Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 19 May 2022 [1]

Case C-635/20 P

European Commission
v
Italian Republic,

Kingdom of Spain

(Appeal – Rules on languages – Notice of open competitions for the recruitment of investigators and team leaders – Knowledge of languages – Restriction of the choice of language 2 of the competitions to English, French or German – Regulation No 1 – Staff Regulations – Discrimination based on language – Justification – Interests of the service – Need for newly recruited staff to be immediately operational)

I. Introduction

1. Language is an important part of the cultural and political identity of Union citizens and both the Treaty on the European Union and the Charter of Fundamental Rights enshrine respect for the Union's linguistic diversity. [2] That respect is endorsed by the designation of all of the European Union's 24 official languages as the working languages of its institutions. [3]

2. Languages facilitate communication between individuals and thereby enable them to work together. Since the simultaneous use of all 24 official languages would, as matters currently stand, seriously impair such communication and collaboration, it is understandable that the EU institutions seek to recruit civil servants who have a working knowledge of at least one vehicular language in addition to their mother tongue. There is a long list of languages that, at various times in European history, could be described as having enjoyed vehicular status either throughout, or in large parts of, the continent. A language may enjoy vehicular status in a particular political and economic context, which, in the course of things, does not last forever: it is, however, undeniable that the perception of a language as vehicular enhances its status.

[1] Original language: English.

[2] Article 3 TEU and Article 22 of the Charter of Fundamental Rights of the European Union. Account must also be taken of the approximately 60 regional and minority languages spoken on the territory of the European Union.

[3] Article 1 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 by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1) ('Regulation No 1/58').

3. Since the European Union puts all of its official languages on an equal footing, and the designation of a language as vehicular for a given purpose is an undoubted advantage for those candidates who are proficient in it, such a choice must be justified on objective and reasonable grounds. The case-law of the Court acknowledges that the needs of the service provide such a justification, subject to two requirements. The justification advanced must thus relate to the duties that the persons recruited will be required to carry out. The evidence relied on in order to justify the proposed restriction must be accurate, reliable and consistent. [4]

4. In the present case, the European Commission seeks the annulment of the judgment of 9 September 2020, *Spain and Italy v Commission* (T-401/16, not published, EU:T:2020:409; 'the judgment under appeal'), by which the General Court annulled a notice of open competitions to recruit administrators. EPSO/AD/323/16 sought to recruit 'Investigators (AD 7) for the following profiles: 1 – Investigators: EU expenditure, anti-corruption – 2 – Investigators: Customs and trade, tobacco and counterfeit goods'. EPSO/AD/324/16 sought to recruit 'Investigators (AD 9): Team leaders'. [5] The contested EPSO [6] notice in the present case specifies that candidates must meet the following specific language conditions:

– Language 1: minimum level – C1 in one of the 24 official EU languages;

– Language 2: minimum level – B2 in English, French or German; must be different from language 1. [7]

5. The contested EPSO notice then specifically identifies a high standard of English as necessary in order to be able to fulfil the relevant duties:

'A good understanding of English (written and spoken) is required for recruitment in these two competitions. English is the main language used by investigators working in the area of anti-corruption and/or financial crime in an international context. A good command of English is therefore essential, whether for giving presentations and holding discussions or for writing reports, so as to ensure effective cooperation and information exchange with the national authorities of Member States and third countries.'

4 See, for example, judgments of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752); of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251); of 26 March 2019, *Spain v Parliament* (C-377/16, EU:C:2019:249); of 15 September 2016, *Italy v Commission* (T-353/14 and T-17/15, EU:T:2016:495); of 14 December 2017, *PB v Commission* (T-609/16, EU:T:2017:910); of 3 March 2021, *Barata v Parliament* (T-723/18, EU:T:2021:113); and of 9 June 2021, *Calhau Correia de Paiva v Commission* (T-202/17, EU:T:2021:323).

5 EPSO/AD/323/16 and EPSO/AD/324/16, OJ 2016 C 187 A, p. 1; 'the contested EPSO notice'.

6 Article 2 of Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing a European Communities Personnel Selection Office (OJ 2002 L 197, p. 53) transferred responsibility for conducting the open competitions to which the first paragraph of Article 30 of, and Annex III to, the Staff Regulations refer, to the European Personnel Selection Office (EPSO). By Article 4 thereof any appeal relating to the exercise of the powers conferred on EPSO is to be taken against the Commission.

7 The Common European Framework of Reference for Languages, issued by the Council of Europe (Recommendation of the Committee of Ministers of the Council of Europe No R (98) 6 of 17 March 1998; 'the CEFR'), describes six levels of language skills, ranging from A1 to C2. One of its tables contains an overview of the common levels of knowledge. Level C1, corresponding to the linguistic knowledge of a 'proficient user', is described as follows: 'Can understand a wide range of demanding, longer texts, and recognise implicit meaning. Can express him/herself fluently and spontaneously without much obvious searching for expressions. Can use language flexibly and effectively for social, academic and professional purposes. Can produce clear, well-structured, detailed text on complex subjects, showing controlled use of organisational patterns, connectors and cohesive devices.' Level B2, corresponding to the linguistic knowledge of an 'independent user', is presented as follows: 'Can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialisation. Can interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party. Can produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.'

6. The judgment under appeal holds that the Commission has not shown that the restriction of candidates' choice of second language to English, French or German is objectively justified and proportionate to the main aim it seeks to achieve, namely to recruit administrators who are immediately operational. Nor has the Commission demonstrated that the language restriction is justified by reference to budgetary and operational constraints and/or the nature of the selection process.[8] In its appeal before this Court, the Commission argues that the burden the General Court imposed on it as regards the justification given for the language restriction is unreasonably high. It also takes issue with the General Court's evaluation of the evidence the Commission adduced in support of that restriction.

II. Legal context

A. Regulation No 1/58

7. By Regulation No 1/58, the Council exercised the power given to it by what is now Article 342 TFEU to lay down rules governing, inter alia, the use of languages by and within the institutions of the European Union. In the version currently in force, it provides, in relevant part, that:

'Article 1

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

…

Article 6

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

B. The Staff Regulations

8. In so far as may be relevant, Article 1d of the Staff Regulations[9] provides:

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

…

[8] Judgment of 9 September 2020, *Spain and Italy v Commission* (T-401/16, not published, EU:T:2020:409, paragraph 205).

[9] Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968(I), p. 30), as amended ('the Staff Regulations').

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

9. Chapter 1 of Title III of the Staff Regulations, entitled 'Recruitment', consists of Articles 27 to 34. Article 27 provides:

'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Union. No posts shall be reserved for nationals of any specific Member State. …'

10. According to Article 28(f):

'An official may be appointed only on condition that:

… he [or she] produces evidence of a thorough knowledge of one of the languages of the Union and of a satisfactory knowledge of another language of the Union to the extent necessary for the performance of his duties.'

11. Annex III to the Staff Regulations is entitled 'Competitions'. Article 1 thereof provides:

'1. Notice of competitions shall be drawn up by the appointing authority after consulting the Joint Committee.

The notice shall state:

…

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

…'

III. Facts, procedure and form of order sought

12. Paragraphs 1 to 15 of the judgment under appeal summarise the facts of the case and the terms of the contested EPSO notice.

13. The Commission asks the Court to:

set aside the judgment under appeal;

if it considers that the state of the proceedings so permits, dismiss the action at first instance as unfounded;

order the Kingdom of Spain and the Italian Republic to pay the costs of the present proceedings and those of the proceedings at first instance.

14. In support of those forms of order, the Commission relies on three grounds.

15. The first ground of appeal consists of three limbs. The first limb alleges that paragraphs 157 and 181 to 183 of the judgment under appeal contain an error of law and an error of reasoning.

16. The second limb challenges the last sentence of paragraph 133, paragraphs 158 and 164, the last sentence of paragraph 167, and paragraphs 180 to 183, 201 and 205 of the judgment under appeal. The Commission submits that those paragraphs impose an unreasonably high burden on it, both as regards the obligation to give reasons for the language restriction in the contested EPSO notice, and its evaluation of the evidence it adduced in support of the reasons EPSO relies upon therein.

17. In the third limb, the Commission contends that paragraphs 152 to 155 of the judgment under appeal contain an error of law in that the case-law does not require the Commission to identify a legally binding act in its internal rules as a basis for a language restriction.

18. The second ground of appeal seeks to identify six instances on which the General Court distorted the evidence before it. The third ground of appeal alleges that the General Court's analysis of the candidates' languages of communication is unlawful.

19. The Kingdom of Spain and the Italian Republic contest the Commission's arguments. They claim that the Court should:

dismiss the appeal;

order the Commission to pay the costs.

20. The present case was joined with Case C-623/20 for the purpose of the hearing on 2 March 2022, at which the parties presented oral argument and answered the written and oral questions put by the Court.

21. In line with the Court's request, my Opinion is confined to the first ground of appeal.

IV. Assessment of the first ground of appeal

A. The first limb

22. The Commission considers that paragraph 157 of the judgment under appeal contains an error of law because it concludes that it cannot be presumed, without further explanation, that a newly recruited official who is not proficient in English, French or German would be incapable of immediately carrying out useful work in an EU institution. The General Court ought instead to have assessed whether the language restriction is objectively justified, in the interest of the service, by the need to recruit candidates who would be immediately operational. The Commission differentiates between a candidate who is capable of 'immediately doing useful work' and a candidate who is 'immediately operational'. Since the General Court's error is fundamental to its dismissal of the evidence relating to the link between the use of those three languages by the College of Commissioners and the work of the Commission's services, the judgment under appeal must be annulled.

23. Paragraph 157 of the judgment under appeal states:

'More specifically, it is not apparent either from those texts or, a fortiori, from other documents in the files of the present cases, that there is a necessary link between the Commission's decision-making procedures, particularly those carried out by the College of Commissioners, and the duties that the successful candidates in the competitions at issue might perform, namely investigator's and team leader of investigator's duties such as those set out in paragraph 113 above. Even if the members of a given institution use only one or some languages in their deliberations, it cannot be presumed, without further explanation, that a newly recruited official who is not proficient in any of those languages would be incapable of immediately carrying out useful work in the institution concerned (judgment of 15 September 2016, *Italy v Commission*, T-353/14 and T-17/15, EU:T:2016:495, paragraphs 121 and 122 (not published)). That is particularly so since, in the present cases, the duties concerned are very specific and a priori are not closely connected with the work of the College of Commissioners.'

24. I note, first, that the first sentence of Article 1d(6) of the Staff Regulations provides that any limitation of the application of the principle of non-discrimination must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy. Second, according to the settled case-law of the Court, a difference in treatment based on language, such as that resulting from the language restriction, can be accepted only if it is objectively justified and proportionate to the real needs of the service.[10] Paragraphs 71 and 72 of the judgment under appeal set out that consideration, and cite paragraphs 89 to 90 of the judgment in *Commission v Italy*,[11] which in turn cite paragraph 88 of the judgment in *Italy v Commission*.[12]

25. To assess whether a difference in treatment is objectively justified and proportionate to the real needs of the service, those needs must first be ascertained. In the present case, the general rules governing open competitions published in the *Official Journal of the European Union* of 27 February 2015[13] state, in section 1.3, in relevant part:

'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 (level C1 of the CEFR …) of one official EU language and a satisfactory knowledge (level B2 of the CEFR) 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 …

…

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.

[10] See also paragraph 96 of the judgment under appeal and the case-law cited.

[11] Judgment of 26 March 2019 (C-621/16 P, EU:C:2019:251).

[12] Judgment of 27 November 2012 (C-566/10 P, EU:C:2012:752).

[13] OJ 2015 C 70 A, p. 1.

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.'

26. In addition, the contested EPSO notice states, in the section entitled 'Am I eligible to apply?': 'The second language chosen must be *English, French, or German*. These are the main working languages of the Commission and, in the interests of the service, new recruits must be immediately able to work and communicate effectively in their daily work in at least one of them.' Annex II to the contested EPSO notice, entitled 'Justification of the language regime for these selection procedures', states, in the first paragraph, that 'the requirements set out in the "AM I ELIGIBLE TO APPLY?" section of this notice of competition are in line with the EU institutions' primary requirements for specialist skills, experience and knowledge and the need for new recruits to be able to work effectively, in particular with other members of staff'. The third paragraph of that annex states that 'once recruited, it is essential that the administrators are operational immediately and are able to communicate with their colleagues and managers'. In the following section, entitled 'Justification for selecting languages for each selection procedure', the second paragraph states that: 'New recruits need to be immediately operational and capable of performing the duties for which they were recruited. Therefore, EPSO must ensure that successful candidates possess adequate knowledge of a combination of languages that will enable them to carry out their duties in an effective manner and in particular that successful candidates are able to communicate effectively in their daily work with colleagues and managers.'

27. The description in the contested EPSO notice of 'the real needs of the service' therefore includes the need to recruit candidates who are immediately able to work effectively. It follows that, when paragraph 157 of the judgment under appeal states that it cannot be presumed, without further explanation, that a newly recruited official who is not proficient in French, German or English would be incapable of immediately carrying out useful work in the institution concerned, it refers to 'the real needs of the service' as described in the contested EPSO notice.

28. The fact that the General Court considers that the requirement that new recruits be 'immediately operational' is an essential reason for the language restriction [14] and uses that expression frequently in the judgment under appeal [15] does not mean that other descriptions based on the text of the contested EPSO notice are not also relevant for the purpose of assessing whether the available evidence demonstrates that the language restriction is objectively justified and proportionate to the real needs of the service.

29. Indeed it is not easy to understand how the Commission can argue that a passing reference in the judgment under appeal to text in the contested EPSO notice relied upon to justify the language restriction could invalidate that judgment. What is more, it is difficult to discern any difference between a newly recruited civil servant being 'immediately operational' or being 'capable of immediately doing useful work'. Although the Commission relies on that distinction to argue that the General Court erred in law, it fails to explain in its pleadings what that distinction consists in. At the hearing, the Commission clarified that, in its view, the capacity to do useful work refers

[14] Paragraph 106 of the judgment under appeal.

[15] There are at least 30 occurrences of the phrase 'immediately operational' in the judgment under appeal, including in the paragraphs framing the analysis of the evidence (paragraphs 117 and 118) and the paragraphs setting out interim conclusions on the evaluation of the evidence (paragraphs 114, 169, 196 and 205).

to the ability to perform marginal tasks not related to the candidates' actual duties. That interpretation is, however, at odds with both the ordinary meaning of the words and the context in which they are used in paragraph 157 of the judgment under appeal.

30. Nor can the General Court be faulted for citing in paragraph 157 of the judgment under appeal an earlier judgment in which it used the same wording and came to a similar conclusion, given that this Court dismissed the Commission's appeal against that judgment. [16]

31. The Commission's other main argument is that the General Court inadequately explained why it cannot be presumed, without further explanation, that a newly recruited official who is not proficient in any of English, French or German would be incapable of immediately carrying out useful work in an EU institution. In my view, that argument amounts to an attempt to reverse the burden of proof. It is for the Commission to explain why a difference in treatment based on language, such as that resulting from the language restriction at issue, is objectively justified and proportionate to the real needs of the service, whether they are described as the need for newly recruited civil servants to be 'immediately operational' or to be 'capable of immediately doing useful work'. [17]

32. I therefore propose that the Court dismiss the first limb of the first ground of appeal.

B. The second limb

33. The Commission submits that the burden the General Court imposes on it, both as regards the merits of the reasons for the language restriction in the contested EPSO notice and in its evaluation of the evidence that the Commission adduced in support of the reasons that EPSO relied upon, is unreasonable.

1. Merits of the reasons for the language restriction in the contested EPSO notice

34. The Commission clarified at the hearing that, despite raising a number of issues in respect of the General Court's assessment of the merits of the reasons for the language restriction in the contested EPSO notice, [18] it does not challenge that assessment because the judgment under appeal annuls the contested EPSO notice for different reasons.

35. The Commission nevertheless submits that the judgment under appeal accepts that since a notice of competition is a measure of general scope the reasoning therein may be limited to a description of the general situation that led to its adoption and the general objectives that it intends to achieve. The General Court arrives at the unjustified conclusion that the reasons in the contested EPSO notice are 'vague and general'. [19] That notice complies with the requirement in the case-law that the rules limiting the choice of the second language must contain clear, objective and foreseeable criteria so that candidates may know sufficiently in advance what the language requirements are and can prepare to take part in the competition in the best possible circumstances.

[16] Judgment of 15 September 2016, *Italy v Commission* (T-353/14 and T-17/15, EU:T:2016:495, paragraphs 121 and 122). The Commission's appeal against that judgment was dismissed by judgment of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251).

[17] See, to that effect, judgment of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251, paragraph 93 and the case-law cited).

[18] Paragraphs 54 to 117 of the judgment under appeal.

[19] Paragraph 116 of the judgment under appeal.

36. Paragraph 116 of the judgment under appeal concludes that the reason relating to the need for new recruits to be immediately operational cannot, in view of its vague and general wording, and the absence of any specific evidence to support it in the contested EPSO notice, justify the language restriction. Thereafter the General Court examines whether the information and evidence the Commission provided in relation to the need for new recruits to be immediately operational justify the language restriction. It concludes that they did not do so.[20] It follows that the annulment of the contested EPSO notice rests on both legs of the General Court's analysis. For completeness, I will therefore address the Commission's critique of the first part of the judgment under appeal.

37. The Commission contends that the contested EPSO notice complies with the requirement that rules restricting the choice of second language must contain clear, objective and foreseeable criteria so that candidates may know, sufficiently in advance, what the language requirements are and can prepare to take part in the competitions in the best possible circumstances.

38. The criteria of clarity, objectivity and foreseeability derive from paragraph 90 of the judgment in *Italy v Commission*.[21] Paragraphs 87 to 94 of that judgment explain that the institutions concerned by the competitions in that case had not adopted rules of procedure in accordance with Article 6 of Regulation No 1/58 stipulating which of the official languages were to be used in specific cases.

39. Paragraph 95 of that judgment states:

'The Commission argued at the hearing that it was possible for the candidates to prepare themselves after the competition notice was published. However, the period between publication of each contested competition notice and the date of the written tests does not necessarily allow a candidate to acquire sufficient language skills to establish his professional competences. Regarding the possibility of learning one of those three languages with a view to future competitions, that presupposes that the languages which will be required by EPSO can be determined far in advance. The absence of rules [of procedure adopted in accordance with Article 6 of Regulation No 1/58] means, however, that it cannot be at all certain that the languages chosen for the competition will remain the same and makes the situation unforeseeable.'[22]

40. The criteria of clarity, objectivity and foreseeability thus reflect the requirement that in order to obtain a post within an institution potential candidates must know sufficiently far in advance of a requirement to acquire knowledge of one (or more) specified language(s) to a specified level capable of being assessed objectively. The contested EPSO notice requires knowledge of English, French or German at level B2. That requirement is arguably clear and objective. However, the number of hours commonly proposed in order to prepare for an examination in a language at level B2 appears to be between 500 and 650.[23] Unless potential candidates would be in a position to achieve that level of knowledge of one of the three languages specified in the contested EPSO notice between the date of its publication and the date on which the tests in that language are held, the contested EPSO notice is unlikely to comply with the criterion of foreseeability as

[20] See, in particular, paragraph 205 of the judgment under appeal.

[21] Judgment of 27 November 2012 (C-566/10 P, EU:C:2012:752).

[22] See also Opinion of Advocate General Bobek in *Commission v Italy* (C-621/16 P, EU:C:2018:611, point 175), and judgment of 27 November 2012, *Italy v Commission* (C-566/10 P, EU:C:2012:752, paragraph 67).

[23] Opinion of Advocate General Sharpston in *Spain v Parliament* (C-377/16, EU:C:2018:610, point 46).

described at paragraph 95 of the judgment in *Italy v Commission*.[24] Moreover, that requirement is additional to the condition that a language restriction is acceptable only if it is objectively justified and proportionate to the real needs of the service.[25] It is therefore incorrect to imply, as the Commission appears to, that once it demonstrates that the rules limiting the choice of the second language are clear, objective and foreseeable the General Court is absolved from carrying out an assessment of the merits of the reasons for the language restriction in the contested EPSO notice.

2. Evaluation of evidence

41. The Commission raises a series of discrete arguments that seek to demonstrate that the General Court exceeded the limits of review established by the case-law.

42. By way of a preliminary observation, I note that the case-law acknowledges that Article 2 of the Staff Regulations affords EU institutions a wide margin of discretion and autonomy with regard to the creation of posts for officials or servants, the choice of the official or servant to fill the post created, and the nature of the employment relationship so established.[26]

43. Where a decision is challenged by way of an action for annulment under Article 263 TFEU the General Court is charged with conducting a full judicial review of the law and of the facts at issue in such proceedings. In particular, as point 24 of the present Opinion observes, this Court has held that the EU judicature is entitled to verify whether a restriction of the choice of second language is objectively justified and proportionate to the real needs of the service.

44. As Advocate General Bobek observed in his Opinion in *Commission v Italy*,[27] delivered in the context of facts and evidence very similar to those under consideration in the present appeal, most of the reasons for the language restriction contained in the contested EPSO notice, and the evidence the Commission adduced in support thereof, are propositions of fact. The wide margin of discretion the decision maker enjoyed in that case included whether, and how, to limit the choice of second language in that competition and of the reasons in support of that limitation. Once EPSO gives reasons for its choice of second languages by reference to a set of factual propositions, both those reasons, and the evidence in support thereof, are fully reviewable by the EU Courts. That review includes whether the rules relating to the burden of proof and the taking of evidence were observed and whether the correct legal criteria were relied upon in the appraisal of the facts and of the evidence.[28]

45. In the light of those observations, I will consider the arguments the Commission makes in support of the contention that the General Court's appraisal of the evidence adduced imposed an unreasonably high burden on it.

[24] Judgment of 27 November 2012 (C-566/10 P, EU:C:2012:752). See also judgment of 15 September 2016, *Italy* v *Commission* (T-353/14 and T-17/15, EU:T:2016:495, paragraphs 50 and 51), upheld on appeal by judgment of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251).

[25] Judgment of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251, paragraph 91).

[26] See, to that effect, judgments of 8 September 2005, *AB* (C-288/04, EU:C:2005:526, paragraphs 26 and 28), and of 26 March 2019, *Commission v Italy* (C-621/16 P, EU:C:2019:251, paragraph 88 and the case-law cited).

[27] C-621/16 P, EU:C:2018:611, points 105, 108 and 112.

[28] Judgment of 2 March 2021, *Commission v Italy and Others* (C-425/19 P, EU:C:2021:154, paragraphs 52 to 53 and the case-law cited).

46. Turning first to the Commission's argument that 'the degree of precision of the statement of the reasons for a decision must be weighed against the practical realities and the time and technical facilities available for making the decision', I note that that statement derives, inter alia, from the case-law on merger control.[29] It is plausible that the practical realities of drafting a decision on the anticipated effect on competition of a concentration within the time constraints imposed by the EU Merger Regulation[30] have an impact on the degree of precision of the statement of reasons contained therein. However, those circumstances do not pertain here: this is not an *ex ante* assessment; there is no need to obtain and to rely upon detailed market information from third parties; there is no complex economic analysis and there are no statutory time limits. Moreover, the Commission provided no information to the General Court regarding the practical realities surrounding the adoption of the contested EPSO notice, nor explained the constraints EPSO faced in terms of time and technical facilities, which omission calls into question the very admissibility of the argument. In all of those circumstances that case-law cannot be relied upon to support the proposition that the General Court transgressed the limits the case-law imposed on it.

47. Next, the Commission takes issue with the finding in paragraphs 133, 158 and 180 of the judgment under appeal that the documentary evidence does not show that English, French and German are the languages actually used by 'all of the Commission's services in their daily work'. According to the Commission, the only relevant issue is whether the services in which the successful candidates will be deployed use those languages.

48. I find that argument unpersuasive. The contested EPSO notice specifies that successful candidates will mainly be deployed within the European Anti-fraud Office (OLAF); it leaves open the possibility that some will work elsewhere.[31] The Commission's submission is also inconsistent with another argument that it raises, namely that the daily work of the institution consists of a large number of preparatory acts, notes, preliminary drafts and other documents, including electronic communications, that constitute tools of analysis and communication used within that institution to adopt measures that reflect the position of the relevant service. If successful candidates can be deployed anywhere within the Commission and be engaged in general preparatory work, then it is relevant whether the evidence shows that English, French and German are the languages actually used by 'all of the Commission's services in their daily work'. Moreover, the evidence under consideration in paragraphs 133 and 158 of the judgment under appeal relates to the Commission's internal language practices generally, and not to the work or procedures of the particular services in which the successful candidates will be deployed. On the basis of the evidence adduced before it, the General Court could not assess anything other than whether English, French and German are the languages used generally within the Commission.

49. The Commission also takes issue with the conclusion in paragraph 180 of the judgment under appeal that the evidence relating specifically to the linguistic knowledge of personnel working in OLAF does not show that the language restriction is proportionate to the need for the recruited staff to be immediately operational because it is not possible to establish, by reference to those

[29] Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala* (C-413/06 P, EU:C:2008:392, paragraph 167 and the case-law cited).

[30] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1)

[31] Paragraph 1 of the contested EPSO notice states that the competition is organised to draw up reserve lists from which the European Commission, mainly the European Anti-fraud Office, will recruit new members of the civil service as 'administrators' (function group AD). Paragraph 120 of the judgment under appeal observes that 2 of the 40 successful candidates in relation to EPSO/AD/323/16 were recruited by other employers, namely by the European Data Protection Supervisor and by the European Court of Auditors. Out of the 50 successful candidates in relation to EPSO/AD/324/16, none was recruited by another European institution.

data, the languages that are used in the various services, or which languages are essential to the performance of the functions carried out by investigators or by their team leaders.[32] The Commission points to that paragraph as an example of the unreasonably high burden that the General Court imposed.

50. Paragraphs 182 to 184 of the judgment under appeal analyse that evidence on the assumption that the linguistic knowledge of OLAF staff indicates that, in order to be immediately operational, new staff would need to have a command of those languages. Even on that assumption they conclude that the language restriction was unjustified. It thus appears that the General Court considered the evidence the Commission put before it from every possible angle with a view to ascertaining if it was capable of justifying the language restriction. I therefore fail to see how it can be said that the General Court's approach to the evidence imposes an unreasonably high burden on the Commission.

51. The Commission then raises the argument, specifically in relation to the document referred to in the judgment under appeal as Commission communication SEC(2006) 1489 final of 20 December 2006 on 'translation in the Commission', that paragraph 164 of the judgment under appeal incorrectly assessed whether that document showed that the three procedural languages referred to therein are used exclusively in the procedures to which they relate.[33] The assessment of the evidence in the light of that question is incorrect because the Commission was only required to provide evidence to show that English, French and German are mainly used for internal and external communication and the management of cases, which is the wording used in the contested EPSO notice.[34]

52. Paragraphs 160 to 162 of the judgment under appeal assess Commission communication SEC(2006) 1489 final of 20 December 2006 on 'translation in the Commission'. Paragraph 163 concludes that that communication is irrelevant for the resolution of the dispute. Thereafter the judgment does not refer to that document. Paragraphs 164 to 168 of the judgment under appeal analyse a document entitled 'Language rules depending on adoption procedures'. At the hearing the Commission was given the opportunity to explain the link between Commission communication SEC(2006) 1489 final of 20 December 2006 on 'translation in the Commission' and the analysis of the documents contained in paragraphs 164 to 168 of the judgment under appeal. It responded by claiming that the words 'in any event' at the beginning of paragraph 164 indicated that the General Court had taken that document into account in its analysis in paragraphs 164 to 168 of the judgment under appeal. An objective reading of the relevant passages of the judgment under appeal demonstrates that the Commission's plea on this point is unsustainable.

53. The Commission next takes issue with paragraphs 181 to 183 of the judgment under appeal, which refer to the advantage that candidates having knowledge of certain languages may have over others who do not possess that knowledge.

54. Paragraphs 171 to 180 of the judgment under appeal evaluate data relating to the language skills of personnel in OLAF. Paragraphs 181 to 187 of that judgment draw certain conclusions from the evaluation of that evidence. The first sentence of paragraph 181 correctly states that a language restriction can be accepted only if it is objectively justified and proportionate to the real needs of the service. Paragraph 183 then states that, on the basis of the evidence produced, only

[32] Paragraphs 175 to 180 of the judgment under appeal.

[33] Paragraph 164 of the judgment under appeal.

[34] See the third subparagraph of paragraph 3 of the judgment under appeal, citing the text of the contested EPSO notice.

knowledge of English can be considered to be an advantage for successful candidates and that it is not clear from the evidence why a candidate with a thorough knowledge of Italian and a sufficient knowledge of German [35] could be immediately operational, whereas a candidate with a thorough knowledge of Italian and a sufficient knowledge of Dutch or Spanish would not be. [36]

55. Paragraphs 181 to 183 of the judgment under appeal thus compare categories of candidates with different language skills in an attempt to evaluate the extent to which candidates in those different categories can be immediately operational. I fail to see how the reference to knowledge of certain languages conferring an advantage can be interpreted as imposing an unreasonably high burden on the Commission.

56. The Commission is also aggrieved by paragraph 181 of the judgment under appeal, which states that there is 'no valid reason why knowledge of all other official languages would not also be permitted'.

57. The full sentence from which that phrase is taken explains that, based on the evidence before the General Court, namely the data pertaining to the language skills of personnel in OLAF, only knowledge of English offers a clear advantage for the successful candidates' ability to be immediately operational. The contested EPSO notice recognises that, out of the three languages, only a good knowledge of English is necessary to carry out the duties outlined. The notice states that candidates must perform an additional English-language comprehension test, resulting in the elimination of those candidates who do not score adequately. In paragraph 110 of the judgment under appeal, the General Court refers to this additional assessment. In paragraph 111, it reasons that the requirement of an English-language test demonstrates that, relative to English, there is no justifiable reason for extending the permitted languages to German and French. The result of specifically requiring a certain standard of English is that a French- and German-speaking candidate may not be immediately operational, despite this being a viable combination under the disputed EPSO notice.

58. In other words, the requirement for knowledge of English as a second language may be justified, but the requirement for knowledge of either English, French or German is not. The General Court then states, at the end of paragraph 181, that there is therefore no valid reason why knowledge of English or any one or more of the official languages, other than, or in addition to, French and/or German, should not be permitted. I cannot fault that conclusion. There is no indication that the General Court excluded the possibility that the Commission could have adduced other evidence that might have supported a different conclusion. Again, I fail to see how, in reaching a conclusion by reference to the evidence adduced before it, the General Court imposed an unreasonably high burden on the Commission.

59. The Commission argues that the General Court wrongly excluded evidence relating to the use of English, French and German in the European Union for the reason that it may not correctly reflect the linguistic knowledge of potential candidates. [37] It relies on paragraph 124 of the

[35] I understand this to refer to knowledge at level B2.

[36] The data in paragraphs 175 to 178 of the judgment under appeal relating to languages 1 and 2 appears to show that approximately 72% of the personnel working in OLAF have knowledge of English, 42% French, 15% German, 11% Italian, 10% Dutch, 8% Spanish and 7% Polish. If language 3 is included, the percentages are: 91% English, 74% French, 24% German, 18% Spanish, 15% Dutch, 14% Italian and 7% Polish. The conclusion that presents itself is that communicating in a language other than English has the consequence of excluding a significant proportion of colleagues from the relevant work processes. Between approximately 25% and 60% of colleagues may not understand the communication if French is used. If German is used, 76% may not understand the communication..

[37] Paragraph 201 of the judgment under appeal.

judgment of 26 March 2019, *Commission v Italy*,[38] to argue that, on the basis of the statistical evidence, the General Court should have presumed that the language restriction was proportionate; all the more because those data have not changed over the years.

60. Paragraph 124 of the judgment of 26 March 2019, *Commission v Italy*,[39] states:

'In that regard, although it is not excluded that the interests of the service may justify restricting the choice of language 2 of the competition to a limited number of official languages which are most widely known in the European Union (see, by analogy, judgment of 9 September 2003, *Kik v OHIM*, C-361/01 P, EU:C:2003:434, paragraph 94), even in the context of competitions of a general nature, such as that referred to in "Notice of Open Competition – EPSO/AD/276/14 – Administrators (AD 5)", such a restriction must nevertheless, having regard to the requirements set out in paragraphs 92 and 93 of the present judgment, be based on elements which are objectively verifiable, both by candidates and by the Courts of the European Union, such as to justify the knowledge of languages required, which must be proportionate to the real needs of the service.'

61. I do not consider that that statement of the law requires the General Court to presume that a language restriction is justified provided that it covers the languages most widely known in the European Union. To the contrary, I interpret it as a statement by the General Court that the Commission may rely on evidence relating to the languages that are most widely known in the European Union in order to justify a language restriction. Such a restriction must, however, be based on elements that are objectively verifiable, by candidates and by the Courts of the European Union, so as to justify the level of knowledge of languages required, which knowledge must be proportionate to the real needs of the service.

62. The General Court therefore proceeded correctly by first evaluating the evidence the Commission adduced relating to the dissemination of German, English and French as foreign languages that are spoken and learned in Europe.[40] Paragraphs 197 to 203 of the judgment under appeal note that the evidence shows that English is by far the foreign language most studied at all levels of education, followed by French, German, Russian, and, to a lesser extent, Spanish, and that the best known foreign language by far[, in Europe,] is perceived to be English, followed by German, Russian, French and Spanish. Further evidence shows that German is the most spoken language in Europe and that English, French and German are the three foreign languages most often learned as a second language (38%, 12% and 11% respectively).

63. The General Court then observed that the relevant statistics relate to all EU citizens, including those who have not yet reached the age of majority; therefore the data may not adequately reflect the linguistic knowledge of potential applicants. It concluded that these statistics only show that the number of potential candidates affected by the language restrictions under consideration in the present case is less high than it would be were it based on languages other than English, French and German, but in itself that does not lead to the conclusion that the language restriction is not discriminatory.

64. The General Court's approach cannot be faulted in that respect. Contrary to what the Commission argues, it did not dismiss the statistical evidence because it included EU citizens who had not yet reached the age of majority. In fact, the General Court concluded that the

38 C-621/16 P, EU:C:2019:251.

39 C-621/16 P, EU:C:2019:251.

40 Paragraphs 197 to 203 of the judgment under appeal.

evidence shows that a language restriction based on English, French and German is likely to have had a negative effect on fewer potential candidates than a restriction based on another combination of languages. There are no indications that that conclusion, which, moreover, the Commission does not contest, would have been different had the statistical data excluded EU citizens who had not yet reached the age of majority.

65. Finally, the Commission contends that paragraph 159 of the judgment under appeal incorrectly assesses Memorandum SEC(2000)2071/6 of 29 November 2000 simplifying the Commission's decision-making process mentioned in paragraphs 158 and 159 thereof. The Commission argues that the General Court did not accept its clear meaning but instead substituted its own subjective vision of the manner in which work is organised as between civil servants.

66. By that argument it would appear that the Commission seeks not so much to have the Court of Justice sanction a distortion of evidence by the General Court than to invite it to replace the General Court's assessment of the facts and evidence with its own. That is impermissible in the context of an appeal.[41]

67. For those reasons the Commission's arguments cannot be relied upon to support the proposition that the judgment under appeal goes beyond the limits that the case-law imposes. I accordingly suggest that the Court dismiss the second limb of the first ground of appeal.

C. The third limb

68. The Commission first argues that paragraphs 152 to 155 of the judgment under appeal reduce the scope of the evidence because they do not show the existence of a legally binding act defining the working languages of the institution. According to the Commission, it cannot be deduced either from the case-law or Article 1d(6) of the Staff Regulations that only legally binding acts can lawfully restrict the choice of a second language. Moreover, paragraph 11 of the judgment under appeal notes correctly that the contested EPSO notice refers to 'internal rules', that is to say, rules that are binding only within the institutions. That description of those rules finds support in the evidence the Commission adduced.

69. Paragraph 11 of the judgment under appeal observes that point 2 of Annex II to the contested EPSO notice states that, for each selection procedure, the EPSO Management Board must determine on a case-by-case basis the languages to be used for individual open competitions taking into account 'any specific internal rules on the use of languages within the institutions or body concerned'.

70. Paragraphs 152 and 153 of the judgment under appeal observe that the documents adduced in evidence, described in paragraphs 123 to 125 and 127 thereof, cannot be considered as Commission rules for the purposes of Article 6 of Regulation No 1/58. The Commission accepts that that evidence merely reflects a long-standing administrative practice whereby documents to be submitted to the College of Commissioners for approval must be available in English, French and German. Paragraph 154 of the judgment under appeal finds that there is no evidence that either the President of the Commission or the College of Commissioners formally approved the

[41] See, for example, judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (C-105/04 P, EU:C:2006:592, paragraphs 69 and 70 and the case-law cited), and judgment of 21 September 2006, *Technische Unie v Commission* (C-113/04 P, EU:C:2006:593, paragraphs 82 and 83 and the case-law cited).

'Guide for operational procedures'. Paragraph 155 of that judgment states that, in the context of the present case, the Commission confirmed that there is no internal decision that determines the working languages within that institution.

71. Paragraphs 157 to 159 of the judgment under appeal assess whether the documents adduced in evidence showed a link between the Commission's decision-making procedures, including those of the College of Commissioners, and the tasks to be carried out by successful candidates. Paragraphs 160 to 169 of that judgment further evaluate that evidence in the light of other documentary material the Commission produced.

72. Contrary to what the Commission asserts, the judgment under appeal does not dismiss evidence, or 'reduce its scope', because the material it adduced in evidence did not reveal the existence of a 'legally binding act'. Instead, the General Court correctly assesses whether the Commission had adopted any internal rules pursuant to Article 6 of Regulation No 1/58 specifying that one or more of the official languages and the working languages listed in Article 1 thereof is to be used in specific cases. Paragraph 155 of the judgment under appeal discloses that the Commission did not dispute that such rules had not been adopted.

73. Upon reaching that uncontested interim conclusion, the General Court thereafter continues its detailed evaluation of the evidence that the Commission adduced in respect of its internal procedures.

74. I thus propose that the Court dismiss the third limb of the first ground of appeal since it appears to be based upon an incorrect and selective reading of the judgment under appeal.

V. Conclusion

75. By reason of the foregoing, I propose that the Court dismiss the first ground of appeal.