

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
11 February 1993 \*

In Case T-22/91,

**Inès Raiola-Denti, Marie-Thérèse de Cuyper-Pirotte, Lieve De Nil, Everdien Diks, Alma Forsyth, Claudine Hendrickx, Christiane Impens, Rita Talloen, Danielle Vandenameele**, officials of the Council of the European Communities, residing in Brussels, represented by Gérard Collin and Michel Deruyver, of the Brussels Bar, and, in the case of Lieve De Nil and Everdien Diks, at the hearing, by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicants,

v

**Council of the European Communities**, represented by Yves Crétien, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of the decision of the Selection Board in Competition B/228 not to reclassify the applicants' posts in Category C, Grade 1, as posts in Category B, Grade 5,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: D. P. M. Barrington, President, K. Lenaerts and A. Kalogeropoulos,  
Judges,

Registrar: H. Jung,

\* Language of the case: French.

having regard to the written procedure and further to the hearing on 9 December 1992,

gives the following

## Judgment

### Facts and procedure

1 The Joint Committee of the Council of the European Communities (hereinafter 'the Council') undertook a series of studies of the provisions governing competitions internal to the Community institutions, in order to establish the most appropriate rules in that regard, including those for 'upgrading' competitions. According to the last of those studies, dated 20 December 1990 and notified to staff by Note No 16/91 of 11 February 1991, a competition of that type, designed to facilitate the mobility of officials and the flexible management of human resources within the institution, was to be organized in order to fill posts which had been assigned a different category classification and which would be decided under the budgetary procedure following consultation with the Staff Committee and consideration of the opinion of the Joint Committee.

2 In 1989, following a decision on the part of the Secretary-General to put those studies into practice, the Council held its first internal upgrading competition (B/225). That was followed by the competition in dispute (B/228) whose organization was modelled on the former competition and which was notified to staff by Note No 100/90 of 26 October 1990. The purpose of Upgrading Competition B/228, which was based on qualifications and tests, was to fill 15 vacancies for administrative assistants in the Council's General Secretariat. Appointments were to be made at Grade B 5 and were not to involve transfers.

3 For admission to the tests in Competition B/228, candidates had to be employed in Category C, Grade 1, to have carried out for at least three years within the institution duties involving responsibility in the actual management of an area of activ-

ity and to be able to provide proof of length of service with the European Communities totalling at least six years.

4 The nature and marking of the oral tests were described in Point V of the notice of competition as follows:

‘a) Interview to assess the candidate’s professional skills, organizational ability and knowledge of the functioning of the General Secretariat. During this interview the candidate will be questioned *inter alia* on the detailed description of duties submitted with the application form.

Marks: out of 60.

b) Interview to assess the candidate’s knowledge of languages.

Marks: out of 20.’

5 As regards the establishment of a list of suitable candidates, the notice of competition stated that candidates obtaining at least 48 marks out of 80 for the oral tests as a whole would be entered on that list.

6 The order of the list of suitable candidates was to be determined by the number of marks obtained in the tests as a whole as well as the additional marks awarded for length of service with the Communities and for the length of professional experience specific to the post applied for.

7 The notice of competition also stated that, in view of the nature of the competition, no reserve list was to be drawn up and the number of successful candidates was not to exceed the number of posts to be filled.

- 8 By standard letter of 4 December 1990 the candidates admitted to the tests were notified to that effect.
- 9 In that letter the candidates' attention was directed to a statement by the Joint Committee which had been published in Staff Note No 112/89 concerning the first upgrading competition (B/225) but had not appeared in the notice concerning Competition B/228, the competition in dispute. That statement was as follows:
- This type of internal competition must be designed to allow staff in Grade C 1 who have considerable seniority in a post of responsibility which they themselves have contributed towards upgrading by their work, to obtain actual upgrading of the post through its reclassification as a Category B post. These are the only grounds for this competition.
  - The method chosen must go hand in hand with the organization of internal Category B competitions based on qualifications and tests accessible to other Category C staff.'
- 10 On 14 December 1990 the applicants took the oral test, in the form of an interview with the selection board.
- 11 By standard letter of 8 January 1991 the Council informed the applicants of the selection board's decision not to reclassify their posts as Category B posts. It has not been possible to establish precise dates for the receipt of that letter by the candidates. At the hearing the Council stated that it was unable to rule out the possibility that the letters were received during the latter half of January 1991.
- 12 By memorandum of 21 January 1991 addressed to the members of the selection board, Mrs E. Diks, one of the applicants, expressed doubts as to the proper conduct of the tests, claiming in particular that the selection board had failed to ask

any questions on the functioning of the Council's General Secretariat and that, at the linguistic level, non-francophone candidates had been discriminated against by comparison with francophone candidates, since they had all been questioned directly in French. The selection board for Competition B/228 did not reply to that memorandum.

- 13 Accordingly, by application lodged at the Registry of the Court of First Instance on 13 April 1991, the applicants brought these proceedings.
- 14 By letter of 17 July 1991 addressed to the Registry of the Court of First Instance, the applicants waived their right to lodge a reply.
- 15 By letter of 25 May 1992 from the Registry of the Court of First Instance, the applicants were requested by the Court to produce the contested measure, in the form in which it had been addressed to each candidate notifying the addressee of the selection board's refusal to reclassify his post as a post in Category B.
- 16 By letter from the Registry, also dated 25 May 1992, the Council was requested to:
  - a) indicate the legal basis for the organization of an internal 'upgrading' competition;
  - b) produce the written records of the oral tests in the competition;
  - c) produce the selection board's reasoned report and all other documents setting out the selection criteria governing the 'upgrading' of the posts to be filled.
- 17 Both the applicants and the Council complied in due time with the Court's request.

- 18 In reply to the first question, the Council stated that the legal basis for an internal upgrading competition 'rests on the decision of the Secretary-General of the Council to act on the findings of a study conducted by the Joint Committee of the Council on the question of internal competitions', notified to staff by Note No 16/91 of 11 February 1991.
- 19 In reply to the second question, the Council stated that, following the usual practice, 'the selection board for Internal Competition B/228 did not make a formal record of the oral tests'. In the same reply, the Council stated that 'the selection board assigned a mark for the tests taken by each candidate on the basis of the marks suggested and the comments made by each of its members, in conjunction with the seniority criteria to be applied in compliance with the notice of competition'. Lastly, the Council stated that 'the selection board did not provide the administration with a formal record of the marks awarded to each candidate in the various tests,' but only with 'a list of suitable candidates — in which the successful candidates were placed in order according to their results and having regard to the seniority criteria — and a report on the way in which the tests were conducted'.
- 20 In reply to the third question, the Council produced before the Court the selection board's reasoned report in which it was stated *inter alia* that 'at the oral test ... it was explained to each candidate that the selection board had to ensure a measure of even-handedness in the allocation of upgrading possibilities among the various departments of the Council's General Secretariat'. The Council also produced three other documents, referred to in Point 4 of the selection board's reasoned report, namely: (a) the Joint Committee's declaration of 20 July 1989 which was said to apply to Competition B/228, just as it did to the first upgrading Competition B/225 (Staff Note No 112/89, mentioned above); (b) a memorandum dated 13 November 1990 from the Secretary-General addressed to the selection board for Competition B/228, and (c) the report dated 18 December 1989, addressed to the appointing authority by the selection board for Competition B/225. The Council added that 'no document other than the note issued on 26 October 1990 sets out the special selection criteria to be applied to the candidates in Competition B/228'.
- 21 The written procedure followed the normal course. Having regard to the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by letter from the Registry dated 11 November 1992, asked the parties to answer a number of questions at the hearing.

22 The oral procedure took place on 9 December 1992. The parties' representatives presented oral argument and replied to the questions put by the Court. Furthermore, at the hearing the applicants lodged a document comprising the declarations made by the seven applicants regarding the conduct of the oral tests in the competition. The defendant, for its part, lodged the following documents: (a) the report of the selection board in Competition B/228 to the appointing authority, containing a hand-written note of the mark awarded to each of the successful candidates; (b) a list in alphabetical order of the files forwarded to the selection board, containing various hand-written notes and observations concerning the professional experience of the candidates; (c) a draft list of the candidates taking the tests, drawn up by a member of the selection board for his own use, indicating the date and time of the tests, and containing particulars of the duties performed by the candidates and the marks obtained in the tests by 40 of the 71 candidates; (d) two pieces of scrap paper on which a member of the selection board had privately noted particulars of the marks awarded to the successful candidates in the competition, together with their final marks; (e) a hand-written list showing the weighting attributed by reference to seniority acquired by the candidates in the Council and within the grade.

### Forms of order sought by the parties

23 The applicants claim that the Court of First Instance should:

1. declare the application admissible and well founded;

2. consequently;

— annul the decisions of the selection board taken following the decisions on admission to the tests in the competition;

— at the very least, annul the decisions of the selection board not to reclassify the applicants' posts as posts in Category B;

3. order the Council to pay the costs.

24 The Council contends that the Court of First Instance should:

1. declare the application unfounded in respect of the decisions taken by the selection board in Internal Competition B/228;
2. if appropriate, hear the testimony of the Chairman of the selection board beforehand;
3. order the applicants to pay the costs.

## Substance

### *Pleas in law and arguments of the parties*

25 The applicants claim that the selection board was under an obligation to comply with the nature and method of marking of the tests, specified in Notice of Competition B/228. However, there was only one interview with each of the candidates, at which they were asked 'to talk about their work'. Consequently, no assessment had been made either of the candidates' knowledge of the functioning of the General Secretariat or of the practical skills which they had acquired but did not use in the performance of their duties at that time. The applicants further claim that the selection board failed to undertake an assessment of the candidates' knowledge of languages even though a mark out of 20 should have been awarded on that basis.

26 The applicants claim that the candidates have thus been assessed on the basis of only one of the criteria set out in the notice of competition, which they allege is contrary to the principle of equal treatment. On that point they emphasize that by failing to take into consideration the other criteria described in the notice of competition, the selection board acted to the detriment of those candidates with a good knowledge of languages who had been enterprising enough to familiarize themselves with, or improve their knowledge of, the functioning of the Council's General Secretariat, for the benefit of those candidates who gave the selection board a favourable description of their duties.

- 27 Lastly, the applicants claim that the selection board failed to give reasons for its decisions, that it is not possible for either the candidates or the Court to ascertain whether the defects complained of could have vitiated the final result of the competition and that, by the same token, the Council cannot contend that they had no effect on that result.
- 28 The Council contends that the selection board complied with the terms of the notice of competition and that the fact that only one interview was held with each candidate did not prevent the selection board from assessing the areas of expertise referred to in Point V of that notice. Each candidate had the opportunity to explain the reasons why he believed that his post should be upgraded and to point out how he had contributed to the upgrading in the context of the activities of the Council's General Secretariat. The selection board was then able to test the candidates' knowledge of languages. Lastly, according to the Council, the placing of candidates on the list of suitable candidates and their respective positions on that list depended on the marks obtained at the interview and the additional marks awarded to reflect the candidates' length of service and time spent in their duties and grade.
- 29 As regards in particular the assessment of the candidates' knowledge of languages, the Council contends that that was indeed tested by the selection board and marks duly awarded. The language test was not in itself eliminatory and the selection board took knowledge of languages into account in so far as it was genuinely a contributory factor in the upgrading of the candidates duties in the sense clearly intended by the notice of competition.
- 30 As regards breach of the principle of equal treatment, the Council contends, first, that the applicants have failed to establish that some candidates were able to give the selection board a favourable description of their duties and, secondly, that the selection board was in a position to verify in detail the accuracy of the information provided and of the description of the candidates duties as set out in their applications. The candidates were thus treated on an equal footing and the choice between them following the oral test was made on an objective basis.
- 31 As regards the content of the oral test, the Council points out that the notice of competition itself was not intended to lay down detailed rules for the conduct of

the competition, since the precise content of tests is always left to the discretion of the selection board. According to settled case-law, the selection board enjoys a wide discretion which cannot be subject to judicial review so far as concerns the soundness of the choices or the value judgments which it may make in the exercise of that discretion (judgments of the Court of Justice in Joined Cases 112/73, 144/73 and 145/73 *Campogrande and Others v Commission* [1974] ECR 957 and in Case 228/86 *Goossens and Others v Commission* [1988] ECR 1819; judgment of the Court of First Instance in Case T-1/90 *Pérez-Minguez Casariego v Commission* [1991] ECR II-143).

32 Lastly, as regards the alleged breach of the obligation to state reasons, the Council observes that the application fails to develop any argument in support of that plea in law.

### Findings of the Court

33 The Court considers it necessary to establish whether, in the present case, the selection board in Competition B/228 complied with the notice of competition.

34 In that connection it should first be noted that Point VI(c) of the contested Notice of Competition provided that, as regards the establishment of the list of suitable candidates, in order to decide the way in which the tests should be marked, 'the aggregate mark for the tests and the additional marks awarded for length of service and length of specific professional experience will be added together' and that 'the result will determine the order in which candidates are short-listed'.

35 Thus, in order to comply with the notice of competition on that point, the order in which the candidates were short-listed had to reflect the results obtained by adding the marks awarded by the selection board to each candidate for each test specified by the notice of competition (general practical skills and knowledge of languages) and the additional marks awarded to candidates for length of service and length of specific professional experience.

- 36 It is common ground that none of the documents produced by the Council enables it to be established whether the order in which the candidates were short-listed is the result of that method of calculation. The Council was unable to produce, at the Court's request, any document proving that the selection board had used that method. At the hearing, the Council even admitted that no such document had been drawn up by the selection board, and confined itself to lodging personal papers belonging to two members of the selection board, disclosing the marks they had awarded to some of the candidates following the oral test and a list of the successful candidates in the competition with a hand-written note beside each name of the overall mark obtained. Consequently, the Council has failed to show that the selection board for Competition B/228 complied with the notice of competition as regards the marking of the tests, whether in respect of the entry of candidates on the list of suitable candidates or the order in which they were placed on that list.
- 37 That constitutes a manifest infringement of the obligation incumbent upon selection boards in competitions to state the reasons for their decisions, preventing judicial review of the question whether the conduct and marking of the tests complied with the notice of competition (judgments of the Court of Justice in Case 21/65 *Morina v Parliament* [1965] ECR 1033 and in Case 144/82 *Detti v Court of Justice* [1983] ECR 2421).
- 38 The Court further observes that it is apparent from the selection board's reasoned report, produced by the Council at the Court's request, that one of the criteria to be applied by the selection board for the competition concerned the need 'to ensure a measure of even-handedness in the allocation of upgrading possibilities among the various departments of the Council's General Secretariat.' That criterion, which has no bearing on the abilities of the candidates, who must be assessed only by means of a competition, was not set out in the notice of competition and its application inevitably led the selection board for the competition to encroach upon the exclusive powers of the appointing authority, namely, the selection of successful candidates from the competition for appointment and the decision regarding the posts to be filled following the competition.
- 39 As regards the effect which the application of the aforesaid criterion in the present case may have had on the results of the competition, the Court takes the view that, only if the marks for the tests had been awarded on the basis of the marking system set out in Notice of Competition B/228, would it have been possible to show that the selection board's application of that criterion — non-quantifiable by nature — affected the results only to a limited extent, in that it was applied only in the

case of candidates who had obtained the same number of points on the basis of the other marking criteria set out in the notice of competition.

40 However, the lack of grounds for the selection board's decisions impedes review by the Court in that respect also.

41 The Court finds, secondly, that the tests in Competition B/228 were not conducted in compliance with Point 5 of the notice of competition.

42 It is clear from the statements made by the applicants — corroborated by the notes taken by members of the selection board and produced by the Council at the hearing — that the first test essentially consisted only of the candidates' descriptions of their duties. Thus, contrary to the terms of the notice of competition, that test did not cover knowledge of the functioning of the Council's General Secretariat, which was intended to constitute one of that test's key elements.

43 Furthermore, the second test — of a linguistic nature — did not take place. No interview was held with the candidates which focused on their knowledge of languages, and the selection board only interviewed the candidates in one language. The applicants' statements, which have not been contradicted by the Council, disclose that the only language in which the interviews were conducted was French, the candidates' working language. The selection board accordingly placed at a disadvantage those candidates whose mother tongue differed from the working language. It follows that the selection board rendered nugatory the language test in Competition B/228.

44 The Council cannot contend that the language test was not eliminatory or that knowledge of languages was taken into account only in so far as it might constitute a genuine factor in the upgrading of the candidates' duties in the sense clearly intended by the notice of competition. Indeed, the sole point of a language test is to assess the candidates' knowledge with regard to both the number of languages

known and the level of such knowledge. Thus, in that respect also, the selection board acted in breach of Notice of Competition B/228.

- 45 It follows from the foregoing considerations, without there being any need to examine other possible grounds of illegality in this case, that all the steps taken following the decisions admitting candidates to the tests in the Council's Internal Competition B/228 (referred to as an upgrading competition), the notice of which was published in Staff Note No 100/90 of 26 October 1990, must be annulled.

### Costs

- 46 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. Since the Council has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

### THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Declares that all the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228, which was organized by the Council and the notice of which was published in Staff Note No 100/90 of 26 October 1990, are annulled;
2. Orders the Council to pay the costs.

Barrington

Lenaerts

Kalogeropoulos

Delivered in open court in Luxembourg on 11 February 1993.

H. Jung

D. P. M. Barrington

Registrar

President