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Own initiative inquiry OI/5/05/PB relating to the European Personnel Selection Office

Letter of further inquiry

Dear Mr Halskov,

On 10 October 2005, I opened the present own-initiative inquiry into the issue of candidates' access to the marking criteria established by the selection boards and applied to written examinations forming part of competitions organised by the European Personnel Selection Office (EPSO). My present letter, which is a letter of further inquiry, contains an analysis of the main issues involved as well as a request for your views on that analysis. The analysis is preceded by a summary of the inquiry up to now, including your opinion of 31 May 2006.

The inquiry

The opening of the present inquiry was preceded by relevant draft recommendations I had addressed to EPSO that did not result in a positive outcome. A meeting between members of my legal staff and EPSO was held on EPSO's premises on 25 November 2005, during which EPSO provided explanations on the nature of the recruitment procedures, on the rules applicable thereto, and on issues relating specifically to the marking criteria established by the selection boards. EPSO staff furthermore presented samples of recruitment competition files containing such marking criteria and other materials produced by the selection boards concerned.

After taking into account the above-mentioned information and materials, I informed EPSO, by letter of 20 February 2006, of my understanding that selection boards essentially establish, or may establish, three types of criteria for their assessment of written tests. By the same letter, I also asked EPSO (a) for its views on this typology of marking criteria established by the selection boards, and (b) for its

opinion on the possibility of granting candidates access to these types of criteria. The three types of criteria I identified were the following:

(A) general criteria, underlying the conditions laid down by the notice of competition, regarding the purpose and/or the content of the test;

(B) criteria for the allocation of marks, such as the weighting of questions;

(C) criteria in the form of instructions for marking the written tests.

I further made the following observations as regards the above classification.

Criteria A refer to criteria which *elaborate on, specify the scope of, or present in a more detailed manner* the criteria laid down in the notice of competition. These criteria are *general*, in the sense that they are applicable to a certain *type* of written exams (which is why they may also appear in the notice of competition itself). For example, the criterion "thorough knowledge" of a language may be specified by the selection board as implying, *inter alia*, the absence of spelling and grammar errors. The condition to meet "the character requirements for the duties involved" may be specified as "knowledge of the field", "editing skills", which may, in turn, include sub-specifications such as "reference to key points", "ability to structure", "creative input", and so forth.

Criteria B refer to the *marking methods*, to the rules for the calculation of marks, for instance, the weighting of questions and the value of the answers given. For a translation test, the selection board may, for instance, decide that a serious vocabulary error (e.g., use of a phrase which is irrelevant to the meaning of the correspondent phrase in the test) leads to the deduction of one point, while a minor vocabulary error (use of a phrase which is relevant to the correspondent phrase in the test but which does not convey its meaning in a particularly accurate way) leads to the deduction of half a point. For an essay test it may, for instance, be laid down that "clarity and precision" have a greater weight in the overall marking than for instance "style, presentation". Such criteria may appear as inextricably intertwined with criteria concerning the propriety of certain answers (i.e., *criteria C*). For example, the selection board may say that a specific translation error leads to the deduction of one point. Or an instruction sheet may contain a bullet point overview of the key-elements that *must* be included in the respective parts of the essay accompanied by instructions as to how many points should be awarded for each key-element.

Criteria C must be deemed as applying criteria A and/or the conditions laid down by the notice of competition, regarding the purpose and/or the content of the test, in view of the *specific content of the selected test*. These criteria consist of *instructions* concerning the correctness, adequacy, structure etc. of the candidates' replies to the specific test. These instructions might include either *authoritative rules* to be respected by the markers (e.g., a rule that a specific translation choice is to be considered as correct, or a rule concerning the elements that *must* be included in an essay), or *simple guidelines* about (i.e., *mere indications* of) what could constitute good or bad answers (usually the former) to the questions or tasks posed in the written test [for a translation

test, these guidelines might consist of suggested translation choices for specific terms or phrases; for an essay test, it might consist of model answers ("corrigé type"]].

EPSO's opinion

On 31 May 2006, EPSO sent me its opinion. While refraining from stating any express views on the above-mentioned typology of marking criteria, EPSO made the following comments:

1. *"As is clear from the terms of the own-initiative inquiry, the Ombudsman is seeking EPSO's views as to what information should be given to candidates on their performance in written tests.*
2. *With regard to this type of test, it is worth pointing out that, when a selection board lays down criteria for assessing written tests, all it does is seek a consensus among its members on all the relevant factors enabling such an assessment to be made, bearing in mind, of course, the purposes specified in the competition notice.*
3. *Whereas the competition notice defines the purpose of a test in general terms, each selection board should still be able to confer in order to pinpoint the qualities or knowledge the possession of which it considers to be necessary in order to satisfy the requirements of each written test.*
4. *At all events, as far as such tests are concerned, EPSO would stress that all these factors are already mentioned in the assessment sheets that are available to candidates on request. Consequently, it considers that there is no need to take any further action with regard to access to the criteria referred to at (A) in the inquiry document.*
5. *Turning now to the information referred to at (B), EPSO would like to make a clear differentiation from the general criteria mentioned at (A) relating to the requirements of the competition notice. The general criteria mentioned at (A) are not covered by the need for secrecy and must be communicated to candidates so that they are aware of all the factors on which the selection board bases its assessment and can, if necessary, challenge that assessment.*
6. *However, when it comes to written tests, whether on a general subject, a case file or a translation, the selection board must lay down, depending on the nature of the competition and/or the field covered, a marking grid - also based on factors imposed by the competition notice - but which may take account of other factors, such as:*
 - a) *certain criteria that will serve as a framework for the persons marking the tests;*
 - b) *the scale for assessing marks; and*
 - c) *standards for ensuring equal treatment of candidates.*

7. *The documents referred to at (B) and (C) in the own-initiative inquiry have always been considered by the case law to involve comparative assessments by the selection board of candidates' respective merits, and hence to be covered by the secrecy of the board's proceedings.*
8. *In explanation of the reasons behind this case law, EPSO would point out that there is a clear distinction to be made between, on the one hand, the objective factors which help to supplement the general criteria laid down in the competition notice and, on the other, the correction criteria which enable the marks to be determined.*
9. *The qualities or knowledge needed to satisfy the requirements of each test are objective factors which help to supplement the general criteria laid down in the competition notice. By contrast, the correction criteria which enable the marks to be determined are designed to improve the conduct of a selection board's internal discussions and are related to factors linked to candidates' personal performance.*
10. *These latter factors stem from selection board members' assessments and from candidates' individual qualities. Consequently, they cannot be explained without knowing the performance level of all candidates.*
11. *The example mentioned in the own-initiative inquiry concerning translation tests is a good illustration of this difference. Thus, in the context of a translators' competition, a selection board might well decide not to penalise the absence of accents.*
12. *Such a decision could not for all that become a criterion communicable to candidates. It would merely be the result of a finding as to a very low level of linguistic knowledge on the part of candidates, obliging the selection board to relax its correction criteria.*
13. *Clearly, however, communicating such a criterion to candidates would have the effect of presenting it as being the level of ability required of officials for the purposes of Article 27 of the Staff Regulations, which might be misleading.*
14. *A selection board that adopted such a hypothetical decision would have done so as part of a specific competition taking account both of the needs of the departments and of the average level of performance of the candidates, which is why only those who have had the opportunity to assess the overall performance of all the candidates would be in a position to understand it and judge it to be fair.*
15. *Consequently, the communication of such correction criteria is inappropriate in so far as it may not altogether correspond either to the qualities or to the knowledge needed to satisfy the objective requirements of the tests.*

16. *Attention should also be drawn to the fact that each selection board is a body independent of the administrative authority and that it is bound only by the wording of the competition notice, which may well lead, depending on the nature of the competition and the number of applications received, to widely differing practices from one competition to another. This is further illustration of the risk involved in publishing correction criteria and marking grids, which might mislead candidates into thinking that these same criteria/grids will be applied in any subsequent competition of the same type.*
17. *From a rather more practical point of view and bearing in mind the independence of selection boards, EPSO would add that it cannot be ruled out that the correction criteria, which the Ombudsman would like to see communicated, may not be adopted at all by the selection board. Such would be the case where, for example, a selection board decided to distribute scripts for correction among its members, to adopt subsequently provisional correction parameters and to get together later to discuss the said correction at a full meeting. In that event, the final correction would be done only at the full meeting, on a case-by-case basis and subject, where necessary, to adaptation of the said provisional parameters.*
18. *In conclusion, EPSO considers that the assessment sheet as currently drawn up (as in the case of competition EPSO/A/19/04, to which the Ombudsman refers by way of example) contains additional elements which may be of help and use to candidates by increasing their understanding of those aspects of their written tests which have been evaluated and taken into consideration by the selection board. This therefore complies with the Ombudsman's request that access be given to the criteria mentioned at (A) in his own-initiative inquiry.*
19. *Any other information (such as the criteria mentioned at (B) et (C)) would go beyond the limits laid down by the Staff Regulations and the case law and might even involve a risk of "false" information misleading candidates, who might suppose that these same criteria apply permanently to all competitions in such and such a field, for which a "new" selection board might - justifiably - lay down different criteria from those used for an earlier competition."*

THE EXAMINATION OF THE ISSUES INVOLVED

EPSO's opinion

I first note that EPSO has stated that all the factors set out under *criteria A* referred to above are now mentioned in the evaluation sheet that is made available to the candidates upon request. Thus, no further inquiries relating to *criteria A* are necessary, and my analysis below only concerns marking criteria B and C.

I furthermore note that EPSO's opinion essentially refers to two categories of concerns that, in its view, explain the current practice of keeping marking criteria B and C secret. First, EPSO refers to the limits laid down by the Staff Regulations and the case-law. Second, EPSO states concerns that seem to refer to the possibility that

information given to candidates about marking criteria might be misleading or not understood correctly by candidates and that such criteria may not be adopted at all by certain selection boards.

I will discuss these two categories of concerns separately in the following parts 1 and 2, addressing first the concerns relating to the possibility that information given to candidates about marking criteria might be misleading or not understood correctly and that such criteria may not be adopted at all by certain selection boards. Following that, I will, in Part 3, explain the underlying needs for disclosure.

1 EPISO's concerns relating to the possibility that marking criteria may not be adopted at all by a selection board and that information given to candidates about marking criteria might be misleading or not understood correctly by them

1.1 First, I would like to reiterate that my inquiry concerns the marking criteria actually established by the selection boards, not the question whether such criteria should be established.

The example given in point 17 of EPISO's opinion suggests that the final correction made at the full meeting might have not been based on certain provisional marking criteria, established by the board. In this regard, I would to make clear that my present inquiry concerns the *final* marking criteria established by the Board, on the basis of which the Board made the (comparative) assessment of the candidates' merits, reflected in the marks it communicated to them.

1.2 EPISO argues (point 16 of its opinion) that the communication of marking criteria might mislead candidates into believing that these criteria would also be applicable to other competitions (of the same type). This is not a valid and adequate ground for refusing, in general, to communicate the marking criteria, because (i) the mere fact that some candidates might believe what EPISO indicated does not mean that the information provided about the marking criteria established and applied in the context of the specific competition can reasonably be characterised as misleading; (ii) in any event, if EPISO is concerned about the possibility that certain candidates might wrongly believe what it has indicated, it may include a relevant, appropriately formulated, clarification in the document communicating the marking criteria to the candidates who have asked to be granted access to them.

1.3 In its opinion, EPISO presented a hypothetical example (point 12, a selection board's decision not to penalise the absence of accents in translation test, because of very low level of linguistic knowledge on the part of the candidates, taking into account the needs of the departments concerned) in which communication of a marking criterion to candidates would not appear to be appropriate, in its view, because "only those who have had the opportunity to assess the overall performance of all the candidates would be in a position to understand it and judge it to be fair". Relatedly, EPISO contended that the correction criteria which

enable the marks to be determined are related to factors which cannot be explained without knowing the performance level of all candidates.

- 1.4 The above argumentation is not convincing because (i) it cannot be reasonably considered that, in general, marking criteria B and C may not be understood and judged fairly by the candidates without knowledge/assessment of the overall performance of the candidates; (ii) where this might be the case, the board could explain the reason for the adoption of a marking criterion, which could be viewed, without such explanations, as unfair; (iii) EPSO's conclusion, in point 15 of its opinion, taken together with its statement in point 13, is not sufficiently clear and appears rather puzzling, in particular as regards compliance with the provisions of the competition notice. Relatedly, it must be noted that the aim of the tests is the verification/evaluation of the abilities and knowledge of the candidates, according to the relevant requirements of the notice of competition (which must be interpreted, *inter alia*, in light of the Community's interest, provided for in Article 27 of the Staff Regulations, in recruiting officials of the highest standard of ability, efficiency and integrity). Hence, the board's decision to relax its correction criteria (for instance by deciding not to penalise certain types of errors), because of the very low average level of performance of the candidates in a given test, may well be explained only by reference to this fact but also be illicit and incompatible with the relevant provisions of the competition notice. Disclosure of the marking criteria thus furthers the need for appropriate transparency in this context, in order to enable verification of the respect (or non-respect) of the principle of fair and equal treatment of candidates, as analysed below.

2 The Staff Regulations and the case-law

- 2.1 Turning to the main issue raised in EPSO's opinion, I first note that the opinion does not expressly refer to the sources concerned. It is clear, however, that EPSO essentially refers to Article 6 of Annex III to the Staff Regulations and the European Court of Justice's decision in the *Innamorati* case.
- 2.2 Article 6 of Annex III to the Staff Regulations (hereinafter *Article 6*) provides as follows: “[t]he proceedings of the Selection Board shall be secret” / “*Les travaux du jury sont secret*” / “*Die Arbeiten des Prüfungsausschusses sind geheim*”.
- 2.3 It is clear from the above that the Staff Regulations do not actually contain any clearly formulated limits in relation to the subject matter of the present inquiry. *Article 6* does not provide any indication as to its purpose, nor as to what should be understood by “*proceedings*” or “*shall be secret*”. In order to understand the implications of *Article 6*, it is therefore necessary to turn to the case-law of the Court of Justice.
- 2.3 The purpose of *Article 6* has been identified by the Court of Justice in, amongst others, the above-mentioned *Innamorati* case. In this case, the Court of Justice was called upon to review specifically the extent of the selection board's *duty to*

state reasons for its assessment of candidates. In so doing, the Court made a number of observations and comments regarding *Article 6*.

- 2.4 In paragraph 24 of its decision, the Court noted the purpose of *Article 6*: (underlining added):

"As the Court of Justice has already had occasion to state, that secrecy was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the Community administration itself or the candidates concerned or third parties."

The *Innamorati* Court further noted (paragraph 24) that "[o]bservance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates (*Case 89/79 Bonu v Council* [1980] ECR 553, paragraph 5)."

- 2.5 On the basis of the above, the Court concluded that

"Having regard to the secrecy which must surround the proceedings of a selection board, communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based." (Paragraph 31.)

- 2.6 It clearly followed from this that, in order to comply with its legal duty to state reasons, the selection board was not obliged to provide the applicant with other information than the mark that s/he had obtained in the test concerned.

- 2.7 One such category of information that the board was not legally obliged to disclose in order to comply with its above duty was "marking criteria adopted by the selection board". The Court commented on this in one paragraph in its decision, as follows:

"The criteria for marking adopted by the selection board prior to the tests form an integral part of the comparative assessments which it makes of the candidates' respective merits. They are designed to guarantee, in the candidates' own interests, a certain consistency in the board's assessments, especially where there is a large number of candidates. Those criteria are therefore covered by the secrecy of the proceedings in the same way as the selection board's assessments." (Paragraph 29.)

The specific rule thus inferred from *Article 6*, by the Court, was that the marking criteria adopted by the selection board prior to the tests, which form an integral part of the comparative assessments it makes of the candidates' respective merits, are covered by the secrecy of the proceedings "in the same way" as these assessments.

- 2.8 Furthermore, it seems appropriate to refer summarily to certain relevant arrangements, made by the Commission and, subsequently, by EPSO, obviously after taking into account the secrecy requirements referred to in paragraphs 24 and 29 of *Innamorati*. First, the former Commission President Prodi decided, in 1999, in response to an own-initiative inquiry launched by my predecessor, to "*propose the necessary legal and organisational arrangements to give candidates access to their own marked examination papers, upon request, from 1 July 2000 onwards.*"¹ The principal arrangement that was adopted consisted of providing candidates, upon request, with their marked examination paper accompanied by the selection board's final evaluation sheet.
- 2.9 EPSO has gone a considerable way to continuously improve this arrangement. In the context of the Ombudsman's inquiry into complaint 2028/2003/PB, EPSO announced its decision to increase and enhance the information provided to candidates on the selection board's final evaluation sheet. An example of such a new style of final evaluation sheet was provided to the Ombudsman's staff at the initial meeting organised for the purpose of the present inquiry. The notice of competition for the competition concerned had merely stated "*[t]he written test, in your language 1, is designed to test your administrative skills in relation to the field chosen for the competition*". The selection board had therefore adopted more specific marking criteria. In the new style of final evaluation sheet, applied to the competition concerned, the candidate was specifically informed that "*[p]our évaluer votre prestation, le jury s'est basé sur les critères suivants:*". These criteria were then outlined under two main criteria (first, "Connaissance du domaine", second, "Capacité de rédaction dans la langue principale"). Following this, for each of these two main criteria, the candidate was informed of an "évaluation générale", which for each main criteria indicated either "Très bien", "Bien", "Moyen" or "Insuffisant". Finally, the candidate was informed of an "Appréciation littérale", essentially conveying information as to whether his/her paper had been assessed as "excellente", "bonne", "moyenne" or "insuffisante".
- 2.10 The introduction of the improved style of evaluation sheet, which, if I have understood correctly, is now used as a matter of standard practice, surely contributes substantially to the provision to candidates of useful information both on the marking criteria adopted by the selection board and on the selection board's final collective assessment of the examination paper concerned, made on the basis of these criteria.
- 2.11 The information provided by EPSO, in the present inquiry as well as in other complaint based inquiries, is that the final evaluation sheet actually contains the selection board's final collective assessment of the examination paper concerned. To the extent that the candidate's file contains any preceding "provisional" formal assessments, these figure in the form of evaluation sheets filled in by two or more independent evaluators who assist the board in its work, and on the basis of

¹ Cf. press release no 16/99 of the European Ombudsman of 15 December 1999.

which the board may or will lay down its final global assessment on the final evaluation paper.

It thus seems accurate to say that the global final assessment of the selection board actually appears on the final evaluation sheet, a copy of which is currently provided to candidates upon request.

The standard of secrecy currently applied to the selection boards' assessments in written exams is therefore that the *final global* assessment can and will, in principle, be disclosed upon request.

- 2.12 This by no means put into question the applicability of *Article 6* to the deliberations of the selection board, in particular the importance of keeping provisional and individual views of the board members secret, a secrecy need that neither I nor my predecessor have ever put into question.
- 2.13 It follows that the standard of secrecy to be applied to "*the criteria for marking adopted by the selection board prior to the tests*" should logically be the same and that the final versions of such marking criteria ought, in principle, be disclosed upon request, since "[t]hose criteria are [...] covered by the secrecy of the proceedings in the same way as the selection board's assessments".
- 2.14 Such a possibility does not only tie in with the recent and important developments toward openness at the administrative level. It also finds support in relevant judgments of the Court of First Instance and related interpretations.
- 2.15 I have previously drawn your attention to the *Pyres* case, in which the Court of First Instance, while confirming that the Community institution in that case was not legally obliged to disclose the selection board's marking criteria as a consequence of the duty to state reasons specifically, made the following findings (underlining added)².

"70. Cette conclusion n'implique pas que les candidats à un concours qui en font la demande ne puissent, le cas échéant, obtenir la communication des critères généraux de correction des épreuves ainsi que leurs copies corrigées, en vertu d'une pratique visant à accorder l'accès à de tels documents, adoptée par l'institution qui organise le concours dans le but de concilier les exigences de transparence des procédures de recrutement avec la règle du secret des travaux des jurys, inscrite à l'article 6 de l'annexe III du statut.

71. De même, il n'est pas exclu qu'une obligation en ce sens, lorsque la divulgation de tels documents s'avère compatible avec

² Case T-72/01 *Pyres v Commission* [2003] ECR-SC I-A-169 and II-861, cf. also Case T-233/02 *Alexandratos and Panagiotou v Council* [2003] ECR-SC I-A-201 and II-989, paragraph 36.

le respect de la règle du secret des travaux des jurys et avec les exigences impératives d'ordre public qui la sous-tendent, puisse peser sur les institutions communautaires non pas au titre de l'article 25 du statut et de leur devoir de motivation mais en application des actes visant à donner exécution, conformément à l'article 255, paragraphe 1, CE, au droit d'accès du public aux documents.

- 2.16 This decision has already given rise to new interpretations and applications of the law in this area, for instance by the Council in its response to the Ombudsman's draft recommendation in 2097/2002/GG. In that case, the Council initially refused to grant access to the complainant's marked examination paper. However, following a draft recommendation of the Ombudsman, and following which the Court of First Instance gave judgment in the *Pyres* case, the Council decided to disclose to the complainant both her examination paper and the selection board's final evaluation sheet, making the following comments (underlining added):

"I am pleased to inform you that I have decided to accept your draft recommendation and to allow the complainant access to her own marked examination paper. A copy of her paper submitted for examination C. (b) on personal computer as well as its evaluation by the Selection Board will be sent to her today by surface mail.

In consideration of the Staff Regulations of Officials and the very recent jurisprudence of the Court of First Instance in case T-72/01 [i.e. the Pyres case], the communication of these documents can be considered not to counter the secrecy principle inherent in the Selection Board's proceedings. At the same time, according to Article 6 of Annex III to the Staff Regulations of Officials, the opinions reached by individual members of the Selection Boards have to remain secret in order to guarantee their independence and the objectivity of their proceedings."

- 2.17 Although the Court of First Instance has subsequently refrained from finding that there is a legal *obligation* to disclose the documents referred to above, it has seemingly concurred with the Council's position in so far as the latter considered that there is nothing to legally *prevent* it from so disclosing those documents (see *Le Voci*³).
- 2.18 More recent developments have taken place in the field of protection of personal data. On 24 February 2006, the European Data Protection Supervisor (EDPS) issued an opinion on the system of "Recruitment, by competition, of permanent staff for the European institutions or for Community bodies, offices and

³ Case T-371/03, *Le Voci v Council*, ECR 2005, p. IA-209; p. II-957, paragraph 126.

agencies" (Case 2004-236⁴). In his opinion, the EDPS examined the issue of candidates' right of access to the marks assigned at the oral tests, making the following findings (underlining added):

"Two fundamental points emerge from an analysis of the Court's case law: on the one hand the importance of the secrecy of selection board proceedings, as provided for in Article 6 of Annex III to the Staff Regulations and on the other hand the fact that the Court has no jurisdiction to review the selection board's value judgments unless there is a clear infringement of the rules governing selection board proceedings. These principles are nevertheless entirely compatible with revealing the details of the mark assigned at the oral test.

There seems to be a clear contradiction between the fact that assessments made by the selection board on the written test (overall assessment sheet) can be obtained and the fact that detailed marks for the oral test cannot be obtained if the notice of competition specifies the areas of assessment in the oral test, a provision which ought to be the general rule. There is no fundamental difference between revealing partial marks and revealing an overall mark and there is nothing here to infringe the principle of secrecy of selection board proceedings. Just as the secrecy of selection board proceedings does not prevent access to the individual assessment sheet showing selection board assessments for the written test, it cannot be invoked as a reason for not revealing detailed marks for the oral test.

The applicants' right of access to information concerning them directly and individually must in this instance be more strictly complied with. It enables applicants to see which elements were taken into account for the overall assessment. Access to such data should be offered on the basis of Article 13 of the Regulation, thus not implying any right of rectification. Right of access under Article 13 of the Regulation does not serve the same purpose as under Article 14 of the Regulation (right of rectification). The applicants' right of access enables them to see that the selection board has acted fairly and objectively. Such a right does not

interfere in any way with the principle of equal treatment of applicants since it is open to all of them.

The right of rectification, on the other hand, can obviously apply only to factual data. Marks allocated could not under any circumstances be open to a right of rectification by the data subject.

The European Data Protection Supervisor recommends that EPSO indicates, as a general rule, in future notices of competition published in the Official Journal the various areas in which applicants will be assessed and the breakdown by percentage allocated to each area in the overall mark, except where it is objectively impossible to do so for certain extremely specific competitions. EPSO will thus have to inform applicants that this possibility is open to them and that it is covered by the right of access provided for in Article 13 of Regulation No 45/2001 but not by the right of rectification."

- 2.19 EPSO has subsequently informed me of its response to this, by sending me its "Notification to the Data Protection Officer DPO-336 version 1", of 20 November 2006. Under Point 15 b) (concerning the procedures put in place to enable Data Subjects to exert their rights of access, verification etc.), the following is noted:

"Par ailleurs, l'avis du concours informe les candidats de leur droit d'accéder aux informations les concernant directement et individuellement. En vertu de ce droit, EPSO peut leur fournir, s'ils en font la demande, des informations supplémentaires concernant leur participation au concours. Les demandes sont traitées en tenant compte du caractère secret des travaux du jury et dans le respect des règles relatives à la protection des personnes physiques à l'égard du traitement des données à caractère personnel. Les informations pouvant être fournies dans ce cadre sont les suivantes: s'il s'agit d'un concours avec des tests écrits (hors CBT) de présélection, les candidats pourront obtenir sur demande une copie de leurs réponses ainsi qu'une copie de la grille des réponses exactes. Pour l'épreuve écrite, ils pourront obtenir sur demandes une copie de leur épreuve ainsi que de la fiche d'évaluation individuelle reprenant les appréciations formulées par le jury sur cette épreuve. Pour l'épreuve orale, ils pourront recevoir leur note globale et de la même manière lorsqu'ils le demandent les notes partielles a l'oral dans tous les cas ou l'AIPN aurait jugé opportun de définir de manière plus stricte le cadre légal a respecter par le jury".

- 2.20 I do not consider it necessary to comment in detail on the EDPS' findings quoted above or EPSO's corresponding reply. In my view, the EDPS' findings constitute a clear and recent example of the fact that not only practice but also the relevant legal framework has evolved significantly in the area concerned by my present inquiry.
- 2.21 By way of conclusion, it is apparent from the foregoing account that the secrecy practices currently applied in respect to marking criteria B and C are not consistent with the relevant legal and administrative rules as currently applied and understood in practice. At the very least, it seems accurate to conclude that EPSO is legally free to disclose (of course in principle and unless very special circumstances prevent it) the final versions of criteria B and C to candidates who request them following receipt of the mark obtained.
- 2.22 On a broader note, I would like to add to these observations my full and sincere recognition of EPSO's considerable efforts to ensuring the propriety of the recruitment procedures and the assessments that they involve. These efforts - information on which was given to my staff at the meeting of 25 November 2005 and through subsequent related information⁵ - demonstrate a highly professional approach to the preparation and organisation of competitions, and include the important and relevant measures intended to enhance the quality of the drafting and application of marking criteria adopted by the selection boards. In my view, EPSO therefore has every reason to disclose such marking criteria with a view to enhancing the applicants' trust in its own and the boards' work.

3 The requirement for disclosure and its underpinnings

- 3.1 I have on some occasions been left with the impression that EPSO sees my views on the issues here concerned as relating exclusively to an on-going agenda aimed purely at making the EU administration generally more open towards the citizens. However, the needs for greater openness in recruitment procedures are much more specific and wide-ranging than a general openness agenda, however important the latter may be. They include important concerns of legal protection, equality, proportionality and the Community's interest in recruiting officials of the highest standard of ability, efficiency and integrity. I will attempt to explain this in more detail in the ensuing paragraphs.
- 3.2 It seems evident to me - and it is my understanding that EPSO largely agrees with me on this - that a balance has to be struck between the legitimate purpose underlying the secrecy rule of article 6 of Annex III to the Staff Regulations (as that purpose is defined by the case-law of the Community courts), and the need to ensure an appropriate level of transparency, aimed at preserving both the appearance and the reality of fairness in the selection boards' work and decisions. The case-law of the Court of First Instance has already made reference to the

⁵ For instance the 'Guide for Selection Boards and Selection Committees', EPSO December 2005.

communication to the candidates of the correction and marking criteria established by the selection boards, with a view to reconciling the secrecy rule with the requirements of transparency in the recruitment procedures (see the above-mentioned *Pyres v Commission*⁶ and *Alexandratos and Panagiotou v Council*⁷). The selection boards must be adequately protected from all external interference and pressures when they perform their difficult and important task, but this protection cannot justify, as explained below, the keeping of the marking criteria away from the public eye and scrutiny, after the communication of the marks.

- 3.3 The fairness of the selection boards' operations serves not only the legitimate interests of the candidates but also the Community's vital interest in recruiting officials of the highest standard of ability, efficiency and integrity⁸. It presupposes respect of the principle of equal treatment of candidates, which constitutes a general principle of Community law⁹. This principle is comparable to the principle of equal treatment of persons competing for the award of a tender (e.g., contract for the provision of services to the Community), which is also considered as a general principle of Community law¹⁰. The latter principle implies a duty of transparency, aimed at enabling verification that this principle has been complied with¹¹. Although tender award procedures and EPSO competitions may not be comparable in certain respects, the risk of non-compliance (not necessarily deliberate, but also likely to result from the absence of sufficient diligence on the part of the decision-making body) with the requirement for fundamental fairness, including that for equal treatment of the applicants concerned, is surely present in both contexts. Accordingly, the requirement for fair and equal treatment of candidates may (and, in my view, should) also be considered as implying a duty of sufficient transparency in the works of the Selection Board, to enable review of whether or not it has been respected. This approach is in harmony with and fulfils the Community's commitment for openness in the activities of its institutions, as expressed in Article 1 of the EU Treaty and in Articles I-45 and I-50 of the draft EU Constitution.

⁶ Case T-72/01 *Pyres v Commission* [2003] ECR-SC I-A-169 and II-861, paragraph 70).

⁷ Case T-233/02 *Alexandratos and Panagiotou v Council* [2003] ECR-SC I-A-201 and II-989, paragraph 36.

⁸ See Article 27 of the Staff Regulations.

⁹ See, for instance, Case T-173/99 *Elkaïm and Mazuel v Commission* [2000] ECR-SC I-A-101 and II-433, paragraph 87.

¹⁰ See for instance Case C-57/01 *Makedoniko Metro*, [2003] ECR I-1091, paragraph 69. Both principles form part of the broader principle of equality, which is a general principle of Community law (see, for instance, Case 810/79, *Peter Überschär v Bundesversicherungsanstalt für Angestellte*, ECR 1980, p. 2747 (paragraph 16) and C-15/95, *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trioux*, ECR 1997, p. I-1961, paragraph 35. The principle of non-discrimination requires, inter alia, that different situations must not be treated in the same way unless such treatment is objectively justified: see Case C-344/04 *International Air Transport Association*, judgment of 10 January 2006, not yet reported, paragraph 95.

¹¹ See Case C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745, paragraphs 61-62.

- 3.4 Compliance with the above duty means that the secrecy rule of Article 6 of Annex III of the Staff Regulations should be interpreted in a way compatible with its performance. And, in any event, the secrecy rule must be interpreted in accordance with its intended purpose and the principle of proportionality, which is not only a basic good administration requirement (Article 6 of the European Code of Good Administrative Behaviour), but is also recognised as a general principle of Community law¹². This implies, in particular, that the secrecy rule, both in itself and as an exception to the above-mentioned transparency requirement (and the correspondent right, or protected interest, of the candidates to be granted access to documents and information held by EPSO), must be interpreted and applied in a manner which is reasonably tailored to serve the rule's legitimate objective. In this regard, I think that a presumption of honesty and integrity in those serving as members of the Selection Boards must also be weighed in the balance, in favour of the need for transparency; indeed these persons must be assumed to be men and women of conscience and discipline, capable of resisting to illicit external interference and pressures and preserving the objectivity and impartiality of the evaluation procedure.
- 3.5 In light of the above, it seems to me that, at the present stage of the development of the Community legal order, even marking criteria B and C should, at least in principle, be accessible to candidates, once the board has communicated to them their marks and its decisions based on these marks. I note, first, something which both the Court of Justice and EPSO have clearly indicated: that the establishment and application of these criteria is directly and closely related to the need for fair, equal treatment of candidates, in the context of the assessment of their replies. Indeed in *Innamorati* (paragraph 29), the Court observed that the criteria for marking adopted by the selection board prior to the tests "*are designed to guarantee, in the candidates' own interests, a certain consistency in the board's assessments, especially where there is a large number of candidates*". And in its opinion, EPSO stated that such factors include "criteria that will serve as a framework for the persons marking the tests" and "standards for ensuring equal treatment of candidates". I think there is no need to elaborate on this matter: it is quite clear that, in particular in the context of the *comparative* assessment of the abilities of the candidates, as demonstrated through their replies, the propriety of the criteria at issue is of fundamental importance to the fairness of the evaluation process.

Although the selection boards normally enjoy a wide margin of discretion when they determine these criteria, this discretion must be exercised in a way which is compatible not only with the provisions of the notice of competition but also with other applicable legal rules and principles¹³, including the principle of equal

¹² See for instance Case C-384/05, *Piek*, judgment of 11 January 2007, paragraph 34 and references therein, not yet published in the ECR.

¹³ Cf. case T-291/94, paragraph 63, and *Le Voci*, referred to above, paragraph 64.

treatment of candidates¹⁴. If a board has exercised its above discretion in disregard of the principle of equal treatment of candidates, its comparative evaluation of the candidates' replies, is (if not necessarily, at least) likely to be tainted by a "structural" error, vitiating the fairness of the evaluation process and its outcome (marks awarded). Hence, communication of these criteria to the candidates who wish to acquire knowledge of them, apart from reassuring the candidates concerned that the selection board has nothing "suspicious" to hide as regards such important, generally applicable, factors of the evaluation of their replies, also permits the candidates to assess the compatibility of these criteria with the legal rules and principles that the selection board is bound to respect when determining those factors.

Further, in case of a relevant complaint to the board, it allows it to reconsider the matter and either explain to the complainant the legality of its actions or correct its illegal behaviour, in the interest both of the candidates concerned and the Community. Moreover, in case a relevant action or complaint is lodged with the competent Community Court or the European Ombudsman, it preserves the useful effect of the right to file such an action or complaint, by enabling the Court or the Ombudsman to exercise, in a meaningful way, its or his powers of review and examine whether the board manifestly exceeded the limits of its discretion in the context of the evaluation of the candidates' replies¹⁵.

- 3.6 With respect to the other side of the scale in the above-mentioned balance, and the interpretation of the secrecy rule in accordance with its intended purpose and the principle of proportionality, I recognise the importance of the Community's interest in adequately protecting the members of the selection boards from all external interference and pressures when they perform the sensitive task of (comparative) evaluation of the candidates' replies and of the determination of their marks. Imposing a duty to grant candidates' requests for access to the marking criteria on the basis of which the comparative assessment and the marking of their replies is to be made, at a time when this procedure has not yet started or is still ongoing and the selection board has not yet finalised the results and communicated its relevant decisions along with the marks, is likely to cause a serious disruption in the board's works and even to threaten or undermine the integrity and impartiality of its proceedings, following reactions amounting to "external interference and pressures"¹⁶.

Nevertheless, the situation changes significantly when the above procedure is completed and the communication of the marks and relevant decisions has taken place. At this stage, the risk of disruption of the board's above-mentioned works exists no more. Moreover, the members of the selection board, who are presumed

¹⁴ See Case 144/82, *Detti v Court of Justice*, ECR 1983, p. 2421, paragraphs 28-30.

¹⁵ Cf., in particular, the *Detti* case, referred to above, paragraph 27-30, and 32.

¹⁶ For example, the Board might be put under pressure to modify or add certain evaluation criteria not for objective reasons but in order to "adapt" them to the performance and abilities of certain candidates.

to be persons of honesty and integrity, would appear to be even less susceptible and vulnerable to illicit "external interference and pressures"¹⁷, at this stage of the procedure, where the decisions have already been made and communicated to the persons concerned and any changes in the marks awarded and correspondent modifications in the list of successful candidates should be duly reasoned and sufficiently transparent. In any event, following the communication of the results, illicit external pressure may be exercised on the selection board and lead to instances of favouritism, even in the absence of communication of the correction criteria on which the board's comparative assessments were based. Most importantly, the compelling need for transparency discussed above clearly outweighs, at this stage of the procedure, the interest in avoiding a simple, purely hypothetical and merely conjectural, risk of favouritism, following the exercise of illicit pressure on the Selection Board, somehow connected to the communication of the marking criteria it has established and applied.¹⁸

Final remarks

By way of final remarks and summary, I emphasise again the fact that not only practice but also the relevant legal framework has evolved significantly in the area concerned by my present inquiry, which has led me to the conclusion that EPSO is legally free to disclose (of course in principle and unless very special circumstances prevent it) the final versions of criteria B and C to candidates who request them following receipt of the mark obtained. The disclosure could take place at the same time as the disclosure of the final evaluation sheet, currently released upon request following communication of the mark to the candidate.

I have furthermore pointed out, and would like to here repeat, my full and sincere recognition of EPSO's considerable efforts to ensuring the propriety of the recruitment procedures and the assessments that they involve. These efforts demonstrate a highly professional approach to the preparation and organisation of competitions - including the drafting and use of criteria - in light of which disclosure of the marking criteria established by the selection boards could only enhance the applicants' trust in EPSO's and the boards' work.

I have finally emphasised that the requirement for disclosure is far from related solely to a general aim of making the EU administration more transparent, but is underpinned by important concerns about the Rule of Law, the fairness of the

¹⁷ Formal complaints or requests for reconsideration, usually provided for in the notice of competition, cannot be deemed as "external interference and pressures", as this phrase is used in paragraph 24 of *Innamorati*, to the extent such requests or complaints are supported by arguments concerning the fairness of the evaluation carried out and are not accompanied by illicit attempts to influence their outcome.

¹⁸ Relatedly, it must also be noted that the exercise of illicit pressure on the Selection Board at this stage of the competition will normally aim at bringing about the change of the marks awarded on the basis of a reasoning which would not be likely to give rise to questions about the fairness of the whole evaluation procedure or necessitate its repetition. However, a reasoning involving changes in the evaluation criteria applied by the Board would not be of this kind.

evaluation process, and the EU's interest in ensuring recruitment of the most qualified personnel.

I would be grateful if you could inform me, by 15 September 2007, of your views on my above analysis and related suggestions. I would furthermore be grateful if you could inform me whether your views also apply to the question of access to marking criteria laid down for the purpose of *oral* tests, and if so how.

Needless to say, I would be entirely open to any proposal to have the matter further discussed at a meeting between relevant members of our respective services.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Diamandouros', with a long horizontal line extending to the right.

P. Nikiforos Diamandouros