

First Instance, which is unable to determine whether the principle that candidates must be treated equally was observed in the marking of the written test or whether that irregularity may have distorted the final outcome of the competition, must annul both the selection board's decision with regard to the marking of the tests and the subsequent acts in the procedure.

2. Applicants who failed a written test in a competition have a legitimate interest in claiming that the conditions under which the test was held were substantially modified by the instructions given to the markers by the selection board, after the tests had been held, to increase the limit on the number of words, a limit which had been imposed to ensure that only comparable papers would be marked.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
12 July 1990 *

In Case T-35/89,

Alessandro Albani, Alberto Caferri, Claudio Caruso and Bruno Buffaria, all of Brussels, represented by Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 6-8 rue Origer,

applicants,

supported by

Union of International and European Civil Servants, represented by Michel Deruyver and Françoise Decoster, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 6-8 rue Origer,

intervener,

* Language of the case: French.

and

European Public Service Union, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 6-8 rue Origer,

intervener,

v

Commission of the European Communities, represented by its Legal Adviser Sergio Fabro, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decisions of the selection board in Open Competition COM/A/482,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and B. Vesterdorf, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearings on 3 May, 6 and 20 June 1990,

gives the following

Judgment

Facts

- 1 By Notice of Open Competition COM/A/482, published on 12 February 1987 (Official Journal C 34, p. 15), the Commission commenced an open competition, based on qualifications and tests, to constitute a reserve of administrators in Grades 7 and 6 of Category A in the field of agriculture, fisheries and cooperation with developing countries.
- 2 According to the notice of competition, the tests were to take place in two stages: the first written and the second oral.
- 3 The written test was also divided into two stages: a first written test consisting of a series of multiple-choice questions to test candidates' general knowledge in the fields covered by the competition; and a second written test which was a drafting test designed to test candidates' analytical ability and their experience of dealing with case studies. Candidates could take part in the second written test only if they passed the first.
- 4 Candidates who obtained an aggregate of at least 60 marks out of 100 in the two written tests with a pass mark in both tests were admitted to the oral test.
- 5 The four applicants were among the 877 candidates who were allowed to take the written tests. The first written test was held on 20 November 1987 in 19 different centres in Europe, South America and Australia. The candidates obtained a pass mark in the eliminatory test and took the second written test.
- 6 In that second written test, for which three and a half hours were allowed, the selection board asked candidates to write a memorandum, based on a case study,

containing not more than 800 words in total. The memorandum, addressed to the President of the Commission, was to include a summary of the Court of Auditors' special report on the system for paying agricultural export refunds and the candidates' own views on the problem in question.

- 7 Of the 800 words in the memorandum, 300 were to be used to express the candidate's own opinions. Candidates were to count the number of words used themselves and enter those figures in a table. Candidates who failed to observe the abovementioned conditions or whose answers were illegible would not have their papers marked.
- 8 After the second written test had been held but before it was marked, the selection board instructed markers not to mark papers which were obviously too long, that is to say in excess of 1 200 words.
- 9 The applicants failed at the stage of the second written test, having failed to achieve the pass mark of 60% for the two tests. Consequently, they were not allowed to take part in the oral test, as the Head of the Recruitment Division informed them by a letter of 21 March 1988.
- 10 Only 172 candidates were admitted to the oral test, and 167 in fact took part.
- 11 Finally, a list of suitable candidates was drawn up on 26 May 1988, comprising 67 successful candidates.

Procedure

- 12 By an application lodged at the Court Registry on 25 May 1988, the applicants brought an action against the decisions adopted by the selection board in Competition COM/A/482.

- 13 On the day the action was brought the applicants also lodged, by separate document, an application for interim measures under Article 83(2) of the Rules of Procedure to suspend the further stages of the competition and, in particular, to suspend the drawing up or publication of the list of suitable candidates resulting from that competition.
- 14 Applications to intervene in support of the applicants were made on 12 June 1988 pursuant to Article 93 of the Rules of Procedure by:
- (i) Union of International and European Civil Servants;
 - (ii) European Public Service Union, Giovanni di Muro and Arlette Grynberg;
 - (iii) the Central Staff Committee.

Those applications were made in respect of both the application for interim measures and the main proceedings.

- 15 By an order of 13 June 1988, the President of the Second Chamber of the Court of Justice granted the European Public Service Union and the Union of International and European Civil Servants leave to intervene in the proceedings for interim measures and rejected the application of Giovanni di Muro and Arlette Grynberg.
- 16 At the hearing of the application for interim measures, the Commission stated that only five of the 172 candidates who had passed the written test had exceeded the limit of 800 words and none of those five appeared on the list of suitable candidates. At the same hearing, the Central Staff Committee withdrew its application to intervene.
- 17 By an order of 21 June 1988 the President of the Second Chamber of the Court of Justice dismissed the application for interim measures. The Court observed that the Commission's conduct in not producing the above information, of unspecified

source, until the hearing was regrettable, but considered that at that stage of the proceedings it must be used as the basis for its decision. The Court took the view that, according to that information, the alleged irregularity was not such as to distort the final outcome of the competition.

18 By an order of 13 December 1988 the Court of Justice (Second Chamber) granted the European Public Service Union and the Union of International and European Civil Servants leave to intervene in support of the submissions of the applicants.

19 By orders of 13 December 1988 the Court of Justice acknowledged the withdrawal by Giovanni di Muro, Arlette Grynberg and the Comité central du personnel of their applications to intervene.

20 By an order of 15 November 1989 the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

21 By an order of 13 February 1990 the Court of First Instance (Third Chamber) asked the Commission to produce the following documents:

- (a) the list of suitable candidates resulting from Competition COM/A/482;
- (b) the selection board's interim and final reports relating, respectively, to the second written test and the oral test in the competition in question;
- (c) the documents in the files relating to the second written tests of the 67 successful candidates or any other evidence which could establish the number of words used by the successful candidates in their papers in the second written test.

22 By an order of 14 March 1990 the Court of First Instance granted an extension of the time allowed for the production of those documents.

- 23 In response to the order of the Court of First Instance, on 22 March 1990 the Commission produced some of the documents requested, namely those referred to under paragraphs (a) and (b). With regard to paragraph (c), the Commission did not produce any documents and stated that it 'is unable to comply with the paragraph in question'.
- 24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. It asked the Commission to supply certain particulars which it considered necessary for the purposes of the proceedings. In particular, the Commission was asked to supply, at the hearing, the following particulars:
- (a) to state whether the list of suitable candidates was still in force and, if not, whether candidates had been recruited from the list;
 - (b) to provide evidence that only five candidates had exceeded the limit of 800 words (namely one with 810 words, two with between 820 and 830 words and two others with between 840 and 850 words);
 - (c) to provide evidence that the abovementioned five candidates did not appear on the list of successful candidates.
- 25 At the hearing on 3 May 1990, the Agent of the Commission stated that the validity of the list of suitable candidates had been extended until 31 December 1990 and that candidates had been recruited from that list. That information was supplemented by a document which he produced at the hearing containing the names of the successful candidates who had been recruited by that date. Moreover, the Commission's Agent stated that it was physically impossible for him to produce the written proof referred to under paragraph (c) of the abovementioned order and under paragraphs (b) and (c) of the list of questions addressed by the Court of First Instance to the Commission because the written tests in the competition had been destroyed, in spite of instructions to the contrary given by Mr Kalbe, Head of the Recruitment Division, at the time of his transfer. Having regard to that fact, the Commission asked that Mr Kalbe should be called as a witness before the Court of First Instance in order to answer the foregoing questions.
- 26 By an order of 15 May 1990, the Court of First Instance reserved its decision on the request that it hear evidence from Mr Kalbe and decided that it was appropriate to hear evidence from Mr Benda and Mr Bouratsis, who had been members

of the selection board. The witnesses were asked to give evidence concerning the marking of the written tests in the competition and to describe what, in their experience, was the administration's usual practice with regard to storing tests after a competition had been held. The Court of First Instance was not able to hear evidence from Mr Ries, in his capacity of Chairman of the selection board, because, as the Registry was informed, he had since retired and was abroad for an indefinite period.

- 27 At the hearing on 6 June 1990 the Court of First Instance heard the evidence of Mr Benda and, at the request of the Commission, also heard evidence from Mr Heine, Deputy Chairman of the selection board.
- 28 Mr Benda stated *inter alia* that he was unable to give the exact number of candidates who had exceeded the limit of 800 words or the number of words used. In any event, there could not have been more than 10 such candidates and the number of words by which they had exceeded the limit could not have been more than 200. Moreover, he could not say whether any of them was on the list of suitable candidates. The instructions to markers, authorizing the marking of papers not exceeding 1 200 words, were intended to facilitate their task by allowing them a degree of flexibility. Finally, the witness stated that he did not know what the administration's usual practice was with regard to keeping the documents from a competition.
- 29 The second witness, Mr Heine, stated *inter alia* that he did not know whether any of the candidates admitted to the oral tests had exceeded the limit of 800 words. Once it had been decided to allow the limit to be exceeded no further account was taken of the matter. The selection board merely noted that the markers had not found that the limit of 800 words had been exceeded to a significant extent. He did not remember whether any of the 67 successful candidates had exceeded the limit of 800 words. Nor was he acquainted with the usual practice with regard to the keeping of documents after the holding of a competition. As regards the competition at issue, two secretaries in Directorate-General (DG) IX were responsible for keeping the tests. In his view, those secretaries could not on their own initiative destroy them.
- 30 By an order of 6 June 1990 the Court of First Instance decided that it was appropriate to grant the Commission's request that Mr Kalbe should be called to give

evidence regarding the marking of the second written test and the fate of the tests after the competition had been held.

- 31 At the hearing on 20 June 1990 the Court of First Instance heard the evidence of Mr Bouratsis and Mr Kalbe.
- 32 Mr Bouratsis stated *inter alia* that the candidates were themselves to count the number of words used and that markers were, obviously, required to check the figures. He said that the instruction to mark papers containing more than 800 words came from the Chairman of the selection board and was notified subsequently to the other members. Furthermore, he was unable to give the number of candidates admitted to the oral tests who had exceeded the limit of 800 words. He also stated that he was unaware of the administration's usual practice regarding the keeping of papers after the holding of a competition. As regards the tests at issue, he remembered that after the competition had been held the secretaries had placed the files in a cabinet belonging to DG IX but he did not know what had happened to them subsequently.
- 33 Mr Kalbe stated *inter alia* that the instructions to markers were given by the Chairman of the selection board before the second written tests were marked. The issue of the prescribed number of words having been exceeded arose, as far as the selection board was concerned, when the European Public Service Union raised it in a circular to members of staff before the oral tests took place. The selection board thereupon asked the secretariat to carry out a check. A second check was carried out at the time of the application to the Court of Justice for interim measures. The check was carried out on the papers of the 172 candidates who were admitted to the oral test. Of those, the secretariat checked the papers of candidates who had given approximately 800 as the total number of words. The secretariat carried out a random sample of the other papers. That check showed that only five candidates had exceeded the limit of 800 words. Mr Kalbe was unable to give the names of those five persons because the check had been carried out by comparing the code numbers of the successful candidates with the numbers of the abovementioned five persons. None of those five were on the list of successful candidates. According to the witness, the files containing written tests are usually kept for a long time. With regard to the tests in question, he had given the necessary instructions for them to be kept. However, he had had to leave the Recruitment Division at the end of July 1989. When he searched the archives at the time of the written procedure he found nothing. His conclusion was that the papers must have been destroyed.

34 After the witnesses had given their evidence, the representatives of the parties presented their observations, and the President then declared the oral procedure closed.

The conclusions of the parties

35 The applicants claim that the Court should:

- (a) declare the present application admissible and well founded;
- (b) consequently, annul the marking of the written tests in the competition in its entirety or at least annul the decision of the selection board not to admit the applicants to the oral tests in the competition;
- (c) order the defendant to pay all the costs.

36 The Commission contends that the Court should:

- (a) dismiss the application as unfounded;
- (b) award costs in accordance with the applicable provisions.

Substance

37 The applicants claim essentially that after setting a limit on the amount of time available to candidates, imposing on them a maximum number of words (800) and requiring candidates to count the words themselves, the selection board departed from its own instructions by asking markers not to mark papers containing more than 1 200 words. In so doing, the selection board required markers to mark the papers of candidates who had deliberately failed to comply with those instructions by exceeding the limit on the number of words and not taking the trouble or the time to count how many words they had used. The selection board thus modified

the explicit conditions which it had originally laid down for the written tests, thereby allowing some candidates to have a clear advantage over others. According to the applicants, such conduct constitutes a breach of the rules for the holding of the second written test and infringes the principles of equal treatment, objectivity and legitimate expectations, and must consequently entail the annulment of the contested decisions.

- 38 The Commission contends that of the 172 candidates who passed the second written test only five exceeded the limit of 800 words; one candidate used up to 810 words, two candidates used between 820 and 830 words and two others used between 840 and 850 words. None of the five were included on the list of successful candidates. The modification of the conditions laid down by the selection board was justified by the special circumstances of the test, possible errors of calculation and grammatical differences in the languages used by the candidates, of which account had to be taken. Moreover, the Commission contends that the instructions to the markers did not affect the applicants because the selection board decided to eliminate them at the stage of the second written test on the basis of an objective and comparative assessment of the merits of their papers.
- 39 The applicants point out that grammatical differences between the languages could not justify a 50% increase in the standards adopted. In the present case, before marking the second written test the selection board ought first to have eliminated any candidates who had not counted the number of words used and any who had exceeded the limit. Finally, the applicants claim that the Commission has adduced no evidence regarding the number of candidates who exceeded the limit and the number of words by which it was exceeded. The Commission has thus prevented the Court of First Instance and the applicants from verifying whether the contested decisions had the effect of distorting the comparative assessment of the merits of the candidates.
- 40 The Commission replies that it can hardly be suggested that the comparative assessment of the test papers was erroneous merely because the selection board took into consideration the papers of the five other candidates who only just exceeded the limit of 800 words. Moreover, the Commission states that it is ready and able to supply the Court with proof of its assertions. Finally, the Commission cites the case-law of the Court of Justice to the effect that the selection board has a wide discretionary power and the correctness of its value judgments cannot be reviewed by the Court of First Instance.

- 41 The interveners, in support of the applicants' arguments, emphasize the importance of both the second written test and the fact that the Commission has not substantiated its assertions.
- 42 It must be pointed out that the notice of competition in question indicates, in Section VII, the nature of the written tests, the time allowed and the way in which the written tests are to be marked. In particular, the second written test was to be a drafting test based on a case study, designed to test candidates' analytical ability and their experience of dealing with case studies. In accordance with the notice of competition the selection board asked candidates to draft a memorandum of a practical nature and required them to observe both a time-limit (three and a half hours) and a limit on the number of words (800), failing which their papers would not be marked.
- 43 The purpose of the limits imposed was to ensure that candidates dealt with the subject of the written test on the same terms and to enable markers to apply objective criteria uniformly to comparable tasks. A failure to observe the limit of 800 words, if substantial, constitutes an irregularity of such a kind as to vitiate both the contested decision of the selection board regarding the marking of the test and the rest of the procedure.
- 44 However, in an open competition based on qualifications and tests consisting of a number of stages, an irregularity in an intermediate stage is a ground for the annulment of the contested decision only if it distorts the outcome of the competition. In such a case, the competition is a complex administrative procedure inasmuch as earlier acts are incorporated in the final act.
- 45 In the present case, the applicants claim that the instructions given to the markers by the selection board substantially modified the conditions under which the second written test was held. That submission, which has been shown to be factually correct, appears well founded in law. For the reasons given above, the selection board's subsequent increase by up to 50% in the number of words allowed in the test constitutes a substantial irregularity which cannot be justified either by grammatical differences in the languages used nor by any errors of calculation made by candidates, as the administration wrongly claims.

- 46 The Commission's contention that the instructions given to the markers did not directly affect the applicants is unfounded. The applicants have a legitimate interest in putting forward that submission which concerns observance of limits which were imposed in an open competition in order to ensure that only comparable papers would be marked.
- 47 However, having regard to the foregoing considerations (paragraphs 43 and 44), the defendant's argument that the five candidates exceeded the limit of 800 words only slightly and that that slight irregularity could not have distorted the final outcome of the competition appears material and must be considered.
- 48 As the applicants have shown that the selection board allowed the prescribed limits to be exceeded, it is for the Commission to adduce proof of the veracity of its earlier assertions, particularly as in the present case the tests at issue are in the Commission's possession.
- 49 By an order of 13 February 1990 the Commission was asked to adduce such proof by producing the material documents. It stated that it was unable to comply with that part of the order. At the hearing, the Commission's representative stated that it was physically impossible for him to produce the written tests because they had been destroyed after the transfer of Mr Kalbe, Head of the Recruitment Division at the material time. Consequently, the Court of First Instance decided to hear witnesses, whose evidence is set out at length in this judgment under the heading 'Procedure'.
- 50 It emerges from that evidence that it was not the selection board which checked whether the limit of 800 words had been exceeded. The check was carried out by the secretariat of the Recruitment Division, in particular at the time of the proceedings for interim measures. Mr Kalbe's evidence shows that that check was not carried out on all the papers of the 172 candidates admitted to the oral test but was confined to the papers of candidates who had entered a figure of approximately 800 words in the appropriate table; only a random sample was carried out on the rest of the papers. It is therefore possible that some of the unchecked papers

may have exceeded the prescribed limit. Consequently, the result of that check cannot be considered to be reliable. Moreover, there is no evidence of the names of the five candidates who, according to the administration, exceeded the limit but were not included on the list of successful candidates. Only the identification of those persons would enable the applicants to seek to rebut that assertion.

51 Consequently, the Commission has not substantiated its principal contention that only five candidates slightly exceeded the limit of 800 words and that those five are not on the list of successful candidates.

52 The Court of First Instance is therefore unable to determine whether the principle that candidates must be treated equally was observed in the marking of the second written tests or whether that irregularity may have distorted the final outcome of the competition.

53 Consequently the applicants' submissions must be upheld and the marking of the second written test in Competition COM/A/482 and the subsequent acts in the procedure must be annulled. The new marking procedure must be a comparative reassessment of the papers which comply with the prescribed limits. However, if the papers of the 172 candidates who were admitted to the oral tests must be considered to be definitively lost, or if it is impossible to guarantee the secrecy of the selection board's work in a new marking procedure, the administration can of course repeat the competition procedure, from the second written test onwards.

Costs

54 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which is applicable *mutatis mutandis* to the Court of First Instance pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- (1) Annuls the decision of the selection board in Competition COM/A/482 concerning the marking of the second written test, and the subsequent acts in the competition procedure;**
- (2) Orders the Commission to pay the costs, including those of the interveners.**

Saggio

Yeraris

Vesterdorf

Delivered in open court in Luxembourg on 12 July 1990.

H. Jung

Registrar

A. Saggio

President of Third Chamber