

# TRANSPARENCY IN THE STAFF SELECTION PROCEDURE OF THE EU INSTITUTIONS: COMMENTS ON THE PACHTITIS CASE

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*As one of the key principles governing the activities of the civil service of the European Union, transparency has become more and more important in the decision-making process, activities of the institutions, budget and staff-selecting process. The European Personnel Selection Process (EPSO) -the body in charge of organising the competitions to become EU staff- must ensure it in the selection procedures for the future employees. As a result of the efforts of the EU to apply that principle, candidates of the competitions have been able to get access to information on their performance in those exams. Furthermore, the Court of Justice of the EU has recognised such transparency of the EU administration towards the candidates in competition selection procedures. In 2007, a candidate in a staff selection process appealed the decision of EPSO to exclude him from the competition and alleged, amongst other grounds, a failure to comply with the EU principle of transparency. Despite the fact that there have been judgments and decisions, the issue has not been entirely addressed by both the Court of Justice of the EU and the European Ombudsman. The purpose of this paper is to assess that possible breach of the principle of transparency in the particular Pachtitis case.*

Keywords: CJEU, EPSO, EU Administration, EU Law, EU Institutions, Staff Selection, Transparency.

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## I. INTRODUCTION

*Subject delineation.* Transparency is one of the key principles governing the activities of the civil service of the European Union (EU).<sup>1</sup> From the Treaty of Maastricht to the Lisbon Treaty, transparency has become more and more important for an EU whose fight against opacity in the decision-making process has reinforced its democratic character and enhanced the public confidence towards it<sup>2</sup>. All the European institutions, bodies, offices and agencies have to work in the most open way possible and enable

<sup>1</sup> European Ombudsman, ‘Public Service Principles for the EU Civil Service’ (*European Ombudsman website*, 2012) <[www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces](http://www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces)> accessed 6 June 2014.

<sup>2</sup> For the European Ombudsman, ‘transparency has been the subject of growing recognition in Europe, starting with Declaration No 17 on the right of access to information annexed to the Final Act of the Treaty on European Union, which was signed in Maastricht on 7 February 1992, and culminating in the adoption and solemn proclamation of the Charter of Fundamental Rights’. European Ombudsman, Decision of 9 March 2009 on own-initiative inquiry, OI/4/2007/(ID)MHZ, [32].

citizens, residents and legal entities in the EU to exercise the right to access to their documents under certain principles and conditions<sup>3</sup>. Moreover, the Financial Regulation also foresees the principle of transparency when establishing and implementing the EU budget.<sup>4</sup>

However, not only must the principle of transparency be applied to the EU institutions' activities, decision-making process or budget but also to its staff selection process.<sup>5</sup> In this sense, the European Personnel Selection Office (EPSO) – the body in charge of organising the competitions to become a member of the EU staff – must ensure transparency in the selection procedures for future officials.<sup>6</sup> As a result of the efforts of the EU to apply that principle, candidates have been able to get access to information on their performance in the competition tests.<sup>7</sup> Furthermore, European case law has recognised such transparency of the EU administration towards candidates in competition selection procedures.<sup>8</sup>

*Problems.* In 2007, a candidate appealed the decision of EPSO to exclude him from the competition. That candidate, Mr Dimitrios Pachtitis, followed a series of legal and administrative actions before the European institutions and bodies to challenge this decision and alleged, amongst other grounds, a failure to comply with the EU principle of transparency. EPSO is an EU inter-institutional body which plays a key role in the organization of transparent competition exams to become a member of the EU staff. The candidate requested a review of the decision as well as a copy of his questions and answers in those tests, together with a copy of the sheet of correct answers and he also asked to be informed about which questions had been annulled later.

Despite insisting, all that Mr Pachtitis managed to get was a statement several months later with the number of questions, the letters corresponding to his answers and those corresponding to the correct

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<sup>3</sup> Article 15 of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

<sup>4</sup> European Commission, Commission Regulation (No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (Financial Regulation) [2002] OJ L357/1.

<sup>5</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (Staff Regulations) [1962] OJ L 45/1385, arts 3.5 and 12.3.

<sup>6</sup> *ibid.*

<sup>7</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [33].

<sup>8</sup> Case T-72/01 *Pyres v Commission* [2003] ECR-SC-IA-169 and II-86I, [70]; Case T-371/03 *Le Voici v Council* [2003] ECR SC-IA-209, [126].

answers as well as the assurance that his tests did not include any of the annulled questions. Moreover, so far a series of circumstances have prevented a correct assessment and consideration of the potential breach of the principle of transparency. The fact that EPSO apparently seems to fall outside the scope of the EU rules on transparency (Regulation 1049/2001) has been one of the reasons. There have also been problems of competences between the different courts of the Court of Justice of the EU (CJEU or the Court). Furthermore, the body in charge of watching over the good administration of the EU institutions and bodies (the European Ombudsman) has had to refrain due to the fact that the principle of transparency was under judicial review before the CJEU and both the Treaty on the Functioning of the EU (TFEU) and the Ombudsman's own Statute prevent it from acting in those situations. The purpose of this paper is to assess the possible breach of the principle of transparency in the particular *Pachtitis* case.

*Structure.* The main question addressed in this paper is the application of the principle of transparency in the EU staff selection process by analysing the *Pachtitis* case. This study has been divided into four parts. The paper begins with the establishment, administration and tasks of EPSO as well as giving a brief overview of the staff selection procedure and how the principle of transparency is ensured in it. It will then go on to review the controversy through: the facts of the *Pachtitis* case; the three times that the CJEU considered the case; and the opinion of the European Ombudsman, as guardian of good administration in the EU institutions, through inquiries on this case and others related. The third section analyses the possible failure to comply with the principle of transparency from three points of view: Regulation 1049/2001 on the access to European Parliament, Council and Commission documents; the European Code of Good Administrative Behaviour; and the relevant case-law of the CJEU. Finally, the fourth section provides the conclusions.

*Method followed and materials used.* A case study approach was chosen to analyse the application of the EU principle of transparency in the staff selection procedure. The methodology to carry out this study has obviously included bibliographic research and document review through a series of EU primary and secondary legislation, case-law and websites. A major problem in analysing the breach arose because all the facts from the case were obtained after examining the relevant judgments and decisions of the CJEU and the European Ombudsman respectively. In this sense, further collection of information is required to corroborate the facts and evaluate exactly the content of the correspondence exchanged between EPSO and Mr Pachtitis.

*Originality.* The EU staff selection procedure must be transparent in order to be consistent with democracy and the principle of good administration as well as the strengthening of public confidence on the EU.<sup>9</sup> If the principle is not adhered to, it risks undermining public confidence in the EU institutions and dissuading potential candidates to participate in the selection processes.<sup>10</sup> When discussing the EU staff recruitment procedure, the *Pachtitis* case has been a hot topic in the last few years due to the many times that the CJEU had to deal with the controversy.<sup>11</sup> The judgments of the CJEU in favour of Mr Pachtitis led to a decision adopted by EPSO allowing those candidates excluded after the first stage of the 2010 competition to retake their exams. Since EPSO decided not to open new annual competitions but to allow those unsuccessful candidates to retake the exam instead, this had effect on the thousands of applicants who decide every year to participate in the competition with the hope of becoming EU officials.<sup>12</sup> A lot has been said about the lack of authority of EPSO to exclude Mr Pachtitis from the process<sup>13</sup>, but this author is not aware of any publication analysing the possible failure to comply with the principle of transparency despite the fact that it was one of the grounds alleged by Mr Pachtitis. Furthermore, neither the CJEU nor the European Ombudsman have managed so far to address the issue entirely, mainly because of problems related to the competences of each body.<sup>14</sup> In this sense, this study seeks to analyse the case from the point of view of the legal aspects of the principle of transparency.

## II. THE EPSO AND TRANSPARENCY IN THE COMPETITIONS TO BECOME AN EU OFFICIAL

The European institutions select their permanent staff through competitions composed of several exams and open to any EU citizen who meets the preconditions needed. The aim of the competitions is not to fill positions but to provide a list of candidates for the institutions to choose from for future positions. Thus, a successful candidate does not immediately become a member of the EU staff. The competitions are

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<sup>9</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [32].

<sup>10</sup> *ibid.*, [32-34].

<sup>11</sup> 'Summaries of the Rulings of the Court of Justice of the EU on the *Pachtitis* case' (*Europa website*, 21 December 2012) <[http://europa.eu/epso/doc/news\\_en.pdf](http://europa.eu/epso/doc/news_en.pdf)> accessed 17 May 2013.

<sup>12</sup> 'EPSO statement' (*Europa website*) <[http://europa.eu/epso/doc/statement\\_en.pdf](http://europa.eu/epso/doc/statement_en.pdf)> accessed 7 May 2013.

<sup>13</sup> Case F-35/08 *Pachtitis v Commission* [2010] (Civil Service Tribunal, 15 June 2010); Case T-361/10 *P Commission v Pachtitis* [2011] ECR II-08225; European Ombudsman, Decision of 9 March 2009 (n 2).

<sup>14</sup> *ibid.*

organised by EPSO but there is a selection board which is appointed to select the candidates on the basis of their performance and the requirements set by the competition notice.<sup>15</sup> Such a process must be governed by the principle of transparency as laid out by the relevant EU primary and secondary legislation and case-law.

### 1. *What is the European Personnel Selection Office (EPSO)?*

On 25<sup>th</sup> July 2002 EPSO was created by Decision 2002/620/EC.<sup>16</sup> Moreover, Decision 2002/621 of 25 July 2002 regulates its organisation and operation.<sup>17</sup> EPSO's aim is to provide a list of candidates from which all the European institutions and bodies can recruit staff. It is important to note that EPSO was created in the context of the EU enlargement in 2004 and thus the main priority at its establishment was to organise open competitions for citizens of the new Member States.<sup>18</sup> EPSO became operational as of 1<sup>st</sup> January 2003 and since then it has organised more than 700 open competitions and selected over 20,000 qualified candidates who have been placed on reserve lists, out of which more than 15,000 have been recruited by the European Institutions.<sup>19</sup>

There are several categories of staff at the EU institutions.<sup>20</sup> A distinction must be made between permanent employees (officials) and temporary ones. Permanent employees are either administrators (AD) or assistants (AST), which are all selected through a competition organised by EPSO.

Amongst the temporary staff there are contractual agents, temporary

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<sup>15</sup> European Personnel Selection Office (EPSO), Guide to open competitions [2012] OJ C270 A/1, p 3.

<sup>16</sup> Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing a European Communities Personnel Selection Office [2002] OJ L 197/53.

<sup>17</sup> Decision 2002/621/EC of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of the European Communities Personnel Selection Office [2002] OJ L197/56.

<sup>18</sup> 'About EPSO' (*EPSO website*) <<http://europa.eu/epso/about/>> accessed 29 May 2013.

<sup>19</sup> European Personnel Selection Office (EPSO) & European School of Administration (EUSA), 2012 Annual Activity Report <[http://ec.europa.eu/atwork/synthesis/aar/doc/epso\\_eusa\\_aar\\_2012.pdf](http://ec.europa.eu/atwork/synthesis/aar/doc/epso_eusa_aar_2012.pdf)> accessed 25 May 2013.

<sup>20</sup> 'Types of employment' (*EPSO website*) <[http://europa.eu/epso/discover/types\\_employment/index\\_en.htm](http://europa.eu/epso/discover/types_employment/index_en.htm)> accessed 2 May 2013.

agents, interim staff, seconded national experts and trainees. Contractual agents are employed for a contract between one and three to five years whereas temporary agents are hired for a maximum period of six years. Interim staff are signed up on a very short term and temporary basis (up to 6 months), through temping agencies. Seconded national experts are supported by the Member States' public administrations for a certain period of time up to four years. Trainees can be either paid (blue book stagiaires) or unpaid (stagiaires 'atypiques').<sup>21</sup> From all the categories of temporary staff, EPSO only organises the selection for contractual agents. Thus, EPSO is only responsible for the competitions to become permanent staff and contractual agents. When doing so, EPSO is obliged to ensure the transparency of the process.<sup>22</sup>

## 2. *How Are the Competitions Performed and How Is Transparency Ensured?*

In order to participate in the competition exams, candidates must register online and submit their application files. The competitions for permanent staff consist of at least two stages: the first has a series of tests which may vary depending on the competition and leads to the second stage, which is the assessment centre to which only the most successful candidates of the first stage are admitted.<sup>23</sup> The selection board appointed for the competition assesses the performance of the candidates and selects those who finally end up in the reserve list. The competitions for contractual agents include a first stage and afterwards there is a competency test.<sup>24</sup> The successful candidates in both processes only become EU staff if the services of the institutions select them.<sup>25</sup>

Before 2005, the competition exams included pre-selection tests, both written and oral<sup>26</sup>. In those pre-selection tests, the candidates were allowed to leave the examination room with the paper containing the questions of the exam.<sup>27</sup> They were also allowed to request and receive detailed information about their answers (ie which questions they had answered correctly or incorrectly).<sup>28</sup> However, in 2005, EPSO decided to alter the exams and the pre-selection tests were replaced by multiple choice computer based tests (CBTs).<sup>29</sup> These CBTs allow each participant to take

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<sup>21</sup> To check all the different types of employment please read EPSO website, *ibid*.

<sup>22</sup> Staff Regulations (n 5).

<sup>23</sup> EPSO Guide to Open Competitions (n 15).

<sup>24</sup> This varies depending on whether it is a specific or general contract agent selection process, *ibid*.

<sup>25</sup> *ibid*.

<sup>26</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [2].

<sup>27</sup> *ibid*, [1].

<sup>28</sup> *ibid*.

<sup>29</sup> EPSO, Annual Activity Report 2005

the exam in a special centre prepared to carry out such tests on a date chosen by the participant and within a specific and defined period of the year.<sup>30</sup> For that reason, EPSO carried out a call for tender to contract an operator of the CBT system which has prepared the tests ever since.<sup>31</sup>

Article 15 TFEU establishes the duty for all European institutions, bodies and offices and agencies to work in the most open manner possible. More specifically, the EU Staff Regulations require EPSO to carry out the procedure in a transparent manner.<sup>32</sup> Furthermore, there have been a series of cases where the CJEU has shaped the jurisprudence on the application of transparency in the selection procedure.<sup>33</sup> In addition, a series of EU secondary legislation governs the right of citizens to have access to the documents of all European institutions and bodies or certain ones in particular (Commission, Parliament and Council).<sup>34</sup>

EPSO also acknowledges the right of candidates to access information when they are directly and individually concerned.<sup>35</sup> However, it refuses to grant access to anything else but the results of the CBTs and, in the event of candidates making it to the second stage, their overall marks for each competency assessed and their competency passport, unless candidates failed to complete the tests.<sup>36</sup> Thus, EPSO publicly states that, when granting access to the results of the CBT tests, '(t)hese will not show the wording of the questions or of the answers, but merely the reference

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<[http://ec.europa.eu/atwork/synthesis/aar/aar2005/doc/epso\\_aar.pdf](http://ec.europa.eu/atwork/synthesis/aar/aar2005/doc/epso_aar.pdf)> accessed 21 May 2013.

<sup>30</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [2].

<sup>31</sup> *ibid.*

<sup>32</sup> Staff Regulations (n 5).

<sup>33</sup> C-23/64 *Vandevyvere v Parliament* [1965] ECR 157, [164]; Case T-189/99 *Gerochristos v Commission* [2001] ECR-SC I-A-11 and II-53; Cases T-167/99 and T-174/99 *Giulietti v Commission* [2001] ECR-SC I-A-93 and II-441; Case T-72/01 *Pyres v Commission* (n 8); Case T-72/01 *Pyres v Commission* [2003] ECR-SC I-A-169 and II-861; Case T-371/03 *Le Voici v Council* [2003] ECR-IA-209; Case T-33/00 *Martínez Páramo v Commission* [2003] ECR-SC I-A-105 and II-541; Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077; Case F-2/07 *Martins v Commission* [2010] (unpublished); Case F-7/07 *Angioi v Commission* [2011] (Civil Service Tribunal, 29 June 2011).

<sup>34</sup> Article 23 of the European Parliament resolution on the European Ombudsman's special report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour ('European Code of Good Administrative Behaviour') (C5-0438/2000 – 2000/2212 (COS)), [2002] OJ C72/331; and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

<sup>35</sup> EPSO Guide to Open Competitions (n 15), point 6.2.

<sup>36</sup> *ibid.*, point 6.2.



number/letter of the answers you chose and of the correct answers.<sup>37</sup>

The questions of the CBTs may be cancelled by the selection board if an error is detected after the tests have taken place. In this case, the points initially attributed to that question are redistributed amongst the remaining questions.<sup>38</sup> EPSO allows candidates who consider that one or more questions had errors to ask for their annulment and it also enables them to request a review of the process under certain conditions.<sup>39</sup> In addition, candidates also have administrative and judicial appeal procedures to challenge the actions or failures to comply with the rules and obligations. Judicial appeals are submitted to the EU Civil Service Tribunal of the CJEU whereas administrative appeals are lodged before the EPSO and the European Ombudsman.

In spite of all the aforementioned, there are still some concerns about the application of the principle of transparency by EPSO. In this sense, it must be remembered that according to data released by the European Ombudsman in 2012, EPSO only scored a 69% compliance rate with the Ombudsman's suggestions in 2011.<sup>40</sup> Moreover, the Ombudsman also found a case of non-satisfactory response to its suggestions concerning a lack of transparency in an EPSO competition.<sup>41</sup> In addition, EPSO's way of carrying out the recruitment procedures has been recently affected by the judgments of the Court of Justice of the EU in favour of a candidate who challenged the process. After being rejected in an EPSO competition exam in 2007, Mr Dimitrios Pachtitis denounced a series of errors and failures to comply with several principles (transparency amongst them) before the Court of Justice of the EU and the European Ombudsman.

### **III. ORIGINS OF THE CONTROVERSY BETWEEN MR PACHTITIS AND EPSO**

As outlined above, Dimitrios Pachtitis followed a series of legal and

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<sup>37</sup> *ibid*, point 6.2.1.

<sup>38</sup> *ibid*, point 6.3.

<sup>39</sup> *ibid*, point 6.4.

<sup>40</sup> European Ombudsman, 'EU Institutions Comply with 82% of Ombudsman Suggestions' Press Release EO/12/18 of 3 December 2012 <[http://europa.eu/rapid/press-release\\_EO-12-18\\_en.htm](http://europa.eu/rapid/press-release_EO-12-18_en.htm)> accessed 19 May 2013.

<sup>41</sup> In Case 2586/2010/(ML)TN (European Ombudsman, 30 April 2013) the complainant alleged that EPSO misused resources by organising a two-field competition with a single reserve list; and refused to provide the contestant with the name of the external examiner assisting the selection board. The Ombudsman found that the grounds for rejection were very inadequate and, in some respects, blatantly incorrect.

administrative actions before the European institutions and bodies to challenge EPSO's decision to exclude him from a competition in 2007. The aim of this chapter is to provide the reader with the background to the dispute as well as to examine both the judgments of the Court of Justice of the EU and the inquiries of the European Ombudsman on this issue.

### 1. *Background to the Dispute*

Dimitrios Pachtitis is a Greek national who participated in an administrators' competition organised by EPSO in 2006/2007 to establish a reserve list of Greek translators to work as permanent staff for the EU institutions.<sup>42</sup> The competition was published on 15 November 2006 and the selection procedure consisted of three different stages.<sup>43</sup>

The first stage had two multiple-choice tests each containing 30 questions; one of them aimed to evaluate the general knowledge of the participants about the EU whereas the other one was to evaluate the candidates' abilities (ie verbal and numerical reasoning skills).<sup>44</sup> The first stage tests were carried out by computer and the questions were different for each candidate since they were randomly selected from a database provided to EPSO by an external contractor.<sup>45</sup> Only the 110 candidates who obtained the best mark in the admission tests would be invited to the second stage of the competition.<sup>46</sup> The second stage would consist of written tests and the third stage would be an oral test.<sup>47</sup> The selection board of the competition was involved only after the admission tests and therefore only at the stage of the written and oral tests.<sup>48</sup>

On 31<sup>st</sup> May 2007, EPSO notified Mr Pachtitis that he had not passed the first phase of the selection process because his results did not allow him to be within the short-listed 110 candidates who would go to the next phase.<sup>49</sup> In fact, Mr Pachtitis scored 18.334 out of 30 points, whereas the 110 successful candidates had obtained at least 21.333 out of 30 points.<sup>50</sup> He then wrote a letter to EPSO on 4<sup>th</sup> June 2007 requesting copies of his

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<sup>42</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [16].

<sup>43</sup> *ibid*, paras 16 and 18.

<sup>44</sup> *ibid*, para 18.

<sup>45</sup> *ibid*, para 20.

<sup>46</sup> *ibid*, para 18.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid*, para 20.

<sup>49</sup> *ibid*, para 21.

<sup>50</sup> Mr Pachtitis scored 23 out of 30 points in the test about the EU and 16 out of 30 points in the test about personal abilities, *ibid*.

questions, his answers and a sheet with the correct answers<sup>51</sup>. However, EPSO refused to provide him with such information on 27<sup>th</sup> June 2007 and did not justify such refusal.<sup>52</sup>

Then, on 10<sup>th</sup> July 2007 Mr Pachtitis submitted a complaint, under Article 90(2) of the Staff Regulations of the Officials of the European Union (from now on the Staff Regulations)<sup>53</sup> and Regulation (EC) 1049/2001 regarding public access to documents of the EU institutions<sup>54</sup>, contesting the validity and content of EPSO's decision of 31<sup>st</sup> May 2007 and requesting copies of his exam's own answers and all the correct answers.<sup>55</sup> On the one hand, Mr Pachtitis alleged the failure to comply with the principles of equal treatment, objectivity and transparency, as well as the infringement of the obligation to motivate the decision of 31<sup>st</sup> May 2007. On the other hand, Mr Pachtitis also denounced that there had been errors detected by the selection board of the admission tests' when correcting the exams.<sup>56</sup> Those errors consisted in a series of questions which were proved to be incorrect and later cancelled by an advisory board to the procedure.<sup>57</sup> Consequently, he asked EPSO to revise its decision of 31<sup>st</sup> May 2007 by re-examining his exams and informing him about those errors found by the selection board.<sup>58</sup>

On 20<sup>th</sup> July 2007, EPSO replied to him by saying that he had to address the complaint to the Secretariat-General of the European Commission in order to request access to the documents.<sup>59</sup> Mr Pachtitis did so one day later.<sup>60</sup> By 22<sup>nd</sup> September of that year he had not received any reply, so he decided to bring an action before the former Court of First Instance and current General Court of the CJEU against the refusal to provide him with the copies.<sup>61</sup> However, the General Court would not rule until 20<sup>th</sup> April 2012 by declaring itself incompetent and referring the case to the EU Civil

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<sup>51</sup> *ibid*, para 22.

<sup>52</sup> *ibid*, paras 23-24.

<sup>53</sup> Staff Regulations (n 5).

<sup>54</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43

<sup>55</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [24].

<sup>56</sup> *ibid*.

<sup>57</sup> *ibid*, para 26.

<sup>58</sup> *ibid*, para 24.

<sup>59</sup> Decision of the European Ombudsman of 26 March 2009 closing his inquiry into complaint 1150/2008/(ID)(BU)CK against the European Personnel Selection Office (EPSO), [3].

<sup>60</sup> *ibid*, [4].

<sup>61</sup> As it will be seen later, the Tribunal avowed itself to have no competence on the issue and referred it to the EU Civil Service Tribunal, *ibid*, [5].

Service Tribunal.<sup>62</sup>

EPSO notified Mr Pachtitis that ‘*the number of multiple choice questions set, the letters corresponding to the applicant’s answers and those corresponding to the correct answers*’ by email on 26<sup>th</sup> November 2007.<sup>63</sup> Finally, EPSO rejected his complaint by a Decision of 6<sup>th</sup> December 2007 and claimed to have re-examined his file and the consequences of cancelling certain questions for his results.<sup>64</sup> Apparently, Mr Pachtitis’ tests did not include any of the seven questions that were cancelled by an ‘advisory committee’ which was responsible for the quality control of questions inserted in the database.<sup>65</sup>

Apologising for the delay, the Secretariat-General of the European Commission replied negatively to Mr Pachtitis’ request for documents on 17<sup>th</sup> January 2008.<sup>66</sup> On 14<sup>th</sup> March 2008, he brought proceedings for annulment before the EU Civil Service Tribunal against EPSO’s decisions of 31<sup>st</sup> May and 6<sup>th</sup> December 2007 and all related measures.<sup>67</sup> That was the second time he was denouncing EPSO before the CJEU.<sup>68</sup> Besides this, on 14<sup>th</sup> April 2008 Mr Pachtitis lodged a complaint with the European Ombudsman because of EPSO’s failure to transfer his request for documents on 10<sup>th</sup> July 2007 to the Secretariat-General of the European Commission.<sup>69</sup> The Ombudsman decided to open an inquiry on 5<sup>th</sup> June 2008.<sup>70</sup> However, it closed the inquiry on 26<sup>th</sup> March 2009 without acknowledging Mr Pachtitis to be right.<sup>71</sup>

On 15 June 2010, the EU Civil Service Tribunal ruled in favour of Mr Pachtitis and annulled both EPSO decisions of 31 May and 6 December 2007.<sup>72</sup> On 25 August 2010, the European Commission brought an appeal against the ruling of the EU Civil Service Tribunal.<sup>73</sup> However, on 14

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<sup>62</sup> Case T-374/07 *Pachtitis v Commission* [2012] OJ C 174/22. In any case, the EU Civil Service Tribunal ruled on December 2013 by stating that there was no further need to adjudicate on the action. This was held on the grounds that Mr Pachtitis did not have any more a personal interest to seek the annulment of the decision because it would not bring him any benefit: Case F-49/12 *Pachtitis v Commission* [2013] (Civil Service Tribunal, 2 December 2013), [28], [30-31] and [33].

<sup>63</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [25].

<sup>64</sup> *ibid*, [26].

<sup>65</sup> *ibid*.

<sup>66</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [6].

<sup>67</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [1].

<sup>68</sup> The first time was Case T-374/07 *Pachtitis v Commission* (n 62).

<sup>69</sup> European Ombudsman, Decision of 26 March 2009 (n 59).

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid*.

<sup>72</sup> Case F-35/08 *Pachtitis v Commission* (n 13).

<sup>73</sup> Case T-361/10 *P Commission v Pachtitis* (n 13), [8].

December 2011 the General Court dismissed the appeal.<sup>74</sup>

The case had consequences for the EPSO competitions' applicants in the years 2010 and 2013. The judgments made EPSO decide to repeat the following competitions which had already taken place in 2010: EPSO/AD/177/10 (European Public Administration, Law, Economics, Audit and ICT<sup>75</sup>), EPSO/AD/178/10 (Librarians) and EPSO/AD/179/10 (Audiovisual).<sup>76</sup> Because of that, EPSO decided not to organise competitions in 2013 for the respective categories but to allow participants of 2010 to retake the exams.<sup>77</sup>

In a public statement, EPSO announced the amendment of the procedures for future competitions in order to take into account the rulings and explained that it had decided to repeat the competitions with the aim of preventing past candidates from lodging further complaints on the same basis as Mr Pachtitis.<sup>78</sup>

On 21 March 2013, corrigenda to the notices of competitions EPSO/AD/177/10-Administrators (AD 5) and EPSO/AD/178-Librarians and EPSO/AD/179/10 (Audiovisual) were published in the Official Journal of the European Union.<sup>79</sup> In those corrigenda, EPSO clarified who could retake the exams.<sup>80</sup> According to it, only those participants in the 2010 competitions who were excluded after the CBTs because they did not meet the minimum result or the result was not sufficiently high enough to be invited for the next phase. Consequently, no European citizen was able to take part in the exams in 2013 except for those who did participate in 2010 but were excluded after the first phase.

## 2. *The Controversy Before the Court of Justice of the EU (CJEU)*

The CJEU has dealt four times with the *Pachtitis* issue so far, more

<sup>74</sup> *ibid.*

<sup>75</sup> The number of candidates who validated their application in the competition EPSO/AD/177/10-Administrators (AD 5) was 51639 (European Public Administration: 29104; Law: 7331; Economics: 6391; Audit: 2941, and; ICT: 5872) <[http://web.archive.org/web/20100526135300/http://europa.eu/epso/apply/on\\_going\\_compet/adm/index\\_en.htm](http://web.archive.org/web/20100526135300/http://europa.eu/epso/apply/on_going_compet/adm/index_en.htm)> accessed 21 May 2013.

<sup>76</sup> Corrigendum to notice of open competitions EPSO/AD/177/10 [2013] OJ C82 A/5 and EPSO/AD/178-179/10 [2013] OJ C82 A/6.

<sup>77</sup> However only those candidates who did the CBT and did not make it to the second stage can retake the exam, *ibid.*

<sup>78</sup> 'EPSO statement' (*Europa website*)

<[http://europa.eu/epso/doc/statement\\_en.pdf](http://europa.eu/epso/doc/statement_en.pdf)> accessed 7 May 2013.

<sup>79</sup> See (n 76).

<sup>80</sup> *ibid.*

specifically the EU Civil Service Tribunal and the General Court. Nevertheless, the breach of the principle of transparency has not been considered in any of those judgements. In this subsection, all those judgments are analysed together.

a. Case F-35/08 *Pachtitis v Commission*, Judgment of the European Union Civil Service Tribunal of 15 June 2010

On 14 March 2008 Mr Pachtitis brought proceedings for annulment before the European Union Civil Service Tribunal against EPSO's decisions of 31<sup>st</sup> May and 6<sup>th</sup> December 2007 and all related measures.<sup>81</sup> He alleged absence of justification for the reasons for which he was refused access to the documents requested in those two decisions by EPSO, a lack of authority to exclude him from the competition, breaches of several important principles (equal treatment, proportionality and objectivity) and errors in the process.<sup>82</sup> The Tribunal annulled both decisions and set aside any related measure.<sup>83</sup> Nevertheless, the ruling of the Tribunal did not consider at all the possible breach of the principle of transparency but it is important to note that Mr Pachtitis did not allege it in his appeal either.

In this sense, the EU Civil Service Tribunal ruled in favour of Mr Pachtitis and annulled both EPSO decisions. This was justified because 'the applicant was excluded from the second stage of the competition at issue by a procedure conducted by an authority lacking power to do so and by a decision taken by that same authority'.<sup>84</sup> For the Tribunal, neither EPSO nor the advisory committee, which had invalidated seven questions of the tests, were to be considered as a 'selection board' in the meaning which is provided by the Staff Regulations.<sup>85</sup>

It argued that EPSO had insufficient authority to carry out the tasks assigned to the selection board by the Staff Regulations<sup>86</sup>, and more specifically those tasks that

affect the determination of the content of the tests and their correction, including tests comprising multiple-choice questions to assess verbal and numerical reasoning ability and/or general knowledge and knowledge of the European Union, even if those tests are presented as tests for 'admission' of candidates to the

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<sup>81</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [1].

<sup>82</sup> *ibid*, [44].

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid*, [65].

<sup>85</sup> *ibid*, [66].

<sup>86</sup> *ibid*, [70].

competition's written and oral tests.<sup>87</sup>

With this ruling, the EU Civil Service Tribunal rejected the authority of EPSO to act as a selection board unless the Staff Regulations are amended to grant powers to EPSO allowing it to perform that function. It is important to bear in mind that the Tribunal based its judgment on EPSO's lack of authority to reject candidates.<sup>88</sup> Thus, the other three allegations made by Mr Pachtitis were not addressed. Nevertheless, the European Commission appealed against the judgment before the General Court of the Court of Justice of the EU.<sup>89</sup>

b. Case T-361/10 P *Commission v Pachtitis*, Judgement of the General Court of 14 December 2011

On 25 August 2010 the European Commission appealed against the judgment of the EU Civil Service Tribunal before the General Court of the CJEU since it considered that EPSO was competent to exclude Mr Pachtitis from the second stage of the competition.<sup>90</sup> However, the General Court did not accept the arguments provided by the Commission and, on 14<sup>th</sup> December 2011 it issued a ruling confirming the previous judgment in favour of Mr Pachtitis, without considering the possible breach of the principle of transparency.<sup>91</sup> That non-consideration can be explained because the appeal by the Commission did not call for it, nor did the original complaint by Mr Pachtitis. The previous ruling had not taken it into account either. Thus, for the General Court, Mr Pachtitis had been excluded from the second stage of the competition through a decision from an authority lacking the power to do so.<sup>92</sup> In this manner, the General Court sided with the judgment of the EU Civil Service Tribunal and rejected point by point the arguments raised by the Commission.

The European Commission claimed that the EU Civil Service Tribunal had failed to comply with the obligation to state the grounds of the judgment because it did not explain why a competition could not be done in two stages, it did not indicate any provision preventing EPSO from organising the first of the two stages of the competition, and it also made a mistake by not considering all the powers conferred to EPSO by Decisions 2002/620 on the creation of EPSO and 2002/621 on EPSO's organization and functioning and by Articles 1(1)(e) and 7(1) and (2) of annex III of the

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<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*, [48-72].

<sup>89</sup> Case T-361/10 P *Commission v Pachtitis* (n 13).

<sup>90</sup> *ibid.*, [22].

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*, [58].

### Staff Regulations.<sup>93</sup>

The General Court rejected all the allegations and argued that the obligation to state the grounds does not carry an obligation of a point-by-point reply to all the arguments of the litigants.<sup>94</sup> Moreover, it denied that the EU Civil Service Tribunal had said that a competition could not be done in two stages and that EPSO was not competent for organizing the first stage. It explained that the Tribunal had simply shown that EPSO had no competences to choose and assess the subject of the questions of the competition and it could not replace the selection board.<sup>95</sup> The General Court argued that the Tribunal did not call into question EPSO's competence to organize a two-stage competition but wanted to clarify whether the first stage of the competition could be organised and exclusively performed by EPSO without any involvement of the selection board.<sup>96</sup> Furthermore, the General Court agreed with the views of the Tribunal on the fact that the first stage of the competition was indeed a competition itself and not a merely formal element of the procedure as the Commission was pointing out.<sup>97</sup>

The General Court also held that the Tribunal did not fail to consider Decisions 2002/620 and 2002/621 because they have a lower rank than the provisions of the Staff Regulations about which it had already made conclusions.<sup>98</sup> In addition, the General Court acknowledged the Tribunal to be totally right when considering that EPSO's establishment in 2002 and particularly article 7 of annex III of the Staff Regulations and Decisions 2002/620 and 2002/621 did not affect the allocation of powers between the appointing authority and the selection board.<sup>99</sup> In this sense and according to the General Court, the EU Civil Service Tribunal had explained that under article 30 of the Staff Regulations, a selection board designated by the appointing authority has to draw up a list of suitable candidates and the procedure for competitions laid down in Annex III to the Staff Regulations.<sup>100</sup>

As a consequence of this judgment confirming the previous one by the EU Civil Service Tribunal, EPSO decided to take several measures with the

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<sup>93</sup> *ibid*, [24] and [30].

<sup>94</sup> *ibid*, [25].

<sup>95</sup> *ibid*, [26-27].

<sup>96</sup> *ibid*, [31].

<sup>97</sup> *ibid*, [34].

<sup>98</sup> *ibid*, [28].

<sup>99</sup> *ibid*, [55].

<sup>100</sup> *ibid*, [43].



aim of preventing the situation from repeating.<sup>101</sup> Thus, it amended the procedures for the competitions and since then, the pre-selection tests of the competition's first stage are no longer held by EPSO but they are the responsibility of the Selection Board.<sup>102</sup> Also, EPSO decided to repeat those competitions already held but where the same mistakes in the distribution of tasks detected by the judgments were found.<sup>103</sup> For example, this last measure meant that no new general competition for administrators was carried out in 2013 except for repeating the administrators' competition in 2010.<sup>104</sup>

- c. Case T-374/07 *Pachtitis v Commission*, Order of the General Court of 20 April 2012 and Case F-49/12 *Pachtitis v Commission*, Order of the EU Civil Service Tribunal of 2 December 2013

In case T-374/07 the General Court gave judgment on the issue on 20<sup>th</sup> April 2012.<sup>105</sup> In fact, this was the first proceeding for annulment introduced by Mr Pachtitis before the CJEU on 22<sup>nd</sup> September 2007 against EPSO's decision of 27<sup>th</sup> June 2007 refusing to grant him access to a copy of his questions and answers in the first stage of the competition and against EPSO's implicit rejection on 20<sup>th</sup> July 2007 to his complaint issued on 10<sup>th</sup> July 2007.<sup>106</sup> This is the proceeding that Mr Pachtitis started while waiting for the reply of the European Commission's Secretariat-General and it is also the same proceeding alleged by EPSO during a European Ombudsman's investigation and which was closed since the issue of the

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<sup>101</sup> See EPSO's statement (n 78).

<sup>102</sup> *ibid.*

<sup>103</sup> Corrigendum to notice of open competitions EPSO/AD/177/10 [2013] OJ C 82 A/5 and EPSO/AD/178-179/10 [2013] OJ C82 A/6.

<sup>104</sup> Since only candidates of the Administrators competition in 2010 who took the exam and did not make it to the second stage are allowed to participate in the repetition of the exam, only 20,994 people (12,542 in Public Administration, 2,774 in Law, 2,186 in Economics, 1,173 in Audit and 2,319 in ICT) out of the 51671 candidates in 2010 (29,118 in Public Administration, 7,337 in Law, 6,397 in Economics, 2,994 in Audit and 5,865 in ICT) have confirmed taking the exam again. See: <[http://www.eustraining.eu/eu\\_news\\_details/chances\\_of\\_getting\\_an\\_eu\\_job\\_are\\_now\\_tripled#](http://www.eustraining.eu/eu_news_details/chances_of_getting_an_eu_job_are_now_tripled#)> accessed 13 May 2013.

<sup>105</sup> Case T-374/07 *Pachtitis v Commission* (n 62).

<sup>106</sup> Mr Pachtitis had requested access on 4<sup>th</sup> June 2007 and ESPO replied on 27<sup>th</sup> June 2007 by refusing him the access to the documents requested. On 10<sup>th</sup> July 2007 Mr Pachtitis had submitted a complaint, under Article 90(2) of the Staff Regulations of the Officials of the European Union and Regulation (EC) 1049/2001 contesting the validity and content of the EPSO decision of 31<sup>st</sup> May 2007 and requesting copies of his exam's own answers and all the correct answers. EPSO replied on 20<sup>th</sup> July 2007 telling him to readdress his complaint to the Secretariat-General of the European Commission. European Ombudsman, Decision of 26 March 2009 (n 59), [2-5].

principle of transparency was already before the Court.<sup>107</sup>

Contrary to the other appeal by Mr Pachtitis, this one did stress the failure to comply with the principle of transparency. Nevertheless, the General Court did not consider it. This was due to the fact that the General Court found itself at a crossroads since the issue covered both the Staff Regulations and Regulation 1049/2001. The General Court would be competent to deal with Regulation 1049/2001 but not for the Staff Regulations, which are under the responsibility of the EU Civil Service Tribunal.<sup>108</sup> After assessing the grounds of the proceeding, the General Court considered that it was not competent to deal with it and forwarded it to the EU Civil Service Tribunal.<sup>109</sup> The General Court deliberated that the decision which Mr Pachtitis wanted to annul was not an act adversely affecting Regulation 1049/2001 but articles 90 and 91 of the Staff Regulations.<sup>110</sup> Moreover, relevant case-law of the CJEU had considered that article 91 of the Staff Regulations relating to the conditions for appeals of EU staff before the Court is applicable also for candidates of EU competition exams.<sup>111</sup> As Mr Pachtitis was a candidate of the competition exams for working at the European institutions, the General Court argued that he was subject to the Staff Regulations<sup>112</sup> and as such, the issue should be dealt by the EU Civil Service Tribunal.<sup>113</sup>

Consequently, the Court addressed the issue again on case F-49/12 OF 2 December 2013.<sup>114</sup> However, the EU Civil Service Tribunal did not tackle the issue from the point of view of Regulation 1049/2001. Thus, it did not pronounce itself about the possible breach of the principle of transparency. In fact, the Tribunal decided not to adjudicate on the action because Mr Pachtitis did not have yet a personal interest to seek the

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<sup>107</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [29].

<sup>108</sup> Case T-374/07 *Pachtitis v Commission* (n 62), [13] and [17].

<sup>109</sup> *ibid*, [18].

<sup>110</sup> *ibid*, [13].

<sup>111</sup> Case 23/64 *Vandevyvere v Parliament* [1965] ECR 157 and 164; Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077, [18].

<sup>112</sup> Case T-374/07 *Pachtitis v Commission* (n 62), [15].

<sup>113</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (Statute of the Court of Justice of the European Union) [2012] OJ L228/1. According to article 8.2 of Annex I of the Statute of the Court of Justice of the EU, if the Court of Justice or the General Court note that an appeal falls under the jurisdiction of the European Union Civil Service Tribunal, then they will forward it to that Tribunal; Case T-374/07 *Pachtitis v Commission* (n 62), [17].

<sup>114</sup> Case F-49/12 *Pachtitis v Commission* (n 62).

annulment of a decision which is not going to benefit him.<sup>115</sup>

### 3. *The Opinion of the European Ombudsman on the Issue*

The European Ombudsman is the guardian of the European administration and it has dealt twice with the *Pachtitis*' issue: one own-initiative general inquiry concerning EPSO's refusal to provide candidates with access to their questions and answers and a more specific one lodged by Mr Pachtitis himself.<sup>116</sup>

#### a. The Ombudsman's Own-Initiative Inquiry OI/4/2007/(ID)MHZ

Following several complaints received by the European Ombudsman against EPSO for refusing candidates' access to their questions and answers in the multiple choice computer based tests of the first stage of the competitions organised, it decided to open an own-initiative inquiry against EPSO on 20<sup>th</sup> November 2007.<sup>117</sup> This inquiry concerned not only the particular *Pachtitis* case but also many other different cases.

For the Ombudsman, EPSO's refusals neglected the right of candidates to request and obtain a copy of their test papers and constituted '*an instance of maladministration*<sup>118</sup>' because it did not justify adequately the refusals. Since the questions were reused for different exams, EPSO alleged financial arguments as the reason for not granting the candidates' access to their copies.<sup>119</sup> EPSO maintained that providing candidates with their copies would oblige it to replace those questions from the database containing all of them.<sup>120</sup> Apparently, those questions were provided by an external service provider and the replacement of each question costs several hundreds of Euros.<sup>121</sup> Thus, EPSO would incur more costs to replace the revealed questions.<sup>122</sup> In its defence, EPSO also argued that candidates could receive an information sheet concerning their performance at the tests and which contained the question numbers, the answers given, the corresponding correct answer and the time needed to answer each of them.<sup>123</sup> Furthermore, EPSO did not refuse to give access to those questions challenged by a candidate when a court needs to exercise control

<sup>115</sup> *ibid*, [28], [30], [31] and [33].

<sup>116</sup> European Ombudsman, Decision of 9 March 2009 (n 2); European Ombudsman, Decision of 26 March 2009 (n 59).

<sup>117</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [3-6].

<sup>118</sup> *ibid*, [12] and [13].

<sup>119</sup> *ibid*, [19-23].

<sup>120</sup> *ibid*, [21].

<sup>121</sup> *ibid*, [22].

<sup>122</sup> *ibid*.

<sup>123</sup> *ibid*, [18].

over them.<sup>124</sup>

In order not to neglect the principle of transparency, the European Ombudsman seemed very reluctant to accept the financial arguments alleged by EPSO and was not convinced at all about the administrative and financial burdens for EPSO that would result from the disclosure of the questions.<sup>125</sup> The Ombudsman acknowledged that the computer based tests had led to better and more efficient examinations but that could not be at the expense of the transparency of the selection process.<sup>126</sup>

Nevertheless, the Ombudsman decided not to continue its own-initiative inquiry.<sup>127</sup> EPSO had pointed out that some cases, such as the previously analysed case *Pachtitis v Commission and EPSO* (T-374/07) concerning the disclosure of the questions and challenging EPSO's refusal to do so on the basis of Regulation 1049/2001, were pending before the CJEU.<sup>128</sup> The European Ombudsman cannot open inquiries when the alleged facts are or have been the subject of legal proceedings and it must prevent itself from intervening in cases which question the soundness of a court's ruling.<sup>129</sup> Thus, it decided to close the inquiry on 9<sup>th</sup> March 2009.<sup>130</sup> In fact, at that time there were two other similar cases pending before the Court besides the *Pachtitis* case, namely *Angioi v Commission* (F-7/07)<sup>131</sup> and *Martins v Commission* (F-2/07).<sup>132</sup>

#### b. Inquiry After Mr Pachtitis' Complaint 1150/2008/(ID)(BU)CK

On 14<sup>th</sup> April 2008 Mr Pachtitis issued a complaint to the European Ombudsman against EPSO.<sup>133</sup> That complaint was lodged some months after the Ombudsman decided to open the own-initiative inquiry previously analysed. In this case, Mr Pachtitis' accusation had nothing to do with the refusal of access to the questions and answers. In fact, Mr Pachtitis' complaint was about EPSO's failure to transfer his submission of a compliant on 10<sup>th</sup> July 2007 to the European Commission. As seen before, EPSO replied by 20<sup>th</sup> July asking Mr Pachtitis to re-address his

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<sup>124</sup> *ibid*, [19].

<sup>125</sup> *ibid*, [34].

<sup>126</sup> *ibid*, [31].

<sup>127</sup> *ibid*, [29].

<sup>128</sup> *ibid*, [14].

<sup>129</sup> Art 228 of the Treaty of the Functioning of the EU (TFEU) and art 1(3) of the European Ombudsman's Statute.

<sup>130</sup> European Ombudsman, Decision of 9 March 2009 (n 2).

<sup>131</sup> Case F-7/07 *Angioi v Commission* (n 33).

<sup>132</sup> Case F-2/07 *Martins v Commission* decision of 15 April 2010 (not yet reported).

<sup>133</sup> European Ombudsman, Decision of 26 March 2009 (n 59).

complaint to the European Commission's Secretariat General.<sup>134</sup> Consequently, Mr Pachtitis invoked the principle of good administration under the European Code of Good Administrative Behaviour<sup>135</sup>, which obliges the transfer to the competent service of the Institution of those letters or complaints which are received by a service which is not competent to deal with it.<sup>136</sup>

That code is applied 'to all officials and other servants to whom the Staff Regulations and the Conditions of employment of other servants apply, in their relations with the public'.<sup>137</sup> By following the code, the institutions and their administration should do everything necessary to apply this code to other persons working for them, and who are not officials or other servants (ie persons employed under private law contracts, national experts and even trainees).<sup>138</sup> There is also an obligation to transfer to the competent service of the EU institution any letter or complaint received by a Directorate General, Directorate or Unit which has no competence to deal with it.<sup>139</sup> Thus, Pachtitis argued that EPSO should have transferred his complaint to the European Commission.<sup>140</sup>

On 5<sup>th</sup> June 2008 the European Ombudsman decided to open an inquiry.<sup>141</sup> It is important to remember that, on 22<sup>nd</sup> September 2007, Mr Pachtitis lodged a proceeding for annulment against EPSO's decision refusing to provide him with the questions and answers<sup>142</sup> and, in March 2008, he lodged another similar proceeding against EPSO's decision to exclude him from the competition.<sup>143</sup> Since the subject matter of his complaint to the Ombudsman had nothing to do with the two previous proceedings for annulment<sup>144</sup>, the European Ombudsman was indeed able to open the inquiry.<sup>145</sup>

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<sup>134</sup> The Secretariat General of the European Commission did not reply until 17 January 2008. *ibid*, [3].

<sup>135</sup> European Parliament resolution on the European Ombudsman's special report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a European Code of Good Administrative Behaviour (n 33), art 15.

<sup>136</sup> *ibid*, art 15.

<sup>137</sup> *ibid*, art 1.1.

<sup>138</sup> *ibid*, art 1.2.

<sup>139</sup> *ibid*, art 15.

<sup>140</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [8-9].

<sup>141</sup> *ibid*.

<sup>142</sup> Case T-374/07 *Pachtitis v Commission* (n 62).

<sup>143</sup> Case F-35/08 *Pachtitis v Commission* (n 13).

<sup>144</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [12].

<sup>145</sup> Art 228 of the TFEU prevents the European Ombudsman from opening inquiries when the alleged facts are or have been the subject of legal proceedings. Moreover,

On the arguments presented to the Ombudsman, EPSO acknowledged that the European Code of Good Administrative Behaviour's article 15 on the obligation to transfer to the competent service was a principle to follow generally.<sup>146</sup> Furthermore, EPSO also informed the Ombudsman that it had cooperated with the European Commission in the handling of applications for public access to documents.<sup>147</sup> According to such cooperation, EPSO was responding to direct and indirect requests transferred by the Commission and it was also informing those applicants whose requests for access were refused that they were able to lodge an application to the European Commission on the grounds of Regulation 1049/2001.<sup>148</sup> This was done on the basis of article 4 of the Commission Decision 2001/937/EC of 5 December 2001 amending its rules of procedure.<sup>149</sup> That Decision annexed the rules for the application of Regulation (EC) No 1049/2001 to the Commission's Rules of Procedure.

The European Ombudsman had some doubts about EPSO being under the duty to transfer the complaint to the Commission under the principle enshrined in article 15 of the Code.<sup>150</sup> Furthermore, the Ombudsman first noticed that EPSO was not mentioned in either Regulation 1049/2001 or Decision 2001/937 and realised later that Decision 2002/621/EC setting up the body does not regulate public access to documents held by EPSO.<sup>151</sup> On top of that, the Ombudsman was of the opinion that, even if the Commission had some documents of EPSO, not all documents held by EPSO fell within the sphere of responsibility of the European Commission.<sup>152</sup> The Ombudsman's reasoning followed article 3(a) of Regulation 1049/2001 which applies to documents 'concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.<sup>153</sup> Hence, the European Ombudsman also rejected the competence of the Commission to issue decisions on confirmatory applications made against EPSO's rejection of initial

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art 1(3) of the European Ombudsman's Statute impedes its intervention in cases which are either before courts or which question a court's ruling.

<sup>146</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [14].

<sup>147</sup> *ibid*, [15].

<sup>148</sup> *ibid*.

<sup>149</sup> Commission Decision of 17 October 2000 amending its Rules of Procedure (European Commission Code of Good Administrative Behaviour) [2000] OJ L267/63.

<sup>150</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [17].

<sup>151</sup> *ibid*, [18].

<sup>152</sup> *ibid*, [21].

<sup>153</sup> Regulation (EC) No 1049/2001 (n 54), art 3(a).

applications.<sup>154</sup> Consequently, the European Ombudsman decided to close his inquiry on 26<sup>th</sup> March 2009.

From both inquiries, it is clear that the Ombudsman found grounds to consider that EPSO failed to comply with some principles when dealing with the *Pachtitis* case. Whereas the own-initiative inquiry covered the possible breach of the principle of transparency, the complaint lodged by Mr Pachtitis only dealt with the principle of good administration. Nevertheless, the Ombudsman had to refrain because the principle was already under judicial review by the CJEU.<sup>155</sup>

#### **IV. IS THERE A BREACH OF THE EU PRINCIPLE OF TRANSPARENCY?**

The degree of transparency varies across the public administration of the different EU countries.<sup>156</sup> However, it is a structural and essential principle for an accountable and legitimate legal system as well as for the exercise of the rule of law.<sup>157</sup> Transparency is very useful in order to have a more adequate control over the legality of public action and refers to 'a minimal openness of process, access to documents and publication of official measures'.<sup>158</sup> As such, it is an underlying requirement for proper administration in the EU which caters 'for an effective relationship of political control between the democratic sovereign – EU citizens – and the responsible public institutions'.<sup>159</sup> Since it is the EU legislature's duty to publish all legislative measures and decisions<sup>160</sup>, the principle of transparency interacts with important precepts such as legal and institutional responsibility, accessibility, and publication.<sup>161</sup>

Criticisms on the level of transparency have led to measures being taken to improve the openness of the EU institutions.<sup>162</sup> Therefore, the quest for increased openness and transparency in the decision-making process has always been at the very heart of the debate about the future direction of

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<sup>154</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [21].

<sup>155</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [29].

<sup>156</sup> Svein S Andersen and Kjell A Eliassen, *The European Union: How Democratic Is It?* (Sage publications 1998), 2.

<sup>157</sup> Herwig CH Hofmann, Gerard C. Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 170.

<sup>158</sup> *ibid.*, 170-171.

<sup>159</sup> *ibid.*

<sup>160</sup> As required expressly in Article 297 TFEU. *ibid.*, 172.

<sup>161</sup> *ibid.*

<sup>162</sup> Andersen and Eliassen (n 156), 159.

the EU.<sup>163</sup> Transparency is one of the principles which guide the European Union's civil service.<sup>164</sup> According to that principle, 'civil servants should be willing to explain their activities and to give reasons for their actions' and they should also 'keep proper records and welcome public scrutiny of their conduct, including their compliance with these public service principles'.<sup>165</sup>

Even though it is not a new principle, it represents existing expectations of citizens and civil servants.<sup>166</sup> Besides, it also helps 'civil servants to understand and apply rules correctly, and guide them towards the right decision in situations where they should exercise judgment'.<sup>167</sup> As a high-level distillation of the ethical standards for EU civil servants, the principle of transparency constitutes a vital component of the service culture to which the European public administration adheres. It also helps to generate and focus an on-going, constructive dialogue among civil servants, and between civil servants and the public.<sup>168</sup> Such a dialogue is vital in order to consolidate and deepen 'a shared understanding of the ethical values of public service among civil servants and citizens with different cultural backgrounds'.<sup>169</sup>

In order to consider the possible breach of the principle of transparency, this section analyses the issue from the point of view of Regulation 1049/2001 on the access to documents of the European Parliament, Council and Commission, the European Code of Good Administrative Behaviour, and the relevant case law of the CJEU.

#### 1. *Analysis of the Potential Breach Under the Scope of Regulation 1049/2001*

Regulation 1049/2001 lays out the conditions for public access to the documents of the European Parliament, European Commission and Council of the EU.<sup>170</sup> The Regulation is applicable to all the documents elaborated or received by those three EU institutions.<sup>171</sup> Any EU citizen as well as any individual or legal entity that lives or has its registered office in

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<sup>163</sup> Dimitris Chrysochoou, *Democracy in the European Union* (IB Tauris & Co 2000), 9.

<sup>164</sup> European Ombudsman (n 1).

<sup>165</sup> *ibid.*, 6.

<sup>166</sup> *ibid.*, 1 (Introduction).

<sup>167</sup> *ibid.*

<sup>168</sup> *Ibid.*, 2 (Introduction).

<sup>169</sup> *Ibid.*, 4 (Introduction).

<sup>170</sup> Regulation (EC) No 1049/2001 (n 54).

<sup>171</sup> *ibid.*, art 2.3.



a Member State has the right to have access to such documents.<sup>172</sup> As Mr Pachtitis is a Greek national and thus he is an EU citizen, it is clear that this Regulation applies.

Article 3 of the Regulation provides a very broad definition of the term 'document'. According to that article, a document means any content, whatever its medium is<sup>173</sup>, concerning issues under the competences of the corresponding EU institution. In this sense, Mr Pachtitis requested EPSO to provide him with an exact copy of the questions that he got and the answers, both the ones that he provided and the correct ones, in the two tests of the first stage of the competition in which he participated.<sup>174</sup> Since the definition of 'document' in Regulation 1049/2001 is very broad, it could be argued that it seems that the information requested by Mr Pachtitis to EPSO falls under the Regulation's definition of 'document'. However, it brings us to the question of whether EPSO is covered by this Regulation.

In fact, the title of the Regulation expressly mentions public access to the documents of the European Parliament, Council and Commission. Article 1 of the Regulation specifies that the aim of the Regulation is 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission [...] documents [...] in such a way as to ensure the widest possible access to documents.'<sup>175</sup>

EPSO is not part of the three mentioned EU institutions. Actually, EPSO is an inter-institutional body of the European Union, such as the Publications Office of the European Union<sup>176</sup>, the European School of Administration<sup>177</sup> and the Computer Emergency Response Team<sup>178</sup>. The Regulation specifically foresees its application to the public access of documents of the three main institutions involved in EU legislation.

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<sup>172</sup> *ibid*, art 2.1. Besides, art 2.2 allows the EU institutions to grant access to those documents to any individual or legal entity who does not live or have its registered office in a Member State.

<sup>173</sup> *ibid*, art 3, which sets out that the format may be written on paper or stored in electronic form or as a sound, visual or audiovisual recording.

<sup>174</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [22].

<sup>175</sup> Regulation (EC) No 1049/2001 [54], art 1.

<sup>176</sup> Inter-institutional body whose task is to publish the publications of the institutions of the European Union.

<sup>177</sup> Inter-institutional body set up on 10<sup>th</sup> February 2005 to provide training in specific areas for members of EU staff.

<sup>178</sup> Inter-institutional body set up on 1<sup>st</sup> June 2011 to help manage threats to EU institutions' computer systems.

However, article 15 (3) of the TFEU lays down the access to documents, whatever their medium, of the European institutions, bodies, offices and agencies for any citizen of the EU, and any natural or legal person residing or having its registered office in a Member State. Besides, it also stipulates that 'each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents'. By reading that article, it is clear that an EU citizen such as Mr Pachtitis should be allowed to have access to the documents of an EU inter-institutional body such as EPSO. Nevertheless, it should not be forgotten that the wording of article 15 (3) TFEU came after the amendments introduced by the Lisbon Treaty to both TFEU and the Treaty of the EU (TEU). In this sense, it has to be borne in mind that the Lisbon Treaty entered into force on 1<sup>st</sup> December 2009 and Mr Pachtitis had already lodged his complaint before that date. Hence, it would be difficult to argue that the dispositions of TFEU apply to a past situation which happened before they became applicable. The European Ombudsman has already shared the same concerns about whether EPSO is covered or not by Regulation 1049/2001 and his decision hints that it is not<sup>179</sup>. In any case, the duties of the Ombudsman do not include the interpretation of EU law but the uncovering of maladministration in the activities of the institutions.<sup>180</sup>

In order to adapt the Regulation to the changes introduced in the EU Treaties following the entry into force of the Treaty of Lisbon on 1 December 2009, on 21<sup>st</sup> March 2011 the European Commission tabled a proposal whose aim is to extend the scope of the Regulation to all the EU institutions, bodies, offices and agencies.<sup>181</sup> Nevertheless, the proposal's approval is still pending. Thus, it cannot be used for the purposes of this study.

However, it should not be forgotten that on 21<sup>st</sup> July 2007 Mr Pachtitis wrote to the European Commission requesting the documents (ie his exam

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<sup>179</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [18-20].

<sup>180</sup> Art 2 of Decision 2008/587/EC, Euratom of the European Parliament of 18 June 2008, amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (European Ombudsman's Statute) [2008] OJ L189/25.

<sup>181</sup> The Commission had already tabled another proposal on 30 April 2008, whose approval is still pending. The 2011 proposal, which was tabled to adapt the Regulation to the provisions of TFEU, also foresees some restrictions for the public access to documents of the European Court of Justice, the European Central Bank and the European Investment Bank.

questions and answers).<sup>182</sup> He did so as EPSO had told him on 20<sup>th</sup> July 2007 to readdress the request to the Commission.<sup>183</sup> The Commission replied negatively on 17<sup>th</sup> January 2008, clearly infringing the duty to reply within due time<sup>184</sup> and posing some doubts concerning the obligation to motivate the refusal.<sup>185</sup> On the Commission's defence it could be argued that it does not own EPSO's documents.<sup>186</sup> Nevertheless, since EPSO told Mr Pachitis to forward the complaint to the Commission<sup>187</sup>, it could be assumed that the documents were indeed under its possession and thus, Regulation 1049/2001 would be applicable.

Furthermore, article 4 of Regulation 1049/2001 contains the grounds of justification that the EU institutions may use to reject a request for access to their documents. Those exceptions allow the Commission, Parliament and Council to refuse access to a document whose disclosure would undermine the protection of public interest<sup>188</sup>, the privacy and the integrity of an individual<sup>189</sup>, the commercial interests of a natural person or legal entity, court or tribunal proceedings and legal advice, and inspections, investigations and audits. Moreover, the EU institutional triangle can refuse access to internal documents or documents received which concern an issue pending decision as long as the disclosure undermines the institution's decision-making process.<sup>190</sup> In the case of internal documents which contain opinions for internal use, even if the decision is adopted, the institutions may refuse the access unless the disclosure has a superior public interest.<sup>191</sup> Last not but least, in the case of documents which concern third parties, the EU institutions have to consult them before disclosing any document.<sup>192</sup>

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<sup>182</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [4].

<sup>183</sup> *ibid*, [3].

<sup>184</sup> Replies must be sent within fifteen working days according to the European Commission's own Code of Behaviour for staff of the European Commission in their relations with the public. Commission Decision of 17 October 2000 amending its rules of procedure (2000/633/EC, ECSC, Euratom) OJ L267/63.

<sup>185</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [13].

<sup>186</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [21].

<sup>187</sup> *ibid*, [3].

<sup>188</sup> Regulation (EC) No 1049/2001 (n 54). Article 4.1.a clarifies that the protection of the public interest must be regarding public security, defence, international relations, and the financial, monetary or economic policy of the EU or a Member State.

<sup>189</sup> *ibid*. Art 4.1.b points out that the protection of privacy and the integrity of an individual must be in accordance with the EU legislation regarding the protection of personal data.

<sup>190</sup> *ibid*. However, art 4.3 also provides an exception to the exception by stating that this provision shall not apply if the disclosure has an upper public interest.

<sup>191</sup> *ibid*, art 4.3.

<sup>192</sup> *ibid*, art 4.4.

When reading article 4, it does not seem that Mr Pachtitis's request fits any of the grounds for exception. In fact, he was asking for his own documents and there was no risk to undermine any third party nor his intimacy and integrity. Furthermore, he was requesting copies of the questions and answers of the exam. None of those documents contained any opinion for internal use since the exam was a multiple-choice test corrected by a computer. Thus, there should be no grounds to refuse Mr Pachtitis' request in principle.

Article 7 of Regulation 1049/2001 also foresees a motivation in the case that there is a total or partial refusal. It seems that neither EPSO nor the Commission motivated their refusals. However, the CJEU has ruled that providing the results of the CBTs is more than enough to motivate the refusal.<sup>193</sup> Additionally, EPSO publicly rejects to send anything but the information sheet with the results to those candidates in the first stage.<sup>194</sup> That argument seems weak and will be later analysed in the section dealing with the case-law of the CJEU.

Therefore, from all the aforementioned facts, it can be concluded that there is no breach of this Regulation by EPSO because it falls outside its scope of application. If that were not the case and EPSO was covered by this Regulation, there would have been an infringement of this particular law. On the contrary, the Commission could be considered as not having complied with the Regulation as long as the documents are in its possession and since any of the grounds of exception provided by article 4 seem to apply.

## 2. *Assessing the Possible Infringement of the European Code of Good Administrative Behaviour*

The European Code of Good Administrative Behaviour is a non-legislative EU act contained in a resolution of the European Parliament of 6 September 2001.<sup>195</sup> The code aims to lay out a series of rules and principles that the EU institutions and bodies as well as their staff are bound to respect when dealing with the public.<sup>196</sup> The code applies to any EU

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<sup>193</sup> Case F-7/07 *Angioi v Commission* (n 33), [67]; Case T-33/00 *Martínez Páramo v Commission* (n 33), [43].

<sup>194</sup> EPSO Guide to Open Competitions (n 13), point 6.2.

<sup>195</sup> European Parliament resolution on the European Ombudsman's special report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a European Code of Good Administrative Behaviour (n 33).

<sup>196</sup> *ibid.*

institution and body, such as EPSO, and to their staff.<sup>197</sup>

Transparency is one of the principles which appears in that code. In this sense, the code establishes the obligation for the EU staff to ‘deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001’.<sup>198</sup> Since EPSO is covered by this Code and the previous section has analysed the issue from the point of view of Regulation 1049/2001, a consideration of the rules regarding transparency adopted by EPSO is needed in order to see whether there has been a failure to comply with the principle of transparency in the *Pachtitis* case.

In this sense, Mr Pachtitis only participated in the first stage of the competition and EPSO considers that it is only obliged to provide those candidates of that stage with their test results.<sup>199</sup> This is argued for financial reasons since questions are re-used for future competitions and replacing them is expensive according to EPSO.<sup>200</sup> Moreover, it is also done in order to avoid commercial practices with the questions.<sup>201</sup> Thus, EPSO expressly refuses to grant access to ‘the wording of the questions or of the answers’ and will only provide with ‘the reference number/letter of the answers’ chosen by the candidate ‘and of the correct answers’.<sup>202</sup> However, the CJEU has specified those conditions more in detail.

### 3. *The Consideration of the Principle of Transparency by the Court of Justice of the EU (CJEU)*

The CJEU has stressed the need for transparency in the EU staff selection process several times. As seen in Case T-374/07 *Pachtitis v Commission*, candidates of competition exams are considered to be covered by the Staff Regulations.<sup>203</sup> Thus, the Court confirms that, under the second paragraph of article 25 of the Staff Regulations, ‘any decision relating to a specific individual who is taken under the Staff Regulations and adversely affecting him must state the grounds on which it is based’.<sup>204</sup> Besides, it has acknowledged that candidates are allowed to be provided with the general criteria for correcting the exams as well as copies of their corrected exams

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<sup>197</sup> *ibid*, art 2.

<sup>198</sup> *ibid*, art 23.

<sup>199</sup> EPSO Guide to Open Competitions (n 13), point 6.2.

<sup>200</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [22].

<sup>201</sup> *ibid*, [20] and [21].

<sup>202</sup> EPSO Guide to Open Competitions (n 13), point 6.2.1.

<sup>203</sup> Case T-374/07 *Pachtitis v Commission* (n 62), [18].

<sup>204</sup> Case F-7/07 *Angioi v Commission* (n 33), [136].

if they request them.<sup>205</sup> However, the Court has also ruled that the candidates are only allowed to have access to their own written exams<sup>206</sup> and in the case that the candidates took part in a multiple choice test, the relevant EU institution fulfils the obligation to justify a refusal of access to the documents requested by communicating the results of the tests and informing about the annulment of certain questions.<sup>207</sup>

However, the argument of complying with the obligation to justify by simply communicating the results and informing about the annulment of questions seems weak. By only providing the results, the candidate cannot either check the accuracy of the answers or identify errors. Thus, the candidate has to rely on what EPSO says. Since the CBT questions are re-used in later competitions, EPSO has justified this refusal to access the answers and questions on the basis of economic reasons and to avoid commercial businesses with the questions.<sup>208</sup> In this sense, the competitions where candidates were allowed to have access to their written exams seemed to be more transparent than the current ones.<sup>209</sup>

Notwithstanding, the CJEU has also admitted that a candidate has the right of access to the questions when he challenges the relevance of certain questions or the validity of the answer adopted as correct and provided that the difference between his results and the pass threshold is such that, assuming that his objection is well founded (...) he could be among the candidates who passed the tests in question.<sup>210</sup>

Unless that happens, the institution can refuse the access and by providing the results of the exams, it obeys to the obligation to justify such refusal.<sup>211</sup> In the *Pachtitis* case, the claimant wanted access to his own exam's questions and answers but also to the questions of all the exams due to the fact that he was aware that seven questions had been annulled.<sup>212</sup> Furthermore, his results were somehow close to the results of the 110 successful candidates who made it to the second stage of the process. Pachtitis obtained 18.334/30 points, whereas the 110 successful candidates

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<sup>205</sup> Case T-72/01 *Pyres v Commission* (n 8), [70].

<sup>206</sup> Case T-33/00 *Martínez Páramo v Commission* (n 33).

<sup>207</sup> Case F-7/07 *Angioi v Commission* (n 33), [137]; Case T-189/99 *Gerochristos v Commission* (n 33), [34]; T-167/99 and T-174/99 *Giulietti v Commission* (n 33), [81-82].

<sup>208</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [18-22].

<sup>209</sup> T-33/00 *Martínez Páramo v Commission* (n 33).

<sup>210</sup> Case F-7/07 *Angioi v Commission* (n 33), [138].

<sup>211</sup> *ibid*, [139-140].

<sup>212</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [22] and [24].

had obtained at least 21.333/30 points.<sup>213</sup> It seems clear that the checking of the annulled questions is needed so that the candidate may recognise whether he/she took those questions or not.

Thus, Mr Pachtitis was challenging seven annulled questions and his results were close to the minimum grade point average required to go for the second stage of the competition.<sup>214</sup> Even though none of the seven questions annulled were present in Mr Pachtitis' exam, it looks like EPSO should have provided him with at least those seven questions as well as his questions and answers.

Concerning Mr Pachtitis' first letter to EPSO on 4<sup>th</sup> June 2007 requesting access to his tests' questions and answers<sup>215</sup>, EPSO might have breached the principle of transparency. EPSO replied on 4<sup>th</sup> June 2007 refusing access but did not provide any reason for such refusal since it reserved 'the right to include its explanations in a future 'Guide for Applicants'.<sup>216</sup> On the question of the lack of justification, it could be argued that EPSO had already provided him with the results and informed him about the seven questions that were annulled, which is enough reason to justify the refusal of access to questions and answers in multiple-choice tests in accordance with the relevant European case-law.<sup>217</sup> Nevertheless, by reading the facts of the case it is implied that EPSO did not inform him about the seven annulled questions.<sup>218</sup> This is proven by the fact that on his complaint of 10 July 2007, Mr Pachtitis denounced errors in the exam and asked EPSO to 'inform him which, if any, of the questions in the admission tests had been 'cancelled' by the selection board'.<sup>219</sup>

For considering the possible breaching of the principle, it is essential to know whether EPSO had informed him or not about the existence of such errors. If EPSO did, there should be no lack of compliance. On the contrary, the breach of the principle could be argued if EPSO did not inform him. Finally, on 26 November 2007 EPSO provided him with 'a statement showing the number of multiple choice questions set, the letters corresponding to the applicant's answers and those corresponding to the

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<sup>213</sup> *ibid*, [21].

<sup>214</sup> *ibid*, [21], [22] and [24].

<sup>215</sup> *ibid*, [22].

<sup>216</sup> *ibid*, [23].

<sup>217</sup> Case F-7/07 *Angioi v Commission* (n 33), para 137; Case T-189/99 *Gerochristos v Commission* (n 33), [34]; Cases T-167/99 and T-174/99 *Giulietti v Commission* (n 33), [81-82].

<sup>218</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [24] and [26].

<sup>219</sup> *ibid*, [24].

correct answers'.<sup>220</sup> Nevertheless, given that Mr Pachtitis finally obtained that information does not invalidate the fact that there might have been a breach of the principle if EPSO did not inform him on its reply of 4 June 2007 about those annulled questions.

## V. CONCLUSION

Transparency has proven to be very important for the European Union and both primary and secondary legislations have provided for this in respect of the activities of the European institutions, bodies, offices and agencies. Article 15 TFEU establishes an obligation for all of them to work in the most open way possible. Regulation 1049/2001 on access to the documents of the EU institutional triangle gives citizens, residents and legal entities the right to have access to them. In addition, the European Code of Good Administrative Behaviour has laid out a series of rules for the institutions and bodies to follow when dealing with the public. Furthermore, EPSO has developed its own rules to ensure transparency in the selection procedure. But the question is whether all this is enough.

EU case law has ruled that first stage candidates may only be given access to the information sheets with their results in the computer based tests (CBTs).<sup>221</sup> However, the CJEU admits the right of access to questions when a candidate challenges the relevance and/or validity of the questions and their results were close to the minimum score needed to enter into the second stage.<sup>222</sup> Before the use of CBTs, there were pre-selection, written and oral tests. Then, candidates were allowed to have access to their written tests.<sup>223</sup> Thus, it seemed to have been more transparent. Nowadays candidates must rely on the results provided by EPSO and since they cannot see the questions and answers, they cannot check whether there have been mistakes or not that they did not realise at the time of the exam.

EPSO has justified the refusal to the questions and answers on the basis that they are reused and if they are disclosed, they must be replaced.<sup>224</sup> According to EPSO, the replacement of questions is very expensive.<sup>225</sup> Furthermore, EPSO also exculpates itself in order not to foster business activities with the questions.<sup>226</sup> It is true that CBTs have led to a series of improvements which modernise and make the selection process more

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<sup>220</sup> *ibid*, [25].

<sup>221</sup> Case F-7/07 *Angioi v Commission* (n 33), [137].

<sup>222</sup> *ibid*, [138].

<sup>223</sup> Case T-33/00 *Martínez Páramo v Commission* (n 33).

<sup>224</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [19].

<sup>225</sup> *ibid*, [22].

<sup>226</sup> *ibid*, [20].



flexible for the benefit of candidates.<sup>227</sup> Nevertheless, the use of CBTs must not entail less transparency.<sup>228</sup>

In this sense, it must be borne in mind that the CJEU has neither considered so far the failure to comply with transparency nor put into question the use of CBTs in the *Pachtitis* case. It has simply ruled that EPSO did not have legal powers to act like it did in the case.<sup>229</sup> Moreover, EPSO could not be subject to Regulation 1049/2001. Only the institutional triangle falls under the scope of the Regulation. For this reason and in order to adapt to article 15 TFEU, it would be desirable to amend the Regulation including the rest of the institutions and bodies under its scope. This is not easy because the Commission has already tabled two proposals which are still pending approval by the EU co-legislators.<sup>230</sup> Notwithstanding, EPSO is indeed covered by both the European Code of Good Administrative Behaviour and article 15 TFEU<sup>231</sup>, which guarantee the access to documents and require transparency in the activities of EU bodies such as EPSO. Nevertheless, the European Commission is certainly under the scope of Regulation 1049/2001 and it neither granted Mr Pachtitis access to the documents nor stated reasons for the refusal.<sup>232</sup> It remains to be seen whether the Commission had those documents requested by Mr Pachtitis, although it could be argued that it seems it had them since EPSO told him to forward the complaint.<sup>233</sup>

In any case, allowing CBT candidates the access to anything but the information sheet with the results unless they challenge the validity and relevance of the questions is not enough to determine that the selection procedure is transparent. Furthermore, the reasons explaining the refusal to anything but that information sheet are purely economic ones. On top of that, it must be remembered that Mr Pachtitis did challenge the validity of the questions since he was aware of the existence of errors.<sup>234</sup> If the candidate cannot see the questions, how can he know whether there have

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<sup>227</sup> *ibid*, [25] and [31].

<sup>228</sup> *ibid*, [31].

<sup>229</sup> Case F-35/08 *Pachtitis v Commission* (n 13); Case T-361/10 *P Commission v Pachtitis* (n 13).

<sup>230</sup> Proposal for a Regulation of the European Parliament and of the Council of 30 April 2008 regarding public access to European Parliament, Council and Commission documents [COM(2008) 229 final]; Proposal for a Regulation of the European Parliament and of the Council of 21 March 2011 amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents COM (2011) 137 final.

<sup>231</sup> However, the TFEU was not in force at the time of the *Pachtitis* case.

<sup>232</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [22-26].

<sup>233</sup> European Ombudsman, Decision of 26 March 2009 (n 59), [3].

<sup>234</sup> Case F-35/08 *Pachtitis v Commission* (n 13), [24].

been mistakes or not?

Finally, in the particular case of *Pachtitis* there have been some problems related to competences amongst institutions and within them. Thus, for example, the Ombudsman is not allowed by the TFEU and its own statute to intervene if the issue is under judicial review.<sup>235</sup> This happened with the ruling of the General Court in case T-374/07<sup>236</sup> which made the Ombudsman close its inquiries.<sup>237</sup> Nevertheless, that judgment does not tackle the breach of the principle of transparency because the General Court understands that, Mr Pachtitis being a candidate of the EPSO competition, the issue at stake has more to do with the Staff Regulations rather than with Regulation 1049/2001.<sup>238</sup> The General Court forwarded the case to the EU Civil Service Tribunal, which liaised with it from the point of view of the Staff Regulations. Bearing in mind that the appeal was lodged on 22<sup>nd</sup> September 2007 and the judgment was ruled on 20<sup>th</sup> April 2012, this seems too much time to wait for a simply referring to another different court.<sup>239</sup> It should not be forgotten that the review of this appeal made the Ombudsman refrain.<sup>240</sup> Therefore, it would be desirable that such an important principle guiding the EU Civil Service was not discriminated and underestimated by the own bureaucracy of the EU institutions.

For all the arguments raised before, it cannot be concluded that the EU staff selection procedure is entirely transparent since candidates have no access to their questions and answers and must totally rely on what EPSO claims as fact to be the truth.

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<sup>235</sup> Art 228 of the Treaty of the Functioning of the EU (TFEU) and art 1(3) of the European Ombudsman's Statute. European Ombudsman, Decision of 9 March 2009 (n 2), [29].

<sup>236</sup> Case T-374/07 *Pachtitis v Commission* (n 62).

<sup>237</sup> European Ombudsman, Decision of 9 March 2009 (n 2), [29].

<sup>238</sup> Case T-374/07 *Pachtitis v Commission* (n 62), [13], [15], [16] and [18].

<sup>239</sup> *ibid*, [1] and [18].

<sup>240</sup> European Ombudsman, Decision of 9 March 2009 (n2), [29].