On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the parties to bear their own costs.**

Donner O'Keeffe Bosco

Delivered in open court in Luxembourg on 25 November 1976.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

By a notice dated 12 March 1974 posted in the European Parliament it was announced that the post of a Head of Division in Grade A 3 in the Directorate-General for Committees and Interparliamentary Delegations was vacant. The applicant was among those who applied for the post. The post was not filled by promotion or transfer and therefore on 18 November 1974 it was announced that an internal competition — A/51 — would take place. The duties involved in the post were set out in detail and the requisite ability and knowledge indicated in the announcement, as had already been done in the notice of vacancy. Whereas however in the first notice of vacancy thorough knowledge of Danish was required, it was simply stated with regard to the competition that for practical purposes a knowledge of Danish is desirable. The applicant also took part in this competition. The Selection Board carried out the requisite examinations and made its report on 18 April 1975. There were nine applicants on the list of suitable candidates: the candidate who headed the list had total marks of 56·5, the second candidate, Mr G., 50·25, while the applicant with 46·25 came sixth. On the basis of this list the

1 — Translated from the German.

President of the Parliament appointed Mr G. to the advertised post on 29 April 1975 with effect from 1 May 1975.

On 18 June 1975 the applicant made a formal complaint to the administration seeking the annulment of the appointment and the appointment of himself as Head of Division under Article 29 (1) (a) in conjunction with Article 45 (1) or under Article 29 (1) (b) of the Staff Regulations. He stated *inter alia* that as distinct from Mr G. he had already been eligible for promotion at the start of the procedure for filling the vacancy, he had received more marks in the previous competition A/43 (this was the subject of Case 23/74) than had Mr G. and Mr G. had not undergone an examination to test his knowledge of Danish.

This complaint remained unanswered. Therefore on 16 December 1975 the applicant brought the matter before the Court and claimed that the decision of the President of Parliament appointing Mr G. Head of Division should be annulled.

The applicant raised a number of objections in support of his claim. They relate to the correctness of holding an internal competition, the composition of the Selection Board, the criteria of assessment contained in the notice of vacancy, the tests conducted by the Board and the content of the decision of appointment itself.

My views on these claims are as follows:

1. In the first place the question must be considered whether the Parliament in the present case has disregarded Article 29 (1) of the Staff Regulations which provides that before filling a vacant post the appointing authority shall first consider the possibilities of promotion or transfer within the institution. In this connexion the applicant refers to the fact that his suitability for promotion has been recognized as appears from Case 23/74 *(Berthold Küster* v *the European Parliament,* Judgment of 12 March 1975, [1975] ECR 353), and that he is the only candidate for the advertised post who was suitable for promotion. In consequence according to the Staff Regulations he should have been promoted and the next stage for filling a vacant post should not have been embarked upon.

A corresponding objection has already been made in Case 23/74. In my opinion in that case I took the view that there is no right to promotion and that it is permissible to proceed to the second stage provided for in Article 29 (1) (b) of the Staff Regulations for filling a vacant post not only when there are no suitable candidates for promotion or transfer but also where there are other valid reasons. The Court adopted this view and in particular recognized that the presence of several persons eligible for promotion may lead the appointing authority to conclude that the interests of the service render an internal competition desirable.

Such considerations appear to me relevant in the present case.

In this respect it is first important to know that the first notice of vacancy of March 1974 required a thorough knowledge of Danish. The applicant could not show this but simply stated in his application that in the service of the Community he had had to use all official languages other than Danish. The appointing authority could accordingly assume that the applicant was not suitable for the vacant post and it could therefore disregard promotion. Now it is true that since the said notice of vacancy led to no success the linguistic requirements on the opening of the internal competition were reduced to the extent that it was now stated that knowledge of Danish was desirable and it might have been considered again. The fact that this was not done may, however, be regarded as unobjectionable since it could be assumed from the applications

that the applicant did not satisfy the reduced requirements either. The evidence of the Chairman of the Selection Board called as a witness, confirmed this impression, namely that the applicant had only a rudimentary knowledge of Danish which did not merit any special consideration in this competition.

Quite apart from the fact that, as the Parliament has explained in the proceedings, a short time later, namely in January 1975, further candidates came suitable for promotion, it is possible to conclude that in the present case too, there were reasonable grounds for not having regard to the suitability for promotion of the applicant and that therefore there is no infringement of Article 29 of the Staff Regulations.

2. I shall deal quite briefly with a second objection alleging that the Selection Board was wrongly appointed by the Secretary-General of the Parliament because he acted under a power dating from October 1971 which was allegedly not published.

We have met this objection and the inference flowing from it, namely that all the acts of the Selection Board arising therefrom are unlawful, in a number of other cases, namely Cases 23/74, 77/74 and 80/74. I considered it thoroughly then and came to the conclusion that it is untenable. I would like to refer to that conclusion and I abide by it, especially as no new arguments have now been adduced and since it may be inferred from the judgment in Case 23/74 dismissing the application that the Court does not share the applicant's view.

3. The third ground of the application, which relates to the notice of internal competition laid down by the appointing authority and in particular the criteria of assessment contained therein, seems, on the other hand, to be more important. Thus, as is known, it was laid down that with regard to marks attributed to linguistic knowledge only those above five were to be regarded. It was also provided that there should be attributed 0 to 40 marks under the heads set out in the documents, that is there was the same maximum number of marks as for the two oral tests, for it was laid down that there were to be 0 to 30 marks for a test of 15 minutes' duration on subjects relating to the duties attaching to the post referred to in the notice and 0 to 10 marks for another test of 10 minutes' duration relating to linguistic knowledge.

In my opinion there are obvious objections to this limited consideration for marks for linguistic knowledge and this does not need further argument. Such methods of assessment do not allow the knowledge required to be correctly assessed and in particular the results do not permit the differences in linguistic knowledge to be precisely ascertained. It is not clear to me how this can be justified in a competition.

With regard to the fixing of a scale of marks for qualifications on the one hand and oral tests on the other I would remind you that in my opinion in Case 23/74 I mentioned objections to the influence and importance of marks resulting solely from a short conversation. In the competition then in question there were ten criteria for the consideration of qualifications each with ten possible marks and on the other hand for two further criteria which were the subject of a conversation there was a total of 20 marks. If that weighting were contestable on that occasion the same must hold true even more so in respect of the weighting prescribed for competition A/51. It seems to me impossible to evaluate the influence of objective criteria such as seniority, age, university qualifications, reports under Article 43 of the Staff Regulations etc., which often cover long periods, in the same way as the influence of a conversation of some 25 minutes' duration. Those who have been present at oral tests know how important chance

is — choice of questions and the form of the candidates on the day. If the same weight is attached to their results as to qualifications obtained over many years the danger of a false assessment and also of manipulation is considerable. To this extent therefore it must be said that there is an obviously false relationship and the conditions in the notice must be strongly criticized from this point of view.

To draw the conclusion from this, however, that the results of the competition may be completely disregarded and that the appointment made as a result of it must be declared illegal would be premature.

With regard to the contested assessment of linguistic knowledge it is significant that there is uncertainty only in respect of one candidate placed on the list of suitable candidates as a result of awarding no marks. Since, however, this candidate was placed on the list of suitable candidates below not only the appointed official but also the applicant, it may be said that a correction of the list of suitable candidates by removing the defect indicated would have no effect whatsoever on the contested decision of appointment.

On the basis of the material we have before us there is no problem in adjusting the unusual weighting attached to the test papers and results of the test. If this is done and a ratio of 4 : 1 for qualifications and oral tests taken as a basis, it is apparent that the composition of the list of suitable candidates would be affected only slightly — one candidate would lose and another gain — and that there would also be no basic change in the order. Although the appointed official would no longer be in the second but rather the third place, he would nevertheless still be in front of the applicant who on the changed weighting would take the fourth place. In these circumstances it may be assumed that the appointing authority would scarcely have adopted another decision with regard to filling the vacancy, that is, it must be said that the defect mentioned has had no effect on the contested decision.

It is therefore my opinion that in spite of the justifiable criticism that was mentioned, there is no ground for declaring the competition illegal as a whole and accordingly for annulling the decision of appointment made as a result of it.

4. With regard to the other objections I have gained the impression — and here I am to a certain extent anticipating the result of my examination — that they do not require to be dealt with in detail.

(a) I begin with the fact that apart from its result there was no record at all made of the oral test to which so much importance was attached. For purposes of checking the procedure — there can be no question as is known of replacing the assessments — I do not consider this satisfactory, even if I do not go as far as saying — there is no provision for this — that tape recordings would be appropriate. Since however on the other hand there have been no criticisms of the conduct of the oral tests and no evidence of improper conduct has been adduced, I take the view that for the reasons mentioned the competition cannot be declared to be of no effect.

(b) Nor can I see any objections to the limited consideration given to the seniority of the candidates. On this I refer to what I said in my opinion in Case 23/74 which relates to a similar attitude in a previous competition.

(c) I do not consider that any harm was caused by the fact that the appointed official did not take part in the test of knowledge of Danish. We have heard that he has no such knowledge and that the appointing authority knew this. In my view however he could be considered for appointment since Danish was described only as desirable and was not

in any way an indispensable condition for filling the post.

(d) In my view the witnesses have satisfactorily answered a number of questions which the applicant has raised or which have their origin in the report of the Selection Board produced by the Parliament, with the result that no cause for criticism remains.

— This applied first to the question whether a complete file relating to the applicant in the form of a letter dated February 1975 and its enclosures was put before the Selection Board. This was apparently the case for its seems clear that some of the said documents had already for some time been included in the personal file of the applicant.

— This also applies to the consideration of the fact that the applicant had temporarily performed the duties of Head of Division. The fact that it did have an influence appears from a comparison with the results of competition A/43 with criterion No 7 in the present competition.

— This also applied to the question whether earlier entries on the list of suitable candidates should have been considered. In this respect in my view it is significant that such entries in respect of other competitions were considered only where the competitions involved tests and not where they were based on qualifications.

— This applies to the further question whether the applicant's knowledge of Danish was regarded, which appears to have been the case, but having regard to the rudimentary nature of this knowledge it did not lead to any special mention in the list of suitable candidates.

— This applies in addition in relation to the consideration of the earlier activity of the applicant in industry for which the Selection Board did not wish to attribute any marks because it took the view that it could not be regarded as preparation for the duties involved in the post to be filled.

— This applies moreover to the comparison, made by the applicant with the results of previous competitions, about which we have heard that it is not cogent because the tests were different.

(e) Finally, and here I come to the last point, it is irrelevant to the application that the contested decision referred to Article 45 of the Staff Regulations and to promotion.

It clearly appears from the grounds of the decision that the appointment was made on the basis of an internal competition. No one could therefore doubt that there was no promotion in the technical sense of Article 45 and that the reference to Article 45 was made only because there was an advance in grade and the salary step had to be determined accordingly.

5. After careful consideration of all the material in the case the only conclusion can be that none of the grounds raised by the applicant compels the annulment of the contested appointment. The application must therefore be dismissed as unfounded and an order for costs made in accordance with Article 70 of the Rules of Procedure.