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Staff Matters

Legal News from Union Syndicale

Statement of reasons - Article 296 TFEU - Open competition - supplement of the statement of reasons during proceedings - secrecy of the proceedings of the selection board, Article 6 Annex III SR – selection criteria

Court of Justice confirms the importance of the statement of reasons

Art. 296 TFEU stipulates "Legal acts shall state the reasons on which they are based…". This newsletter is about a recent decision of Court of Justice confirming and redefining the right of a candidate in an open competition to obtain a statement of reasons (i.e. a motivation) for the decision not to admit him to the list of successful candidates. Together with a rejection decision, the selection board has to provide reasons for its decision and has to indicate the selection criteria, even if the candidate had not requested communication of reasons or criteria. Where the reasoning of a decision is inadequate, the administration may only in exceptional circumstances supplement the statement of reasons during the proceedings.

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Case C-114/19 P, Commission / D. Di Bernardo, of 11 June 2020

Case T-811/16, D. Di Bernardo / Commission, of 29 November 2018

Facts of the Case and Procedure

The applicant participated in an open competition for the establishment of "Secretaries/Clerks". After he had taken part in the assessment test, the selection board asked him to provide further information on his professional experience. The board wished to obtain detailed job descriptions signed by his previous employers and copies of the contracts of employment. The applicant sent a detailed job description and explained why he did not possess such descriptions for other sections of his application form: the Italian company which had employed him had been dissolved and that he was not in a position to provide these documents. He submitted instead other documents, including Italian national collective labour agreements, with a description of the duties linked to various employment contracts.

The selection board decided not to place him on the list of successful candidates in the open competition because he did not satisfy the requirement of a minimum duration of three years of professional experience in the field related to the nature of the duties. The board informed that it had established selection criteria to assess whether the qualifications and professional experience of candidates matched the competencies required for the positions to be filled.The Court's

Decision and the Arguments of the Parties

The Court of Justice confirms the judgment of the General Court of November 2018 which had annulled the decision of the selection board for infringement of the obligation to state reasons. The Commission appealed against this judgment and lost the case at the Court of Justice that dismissed the appeal.

The Commission pleaded that the General Court had failed to take sufficient account of the legal and factual context of the disputed decision, while the adequacy of a statement of reasons must be assessed in the light of the context of the decision concerned and not merely of its wording. On this plea, the Court of Justice recalls that the statement of reasons required under **Art. 296 TFEU** for measures adopted by EU institutions:

"...must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question."

The Court differentiates the argument brought forward by the Commission that in competitions with a large number of participants, the selection board is authorised to give summary reasons for a refusal to select a candidate. In a competition involving a large number of candidates, the selection board may initially inform the candidates only of the criteria and the result of the selection. Then it may subsequently provide individual explanations to those candidates who expressly so request. The General Court had already pointed out that in the case at hands the selection board took its decision after all the candidates had already taken part in the admission tests and the other tests. The selection board thus only had to deal with a smaller number of candidates being on the short list. The workload related to an open competition thus cannot serve here as argument for failing to motivate the decision of rejecting the applicant.

Also the argument that the applicant had never tried to ascertain the selection criteria was refused by the Court, because even where the selection board is obliged to provide, initially, only summary reasons, as is the case in a competition with a large number of participants, those reasons must include an indication of the selection criteria. The selection criteria constitute a minimum of information which must in any event be provided to candidates, at the latest at the same time as the results of the competition concerned. Finally, the Court stated that also the secrecy of the proceedings of the selection board (Art. 6 Annex III SR) cannot be used to hide the criteria applied for the selection.

On the question whether the statement of reasons can be supplemented later:

As to the timing of the statement of reasons the Court recalls that it must, in principle, be communicated to the person concerned at the same time as the act adversely affecting him. A failure to state reasons cannot be remedied during the court proceedings. However, where there is not an absence but an inadequacy of reasoning, explanations given in the course of the procedure may, in exceptional cases, remedy that inadequacy.
In a competition with a large number of candidates, the institution may be unable, from a practical point of view, to provide each candidate with an adequate statement of reasons in good time. In these circumstances it is exceptionally permitted to produce evidence before the courts, such as minutes of selection boards.

Comments :

1. The central purpose of a reasoning is that it enables the persons concerned to **ascertain the reasons for a decision and to enable the competent court to review its legality**. Absence or lack of reasoning may make an administrative decision liable to annulment, and may lead to the award of damages (F-116/11, Vacca / Commission, of 26 June 2013, para. 64). The lack of reasoning can be raised by the court ex officio (cf. Case F-149/15, HG / Commission, of 16 September 2016, para. 93).

2. Normatively, the obligation to state reasons does not only stem from Art. 296 TFEU, but also from Art. 41 (2) c of the EU Charter of Fundamental Rights. In the context of decisions specifically against officials, Art. 25 (2) SR stipulates this obligation as "Any decision adversely affecting an official shall state the grounds on which it is based." The scope of this obligation differs depending on content and context. Specifically in the case of recruitment processes the duty to give reasons has to be conciliated with confidentiality requirements.

3. The present judgment of the Court follows the line of case-law on the necessity of the statement of reasons. In principle, the reasoning has to be provided together with the decision itself, it cannot be supplemented later during the court proceedings (cf. Case C-521/09 P, Elf Aquitaine / Commission, para. 149). However, to a certain extent the inadequacy of an existing statement of reasons can be healed during the court proceedings. This balanced approach is necessary in order to avoid that the administration abstains from giving reasoning altogether (knowing that they can be still delivered anyway), but is otherwise free to reduce a reasoning to match content and context.

4. The Court accepts that the specific situation of mass procedures involving large numbers of candidates, like an open competition, can justify the exceptional reduction of a reasoning (summary reasons).

5. The Court clarifies that also a "contradictory or unintelligible statement of reasons" amounts to a failure to state reasons.

6. The healing of an insufficient reasoning during court proceedings is "not automatic", as the Court emphasizes. If reasons are supplemented at

the court stage, EU Courts must still ascertain, whether the additional statement of reasons is not liable to infringe the rights of the defence[1]. We have reported about the rights of the defence in our first newsletter, Staff Matters No. 1.

7. As the Court confirms, "secrecy" cannot be used as argument to preclude communication of the objective factors and criteria for assessment (cf. judgment of the Court in Case C-254/95 P, Parliament / Innamorati, of 4 July 1996, paras. 26 to 28).

8. EU selection boards (and other services) will certainly scrutinize this judgment, as it confirms that the statement of reasons in the rejection of a candidate has to be provided without having to ask for it and, likewise, the selection criteria have to be provided without asking for them.

[1] O. Mader, Verteidigungsrechte (Nomos) ISBN 3-8329-1828-0