Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 June 2020*

(Appeal — Civil service — Open competition — Non-admission to tests — Possible for the administration to supplement before the Court the statement of reasons for the decision not to admit — Conditions — Exceptional cases — Concept of 'absence of a statement of reasons')

In Case C-114/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 February 2019,

European Commission, represented by B. Mongin and G. Gattinara, acting as Agents,

applicant,

the other party to the proceedings being:

Danilo Di Bernardo, residing in Brussels (Belgium), represented by S. Orlandi and T. Martin, lawyers,

applicant at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, M. Safjan, L. Bay Larsen, C. Toader and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2020,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 29 November 2018, *Di Bernardo* v *Commission* (T-811/16, not published, 'the judgment under appeal', EU:T:2018:859), by which that Court annulled the decision of the selection

* Language of the case: French.

board in the open competition on the basis of tests EPSO/AST-SC/03/15 of 10 August 2016 not to include Mr Danilo Di Bernardo on the reserve list for the recruitment of secretaries/clerks at grade SC 1 in the field of financial support ('the disputed decision').

Background to the dispute and the disputed decision

2 Open competition EPSO/AST-SC/03/15 was organised in 2015 for the establishment of reserve lists of 'Secretaries/Clerks (SC 1 and SC 2)' in three areas, inter alia that of financial support.

3 Point 2 of Annex II to the competition notice relating to that open competition ('the competition notice') required, in the field of financial support, in addition to passing the tests, a 'level of secondary education attested by a diploma giving access to post-secondary education, followed by at least 3 years' professional experience mostly related to the nature of the duties'.

4 Section VI of the competition notice stated that those requirements would be verified by the selection board, following the assessment tests, on the basis of the supporting documents provided by candidates with their online application forms.

5 Having applied for the open competition in question in the field of financial support, Mr Di Bernardo submitted supporting documents attesting to his qualifications and professional experience and took part in the admission tests and the assessment tests provided for in the competition notice.

6 By email of 14 September 2015, the European Personnel Selection Office (EPSO) informed Mr Di Bernardo that the selection board of the open competition in question wished to have further information concerning the professional experience which he had stated in Sections 2, 5 and 6 of his application form. The selection board wished, inter alia, to obtain documents signed by his previous employers, describing in detail the duties performed during that professional experience, and copies of the contracts of employment, clearly showing the commencement and termination dates of those contracts.

7 By email of 15 September 2015, Mr Di Bernardo sent additional supporting documents concerning Sections 2, 5 and 6 of his application form.

8 By email of 17 September 2015, EPSO replied to Mr Di Bernardo, stating that the selection board of the open competition in question '[asked] him to send a detailed job description signed by the employer in respect of Sections 2, 5 and 6'.

9 In an email dated 18 September 2015, Mr Di Bernardo stated that he did not possess such descriptions for Sections 5 and 6 of his application form. He stated that the Italian company which had employed him had been dissolved and that he was not in a position to provide these documents. He then submitted a copy of the Italian national collective labour agreements, including an official description of the duties linked to various employment contracts, including his own, as well as two letters from and an employment contract with that Italian company.

10 By a further email of 18 September 2015, Mr Di Bernardo sent to EPSO the detailed job description relating to the professional experience set out in Section 2 of his application form.

11 By letter of 27 October 2015, EPSO informed Mr Di Bernardo of its decision not to place him on the list of successful candidates in the open competition in question, on the ground that the professional experience set out in Sections 1 to 7 of his application form did not satisfy the requirement of a minimum duration of 3 years, mostly related to the nature of the duties in the field of financial support, as stated in point 2 of Annex II to the competition notice.

12 By letter of 4 November 2015, Mr Di Bernardo submitted a request for review of the decision of the selection board of the open competition in question.

13 By the disputed decision, that selection board informed Mr Di Bernardo that, after re-examination, it confirmed its decision sent on 27 October 2015. The selection board stated that, before beginning its work, it had established selection criteria to assess whether the qualifications and professional experience of candidates matched the competencies required for the positions to be filled. The selection board informed Mr Di Bernardo that 'after examining the supporting documents submitted to document [his] professional experience referred to in Sections 2, 5 and 6 of his application form, it concluded that those documents did not confirm that [his] professional experience in question was mostly related to the nature of the duties, as required by the competition notice'.

The action before the General Court and the judgment under appeal

14 By application lodged at the Registry of the General Court on 18 November 2016, Mr Di Bernardo sought the annulment of the disputed decision and compensation for his loss.

15 By the judgment under appeal, the General Court upheld the plea alleging infringement of the obligation to state reasons, annulled the disputed decision and rejected the remainder of the form of order sought in the application.

Forms of order sought by the parties before the Court of Justice

16 By its appeal, the Commission asks the Court of Justice to set aside the judgment under appeal, to remit the case to the General Court and to reserve the costs of the proceedings at first instance and on appeal.

17 Mr Di Bernardo contends that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

The appeal

18 In support of its appeal, the Commission raises two grounds of appeal.

The first ground of appeal

Arguments of the parties

19 By its first ground of appeal, the Commission alleges that the General Court erred in law, in paragraphs 41 to 53 of the judgment under appeal, as regards the extent of the obligation to state reasons incumbent on the selection board of the open competition in question. The General Court failed to take sufficient account of the legal and factual context of the disputed decision, while the adequacy of a statement of reasons must be assessed in the light of the context of the decision concerned and not merely of its wording (judgment of 14 February 1990, *Delacre and Others* v *Commission*, C-350/88, EU:C:1990:71, paragraph 16). That ground of appeal is divided into seven parts.

20 First, communication of the selection criteria does not have the importance attached to them by the General Court in paragraphs 41, 45 and 50 of the judgment under appeal with regard to the obligation to state reasons, as is confirmed by the fact that Mr Di Bernardo never tried to ascertain them.

21 Second, according to the Commission, the fact that the selection board of the open competition in question referred, in the disputed decision, only to the supporting documents attesting to professional experience corresponding to Sections 2, 5 and 6 of Mr Di Bernardo's application form does not in any way 'suggest', contrary to the finding of the General Court in paragraph 43 of the judgment under appeal, that that selection board considered the professional experience which the person concerned stated in the other sections of that form to be relevant. On the contrary, the rejection of Mr Di Bernardo's application implies that the selection board was of the view that he did not satisfy the condition of having 36 months' relevant professional experience after examining all the professional experience stated in the seven sections of his application form.

22 Third, the General Court wrongly held, in paragraph 48 of the judgment under appeal, that the request for review submitted by Mr Di Bernardo showed that he was unaware of the reasons for which his professional experience was insufficient.

23 Fourth, the General Court erred in holding, in paragraphs 46 and 47 of the judgment under appeal, that the Commission could not rely on the case-law in accordance with which, in the case of a competition with a large number of participants, the selection board is authorised to give summary reasons for refusing to select a candidate.

24 Fifth, contrary to the General Court's findings in paragraph 50 of the judgment under appeal, the selection board is not required, where no request to that effect is made to it, to disclose the criteria for the selection of qualifications, which would be in disregard of the secrecy of the selection board's proceedings as set out in Article 6 of Annex III to the Staff Regulations of Officials of the European Union.

25 Sixth, to hold, as did the General Court, in paragraphs 49 to 51 of the judgment under appeal, that a non-specific request for review, such as that submitted by Mr Di Bernardo, obliges the selection board of the open competition in question to provide detailed explanations for each section would have the effect of transferring to the board the burden of proof of the existence of the professional experience required under the competition notice. However, the burden of proof lies with the candidates, as is apparent from the competition notice, which states that 'the information given by candidates in their online application will be verified against the supporting documents they have provided'.

26 Seventh, the General Court confused, in paragraphs 53 to 55 of the judgment under appeal, the requirement to state reasons and the merits of the grounds, which concern the substantive legality of the disputed decision. The Commission sees an indication of that confusion in the fact that, in paragraph 53 of that judgment, the General Court held that the selection criteria were indispensable to assess whether, when analysing professional experience, the selection board of the open competition in question had not 'exceeded the limits of its discretion'. Similarly, the Commission regards it as revealing that, in paragraphs 54 and 55 of the judgment under appeal, the General Court held that the disputed decision was inadequately reasoned, not because it did not enable the applicant to know the reasons for his exclusion, but because it prevented him from raising further objections as to the legality of that decision.

27 Mr Di Bernardo regards the entirety of the argument put forward in support of the first plea as unfounded.

Findings of the Court

28 By its first ground of appeal, the Commission submits that the General Court's assessment, in paragraphs 41 to 53 of the judgment under appeal, of the statement of reasons for the disputed decision is vitiated by a number of errors of law.

29 In accordance with settled case-law, the statement of reasons required under Article 296 TFEU for measures adopted by EU institutions must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph16 and the case-law cited).

30 By the fourth part of the first ground of appeal, which it is appropriate to examine first, the Commission submits that the General Court erred in holding, in paragraphs 46 and 47 of the judgment under appeal, that it could not rely on the case-law of the Court of Justice in accordance with which, in the case of a competition with a large number of participants, the selection board is authorised to give summary reasons for a refusal to select a candidate.

31 In that regard, it is necessary to bear in mind the settled case-law of the Court of Justice, in accordance with which, in order to take account of the practical difficulties which arise in a competition involving a large number of candidates, the selection board may initially inform the candidates only of the criteria and the result of the selection, even if it may subsequently provide individual explanations to those candidates who expressly so request (judgments of 26 November 1981, *Michel* v *Parliament*, 195/80, EU:C:1981:284, paragraph 27; of 9 June 1983, *Verzyck* v *Commission*, 225/82, EU:C:1983:165, paragraph 16; of 8 March 1988, *Sergio and Others* v *Commission*, 64/86, 71/86 to 73/86 and 78/86, EU:C:1988:119, paragraph 50; and of 28 February 1989, *Basch and Others* v *Commission*, 100/87, 146/87 and 153/87, EU:C:1989:97, paragraph 10).

32 In the present case, the General Court rightly considered, in essence, that the obligation to state reasons did not impose on the selection board of the open competition in question, in that situation, a workload comparable to that of the selection board of a competition with a large number of participants. As the General Court pointed out in paragraph 47 of the judgment under appeal, the selection board for the open competition in question had been required to take its decision after all the candidates had already taken part in the admission tests and the other tests, including the competencies tests, and, since the latter had been marked, the list of potential successful candidates had already been drawn up. The General Court stated that, at that stage, the main task of the selection board should have been to verify whether the candidates who had passed the tests with the best marks also fulfilled the conditions relating to their level of education and professional experience as laid down in the competition notice.

33 In view of the probable small number of candidates who passed those tests without satisfying the other conditions of that competition, the selection board was not justified in merely providing only a summary statement of reasons even for the initial rejection of Mr Di Bernardo's application on 27 October 2015. A fortiori, the Commission cannot rely on the workload of a selection board in a competition with a large number of participants to justify the inadequacy of the statement of reasons for the disputed decision, which was addressed to the person concerned in response to his request for

review more than a year after the tests in question were held. Consequently, the General Court did not err in law in holding that the Commission could not rely on the case-law referred to in the previous paragraph to claim that the selection board for the open competition in question was required to give only summary reasons for the rejection of Mr Di Bernardo's application. The fourth part of the first ground of appeal must therefore be rejected.

34 By the first part of the first ground of appeal, the Commission submits that the General Court attached too much importance, in particular in paragraphs 41, 45 and 50 of the judgment under appeal, to the communication of selection criteria enabling the selection board of the open competition in question to assess the professional experience in order to satisfy the obligation to state reasons. Moreover, Mr. Di Bernardo never tried to ascertain them.

35 However, it is clear from the case-law cited in paragraph 31 of this judgment that, even where the selection board is obliged to provide, initially, only summary reasons, as is the case in a competition with a large number of participants, those reasons must include an indication of the selection criteria. Thus, the selection criteria constitute a minimum of information which must in any event be provided to candidates, at the latest at the same time as the results of the competition concerned. In the present case, those criteria were not even stated in the reply to the request for review submitted by Mr Di Bernardo. Knowledge of those criteria was the only way for the person concerned to understand how the selection board of the open competition in question came to the conclusion that the length of his relevant professional experience was less than 3 years. In those circumstances, it cannot be claimed that Mr Di Bernardo's interest in obtaining the communication was overestimated in the judgment under appeal.

36 Furthermore, candidates cannot reasonably be expected to request communication of the selection criteria when the very existence of these criteria is not known to them. In the present case, the selection criteria used by the selection board of the open competition in question to assess the length of relevant professional experience were not set out in the competition notice and Mr Di Bernardo learned of their existence, but not of their substance, only by the disputed decision, in response to his request for review. Consequently, the General Court did not err in law in holding that those criteria should have been communicated to the person concerned, without his being required to request them. The first part of the first ground of appeal must therefore be rejected.

37 By the fifth part of the first ground of appeal, the Commission alleges that the General Court failed to have regard, in paragraph 50 of the judgment under appeal, to the fact that the secrecy of the proceedings of the selection board, laid down in Article 6 of Annex III to the Staff Regulations of Officials of the European Union, precluded disclosure of the selection criteria adopted by the selection board in the open competition in question for assessment of relevant professional experience.

38 It is true that the comparative assessments made by the selection board when examining the abilities of candidates are covered by the secrecy inherent in those proceedings. However, applications are verified against the conditions laid down for participation in the competition concerned on the basis of objective data known to each applicant, in as far as he or she is concerned. That is why observance of the secrecy surrounding the proceedings of the selection board does not preclude communication of those objective factors and in particular of the criteria for assessment upon which the selection of applications was based, so as to enable those whose applications have been rejected to ascertain the possible reasons for their elimination (see, to that effect, judgment of 4 July 1996, *Parliament* v *Innamorati*, C-254/95 P, EU:C:1996:276, paragraphs 26 to 28 and the case-law cited). The fifth part of the first ground of appeal must, accordingly, be rejected.

39 By the sixth part of the first ground of appeal, the Commission alleges that the General Court erred in law by holding, in paragraphs 49 to 51 of the judgment under appeal, that a non-specific request for review, such as that made by Mr Di Bernardo, obliged the selection board of the open competition in

question to provide detailed explanations. In the Commission's view, the effect of that position is to shift the burden of proof of the existence of the requisite professional experience to that selection board, while the competition notice expressly placed that burden of proof on the candidates.

40 As has been pointed out in paragraph 29 above, the statement of reasons for any measure must disclose in a clear and unequivocal fashion the reasoning followed by the EU institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.

41 Thus, the case-law of the Court of Justice does not make compliance with the obligation to state reasons conditional on the submission of any request, in particular for review of the decision concerned, which is, moreover, optional, nor, a fortiori, on the sufficient precision of the terms of any such request. That is all the more true in the present case since EPSO's decision of 27 October 2015 did not provide any indication which would have enabled the interested party to make a more detailed request for a review. Consequently, the sixth part of the first ground of appeal must be rejected.

42 By the third part of the first ground of appeal, the Commission criticises the assessment made in paragraph 48 of the judgment under appeal that it is apparent from the content of Mr Di Bernardo's request for review that he was unaware of the reasons for which his professional experience was insufficient. It must be noted that that line of argument, which is based on a criticism of the assessment of the facts by the General Court, is not admissible on appeal, except in the case of distortion of the facts, which is not alleged in support of that part (judgment of 15 May 2019, *CJ* v *ECDC*, C-170/18 P, EU:C:2019:410, paragraph 23 and the case-law cited).

43 By the second part of the first ground of appeal, the Commission disputes the General Court's interpretation of the disputed decision in paragraph 43 of the judgment under appeal. That decision stated that 'after examining the supporting documents submitted to document the professional experience referred to in Sections 2, 5 and 6 of the application form, the selection board concluded that those documents did not confirm that the professional experience in question was mostly related to the nature of the duties, as required by the competition notice'. The General Court took the view, in paragraph 43, that, in the absence of additional information, the reference only to Sections 2, 5 and 6 of his application form suggested that Mr Di Bernardo had not succeeded in showing the relevance of his professional experience for only those three sections. That observation can be made using the actual terms of the disputed decision, since that decision refers to the professional experience 'in question'. In any event, it is part of the assessment of the facts by the General Court, which it is not for the Court of Justice to review in the context of an appeal, other than any possible distortion, which is not alleged by the Commission in support of that part. Consequently, that part must be rejected.

44 By the seventh part of the first ground of appeal, the Commission alleges that the General Court confused, in paragraphs 53 to 55 of the judgment under appeal, the requirement to state reasons and the merits of the grounds of the disputed decision, which concern the substantive legality of the decision. Nonetheless, it is apparent from a reading of those paragraphs that the General Court did not confuse those two distinct grounds, but merely recalled that the statement of reasons of a decision is intended in particular to bring the reasons for that decision to the attention of the addressee in order to enable him to assess their merits and found that, in the present case, the grounds for the rejection of his application had not been communicated to the candidate with sufficient clarity. That part must therefore be rejected.

45 It is clear from all the foregoing that the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

46 The second ground of appeal alleges two errors of law which it is claimed were committed by the General Court, in paragraphs 37 and 38 and 53 to 56 of the judgment under appeal, in refusing to take into account the additional statement of reasons for the disputed decision which the Commission provided in the course of the proceedings.

47 By the first part of the second ground of appeal, the Commission submits that the General Court erred in law in holding that it was impossible to supplement the statement of reasons of a decision during the proceedings, not only where there is a total absence of a statement of reasons but also in the event of an 'almost total' absence of a statement of reasons. The concept of an 'almost total' absence of a statement of reasons is, furthermore, confusing and contradictory.

48 It is alleged in the second part of the second ground of appeal that the General Court failed to have regard to the fact that it is the role of that Court to investigate of its own motion whether the EU institution concerned has satisfied the obligation to state reasons. That being so, the General Court was required to take account of the statements of reasons produced in the course of the proceedings and to find that those statements deprived the ground of appeal alleging breach of the obligation to state reasons of any substance. It is only a total absence of a statement of reasons that could not be remedied in the course of the proceedings.

49 Mr Di Bernardo disputes that line of argument.

Findings of the Court

50 By the first part of the second ground of appeal, the Commission complains that the General Court restricted, in paragraphs 37 and 38 of the judgment under appeal, the possibility of supplementing an inadequate statement of reasons after commencement of the action, by holding that that possibility was excluded not only in the event of a complete absence of a statement of reasons for the decision at issue, but also in the event of a near total absence of a statement of reasons for that decision. Furthermore, the concept, not provided for in the case-law, of an 'almost total absence' of a statement of reasons is contradictory and impossible to define.

51 As recalled in paragraph 29 of this judgment, the obligation to state the reasons for a decision of the EU institutions adversely affecting an individual is intended to enable the EU Courts to review the legality of that decision and to provide the person concerned with sufficient information to know whether that decision is well founded or whether it is vitiated by a defect enabling its legality to be challenged. It follows that the statement of reasons must, in principle, be communicated to the person concerned at the same time as the act adversely affecting him and that a failure to state reasons cannot be remedied by the fact that the person concerned learns of the reasons for the decision during the proceedings before the EU Courts (judgments of 26 November 1981, *Michel* v *Parliament*, 195/80, EU:C:1981:284, paragraph 22; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 463; and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 149).

52 However, where there is not an absence but an inadequacy of reasoning, explanations given in the course of the procedure may, in exceptional cases, remedy that inadequacy, so that the plea in law based on that inadequacy no longer justifies the annulment of the decision in question (see, to that effect, judgments of 8 March 1988, *Sergio and Others* v *Commission*, 64/86, 71/86 to 73/86 and 78/86, EU:C:1988:119, paragraph 52, and of 28 February 2008, *Neirinck* v *Commission*, C-17/07 P, EU:C:2008:134, paragraph 51).

53 Thus, where, in a competition with a large number of candidates, the EU institution concerned is unable, from a practical point of view, to provide each candidate with an adequate statement of reasons in good time, it is permitted, entirely by way of derogation, to produce evidence before the EU Courts, such as minutes of selection boards (judgment of 28 February 2008, *Neirinck* v *Commission*, C-17/07 P, EU:C:2008:134, paragraph 57).

54 As already stated in paragraph 29 of this judgment, the requirement to state reasons must, first, make clear and unequivocal the reasoning of the EU institution concerned which is the author of the act, so as to enable the persons affected to know the reasons for the measure taken and the competent court to exercise its review, and, second, be assessed in the light of all the circumstances of the case, in particular the content of the act, the nature of the grounds relied on and the interest which the addressees of the act or other persons directly and individually concerned by it may have in receiving explanations. Consequently, it is in the light of the purpose of that requirement and of all the abovementioned factors that the statement of reasons of a decision may be considered either absent or inadequate.

55 In that regard, the Court has held that the absence of a statement of reasons may be found even where the decision in question contains certain elements of reasoning. Thus, a contradictory or unintelligible statement of reasons amounts to a failure to state reasons (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 151, 168 and 170, and of 27 October 2016, *Debonair Trading Internacional* v *EUIPO*, C-537/14 P, not published, EU:C:2016:814, paragraph 36). The same applies where the statement of reasons in the decision in question is so incomplete that it does not in any way enable the addressee, in the context of its adoption, to understand its author's reasoning. That is why the existence of a statement of reasons is subject to a detailed assessment by the EU Courts when they must decide whether a supplementary statement of reasons is admissible in the course of the proceedings (judgment of 28 February 2008, *Neirinck* v *Commission*, C-17/07 P, EU:C:2008:134, paragraphs 54 and 55).

56 It follows, therefore, from the case-law of the Court of Justice that the absence of a statement of reasons may cover cases other than that of a total absence of a statement of reasons. Accordingly, by referring to those hypotheses using the expression 'almost total absence of a statement of reasons', the General Court neither erred in law nor failed to have regard to the case-law referred to in paragraph 52 of the present judgment. Consequently, the first part of the second ground of appeal must be rejected.

57 By the second part of the second ground of appeal, the Commission complains that the General Court refused to take into account the additional information which the Commission provided in the course of the proceedings concerning the grounds of the disputed decision and refused to find that the plea in law alleging breach of the obligation to state reasons was, consequently, unfounded. In so doing, the General Court failed to have regard to the obligation of the EU Courts to examine of their own motion whether the EU institution concerned has fulfilled its obligation to state reasons.

58 However, contrary to the Commission's submissions, there is neither a right of the EU institutions to remedy before the EU Courts their insufficiently reasoned decisions, nor an obligation on the part of the latter to take into account additional explanations provided by the author of the measure in question only during the proceedings in order to assess whether the obligation to state reasons has been satisfied. As the Advocate General noted in point 94 of his Opinion, such a state of law would risk blurring the division of powers between the administration and the EU Courts, weakening the review of legality and jeopardising the exercise of the right of appeal.

59 It is only in exceptional cases, such as that referred to in paragraph 53 above, in which it was established that it was impossible in practice for the EU institution concerned to state to the requisite legal standard the reasons for the disputed decision, that the statement of reasons may be supplemented by explanations provided by the author of the act during the proceedings. However, even in those rare cases, it is not automatic that the act which is insufficiently reasoned may be put in

order by explanations provided after the bringing of the action. In view of the imbalance between the parties which late communication of the grounds of the contested measure is liable to create, the EU Courts must still ascertain, as the Advocate General observed in point 95 of his Opinion, whether the decision to accept, on an exceptional basis, the additional statement of reasons is not liable to infringe the rights of the defence. In that regard, it is incumbent on the Court to take into account the stage of the procedure at which the explanations were provided by the EU institution concerned and to ensure that the person concerned was actually able to respond to them.

60 In any event, where the contested decision does not state the reasons on which it is based, the institution which adopted it cannot remedy such a defect by making that statement of reasons before the Court, as pointed out in paragraph 51 of this judgment. However, as noted in paragraph 56 of this judgment, the General Court found that there was no statement of reasons for the disputed decision. Consequently, it cannot be criticised for not having taken into account the reasoning provided by the Commission in the course of the proceedings. The second part of the second ground of appeal must therefore be rejected.

61 In consequence, the second ground of appeal must be rejected in its entirety.

62 The appeal must therefore be dismissed.

Costs

63 Under Article 138(1) of the Rules of Procedure of the Court, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Mr Di Bernardo has applied for costs and since the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]