraph 27).

[15] See the case-law cited in points 61 and 64 of this Opinion.

questionable, if not vitiated by illegality, because it is based on an evaluation method that had a decisive influence on the outcome of the competition since it led to certain professional activities being disqualified as irrelevant, but EPSO nevertheless failed to explain how it functioned. Indeed, the evaluation method itself is not the subject matter of these proceedings because it was not revealed until a late stage in the procedure.

75. However, it seems to me unnecessary to investigate that aspect further in the present context, since the Commission's claim is in any event ineffective because it challenges a ground that was included for the sake of completeness and must, accordingly, be rejected.[16] It is clear from paragraphs 53 to 55 of the judgment under appeal that the General Court focused on the claim relating to an inadequate statement of reasons and only for the sake of completeness made a number of observations on the contents of the statement of reasons, although without expressing a view on whether the decision was well founded. The grounds set out in those paragraphs are intended only to show that the admission criteria at issue were indispensable to assessing whether or not the decision at issue was lawful.

3. Interim conclusion

76. It emerges from the foregoing that the General Court did not impose excessive requirements as regards the statement of reasons of a decision adopted by the Commission. The first ground of appeal must therefore be rejected.

C. The second ground of appeal

1. Arguments of the parties

77. The second ground of the Commission's appeal alleges that the court, in paragraphs 37 and 38 and 53 to 56 of the judgment under appeal, infringed its duty to determine, of its own motion, whether the obligation to state reasons had been complied with.

78. The Commission refers to case-law[17] according to which, in its view, where 'insufficient reasons were given', clarifications can still be given in the course of proceedings and can render a plea in law devoid of purpose where that plea seeks annulment on the grounds of infringement of the obligation to state reasons. That is why, first, in order to rule out the possibility that the statement of reasons could also be supplemented where there was an 'almost complete' lack of any such statement, in the judgment under appeal the General Court deliberately and without precedent extended a threshold that the case-law has nevertheless clearly set as including only those cases where there is a complete lack of any statement of reasons. That concept, not referred to in the case-law, is moreover, according to the Commission, contradictory and impossible to define. Secondly, that new departure in the case-law cannot be reconciled with the court's duty to verify of its own motion whether the requirement to state reasons has been complied with.

79. Mr Di Bernardo submits the following arguments in response to the second ground of appeal.

[16] See, to that effect, judgment of 30 May 2018, *Azoulay and Others* v *Parliament* (C-390/17 P, EU:C:2018:347, paragraphs 29 and 30).

[17] Judgments of 30 May 1984, *Picciolo* v *Parliament* (111/83, EU:C:1984:200, paragraph 22); of 27 March 1985, *Kypreos* v *Council* (12/84, EU:C:1985:142, paragraph 8); and of 8 March 1988, *Sergio* v *Commission* (64/86, 71/86, 72/86, 73/86 and 78/86, EU:C:1988:119, paragraph 52).

80. First, the General court did not err in law when it found, in the present case, that the statement of reasons provided before the decision was appealed amounted to a complete or 'almost complete' lack of a statement of reasons. Secondly, the General Court likewise did not err in law when it found that, in order to state adequate reasons, the decision at issue had at the very least to reflect the board's main line of reasoning. According to Mr Di Bernardo, the decision at issue failed to do this, based as it was on admission criteria of which the applicant was unaware and which were communicated to him only at the stage of the reply. Thirdly, Mr Di Bernardo contends that the task of the EU courts is not to remedy failings by the board and the Commission, which omitted to state reasons for the decision at issue before it was appealed or during the contentious proceedings. Furthermore, the Commission has not identified which information in the case file the General Court allegedly failed to take into account of its own motion in order to determine whether or not the decision contained an adequate statement of reasons.

2. Assessment

(a) Preliminary observations

81. By its second ground of appeal, the Commission is alleging, in essence, that the General Court deprived it of the opportunity to supplement the statement of reasons of the decision at issue during the annulment proceedings on the grounds that there was an 'almost complete' lack of an initial statement of reasons. According to the Commission, the General Court was obliged to have regard, of its own motion, to the specific criteria annexed to the reply, specifically the evaluation matrix that the board had developed in order to assess the professional experience of the applicants in the competition.

82. As I demonstrated in my analysis of the first ground of appeal, the General Court correctly held that the statement of reasons in the decision at issue did not satisfy the requirements of the case-law. To recapitulate, the General Court found in paragraphs 37 and 38 and 53 to 56 of the judgment under appeal that the decision at issue lacked even the 'initial elements of a statement of reasons' from which the authority's main line of reasoning could be discerned. In paragraph 53 of the judgment under appeal it described that initial statement of reasons as 'extremely brief and incomplete'. In addition, the General Court found in paragraph 41 of the judgment under appeal that the board had provided only 'extremely brief reasons' for rejecting the request for review. On the basis of those observations the General Court concluded, correctly, that Mr Di Bernardo's rights had been infringed since that circumstance prevented him from understanding the reasons why his application had been rejected and from requesting, if necessary, that the decision at issue be reviewed by the authority and/or the EU courts. Neither the assessment of the facts nor the interpretation of the scope of the obligation to state reasons for an administrative decision seems to me to be open to legal challenge.

83. Even so, the question that arises in the context of the second ground of appeal is whether and in what circumstances an inadequate statement of reasons, as a procedural defect, can under EU law nevertheless be remedied subsequently by adding further reasons during proceedings. In order to analyse that question it is necessary (b) briefly to examine the case-law to which the General Court refers and (c) to determine whether it complies with the principles established by the case-law of the Court of Justice. I will then assess those principles (d) before finally examining (e) whether they have been applied correctly in the present case.

(b) The case-law to which the General Court refers in the judgment under appeal on whether an inadequate statement of reasons can be remedied

84. It can be seen from paragraph 37 of the judgment under appeal that, according to settled case-law, it is only where a contested decision contains at least the 'initial elements of a statement of reasons' before it is appealed that the authority is entitled to supply additional information during the proceedings and thereby discharge its obligation to state reasons. According to that case-law, the authority's main line of reasoning must at least be discernible from those 'initial elements of a statement of reasons'. The General Court explained in paragraph 38 of the judgment under appeal that explanations provided after a decision is appealed cannot remedy a 'complete or almost complete lack' of a statement of the essential reasons for refusal issued to an applicant before that appeal.

85. Attention should be drawn first of all to the fact that in this case the General Court identified a particular scenario in which a statement of reasons was lacking, which it considered to be an 'almost complete' lack. It should then be noted that the General Court quite clearly based itself on the premiss that the statement of reasons in the decision at issue satisfied the criteria to constitute that scenario, although it did not set out its characteristics. That court's reasoning, particularly as regards the legal consequence of an 'almost complete' lack of a statement of reasons, that is to say, that the decision in question is illegal as a result of a serious procedural defect, suggests that this scenario is at least comparable to that where there is a 'complete' lack of such a statement. However, I would note that this scenario is mentioned only in the judgment under appeal, whilst the case-law of the General Court, including that cited in that judgment [18] makes no other mention of it. The General Court would seem to have departed expressly from the terminology used in its case-law in order best to describe the degree of precision of the statement of reasons in the decision at issue. I will return to this question when I examine whether the case-law has been properly applied.

(c) Whether the principles established by the General Court are compatible with the case-law of the Court of Justice

86. Issues relating to inadequate statements of reasons for adverse administrative measures are not unknown in the case-law of the Court of Justice, which has already had cause to rule on whether such a procedural defect can be regularised by allowing the authority to supplement the statement of reasons during contentious proceedings.

87. As the Court of Justice noted in *Neirinck* v *Commission*, [19] the purpose of the obligation to state reasons is to enable the Court to exercise its jurisdiction to review the legality of adverse decisions and to provide the person concerned with sufficient information to ascertain whether the decision is well founded or whether it is vitiated by a defect that will allow its legality to be contested. In principle therefore, the statement of reasons must be communicated to the person concerned at the same time as the adverse decision. The Court of Justice has accordingly held that a failure to state reasons cannot be regularised by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court of Justice. [20] In contrast, in

[18] Order of 8 March 2012, *Marcuccio* v *Commission* (T-126/11 P, EU:T:2012:115, paragraph 47).

[19] Judgment of 28 February 2008 (C-17/07 P, EU:C:2008:134).

[20] Judgment of 28 February 2008, *Neirinck* v *Commission* (C-17/07 P, EU:C:2008:134, paragraph 50). See also judgments of 26 November 1981, *Michel* v *Parliament* (195/80, EU:C:1981:284, paragraph 22); of 7 February 1990, *Culin* v *Commission* (C-343/87, EU:C:1990:49, paragraphs 13 to 15); and of 23 September 2004, *Hectors* v *Parliament* (C-150/03 P, EU:C:2004:555, paragraphs 49 and 50).

the case of an inadequate statement of reasons, the Court of Justice has found that reasons submitted during the proceedings can, in exceptional cases, render a plea in law alleging infringement of the obligation to state reasons devoid of purpose.[21] The Court of Justice case-law therefore distinguishes between two different scenarios: a 'failure' to state reasons and an 'inadequate' statement of reasons, each governed by its own rules. I note furthermore that the Court of Justice, like the General Court, usually examines on a case-by-case basis whether or not the administrative measure in question contains the 'initial elements of a statement of reasons', which enables it to apply the relevant rules to the specific case it is hearing.

88. I conclude from the foregoing that in essence the General Court's case-law[22] reflects the principles developed in the case-law of the Court of Justice on the requirement properly to state reasons for any administrative measure in order to ensure review by the courts whilst safeguarding the rights of the addressee, the sole exception being the scenario of an 'almost complete' lack of a statement of reasons, which needs to be analysed below.

(d) Assessment of the case-law of the Court of Justice

89. Before looking at how the General Court applied the case-law of the Court of Justice to the present case, I would like to endorse that case-law, which I believe is sufficiently nuanced to take into account the various interests at play in administrative proceedings, even given the complexity of the cases, each of which raises a wide range of procedural issues that the EU court must decide. Nevertheless, I would point out that the requirement to state reasons laid down in the second paragraph of Article 296 TFEU and the third indent of Article 41(2) of the Charter of Fundamental Rights of the European Union, and also present in the second paragraph of Article 25 of the Staff Regulations of Officials of the European Union, which apply by analogy to agents governed by the Conditions of Employment of Other Servants of the European Union, is a fundamental principle of a legal order that upholds the rule of law, such as that of the European Union, which is concerned to ensure the transparency, efficacy and legitimacy of its institutions.[23] As the Court of Justice has recalled several times,[24] the European Union is a union based on the rule of law whose institutions are subject to review of the conformity of their acts, inter alia, with the Treaties and the general principles of law. The requirement for effective judicial protection, as enshrined in Article 47 of the Charter, according to which individuals must have a right to an effective remedy in order to contest the legality of acts of the European Union, is inherent in the rule of law.[25] It is also worth noting that the amendments made to the Treaties by the Treaty of Lisbon have considerably increased the importance of the requirement to state reasons,[26] which the Court of Justice must take into account, in particular when hearing a case such as the present, in which that requirement seems to have been overlooked.

[21] Judgment of 28 February 2008, *Neirinck* v *Commission* (C-17/07 P, EU:C:2008:134, paragraph 51).

[22] Cited in points 61 and 84 of this Opinion.

[23] See, to that effect, Smith, M., 'Developing administrative principles in the EU: A foundational model of legitimacy?', *European Law Journal*, vol. 18, No 2, March 2012, p. 282.

[24] Judgments of 26 June 2012, *Poland* v *Commission* (C-336/09 P, EU:C:2012:386, paragraph 36); of 19 July 2016, *H* v *Council and Commission* (C-455/14 P, EU:C:2016:569, paragraph 41); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 72).

[25] Judgments of 18 December 2014, *Abdida* (C-562/13, EU:C:2014:2453, paragraph 45); of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 95); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 73) .

[26] See Calliess, C., in Calliess, C. and Ruffert, M. (eds), *EUV/AEUV*, C. H. Beck, 4th edition, Munich, 2011, Article 296 TFEU, paragraph 4, which notes that Article 296 TFEU extends the requirement to state reasons to all EU legal acts, in contrast to the former Article 253 EC, which still exhaustively listed those legal acts. According to that author Article 296 TFEU reflects the intention of the reform process, which sought to place the European Union on a more democratic institutional foundation closer to citizens, in accordance with the principles of transparency, efficacy and legitimacy.

90. As Advocate General Ruiz-Jarabo Colomer wrote in his Opinion in *Hectors* v *Parliament*,[27] 'the statement of reasons is not just a courtesy or a routine formality. It is above all a rationalising factor in the exercise of power, facilitating review thereof, and also operates to prevent arbitrariness and to provide protection'. I have already referred to the dual purpose of that requirement, of enabling interested parties to know the purported justification for the measure taken so as to be able to defend their rights, and of enabling the courts of the European Union to exercise their jurisdiction to review the legality of the decision in question.[28] Those two interests are inseparable if there is to be an effective remedy and therefore cannot be considered independently of each other in any analysis. The very nature of that requirement means that those interests will be best served when the reasons are notified to the person concerned at the same time as the adverse decision instead of during the contentious proceedings.[29] The pre-contentious phase offers the person concerned an opportunity to request the authority to review the decision at issue, free of charge and with no administrative burdens. Another advantage is that the authority can itself verify whether its decision complies with EU law, thereby reminding the authority of its obligation to state proper reasons for its decision.[30]

91. In the light of the foregoing, it seems obvious to me that a failure to state any reasons whatsoever is the more serious situation since it harms those interests and ultimately jeopardises the rule of law. In such a case, the defect cannot be regularised during the contentious proceedings, since the person concerned is deprived of the opportunity to learn the reasons for the decision, to express a point of view and, where applicable, to request a review. The EU court, in turn, is deprived of the opportunity to familiarise itself with all aspects of the case, and has to rule on the case at last instance.

92. An inadequate statement of reasons, in contrast, seems to me to call for a more nuanced approach, according to how seriously the requirement to state reasons has been infringed. The Court of Justice seems to have taken such an approach, since its case-law recognises that reasons put forward during proceedings can, in 'exceptional cases', render a plea alleging infringement of the obligation to state reasons devoid of purpose. Given the diversity of conceivable circumstances, the Court of Justice appears to have refrained from exhaustively listing those 'exceptional cases', preferring to apply the concept flexibly and pragmatically.

93. A number of considerations could in theory play a certain part, such as reasons relating to economy of procedure, for example where it is clear that no defect has compromised the substance of the decision, and that annulling the decision on the grounds that it did not contain an adequate statement of reasons could therefore only result in the adoption of a fresh decision which would be identical in substance to the annulled decision, but accompanied by the reasons initially revealed only before the General Court. As Advocate General Fennelly noted in his Opinion in *Parliament* v *Innamorati*,[31] the board would have no discretion in such a case. Accordingly, the defendant would have no legitimate interest in seeking the annulment of the decision at issue for breach of an essential procedural requirement. According to Advocate

27 C-150/03 P, EU:C:2004:146, paragraph 41.

28 See point 61 of this Opinion.

29 See judgment of 26 November 1981, *Michel* v *Parliament* (195/80, EU:C:1981:284, paragraph 22).

30 As Advocate General Kokott states in her Opinion in *Mellor* (C-75/08, EU:C:2009:32, point 32): 'The giving of reasons is not exclusively in the interest of the citizen, moreover: it also effects an initial self-check on the part of the administration and can pacify relations with the citizen, since if the reasons are convincing they put an end to existing conflicts and prevent superfluous legal disputes.' More recently, in her Opinion in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, point 95), Advocate General Kokott stated that 'the obligation to state reasons under the second paragraph of Article 296 TFEU is intended to secure the self-regulation of the relevant authority and thus to ensure that the institution responsible is called upon carefully to verify the conditions governing the adoption of a measure'.

31 C-254/95 P, EU:C:1996:213.

General Fennelly, the originally insufficient statement of the reasons for the impugned decision could no longer be regarded as a breach of an essential procedural requirement that would in itself justify the annulment of that decision.[32] On the other hand, if the statement of reasons is not sufficient even at the contentious stage, the impugned decision should be annulled for breach of an essential procedural requirement.[33]

94. I would like to make a number of remarks to illustrate my point of view in that respect. Whilst I understand, in principle, those practical considerations, which have even manifested themselves in a number of judgments,[34] I would reiterate the importance in the EU legal order of the provisions referred to previously,[35] which in my view means that an inadequate statement of reasons cannot be treated as[36] a merely procedural error.[37] Persuasive though they may seem, the considerations set out above, which seem to be based on reasons of economy of procedure, entail a risk that the authority will interpret the 'opportunity' to supplement an inadequate statement of reasons during the proceedings in an action for annulment under Article 263 TFEU as a 'right' not to communicate information to the person concerned in good time or even to defer the task of giving reasons for an administrative measure, if need be, to the stage of contentious proceedings. Such a practice would remove the advantages I have just described, that is to say, of giving the addressee of such a measure an opportunity to present his or her points of view to the authority and of ensuring that the legal acts adopted by the authority undergo an internal review of legality.[38] Moreover, that practice could conceivably lead to an increase in the number of cases pending before the EU courts, thereby reducing the purported advantages associated with the reasons of economy of procedure. That said, under the distribution of competences between the authority, on the one hand, and the EU courts, on the other, actions for annulment must not become the stage at which the authority discharges one of its most fundamental obligations to the individual seeking justice. Nor should it be overlooked that proceedings involve costs and significant risks for such individuals, and it therefore seems to me unreasonable to oblige them to bring proceedings before the EU courts in order to obtain an adequate statement of reasons for decisions concerning them, when they could have obtained such a statement without incurring costs during the pre-litigation phase.

95. The ability to supplement a statement of reasons during the annulment proceedings must, therefore, be limited to 'exceptional cases', in which it can be seen that at least the principal reasons that gave rise to adoption of the administrative decision have been set out in a clear and

32 Opinion of Advocate General Fennelly in *Parliament* v *Innamorati* (C-254/95 P, EU:C:1996:213, point 39).

33 Opinion of Advocate General Fennelly in *Parliament* v *Innamorati* (C-254/95 P, EU:C:1996:213, point 40).

34 See judgments of 6 July 1983, *Geist* v *Commission* (117/81, EU:C:1983:191); of 8 March 1988, *Sergio* v *Commission* (64/86, 71/86, 72/86, 73/86 and 78/86, EU:C:1988:119, paragraph 53); and of 19 January 2010, *Co-Frutta* v *Commission* (T-355/04 and T-446/04, EU:T:2010:15, paragraph 100).

35 See point 89 of this Opinion.

36 Calliess, C., in Calliess/Ruffert, (ed.), *EUV/AEUV*, C. H. Beck, 4th edition, Munich, 2011, Article 297 TFEU, paragraph 34, observes a number of trends in the case-law of the Court of Justice and the General Court towards finding that only serious infringements of the requirement to state reasons should justify annulling an administrative decision. That approach seems to be based on the argument that it makes no sense to annul an administrative decision that is substantively correct but is nevertheless vitiated by a defect of form. The author believes however that considerations associated with upholding the rule of law suggest that, as a general rule, any decision that does not comply with that requirement to state reasons should be annulled. Gellermann, M., in Streinz, R., *EUV/AEUV*, C. H. Beck, 2nd edition, Munich, 2012, paragraph 16, takes the same view, noting that only review by the courts associated with a threat of annulment can force the EU institutions to take proper account of the requirement to state reasons. At the very most, an exception can be made if there is effectively no alternative to the measure and it is likely to be adopted immediately after it is annulled.

37 Furthermore, it seems apparent from the judgment of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 57), that the Court of Justice only exceptionally allows the regularisation of measures which are unlawful in the light of EU law.

38 In her Opinion in *LS Customs Services* (C-46/16, EU:C:2017:247, point 83), Advocate General Kokott states that 'such self-regulation by the customs authority is possible only to a lesser extent if an adequate statement of reasons is not produced until subsequently at the request of the interested party'. According to the Advocate General, 'this applies a fortiori where the statement of reasons is produced subsequently in legal proceedings'.

unequivocal fashion.[39] It is also necessary to ensure that individuals do not suffer any disadvantage in protecting their rights, which it is for the court to verify on a case-by-case basis. There can certainly be assumed to be such a disadvantage where the additional reasons provided by the authority modify the essence of the legal act, thereby obliging the person concerned to adapt his or her reasoning substantially in order to respond appropriately to the new arguments. To avoid such a situation, strict requirements should be imposed on the form and manner in which the authority submits a supplementary statement of reasons to the EU court. That court should also ensure that the person concerned is able to express a view on the supplementary statement of reasons, for example by adjourning the hearing or giving leave to file a pleading. In those circumstances, it is in my view unavoidable that the person concerned will be taken by surprise by the authority. Depending on his or her procedural position, the EU court must decide whether to reject or, exceptionally, to admit the supplementary statement of reasons.

96. The approach I am proposing can, moreover, be reconciled with the guidance provided by Advocate General Kokott, as apparent from her Opinion in *S.P.C.M. and Others*,[40] according to which the lack of a statement of reasons, or a manifestly inadequate statement of reasons, cannot (in principle) be cured by the fact that the person concerned learns the reasons for the measure during the procedure before the EU judicature. As Advocate General Kokott states, the statement of reasons for an adverse decision must enable the EU court to exercise its power of review and must provide the person concerned with the information necessary to ascertain whether the decision is well founded and whether it is worth bringing legal proceedings. Advocate General Kokott indicates quite correctly that the statement of reasons for a decision is therefore an indispensable condition of the judicial review of a measure.[41]

97. I see no conflict between the positions set out above,[42] given that their starting point is that any adverse measure must contain a statement of reasons specifying all the relevant factual and legal information enabling its legality to be reviewed, and that they only exceptionally allow an inadequate statement of reasons to be regularised during the court proceedings phase. The only difference is that Advocate General Fennelly mentions a specific situation,[43] which is to my mind capable in theory of being an 'exceptional case' within the meaning of the case-law, provided, as already explained,[44] the individual does not suffer any disadvantage in protecting his or her rights. Such a disadvantage is generally unlikely where the administrative decision in question contains at least the 'initial elements of a statement of reasons' enabling the individual to understand the authority's main line of reasoning and to put forward his or her point of view. That question is to my mind the starting point for examining whether the case-law of the Court of Justice has been properly applied in the present case.

[39] To borrow terminology used in the case-law of the Court of Justice. See judgment of 14 February 1990, *Delacre and Others* v *Commission* (C-350/88, EU:C:1990:71, paragraph 15).

[40] C-558/07, EU:C:2009:142.

[41] Opinion of Advocate General Kokott in *S.P.C.M. and Others* (C-558/07, EU:C:2009:142, point 61).

[42] That is to say, the positions, described above, of Advocates General Fennelly and Kokott respectively on whether the lack of a statement of reasons or an inadequate statement of reasons can be regularised subsequently during the court proceedings phase, and my position, which must be interpreted as my contribution to developing the case-law of the Court of Justice.

[43] That is to say, where an administrative decision is vitiated by a defect that nevertheless does not concern the substance of the decision. According to Advocate General Fennelly, such a decision cannot be annulled if the statement of reasons was supplemented during the annulment proceedings.

[44] See point 95 of this Opinion.

98. For the sake of completeness, it is worth noting in this context that the Court of Justice confirmed in *Neirinck*[45] that 'exceptional cases' can arise where there is a 'competition with a large number of candidates', as occurred in *Sergio and Others* v *Commission*,[46] and where there is a 'general competition', as in *Kypreos* v *Council*,[47] since in both situations it is impossible in practice to give each candidate an adequate statement of reasons in good time, which therefore, on a completely exceptional basis, justifies the authority submitting items, such as the minutes of boards, before the EU court. However, as I stated above,[48] the General Court correctly found in paragraphs 46 and 47 of the judgment under appeal that the Commission could not rely on its case-law according to which, in a competition with a large number of candidates, it is permissible for the board initially to give only brief reasons for the refusal to select a candidate. Accordingly, neither of the scenarios that, exceptionally, justify admitting a supplementary statement of reasons during the contentious proceedings applies in the present case.

(e) Assessment of how the General Court applied the case-law of the Court of Justice in the present case

99. Examination of the judgment under appeal shows that the General Court correctly applied the principles identified by the case-law of the Court of Justice, when it analysed whether the decision at issue contained the 'initial elements of a statement of reasons'. As already explained, the finding resulting from that analysis determines whether there is a 'complete lack' of a statement of reasons or an 'inadequate' statement of reasons. The General Court found that there were no such initial elements of a statement of reasons in the present case, on the grounds already analysed in detail and which I believe are not open to legal challenge.[49]

100. It is however necessary to enquire whether, as the Commission argues, the case-law of the Court of Justice precludes the General Court from treating an 'inadequate' statement of reasons as a 'lack' of a statement of reasons by finding there to be an 'almost complete' lack of such a statement. That question prompts a number of observations on my part.

101. Although the case-law only formally recognises two scenarios, it should be recalled that administrative and judicial practice acknowledge several degrees of precision in relation to the statement of reasons of a legal act. The Court of Justice implicitly accepts this in its case-law, given that it allows a statement of reasons to be more or less detailed depending on the context, its importance to the addressee and all the legal rules governing the matter in question. Against that background, it seems that the concept of an 'inadequate statement of reasons' must be given a more nuanced interpretation, encompassing several degrees of precision, from the situation equivalent to an 'almost complete' statement of reasons, as it were, to the 'almost complete' lack of a statement of reasons that the General Court identified in the present case.[50] In the absence of a reliable and accurate method of measuring the degree of precision of the statement of reasons of a legal act, it seems understandable that the General Court, in order to set out its findings simply and clearly, had to resort to a comparison with the situation that best corresponded to the actual facts.

45 Judgment of 28 February 2008, *Neirinck* v *Commission* (C-17/07 P, EU:C:2008:134, paragraph 57).

46 Judgment of 8 March 1988, *Sergio* v *Commission* (64/86, 71/86, 72/86, 73/86 and 78/86, EU:C:1988:119, paragraph 50).

47 Judgment of 27 March 1985, *Kypreos* v *Council* (12/84, EU:C:1985:142, paragraph 8).

48 See points 70 and 71 of this Opinion.

49 See points 62 to 68 and 81 of this Opinion.

50 See paragraph 38 in conjunction with paragraphs 51 and 53 of the judgment under appeal.

102. In my view, that approach falls within the General Court's discretion to evaluate the facts of the case and, therefore, should not be found to be an error of law. The approach in question does not undermine the classification of the various types of statement of reason established by the case-law, but instead offers useful guidelines that enable the parties to understand the reasoning underlying the General Court's decision to annul the decision at issue on the grounds that its statement of reasons did not satisfy the requirements of the case-law.

103. In respect of the Commission's argument that the General Court infringed its obligation to have regard to the additional information submitted by the Commission during the proceedings in order to 'supplement' the statement of reasons of the administrative decision at issue, I would note that here again the Commission is misinterpreting the role of the EU court since it appears to be requiring the General Court to remedy the failings of the board and the Commission, which both omitted to state reasons for the decision at issue before it was appealed. Although it is apparent from the case-law that an inadequate statement of reasons in breach of the second paragraph of Article 296 TFEU constitutes an infringement of essential procedural requirements for the purposes of the second paragraph of Article 263 TFEU and is, moreover, a plea which may, and even must, be raised by the EU judicature of its own motion, [51] that does not mean that the EU courts are obliged to admit a supplementary statement of reasons in all cases.

104. Against that background, I note that the General Court quite correctly took cognisance of the inadequate statement of reasons of the decision at issue and of the response to the request for review, whilst refusing to take into consideration the additional information submitted by the Commission on the grounds that it was submitted at a late stage. Indeed, even supposing that the statement of reasons had to be found merely to be 'inadequate' (with no other specific classification), there is no doubt that the fact that more specific criteria having such an impact on Mr Di Bernardo's application [52] were submitted during the written procedure before the General Court made it very difficult for him to defend himself because it deprived him of any opportunity to react properly to those criteria. [53] As the General Court correctly stated, he was unaware of the reasons why his professional experience had been found to be insufficient. [54] In addition, it appears that, in principle, Mr Di Bernardo had only the hearing at which to present his pleas in law against the statement of reasons of which he became aware only after the reply was filed.

105. That situation scarcely satisfied the principle of respect for the rights of the defence, a fundamental principle of EU law according to which a judicial decision must not be based on facts and documents of which the parties themselves, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to formulate an opinion. [55] The principle of equality of arms, which is a corollary of the very concept of a fair hearing and the aim of which is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the

[51] See, to that effect, judgments of 20 February 1997, *Commission* v *Daffix* (C-166/95 P, EU:C:1997:73, paragraph 24); of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraph 174 and the case-law cited); and of 27 September 2012, *J* v *Parliament* (T-160/10, EU:T:2012:503, paragraph 17).

[52] See points 66 and 68 of this Opinion.

[53] See point 64 of this Opinion.

[54] See point 63 of this Opinion.

[55] See judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 30), and order of 12 July 2016, *Pérez Gutiérrez* v *Commission* (C-604/15 P, not published, EU:C:2016:545, paragraph 33).

proceedings, implies that each party must be afforded a reasonable opportunity to present his or her case, including his or her evidence, under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent. [56]

106. Accordingly, having regard to the situation described above and in accordance with what I have said in my assessment of the case-law of the Court of Justice, in particular in points 93 to 95 of this Opinion, the conditions for exceptionally admitting a supplementary statement of reasons during annulment proceedings are not in my view satisfied.

107. Respect for the principle of the rule of law in fact required EPSO to provide an adequate statement of reasons in the decision at issue itself and to give more precise indications about the additional criteria drawn up by the board in its response to the request for review. By failing properly to discharge its obligations, and instead deferring that task until the phase of court proceedings, the authority defeated the objective of ensuring that there was an internal review. Such an internal review would have enabled it to assess the situation and to confirm whether the statement of reasons satisfied the requirements of EU law. Furthermore, since the defect vitiating the decision at issue was serious because there was a very inadequate, even non-existent, statement of reasons relating to an aspect that was nevertheless particularly important to Mr Di Bernardo, it could not be regularised by a supplementary statement of reasons at the last stage of the annulment proceedings without infringing the rights of the defence. It must therefore be found that the General Court cannot be criticised for intervening to safeguard Mr Di Bernardo's rights and to remind the authority to comply with essential procedural requirements within the meaning of the second paragraph of Article 263 TFEU.

108. For the reasons set out above, I believe that the General Court did not err in law when it refused to take into account the additional information provided by the Commission during the contentious proceedings in order to 'supplement' an inadequate statement of reasons.

3. Interim conclusion

109. In the light of the foregoing, the second ground of appeal should be rejected.

VI. Conclusion

110. In the light of the foregoing, I propose that the Court of Justice should:

– dismiss the appeal and

– order the Commission to bear its costs.

[56] See judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 31), and order of 12 July 2016, *Pérez Gutiérrez* v *Commission* (C-604/15 P, not published, EU:C:2016:545, paragraph 34).