Reports of Cases

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

15 June 2010*

(Open competition EPSO/AD/77/06 — Non-admission to the written test following the result obtained in the admission tests — Powers of EPSO)

In Case F-35/08,

ACTION under Articles 236 EC and 152 EA,

Dimitrios Pachtitis, candidate in open competition EPSO/AD/77/06, residing in Athens (Greece), represented by P. Giatagantzidis and S. Stavropoulou, lawyers,

applicant,

supported by

European Data Protection Supervisor, represented by H. Hijmans and M.V. Pérez Asinari, acting as Agents,

intervener,

v

European Commission, represented by J. Currall and I. Hadjiyiannis, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni, President, H. Tagaras (Rapporteur) and H. Kreppel, Judges,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 1 December 2009,

gives the following

* Language of the case: Greek.

Judgment

1 By application received by fax at the Civil Service Tribunal Registry on 14 March 2008 (the original being lodged on 19 March 2008), Mr Pachtitis requests the annulment of, first, the decision of the European Personnel Selection Office (EPSO) of 31 May 2007, informing him that he had failed the admission tests in open competition EPSO/AD/77/06, second, the EPSO decision of 6 December 2007, rejecting his complaint against the decision of 31 May 2007, and third, any related measures.

Legal context

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

'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 [European Union]. No posts shall be reserved for nationals of any specific Member State.'

3 Article 28 of the Staff Regulations provides:

'An official may be appointed only on condition that:

(a) he is a national of one of the Member States of the [European Union], unless an exception is authorised by the appointing authority, and enjoys his full rights as a citizen;

(b) he has fulfilled any obligations imposed on him by the laws concerning military service;

(c) he produces the appropriate character references as to his suitability for the performance of his duties;

(d) he has, subject to Article 29(2), passed a competition based on either qualifications or tests, or both qualifications and tests, as provided for in Annex III;

(e) he is physically fit to perform his duties;

(f) he produces evidence of a thorough knowledge of one of the languages of the [European Union] and of a satisfactory knowledge of another language of the [European Union] to the extent necessary for the performance of his duties.'

4 Article 29 of the Staff Regulations provides:

'1. Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by:

…

within the institution;

(b) whether requests for transfer have been received from officials of the same grade in other institutions, and/or whether to hold a competition internal to the institution …

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. …

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

2. A procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of senior officials …, and, in exceptional cases, also for recruitment to posts which require special qualifications.

3. The institutions may organise internal competitions for each function group on the basis of qualifications and tests for the institution concerned which shall be at grade AST 6-level or higher and at grade AD 9-level or higher …

4. Once every five years the European Parliament shall organise an internal competition on the basis of qualifications and tests for each function group which shall be at grade AST 6-level or higher and at grade AD 9-level or higher …'

5 Article 30 of the Staff Regulations states:

'For each competition, a selection board shall be appointed by the appointing authority. This board shall draw up a list of suitable candidates.

…'

6 Annex III to the Staff Regulations, entitled 'Competitions', provides, in Article 3:

'The selection board shall consist of a chairman designated by the appointing authority and of members designated by the appointing authority and the Staff Committee, each designating the same number.

For open competitions common to two or more institutions, the selection board shall consist of a chairman appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations and of members appointed by the appointing authority referred to in Article 2(2) of the Staff Regulations on a proposal from the institutions, as well as of members appointed by agreement between the Staff Committees of the institutions, in such a way as to ensure equal representation.

The selection board may, for certain tests, be assisted by one or more examiners serving in an advisory capacity.

Members of the selection board shall be chosen from officials whose function group and grade is at least equal to that of the post to be filled.

If a selection board consists of more than four members, it shall comprise at least two members of each gender.'

7 Pursuant to Article 5 of Annex III to the Staff Regulations:

'After examining [the candidates' files], the 'selection board shall draw up a list of candidates, who meet the requirements set out in the notice of competition.

…

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

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

8 Article 7 of Annex III to the Staff Regulations provides:

'The institutions shall, after consultation of the Staff Regulations Committee, entrust [EPSO] with responsibility for taking the necessary measures to ensure that uniform standards are applied in the selection procedures for officials of the [European Union] and in the assessment and in the examination procedures referred to in Articles 45 and 45a of the Staff Regulations.

2. [EPSO's] task shall be to:

(a) organise, at the request of individual institutions, open competitions;

(b) provide, at the request of individual institutions, technical support for internal competitions organised by them;

(c) determine the contents of all examinations organised by the institutions in order to ensure that the requirements of Article 45a(1)(c) of the Staff Regulations are met in a harmonised and consistent manner;

(d) assume general responsibility for the definition and organisation of the assessment of linguistic ability in order to ensure that the requirements of Article 45(2) of the Staff Regulations are met in a harmonised and consistent manner.

3. [EPSO] may, at the request of individual institutions, perform other tasks linked to the selection of officials.

4. [EPSO] shall, at their request, provide assistance to the different institutions with a view to the selection of temporary staff and contract staff, in particular by defining the contents of the tests and organising the selection procedures in the framework of Articles 12 and 82 of the Conditions of Employment of other servants.'

9 According to the preamble 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, 'the decision setting up EPSO'):

'(1) In the interests of making efficient and economic use of resources, a common interinstitutional body should be entrusted with the means of selecting officials and other servants to serve the European [Union].

(2) The interinstitutional body so established should have the task of drawing up reserve lists from among candidates in open competitions in line with the needs indicated by each institution and in compliance with the Staff Regulations, the decisions to appoint successful candidates being taken by each appointing authority.

…'

10 Article 2(1) of the decision setting up EPSO states:

'[EPSO] shall exercise the powers of selection conferred under the first paragraph of Article 30 of the Staff Regulations and under Annex III thereto on the appointing authorities of the institutions signing this Decision. …'

11 Article 3 of the decision setting up EPSO states:

'1. In response to requests made to it by the appointing authorities referred to in Article 2, [EPSO] shall draw up reserve lists from among candidates in open competitions as referred to in the first paragraph of Article 30 of the Staff Regulations and in accordance with Annex III thereto.

2. [EPSO] may assist the institutions, bodies, offices and agencies established by or in accordance with the Treaties with internal competitions and the selection of other servants.'

12 Article 1 of Decision 2002/621/CE of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of the European Communities Personnel Selection Office (OJ 2002 L 197, p. 56) ('the decision on the organisation and operation of EPSO') provides:

'1. [EPSO] shall organise open competitions with a view to securing the services of officials on optimal professional and financial terms for the institutions of the European [Union]. [EPSO] shall draw up reserve lists enabling the institutions to recruit highly qualified staff meeting the needs determined by the institutions.

2. More specifically, [EPSO's] tasks shall be to:

(a) organise open competitions at the request of individual institutions with a view to drawing up reserve lists of suitable applicants for appointment as officials. The competitions shall be organised in compliance with the Staff Regulations, on the basis of harmonised criteria laid down in accordance with Article 6(c) and in compliance with the work programme approved by the Management Board;

(b) cooperate closely with the institutions with a view to assessing the future staff needs indicated by [them] and preparing and implementing a programme of competitions to meet those needs in a timely manner;

(c) develop selection methods and techniques on the basis of best practice and in line with the skills profiles laid down for the various categories of staff of the institutions;

(d) administer and check the use of the reserve lists established on the basis of interinstitutional competitions;

(e) submit annual reports to the institutions on its activities.'

13 Article 2 of the decision on the organisation and operation of EPSO states:

'The appointing authority of each institution shall make available to [EPSO] a sufficient number of selection board members, examiners and invigilator[s] on the basis of the "quota" approved by the Management Board as provided for in Article 6(i), to enable the selection procedures to proceed smoothly in accordance with Article 3 of Annex III to the Staff Regulations.'

14 Article 5(1) of the decision on the organisation and operation of EPSO states:

'A Management Board shall be set up for [EPSO], comprising one member appointed by each institution and three staff representatives with observer status appointed by common assent by the staff committees of the institutions.'

15 Article 6 of the decision on the organisation and operation of EPSO states:

'In the common interest of the institutions, the Management Board shall: …

(c) acting by a qualified majority on proposals from the Head of [EPSO] … approve the principles governing the selection policy to be followed by [EPSO];

…'

Background to the dispute

16 On 15 November 2006, EPSO published notice of open competition EPSO/AD/77/06 (OJ 2006 C 277 A, p. 3, 'the competition at issue') to constitute a reserve list of Greek-language linguistic administrators, in grade AD 5, in the field of translation. In compliance with the notice of competition, candidates had to choose from two options, described as Option 1 and Option 2, the one which corresponded to their knowledge of languages. Both the second and third languages of the candidates were to be English, French or German.

17 Having worked from January 1982 to December 1991 as a translator in the Commission of the European Communities, the applicant, a Greek national, was a candidate in that open competition for Option 1.

18 The competition was in three stages. According to section B of the notice of competition, the first stage, or the preliminary stage, consisted of two admission tests, each of 30 multiple-choice questions, the first, to assess knowledge of the European Union, its institutions and policies ('Test (a)') and the second to assess general ability, in particular verbal and numerical reasoning skills ('Test (b)'). According to section C of the notice of competition, the second stage consisted of written tests and the third stage of an oral test. Under section B of the notice of competition, and in the case of Option 1, only the 110 candidates who obtained the best marks in the admission tests and, in any event, at least the pass mark, that is to say, 5 out of 10 points in test (a) and 10 out of 20 points in test (b), were to be invited to submit a full application with a view to possible admission to the second stage of the competition; the number of candidates to be admitted to the second stage for Option 2 was fixed at 30.

19 Under section D of the notice of competition candidatures had to be submitted by electronic means. More specifically, each candidate was invited first to create an electronic account with his or her personal data in the EPSO computer system. After registration of his or her account, the candidate could make an electronic application to take part in the competition. If the application was made within the period prescribed, EPSO sent an electronic invitation to participate in the preliminary stage of the competition, and then directed the candidate to the internet site of an external contractor, to whom EPSO had entrusted the organisation and implementation of the preliminary stage of the competition. On the website of that contractor, the candidate had to electronically reserve an examination date and time in the period from 10 April to 4 May 2007, the period during which the admission tests were scheduled to take place in different examination centres.

20 Those tests, which, as provided in section B of the notice of competition, were carried out by computer, were therefore held in places and on dates which were different for each candidate. The questions, which were randomly selected from a database containing a batch of questions, provided to EPSO by an external contractor, were also different for each candidate. The selection board of the competition at issue was involved only after the admission tests and therefore only at the stage of the written and oral tests. According to section E, point 2, of the notice of competition, the names of the members of the selection board were to be published on the EPSO internet site 15 days before the written tests.

21 After the applicant had taken the admission tests, EPSO informed him, on 31 May 2007, by electronic means, of the marks he had obtained in tests (a) and (b), and informed him that those marks 'although better or equal to the minimum required [were] insufficient to allow him to be included among the candidates who obtained the 110 best marks in the admission tests as provided in section B of the notice of competition'. It was indicated in that email that the applicant obtained 18.334/30 points, whereas the 110 successful candidates had obtained at least 21.333/30 points.

22 By letter of 4 June 2007, the applicant requested from EPSO a copy of his answers for tests (a) and (b) and a copy of the multiple choice questions in those tests, together with a copy of the sheet of correct answers.

23 On 27 June 2007 EPSO declined to do so, reserving the right to include its explanations in a future 'Guide for applicants'. More specifically, EPSO made a distinction between the 'pre-selection tests' which had been carried out in earlier competitions and for which the communication of the questions and answers were authorised, and the 'admission tests' such as those in the competition at issue, for which the communication of questions and answers had to be ruled out.

24 The applicant contested 'the validity and content' of the EPSO decision of 31 May 2007 by submitting a complaint under Article 90(2) of the Staff Regulations, in which he alleged, first, infringement of the principles of equal treatment, objectivity and transparency as well as the obligation to give reasons for the decision of 31 May 2007 and, second, errors of assessment that the 'selection board of the admission tests (namely, the computer)' had obviously made having regard to his professional experience when correcting his admission tests, and requested that EPSO revise the content of that decision following re-examination of his admission tests and inform him which, if any, of the questions in the admission tests had been 'cancelled' by the selection board.

25 By email of 26 November 2007, EPSO sent the applicant, as regards tests (a) and (b), a statement showing the number of multiple choice questions set, the letters corresponding to the applicant's answers and those corresponding to the correct answers, but in such a manner as not to divulge the wording of those questions and answers. It appears from that document that, of the 30 multiple choice questions on verbal and numerical reasoning skills, the applicant answered 16 correctly, while, of the 30 questions on knowledge of the European Union, he answered 23 correctly.

26 By decision of 6 December 2007, in which EPSO stated that it had re-examined, first, the applicant's file on the automatic processing of his admission tests and, second, the consequences of the cancellation of certain questions on his results, EPSO rejected the complaint and confirmed its decision of 31 May 2007. As regards, more particularly, the cancellation of questions, EPSO stated that seven questions had indeed been cancelled by an 'advisory committee' which was responsible for the quality control of questions inserted in the database, but that the applicant's admission tests did not include any of the cancelled questions.

Forms of order sought and procedure

27 The applicant claims that the Court should:

— annul EPSO's decisions of 31 May 2007 and 6 December 2007, and all related measures;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application as manifestly unfounded;

— order the applicant to pay the costs.

29 By letter received at the Tribunal Registry on 31 July 2008, the European Data Protection Supervisor (EDPS) applied to intervene in support of the forms of order sought by the applicant. The observations of the main parties on that application were received at the Tribunal Registry on 8 and 12 September 2008 respectively.

30 By order of the President of the First Chamber of the Tribunal of 20 November 2008, the EDPS was granted leave to intervene. The EDPS's statement in intervention was received at the Tribunal Registry on 29 January 2009. In that statement, accepting from the outset that the decisions on the organisation of a competition and the selection of candidates for the next stage of a competition do not fall within its remit, the EDPS made clear that its intervention must therefore be understood to concern only the applicant's request for access to certain documents relating to the competition, in support of his first plea alleging the absence of any statement of reasons in the decisions of 31 May 2007 and 6 December 2007.

31 The Commission and the applicant submitted their observations on that statement in intervention by letters of 5 March 2009.

32 In parallel with his action before the Tribunal, on 31 May 2007 the applicant brought an action before the Court of First Instance (now 'the General Court') against the rejection of his confirmatory application referred to in Article 8 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Those proceedings are now pending and the case is registered as Case T-374/07.

33 In order to prepare the case and arrange the conduct of the proceedings under the best conditions, the Tribunal adopted measures of organisation of procedure, under Articles 55 and 56 of the Rules of Procedure. For this purpose, the Commission was invited, by letters from the Tribunal Registry of 18 November 2009 and 8 December 2009, to clarify the composition and role of the 'advisory committee', referred to in paragraph 26 of this judgment.

34 By letters received at the Tribunal Registry on 24 November 2009 and on 14 December 2009 by fax, the Commission complied with the Tribunal's requests made by way of measures of organisation of procedure.

The subject-matter of the dispute

35 The applicant seeks annulment not only of the EPSO decision of 31 May 2007 but also of the EPSO decision of 6 December 2007 rejecting his complaint against the decision of 31 May 2007.

36 According to settled case-law, an action by an official formally directed against the rejection of a complaint has the effect of bringing before the Court the decision adversely affecting the applicant against which the complaint was submitted (Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 8, and Case T-33/91 *Williams* v *Court of Auditors* [1992] ECR II-2499, paragraph 23).

37 A decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged (Joined Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 9; order of 16 June 1988 in Case 381/87 *Progoulis* v *Commission* [1988] ECR 3081, paragraph 17; Joined Cases T-338/00 and T-376/00 *Morello* v *Commission* [2002] ECR-SC I-A-301 and II-1457, paragraph 34; and Case T-14/03 *Di Marzio* v *Commission* [2004] ECR-SC I-A-43 and II-167, paragraph 54).

38 A purely confirmatory measure, such as an act which contains no new factors as compared with a previous measure adversely affecting the applicant and which has not therefore replaced it, cannot be described as an act adversely affecting the applicant (see, to that effect, Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709, paragraph 18, Case T-608/97 *Plug* v *Commission* [2000] ECR-SC I-A-125 and II-569, paragraph 23; *Di Marzio* v *Commission*, paragraph 54).

39 However, it has been held on several occasions that an express decision rejecting the complaint may, in view of its content, not be confirmatory of the measure challenged by the applicant. This is the case where the decision rejecting the complaint contains a re-examination of the applicant's situation in the light of new elements of law or of fact or when it amends or is supplementary to the original decision. In such circumstances, the rejection of that complaint is a measure subject to review by the Courts of the European Union, which take it into consideration for the purposes of the review of the legality of the contested measure (Case T-258/01 *Eveillard* v *Commission* [2004] ECR-SC I-A-167 and II-747, paragraph 31, and Case T-375/02 *Cavallaro* v *Commission* [2005] ECR-SC I-A-151 and II-673, paragraphs 63 to 66; and the judgment of 9 September 2008 in Case F-18/08 *Ritto* v *Commission*, ECR I-A-1-281 and II-A-1-1495, paragraph 17), or even treat it as an act adversely affecting an applicant replacing that earlier decision (see, to that effect, *Kuhner* v *Commission*, paragraph 9; *Morello* v *Commission*, paragraph 35, and Case T-389/02 *Sandini* v *Court of Justice* [2004] ECR-SC I-A-295 and II-1339, paragraph 49).

40 In the present case, the decision of 6 December 2007 confirms EPSO's refusal to include the applicant's name in the list of the 110 candidates who obtained the best marks in the admission tests to the competition at issue whilst disputing the applicant's arguments and justifying that refusal. Although the decision of 31 May 2007 merely informs the applicant of his failure in the admission tests, the decision of 6 December 2007 is based, on the other hand, on several grounds not contained in the decision of 31 May 2007. In addition, the decision of 6 December 2007 contains the new information that certain questions in the admission tests were cancelled.

41 In those circumstances, the decision of 6 December 2007, which is supplementary to the decision of 31 May 2007, is not a measure confirming that decision and must be taken into account in the review of legality which it is for the Tribunal to undertake.

42 It must therefore be held that the action has the effect of bringing before the Tribunal pleas for annulment of the decision of 31 May 2007, as supplemented by the decision of 6 December 2007 (the 'contested decisions').

The claims for annulment of the contested decisions

43 As a preliminary point, it should be pointed out that, while the decision of 31 May 2007 merely informs the applicant of his failure in the admission tests to the competition at issue, the claims for annulment of that decision must be understood to refer to the actual decision to exclude the applicant from the list of the 110 candidates who obtained the best marks in the admission tests in question.

44 In support of his claim for annulment of the contested decisions, the applicant relies upon four pleas alleging, first, that the contested decisions contained no statement of reasons; second, that EPSO lacked authority to eliminate candidates during the preliminary stage of the competition at issue; third, infringement of the principles of equal treatment, objectivity, and proportionality; and, fourth, manifest errors of assessment.

45 It is appropriate first to examine the second plea in law.

Arguments of the parties

46 The applicant alleges that EPSO had no authority to choose the subject matter of the admission tests of the preliminary stage, because the choice of subject goes to the substance of the exams and falls within the remit of the selection board. To that end, EPSO unlawfully assumed for itself the powers of 'examiner' which should only fall to the selection board of a competition. The applicant is of the view that pursuant to the decision on the organisation and operation of EPSO, its sole task is to 'organise' competitions, that is, to assess, in conjunction with the institutions, recruitment needs, to publish the notice of competition, to ensure the smooth conduct of the competition, to provide the technical and material infrastructure, to monitor the use of the lists of suitable candidates and to draw up annual reports on its activities. In the present case, however, EPSO exceeded the limits of its powers, as thus defined, and the selection board not only did not determine the subjects, but was not involved at all during the preliminary stage of the competition, which in the light of the case-law on the stability and composition of selection boards (Case T-95/98 *Gogos* v *Commission* [2000] ECR-SC I-A-51 and II-219, paragraph 41) can only be seen *a fortiori* as a failure to follow that case-law. The absence of any involvement of a competition selection board at that stage is particularly serious since the preliminary stage of the competition at issue was the most difficult in light, in particular, of the large number of eliminated candidates.

47 In the view of the Commission, the admission tests of the preliminary stage which precede the tests themselves are distinct from the latter tests, the selection board being involved only in the implementation of the tests themselves. The fact that the selection board determines the questions in the written and oral tests does not mean that EPSO could not determine the questions for the admission tests of the preliminary stage. The applicant is therefore wrong to allege that the selection board did not determine the questions and that it had completely failed to fulfil its duties during the preliminary stage of the competition at issue, since that stage concerns only the admission tests. The applicant was also wrong to refer to the judgment in *Gogos* v *Commission*, because there is no link at all between the present case and that case, either as regards the existence of a selection board in the context of the admission tests or as regards the composition of the selection board. The Commission notes that, in any event, according to the case-law, EPSO has a wide discretion in determining the rules and conditions under which a competition is organised. Thus, the General Court held in Case T-207/02 *Falcone* v *Commission* [2004] ECR-SC I-A-305 and II-1393, paragraphs 38 to 40) ('the *Falcone* judgment') that the organisation of an initial stage of pre-selection of candidates, that is a preliminary stage, so as to admit only those who had obtained the best marks, falls within the discretion of EPSO, and that that is consistent with Articles 4 and 5 of Annex III to the Staff Regulations and the principle of sound administration. In that case, passing the pre-selection test was, in fact, a requirement for participation in the written and oral tests. In these proceedings, the admission tests are a requirement for admission to the written and oral tests. Although in the *Falcone* judgment the preliminary stage test was a pre-selection test and in the present case it was an admission test, the principle remains the same.

Findings of the Tribunal

48 It should be noted as a preliminary point that the Staff Regulations attach special importance to the recruitment of officials, requiring in particular, as provided by Article 27, that they be of the highest standard of ability, efficiency and integrity. Although, according to Article 12(1) of the Conditions of employment of other servants of the European Union, the same requirement is also laid down with regard to the recruitment of members of the temporary staff, it must be noted that the qualities in question are of most particular significance for officials, since they are destined, first, to carry out the essential tasks of the European Union and, second, to remain in the employment of the European Union throughout their career.

49 In order to achieve the purpose set out in by Article 27 of the Staff Regulations, the drafters of those regulations, having fixed, in Article 28, the six necessary conditions that a person must satisfy in order to be appointed as an official, first, provided, in Article 29, that the recruitment of officials is usually carried out by competition and, in Article 30, that for each competition the appointing authority appoints a selection board which draws up a list of suitable candidates, and, second, laid down detailed rules in Annex III to the Staff Regulations on the competition procedure.

50 It is apparent, inter alia, from Annex III to the Staff Regulations that the rules on the competition procedure are based on the principle of the sharing of powers between the appointing authority and the competition selection board. That diarchy created by the Staff Regulations, while being a demonstration of the self-limitation of administrative power, reveals the intention of the legislature, in order to ensure the protection of the transparency of the selection procedure for staff of the European Union, not to reserve that sensitive task exclusively to the administration, but also to involve, through the selection board (in which the administration is also represented), persons outside the administrative hierarchy and, in particular, staff representatives.

51 Under this power-sharing arrangement, it is for the appointing authority, as can be seen, in particular, from the first subparagraph of Article 1 of Annex III to the Staff Regulations and Article 4 thereof, first, to draw up the notice of competition, after consulting the Joint Committee and, second, to draw up the list of candidates who satisfy the first three conditions to be appointed as an official set out in Article 28 of the Staff Regulations.

52 Once that list is sent by the appointing authority to the chairman of the selection board, it is subsequently for the selection board itself, as indicated in Article 5 of Annex III to the Staff Regulations, first, to draw up a list of candidates who meet the requirements set out in the notice of competition, second, to proceed with the tests and, third, to draw up a list of suitable candidates, and to send it to the appointing authority.

53 In light of the crucial role conferred on competition selection boards, the drafters of the Staff Regulations provided for a number of safeguards, with regard to its establishment and composition as well as its operation.

54 Thus, as regards the establishment and composition of selection boards, Article 30 of the Staff Regulations and Article 3 of Annex III to the Staff Regulations provide, first, that for each competition a selection board is appointed by the appointing authority; second, that, apart from the chairman of the selection board, the other members must be designated by the appointing authority and the Staff Committee, each designating the same number; third, that the members of the selection board chosen from officials must be officials whose function group and grade is at least equal to that of the post to be filled; and, fourth, that if a selection board consists of more than four members, it must comprise at least two members of each gender.

55 As regards the functioning of the selection board, and apart from the obligations on the selection board arising from general principles of European Union law, for example, to respect the principle of equal treatment of the candidates and the principle of objectivity in the assessment of candidates or to respect the principle of stability in the composition of the selection board (see *Gogos* v *Commission*, and Case T-336/02 *Christensen* v *Commission* [2005] ECR-SC I-A-75 and II-341, paragraph 38 and the case-law cited), Article 6 of Annex III to the Staff Regulations expressly provides for the secrecy of the proceedings of selection boards, a requirement made precisely in order to guarantee its independence and the objectivity of its proceedings, by protecting the selection board from any form of external interference or pressure, whether from the administration itself, the candidates concerned or third parties (Case 89/79 *Bonu* v *Council* [1980] ECR 553, paragraph 5).

56 The allocation of powers between the appointing authority and the selection board, as described in the previous paragraphs, was not affected by the establishment in 2002 of EPSO, it being expressly provided in Article 2 of the decision setting up EPSO that the latter is to exercise the powers of selection conferred on the appointing authority with regard to competitions. Furthermore, it follows from Article 7 of Annex III to the Staff Regulations that, as regards the conduct of competitions for the recruitment of officials, the tasks of EPSO are essentially organisational. That conclusion is not contradicted by the specific provisions contained in the decision setting up EPSO and the decision on the organisation and operation of EPSO, even if those decisions sometimes contain misleading formulations, such as, for example, that EPSO is to 'draw up reserve lists' (which would suggest that EPSO is responsible for determining which candidates are included) because those decisions are in any event of lower rank than the provisions of the Staff Regulations.

57 In any event, both the choice and the assessment of the subjects of the questions set during a competition fall outside the remit of EPSO. That conclusion must be drawn from the considerations in the previous paragraph, and is confirmed by the absence in Article 7 of Annex III to the Staff Regulations of any reference to any task of EPSO related to the determination or the definition of 'the contents of the tests' for recruitment competitions for officials, whereas Article 7 expressly ascribes such tasks to EPSO in respect, in particular, of the certification of officials (paragraph 2(c)) and the selection of temporary staff and contract staff (paragraph 4).

58 In conclusion, although the tasks assigned to EPSO are such as to make this body an important actor in the determination and implementation of EU policy in the field of staff selection, its role as regards the conduct of recruitment competitions for officials, on the other hand, while significant to the extent that EPSO assists the selection board, necessarily remains subsidiary to the latter, which EPSO, moreover, may not replace.

59 In the present case, the applicant complains of his exclusion from the competition at issue after having failed the admission tests, the subject of which had been chosen not by the selection board of the competition at issue, but by EPSO, which had no authority in that regard. The Commission replies, in essence, that the provisions of the Staff Regulations concerning the responsibilities of selection boards and the guarantees attaching to them were not applicable to the tests in question, which were not strictly speaking part of the competition, but were part of a preliminary stage of that competition, for the purpose of selecting persons who would be admitted to the competition at issue.

60 The Commission's submission cannot be upheld.

61 It can be seen from the material on the case-file that, taking both options together, of the 1 772 candidates who had reserved a date for the admission tests to the competition at issue, only 140 could, under section B of the notice of competition, be invited to submit a full application with a view to their possible admission to the second stage of the competition. A procedure leading to the elimination of more than 90% of the candidates, not for formal reasons but for failing to perform sufficiently well in the tests, is an intrinsic part of a competition.

62 The fact that the admission tests were competitive in nature is particularly clear since, in the present case, as stipulated in section B of the notice of competition, it was not enough to obtain the average in the tests in question, but, in order to be admitted to the second stage of the competition, it was necessary, with regard to Option 1 (chosen by the applicant), to be among the 110 candidates who obtained the highest marks in the admission test. This comparative nature of the preliminary stage is something inherent in the very concept of a competition, as made clear by Joined Cases T-167/99 and T-174/99 *Giulietti and Others* v *Commission* [2001] ECR-SC I-A-93 and II-441, paragraph 81, following the Court of Justice's earlier decision in Case C-254/95 P *Parliament* v *Innamorati* [1996] ECR I-3423, paragraph 28.

63 Furthermore, although it is true that, as the Commission observes, the correction of the admission tests was carried out by computer and that, therefore, it is based on an automated procedure with no subjective discretion, the fact remains that the conduct of that automated procedure involved a decision on the merits, in so far as the 'advisory committee' referred to in paragraph 26 of this judgment, first, determined the level of difficulty of the multiple choice questions set during the admission tests and, second, cancelled certain questions, as recounted in paragraph 26 of this judgment. Those are evidently tasks to be carried out by a competition selection board.

64 Furthermore, the Commission's reference to the *Falcone* judgment is not material. In that case the Court of First Instance, in essence, did no more than recognise the discretion of the appointing authority to launch, as in the present case, a competition consisting of two distinct stages, namely an initial pre-selection stage, based on multiple choice questions, and a second stage of competition as such, which was subject to success in the first stage and to which admission was reserved to a reduced number of candidates. The reasoning set out in the present judgment does not cast any doubt on that discretion of the appointing authority. The question which has arisen in the present case is whether the first stage of a competition, such as that described in *Falcone* or in the present case, can be organised and carried out solely by EPSO, without any involvement of the selection board. Not only is that question not addressed at all in the *Falcone* judgment, but it must also be recalled that, in the case giving rise to that judgment, the selection board had monitored and supervised the carrying out of all of the competition tests. It should also be added that, as the Commission acknowledged at the hearing, under the legal situation that obtained before the establishment of EPSO, the organisation of pre-selection tests comparable to the admission tests in the present case was entrusted only to the selection board of a competition.

65 It follows from the foregoing considerations that the applicant was excluded from the second stage of the competition at issue by a procedure conducted by an authority lacking power to do so and by a decision taken by that same authority. The contested decision must accordingly be annulled.

66 The position would be otherwise only if EPSO or the 'Advisory Committee' referred to in paragraph 26 of this judgment, could be considered to be a 'selection board' within the meaning of the Staff Regulations. This is clearly not the case here.

67 As the Commission itself acknowledges in paragraph 4 of its defence, a selection board for the competition at issue existed and the names of the members were communicated 15 days before the date of the written test. However, according to the Commission, that selection board was only involved in the second stage of the competition, since EPSO organised and supervised the admission tests 'in which the selection board did not play any role'.

68 In addition, both the many different tasks (essentially advising and assisting the institutions) entrusted to EPSO and its composition (an Advisory Committee composed exclusively of members nominated by the European institutions, the three staff representatives having only observer status) preclude any possible comparison of EPSO to a selection board, the composition of which must comply with a rule of parity, and which is set up specifically for each competition and has the precisely defined task of carrying out the competition in question.

69 Finally, the Commission not only never claimed that EPSO and the 'Advisory Committee' referred to in paragraph 26 of this judgment performed the function of a selection board, or that it was similar to a selection board, but, on the contrary, with regard to the 'Advisory Committee', it expressly denied this in its letter of 24 November 2009 in response to the measures of organisation of procedure referred to in paragraph 33 of this judgment.

70 Consequently, without an amendment to the Staff Regulations expressly conferring on EPSO the tasks previously assigned to the selection board, EPSO does not have the authority to carry out such tasks, and in particular tasks which, in the case of recruitment of officials, affect the determination of the

content of the tests and their correction, including tests comprising multiple-choice questions to assess verbal and numerical reasoning ability and/or general knowledge and knowledge of the European Union, even if those tests are presented as tests for 'admission' of candidates to the competition's written and oral tests. The same applies, a fortiori, if, as in the present case, the number of candidates admitted to take part in the competition's written test is only a minuscule percentage of the candidates at the preliminary stage.

71 Furthermore, although it is true that, with the enlargement of the Union and the growing number of candidates for competitions for recruitment of civil servants, the workload of selection boards is significantly increasing, it remains the case that the heavy workload which the monitoring and supervision of the admission tests of the preliminary stage would entail for a selection board, even if a reduced number of candidates were eventually admitted to those tests, would constitute only a minor part of the voluminous workload necessitated by the written and oral tests.

72 In view of all of the foregoing, the contested decisions must be annulled.

Admissibility of the claims for annulment of any related measures

73 Those claims must be dismissed as inadmissible, in so far as they merely refer in imprecise terms to EPSO decisions which cannot be identified (see, to that effect order of 24 March 1993 in Case T-72/92 *Benzler* v *Commission* [1993] ECR II-347, paragraphs 16, 18 and 19). Nevertheless, the Commission must give due effect to the annulment by the Tribunal of the contested decisions and set aside any related measures, in so far as such setting aside is required by Article 233 EC.

Costs

74 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title II of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), if equity so requires, the Tribunal may decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any. Pursuant to Article 89(4) of those rules, the intervener is to bear its own costs.

75 It follows from the grounds set out above that the Commission is the unsuccessful party. Furthermore, the applicant expressly claimed in his pleadings that the Commission should be ordered to pay the costs. As the circumstances of the present case do not warrant the application of Article 87(2) of the Rules of Procedure, the Commission must therefore be ordered to pay the costs of the main proceedings.

On those grounds,

THE CIVIL SRVICE TRIBUNAL (First Chamber),

hereby:

1. **Annuls the decisions of the European Personnel Selection Office of 31 May 2007 and 6 December 2007 excluding Mr Pachtitis from the list of the 110 candidates who had obtained the best marks in the admission tests for open competition EPSO/AD/77/06;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Mr Pachtitis;**

3. **Orders the European Data Protection Supervisor, the intervener, to bear his own costs.**

Gervasoni Tagaras Kreppel

Delivered in open court in Luxembourg on 15 June 2010.

W. Hakenberg
Registrar

H. Tagaras
President of the Second Chamber