Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

9 June 2021 *

(Language regime – Competition EPSO/AD/293/14 for the recruitment of administrators in the fields of competition law, corporate finance, financial economics, industrial economics and macroeconomics (AD 7) – Non-inclusion on the reserve list – Plea of illegality – Limitation of the choice of the second language of the competition to English, French or German – Regulation No 1 – Article 1d(1) of the Staff Regulations – Discrimination based on language – Justification – Interests of the service)

In Case T-202/17,

Ana Calhau Correia de Paiva, residing in Brussels (Belgium), represented by V. Villante, G. Pandey and D. Rovetta, lawyers,

applicant,

v

European Commission, represented by L. Radu Bouyon, I. Melo Sampaio and L. Vernier, acting as Agents,

defendant,

APPLICATION under Article 270 TFEU for annulment, firstly, of the decision of the selection board for competition EPSO/AD/293/14 – Administrators (AD 7) in the fields of competition law, corporate finance, financial economics, industrial economics and macroeconomics of 9 November 2015 not to include the applicant's name on the reserve list drawn up at the end of the selection procedure, secondly, of the decision of 23 June 2016 reviewing that first decision, thirdly, of the decision of 22 December 2016 rejecting the complaint filed by the applicant against the first decision and, fourthly, of the reserve list drawn up at the end of the selection procedure referred to above in so far as that reserve list concerns the field of competition law.

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, O. Porchia (Rapporteur) and M. Stancu, Judges,

Registrar: B. Lefebvre, Administrator,

having regard to the written part of the procedure and further to the hearing on 6 October 2020,

gives the following

* Language of the case: English.

Judgment[1]

…

II. Procedure and forms of order sought by the parties

15 By application lodged at the Court Registry on 31 March 2017, the applicant brought the present action.

16 On the date on which that action was brought, an appeal brought by the Commission on 25 November 2016 and registered as Case C-621/16 P against the judgment of 15 September 2016, *Italy* v *Commission* (T-353/14 and T-17/15, EU:T:2016:495) was pending before the Court of Justice. By that judgment, the General Court had annulled the notices of open competition EPSO/AD/276/14 to draw up a reserve list of administrators (OJ 2014 C 74 A, p. 1) and EPSO/AD/294/14 to draw up a reserve list of administrators in the field of data protection (OJ 2014 C 391 A, p. 1).

17 By letter lodged at the Court Registry on 16 June 2017, the Commission requested, on the basis of Article 69(d) of the Rules of Procedure of the General Court, that the proceedings in the present case be stayed pending the final decision of the Court of Justice in Case C-621/16 P.

18 By letter lodged at the Court Registry on 6 July 2017, the applicant objected to a stay of the proceedings.

19 By decision of 11 July 2017, adopted on the basis of Article 69(d) of the Rules of Procedure, the President of the Fifth Chamber of the General Court decided to stay the proceedings.

20 Following delivery of the judgment of 26 March 2019, *Commission* v *Italy* (C-621/16 P, EU:C:2019:251), on a proposal from the Judge-Rapporteur, the General Court (Fifth Chamber) adopted, on 4 April 2019, a measure of organisation of procedure to put a question to the parties on the consequences to be drawn, for the present case, from that judgment and from the judgment of 26 March 2019, *Spain* v *Parliament* (C-377/16, EU:C:2019:249). The parties submitted their observations in that regard within the time limit prescribed.

21 On 5 July 2019, the Commission lodged its defence.

22 The reply and the rejoinder were lodged on 23 September and 11 November 2019, respectively. On 20 November 2019, the written procedure was concluded.

23 On 22 October 2019, in the interests of the proper administration of justice, by reasoned decision and after consulting the judges concerned, the President of the General Court designated, pursuant to Article 27(3) of the Rules of Procedure, a new Judge-Rapporteur, sitting in the First Chamber of the General Court.

24 By letter lodged at the Court Registry on 12 December 2019, the applicant requested that a hearing be held, pursuant to Article 106(2) of the Rules of Procedure.

25 By letter lodged at the Court Registry on the same day, the applicant submitted new evidence, relying on Article 85(3) and (4) of the Rules of Procedure. The Commission submitted its observations on that new evidence within the time limit prescribed and, on that occasion, disputed its admissibility.

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

26 On 21 July 2020, on a proposal from the Judge-Rapporteur, the Court (First Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put questions in writing to the Commission. The Commission complied with those measures within the time limit prescribed.

27 On 21 September 2020, on a proposal from the Judge-Rapporteur, the Court (First Chamber), by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, inviting them to answer those questions at the hearing.

28 The parties presented oral argument and answered written and oral questions put by the Court at the hearing on 6 October 2020.

29 The applicant claims that the Court should:

– annul, where appropriate having previously declared illegal and inapplicable to the applicant the notice of competition and the language regime that it establishes, pursuant to Article 277 TFEU:

  – the decision not to include the applicant on the reserve list,

  – the review decision;

  – the decision rejecting the complaint;

  – the reserve list of the competition at issue;

– order the Commission to pay the costs.

30 In addition, the applicant requests that the Court order measures of organisation of procedure requesting the Commission to produce all of EPSO's files related to the adoption of the decisions the annulment of which is sought.

31 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

…

B. Substance

…

1. Second, third and fourth pleas alleging that the notice of competition is illegal on account of the limitation of the choice of the second language of the competition to English, French or German

…

(a) Admissibility of the plea of illegality

41 In support of its plea of inadmissibility, the Commission contends that it follows from the case-law that a candidate cannot, in a complaint challenging a decision of a selection board, rely on the alleged unlawfulness of the competition notice if he or she has not challenged in due time the provisions of that notice that, in his or her view, adversely affect him or her. The Commission argues that it is only if a close connection between the statement of reasons for the contested decision and the plea of illegality in relation to the notice of competition is established that an applicant can challenge the legality of the notice. In the present case, there is, in the Commission's view, no link between the reasons for the applicant's name not being included on the reserve list and the limitation of the choice of the second language of the competition at issue to English, French or German. The Commission argues that, in particular, such a link cannot be inferred from the comments made in the applicant's competency passport regarding the general competency 'communication'. In the Commission's view, the applicant's performance in that respect was regarded as 'satisfactory', which proves that the fact that she sat the assessment centre tests in French is not the cause of her name not being included on the reserve list.

42 The applicant disputes the Commission's arguments.

43 As a preliminary point, it should be borne in mind that, according to the case-law of the Court of Justice, under Article 277 TFEU, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the European Union is at issue, plead the grounds specified in the second paragraph of Article 263 TFEU in order to invoke before the Court the inapplicability of that act (judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 66).

44 That provision gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, with a view to obtaining the annulment of a decision addressed to that party, the validity of acts of general application which form the legal basis of that decision (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 67 and the case-law cited).

45 Since the purpose of Article 277 TFEU is not to allow a party to contest the applicability of any act of general application in support of any action whatsoever, the act the legality of which is called in question must be applicable, directly or indirectly, to the issue with which the action is concerned (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 68 and the case-law cited).

46 Thus, in an action for annulment brought against individual decisions, the Court has accepted that the provisions of an act of general application that constitute the basis of those decisions or that have a direct legal connection with such decisions may legitimately form the subject matter of an objection of illegality (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 69 and the case-law cited).

47 As regards, in particular, competition notices, it must be borne in mind that, according to settled case-law, in the context of a recruitment procedure, which is a complex administrative operation composed of a series of decisions, a candidate in a competition may, in an action brought against a subsequent step taken in that process, challenge the legality of earlier steps that are closely linked to it (see, to that effect, judgment of 11 August 1995, *Commission* v *Noonan*, C-448/93 P, EU:C:1995:264, paragraph 17 and the case-law cited) and, in particular, challenge the legality of the competition notice pursuant to which the step in question was taken (see judgment of 14 December 2017, *PB* v *Commission*, T-609/16, EU:T:2017:910, paragraph 26 and the case-law cited).

48 Failure to challenge a competition notice within the time limit laid down does not prevent an applicant from relying on irregularities occurring in the course of the competition, even if the origin of those irregularities may be found in the wording of the competition notice (see judgment of 31 January 2006, *Giulietti* v *Commission*, T-293/03, EU:T:2006:37, paragraph 40 and the case-law cited).

49 In particular, where the plea alleging irregularities in the notice of competition, which has not been challenged in good time, concerns the statement of reasons for the contested individual decision, the action is accepted as admissible by the case-law. A candidate in a competition must not be deprived of the right to challenge all the elements, including those defined in the competition notice, comprising the justification for the individual decision concerning him or her taken on the basis of the conditions laid down in the notice, in so far as only that specific decision applying them affects his or her legal position individually and enables him or her to ascertain with certainty how and to what extent his or her personal interests are affected (see judgment of 14 December 2017, *PB* v *Commission*, T-609/16, EU:T:2017:910, paragraph 28 and the case-law cited).

50 On the other hand, where there is no close connection between the reasoning of the contested decision and the plea of unlawfulness in relation to the competition notice, which has not been challenged in good time, the plea must be declared to be inadmissible in accordance with the mandatory rules governing time limits for bringing actions, which cannot be derogated from in such a case without offending against the principle of legal certainty (see judgment of 14 December 2017, *PB* v *Commission*, T-609/16, EU:T:2017:910, paragraph 29 and the case-law cited).

51 It is in the light of those considerations that it is necessary to examine the plea of inadmissibility raised by the Commission against the plea of illegality in relation to the notice of competition.

52 Firstly, it should be borne in mind that, by her plea of illegality, the applicant is challenging, in essence, the provisions of the notice of competition concerning the language regime, namely the limitation of the choice of second language to English, French or German. That second language was used, inter alia, for the tests to assess the general and specific competencies of candidates, which were held at the assessment centre.

53 Secondly, as regards the statement of reasons for the contested decision, it should be borne in mind that, by letter of 9 November 2015, the applicant was informed that her name had not been included on the reserve list on the ground that she had not obtained the highest marks in the assessment centre tests. In addition, in the contested decision, it is stated that the selection board carefully reviewed the marks that had been awarded to the applicant for the assessment centre tests, that it reviewed the assessment of her general and specific competencies and that it concluded that her results reflected her performance at the assessment centre.

54 Thirdly, it is apparent from the ‘competency passport’ issued to the applicant that, for the general competency ‘communication’, she obtained 5.5 points out of 10, which is one of the lowest assessments and scores that she obtained as regards the evaluation of her general competencies at the assessment centre. According to point 1.2 of the general rules, to which footnote No 7 of the notice of competition referred, the purpose of the assessment of those competencies was to evaluate the candidate’s ability to ‘communicate clearly and precisely both orally and in writing’. A finding of the selection board with regard to the applicant as to her knowledge of French or, at the very least, as to her level of proficiency in a competency that was strongly influenced by her knowledge of that language, follows from that by necessary implication.

55 Fourthly, although it is true that the notice of competition did not provide for a test of the applicant’s specific knowledge, in terms of vocabulary or grammar, of English, French or German, it cannot be denied that there is a close connection between the applicant’s knowledge of French, which she chose

as a second language, and the tests that she had to sit in that language. The knowledge which the applicant has of French is inevitably and necessarily reflected in the tests to assess the general and specific competencies as provided for by the competition at issue.

56 In that regard, it is established that the likelihood of getting better marks in the tests is higher if these tests are conducted in the candidate's mother tongue or a language of which he or she has an equal command (judgment of 2 July 2014, *Da Cunha Almeida* v *Commission*, F-5/13, EU:F:2014:176, paragraph 38), especially in the context of a technical test such as the case study.

57 It is common ground that Portuguese is the applicant's mother tongue. Furthermore, although, as the Commission states, the applicant declared in her application form that her level in French is equivalent to level C2 of the CEFR, as is her level in Portuguese, and that she completed part of her studies in Belgium and France, the fact remains that she claims before the Court, without being contradicted in that regard by the Commission, that she has a better command of her mother tongue than French. That is, moreover, particularly likely to be the case in view of the applicant's academic and professional background, as she indicated in her application form, from which it is apparent that both her studies and her professional career took place, for the most part, in Portugal.

58 Fifthly, it should be noted that limiting the choice of the second language of the competition to the three languages in question does not only affect the ability of candidates to express themselves orally or in writing, but also determines the type of keyboard that candidates may use for the purpose of carrying out the case study, the provision of keyboards to candidates being limited, according to EPSO's practice, which was confirmed by the Commission before the Court, to the language (and, as the case may be, to the languages) in which the tests are to be carried out. In the present case, it is not disputed that the applicant was required to use a type of keyboard which she was not accustomed to using because of her mother tongue. It must be stated that that affects the carrying out and therefore potentially the result of a test during which it is necessary to write, using a keyboard, a text of a certain length within a limited timeframe.

59 Sixthly, as regards the argument put forward by the Commission at the hearing that a close connection could only be established if the results of the tests to evaluate candidates' general competencies proved to be negative or disastrous, it must be stated that such an argument amounts to supporting, without justification, a stricter application of the condition that there be a close connection where the illegality alleged relates to the language regime of the competition.

60 In the light of all the foregoing considerations, it should be held that there is a close connection between the statement of reasons for the contested decision and the provisions of the notice of competition relating to the language regime of the competition at issue, the legality of which is disputed.

61 Accordingly, the plea of inadmissibility raised by the Commission must be rejected and the plea of illegality raised by the applicant in relation to the notice of competition must be declared admissible.

…

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Annuls the decision of the selection board of open competition EPSO/AD/293/14 of 23 June 2016, transmitted by the European Personnel Selection Office (EPSO), rejecting the request for review made by Ms Ana Calhau Correia de Paiva following her exclusion from the reserve list of the competition by a decision of 9 November 2015;**

2. **Dismisses the action as to the remainder;**

3. **Orders Ms Calhau Correia de Paiva to bear one third of her own costs;**

4. **Orders the European Commission to bear its own costs and to pay two thirds of the costs incurred by Ms Calhau Correia de Paiva.**

Kanninen Porchia Stancu

Delivered in open court in Luxembourg on 9 June 2021.

[Signatures]