

**JUDGMENT N°1/2011 OF THE ORGAN OF FIRST INSTANCE OF THE EUROPEAN  
UNIVERSITY INSTITUTE**

Concerning an appeal introduced under Article 2, paragraph 3 of the Common Provisions by

- “IB”, appearing in person without legal representation, appellant,

v

- The European University Institute, via dei Roccettini 9, 50014 San Domenico di Fiesole, Italy, represented by the Principal of the European University Institute, Mr Josep Borell Fontelles, assisted by Mme Aude Bouveresse, docteur en droit and Maître de conférences at the University of Strasbourg, France, respondent,

against the decision of the Principal of the European University Institute of 3 May 2010 rejecting a complaint filed by the appellant concerning Open Competitions IUE/5/2009 and IUE/6/2009 for which the appellant was a candidate.

**THE ORGAN OF FIRST INSTANCE**

Member of the Organ of First Instance exercising the judicial function in accordance with Articles 2 and 3 of Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute: D. O’Keeffe,

Secretary of the Organ of First Instance: Mrs Silvia Salvadori,

Having regard to the written procedure and further to the hearing on 1 April 2011,

Gives the following

Judgment

**FACTS**

1. On 16 June 2009, the European University Institute (hereinafter the “EUI”) published the Vacancy Notice for Open Competition IUE/5/2009 on the basis of qualifications and tests. The Competition was aimed at setting up a reserve list in order to fill future vacant posts within the EUI. The nature of the posts was described as “Contract Posts – FGII – Secretary”. The description of duties included secretarial tasks, office management and other equivalent tasks. 162 candidates applied, of which 161 met the requirements set out in the Vacancy Notice and were admitted to the Competition.
2. On 16 June 2009, the EUI published the Vacancy Notice for Open Competition IUE/6/2009 on the basis of qualifications and tests. The Competition was aimed at setting up a reserve list in order to fill future vacant posts within the EUI. The nature of the posts was described as “Contract Posts – FGII – Clerk”. The description of duties included general clerical assistance, office management and other equivalent tasks. It appears from the report of the Selection Board that 139 candidates applied, of which 138 met the requirements set out in the Vacancy Notice and were admitted to the Competition.
3. The appellant was a candidate for Open Competitions IUE/5/2009 and IUE/6/2009 and was admitted to both Competitions.

4. The Selection Board in each Open Competition consisted of a Chairperson and 4 members. The Secretary General of the EUI was Chairperson of each Selection Board and the Director of Personnel was a member of both Selection Boards; the other members sat on only one Board. Each Board was assisted by assessors appointed by the Principal of the Institute: 3 assessors for the short-listing process and a differently composed group of 3 assessors for the interview process. Different assessors were chosen for each Competition.
5. The procedure followed by each Selection Board consisted of a pre-selection process based on the qualifications set out in the Vacancy Notices, against which the qualifications of the candidates were evaluated. The pre-selection process determined which candidates should be placed on the short-list of candidates to be admitted to the tests and interviews for each Competition ("hereinafter the "short-list"). In the case of Open Competition IUE/5/2009, 13 candidates were placed on the short-list and an additional two candidates were placed on a reserve short-list. In the case of Open Competition IUE/6/2009, 12 candidates were placed on the short list; there was no reserve short-list. The short-listed candidates were admitted to the tests and interviews.
6. The Principal of the EUI submitted two separate "attestations sur l'honneur" relating to Open Competition IUE/5/2009 and Open Competition IUE/6/2009 respectively. The EUI also submitted the reports of the Selection Board for both Open Competitions. Annex 2 of each Selection Board Report contains an "Evaluation Table of candidates on the basis of qualifications and the results of tests and interview" giving the marks obtained by short-listed candidates during the different stages for each Competition (hereinafter the "Evaluation Tables")
7. The EUI subsequently spontaneously submitted score-sheets for the pre-selection stage of each Open Competition (hereinafter the "score-sheets") which recorded the scores of each candidate who had obtained at least one point during the pre-selection process. The EUI stated: "...vous trouverez joints, à titre informative, aux rapports des jurys, les tableaux des scores établis de manière informelle par ceux-ci aux fins d'assister les membres du jury dans leur organisation interne concernant la première étape de présélection des candidats" (original in French). The EUI stated that the score-sheets do not form part of the formal selection procedure and are not part of the reports of the Selection Boards.
8. The "attestations sur l'honneur" explained the procedure followed by the Selection Boards. They state: "les membres du jury se sont accordés pour examiner chaque dossier de candidature afin de les classer selon un ordre de priorité allant de 1 à 3." It appears that contrary to what is stated in the "attestations sur l'honneur", this was not an expression of first, second and third choices. In fact, each member of the Selection Board and each Assessor gave numerous first, second and third priority grades to numerous candidates (as an example, one assessor graded 10 candidates as first priority, 5 candidates as second priority and 4 candidates as third priority). According to the "attestations sur l'honneur", the system of 1st, 2nd and 3rd priority ranking was accorded on the basis of an overall general impression ("évaluation globale") of the candidates' files in relation to the criteria set out in the Vacancy Notices."
9. The "attestations sur l'honneur" state that a system of points was established as follows: 3 points for each candidate who was placed in the first order of priority by each Selection Board Member or Assessor, 2 points for candidates who were placed in the second order of priority by each Selection

Board Member or Assessor, and one point for candidates who were placed in the third order of priority by each Selection Board Member or Assessor. If a Selection Board Member or Assessor did not attribute a priority ranking to a candidate, the latter received no points. As an illustration of how the points system worked, a candidate graded as first priority (3 points) by 6 Selection Board members and/or Assessors received 18 points.

10. The "attestations sur l'honneur" state that the minimum number of points required to be placed on the short-list and admitted to the tests and interview was 3 points in the case of Open Competition IUE/5/2009 and 6 points in the case of Open Competition IUE/6/2009. The minimum points were not set out in the Vacancy Notices but determined in the course of the pre-selection procedure. The points of the pre-selected candidates were then translated into a marking scale of 0-20, in conformity with the Vacancy Notices and these marks are recorded in the Evaluation Tables for each Competition. In Open Competition IUE/6/2009, all candidates received 1 mark less on the Evaluation Table than the number of points awarded by the Selection Board members and Assessors. Presumably this was done in order to achieve compatibility with the 0-20 marking scale because one candidate received 21 points.
11. It appears from the file that the pre-selection process leading to admission to the tests and interviews was actually composed of two distinct steps: step 1 being composed of the priority ranking system based on the points awarded by Selection Board Members and Assessors, which led to the elimination of a certain number of candidates and the establishment of a "long list" of candidates, followed by a step 2 setting the minimum score requirement for candidates on the "long list" for admission to the tests and interviews, and then choosing amongst those candidates who exceeded the minimum required score to be placed on the short-list and admitted to the tests and interview.
12. The informal score-sheets indicating the points awarded to each candidate were filled in by members of the Selection Boards and the Assessors alike, on the basis of their first, second and third priority rankings. The Chairperson did not award priority rankings.
13. The Selection Board Reports for each Open Competition do not explain the system of points and marks. They relate the purpose of the competitions, the number of applications received and the exclusion of one candidate for not meeting a formal requirement; they also give the composition of the Selection Board and the names of the Assessors. They then list by name the candidates admitted to the tests and interview (short-list) and in the case of Open Competition IUE/5/2009, the names of the two candidates on the reserve short-list. Each Report gives the date on which the relevant Selection Board met to conduct the pre-selection process. The remainder of the Selection Board Reports describes the subsequent phases of the procedure including the names of the successful candidates who were placed on the reserve list. Each Selection Board Report was signed by the members of the Selection Board (clearly identified as such) and by the Assessors (clearly identified as such).
14. The "Attestation sur l'honneur" relating to Open Competition IUE/5/2009 stated that the appellant received 0 points, and was therefore not short-listed. It stated that the appellant did not fulfil one of the conditions of the Vacancy Notice, "Secretarial skills, attested by a diploma, or equivalent experience".

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15. The "Attestation sur l'honneur" relating to Open Competition IUE/6/2009 stated that the appellant received 2 points, and was therefore not short-listed. It stated that his file did not appear to fulfil, in a sufficiently satisfactory fashion, two of the criteria mentioned in the Vacancy Notice, (i) book-keeping skills and (ii) his "competences informatiques" in Accountancy Management System were insufficient compared to pre-selected candidates.
16. The appellant was informed via e-mail on 7 October 2009 that he was unsuccessful in Open Competition IUE/5/2009. On 12 October 2009, he was informed that he was unsuccessful in Open Competition IUE/6/2009. He was not given reasons for these results. The appellant had meetings with the Chairperson of the two Selection Boards, who provided him with certain texts as well as explanations concerning the selection procedure.
17. On 7 January 2010, the appellant submitted a formal complaint to the Principal of the EUI concerning Open Competitions IUE/5/2009 and IUE/6/2009. He complained that he was denied access to information concerning the evaluation of his applications, he sought information concerning both Open Competitions and made certain allegations concerning the possible incorrect application of the relevant EUI procedures concerning vacancy notices and the Selection Boards.
18. On 3 May 2010, the Principal of the EUI replied to the appellant's complaint. As regards Open Competition IUE/5/2009, the Principal decided that the time-limit of three months for submitting complaints had expired and the complaint was inadmissible. As regards Open Competition IUE/6/2009, the Principal rejected the complaint. However as regards Competition IUE/6/2009, the Principal forwarded the appellant's complaint to the Secretary General of the EUI who was Chairperson of the Selection Board, and provided further details.

#### PROCEDURE BEFORE THE ORGAN OF FIRST INSTANCE

19. By letter dated 2 August 2010, the appellant appealed against the decision of the Principal of the EUI of 3 May 2010 rejecting his complaint of 7 January 2010 concerning Open Competitions IUE/5/2009 and IUE/6/2009.
20. On 19 November 2010, the EUI submitted its Observations entitled "Mémoire en défense" together with supporting documentation in accordance with Rule 16 of the Rules of Procedure, including the Reports of the Selection Boards for Open Competitions IUE/5/2009 and IUE/6/2009 and the Evaluation Tables for both Open Competitions. On 25 November 2010, the EUI spontaneously submitted the informal score-sheets referred to above. The EUI made a request for confidentiality concerning the personal files of the candidates for both Open Competitions, the Reports of the Selection Boards, the Evaluation Tables and the score-sheets. Having heard the appellant, the EUI's request for confidentiality was accepted by the Organ of First Instance by Decision 1/2010 of 21 December 2010, "subject to eventual judicial control by the Organ of First Instance in the event that it emerges during the course of the appeal that the rules governing the conduct of Open Competitions have been violated."
21. By letter of 22 November 2010, as a measure of inquiry under Rule 30(2) of the Rules of Procedure, the Organ of First Instance requested the EUI to submit written observations on the following questions: (i) Does Article 1 (1) of the Common Provisions apply to a person in the situation of [the

appellant], an unsuccessful applicant for a post and not a current member of the staff of the EUI?; (ii) Irrespective of the answer to [the previous] question, even if the EUI considers that Article 1(1) of the Common Provisions does not apply to a person in the situation of [the appellant], does the fact that the President of the EUI rejected a complaint brought by such a person, entitle that person to legitimately bring an appeal before the Appeals Board (Organ of First Instance), having regard to Article 2(3) of the Common Provisions?

22. By letter dated 6 December 2010, the Principal of the EUI replied to both questions. The appellant was invited to comment on the EUI's replies to the questions of the Organ of First Instance but did not do so explicitly.
23. The appellant made written observations on the defence of the EUI in accordance with Rule 16(1) of the Rules of Procedure.
24. Having heard the parties in accordance with Rule 21 of the Rules of Procedure, the Organ of First Instance decided that a public oral hearing should take place. In order to protect the rights of interveners under Rules 36-37 of the Rules of Procedure, the Organ of First Instance adopted Decision 1/2011 of 8 February 2011 providing for publicity on that part of the EUI web-site (hereinafter referred to as "the web-site") which is accessible to the public.
25. By letter of 14 March 2011, as a measure of inquiry under Rule 30(2) of the Rules of Procedure, the Organ of First Instance addressed a number of written questions to the EUI to be answered at the oral hearing, without prejudice to other issues it wished to raise:

(i) Is it correct to deduce from the *Mémoire en défense* that the European University Institute does not contest the admissibility of the appellant's complaint concerning Open Competition IUE/5/2009?

(ii) During the pre-selection process for Open Competitions IUE/5/2009 and IUE/6/2009, did the assessors' evaluations of the candidates have equal weight with those of the members of the Selection Boards? Did the assessors make priority rankings like the members of the Selection Boards and were marks accorded to the assessors' priority rankings which were then used to determine the list of candidates should be admitted to the tests and interviews? Was the procedure followed with respect to the assessors compatible with the role assigned to the assessors in Article 3 of Annex III of the Statute?

(iii) During the pre-selection process for Open Competitions IUE/5/2009 and IUE/6/2009, did each member of the Selection Board (and, if applicable, the assessors) attribute points for each of the "Qualifications" required by the Vacancy Notices (hereinafter the "Qualifications") which they then made known to the other members of the Board or was the system of 1st, 2nd and 3rd priority ranking accorded on the basis of an overall general impression ("évaluation globale") of the candidates' files? How did the Selection Boards determine whether a candidate met each qualification set out in the vacancy notices? Is there a written record?

(iv) During the pre-selection process for each Open Competition, did the Selection Boards consider that all of the Qualifications set out in Vacancy Notices IUE/5/2009 and IUE/6/2009 were essential, or were some considered to be merely desirable? Did the Selection Boards consider that all the

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“Qualifications” carry equal weight or were some Qualifications given more weight than others when assessing the candidates?

(v) What is “Accountancy Management System” referred to in the Mémoire en défense and in the Attestation sur l’honneur concerning Open Competition IUE/6/2009? Was this specifically included as a required qualification or is it subsumed in one of the qualifications for Open Competition IUE/6/2009? Did all candidates admitted to the tests and interviews have proficiency in this area. How was it evaluated?

(vi) What is the legal status or legal value of the document entitled “Guidelines Concerning the EUI’s Recruitment Policy” submitted by the appellant as an annex to his observations of 17 February 2011? Is the EUI obliged to adhere to these Guidelines?

(vii) Is it correct to state that the pre-selection process leading to admission to the tests and interviews was actually composed of two distinct steps: step 1 being composed of the evaluations based on the priority ranking system explained in the Attestations sur l’honneur, which led to the elimination of a certain number of candidates and the establishment of a “long list” of candidates, followed by a step 2 in which the Selection Board used discretion to set a minimum score requirement which candidates on the “long list” should possess for admission to the tests and interviews, the procedure followed thereafter being of no concern for the purposes of the present appeal?

26. The oral hearing took place on 1 April 2011. The appellant and counsel for the EUI presented oral arguments; counsel for the EUI answered the written questions posed by the Organ of First Instance, on which the appellant commented. Both parties answered oral questions posed by the Organ of First Instance.

## FORMS OF ORDER SOUGHT BY THE PARTIES

The applicant claims that the Organ of First Instance should:

- Readmit the Appellant’s complaint concerning Vacancy IUE/05/2009;
- Acknowledge that the present appeal applies not only to Vacancy IUE/06/2009 but also to Vacancy IUE/05/2009;
- Order that the information requested in the appellant’s complaint of 7 January 2010 and in the appeal be provided to the appellant;
- Allow the appellant 3 months time to present a complaint to the Principal if the responses or the lack thereof to this request actually show that both Vacancies and their selection procedure violated the EUI’s norms and/or EU norms since the appellant was unable to do so because of the lack of information which the EUI wrongfully withheld;
- Readmit the appellant to Open Competitions IUE/5/2009 and IUE/6/2009 or
- Annul Open Competitions IUE/5/2009 and IUE/6/2009.

The EUI claims that the Organ of First Instance should:

- Reject the appeal as inadmissible and/or unfounded;
- Make an appropriate order as to costs.

## LAW

### JURISDICTION OF THE ORGAN OF FIRST INSTANCE

27. According to Article 2(3) of the Common Provisions, the Appeals Board may only be asked to deal with a decision which implicitly or explicitly rejects a claim, as laid down in Article 1 of the Common Provisions, as well as requests for stay of execution of an act or for provisional measures in certain circumstances. This provision now applies to the Organ of First Instance by virtue of Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute (hereinafter "Decision 8/06").
28. According to Article 1(2) of the Common Provisions, "any person to whom paragraph 1 [of Article 1 of the Common Provisions] applies may submit to the Principal a complaint against an act adversely affecting him, either where the Principal has taken a decision or where he has failed to adopt a measure prescribed by the Conditions of Employment of Teaching Staff, the Service Rules for Administrative Staff or the Common Provisions."
29. The question therefore arises whether Article 1(1) of the Common Provisions applies to a person in the situation of the appellant, an unsuccessful applicant for a post and not a current member of the staff of the EUI. From its wording, Article 1(1) applies to "[A]ny person to whom the Conditions of Employment of Teaching Staff, the Service Rules for Administrative Staff or the Common Provisions apply". Footnote 1 to that provision clarifies that the Service Rules for Administrative Staff comprehends the Staff Regulations (permanent staff) and the Conditions of Employment for Other Servants.

#### Arguments of the parties

30. In reply to the written questions posed by the Organ of First Instance described at para. 21 above, the Principal of the EUI argued that as Annex III of the Staff Regulations and Articles 30,31 and 33 and more indirectly Article 4, paragraph 4, of the Staff Regulations deal with the case of applicants for posts, the appellant should be considered to be a person to whom the Staff Regulations apply. Accordingly the EUI considered that the appellant fell within the scope of Article 1(1) of the Common Provisions and was entitled to avail of the procedures set out in Articles 1 and 2 of the Common Provisions. The Principal also argued that even if an external candidate for a competition is considered not to fall within the scope of Article 1 of the Common Provisions, a candidate who is the subject of a decision by the Principal should be able to seek judicial review nonetheless and should be able, by virtue of the general principles of law, to seek redress before the Organ of First Instance.

31. The appellant did not directly address this issue.

#### Findings

32. Annex III of the Staff Regulations deals specifically with Competitions, which are also the subject of Articles 30, 31 and 33 of the Staff Regulations, and Article 4, paragraph 4, of the Staff Regulations. Title VII of the Staff Regulations specifically refers to Articles 1 and 2 of the Common Provisions and by virtue of Articles 46 and 117 of the Conditions of Employment for Other Servants that Title

applies by analogy to temporary agents and contract staff, indicating a desire on the part of the legislator to provide for a system of complaints and judicial review.

33. The Organ of First Instance finds highly persuasive the arguments made by the Principal of the EUI concerning jurisdiction. As the Principal argued, access to judicial review by the Organ of First Instance in the case of external candidates for posts would ensure equality of treatment between permanent staff, temporary agents and contractual staff, irrespective of whether they are or are not yet a member of the EUI's staff. The Principal also stated that the creation of the Appeals Board and the Organ of First Instance was precisely to deal with the type of litigation presented in the course of the current appeal. He also referred to the judgment of the Italian Corte di Cassazione (judgment of the Corte di Cassazione, Sezioni Unite Civili, of 23 June 2005 (20995/05)) which recognised the exclusive jurisdiction of the Appeals Board by virtue of its independence and impartiality and reinforces the importance of providing access to judicial review before the Appeals Board and the Organ of First Instance. Finally the Organ of First Instance is persuaded by the Principal's argument to the effect that the general principles of law require that where an individual's legal position is affected by a decision of the Principal, that individual should be entitled to seek redress before the judicial body specifically created for this purpose and endowed with exclusive jurisdiction.
34. The Organ of First Instance is therefore satisfied that Article 1(1) of the Common Provisions applies to a person in the situation of the appellant, an unsuccessful applicant for a post and not a current member of the staff of the EUI who has been the subject of a decision which implicitly or explicitly rejects a claim, as laid down in Article 1 of the Common Provisions. That being the case, the procedural remedies provided under Article 1 and 2 of the Common Provisions apply, including the right of appeal to the Organ of First Instance and thereafter to the Appeals Board. The Organ of First Instance therefore has jurisdiction in the current appeal.

#### **ADMISSIBILITY OF COMPLAINT REGARDING OPEN COMPETITION IUE/5/2009**

##### Arguments of the parties

35. In his decision of 3 May 2010, the Principal decided that the delay of three months for submitting complaints had expired and the complaint was inadmissible as regards Open Competition IUE/5/2009. The appellant was informed of the results of the Open Competition on 7 September 2009, and introduced his complaint on 7 January 2010. The EUI did not raise this issue in its Mémoire en défense as a ground of inadmissibility for the current appeal. At the hearing, in reply to a written question asked by the Organ of First Instance, the EUI confirmed that it contests the admissibility of the complaint concerning Open Competition IUE/5/2009 on the ground that it was lodged outside the time-limits, with evident consequences for the admissibility of the present appeal.
36. The appellant argues that his complaint was admissible. Since the term for lodging a complaint was set at 3 months, the time-limit should have started to run on the following day.

##### Findings

37. According to Article 1(2) of the Common Provisions, a complaint against an act adversely affecting an individual must be brought within three months. According to the second indent of the same provision, the period shall start to run on the day of notification of the decision to the person concerned. Unlike analogous provisions to be found in the Rules of Procedure of the Courts of the

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European Union, the Common Provisions do not contain detailed rules concerning the calculation of time-limits.

38. It is appropriate to recall that Annex I of the Convention setting up a European University Institute (hereinafter the "Convention") provides that the High Council may designate the Court of Justice of the European Communities as the body appointed to settle disputes between the Institute and its staff. It is moreover clear from the Preamble to Decision 8/06, recalling its agreement in principle to transfer jurisdiction over staff cases to the European Court of Justice, that the intention of the High Council is to align as far as possible the system of judicial review provided at the EUI with that of the courts of the European Union. This intention was underlined by Decision 9/08 of the High Council of 12 December 2008 amending the Rules of Procedure in order to bring them into line with EU norms. It follows that it is appropriate to have regard to EU norms and the case-law of the Courts of the European Union as regards the detailed rules for the calculation of time limits as regards the introduction of complaints.
39. Article 100 of The Rules of Procedure of the European Union Civil Service Tribunal provides as follows: "1. Any period of time prescribed by the Treaties, the Statute or these Rules for the taking of any procedural step shall be reckoned as follows: (a) Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question; (b) A period expressed in weeks, months or years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;..." (Consolidated version of the Rules of Procedure of the European Union Civil Service Tribunal of 25 July 2007, *Official Journal C 177, 2/07/2010 P. 71 at page 90.*). Identical provisions are to be found in the Rules of Procedure of the Court of Justice of the European Union and the General Court.
40. As the appellant was informed of the results of Open Competition IUE/5/2009 on 7 October 2009, and introduced his complaint on 7 January 2010, it follows that he complied with the time-limits for introducing a complaint under Article 1(2) of the Common Provisions (see Joined Cases 122/79 and 123/79, *Schiavo v. Council*, Judgment of the Court of Justice of 19 February 1981, p. 473, para. 17).

#### ADMISSIBILITY

41. The EUI raised one general objection and 4 specific arguments concerning admissibility.
42. The EUI argued generally that in order for an action to be admissible, the application should contain in a coherent and comprehensible fashion, the essential legal and factual elements of fact and of law, albeit in a summary way; the application in the present appeal does not fulfil these criteria.
43. This argument must be rejected. Although the appellant's appeal is succinct, it contains the essential factual and legal elements required, presented in a coherent and comprehensible fashion.

(i) Need for 2 separate appeals

44. The EUI claims that the appeal is inadmissible because two separate applications should have been filed, one in relation to each Open Competition.
45. The appellant argues first that the EUI provides extremely limited information concerning the system of complaints and judicial review and does not make publicly available the relevant documentation concerning appeals to the Organ of First Instance on its web-site. He also points to the fact that the EUI never mentioned the need to distinguish two different claims, and this was not raised by the Principal when rejecting his complaint. He argues that the appeal concerns the same issues as regards both competitions: the lack of information allowing the appellant to assess how his qualifications have been evaluated and the objective criteria used, as well as the objective reasons for his exclusion from the short-lists. He points out that the selection procedure and the rules applying to the two competitions are identical as is the methodology for short-listing.

Findings

46. The Principal's Decision did not inform the appellant of the need for two separate complaints or two separate appeals (indeed the Principal's Decision did not advert at all to the possibility of appealing against the Decision), and did not refer to this argument in ruling on the complaint. The two Open Competitions in question were essentially parallel competitions following the same procedures as pointed out by the Chairperson of both Selection Boards in his letter to the appellant of 3 May 2009, and the appellant was a candidate for both competitions. The arguments and the relief sought by the appellant are the same for both competitions: lack of access to information, and alleged irregularities in the selection process. The EUI itself treats both competitions in approximately equal detail in its Mémoire en défense; the Principal of the EUI issued two Attestations sur l'honneur concerning the two competitions which are almost identical. In fact, the issues are so similar that the Organ of First Instance would have been justified in joining the two cases if two appeals had been brought, in the interest of economy of procedure. It is also true that through no fault of his own, the appellant did not receive all the relevant documentation concerning the procedures governing appeals before the Organ of First Instance until 18 October 2010, some time after he had introduced his appeal. In view of all these circumstances, the EUI's argument must be dismissed.

(ii) Absence of an act adversely affecting the appellant

47. The EUI claims that the appeal is inadmissible because of the absence of an act adversely affecting the appellant, within the meaning of Article 1(2) of the Common Provisions, in that the appellant complains that the Selection Boards and their President did not provide him with requested documentation. According to the EUI the only authority entitled to take a decision is the Appointing Authority, the Principal, and the Chairman of the Selection Board and its members cannot take measures adversely affecting him. Furthermore the Principal has a discretionary role allowing him to reject the recommendations of a Selection Board; the Selection Board should therefore be considered only a consultative selection committee and its decisions drawing up the list of selected candidates should only be considered to be preparatory acts which cannot be the subject of an autonomous action for annulment. Consequently the appellant's conclusions seeking to have annulled the decision of the Selection Board not to provide the documentation requested should be rejected.
48. The appellant rebuts the argument relating to the role of the Principal, who according to him has a purely ratifying role. Moreover the Principal's decision approved the results of the competitions constitutes an act adversely affecting the appellant.

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## Findings

49. The argument of the EUI is ill-founded. First, it is manifest that the appellant is challenging an act adversely affecting him, namely the decision of the Principal. Second, it is clear that the appellant does not make any formal conclusion seeking to have annulled the decision of the Selection Board not to provide the documentation requested. Rather, the appellant's comments concerning the failure to provide information are clearly situated in the context of appealing the Principal's decision and form part of a wider argument concerning the way in which the competitions were conducted which was one of the principal subjects of his complaint to the Principal.

### (iii) Expiry of limitations period for challenging the Vacancy Notices

50. The EUI claims that the action is inadmissible because it challenges the evaluation criteria in the Vacancy Notices and as such is out of time because such irregularities should have been contested at the relevant time.
51. The appellant maintains that although he criticises the vagueness of the vacancy notices, he has not made a claim to annul them. He states that that the crucial matter is to ascertain whether the Selection Boards made formally correct assessments of the qualifications required in the vacancy notices according to objective and fair standards.

## Findings

52. The Organ of First Instance recalls that the European Court of Justice held in Joined cases 64, 71 to 73 and 78/86, judgment of 8 March 1988, *Sergio and others v Commission* (European Court reports 1988 Page 1399 at para. 15 as follows: "Failure to challenge a notice of competition within the time-limit laid down does not prevent an applicant from relying on irregularities occurring in the course of the competition, even if the origin of those irregularities may be found in the wording of the notice of competition.")
53. The judgment of the European Court of Justice in *Sergio* finds precise application in the present appeal. In effect, whereas the appellant criticises certain aspects of the Vacancy Notices, he does not seek their annulment but rather perfectly legitimately seeks to ascertain whether irregularities occurred and the evaluation criteria set out in the Vacancy Notices were properly applied. The argument put forward by the EUI in this connection must therefore be rejected.

### (iv) Differences between the Complaint and the Appeal

54. The EUI maintains that the appeal should be declared inadmissible because of certain alleged differences between the complaint to the Principal and the appeal to the Organ of First Instance. The conclusions presented to the Organ of First Instance should have the same object as those of the complaint and the arguments presented before the Organ of First Instance should be the same as those set out in the complaint. Apparently this argument refers to the fact that the appellant made certain allegations about the conduct of the Selection Boards (point B, letters c), d) and e) of the Complaint which he did not pursue in the context of the present appeal.
55. The appellant replies that the formal complaint is clearly an internal conciliatory procedure, distinct from the judicial procedure before the Organ of First Instance and the Appeals Board. Moreover he points out that there is no provision in the EUI's rules establishing that there must be identity between the complaint and the appeal introduced before the Organ of First Instance.

Daniel North

## Findings

56. It is true that according to the constant case-law of the Courts of the European Union, a subsequent application to the court must be based on the same submissions as the administrative complaint (see judgment of the Court of First Instance in Case T-100/04, *Giannini v. Commission*, judgment of 12 March 2008, and the authorities cited therein at para. 38). However the *Giannini* judgment goes on to state at para. 40: "De plus, il a été jugé que les chefs de contestation de la réclamation peuvent être développés, tant au cours de la procédure précontentieuse par des notes additionnelles jusque devant le juge communautaire, à condition que la critique y figurant repose sur la même cause que celle sur laquelle reposent les chefs de contestation invoqués dans la réclamation initiale (arrêts du Tribunal Alexandrakis/Commission, point 34 supra, point 9 ; du 3 mars 1993, Booss et Fischer/Commission, T-58/91, Rec. p. II-147, point 83, et du 17 décembre 1997, Dricot e.a./Commission, T-159/95, RecFP p. I-A-385 et II-1035, point 24). Ainsi, les chefs de contestation peuvent, jusque devant le juge communautaire, être développés par la présentation de moyens et d'arguments ne figurant pas nécessairement dans la réclamation, mais s'y rattachant étroitement (voir, en ce sens, arrêts Rihoux e.a./Commission, point 34 supra, point 13 ; Geist/Commission, point 34 supra, point 9, et ordonnance Vranckx/Commission, point 37 supra, point 41)."
57. It follows from that judgment and the judgment of European Court of Justice in Case 52/85, *Rihoux and others v. Commission*, Judgment of 7 May 1986 (*European Court Reports 1986 Page 1555*) that the submissions and arguments made to the Organ of First Instance in support of the heads of claim need not necessarily appear in the complaint, but must be closely linked to it. In the present appeal, the EUI objects to the apparent abandonment of some of the appellant's arguments. Whereas the case-law has largely turned on the introduction of new arguments following the complaint, it is clear that it can be also applied to the situation where arguments are abandoned following the complaint provided that the principal heads of claim remain the same. However, it would be perverse if it were possible under the conditions laid down by the case-law just cited, to introduce new submissions and arguments before a court without violating the rule of identity of complaint and appeal, and not to be able to abandon arguments which do not alter the object or main heads of claim set out in the complaint. Accordingly the argument of the EUI concerning a lack of identity between the complaint and the appeal must be rejected.
58. It follows from the foregoing that the appeal is admissible.

## SUBSTANCE

59. The applicant essentially argues two heads of claim in support of his appeal. First, he alleges certain irregularities in the procedures followed by the Selection Boards for Open Competition IUE/5/2009 and Open Competition IUE/6/2009. Second, he make a number of arguments concerning access to documents.
60. It is convenient to deal first with the arguments concerning the confidentiality of the work of the Selection Board.

## CONFIDENTIALITY CONCERNING THE WORK OF THE SELECTION BOARDS

### Arguments of the parties

61. In his appeal, the appellant claims access to documents relating to the work of the Selection Boards, notably relating to the criteria used by the Selection Boards and very detailed information concerning the names, scores, and evaluations of the candidates for both Open Competitions.

62. The EUI recalls that according to Article 6 of Annex VI of the Staff Regulations, the proceedings of the Selection Boards are confidential and relies on case-law of the Courts of the European Union in support of this principle.

#### Findings

63. As already explained above, the Organ of First Instance by Decision 1/2010 of 21 December 2010 accepted a request for confidentiality in respect of the personal files of the candidates for both Open Competitions, the Reports of the Selection Boards, the Evaluation Tables and the informal score-sheets used by the Selection Board members. However relying on the judgment of the Court of First Instance of the European Communities in Case T-336/02, *Christensen v. Commission* (judgment of 5 April 2005 at para. 25 and the judgments cited therein), it held in the operative part of its Decision that this was “subject to eventual judicial control by the Organ of First Instance in the event that it emerges during the course of the appeal that the rules governing the conduct of Open Competitions have been violated.” Accordingly these documents were not disclosed to the appellant.
64. The case-law of the European Courts concerning the confidentiality of selection committee proceedings in the context of open competitions was summarized by the European Civil Service Tribunal (“ECST”) in Case F-6/07, *Suvikas v. Council* (judgment of 8 May 2008 at paras. 57-58 (English translation not available): “Selon une jurisprudence bien établie, le principe du secret des travaux des jurys de concours est justifié par des considérations impératives d’intérêt public. En effet, ce principe a été institué en vue de garantir l’indépendance des jurys de concours et l’objectivité de leurs travaux, en les mettant à l’abri de toutes ingérences et pressions extérieures, qu’elles proviennent de l’administration communautaire elle-même, des candidats intéressés ou de tiers (arrêt du Tribunal de première instance du 7 février 2001, Bonaiti Brighina/Commission, T-118/99, RecFP p. I-A-25 et II-97, point 46). Il convient d’ajouter que le principe du secret des travaux des jurys de concours vise également à protéger les intérêts légitimes des candidats à ce que des appréciations concernant leurs compétences et leurs qualités ne soient pas rendues publiques.”
65. Following the hearing and after a further review of the file, the Organ of First Instance considers that it is necessary for the purposes of judicial review within the meaning of the *Christensen* judgment to lift the confidentiality of the Reports of the Selection Boards, the Evaluation Tables and the score-sheets to the extent of quoting from them or describing their contents where relevant without however disclosing the names of candidates or their rank order, or disclosing the documents to the appellant. It follows that the arguments of the appellant are rejected as regards disclosure of the names, scores, and evaluations of the candidates for both Open Competitions but are accepted in so far as it is necessary to examine documents relating to the work of the Selection Boards relevant to his appeal, and that the arguments of the EUI in favour of confidentiality are rejected to this limited extent.

## THE PROCEDURES FOLLOWED BY THE SELECTION BOARDS

### The role of the Assessors

#### Arguments of the parties

66. The appellant alleges that there has been a violation of Article 3 of Annex III of the Staff Regulations which provides that “le jury peut faire appel à un ou plusieurs assesseur(s) ayant voix consultative.”

67. The appellant argues that the Assessors had the same power as the Selection Board members in determining who should be short-listed and who should not whereas this power should lie exclusively with the members of the Selection Board. He points to the fact that both the Selection Board members and the Assessors made global evaluations of the candidates and attributed points to candidates in the same way. He considers that by allowing assessors to grade candidates, the Selection Board gave them a role that cannot be considered as purely consultative. He notes that there is no indication that the ranking provided by the joint exercise of the Selection Board members and Assessors has not been used in full by the Selection Board Members. Moreover there is no indication that the Selection Board Members conducted an independent review of the scoring and ranking established by the joint evaluation; without such an independent review, there would be no independent decision by the members of the Selection Board. As the Assessors should only have a consultative role and do not vote, he concludes that there was a violation of Article 3 of Annex III.
68. The EUI argues that after the Selection Board Members and the assessors had evaluated the candidates' files, the Selection Board alone decided the list of short-listed candidates. The EUI states that even if the Selection Board accepted entirely the views of the Assessors, that would not alter their consultative role as the Selection Board is free to follow or not to follow their advice.

#### Findings

69. In principal, Selection Boards are free to organize their work as they think fit, while complying with the rules governing the conduct of open competitions and rules relating to the procedures of the Selection Boards. Such rules include Article 30 of the Staff Regulations dealing with the appointment of a Selection Board for each competition, Annex III of the Staff Regulations concerning the procedures for competitions and two documents, introduced by the appellant, signed by the Principal, entitled "Composition of the Selection Board", dated 2 July 2009 and 14 July 2009 concerning Open Competitions IUE/5/2009 and IUE/6/2009 respectively. Although not designated as such, these documents must be considered to have the force of decisions of the Principal.
70. The Principal's decisions on "Composition of the Selection Board" appointed the members of the Selection Board for each competition and stated that "the Selection Board is assisted by the following external assessors" which they then proceeded to name. The decisions set out certain rules such as the prohibition on members of the Selection Board to delegate their duties to persons who are not members of the Selection Board. The decisions stated that the proceedings of the Selection Board are confidential. In nominating the assessors, the decisions did not establish their duties or obligations as compared to those of Members of the Selection Board, and the attention of the Organ of First Instance has not been drawn to any EUI document which sets out in detail the role of assessors as compared with that of the members of the Selection Boards. The Principal's decisions did not state that the Assessors had a purely consultative role. The conclusion to be drawn is that the Principal's two decisions did not distinguish, in a sufficiently clear manner, the obligations and duties of the assessors from those of the members of the Selection Board. This is confirmed by the fact that the Selection Board Reports also do not record that the role of the Assessors was purely consultative. Thus there is no documentary or other evidence to show that the roles of the Selection Board Members and those of the Assessors were clarified in an appropriate fashion. However this in itself is not decisive provided the assessors in fact performed a purely consultative role.
71. As regards the working of the Selection Boards, it appears from the file that the members of the Selection Board and the Assessors in each competition all graded the candidates according to the priority ranking system described above. Equal weight was given to the points awarded by the Assessors and the members of the Selection Board. In the "attestations sur l'honneur", in describing the scoring process, the Principal of the EUI does not distinguish between members of the Selection Board and Assessors and simply refers (in the original French) to the award of points by "le jury" and "les membres du jury".

72. As regards Open Competition IUE/5/2009, an examination of the points awarded by the members of the Selection Board and the Assessors (recorded on the informal score-sheets) and the Evaluation Table for Open Competition IUE/5/2009 (annexed to the Selection Board Report) shows that no distinction was made between the points awarded by the members of the Selection Board and the points awarded by the Assessors. The points were cumulated and were exactly translated, in respect of all pre-selected candidates, into the marking scale of 0-20 on the Evaluation Table, e.g. a candidate who was awarded 13 points by the Selection Board members and the Assessors on the informal score-sheets as a result of the priority ranking system operated received a mark of 13/20 on the Evaluation Table, and so on. There was therefore a perfect correlation between the points awarded by Selection Board members and Assessors, recorded on the informal score-sheets, and the marks in the Evaluation Table annexed to the Selection Board report.
73. Likewise in relation to Open Competition IUE/6/2009, no distinction was made in practice between the points awarded by the members of the Selection Board and the points awarded by the Assessors, the only difference with respect to Open Competition IUE/5/2009 being that all candidates received 1 mark less than the number of points awarded by the Selection Board members and Assessors as explained above. Therefore, in this case too, allowing for the general reduction of all marks by 1, there was a perfect correlation between the points awarded by Selection Board members and Assessors, recorded on the informal mark-sheets, and the marks in the Evaluation Table.
74. The reports of both Selection Boards were signed not only by the members of the Selection Board but also by the assessors.
75. The facts and procedure described above would not necessarily lead to the conclusion that the Assessors had played a role beyond that which was purely consultative if it could be demonstrated that after the Assessors had performed their function in assisting in evaluating candidates, the members of the Selection Board reviewed the advice tendered by the Assessors and then proceeded to make an autonomous decision as to the weight which should be accorded to their recommendations. No record of such a review process is contained in the Selection Board Reports and no documentary or other evidence was presented to this effect to rebut the allegations of the appellant.
76. Moreover the perfect correlation between the points awarded by Selection Board members and Assessors, and the marks in the Evaluation Table annexed to the Selection Board suggests that such an independent review process by the Selection Boards did not take place..
77. The Selection Board Reports as drafted do not specify that decisions were taken solely and exclusively by the members of the Selection Boards, explicitly excluding the Assessors. Nor do they specify that having reviewed the recommendations of the Assessors, the members of the relevant Selection Board alone took the decision on the short-lists, the assessors having no further part in the proceedings. The Selection Board Report for each competition makes reference to only one meeting of each Selection Board. At the hearing, counsel for the EUI stated that in fact several meetings of the Selection Boards were held including "informal" meetings of which no records were kept; no dates or details were given of these other meetings. It follows that the reports of the Selection Boards do not give a full record of the proceedings of the Selection Boards. Such information is also not to be found in the "attestations sur l'honneur". The EUI did not call witnesses who could have clarified the situation by explaining the procedure actually followed.

David M...

78. The Organ of First Instance recalls that the European Court of Justice held in Case 122/77, *Agneessens*, judgment of 26 October 1978 (European Court Reports 1978 page 2085 at paras 9 et seq.: "it is necessary, however, for the selection board to retain ultimate control over the procedures and its discretionary power; that condition has been satisfied in the present case; it is apparent from the particulars supplied during the course of the proceedings that the selection board not only controlled the establishment of the criteria according to which the matters to be taken into account in accordance with the notice of competition were to be assessed, but also followed the work of the examiners at all stages in order, on the basis of the proposals submitted by the examiners, itself finally to draw up the list of suitable candidates to be submitted to the appointing authority;"
79. It has not been shown that the test set out in the *Agneessens* judgment has been met in this case.
80. At the hearing, Counsel for the EUI was unable to identify the point at which the assessors ceased assisting the Selection Board and at which the members of the Selection Board took exclusive control of the process. She stated that no record was kept in this regard. She also confirmed that the Assessors were present at the final meetings of the Selection Boards when the decisions establishing the short-lists were taken but did not know if they took the floor.
81. In the light of all the preceding considerations, the Organ of First Instance considers that it has not been demonstrated in a sufficiently convincing manner, so as to rebut the appellant's allegations, that Article 3 of Annex III of the Staff Regulations was respected. Accordingly the appellant's argument must be upheld.
82. Although this finding in itself suffices to dispose of the present appeal and find in favour of the appellant, since judgments of the Organ of First Instance are subject to the appellate control of the Appeals Board, it is appropriate to examine the principal arguments concerning the other head of claim.

## ACCESS TO DOCUMENTS

### Lack of information concerning procedures

#### Arguments of the parties

83. The appellant complains of the lack of information available and inadequate access to documents. He states that in the Vacancy Notices of both Open Competitions, no reference is made to the EUI Guidelines for Recruitment, nor is any reference made to the possibility to file a complaint with the Principal or appeal to the Organ of First Instance. He notes that the two communications rejecting his candidature for the open competitions provided no information as to his evaluation, nor any information as regards access to information or the complaint procedure; these possibilities were also not mentioned in the reserve lists published on the EUI web-site.
84. The appellant also complains of the insufficient information published by the EUI on its web-site concerning complaints and appeals. He maintains that the relevant documents are not publicly available, the only indication being to contact the Personnel Service for more information and for a copy of regulations. He also refers to the difficulties he experienced in obtaining the full documentation concerning complaints and appeals to the Organ of First Instance and maintains that he did not obtain the final document concerning the Organ of First Instance until more than 6 weeks



after filing his appeal. He maintains that the alleged obstacles placed by the EUI discourage filing a complaint or seeking judicial review and are not in accordance with practice in the EU institutions, and most of the EU Member States.

85. The EUI states that there is no right of access to administrative documents in general and in particular to those relating to selection procedures. The EUI does not address directly the more general issues complained of by the appellant, focusing instead on those relating to the Selection procedure.

#### Findings

86. The Convention setting up a European University Institute (notably Article 6(5)(c)) conferred on the EUI competence to lay down the procedure for settling disputes between the Institute and persons concerned by the service rules of the staff of the Institute. Such disputes therefore fall to be decided outside the context of national law, as expressly recognized by the Italian Supreme Court (judgment of the Corte di Cassazione, Sezioni Unite Civili, of 23 June 2005 (20995/05)) and are subject to the exclusive legal order created by the Convention and subsequent Decisions of the High Council.
87. Under Article 1(1) of the Common Provisions, any relevant person may request the Principal to take a decision relating to him. Under Article 1(2) of the Common Provisions, any relevant person may submit to the Principal a complaint against an act adversely affecting him. On the basis of Article 2 of the Common Provisions providing for an Appeals Board, and Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance, a two-tier-system of judicial review has been established whereby members of the Appeals Board and Organ of First Instance are appointed by the High Council on the basis of a list drawn up by an international juridical body (*in specie* the Court of Justice of the European Union) guaranteeing exclusive jurisdictional protection before an impartial and independent judicial body of first instance, subject to the control of the impartial and independent Appeals Board.
88. It is evident that the purpose and good functioning of the legal system thereby created, with its peculiar character of exclusivity, would be frustrated if individuals were not fully informed of the provisions of that system which concern them, and their rights thereunder. This applies both to the administrative procedures and to the system of judicial review which has been established. Failure to provide such information or to publicise it adequately could have the effect that potential complainants or appellants are unaware of the availability of administrative remedies or judicial review, which given the exclusive character of the system, could under certain circumstances, lead to a *de facto* denial of justice and a breach of the general principles of law as well as the principles of international human rights treaties concerning the right to a fair trial (Article 6, ECHR; Article 47 of the Charter of Fundamental Rights of the European Union).
89. It follows that the EUI, as a consequence of the special obligations imposed by exclusive jurisdiction, is required to publish publicly available information concerning the administrative procedures provided for in Article 1 of the Common Provisions, and at all relevant stages draw the attention of interested parties thereto.
90. As regards the system of judicial review, it likewise follows that the EUI is required to publish in a single location, totally accessible to the public, full and complete information concerning the system of judicial review established in the EUI legal system, together with the relevant documentation

concerning the procedures, working and organisation of the Appeals Board and the Organ of First Instance. In view of the evident intention of the High Council to align as far as possible the system of judicial review provided at the EUI with that of the courts of the European Union, manifested in Decision 8/06 establishing the Organ of First Instance and underlined by Decision 9/08 of the High Council of 12 December 2008 amending the Rules of Procedure in order to bring them into line with EU norms, it is appropriate to have regard in this respect to the practice of the Courts of the European Union which publish all relevant documentation on their web-site.

91. The appellant's arguments are therefore well-founded in so far as he alleges that such a comprehensive and publicly accessible system of information was not in place at the relevant time.

### **Evaluation Criteria used in relation to the Qualifications required in the Vacancy Notices**

#### **Arguments of the Parties**

92. The appellant presents a number of arguments which it is convenient to treat together concerning insufficient information concerning the evaluation criteria used by the Selection Boards regarding both himself and the other candidates in relation to the Qualifications required in the Vacancy Notices. He argues that it is not clear whether the Qualifications set out in Vacancy Notices IUE/5/2009 and IUE/6/2009 were essential, or were some considered to be merely desirable. He also maintains that it is not clear whether the Selection Boards considered that all the "Qualifications" carry equal weight or whether some Qualifications were given more weight than others when assessing the candidates. Moreover the appellant states that the Vacancy Notices do not seem to be in accord with the "Guidelines concerning the EUI's Recruitment" (hereinafter the "Guidelines"), a document lodged by the appellant (IUE 150/05 (CS 4)).
93. The EUI maintains the EUI is not obliged to provide the appellant with the evaluations of the Selection Boards as they are covered by the principle of secrecy attaching to the works of the Selection Boards. However the EUI provided reasons both in the Attestations sur l'honneur and in its Mémoire en défense explaining the points awarded to the plaintiff and the reasons why the appellant was not admitted to tests and interview in the two Open Competitions. It appears that in Open Competition IUE/5/2009, the appellant did not meet one of the criteria set out in the Vacancy Notice, namely "Secretarial skills, attested by a diploma, or equivalent experience." In Open Competition IUE/6/2009, the appellant's file was deemed insufficient as he did not meet two of the requirements set out in the Vacancy Notice: (i) book-keeping skills and (ii) his "competences informatiques" in Accountancy Management System were insufficient compared to pre-selected candidates.
94. Counsel for the EUI responded at the hearing to written questions posed by the Organ of First Instance concerning the Qualifications set out in the Vacancy Notices and their evaluation. Counsel for the EUI stated that all qualifications in the Vacancy Notices were considered necessary and two were considered advisable. No information was provided on the weightings attributed to each qualification. Counsel for the EUI stated that a knowledge of Accountancy Management System could be deduced from the Qualifications required in the Vacancy Notice. Knowledge of Accountancy Management System was more important than other Qualifications.

95. Counsel for the EUI also stated at the hearing that the Guidelines had no legal value. They were endorsed by the High Council without however having been the subject of a formal High Council Decision. They simply sum up recruitment principles, and are not part of the staff rules. She said that the Guidelines were not used by the Personnel Service as such but were used as an inspiration; they were not a formal code of conduct or code of good practice. She also confirmed that the Guidelines are published on that part of the EUI's web-site which is not available to the public (intranet) so that it is available to existing staff members but not to members of the public or external candidates for competitions such as the appellant.

#### Findings

96. The Court of Justice has consistently held that as the pre-selection phase of a competition involves a consideration of the abilities of the candidates for the post, in order to draw up a list of those suitable, and involves making comparisons, it is, therefore, governed by the principle of secrecy inherent in the proceedings of a selection board (Case 44/71, *Marcato v. Commission*, judgment of 14 June 1972 European Court reports 1972 Page 427). It follows that insofar as the appellant seeks detailed information concerning the evaluations of other candidates, this must be rejected.
97. As regards the Guidelines, the Organ of First Instance notes that the two decisions of the Principal appointing the Selection Boards for the Open Competitions at issue refer to the "High Council guidelines concerning the EUI's recruitment policy" as one of the two legal bases for the decisions. However this emerged only after a review of the file by the Organ of First Instance following the hearing and the parties have neither raised this point nor have they had the opportunity to argue its significance. In the context of adversarial proceedings, it is not appropriate for the Organ of First Instance to rely on this circumstance without having heard the parties.
98. A copy of the said Guidelines was allegedly given by the Chairperson of the Selection Board to the appellant on 22 October 2009 presumably as a guide to EUI recruitment procedures.
99. However given the lack of clarity concerning the legal status of the Guidelines which emerged at the hearing, the Organ of First Instance considers that the Guidelines cannot be usefully invoked by either party.
100. As regards the Qualifications set out in Vacancy Notices IUE/5/2009 and IUE/6/2009 and the weighing attaching to each of them, it is clear to the Organ of First Instance that on a literal reading, both Notices included one formal eligibility criterion relating to nationality or residence in the EUI. One candidate did not satisfy this criterion and was excluded from both Competitions. In the case of both Open Competitions, it is evident that whereas all the Qualifications were deemed to be "required" according to the Vacancy Notices, two Qualifications were worded as follows: "Work experience in a university or research environment will constitute an advantage" and "knowledge of additional EU languages would be an asset". The use of the words "advantage" and "asset" would ordinarily suggest that the relevant experience or knowledge was advantageous but not required. However it should be noted that no further information was offered concerning these two Qualifications or the consequences of the lack thereof, or their evaluation.

*D. in J. K. M.*

101. It should further be remarked that whereas some Qualifications in the Vacancy Notices were susceptible to an objective evaluation, such as those relating to education, other Qualifications such as "ability to work as part of a multinational team" certainly required criteria on which to make an informed subjective evaluation of the candidates' ability to fulfil them.
102. However despite considering the EUI's replies at the hearing to the written questions posed by the Organ of First Instance, it remains unclear to the Organ of First Instance how the Qualifications set out in the Vacancy Notices were evaluated in relation to qualifications of the candidates. Thus it is unclear whether higher or lower marks were given to some qualifications rather than others, particularly in the case of qualifications which were described as constituting an "asset" or an "advantage". Nor have the evaluation criteria for qualifications which required a subjective assessment such as "ability to work as part of a multinational team" been explained.
103. As Counsel for the EUI stated at the hearing that a knowledge of Accountancy Management System was more important than other Qualifications, and the applicant's secretarial and book-keeping skills were deemed inadequate, it follows that a system of weightings must have been established for the different Qualifications but this information has not been provided to the Organ of First Instance in the context of exercising effective judicial control. By failing to provide adequate explanations concerning the weight attached to the various qualifications, or the evaluation criteria concerning them, the EUI has not been able to rebut the appellant's arguments that the Qualifications in the Vacancy Notice and evaluation criteria concerning them were not applied appropriately by the Selection Boards in relation to the qualifications of the candidates. It follows that the argument of the appellant regarding this issue must be accepted and that an examination of specific issues such as that relating to knowledge of Accountancy Management System is unnecessary.
104. Given the above considerations, the appeal should be upheld.
105. Since the competition was an open competition for the constitution of a reserve for recruitment, it follows from the judgment of the Court of First Instance in *Marcopoulos v Court of Justice of the European Communities*, judgment of 22 June 1990 (European Court Reports page II-281 at para.44, and the authorities cited therein), that the rights of the appellant are adequately safeguarded if the appointing authority reopens, as far as the applicant is concerned, Open Competitions IUE/5/2009 and IUE/6/2009, there being no need to call in question the results of the competitions as a whole or to annul the appointments made on the basis of them. In this case, it is sufficient to readmit the appellant to the pre-selection stage of both competitions.

D. J. Murphy

## DECISION ON COSTS

### Costs

106. In accordance with Rule 33 of the Rules of Procedure, judgments shall include an order for costs in accordance with Article 2(6) of the Commons Provisions. That provision states that the Institute shall bear its own costs.

107. The appellant has not made an application for costs. Therefore he should bear his own costs.

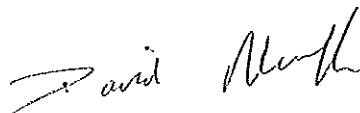
## OPERATIVE PART

On those grounds,

## THE ORGAN OF FIRST INSTANCE

hereby:

1. Readmits the appellant to Open Competitions IUE/5/2009 and IUE/6/2009;
2. Orders each party to bear its own costs.



Member of the Organ of First Instance exercising the judicial function: D. O'Keeffe

Secretary of the Organ of First Instance: Silvia Salvadori

Given on

29 April 2011

