THE COURT (First Chamber)

hereby:

1. **Dismisses the applications.**

2. **Orders each party to bear its own costs.**

A. M. Donner J. Mertens de Wilmars

Delivered in open court in Luxembourg on 9 October 1974.

A. Van Houtte
Registrar

C. Ó Dálaigh
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 9 JULY 1974

My Lords,

On 3 November 1971 the Commission published five notices of internal competition which were, except in one respect, in the same terms. Each notice stated that the competition to which it related would be on the basis of both qualifications and tests and that it would have as its purpose the constitution of a reserve for the future recruitment of administrators in grades A 6 and A 7. There is no doubt that the main object of the Commission in holding these competitions was to open up careers in category A to seasoned category B officials on its staff.

The difference between the notices lay in the descriptions they contained of the duties to be performed by the successful candidates. Each competition was for officials qualified in a particular field, as follows: —

COM/A/264 — Legal and administrative,

COM/A/265 — Economic,

COM/A/266 — Finance and accountancy,

COM/A/267 — Social,

COM/A/268 — Agricultural and technical.

Within each field candidates were given a choice of subjects (referred to as 'options') on which, as part of the tests, they could offer to be examined orally.

The publication of these notices of competition resulted from a decision taken by the Commission at a meeting on 22 July 1971. The relevant extract from the minutes of that meeting has

been placed before the Court by the Commission in response to a request addressed to its Counsel by my Lord, the Judge Rapporteur at the hearing. As appears from it the original decision was to hold six competitions. Precisely how the number came to be reduced to five does not appear, but nothing, I think, turns on this.

The Applicants in these three cases were all at the material time category B officials of the Commission. Two of them, Signorina Campogrande (Case 112/73) and Madame Bouyssou (Case 145/73), were unsuccessful candidates in competition COM/A/264. The third, Mr De Vleeschauwer (Case 144/73), was an unsuccessful candidate in competition COM/A/265. Each of them challenges the results of those competitions, and seeks to have them set aside, on a number of grounds.

I should, I think, mention that, whilst Signorina Campogrande and Mr De Vleeschauwer remain to this day category B officials of the Commission, Madame Bouyssou is now serving a probationary period with the Council in grade LA 7. When, at the close of pleadings, certain questions were put by the Court to the parties, she was asked to say why, in those circumstances, she retained an interest in these proceedings. Her answers are before Your Lordships and they seem to me sufficient. In particular she says that her training and experience suit her for an administrative post better than for a post as a translator and that there is more scope for promotion in an administrative post with the Commission than in the translation service of the Council.

Among the same questions was one addressed to Signorina Campogrande of which the purpose was to elucidate whether she had complied with Article 90 (2) of the Staff Regulations before making her application to the Court. Her answers and the documents annexed thereto show that her complaint under Article 90 (2) was lodged on 6 September 1972 and that no reply to it was made within the four months prescribed by that Article. Her Application, lodged as it was at the Registry of the Court on 22 March 1973, is accordingly in order.

All three Applicants rely in the first place, as a ground for saying that the competitions should be set aside, on the fact that none of the notices of competition specified an age limit or stated that no age limit was applicable.

My Lords, it may well be that, if the law stood today as it stood when this Chamber delivered Judgment in Case 78/71 *Costacurta v Commission* (Rec. 1972, p. 163), that objection would have to be upheld.

Your Lordships will remember that the Judgment in Case 78/71 was delivered on 22 March 1972. In view of its contents the Commission, precisely a week later, i. e. on 29 March 1972, published in the Staff Courier an announcement that the omission from the notices of competition here in question of any mention of an age limit meant that it considered that no age limit was necessary. By that time, however, not only had the list of candidates to take part in the competitions been drawn up, but the written tests had been held, so that it is strongly arguable that, consistently with the law as stated in the Costacurta case, it was then too late to remedy retrospectively the defect in the notices of competition.

The law has not however stood still. On 30 June 1972 the Council adopted Regulation (Euratom, ECSC, EEC) No 1473/72 making the mention of an age limit in a notice of competition discretionary. On 15 March 1973 the Second Chamber delivered Judgement in Case 37/72 *Mercato v Commission* [1973] E.C.R. 361, in which it declined to annul a notice of competition for want of any reference to an age limit although that notice had been published before 30 June 1972. It did so on two grounds. The first was that the setting of an age limit could have resulted either in

eliminating the applicant himself from the competition, which would have been directly contrary to his interests, or else in eliminating other, possibly qualified, candidates, which in the circumstances could not be recognized as a legitimate interest of his. My Lords, I am not sure that that proposition is readily reconcilable with the reasoning of this Chamber in the *Costacurta* case. There are at least three possibilities. One is of course that that proposition is indeed irreconcilable with the *Costacurta* case. Another is that the *Costacurta* and *Marcato* cases are in some way distinguishable from each other. The third is that the present case is, on its facts, distinguishable from both of them, perhaps because it is concerned with competitions for the establishment of reserves or because of the announcement made by the Commission on 29 March 1972. I do not for my part think it necessary to resolve that problem, and for this reason. The second ground given by the Second Chamber for its decision was that, owing to the amendment introduced by Regulation No 1473/72, the annulment of the notice of competition would be of no avail to the applicant. This seems to me, with respect, manifestly right. The Commission having made it perfectly clear, in that case as in this, that it did not consider any age limit to be appropriate, such annulment could only result in the holding of another competition again without any reference to any age limit. The view taken by the Second Chamber seems to me the only one consistent with the principle that a Court of law should not make futile orders — a principle of which, in English law, the root lies in the picturesque, if slightly inaccurate, maxim of the old Court of Chancery: 'Equity, like nature, does nothing in vain'.

I would therefore reject the first ground put forward by the Applicants.

Their second ground of complaint is, in a sentence, that the selection boards in the five competitions did not all judge the candidates, according to the same standards. The Applicants do not go so far as to assert that there was really but a single competition dressed up as five. They say that the five competitions were designed to result and did result in a single list of candidates suitable for promotion and that, that being so, steps should have been taken to ensure that the same criteria were applied to the candidates in all five competitions.

My Lords, I think that there is a fallacy underlying this argument. Either it is the fact that the competitions were to result in a single list from which candidates could thereafter be drawn for promotion to available posts regardless of the competition or competitions in which they had been successful, in which case it was wrong to have five competitions: there should have been a single competition with a single selection board. Or it is the fact the competitions were to result and did result in five separate lists, each comprising the candidates qualified in the particular field covered by the corresponding competition, in which case what was done is not open to criticism.

Of course the competitions were not completely distinct. They were held as the result of a single decision of the Commission. They were announced together in the Staff Courier (see Annexes III and IV to the Rejoinder in each case). They had a common object: to open category A to officials in other categories. The notices of competition were in the same terms, except as to the field covered by each competition. The written tests were the same for all five competitions. And the results of the competitions were announced together in the Staff Courier on 26 June 1972, where the names of the successful candidates were listed alphabetically, it being indicated against the name of each one in which competition or competitions he or she had been successful (see Annex IX to each Rejoinder). But it remains the fact that there were five separate competitions, with different selection boards and covering different fields.

There can in my opinion be no doubt that the selection boards set out to do all that they reasonably and lawfully could to harmonize their standards, as indeed it had been envisaged by the original decision of the Commission that they should (see para. 2 (e) of the minute of the meeting of 22 July 1971). Representatives of the selection boards held three meetings for this purpose. The minutes of those meetings are before Your Lordships (Annex I to each Rejoinder) and they speak for themselves. Particularly significant in my opinion is paragraph 1 of the minutes of the first meeting which records the view of those present that 'Les jurys, tout en étant indépendants, devraient harmoniser le déroulement des travaux dans toute la mesure du possible . . . afin d'aboutir à des listes d'aptitude de qualité comparable'. The real complaint of the Applicants is, I think, that, in the events, this object was not achieved. That it was not achieved was the view of Herr Krauss, who was the chairman of the selection board in competition COM/A/264 and who presided over those 'harmonizing' meetings: see his letter of 22 August 1972 to M. de Groote (Annex 6 (b) to the Commission's answers to the questions put by the Court) which was much relied upon on behalf of the Applicants.

But, my Lords, whether it was achieved or not is in law immaterial. Given that there were five separate competitions, covering different fields, a candidate in one competition had no rights as regards the manner in which other competitions, in which he was not a candidate, were conducted. There is no foundation in the Staff Regulations for the concept of a 'global' competition or of 'linked' competitions for which Counsel for the Applicants contended with such eloquence and persistence.

The only question therefore is one of fact. Did the competitions result in the constitution of a single reserve from which candidates for promotion could be drawn indiscriminately, or did it result in the constitution of five separate reserves? In my opinion nothing turns on the way in which the results were published in the Staff Courier, though it is comprehensible that some people (including apparently the Applicants) should have been misled by it. We know that in fact, as one would expect, each selection board produced its own list of successful candidates (see the Annexes to the Defences) and it is stated on behalf of the Commission that it was from these lists that people were selected for promotion as and when vacancies occurred.

The proof of the pudding being in the eating, the Court asked the Commission to produce a list of the appointments made from among the successful candidates, indicating in each case the competition or competitions in which the candidate in question had been successful and his or her chosen 'option' or 'options'. Such a list was duly supplied by the Commission together with a bundle containing the notices of vacancy relating to the appointments in question (Annex 8 to the Commission's answers to the questions put by the Court). At the hearing Counsel for the Applicants put in a tabular analysis of this list prepared on behalf of the Applicants. From this it emerged that, in the case of 53 out of the 68 appointments on the list, the Applicants did not contest that the post to which the candidate was appointed was in the field covered by a competition in which he had been successful or else that the appointment was explicable in the light of the particular qualifications of the person concerned. In 15 of the cases, however, the Applicants challenge the relevance of the subject-matter of the competition in which the appointee was successful to the duties of the post to which he was promoted. The analysis in question was supplied to Counsel for the Commission too late for him to be able to take instructions as to those 15 cases, although he did at the hearing seek to deal with some of them from his own knowledge. My Lords, I have examined

those 15 cases, comparing, as regards each of them, the description of the duties involved in the post in question, as set out in the relative notice of vacancy, with the description of the field covered by the competition in which the appointee was successful, as well as with that of the option or options chosen by him or her in that competition. As a result, it seems to me that in 9 of the 15 cases the nexus is perfectly obvious, that in 4 is fairly obvious, and that only in 2 is it not obvious.

In the light of that evidence, it seems to me that the Commission is entitled to be upheld in its contention that the competitions were intended to, and did in fact, result in the constitution of five separate reserves. On that footing the second ground of complaint put forward on behalf of the Applicants must fail.

With it must fail also their third ground of complaint which is based on the circumstance that, so they allege, the selection board in competition COM/A/268 allowed English to be offered as a second language by candidates in that competition, although it was not then an official language of the Communities. The Applicants cannot found any complaint on what may have happened in a competition in which none of them was a candidate. I will revert in a moment to an allegation that English was allowed to be offered by one of the candidates in competition COM/A/264.

But I think it convenient to dispose at this point of two other complaints voiced by Mr De Vleeschauwer and Madame Bouyssou, though not by Signorina Campogrande, as to the way in which competition COM/A/268 was conducted. One is that the selection board in that competition used a system of marking different from that used by the other selection boards. The other is that three of the candidates in that competition were coached by members of the selection board. Be those allegations true or not, they are, in my opinion, irrelevant.

The fourth ground of complaint jointly put forward by the Applicants gives rise, to my mind, to more difficulty. It is alleged on their behalf that, at some stage, 'instructions' were given to the chairmen and members of the selection boards to limit as far as possible the number of successful candidates, so as to leave room for the recruitment of staff from the new Member States by may of open competition, and that this resulted in tampering with some candidates' marks.

The actual evidence bearing on this aspect of the case is scant.

It appears from the minutes of the meeting of 22 July 1971 that, at that meeting, the Commission also decided to hold some external competitions, the details of which were to be fixed later. Paragraph 4 (b) of the relevant minute is in these terms:

'La Commission indiquera au jury de chaque concours (interne et externe) le nombre approximatif de candidats qui devraient être inscrits sur la liste d'aptitude, de manière à ce que les listes de réserves internes, et externes puissent être épuisées dans des délais raisonnables.'

The letter from Herr Krauss to M. de Groote to which I have already referred, and which was written because of an inquiry made by Herr Lahnstein, the Head of the Private Office of a Member of the Commission, contains this important passage:

'Par ailleurs, on ne peut pas dire qu'il y avait des interventions en vue de limiter le nombre de candidats sur la liste d'aptitude. Lors d'un déjeuner de travail, auquel ont participé M. Coppé,' who was the Commissioner then responsible for personnel and administration, 'son Chef de Cabinet et les présidents des jurys, M. Coppé, répondant à ma question, a donné une certaine estimation des postes disponibles, par ailleurs de loin inférieurs au nombre de candidats mis ensuite sur les listes d'aptitude. Lorsqu'il y avait des indications que les jurys ne tiendront pas

compte des chiffres évalués par M. Coppé, il y avait encore un entretien avec M. Cardon de Lichtbuer', who was the Head of M. Coppé's Private Office, 'qui est resté sans aucune suite de la part des jurys qui ont insisté sur leur indépendance.

En conclusion, je pense qu'il s'impose de répondre à M. Lahnstein qu'il n'y avait aucun numerus clausus et que par ailleurs les jurys ont agi dans l'indépendance qui leur est non seulement garantie mais imposée par le statut.'

The notices of competition had stated that the tests would be marked as follows:

The written test: from 0 to 20,

The general oral test: from 0 to 20,

The oral test on the candidate's chosen 'option': from 0 to 30,

The language test: from 0 to 10,

making a total of 80 possible marks, out of which 48 were required for a pass.

The minutes of the meetings of the selection board in competition COM/A/268 (annexed to the Defences), after recording that that board had decided to divide the successful candidates into three groups namely-

1. those who had obtained 61 marks or over,
2. those who had obtained from 53 to 60 marks, and
3. those who had obtained from 48 to 52 marks,

continue as follows:

'(b) avant que le jury arrête la liste d'aptitude, un débat profond s'est déroulé sur les exigences à demander à un fonctionnaire de catégorie A. Des différences d'opinion très prononcées sont apparues entre le Président et les autres membres du jury.

La proposition du Président d'exclure de la liste tous les candidats entrant dans le 3ème groupe n'a pas été partagée par les autres membres du jury.

En conséquence, le jury a fixé, à la plus grande majorité, la liste d'aptitude comportant les 28 candidats ayant obtenu une cotation minimale de 48 points sur 80 dans l'ensemble des épreuves.'

The Applicants point to the absence of any record of any such disagreement in the minutes of any of the other selection boards and suggest that it is significant that the proportion of successful candidates was much higher in competition COM/A/268 than in any of the other competitions, the figures being as follows:

COM/A/264: 17 out of 55,

COM/A/265: 10 out of 64,

COM/A/266: 12 out of 44,

COM/A/267: 8 out of 36,

COM/A/268: 28 out of 51.

The Applicants invite the Court to draw the inference that a suggestion similar to that made by its chairman to the selection board in competition COM/A/268 was made to the other selection boards and that they gave effect to it by reducing the marks of certain candidates. It is alleged on behalf of Signorina Campogrande that she was told by a member of the selection board in competition COM/A/264 that her final mark was reduced from 52 to 47. It is correspondingly alleged on behalf of Mme Bouyssou that she was told by a certain Melle Dusseaux the latter had heard from a member of the selection board, Melle de Corne, that Mme Bouyssou had passed. And it is noteworthy that all three of the Applicants ended up with a mark of 47.

On the other hand there are many other possible explanations of the discrepancy between the results of the competitions. Thus the minutes of the meetings of the selection board in competition COM/A/267 disclose what seems to have been a genuine difference of opinion as to the qualities required of an individual for promotion to category A and Herr Krauss, in his letter suggests that, whilst the selection boards adopted

different standards, they did so out of sturdy independence.

The Applicants ask that the members and secretary of the selection board in competition COM/A/264, and also Melle Dusseaux, be summoned to give oral evidence on this issue. I assume that Mr De Vleeschauwer's application to that effect is due to a slip and that he really means to ask for the summoning of the members and secretary of the selection board in competition COM/A/265.

I confess that I have not found it easy to form a view as to whether those applications should be granted.

The Commission argues that the confidential nature of a selection board's proceedings means that its members should not lightly be called upon to give evidence about them. It submits that, before such a step is taken, there should at least be a 'commencement de preuve' that something was amiss in those proceedings. I agree, though I would not put it so much on the ground of confidentiality as on the ground that it would be intolerable if any unsuccessful candidate in a competition under the Staff Regulations were able, simply by making allegations in an application to this Court about the conduct of the competition, to compel the members of the selection board to come here to give an account of what they did.

It seems to me, however, that in the present instance, such evidence as there is does raise a case for inquiry and that the Court might be doing less than justice to the Applicants if it found against them without hearing the witnesses they propose. I think that Signorina Campogrande and Mme Bouyssou should also be heard, pursuant to Article 45 (2) (a) of the Rules of Procedure, so that they can particularize the circumstances in which they were told what they allege that they were told. I would hear them first.

I should make it clear that in my opinion there are only two relevant issues: first, whether the selection board in competition COM/A/264 or competition COM/A/265 altered the marks of any of the Applicants and, second, if they did alter them, whether they did so for improper reasons. I do not doubt that it must often happen that a selection board, in the course of its discussions, alters a candidate's provisional mark, upwards or downwards, even to the extent of making the difference between a pass and a fail for perfectly proper reasons.

I emphasize this because it seems to me that some of the submissions made on behalf of the Applicants go very wide of the point.

For instance, it is suggested on their behalf that there was a breach of the fifth paragraph of Article 5 of Annex III to the Staff Regulations, which requires a selection board, on completion of its proceedings, to include in the list of suitable candidates 'wherever possible' at least twice as many names as the number of posts to be filled. The purpose of that provision, in the case of a competition for a specific post or posts, is clear: it is to afford the appointing authority a choice. But it does not seem to me possible, either as a matter of strict interpretation or as a matter of common sense, to apply it to a competition held for the constitution of a reserve list. It is in the nature of such a competition that there are strictly no 'posts to be filled', although of course the number of relevant posts that may eventually become vacant may be capable of estimation. The crux is that the real purpose of such a competition is not to fill a particular post or posts but to ascertain which among the candidates would be suitable for appointment to a certain kind of post.

Equally misconceived to my mind, is the reliance placed by Counsel for the Applicants in this context on the maxim 'patere legem quam ipse fecisti', his suggestion being that the Commission changed the original purpose of the competitions. He went so far, at the hearing, as to dub the Commission's

conduct in this respect its 'péché majeur'. But of course what matters, in these cases, is not what the Commission may have done or not done, but what the selection boards did.

No more pertinent, in my opinion, is the suggestion that there was a misuse of power on the part of the Commission. The relevant power was not the Commission's to exercise. It was the selection boards' and the question, as I have indicated, is whether those boards allowed themselves to be influenced by extraneous considerations.

In their Replies (they say they did not know about it at the time their Applications were settled) the Applicants allege that one of the candidates in competition COM/A/264, Herr Winkler, was allowed to offer English as a second language. This cannot be relevant in the case of Mr De Vleeschauwer, who was not a candidate in that competition. But both Signorina Campogrande and Madame Bouyssou say that they might have been able to improve their results if they had been allowed to do the same. My Lords, assuming the facts to be as they allege (and they are not admitted by the Commission) it does not seem to me that the Applicant's rights were thereby infringed. Their right was to have their knowledge of languages tested on the basis of the notices of competition, which required a thorough knowledge of one of the languages of the Communities and a satisfactory knowledge of another. The circumstance that another candidate was tested otherwise than on that basis could only be relevant if the competition had been one for filling a specific post or posts and if that candidate had been successful. In fact the competition was for the establishment of a reserve list and Herr Winkler was unsuccessful in it.

To what I may call their joint complaints the Applicants add individual complaints.

Your Lordships will remember that the first task of a selection board under Article 5 of Annex III to the Staff Regulations is to examine the candidates' files and draw up a list of those who meet the requirements set out in the notice of competition. When the selection board in competition COM/A/264 went through this process they came to the conclusion that Signorina Campogrande did not meet those requirements. They accordingly excluded her from the list. At this she protested, first to Herr Krauss and then to M. Coppé. Following the latter's intervention, the selection board reversed its decision and put her on the list. She complains that, as a result of that incident, she was informed later than the other candidates (i.e. on 22 March instead of 10 March 1972) of what she should read in preparation for the tests. This may have been unfortunate, but I cannot see that it constitutes a legitimate ground of complaint. The only alternative would have been for the selection board to have adhered to its original decision. In any case, as the Commission points out, the reading in question was relevant not to the written tests, which took place on 23 March, but to the oral tests which took place later over a period of several days.

Mr De Vleeschauwer and Madame Bouyssou found a complaint on the manner in which the written tests were conducted. The description of the general test in the notices of competition was 'Rédaction d'une note de service ou d'un compte rendu de réunion dont les thèmes sont determinés par le jury'. It seems that the presiding invigilator, who was M. Morel, the chairman of the selection board in competition COM/A/265, explained to the candidates orally that that test involved producing not merely a summary but also comment. These two Applicants complain that M. Morel thereby imposed on the candidates a test not prescribed by the notices of competition. They also say that it caused confusion: that it was differently understood by different candidates, and indeed by different examiners, partly by reason of mistranslations. They suggest that the confusion was increased by the terms of

the written instructions handed to the candidates at the outset of the tests. My Lords, it seems to me that there is nothing in these complaints. The written instructions are in evidence (in Annex II to the Rejoinders) and seem to me perfectly clear and unexceptionable. What M. Morel said, bearing in mind the terms of those instructions and the fact that the competitions were for promotion to category A, cannot have been, to most of the candidates, anything more than a statement of the obvious. As experienced category B officials, they must have seen many times, in the course of their work, the kind of thing that was expected of them. As for the alleged imperfections in translation, I am at a loss to understand how, if they occurred, they can have affected the Applicants. It appears that M. Morel spoke in French. Madame Bouyssou is French. Mr De Vleeschauwer is Belgian and it was explained by his Counsel at the hearing, in another context, that, although his mother tongue is Dutch, he is more accustomed to working in French.

So far as points raised during the course of the written procedure are concerned, there remain a number of minor complaints put forward on behalf of Mr De Vleeschauwer alone. It would, I think, be an abuse of Your Lordships' time for me to rehearse these and deal with them individually. They are set out at pp. 27 to 30 of the Report for the Hearing. I confine myself to saying that in my opinion none of them would afford a ground for setting aside the results of the competition in which Mr De Vleeschauwer took part. The least trivial of them amounts to no more than saying that Mr De Vleeschauwer was confronted with difficulties of a kind that a category A official should be able to take in his stride.

By a letter dated 4 July 1974 addressed to my Lord the President of the Chamber, Counsel for the Applicants sought to raise a new point. This is founded on the fact that the minute of the Commission's meeting of 22 July 1971 records its decision as having been to hold that October 'des concours internes de rattrapage pour les fonctionnaires de catégorie B'. The complaint is that, in the event, officials of categories LA and C were also allowed to compete. In my opinion, my Lords, it should be enough to say that Article 42 (2) of the Rules of Procedure makes it perfectly clear that no fresh issue may be raised after the close of the written procedure, so that the point is inadmissible. In any case I would have said that there was no substance in it, if only because the decision of the Commission did not of itself confer any legal rights on the Applicants.

In my opinion the only act that could have any legal effect so far as they were concerned was the formal public act by which the Commission gave effect to its decision, that is the publication of the notices of competition. I do not think that the Applicants are entitled to go behind these and require an investigation of the decision-making processes of the Commission. We do not know what may have happened between 22 July 1971 and the publication of the notices, but whatever may or may not have happened cannot in my view be relevant to the Applicant's rights. What is relevant is that the notices of competition did not make it a condition of participation in them that candidates should be officials of category B. Indeed I doubt if they lawfully could have done so. Article 27 of the Staff Regulations provides, among other things, that recruitment 'shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity'. It would seem to me inconsistent with that requirement deliberately to confine an internal competition for recruitment to category A to officials of a particular other category. It is noteworthy that Article 1 of Annex III, which deals in detail with the contents of a notice of competition, does not envisage the possibility of such a restriction.

In the result I am of the opinion that Your Lordships should, at this stage, defer giving Judgment and order the inquiry I have indicated.