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OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 25 July 2018 [1]

Case C-621/16 P

European Commission
v
Italian Republic

(Appeal — Language rules of the EU institutions — Notices of open competition — Limitation of the second language of competition and of the language of communication between candidates and EPSO to English, French and German — Regulation No 1 — EU Staff Regulations — Recruitment of officials — Discrimination based on language — Justifications)

[1] Original language: English.

I. Introduction

1. In 2014, the European Personnel Selection Office ('EPSO') published two notices of open competition. Those notices allowed candidates to choose only English, French or German as the second language for those competitions. Moreover, the notices permitted the use of only those three languages for communications between candidates and EPSO.

2. By an action brought before the General Court, the Italian Republic contested the legality of that dual limitation to those three languages. By its judgment of 15 September 2016, *Italy* v *Commission* (T-353/14 and T-17/15, EU:T:2016:495), the General Court annulled both notices.

3. By the present appeal, the Commission challenges the judgment of the General Court, thus inviting this Court, once again, [2] to take a position on the legal limits on restrictions of the languages that EPSO may impose on candidates wishing to take part in open competitions.

II. Legal framework

A. Primary law

1. Treaty on the Functioning of the European Union

4. Pursuant to the fourth subparagraph of Article 24 TFEU: 'Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.'

5. Article 342 TFEU states: 'The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.'

2. Charter of Fundamental Rights of the European Union ('the Charter')

6. According to Article 21(1) of the Charter: 'Any discrimination based on any ground such as … language … shall be prohibited.'

7. Article 41(4) of the Charter reads as follows: 'Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

2 See judgment of 27 November 2012, *Italy* v *Commission* (C-566/10 P, EU:C:2012:752).

B. Secondary law

1. Regulation No 1

8. Articles 1, 2, 5 and 6 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, [3] as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 [4] ('Regulation No 1'), state:

'Article 1

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

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the [Union] may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

…

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

Article 6

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

3 OJ, English Special Edition 1952-1958(I), p. 59.

4 Regulation adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 1).

2. The Staff Regulations

9. Article 1d of the Staff Regulations of Officials of the European [Union], [5] as amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 [6] ('the Staff Regulations') reads as follows:

'1. In the application of these Staff Regulations, any discrimination based on any ground such as … language … shall be prohibited.

…

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

10. Title III of the Staff Regulations is entitled 'Career of officials'. Chapter 1 thereof, entitled 'Recruitment', is composed of Articles 27 to 34.

11. Pursuant to the first subparagraph of Article 27 of the Staff Regulations: 'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Union. No posts shall be reserved for nationals of any specific Member State.'

12. Article 28 of the Staff Regulations states:

'An official may be appointed only on condition that:

(a) he is a national of one of the Member States of the 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 in Annex III;

5 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition, 1959 to 1962 (I), p. 135).

6 OJ 2013 L 287, p. 15.

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

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

13. According to Article 30 of the Staff Regulations:

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

The appointing authority shall decide which of these candidates to appoint to the vacant posts.

…'

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

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

The notice shall state:

…

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

…'

15. Article 7(1) and (2) of Annex III to the Staff Regulations states:

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

2. The Office's task shall be to:

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

…'

3. Decision 2002/620

16. Pursuant to Article 2(1) of Decision 2002/620/EC, establishing EPSO: [7]

'The Office 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. In exceptional cases only and with the agreement of the Office, the institutions may hold their own open competitions to meet specific needs for highly specialised staff.'

17. Article 4 of Decision 2002/620 provides:

'In accordance with Article 91a of the Staff Regulations, requests and complaints relating to the exercise of the powers conferred under Article 2(1) and (2) of this Decision shall be lodged with the Office. Any appeal in these areas shall be made against the Commission.'

III. Facts and legal proceedings

18. On 13 March 2014, EPSO published the notice of open competition EPSO/AD/276/14 to draw up a reserve list of administrators (AD 5) [8] ('the general competition notice').

19. On 6 November 2014, EPSO published the notice of open competition EPSO/AD/294/14 to draw up a reserve list of administrators (AD 6) in the field of data protection for the European Data Protection Supervisor [9] ('the data protection competition notice').

20. The general competition notice and the data protection competition notice (together, 'the contested notices') both state in the introductory section that the General Rules governing open competitions ('the General Rules') [10] are an 'integral part' of each competition notice.

21. The General Rules were published by EPSO in the *Official Journal of the European Union*. The introductory section of the General Rules states that 'these general rules are an integral part of the competition notice, and together with the notice they constitute the binding framework of the competition procedure'.

7 Decision 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).

8 OJ 2014 C 74 A, p. 4.

9 OJ 2014 C 391 A, p. 1.

10 OJ 2014 C 60 A, p. 1.

22. In a section entitled ‘Knowledge of languages,’ after noting that ‘unless otherwise stated in the competition notice the choice of second language will normally be limited to English, French or German’, the General Rules provide reasons for the limitation of the second language. That section of the General Rules further refers to the ‘General Guidelines on the use of languages in EPSO competitions’ adopted by the College of Heads of Administration on 15 May 2013 (‘the General Guidelines’). The General Guidelines are annexed to the General Rules and provide a more specific justification for the limitation of the choice of second language to English, French or German.

23. In each of the contested notices, Section III on ‘Eligibility’ sets out general conditions as well as specific conditions. The specific conditions include the requirement of knowledge of two languages: a thorough knowledge of one of the official languages of the European Union, defined as the ‘main language’ or ‘language 1’, and a satisfactory knowledge of English, French or German, defined as the ‘second language’ or ‘language 2’. That language must be different from language 1.

24. Concerning the limitation of the choice of second languages, point 2.3 of the general competition notice states:

‘In the light of the judgment [of 27 November 2012, *Italy* v *Commission* (C-566/10 P, EU:C:2012:752)], the EU institutions wish to state the reasons for limiting the choice of the second language in this competition to a small number of official EU languages.

Candidates are informed that the second language options in this competition have been defined in line with the interests of the service, which require new recruits to be immediately operational and capable of communicating effectively in their daily work. Otherwise the efficient functioning of the institutions could be severely impaired.

It has long been the practice to use mainly English, French, and German for internal communication in the EU institutions and these are also the languages most often needed when communicating with the outside world and dealing with cases. Moreover, English, French, and German are the most common second languages in the European Union and the most widely studied as a second language. This confirms what is currently expected of candidates for European Union posts in terms of their level of education and professional skills, namely that they have a command of at least one of these languages. Consequently, in balancing the interests and needs of the service and the abilities of candidates, and given the particular field of this competition, it is legitimate to organise tests in these three languages so as to ensure that all candidates are able to work in at least one of them, whatever their first official language. Assessing specific competencies in this way allows the institutions to evaluate candidates’ ability to be immediately operational in an environment that closely matches the reality they would face on the job.

For these same reasons, it is reasonable to limit the language of communication between candidates and the institution, including the language in which applications are to be drafted. Furthermore, this ensures uniformity when comparing candidates and checking their application forms.

To ensure equal treatment for all candidates, everyone — including those whose first official language is one of the three — must take some tests in their second language, chosen from among these three.

None of this affects the possibility of later language training to enable staff to work in a third language, as required under Article 45(2) of the Staff Regulations.'

25. Point 2.3 of the data protection competition notice is drafted in essentially identical terms.

26. Both contested notices therefore limit the language that candidates can use to communicate with EPSO and in which applications are to be drafted to the chosen second language of each candidate: either English, French or German.

27. The contested notices also provide rules for the language to be used — the main language or the second language — for each of the tests and exercises of the competitions. Both competitions consisted of a number of computer-based tests and a number of exercises to be evaluated in an assessment centre. The general competition notice determines that candidates had to pass one of the computer-based tests (the situational judgment test) and all of the exercises at the assessment centre in the chosen second language. The data protection competition notice, in turn, establishes that candidates had to pass all exercises which were not computer-based in the chosen second language.

IV. The judgment under appeal and the proceedings before the Court

28. On 23 May 2014, the Italian Republic filed an application before the General Court seeking annulment of the general competition notice (Case T-353/14).

29. On 15 January 2015, the Italian Republic filed another application before the General Court seeking annulment of the data protection competition notice (Case T-17/15). The Republic of Lithuania was granted leave to intervene in support of the form of order sought by the Italian Republic.

30. Before the General Court, Cases T-353/14 and T-17/15 were joined for the purposes both of the oral part of the proceedings and of the final decision.

31. In essence, the actions brought by the Italian Republic challenged the legality of two aspects of the language rules provided by the contested notices. The first aspect relates to the fact that candidates could choose only English, French or German as the second language for the competitions. The second aspect

challenged was the limitation of the language of communication between candidates and EPSO to those three languages.

32. In the judgment of 15 September 2016, *Italy* v *Commission* ('the judgment under appeal'), [11] the General Court annulled the contested notices.

33. By the present appeal, the Commission claims that the Court should set aside the judgment of the General Court. If the Court considers that the state of the proceedings so permits, it should dismiss the claims at first instance as unfounded, order the Italian Republic to pay the costs incurred at first instance and on appeal, and order the Republic of Lithuania to pay its own costs.

34. In support of its appeal, the Commission relies on four grounds of appeal. The first ground of appeal challenges the admissibility of the claims before the General Court. The second and third grounds of appeal concern the legality of the limitation, in the contested notices, of the choice of the second language to English, French and German. The fourth ground of appeal relates to the limitation of the choice of the language of communication between candidates and EPSO to those three languages.

35. The Italian Republic claims that the Court should dismiss the appeal and order the Commission to pay the costs.

36. By decision of the President of the Court of 30 March 2017, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Italian Republic.

37. Written submissions were lodged by the Kingdom of Spain, the Italian Republic and the Commission. All these interested parties presented oral argument at the hearing that took place on 25 April 2018.

V. Assessment

38. In this Opinion, I will examine each of the grounds of appeal raised by the Commission in turn (Sections A, B, C and D respectively). That will lead me to suggest that the Court dismiss the present appeal. I do not necessarily agree with all the legal propositions advanced by the General Court, in particular with those relating to the fourth ground of appeal. I do, however, agree with the annulment of the contested notices carried out by the General Court and thus with the overall disposition of the case.

39. Judicial minimalism is a virtue. I do wonder, however, how far that statement remains valid in a situation in which the Grand Chamber is again called, in the space of just a few years, to address the issue of limitations to the choice of second languages in competition notices. There are also at least a dozen similar

[11] T-353/14 and T-17/15, EU:T:2016:495.

cases which are either pending or which have been freshly decided in the General Court, [12] the recurring theme being the broader issue of the linguistic regime of the institutions. [13] In such circumstances, also taking into account that individual lives, expectations and careers are at stake, it would perhaps be advisable to provide at least some guidance as to what the institutions may do when establishing limitations in respect of the use of working languages based on the interests of the service (E).

A. The first ground of appeal: the admissibility of the claims before the General Court

40. The first ground of appeal of the Commission is subdivided into four parts. By the first part of this ground of appeal, the Commission claims that there is an error of law, in paragraphs 45 to 52 of the judgment under appeal, in the interpretation of the legal nature of the General Rules because the General Court did not recognise their binding effects.

41. Similarly, by the third part of the first ground of appeal, the Commission argues that the General Court, in paragraph 58 of the judgment under appeal, erred in law in concluding that 'the General Rules and the General Guidelines must be interpreted as constituting, at most, communications, for the purposes of paragraph 91 of the judgment of 27 November 2012, *Italy* v *Commission* (C-566/10 P, EU:C:2012:752), which set out criteria by which EPSO intends to choose the language rules for the competitions which it is responsible for organising'.

42. By the fourth part of the first ground of appeal, the Commission claims that there is an error in law in paragraphs 65 to 71 of the judgment under appeal, where the General Court examined the legal nature of the contested notices. The Commission maintains that the General Court infringed its duty to state reasons, because it did not assess whether the contested notices constituted confirmatory measures.

43. Finally, by the second part of the first ground of appeal, the Commission alleges an error of law in the interpretation of Article 7(1) of Annex III to the Staff Regulations. It contests the findings of the General Court, in paragraphs 53 to 57 of the judgment under appeal, according to which that article 'entrusts EPSO with responsibility for taking measures to implement uniform standards, and not responsibility for adopting general and abstract binding standards'.

12 Quoted below in footnotes 58 and 59.

13 Apart from the cases quoted in the ensuing parts of this Opinion, I refer to the parallel case also pending before the Grand Chamber addressing very similar issues, namely *Spain* v *Parliament* (C-377/16). The illuminating Opinion of my learned colleague Advocate General Sharpston in that case, which I have had the benefit of reading in draft, is to be delivered on the same date as this Opinion.

44. In my view, the different parts of the first ground of appeal raise essentially two issues. The first concerns the question of the legal nature of the General Rules (first and third parts) and of the contested notices (fourth part). The second issue is whether EPSO had the power to adopt the General Rules (second part).

45. However, in order to decide on the first ground of appeal, I consider that the Court does not need to address all those parts. The key issue is the fourth part of this ground of appeal, which concerns the legal nature of the contested notices. Those notices are, to my mind, clearly binding, in and of themselves, irrespective of the legal nature of the General Rules (1). Provided that the Court reaches the same conclusion as to the legal nature of those notices, the remaining arguments advanced by the Commission in the first ground of appeal become simply ineffective (2 and 3).

1. The fourth part of the first ground of appeal: the legal nature of the contested notices

46. The Commission's appeal argues that the General Court breached its duty to state reasons for its ruling because it did not examine whether the contested notices constituted confirmatory measures. The Commission criticises the General Court for not having compared the content of the contested notices with the content of the General Rules which, as far as the language rules are concerned, were identical. In doing so, the General Court should have concluded that the contested notices were a measure which merely confirmed measures having binding effects, namely the General Rules.

47. In my view, the contested notices are clearly binding in and of themselves.

48. First, from a textual perspective, the Commission's argument that the contested notices do not have binding effects seems to be contradicted by the General Rules themselves, the introductory section of which states that 'these general rules are an integral part of the competition notice, and *together with the notice they constitute the binding framework* of the competition procedure' (emphasis added).

49. Second, looking at the operation of the system, the language rules for each competition were composed of two tiers: a *general* tier constituted by the General Rules, and an *individual* tier made by each competition notice. Therefore, what determined the language rules in each individual case was either (i) the relevant competition notice, or (ii) the relevant competition notice taken together with the General Rules.

50. Hence, by any reading and understanding of the system, the notices would *always be included* in the setting up of the language rules for an individual competition. A potential claimant [14] wishing to challenge the lawfulness of the

[14] It might be underlined that by this I mean *any* claimant, irrespective of whether that is an individual or a Member State. It would appear that the implicit assumption in the Commission's

choice of languages stated in a competition notice had to challenge, as the binding measure, either the notice or the notice together with the General Rules. In other words, if wishing to challenge the parameters of *an individual* competition, that claimant could not have challenged the General Rules alone. Indeed, the General Rules specifically provide that *unless otherwise stated in the competition notice* the choice of second language will *normally* be limited to English, French or German (emphasis added).

51. Therefore, since it was possible for each competition notice to depart from the default second languages set out in the General Rules, [15] it seems clear to me that the language requirements of each individual competition cannot be considered to be fully defined until the competition notice is published. This is further confirmed by Article 1(1) of Annex III to the Staff Regulations, which lists what must be mentioned in the competition notices. According to point (f) of that provision, competition notices must state, 'where applicable, the knowledge of languages required in view of the special nature of the posts to be filled'.

52. Finally, I would like to add that the Commission's view that the contested notices are measures that simply confirm the General Rules would lead, if taken to its full logical conclusions, to a number of absurd results.

53. First, in practical terms, individual (non-privileged) applicants would have no standing to challenge anything in a competition. On the one hand, it would be rather difficult or almost impossible for them to prove that the General Rules are 'of direct and individual concern' to them, as required by the fourth paragraph of Article 263 TFEU. On the other hand, they could not challenge the individual notice either, because it would be a mere 'confirmation'. Hence, the protection of individuals would effectively fall between two stools, since the individual would be unable to challenge anything at all.

54. Second, the two-month time limit to bring an action for annulment, found in the sixth subparagraph of Article 263 TFEU, would be impossible to meet in most cases, because it is safe to assume that most competition notices would be published after the expiry of this deadline. The problems both in terms of standing and time limits are further exacerbated by the fact that, when the General Rules

arguments is that since the Italian Republic is a Member State, which would be a privileged applicant under the second paragraph of Article 263 TFEU, and would be likely to have standing to challenge the General Rules directly, it should have done so and not have 'waited' for those being 'put into practice' by an individual competition notice. Yet again, suffice it to say that the Italian Republic chose to challenge not the General Rules, but rather the individual competitions as set out in the individual notices.

15 This is the case not only for competitions with specific language requirements, such as competitions for lawyer-linguists, but also, for example, for competitions for specific EU agencies that have a limited number of working languages. It could also be the case for competitions for agencies or other bodies located in a Member State whose official language is different from the three default languages, where knowledge of that language is necessary for carrying out the tasks of the agency or body.

are published, an individual can hardly be expected to know whether he might be interested in taking part in a competition organised months, or even years, later.

55. Third, the approach proposed by the Commission would also be completely unpredictable. The possibility of challenging the General Rules would be contingent on the language choice offered by EPSO in each and every subsequent notice of competition. Indeed, this approach would effectively mean that if a given competition notice limits the second languages to English, French or German, it could not be challenged as it would only be a measure confirming the default rule of the General Rules. However, if a competition notice established a different choice of second languages, it could be challenged as it would not be considered as a confirmatory measure. [16]

56. In my view, those arguments show rather clearly that each individual competition notice is an act capable of being challenged in its own right, regardless of whether or not the second language requirements it sets out depart from the default system foreseen by the General Rules. The General Court therefore did not err in law when it concluded, in paragraph 70 of the judgment under appeal, that 'the contested notices constitute measures which have binding legal effects as regards the language rules for the competitions in question, and therefore constitute acts which are open to challenge'.

57. The fourth part of the first ground of appeal is therefore unfounded.

58. As I have already indicated in point 45 of this Opinion, in view of this conclusion, the arguments advanced by the Commission in the other parts of the first ground of appeal thus become ineffective: since the individual competition notices could in any case be challenged independently, the legal nature of the General Rules, and whether those could or could not have been challenged separately, become irrelevant issues for the purpose of the present appeal.

59. I would therefore suggest that there is no need for the Court to address any of the other parts of the first ground of appeal. However, for the sake of completeness and in order to fully assist the Court in the case it were to reach a different conclusion as to the legal nature of the notices, I now briefly consider the remaining three parts of the first ground of appeal.

16 As a point of context, without drawing any conclusions from that fact for the present case, it might be noted that EPSO seems to have dropped the practice of publishing the General Rules separately and making a reference to them in each notice of competition. The General Rules seem now to be systematically integrated as an annex to each notice of competition. See, for example, the notice of open competition EPSO/AD/338/17 to draw up a reserve list of administrators (AD 5) (OJ 2017 C 99 A, p. 1), the notice of open competitions EPSO/AD/354/17 to draw up a reserve list of Latvian-language lawyer-linguists (AD 7) and EPSO/AD/355/17 to draw up a reserve list of Maltese-language lawyer-linguists (AD 7) (OJ 2017 C 418 A, p. 1), or the notice of open competition EPSO/AD/356/18 to draw up a reserve list of administrators (AD 5) (OJ 2018 C 88 A, p. 1) ('the general competition notice of 2018').

2. The first and third parts of the first ground of appeal: the legal nature of the General Rules

60. By the first and third parts of the first ground of appeal, the Commission claims that the General Court erred in law in its interpretation of the legal nature of the General Rules. The Commission considers that the General Rules produced binding effects in so far as they established the linguistic legal framework applicable to the competitions, which the competition notices merely confirmed.

61. I must agree with the first part of the Commission's proposition: namely that the General Rules are a challengeable legal act in their own right. Yet in contrast to the second part of the Commission's proposition, and for the reasons explained above in the previous section of this Opinion, that statement, in my view, in no way precludes the fact that individual competition notices may also be challenged.

62. It would appear, taking into account the established case-law of the Court, that the General Rules could indeed be considered as producing *binding legal effects*. The Court has consistently held that any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'challengeable acts' for the purposes of Article 263 TFEU. [17] In order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, where necessary, the context in which it was adopted and the powers of the institution which adopted the act. [18]

63. First, as to their wording, the General Rules are called 'rules', not 'principles' or 'framework' or any other term denoting a mere recommendation. They are also worded in quite mandatory terms, [19] thus clearly going beyond any mere invitations or suggestions. Second, as regards their content, the introductory section of the General Rules states explicitly that they constitute (together with the competition notice), 'the binding framework of the competition procedure'.

17 Most recently, see judgment of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 31 and the case-law cited).

18 Judgment of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 32 and the case-law cited).

19 The General Rules affirm that 'unless otherwise stated in the competition notice the choice of second language *will normally be* limited to English, French or German', and subsequently advise that all candidates '*must take* certain tests in their second language, chosen from among these three' (emphasis added). The General Guidelines start by stating that 'it is confirmed that, as a general rule, the use of languages in EPSO competitions *will be* as follows', adding later that 'assessment centres *will be* held in the candidates' second language only, chosen from English, French and German' (emphasis added).

64. Third, on a systemic level, the binding character of the General Rules can also be inferred from the fact that, in practice and at the very least, they create obligations incumbent on EPSO itself. Indeed, the General Rules impose upon EPSO — or, as the case may be, upon a specific institution organising an open competition — an *obligation to give reasons* for the departure from the rules in the default regime on the choice of the second language. This duty to expressly derogate or 'opt out' of the General Rules in a specific competition notice in order to establish a different choice of languages necessarily entails that the General Rules are binding. If they were not binding, an obligation to give reasons for the departure from the General Rules could not exist.

65. In addition, there is no denying that that institutional dimension, in which the binding nature of the General Rules establishes the obligation to give reasons for any departure from those rules, has broader repercussions. By establishing this default regime in the General Rules, EPSO created legitimate expectations for candidates with regard to the rules that are supposed to be followed not only by the candidates, but also by EPSO itself. Any such instrument adopted by EU institutions or bodies can thus reasonably be perceived as a(n) (auto-)limitation of the exercise of their own discretion in the future, [20] thereby clearly reinforcing the normative relevance of any such document.

66. In sum, the wording and content of the General Rules, as well as their context and the intention of EPSO when drafting them, all point in the direction of recognising their binding legal effects, as the default regime which will be applied for all competitions, unless EPSO clearly and specifically opts out, for which reasons would have to be given in each individual case.

67. That conclusion is in no way challenged by the fact that, as I have previously stated in points 53 and 54 of this Opinion, bringing a claim for annulment directly and solely against the General Rules would likely be problematic in terms of standing and time limits. Indeed, on an individual level, it would be rather difficult for a future applicant in an upcoming competition to prove that he is directly and individually concerned by the General Rules in order to file such a claim, as required by the fourth paragraph of Article 263 TFEU. However, a Member State — such as the Applicant in the present case — or another privileged applicant does not have to prove any such an interest. [21]

68. However, even though the General Court erred in law by not recognising the binding effects of the General Rules, the first and third parts of the first ground

20 See, in particular, judgment of 13 December 2012, *Expedia* (C-226/11, EU:C:2012:795, paragraph 28 and the case-law cited).

21 See, for example, judgment of 5 September 2012, *Parliament* v *Council* (C-355/10, EU:C:2012:516, paragraph 37 and the case-law cited). As already indicated above, in footnote 14, this fact cannot nonetheless be turned around to suggest that because a Member State could potentially have already challenged the General Rules, this turns the notices into mere 'confirmatory acts' (but presumably only in relation to that specific Member State).

of appeal are ineffective. Indeed, since the General Court did not err in law when it concluded that the contested notices had binding effects and thereby correctly allowed for their judicial examination, the fact that it did not also recognise the binding legal force of the General Rules had no impact on the operative part of its judgment.

3. The second part of the first ground of appeal: the powers of EPSO

69. Finally, by the second part of the first ground of appeal, the Commission invokes an error of law in the interpretation of Article 7(1) of Annex III to the Staff Regulations, which establishes the powers of EPSO, in so far as the General Court denied EPSO's power to adopt 'general and abstract binding standards'.

70. Again, I do not consider it necessary for the Court to address this part of the first ground of appeal. Indeed, since the key arguments of the General Court for annulling the contested notices were of a different nature, I fail to see how disputing a passing remark made by the General Court could lead to setting aside the judgment under appeal. This part of the first ground of appeal is thus ineffective.

71. Nevertheless, I wish to highlight that, provided that any such argument were to be assessed, a much more detailed discussion would be required in order to correctly interpret Article 7(1) of Annex III to the Staff Regulations and assess the role of the General Rules in the light of the powers devolved to EPSO by this provision.

72. Article 7(1) states that EPSO is entrusted with responsibility for taking the necessary measures to ensure that *uniform standards* are applied in the selection procedures for officials of the Union.

73. Looking at the text and its context and logic, I do not agree, on the one hand, with the somewhat sweeping and categorical finding of the General Court, in point 56 of the judgment under appeal, that under Article 7(1) EPSO could never be allowed to adopt 'general and abstract binding standards'. If EPSO must ensure that uniform standards are applied in the selection *procedures*, that is to say in all competitions, this necessarily implies that it must have the power to adopt general rules that may be applied to future competitions, as the Commission rightly pointed out in its written submissions.

74. However, on the other hand, and in contrast to the Commission, I think that the *substantive* scope of the powers conferred on EPSO by that provision is much less clear. EPSO can certainly adopt 'general and abstract binding standards' — or, in the wording of Article 7(1), 'uniform standards' — regarding the technical organisation of competitions, such as, for example, a prospective and general decision on the type of tests or questions to be used, the (non-)use of computers, the time allowed to carry out the tests, and so on.

75. However, could EPSO, by the same token, effectively decide on the future of the linguistic regime within the institutions? Is it really possible to maintain that the choice of the languages of competitions, which will undeniably have an impact on the languages subsequently used within the institutions, is simply a technical or organisational rule for a selection procedure for officials, falling under the notion of 'uniform standard', in the sense of Article 7(1) of Annex III to the Staff Regulations?

76. Without suggesting that there is an intent to do so, allowing for such a possibility could come dangerously close to circumvention of Regulation No 1 and of Article 342 TFEU, which provides that the rules governing the languages of the institutions must, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, [22] be determined by the Council acting unanimously. This issue has also a very strong temporal dimension. Even a temporary departure from the linguistic rules that ought to be (correctly) applied to competitions is likely to have lasting effects on the future linguistic balance within the institutions. The present forms the future, and the future thus shaped will soon start defining the objective present needs of the institutions in terms of languages.

77. Thus, even if it did challenge that passing statement of the General Court, I would be rather surprised if the Commission really wished to address that significant (constitutional) issue in the context of the present appeal. Be that as it may, I would suggest that the Court dispose of this part of the first ground of appeal merely by holding that, in view of the form of order sought by the Commission in the present appeal, that part of the first ground of appeal is ineffective.

B. The second ground of appeal

78. By the *first part* of the second ground of appeal, the Commission claims that, in paragraphs 91 and 92 of the judgment under appeal, the General Court erred in law in the interpretation of Article 1d of the Staff Regulations. According to the Commission, the General Court was wrong in affirming, on the basis of paragraph 102 of the judgment of 27 November 2012, *Italy* v *Commission* ('the judgment in *Italy* v *Commission I*'), [23] that the limitation of the choice of second language constituted, in itself, a discrimination on the basis of language. The Commission argues that that paragraph referred to the obligation of publication of competition notices in the Official Journal in all official languages. The Commission also asserts that the General Court erred when it held, in paragraph 92 of the judgment under appeal, that Article 1d of the Staff Regulations prohibits discrimination based on language. The Commission argues that that provision allows for disparities of treatment under certain conditions.

22 Article 64 of Protocol (No 3) on the Statute of the Court of Justice of the European Union.

23 C-566/10 P, EU:C:2012:752.

79. In my view, this part of the second ground of appeal is unfounded.

80. First, the reference that the General Court made, in paragraph 91 of the judgment under appeal, to the judgment in *Italy* v *Commission I*, was an additional reference made in conclusion of an argument and introduced by 'see to that effect'. That citation clearly did not constitute the basis for the finding of the General Court, in that paragraph, that the limitation of the choice of second languages constituted discrimination on the basis of language. The reasons for that conclusion are given in the paragraphs preceding the challenged reference in paragraph 91. By this argument, the Commission appears again to be challenging a passing reference but not the substantive reasons for a statement of the General Court.

81. Second, by stating in paragraph 92 of the judgment under appeal that Article 1d of the Staff Regulations prohibits discrimination based on language, it does not follow that the General Court intended to exclude the possibility to justify such discrimination under certain conditions. Indeed, the General Court expressly noted, in paragraph 88 of the judgment under appeal, that Article 1d allows limitations to the principle of non-discrimination.

82. I thus consider that, in paragraph 92 of the judgment under appeal, the General Court simply recalled that the general principle of Article 1d is the prohibition of discrimination on any ground such as, inter alia, language. However, when reading the entire section of the reasoning of the General Court, it cannot be inferred from that statement that the General Court held that Article 1d does not allow for such discrimination to be justified under certain conditions.

83. By the *second part* of the second ground of appeal, the Commission argues that paragraphs 98 to 104 of the judgment under appeal constitute erroneous reasoning, as the General Court did not examine whether the General Rules were 'communications' or 'other measures' in the sense of paragraph 91 of the judgment in *Italy* v *Commission I*. The Commission also maintains that the reasoning of the judgment under appeal is insufficient because the General Court only examined the justification of the choice of second languages contained in the contested notices, but not the justification thereof contained in the General Rules.

84. In my view, this part of the second ground of appeal is also unfounded.

85. It is true that in paragraph 91 of the judgment in *Italy* v *Commission I* the Court noted, first, that the institutions concerned by the competitions at stake in that case had never adopted rules of procedure in accordance with Article 6 of Regulation No 1. It then added that the Commission had not 'referred to *other measures* such as *communications* which lay down criteria governing the choice of a language as a second language for participation in a competition' (emphasis added). Finally, it noted that the competition notices contested in that case '[did] not contain any reasoning that might justify the choice of the three languages in question'. This last sentence was actually at the core of the Court's reasoning, in

so far as it had held, in paragraph 90 of that judgment, that 'the rules limiting the choice of the second language must provide for clear, objective and foreseeable criteria so that the candidates may know, sufficiently in advance, what the language requirements are and can prepare to take part in the competitions in the best possible circumstances'.

86. However, I fail to see how that specific reasoning of the Court would have the consequences that the Commission is apparently ascribing to it. It does not seem to me that in paragraph 91 of the judgment in *Italy* v *Commission I* the Court set out any criteria on the basis of which the legal nature of those communications were to be assessed, and even less so have stated that any such assessment would, in fact, have to be carried out in order to 'trigger' what was stated in paragraph 91. The reference to '*other measures* such as *communications*' simply meant, to my understanding, that the institution must adopt any such (generic) measures (of whatever sort) so that the candidates may know in advance what will be required of them. Therefore, the fact that the General Court, in the judgment under appeal, did not examine whether the General Rules constituted such communications for the purposes of the statement of the Court in paragraph 91 does not in any way vitiate its reasoning.

87. The Commission also claims that the General Court did not examine the justification of the choice of second languages set out by the General Rules. To the extent that that argument, as the Commission itself apparently acknowledges, does not overlap with the issues pertaining to and dealt with under its first ground of appeal, [24] it is sufficient to note that in the judgment under appeal the General Court did examine the justification contained not only in the contested notices, but also in the General Rules (paragraph 115) and in the General Guidelines (paragraph 116).

88. As a consequence, all the arguments advanced by the Commission in the second ground of appeal are unfounded.

C. The third ground of appeal

89. The third ground of appeal concerns the legality of the limitation to English, French and German as choices for the second language for the competitions. The first part of this ground of appeal relates to the interpretation of Article 27 of the Staff Regulations and its precise relationship to Article 28(f) thereof (1). The second and third parts concern the parameters chosen by the General Court for the review of the legality of the competition notices and the intensity of the review it carried out (2).

[24] Addressed above, in points 46 to 68 of this Opinion.

1. The first part of the third ground of appeal: the relationship between Article 27 and Article 28(f) of the Staff Regulations — is language an ability?

90. By the first part of the third ground of appeal, the Commission claims that the judgment under appeal is vitiated by an error in the interpretation of Article 28(f) of the Staff Regulations contained in paragraph 106 of that judgment. In that paragraph, the General Court stated that only the objective of having immediately operational candidates could justify discrimination based on languages. In contrast, the General Court noted that the objective of recruiting officials of the highest standard of ability, efficiency and integrity could not justify such discrimination. This is because those qualities are manifestly independent from knowledge of languages.

91. The Commission maintains that, according to Article 28(f) of the Staff Regulations, knowledge of languages is one of the conditions of recruitment for a position in the institutions. It thus considers that such knowledge is part of the requirement of 'ability' in the sense of Article 27 of the Staff Regulations.

92. For what it is worth, from a textual perspective, the notion of 'ability' as used in Article 27 can be defined as 'possession of the means or skill to do something' [25] or as 'competence in doing something'. [26] This idea of 'ability' being related to 'competence' or to having the skill 'to do' something is also confirmed by other language versions of the Staff Regulations, which use the terms 'compétence' [27] (in French), 'Befähigung' [28] (in German), 'competenza' [29] (in Italian), 'competencia' [30] (in Spanish) or 'způsobilost' [31] (in Czech).

93. The precise meaning of the notion of 'ability' used by Article 27 could also be assessed systematically, by reference to Article 28 of the Staff Regulations. Article 28 of the Staff Regulation lays down the 'conditions' for an official to be

25 *Concise Oxford English Dictionary*, 11th ed., Edited by Soanes, C., and Stevenson, A., Oxford University Press, Oxford, 2004.

26 Online *Merriam-Webster Dictionary* (available at https://www.merriam-webster.com).

27 'Capacité reconnue en telle ou telle matière en raison de connaissances possédées et qui donne le droit d'en juger': *Le petit Larousse illustré*, Larousse, Paris, 2011.

28 'Das Befähigtsein; Eignung; Tauglichkeit; Begabung': *Duden. Deutches Universalwörterbuch*, 6th ed., Dudenverlag, Mannheim, Leipzig, Vienna, Zürich, 2006.

29 'L'essere competente', defining in turn 'competente' as 'che ha la capacità, le qualità, le conoscenze, l'esperienza necessarie a fare bene qualcosa, a ben valutare, giudicare e sim.; esperto': *Dizionario italiano Garzanti*, Garzanti Linguistica, Milan, 2005.

30 'Pericia, aptitud o idoneidad para hacer algo o intervenir en un asunto determinado': *Diccionario de la lengua española*, 23rd ed., Real Academia Española, Espasa Libros, Barcelona, 2014.

31 *Slovník spisovné češtiny*, 4th ed, Akademia, Prague, 2009, defines 'způsobilý' as 'mající k něčemu potřebné schopnosti, předpoklady'.

appointed, including, in point (f), the condition that the candidate 'produces evidence of a thorough knowledge of one of the languages of the Union and of a satisfactory knowledge of another language of the Union to the extent necessary for the performance of his duties'.

94. However, Article 28 contains a mixture of different elements. Some of those elements could be classified as 'eligibility' conditions, such as the condition of being a national of one of the Member States and enjoying full rights as a citizen (point a), having fulfilled any military service obligations (point b), and being physically fit to perform one's duties (point e). Conversely, other elements appear to be conditions relating to the 'competence' of the official, such as producing the appropriate character references as to his suitability for the performance of his duties (point c) or having passed a competition based on either qualifications or tests, or both qualifications and tests (point d).

95. In view of this mixture of different elements, I consider that very little, if any, clear conclusion can be drawn from such a systematic argument and the relationship between Articles 27 and 28 of the Staff Regulations for the discussion on whether that language ought to be qualified as 'knowledge' or as 'ability' in the sense of Article 27 of the Staff Regulations.

96. Furthermore, no clear guidance on this issue can be derived from paragraph 94 of the judgment in *Italy* v *Commission I*, where the Court held that it is for the institutions 'to weigh the legitimate objective justifying the limitation of the number of languages of the competition against the objective of identifying the most competent candidates'. [32]

97. Finally, it is also clear that the understanding of the notion of 'ability' with respect to the knowledge of languages might be to some extent context-dependent, in particular in view of the position advertised. For example, in the case of a position of translator, interpreter or lawyer-linguist, knowledge of languages could more easily fit into the notion of 'ability' or 'competence' than for other, less language-dependent positions. [33]

98. Personally I would have no great difficulty, on the basis of the natural meaning of the words used, in subsuming knowledge of languages under the notion of 'ability' in the sense of Article 27 of the Staff Regulations. [34] However, I

[32] It seems to me that the phrase 'the most competent candidates' was, as regards the substance of the statement, supposed to rather mean 'the candidates having the highest standard of ability,' since in other language versions of the judgment the Court used the same wording that appears in the respective language version of Article 27 of the Staff Regulations (for example, 'ayant les plus hautes qualités de compétence' in the French version of the judgment, or 'dotati delle più alte qualità di competenza' in the Italian version, which was the language of the case).

[33] See, in this regard, judgment of 17 December 2015, *Italy* v *Commission* (T-510/13, not published, EU:T:2015:1001, paragraph 102).

[34] Nevertheless, even if language knowledge can be considered as an ability to be assessed at the time of the appointment of the official, it is of course not an ability which must *exclusively* be

do have a slightly greater difficulty in seeing why such an ancillary point of the reasoning of the General Court, made in paragraph 106 of the judgment under appeal, should be of great importance in the context of the present appeal. In my view, even if the Court were to find that the knowledge of a language, as required by Article 28(f), can be classified as an 'ability' in the sense of Article 27 of the Staff Regulations, this would still not lead in any way to the annulment of the judgment under appeal. [35]

99. Indeed, the contested notices were annulled essentially for lack of sufficient justification of the limitation of the choice of second language. However, paragraph 106 of the judgment under appeal does not concern that issue. The first part of the third ground of appeal thus appears to be ineffective.

2. The second and third parts of the third ground of appeal: the scope and intensity of the review of the legality of the competition notices

100. By the second part of the third ground of appeal, the Commission contests the parameters or criteria used by the General Court, in paragraphs 107 to 117 of the judgment under appeal, to review the legality of the competition notices. It claims that the judgment is based on an erroneous interpretation of the scope of discretion that EPSO enjoys in determining the criteria of ability that candidates must meet. The Commission points out that the Court only required, in paragraph 90 of the judgment in *Italy* v *Commission I*, that 'the rules limiting the choice of the second language must provide for *clear, objective and foreseeable criteria* so that the candidates may know, sufficiently in advance, what the language requirements are and can prepare to take part in the competitions in the best possible circumstances' (emphasis added). This however would not justify the finding of the General Court, in paragraph 152 of the judgment under appeal, in the sense that EPSO should have produced 'specific and verifiable' elements.

101. By the third part of the third ground of appeal, the Commission also criticises the intensity of the review carried out by the General Court in paragraphs 120 to 144 of the judgment under appeal. It considers that the General

assessed at that time. This is proved by Article 45(2) of the Staff Regulations, according to which officials are required to demonstrate before their first promotion the ability to work in a third language. Knowledge of languages is thus an ability that can be acquired. However, in and of itself, this does not exclude the possibility to assess languages in the framework of a competition: indeed, as the Court noted in paragraph 97 of the judgment in *Italy* v *Commission I*, 'it is … a matter for the institutions to weigh *the legitimate objective justifying the limitation of the number of languages of the competitions* against the opportunities for recruited officials of learning, within the institutions, the languages necessary in the interest of the service' (emphasis added).

35 In my view, the crucial question connected to paragraph 106 of the judgment of the General Court would rather be what (type of objective and reasonable) grounds may actually be invoked for imposing limitations on languages in the recruitment process, as well as the systemic connection between Article 27 and Article 1d(6) of the Staff Regulations. But those issues are not being raised by the present appeal.

Court exceeded the limits of its power of judicial review and substituted itself for the administration when it assessed the data produced by the Commission and concluded that that data was not capable of supporting the arguments justifying the limitation of the second language.

102. The Commission, by both the second and third parts of the third ground of appeal, is essentially suggesting that the General Court overreached the limits of its power of judicial review and, by the same token, disregarded the wide discretion that EPSO enjoys when defining, on behalf of the institutions, the criteria of (linguistic) ability that candidates must meet.

103. I disagree.

104. It ought to be recalled at the outset that first-instance review before the EU Courts is a *full* judicial review. Indeed, it is established case-law that the review of legality provided for in Article 263 TFEU involves review in respect of both the law and the facts, which means that the competent EU Court has the power, inter alia, to assess the evidence. [36] Therefore, all the facts asserted by an institution in support of its decision can be assessed by the General Court.

105. It also ought to be underlined that most of the reasons relating to the limitation of the second language contained in the contested notices and in the General Rules, namely those elements of justification chosen and offered by EPSO in support of its decision, are *factual propositions*.

106. Amongst other elements, the contested notices invoke [37] the existence of a long practice 'to use mainly English, French, and German for internal communication in the EU institutions' and state that 'these are also the languages most often needed when communicating with the outside world and dealing with cases'. They add that these are 'the most common second languages in the European Union and the most widely studied as a second language'. According to the notices, limiting the languages to be used at the assessment centres, where specific competencies are assessed, 'allows the institutions to evaluate candidates' ability to be immediately operational in an environment that closely matches the reality they would face on the job'.

107. The General Rules, as well as the General Guidelines annexed thereto, mainly advance very similar justifications, which are also of a factual nature. Moreover, the General Guidelines set out further elements, such as maintaining

36 See, for example, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 53 and the case-law cited); see also judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 67), and of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 63).

37 For the full text of the justification provided by the general competition notice, see point 24 of this Opinion. The equivalent section of the data protection competition notice is drafted in essentially identical terms.

that English, French and German have been traditionally used 'in meetings of members of the institutions'. They claim that the fact that they are 'the languages used most often for communication both in-house and with the outside world … is borne out by statistics on the source languages of the texts translated by the institutions' translation services'. This choice of languages is also 'justified by the nature of the tests involved', which are 'methods of assessment based on competences'. The General Guidelines also state that these three languages, as well as being the ones most often learned as foreign languages, are also 'the languages that people think are the most useful to learn'. Finally, they also invoke statistics according to which these languages were the most frequently chosen second languages by candidates in competitions held in 2005 and also in 2010.

108. By their nature, all of these statements are factual propositions that of course can, and if being invoked as the reasons for a certain administrative decision should, be judicially reviewable if they are challenged before the EU Courts. I am thus of the view that the General Court certainly did not err in law when it undertook an assessment of these factual propositions contained in the contested notices, in the General Rules and in the General Guidelines.

109. Nor for that matter did the General Court err in law when it reviewed further evidence presented by the Commission in the course of the first-instance proceedings, yet again in the form of factual propositions. By these additional statements, the Commission suggested that English, French and German are: (i) the three main languages in the deliberations of the institutions of the Union; (ii) the languages into which almost all documents are translated by its Directorate-General for Translation; (iii) the languages most spoken by its officials and agents; and (iv) the languages studied and spoken more often as foreign languages in the Member States. Assessing such factual propositions in the light of the evidence presented by the parties is again exactly what the EU Courts, in first-instance proceedings, are supposed to do. [38]

110. It would appear to me that in its understanding of the notion of 'margin of discretion', the Commission is conflating two different issues: the fact that an institution is free, within the confines of legality, to choose what it wishes to do, how it wishes to go about it, and what reasons it then wishes to publicly invoke and state for that decision, certainly does not mean that, once those choices have been exercised, the reasons stated become immune from review.

111. A (wide) margin of discretion entails, in line with the established case-law of the Court, certain leeway in the assessment of and the inferences to be drawn

[38] As the Court held in the judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 56 and the case-law cited), 'the EU judicature must carry out its review of legality on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and it cannot use the Commission's margin of discretion as regards the assessment of that evidence as a basis for dispensing with the conduct of an in-depth review of the law and of the facts'.

from facts, in particular those that are highly technical or political. [39] However, as the Court has confirmed with regard to a number of substantive areas of law, such as competition law, [40] state aid, [41] or the common foreign and security policy, [42] the fact that the administration has a margin of discretion does not shield the factual propositions and statements made in reaching a decision in those areas from potential judicial review, in particular from the assessment whether the facts on which the contested decision was based are accurately stated and allow for such a conclusion to be made. Finally, there are other fields, such as transport [43] or agriculture, [44] where the recognised broader margin of discretion could indeed mean that the intensity of review may arguably be said to be lower. In those fields, the Union judge only verifies whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the institution clearly exceeded the bounds of its discretion. However, even in those cases, review is again by no means excluded.

112. In short, the margin of discretion enjoyed by the administration in the present case certainly included the choice of whether and how to potentially limit the use of the second language in competitions. It also included the choice of the type of argument to invoke in relation to that type of potential limitation. [45] However, once EPSO decided to give reasons for a certain choice of second languages on the basis of a set of factual propositions about how those languages have been used and are being used in Europe, both within the institutions and outside, such types of statements invoked in the notices, the General Rules and the General Guidelines become fully reviewable by the EU Courts. In carrying out that review, the General Court in no way substituted its own assessment for that of

39 See, for example, the Opinion of Advocate General Léger in *Rica Foods* v *Commission* (C-40/03 P, EU:C:2005:93, points 45 to 49).

40 See judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39); see also judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 54), and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 54).

41 For example, judgment of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission* (C-328/99 and C-399/00, EU:C:2003:252, paragraph 39).

42 For example, judgment of 21 April 2015, *Anbouba* v *Council* (C-605/13 P, EU:C:2015:248, paragraphs 41 and 45).

43 For example, judgment of 16 April 1991, *Schiocchet* v *Commission* (C-354/89, EU:C:1991:149, paragraph 14).

44 See, for example, judgment of 22 November 2001, *Netherlands* v *Council* (C-301/97, EU:C:2001:621, paragraph 74 and the case-law cited).

45 It might be again recalled that the requirement set by the Court in *Italy* v *Commission I* (above, point 85) was that there must be clear, objective and foreseeable criteria that the candidates may know in advance. Nothing at all was stated with regard to what types of arguments may be invoked for setting such criteria.

the administration: it simply reviewed the arguments presented for that assessment by the administration.

113. I wish to underline that that does not necessarily mean that I agree with all the findings that the General Court made in the course of its robust and thorough assessment of the arguments presented by the Commission. That is, after all, also not necessary, since the assessment of facts is indeed the task of the first-instance court. [46] Yet I certainly agree with the overall outcome of the case in the sense of the annulment of the contested notices.

114. It might be added, on a subsidiary note, that the same outcome would in fact also be reached if a lower-intensity review, as suggested by the Commission, were to be carried out (*quod non*). The simple truth remains that when taken together, the individual propositions advanced by EPSO simply pull in different directions. They are therefore inconsistent as regards the exact limitation of the second language for the competition to English, French and German, yet again at the level of factual statements pointing exactly and always to those three languages. Some of these arguments justify the choice of one of these languages (English), while others justify the choice of more than one, but not always the same ones.

115. Therefore, I consider that the General Court did not exceed the limits of its power of judicial review when assessing the factual propositions against the evidence produced to support them. Therefore, the second and third parts of the third ground of appeal are unfounded.

D. The fourth ground of appeal: the limitation of the languages of communication between candidates and EPSO — the relationship between Regulation No 1 and the Staff Regulations

116. By the fourth ground of appeal, the Commission argues that the General Court erred in law in the interpretation of Article 2 of Regulation No 1, regarding the question of whether the limitation of the languages of communication between candidates and EPSO constituted discrimination. The Commission criticises the interpretation, in paragraphs 183 to 185 of the judgment under appeal, of the judgment in *Italy* v *Commission I*. More specifically, the Commission considers that the General Court should not have inferred from paragraphs 68 and 69 of the judgment in *Italy* v *Commission I* that Regulation No 1 is applicable to candidates. According to the Commission, those paragraphs concerned the obligation to

[46] This Court has consistently held that since the appeal is limited to points of law, the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal: see, for example, judgments 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 177), and of 28 February 2018, *mobile.de* v *EUIPO* (C-418/16 P, EU:C:2018:128, paragraph 65).

publish competition notices in the Official Journal in all the official languages. In the present case, Article 1d of the Staff Regulations would be applicable and thus serve as a legal basis for the limitation of the languages of communication between candidates and EPSO.

117. Therefore, this ground of appeal essentially raises the issue of whether the Staff Regulations apply to candidates for a competition and, if that is the case, from what moment in time. In order to answer that issue, however, a more general question needs to be addressed first: what is the relationship between Regulation No 1 and the Staff Regulations?

118. In this section, I will first examine the arguments of the parties as to the applicability of each of these regulations to candidates for a competition (1), before clarifying how I think paragraphs 68 and 69 of the judgment in *Italy* v *Commission I* should be interpreted (2). I will then turn to the scope of application of the Staff Regulations (3) and suggest that they apply to candidates once they submit an application to a specific competition (4). Nevertheless, Regulation No 1, as the general legislative framework on languages, retains some role in the framework of competitions and also later on (5). Those findings lead to the conclusion that the fourth ground of appeal of the Commission is well founded. However, since that fact does not alter the outcome of the case before the General Court, I would suggest that the Court proceed, within the scope of the fourth ground of appeal, to a substitution of the reasoning of the General Court (6).

1. The arguments of the parties on the rules applicable to candidates

119. The Commission argued at the hearing that at the moment of publication of competition notices in the Official Journal, Regulation No 1 and the Staff Regulations are applicable *concurrently*. This would be justified by the fact that, on the one hand, the Staff Regulations state that notices of open competitions must be published in the Official Journal and, on the other hand, Regulation No 1 provides that the Official Journal must be published in (all) the official languages. However, the Commission further suggested that once a candidate submits an application, Regulation No 1 would cease to apply to the candidate, who would become subject only to the Staff Regulations.

120. By contrast, the Italian Republic and the Kingdom of Spain maintained that competitions are governed by Regulation No 1 alone. The Staff Regulations would become applicable at a later date that was not identified by these two parties, but in any event they would not apply to candidates, who would thus be subject only to Regulation No 1. By implication, I would logically assume that under this position, the entire selection procedure would then have to be governed by Regulation No 1 and the Staff Regulations would become applicable only once an official takes up his functions.

2. The judgment in Italy v *Commission I*

121. At the outset, in view of the arguments advanced by the Commission in support of this ground of appeal, it is important to clarify the meaning and scope of the findings of the Court in paragraphs 68 and 69 of the judgment in *Italy* v *Commission I*. In paragraph 68, the Court held that in the absence of specific rules adopted, in particular, by virtue of Article 6 of Regulation No 1, there was no document 'on the basis of which it could be concluded that the relationship between [the] institutions and their officials and other servants is completely excluded from the scope of Regulation No 1'. In paragraph 69, the Court added: 'that is all the more the case with regard to the relationship between the institutions and the candidates for an external competition who are not, in principle, either officials or servants'.

122. In order to assess the meaning and scope of these statements, and especially of paragraph 69, it is important to put them in the context of the appropriate section of the reasoning of the Court in which they were made. In the judgment in *Italy* v *Commission I*, the Court examined the obligation relating to the *publication* of competition notices, in the context of a case in which the contested competition notices had been published in full only in the English, French and German versions of the Official Journal. The statement of the Court concerning the applicability of Regulation No 1 to candidates for an external competition was therefore made in relation to the obligation to publish the competition notices, and not regarding the choice of the second language, which was addressed in a different section of the judgment (paragraph 79 et seq.).

123. Moreover, the key argument with regard to that legal issue was, in my view, not even made in paragraph 69 of the judgment, concerning the inclusion of candidates for external competitions within the scope of Regulation No 1. Instead, the conclusive argument for the Court's finding in relation to the obligation to publish competition notices in the Official Journal (in accordance with Article 1(2) of Annex III to the Staff Regulations) in all the official languages (as required by Article 5 of Regulation No 1) was contained in paragraphs 70 and 71 of the judgment.

124. As a consequence, what follows from the judgment in *Italy* v *Commission I* is that competition notices must be published in all official languages. It is also rather clear that at that precise moment and in relation to the publication in the Official Journal, Regulation No 1 is applicable. However, this judgment did not, in my view, provide an answer to the question of whether or not candidates for a competition are subject to the Staff Regulations.

3. Do the Staff Regulations apply to candidates?

125. In order to understand the relationship between Regulation No 1 and the Staff Regulations, the scope of application of both measures must be analysed first.

126. It is quite clear that Regulation No 1 is the general regime, containing default rules governing languages of the institutions of the European Union. Unless and until expressly derogated from, that regime remains applicable.

127. However, the scope of application of the Staff Regulations is somewhat less clear.

128. On the one hand, there is Article 1 of the Staff Regulations, which, if read in isolation, could provide a rather straightforward answer. It states that Staff Regulations 'apply to officials of the Union'. In turn, Article 1a(1) defines the notion of 'official of the Union' as 'any person who has been appointed … to an established post on the staff of one of the institutions of the Union'.

129. On the other hand, other provisions of the Staff Regulations as well as a number of other systemic considerations seem to lead to a different, arguably a more nuanced conclusion.

130. First, there is ample textual and systemic support for the proposition that *ratione materiae*, the Staff Regulations are applicable to the recruitment process. The Staff Regulations contain an (entire) chapter entitled 'Recruitment', namely Chapter 1 of Title III, composed of Articles 27 to 34. This chapter not only deals with the final stage of the recruitment process, that is to say the administrative procedure of *appointment* of an official to a specific post within an institution, but it also provides, in Article 30, that the appointing authority must appoint a *selection* board for each competition. Furthermore, Annex III to the Staff Regulations is entitled 'Competitions' and contains a comprehensive set of rules on that matter. Those include the designation of the authority charged with drawing up the competition notice, the content of the competition notice or the obligation to publish the competition notices in the Official Journal (Article 1); the obligations incumbent upon candidates in order to submit an application (Article 2); the composition of selection boards (Article 3); the procedure to be followed by selection boards in order to draw up the list of suitable candidates (Article 5); and so on.

131. Second, also in the context of remedies, the Staff Regulations appear to be applicable to candidates. For what such (self-)perception might be worth, candidates have the right to address to the Director of EPSO, as the appointing authority, an administrative complaint under the Staff Regulations. [47] Moreover,

47 See point 3.4.4.1 of the General Rules, which refers to Article 90(2) of the Staff Regulations, although it seems that it should be read together with Article 90c, in so far as EPSO is an interinstitutional body to which several institutions have entrusted the exercise of some of the powers conferred on the Appointing Authority, in the sense of Article 2(2) of the Staff Regulations. See also Article 4 of Decision 2002/620, which provides that requests and complaints relating to the exercise of the powers conferred on EPSO must be lodged with EPSO in accordance with Article 91a of the Staff Regulations. I believe that the precise reference should be to Article 90c rather than Article 91a, in so far as the former refers to 'requests and complaints' and the latter to 'appeals' (to the EU Courts).

candidates also have the right to submit an appeal before the EU Courts under Article 270 TFEU (which grants jurisdiction to the Court of Justice of the European Union 'in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations') and Article 91 of the Staff Regulations. [48] In so far as the Staff Regulations allow these complaints and appeals to be submitted by 'any person to whom [the] Staff Regulations apply', it seems reasonable to infer that candidates come within the scope of application of the Staff Regulations.

132. Third, and perhaps more importantly, the case-law of this Court confirms that the Staff Regulations do not exclusively apply to officials of the European Union, nor exclusively to the staff of the institutions and other bodies. For example, as regards the notion of 'any person to whom [the] Staff Regulations apply' in the sense of Articles 90 and 91 thereof, the Court held that these provisions 'do not, as such, permit a distinction to be made between an application brought by an official and one brought by any other person referred to in the regulations' and concluded that 'the Civil Service Tribunal [had] jurisdiction *ratione personae* to hear and determine not only applications brought by officials but also applications brought by any other person referred to in those regulations'. [49]

133. In a similar vein, albeit by now institutionally obsolete, [50] the case-law of this Court concerning the jurisdiction *ratione personae* of the Civil Service Tribunal is still pertinent in so far as it confirms that the candidates for a competition can bring their appeals before the General Court on the basis of the combined provisions of Article 270 TFEU and Articles 90 and 91 of the Staff Regulations, [51] rather than via other, more general provisions, such as Article 263 or Article 268 TFEU.

48 See point 3.4.4.2 of the General Rules. For a more recent competition, see point 4.3.2 of Annex II to the general competition notice of 2018.

49 Judgment of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission* (C-417/14 RX-II, EU:C:2015:588, paragraph 33). In that case, the Court referred to Article 73(2)(a) of the Staff Regulations, which expressly identifies the 'descendants' and the 'ascendants' of the official, in order to justify the jurisdiction *ratione personae* of the Civil Service Tribunal in an action concerning the question of whether the father and the children of a deceased official had a right to payments guaranteed by Article 73 of the Staff Regulations. See also judgment of 16 May 2013, *de Pretis Cagnodo and Trampuz de Pretis Cagnodo* v *Commission* (F-104/10, EU:F:2013:64, paragraph 51).

50 Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

51 In judgment of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission* (C-417/14 RX-II, EU:C:2015:588, paragraph 30), the Court noted that Articles 90 and 91 of the Staff Regulations implement Article 270 TFEU.

134. In sum, there is, on the one hand, the rather isolated statement in Article 1 of the Staff Regulations, and, on the other hand, the weighty intra-systemic arguments referring to other provisions of the same Staff Regulations stating something somewhat different, coupled with the broader systemic considerations.

135. Against such a background, I cannot but conclude that the Staff Regulations apply to candidates for a competition, of course in as much as they contain provisions that can be substantively applied to the situation of those candidates.

4. From which moment?

136. This, of course, raises the question as to when exactly the Staff Regulations become applicable to candidates for a competition. There are two points in time that form the logical 'outer points': on the one hand, this could hardly be before the notice for competition is published. On the other, it must be at the latest when the official is appointed as provided for in the Staff Regulations.

137. In my view, for the purpose of the potential applicability of the relevant provisions of the Staff Regulations, the key moment is when the individual applicant singles himself out, by his own actions, from the general public and enters into the application process. Thereby, he also enters into the scope of application of the Staff Regulations. Metaphorically speaking, a person becomes a candidate because he steps out of the general public and enters into the competition 'tunnel' at one end, hoping to emerge at the other as an appointed official. As explained in the previous section, the Staff Regulations as well as other provisions of EU law clearly declare that they are also applicable to, and in, that 'tunnel' called 'the recruitment process'.

138. A member of the general public becomes a candidate from the moment when he submits an application to a specific competition, thereby clearly and unequivocally declaring his intent to participate in that competition and be treated as a candidate. In principle, an application is considered to be submitted once the candidate has validated it, because from this moment on he will no longer be able to make any changes to it. [52]

139. Apart from being the most reasonable moment, the same understanding is further supported by two provisions of Annex III to the Staff Regulations. First, Article 2 of Annex III to the Staff Regulations states that 'candidates shall complete a form prescribed by the appointing authority. They may be required to furnish additional documents or information'. This provision thus refers to the form that prospective candidates must complete in order to submit their application. Second, Article 4 of Annex III to the Staff Regulations provides that 'the appointing authority shall draw up a list of candidates who satisfy the

[52] See point 2.1.6 of the General Rules. For a more recent competition, see the section entitled 'How will I be selected?', of the general competition notice of 2018.

conditions laid down in Article 28(a), (b) and (c) of the Staff Regulations and shall send it, together with the candidates' files, to the chairman of the Selection Board'. Therefore, a candidate for a competition who has already submitted and validated an application (but who has not yet been assessed by a selection board) can indeed be considered as a 'person referred to in the [Staff Regulations]' in the sense of the case-law of this Court and, as a consequence, as a person to whom the Staff Regulations apply.

140. The conclusion that a candidate enters into the scope of application of the Staff Regulations once he submits and validates his application for a specific competition also seems reasonable when taking into consideration the subsequent phases of the selection procedure and, even more so, the languages that will be used once the candidate is appointed. I do not think it would make much sense to keep the languages that can be used during the entire selection procedure separate from the languages that will be used later, after the candidate has successfully passed the competition. [53] This would of course only be the case provided that it is possible, under Article 1d(6) of the Staff Regulations (or, if it were to be used, via the implementation of derogations on the basis of Article 6 of Regulation No 1), to limit the use of languages. Assuming (but in no way prejudging) that this is possible, then how or when else should, or even could, the language knowledge of the candidates be tested?

5. The applicability of Regulation No 1 to candidates (and officials)

141. It has been suggested that Staff Regulations become applicable to candidates for a competition from the moment they enter a specific competition. However, Regulation No 1, as the default and general regime, is also applicable to those candidates. [54]

142. On the one hand, it might be recalled that Regulation No 1 establishes the general language framework [55] applicable to the institutions and to their relationships with Member States and persons subject to the jurisdiction of a Member State. Article 2 thereof provides that documents sent to an institution may be drafted in any one of the official languages selected by the sender and that the reply must be drafted in the same language. Article 6 of Regulation No 1 allows for a limited possibility to derogate from this principle, stating that the

53 It could certainly be suggested, on a rather abstract and normative level, that the language rules for a selection procedure are and ought to be separate from the language requirements for the later exercise of the job. In that case, the choice and the potential justification for that choice of languages in the selection process would then also be separated from the conditions applicable later in the exercise of the job in question.

54 As the Court noted in paragraph 68 of the judgment in *Italy* v *Commission I*, the relationship between the institutions and the candidates for an external competition is not 'completely excluded from the scope of Regulation No 1'.

55 Above, point 126.

institutions may stipulate in their rules of procedure which of the languages are to be used in specific cases. [56]

143. On the other hand, Article 1d of the Staff Regulations prohibits, in paragraph 1, any discrimination based, inter alia, on grounds of language. Nevertheless, paragraph 6 of that provision allows for a limitation of the application of the principles of non-discrimination and of proportionality where this is 'justified on objective and reasonable grounds' and 'aimed at legitimate objectives in the general interest in the framework of staff policy'.

144. In accordance with the principle *lex specialis derogat legi generali*, special provisions prevail over general rules in situations which they specifically seek to regulate. [57] Where two conflicting rules intend to regulate the same situation, that principle allows one to choose which rule must be retained on the basis of the scope of application of each rule. The special provision will thus prevail over the general one.

145. As regards language rules, Regulation No 1 is undoubtedly the general provision, whereas the Staff Regulations have a more specific scope of application. The Staff Regulations would thus effectively function, from the moment they become applicable to candidates, as a *lex specialis* prevailing over Regulation No 1.

146. Since the Staff Regulations clearly state that they are the rules applicable to the recruitment process, once a person enters into their scope of application by choosing to become a candidate, it will be that specific language regime that will become applicable to him for the purposes of and within the scope of that recruitment process.

147. That being said, I wish to add two concluding clarifications on the ongoing relevance of Regulation No 1 to candidates for a competition, notwithstanding the applicability of the Staff Regulations as *lex specialis*.

56 The Court noted in paragraph 67 of the judgment in *Italy* v *Commission I* that the institutions had not made use of this article. This was also confirmed by the Commission at the hearing of the present case. As a general rule this seems to be accurate, perhaps with the partial exception of Article 14 of the Rules of Procedure of the Council (OJ 2009 L 325, p. 36), which appears to have been adopted on the basis of Article 6 of Regulation No 1, as noted in the *Comments on the Council's Rules of Procedure* published by the General Secretariat of the Council, p. 48 (available at http://www.consilium.europa.eu/media/29824/qc0415692enn.pdf). The Court dealt with this provision of the Rules of Procedure of the Council in its judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraphs 200 to 204), but did not address the question of whether it had been adopted pursuant to Article 6 of Regulation No 1.

57 See, for example, judgments of 19 June 2003, *Mayer Parry Recycling* (C-444/00, EU:C:2003:356, paragraph 57); of 30 April 2014, *Barclays Bank* (C-280/13, EU:C:2014:279, paragraph 44); and of 12 February 2015, *Parliament* v *Council* (C-48/14, EU:C:2015:91, paragraph 49).

148. First, the fact that from a certain moment in time, Staff Regulations become *lex specialis* in terms of the language of communication between the institutions and the candidates cuts both ways: on the one hand, it means an authorised departure. On the other hand, as with any other exception, departure, or derogation, Regulation No 1 still remains relevant as the overall or default framework that was departed from. It thus serves as a yardstick in terms of whether the departure and derogation have been limited to what was indeed necessary, proportionate, and reasonable.

149. In other words, the fact that the Staff Regulations as *lex specialis* allow for a departure from Regulation No 1 should not be understood as implying a binary choice, whereby the application of the special rule completely excludes the applicability of the general rule. It ought to be a reasonable and proportionate departure. Returning to the abovementioned metaphor of the 'recruitment tunnel', when entering a (certainly open) tunnel, the light level is also not binary, changing abruptly from being fully lit to total darkness. There is, rather, a gradual darkening, which intensifies with every step taken further into the tunnel. In a similar vein, any potential derogation from Regulation No 1 is also to be implemented in a reasonable and proportionate way. If necessary, a sensible and gradual decrease in the number of languages available could be sought, rather than a bipolar jump from 24 official languages to, for example, just one.

150. Second, it is also rather clear that Article 2 of Regulation No 1 would continue to apply to any communication of the candidate that is not related to the competition, and, for that matter, to any communication made by an official or other agent of an institution outside of the scope of his relationship of subordination. The existence of such a relationship and the rules on communication within that framework, or by extension those unfolding within the 'tunnel' leading to that status, are after all the defining elements of the type of communication that allows for the triggering of the *lex specialis* rule (and hence also delimits its scope of application).

151. Therefore, any communication taking place before that moment (such as a person contemplating applying after a notice of competition was published but before submitting an application and/or asking for further information) or, for that matter, any situation taking place afterwards but not related to that relationship of subordination (such as, for example, an official working for the European Parliament writing a letter in his personal capacity as a citizen of the European Union to the Commission) will still be fully covered by the rules of Regulation No 1.

6. Interim conclusion on the fourth ground of appeal

152. In my view, the General Court erred in law by focusing exclusively on the obligations deriving from Article 2 of Regulation No 1, while disregarding the systemic relationship existing between the Staff Regulations and Regulation No 1. However I consider that the contested notices were correctly annulled on the

ground that EPSO did not correctly justify the limitation of the second language. Therefore, since that error in law committed by the General Court does not in any way affect the operative part of the judgment under appeal, I would suggest that in relation to that ground of appeal, the Court proceed to the partial substitution of the reasoning of the General Court.

E. Postscript

153. The present case is one in a, by now, rather long list of pending or closed cases which have raised (at least partially) the same issues. The General Court has recently rendered a number of judgments annulling competition notices on language grounds. [58] Moreover, other similar cases are currently pending before the General Court. [59] As regards this Court, this is the second time since the judgment in the quasi-homonymous case *Italy* v *Commission I* [60] was handed down that the Grand Chamber is called upon to address essentially the same issues. [61]

154. Unfortunately, in spite of all those cases, and even after addressing the issues raised by the present appeal, the crux of the matter still appears to be far from resolved. In *Italy* v *Commission I*, the problem (in a nutshell) was that no reasons were given for limiting the languages in competition. The problem of the present case is, again put simply, that too many internally contradictory reasons were given.

155. An optimist seeing the judicial process as a progressive dialectic process of trial and error might find consolation in the fact that in terms of amount of reasons given, the next case is likely to find itself presumably somewhere in the middle. The slightly less optimistic realist might become somewhat worried by the fact that the genuinely key issues, such as what kind of reasons need to be given and, whether any such limitation is actually permissible at all, have not been addressed in any of the cases, including the present appeal. An awful cynic might try to suggest that the fact that neither of those key issues was actually challenged in either of those cases was no accident.

58 Judgments of 24 September 2015, *Italy and Spain* v *Commission* (T-124/13 and T-191/13, EU:T:2015:690); of 17 December 2015, *Italy* v *Commission* (T-275/13, not published, EU:T:2015:1000); of 17 December 2015, *Italy* v *Commission* (T-295/13, not published, EU:T:2015:997); and of 17 December 2015, *Italy* v *Commission* (T-510/13, not published, EU:T:2015:1001).

59 These are Cases *Italy* v *Commission* (T-313/15), *Italy* v *Commission* (T-317/15), *Spain* v *Commission* (T-401/16), *Italy* v *Commission* (T-437/16), *Italy* v *Commission* (T-443/16), *Calhau Correia de Paiva* v *Commission* (T-202/17) and *Spain* v *Commission* (T-704/17).

60 Indeed, although the name of the present case is *Commission* v *Italy*, the case before the General Court which gave rise to the judgment under appeal was *Italy* v *Commission*. Hence, to that extent the present case could indeed be called '*Italy* v *Commission II*'.

61 Together with the parallel case *Spain* v *Parliament* (C-377/16), referred to above in footnote 13.

156. In my view, intriguing as the study of the judicial process, its psychology, and interinstitutional politics are, the genuine problem posed by those cases is the human cost(s) involved: the expectations, dreams, and careers of individuals involved in all those cases over the years. In the absence of a clear answer to the question of the language limits in the work of the institutions, with the way competitions are organised changing repetitively, it may be rather difficult to plan and to prepare, should one wish to, for a career in a European institution.

157. The human problem may become further exacerbated rather soon if, in terms of remedies provided, the judicial policy were to change from, to put it bluntly, 'this was wrong but because of legitimate expectations the results will not be annulled' to 'this was wrong and all will be annulled, including individual lists, appointments, or working contracts'. In this regard, I share fully the concerns expressed by my learned colleague Advocate General Sharpston in her Opinion in the (parallel) case *Spain* v *Parliament*, where she proposes that the Court annul not only the contested call for expressions of interest, but also the database of potential candidates established on the basis of that call for expressions of interest. [62] Indeed, the point is well taken: if an institution keeps disregarding the decisions of the Court, more stringent measures are called for. One might add that there would be an even greater need for that course of action if, purely hypothetically, an institution were trying to bring about a change in the current regime by deliberately disregarding the law in the present in order to bring about factual change for the future, which then would have to be accepted as the new norm. *Ex injuria ius non oritur*.

158. All those considerations lead me to invite the Court to provide at least some guidance on the genuine issue underlying this appeal: is it possible to limit the internal working languages of the institutions and if so, how? The closing points of this Opinion provide a few suggestions in that regard.

159. As a starting point, I think it would be important to differentiate between the external and the internal (working) language(s) of an institution.

160. By 'internal' working languages, I make reference to the languages that are used for oral as well as written communications that are not supposed to leave the internal sphere of an institution (or, as the case may be, of two or more institutions, for example in the framework of interinstitutional meetings or written discussions). Further, by internal or interinstitutional meetings or similar types of events, I understand this to mean only those meetings at which no member of the general public is present. This would exclude events like hearings or sessions held at the European Parliament, as well as public hearings before the General Court or before this Court, which are 'external' by nature.

62 Opinion of Advocate General Sharpston in Case C-377/16, *Spain* v *Parliament*, points 156 to 161, 163 and 164.

161. By 'external' working languages, I refer to the languages used for any type of oral or written communication with individuals who are not connected to the institutions, including officials and other staff of the institutions in so far as they engage in oral or written communication with an institution in their private capacity. [63]

162. For *external* communications, the current rules on multilingualism must remain fully applicable without compromises or derogations. As the Court has already noted, the European Union is committed to the preservation of multilingualism, the importance of which is stated in the fourth subparagraph of Article 3(3) TEU and in Article 22 of the Charter. [64] The obligation for the European Union to respect its linguistic diversity, which derives from these provisions, proves the high value of multilingualism as one of the founding values of the European Union. Admittedly, the obligation of multilingualism is not absolute and unfettered, since there is no principle of EU law conferring 'a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances'. [65] However, the core of that obligation cannot be, from my point of view, touched. That core includes in particular, all binding acts that are to be enforced against natural and legal persons in a Member State, [66] as well as other non-binding documents in so far as they impose, directly or indirectly, obligations on individuals. [67]

163. The obligation to respect multilingualism also strictly applies, pursuant to Article 41(4) of the Charter, Article 20(2)(d) and Article 24 TFEU and Article 2 of Regulation No 1, whenever an individual writes to the institutions or addresses them in any other way, which in turn creates the right to receive an answer in the same language used by that individual.

164. Conversely, for *internal* communications, the choice of languages available and, more generally, the language rules applicable within or among the institutions ought to be more flexible. This flexibility and potential for limitations would not necessarily derive from budgetary considerations, [68] but rather from the imperative of reasonable internal institutional operability. That is a valid ground that from my point of view could be invoked under Article 1d(6) of the Staff

63 As discussed above in point 151.

64 Judgment of 5 May 2015, *Spain* v *Council* (C-147/13, EU:C:2015:299, paragraph 42).

65 Judgment of 9 September 2003, *Kik* v *OHIM* (C-361/01 P, EU:C:2003:434, paragraph 82).

66 See judgment of 11 December 2007, *Skoma-Lux* (C-161/06, EU:C:2007:773, paragraphs 37 and 38); see also judgment of 12 July 2012, *Pimix* (C-146/11, EU:C:2012:450, paragraph 33).

67 See judgment of 12 May 2011, *Polska Telefonia Cyfrowa* (C-410/09, EU:C:2011:294, paragraph 34).

68 Indeed, as the Italian Republic correctly pointed out at the hearing, budgetary considerations cannot justify discrimination: see, for example, judgment of 1 March 2012, *O'Brien* (C-393/10, EU:C:2012:110, paragraph 66 and the case-law cited).

Regulations and could be considered objectively justified if applied in a reasonable and proportionate way, as required by the Court in paragraph 88 of the judgment in *Italy* v *Commission I*.

165. Any such choice would indeed be inherently discretionary and political on two accounts: certainly at the level of whether and how that choice should be made but also, once that choice has been made, at the level of what precise reasons are to be used for justifying it. Therefore, on both accounts the institutions would have a wide margin of discretion. In that specific regard, however, I wish to make a twofold clarification.

166. First, should the justification of language rules be general and across the board or rather individual and on a case-by-case basis? The Italian Republic and the Kingdom of Spain insisted on the need to justify any discrimination based on language on an individual basis, not only in the framework of each competition but also, if need be, regarding each position to be filled.

167. However, it would appear to me that predictability and the possibility for candidates to prepare for competitions beforehand speaks rather in favour of a more general policy. It might again be recalled that in paragraph 90 of the judgment in *Italy* v *Commission I*, the Court noted that 'the rules limiting the choice of the second language must provide for clear, objective and foreseeable criteria so that the candidates may know, sufficiently in advance, what the language requirements are and can prepare to take part in the competitions in the best possible circumstances'.

168. I am not entirely sure how that requirement would be met by obliging EPSO — or, as the case may be, an individual appointing authority — to reason each individual case anew and from scratch. That judgment instead requires providing a structured answer that allows candidates to foresee the language rules that are likely to apply in the future — and not only in the near future, but also in the medium term. Finally, in practical terms, insisting on reasoning each individual case anew (without there really being any distinguishing factors) would only result in a formalistic repetition of the same justification, in all likelihood resulting in a mere copy-pasting of the General Rules into each individual notice, with no actual *individual* justification.

169. Thus, from this point of view, I must admit that a combined approach of having a set of general guidelines which may be departed from in individual cases where it is justified in that particular case seems to me a rather sensible way of setting out the language rules for competitions. [69]

[69] While, I wish to repeat again, in no way pre-empting the issue of whether EPSO would have the power to adopt any such General Rules, expressly left open above in points 69 to 77 of this Opinion.

170. Second, should the justification of language rules be past-oriented and factual, or rather prospective and normative? The most important question of the present case appears to be precisely that: what sort of justification must be provided in order to limit the (second) languages available to candidates for a competition? That key question is touched upon only very indirectly in the context of the second and third parts of the third ground of appeal, hiding within the issue of the limits and the intensity of the review by the General Court: *what* was the General Court supposed to review and *how* was it supposed to exercise such a review?

171. But it is precisely by asking that relevant question that the mismatch in ideas and expectations of what it means to have a margin of discretion becomes rather plain. What EPSO — or, arguably, the institutions which are represented in the Management Board of EPSO — apparently wished to carry out was a certain (political) choice in terms of the languages that should be used for the internal operation of the institutions, choosing a number of languages that they believed reasonably allow for their internal functioning. That is a normative, prospective or future-oriented choice. But because it would appear that such a choice could not be made openly (or, in any event, the institutions did not wish to state it openly, for whatever reasons), what has actually been presented as arguments for that choice were past-oriented propositions about facts (statistical and otherwise) and certain usages and practices within the institutions.

172. Naturally, the result is a mismatch between the (factual, past-oriented) reasons invoked by EPSO to justify the choice of languages and the (normative, future-oriented) reasons which transpire from that choice. This mismatch came clearly to the surface at the oral hearing, when some of the arguments brought forward by the Commission were endowed with distinct '*Back to the Future IV*' circularity logic: a certain perception of the past must forever determine the future, these are the past and present that must be because this is the desired future, and since the past cannot be changed, nor can the future.

173. Therefore, in order to avoid the recurrence of such a phenomenon in *Italy* v *Commission III*, EPSO — and, by implication, the institutions which are represented in its Management Board — should clearly decide how it wishes to proceed in terms of choice of languages and how it wishes to reason any potential limitation: either by means of factual, past-oriented justifications or by means of normative, future-oriented ones. It might be expected that past- and present-based factual assertions will again be subject to full judicial review. By contrast, normative, future-oriented choices about the linguistic regime of the institutions perhaps less so, provided that they remain compatible with the valid legal framework, because indeed those are likely to be of an inherently political nature. Above all, once that choice is made, the institutions in question should be open and consistent regarding the underlying justifications.

174. Finally, whatever the final language choice, there are in my view two further limits to how any such choice ought to be realised in practical terms, when being translated into a procedural framework.

175. First, the choice of available languages should be clear, objective and foreseeable for the candidates, as required by the Court in paragraph 90 of the judgment in *Italy* v *Commission I*. If somebody is contemplating a career in the European institutions, he must be able to prepare for future competitions. This necessarily implies a certain degree of stability: the languages that he will be allowed to choose should not change every year. Thus, a flexible approach, whereby the required languages could be adapted relatively frequently to meet the demands of candidates, would hardly meet the requirement of foreseeability, which permits — in the words of the Court — that 'the candidates may know, sufficiently in advance, what the language requirements are and can prepare to take part in the competitions in the best possible circumstances'.

176. Second, whatever the choice made, maximum equality and neutrality in the way the competitions are carried out must be guaranteed. In plain language: if you cannot treat everybody equally well (meaning that every person could be tested in the languages of their choice), then treat them all equally badly (everyone must compete with the same handicap). In practical terms, I can think of at least two examples of the application of that rule.

177. On the one hand, if there is more than one language available as a second language, in which it would appear that the decisive part of competitions takes place in practice, it should be (as far as possible) guaranteed that all candidates are obliged to choose their non-native language as that second language. Candidates cannot be allowed to gain an advantage over those whose mother tongue does not appear among those selected, by strategically declaring their mother tongue to be their second language.

178. On the other hand, implementing the same logic, all candidates should be obliged to communicate with EPSO, including filling in the application form and submitting relevant documents, again on an equal footing. Any indirect advantage must also be avoided in this regard. Hence, for example, if all official languages are not available for communication with and submission of applications or other documents to EPSO, and other communication in the ensuing selection procedure, then candidates whose native language is one of the available languages should not be allowed to use it. Thus, yet again, they would not gain an indirect advantage by having the opportunity to submit documentation relevant and crucial for the selection process in their mother tongue.

179. In sum, whatever the choice made, the system must be designed in a way that the fact that a certain language will be offered cannot grant the native speakers of that language (and thus, in the vast majority of cases, the nationals of a given Member State) any direct or indirect advantage in the selection process.

VI. Conclusion

180. In the light of the aforementioned considerations, I propose that the Court:

– dismiss the appeal;

– order the European Commission to pay its own costs and those of the Italian Republic;

– order the Kingdom of Spain and the Republic of Lithuania to bear their own costs.