# JUDGMENT OF THE COURT (FIRST CHAMBER) OF 16 MARCH 1978 [1]

# Bernhard Diether Ritter von Wüllerstorff und Urbair v Commission of the European Communities

**Case 7/77**

1. *Officials — Application — Initial complaint — Required condition only for measures which the administration can review — Decision of a Selection Board*
   *(Staff Regulations, Arts. 90 and 91)*

2. *Officials — Application — Assignment to a post — Absence of financial benefits or enhanced official status — legal interest in taking proceedings*
   *(Staff Regulations, Art. 91)*

1. By providing that an appeal to the Court of Justice shall lie only if the person concerned has previously brought an official complaint, Article 91 (2) of the Staff Regulations refers only to measures which the appointing authority can review and does not therefore cover the decisions of a Selection Board.
2. Even in the absence of financial benefits or enhanced official status, an official or servant may have an interest in preferring some oduties to others.

In Case 7/77

BERNHARD-DIETHER RITTER VON WÜLLERSTORFF UND URBAIR, an official of the Commission of the European Communities, represented by Marcel Grégoire and Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, assisted by Denise Sorasio-Allo, a member of its Legal Service, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

1 — Language of the Case: French.

APPLICATION for the annulment of the decision, notified on 16 November 1976, whereby the Selection Board for Internal Competition COM/1149/75 refused to admit the applicant to the competition, and consequently, for the annulment of the said competition and of the appointment which was made on the basis thereof.

THE COURT (First Chamber),

composed of: G. Bosco, President of Chamber, A. M. Donner and J. Mertens de Wilmars, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Facts and issues

The facts of the case, the course of the procedure, the conclusions, submissions and arguments of the parties may be summarized as follows:

### I — Facts and procedure

During the second half of 1972 the Commission posted up Vacancy Notice COM/646/72 relating to a post of Principal Administrator in Category and career bracket A 5/A 4 in the Tobacco, Hops, Potatoes and Other Specialized Crops Division of the Organization of Markets in Specialized Crops, Fisheries Directorate of the Directorate General for Agriculture.

On 22 October 1973 the Commission decided to fill this vacancy pursuant to Article 29 (2) of the Staff Regulations of Officials and to appoint Mr Eduardo Capuano to the post. By judgment of 29 October 1975 the Court (First Chamber) annulled *inter alia* the decision making that appointment (Joined Cases 81 to 88/74, *Marenco* v *Commission* [1975] ECR 1247).

Subsequently the Commission notified its staff, through Vacancy Notice COM/1149/75, that the said post was vacant and fixed 30 January 1976 as the closing date for application.

Mr Bernhard-Diether Ritter von Wüllerstorff und Urbair, who was at that time in Grade A 6 and assigned to the Wine, Spirits and Derived Products Division of the Organization of Markets in Specialized Crops, Fisheries Directorate of the Directorate General for Agriculture, and certain other officials then applied for promotion to the vacant post. The Director of the Directorate in question carried out an examination of the comparative merits of the candidates and proposed that Mr von Wüllerstorff should be appointed to

the post in question. The Director General however did not implement that proposal and decided to hold an internal competition based on qualifications and tests.

The notice of Internal Competition COM/1149/75 described the nature of the duties as follows:

"Administrative advisory and supervisory duties, involving:

— establishment of a common organization of potato markets, bringing the organization into operation, and studies and analyses relating to the potato market;

— application of the regulation on the common organization of the market in seeds, notably study of market trends and drafting and supervising the application of Community provisions in this sector;

— quality and marketing standards and problems relating to potato diseases."

Three servants applied, including Mr Capuano and Mr von Wüllerstorff. The latter was informed by a note of 16 November 1976 that the Selection Board, which was required to consider the various applications, had been unable to admit him to the competition because he did not fulfil the conditions set out at II (1) (b) and (d) under Eligibility. Those conditions were as follows:

"(b) Thorough knowledge of economic and technical problems in the sectors involved, particularly the potato market (production, trade, prices) in Community and non-Community countries.

(d) Thorough experience relevant to the post".

The only candidate admitted to the competition was Mr Capuano. On the basis of written and oral tests, which took place on 23 and 30 November 1976, Mr Capuano was declared successful in the competition and was appointed to the vacant post on 28 February 1977, with effect from 1 February 1977.

Mr von Wüllerstorff was promoted to Grade A 5 with effect from 1 January 1977 by a decision of 8 December 1976 and was assigned to the Financing and Auditing: Guarantee Division of the European Agricultural Guidance and Guarantee Fund Directorate.

He initiated the present proceedings by an application which was lodged at the Court Registry on 12 January 1977.

## II — Conclusions of the parties

The *applicant* claims that the Court should:

— Annul the decision of the Selection Board for Internal Competition COM/1149/75 not to admit the applicant to that competition;

— Annul Internal Competition COM/1149/75 and the appointment made on the basis thereof;

— Order the defendant to bear the costs of the proceedings.

The *defendant* contends that the Court should:

— Dismiss the present application in its entirety as inadmissible and in any case as unfounded;

— Order the applicant to bear the costs.

## III — Submissions and arguments of the parties

### *A — Admissibility*

The *defendant* emphasizes first of all that the present application was lodged without the applicant's having first submitted a complaint as provided in Article 90 (2) of the Staff Regulations of Officials. Since the present application is principally directed against the

decisions of a Selection Board which cannot be revoked or amended by the appointing authority it might appear superfluous to compel officials to submit a complaint to the latter. Nevertheless the terms of the rule inserted in the Staff Regulations and considerations of the usefulness, in certain cases, of a stage of procedure before the matter comes into court tell in favour of maintaining the procedure of an initial complaint even in these circumstances.

The principles established by the Court, in particular in its judgment of 14 June 1972 (Case 44/71 *Marcato* v *Commission* [1972] ECR 427), namely that the only form of appeal in relation to a decision taken by a Selection Board lies in an application to the Court, were set out in proceedings governed by the former version of Articles 90 and 91 of the Staff Regulations. After the revision of these provisions the Court ruled that the admissibility of an application could not be contested as time-barred by reason of the procedure for an official complaint having taken its course (31/75 *Costacurta* v *Commission* [1975] ECR 1563. The present position thus appears to be that the Court permits one or other course to be followed. The defendant nevertheless considers that a ruling settling the principle would afford a greater degree of legal certainty. Thus it does not wish to maintain that the applicant has failed to submit an initial complaint, in order formally to rely upon the inadmissibility of the application.

On the other hand it considers that the application is inadmissible because the applicant has no legal interest in taking proceedings, if only in view of the fact that on 1 January 1977 he was promoted to Grade A 5. If the Court of Justice rules in favour of the applicant's claims he could apply for the post which would then have to be declared vacant. In that case, however, he could only be a candidate for transfer. Whilst the need to protect promotion prospects is not disputed the servant does not enjoy similar protection with regard to his opportunities for transfer from one department to another in an institution.

Furthermore, in the present case it is not clear how the applicant was put at any disadvantage by the fact that he was not appointed to the post in question but after all to another post in the same Directorate General.

The *applicant* remarks, with regard to the failure to submit a complaint, that the Court of Justice has already delivered an express ruling in the dispute in question to the effect that it is unnecessary to submit a complaint (see the above-mentioned judgment in the *Costacurta* case). Nevertheless in case the Court should take a contrary view an official complaint was lodged on 2 February 1977. With regard to his legal interest in taking proceedings the applicant considers that the finding, which may be made in his favour, that he is entitled to apply for the transfer suffices to show that he has an interest in the annulment of the contested measures. He disputes that opportunities for transfer do not constitute a legal interest: since a post has been declared vacant he is entitled, if he fulfils the respective conditions, to submit his application for transfer as well as for promotion (third paragraph of Article 4 and Article 29 (1) (a) of the Staff Regulations of Officials).

Finally, an official who has applied for transfer to a vacant post is entitled to institute proceedings against a decision to appoint another official to that post (see judgment of 3 February 1977 in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7). A legal interest in a transfer thus exists and an application for transfer must naturally be protected by the Court.

In the present case the specific interest of the applicant in obtaining the post in dispute is sufficiently established by the fact that he endeavoured to obtain the

post not only by promotion but also through the competition organized. He is at present employed in an accounting post which does not accord so well with his training and experience as the post in question. He would thus have better prospects if he held the post in dispute instead of his present post.

The *defendant* considers that the sole point at issue is whether, in the event of the post in question again becoming vacant, any advantage would accrue to the applicant or any legal interest of his would be protected, having regard to his present situation.

The fact that the applicant for his present post and that he previously applied for six other vacant posts in Grade A 5/4 in the Directorate General for Agriculture shows that the applicant's main concern was to obtain promotion to Grade A 5. It cannot thus be claimed that he has failed to obtain the advantages which he was seeking by entering the disputed competition.

Finally, the applicant is not entitled to claim that the duties of this present post are unsuitable: he himself chose to apply for that post.

*B — Substance*

The applicant advances the following complaints concerning:

1. Infringement of Article 25 of the Staff Regulations of Officials and of Article 5 of Annex III thereto; conduct *ultra vires* in that no sufficient statement of reasons has been supplied for the decision of the Selection Board in Internal Competition COM/1149/75 not to admit him to that competition;
2. In the alternative:

   Infringement of Article 25 of the Staff Regulations of Officials and of Article 5 of Annex III thereto, and, more generally, of the rules and principles in accordance with which any administrative measure must contain a statement of reasons and such statement may not be vitiated by errors of law or of fact; conduct *ultra vires* in that the Selection Board erred in failing to admit the applicant to the competition.
3. As a further alternative:

   Infringement of Article 7 of the Staff Regulations of Officials and of Article 27 thereof and especially the third paragraph of the latter; misuse of powers in that, on the one hand, the post in question was reserved for a person of a specific nationality and on the other, the entire course of the procedure shows that the aim pursued was not the interests of the service but the appointment of the person whose previous appointment to that post had been annulled by the Court.

First submission

The *applicant* claims that the Selection Board for the competition simply stated that he did not fulfil the conditions set out at (b) and (d) under Eligibility (see Annex I to the application). This mere assertion is quite unsubstantiated and no explanation is even attempted. Since the reasons which guided the Selection Board in its appraisal remain unknown the Court cannot review the lawfulness of that appraisal. In the present case this "statement of reasons" must *a fortiori* be held utterly insufficient in that the applicant:

— was proposed for promotion to the post by the Director of the Directorate where the post in question is;

— is a Doctor in Agricultural Sciences, which in principle should permit him to take part in any competition for a post relating to agriculture;

— has passed the "Staatsexamen" in agriculture in Bavaria, which gives him the status of "Landwirtschaftlicher Assessor";

— the test for this qualification required studies at advanced level in general agricultural economy which clearly covers potatoes;

— completed one of the two probationary years of practical work, before going up to university, on a German national research farm where, out of 350 hectares cultivated, 150 were given over to potatoes and indeed exclusively to the cultivation and propagation of new varieties.

The *defendant* observes that the very purpose of the stage at which applications are considered is to compare the qualifications submitted by the candidates with the conditions laid down by the vacancy notice. It is thus difficult to imagine that in the drafting of a statement of reasons for a refusal to grant admission to a competition express reference to eligibility should not be made. In the present case the wording of the conditions of eligibility was very clear. There is no difference between this manner of notifying the candidate and a more explicit form of notification which could only have repeated the substance of terms of the section in question. In fact the adequacy of the statement of reasons can only be appraised with regard to the requirements of review by the Court; the person concerned must be in a position, if necessary, to challenge these reasons and the Court must be able to consider their lawfulness. In the present case it is clear that the Court, like the parties, is fully acquainted with the reasons which prompted the Selection Board to take its decision. In view of the wording of that statement of reasons, of the extreme clarity of the drafting of the notice of competition and of the qualifications submitted by the applicant, the Court is certainly in a position to appraise the lawfulness of the statement of reasons.

The *applicant* in his reply relies upon the judgment of 15 March 1973 in Case 37/72 *Marcato* v *Commission* [1973] ECR 361 where it was held that the report of the Selection Board and a further note from the administration did not contain a sufficient statement of reasons since they "merely indicated the qualifications in which the applicant was considered to be deficient whereas, at first sight, his practical experience might seem comparable to that of the other candidates admitted".

At all events an appraisal lacks a sufficient statement of reasons if the reasons or criteria upon which it was based are unknown. In the present case it is evident at least that the qualifications and experience of the applicant are at first sight comparable to those of the candidate admitted. In order to establish this it is sufficient to recall the above-mentioned qualifications of the applicant who in addition has acquired extensive experience in setting up common organizations of the market in that he has personally taken part in the establishment of two such organizations. It must further be emphasized that the applicant was proposed for the post in dispute by the Director concerned on the ground, which on this occasion was properly substantiated, that the applicant fully meets the requirements laid down for this post (see Annex II to the defence). With regard to the requirements for review by the Court the applicant observes that it is impossible in the present case to examine or review the reasoning by which the Selection Board was guided. It is even more necessary to be acquainted with these reasons since it is at first sight incomprehensible that a candidate, who was proposed for promotion to a post because he fully meets the requirements thereof, is subsequently not even admitted to the competition for that post.

Finally, it is clear that explanations "*a posteriori*" by the defendant, putting itself in the place of the Selection Board for the competition, cannot compensate

for the lack of a proper statement of reasons for the decision of the latter.

The *defendant* in its rejoinder disagrees with the interpretation which the applicant has placed upon the judgment in the *Marcato* case. What the Court censured in that case was the fact that the statement of reasons on the one hand merely mentioned that the candidate did not fulfil a condition which was drafted in very general terms whereas, on the other, the applicant's practical experience might "at first sight" seem comparable to that of the other candidates admitted. It clearly follows that that decision cannot be extended to a case where the statement of reasons refers to very clear and moreover specific conditions for the post to be filled. The present dispute also differs from the *Marcato* case precisely in that it does not appear that either the qualifications or the experience of the applicant can "at first sight" compare with those of the candidate admitted. On the contrary it appears "at first sight", and in any case on consideration of the documents before the Selection Board, that the applicant manifestly did not fulfil the required conditions. In these circumstances the Selection Board had neither a duty nor any special reason to give a fuller statement of reasons for its decision and thereby depart from its normal practice in such matters.

Second submission

The *applicant* maintains that he fulfils the conditions set out at (b) and (d) under Eligibility in the notice of competition.

With regard to (b) he refers to his studies and to the two probationary years of practical work (see above). Furthermore, during his university vacations he spent periods on various farms on which potatoes were cultivated.

The same facts can be taken to establish that the applicant fulfils the condition at (d), "thorough experience relevant to the post". The applicant adds that he has undoubtedly acquired wide experience in the establishment of common organizations of the market. He not only took part in setting up two of these organizations but has also dealt in recent years with comparable problems in the common organizations of the markets in general.

The fact that the Director concerned, who was best able to know that the applicant was the person most suitable for the post in question, proposed that he should be promoted further confirms that the two disputed conditions of eligibility were fulfilled in the present case.

The *defendant* considers that the information supplied by the applicant shows clearly that the latter can indeed be considered as a specialist in agricultural sciences but certainly not as a specialist in the economic and technical aspects of the potato sector. The practical courses which he followed before or during his studies, that is to say almost twenty years ago, cannot be seriously taken into consideration in order to determine whether the applicant is now thoroughly conversant with the technical aspects of this sphere and, even less, with its economic aspects.

With regard to the requirement of thorough experience relevant to the post it can be accepted that the applicant has a general experience of problems concerning the common organization of the agricultural markets but certainly no specific knowledge of potatoes and seeds nor experience of quality and marketing standards and problems relating to potato diseases.

The applicant replies that the degree of Doctor in Agricultural Sciences implies the first qualification in question.

Even if doubts might be entertained regarding his present thorough

knowledge this does not constitute a reason for refusing to admit him to the competition which is indeed intended to test that knowledge. An interview with the Selection Board which is intended to determine whether the candidate has the required knowledge loses its purpose if he is denied the opportunity to establish that his knowledge is up to date on the pretext that the periods of practical work seem inadequate because they were completed so long ago.

The same considerations apply to the second condition in dispute. Experience in carrying out the work involved in managing the common organizations of the agricultural markets (and thorough knowledge of the potato sector) has further been accepted by the Director concerned.

Finally, apart from cases where a notice of competition was "made to measure" for a candidate, it is always possible to find, if it is so desired, that any candidate for posts involving a certain technical complexity, which have not been held before by the persons concerned, one or more ways in which the latter does not fully meet the requirements. It is to be wondered how Mr Capuano can have a better experience than the applicant of a post mainly concerned with the establishment and application of common organizations of the market when the former has never set up or worked in such organizations.

The *defendant* replies that the Selection Board for a competition necessarily enjoys a certain margin of discretion in exercising its powers. Only the infringement of a provision of law or a manifest error of fact can entail the annulment of its decisions. In particular a more or less strict interpretation of conditions appearing in the notice of competition naturally falls within the exercise of that discretion.

As to the point whether the Selection Board has committed a manifest error in its appraisal the defendant refers to its above-mentioned statement and to the documents with which the Board was acquainted. They show clearly that the applicant did not have the necessary qualifications.

Finally, the proposal that he be promoted does not support the applicant's argument: this proposal clearly has no validity in law at the competition stage and it could in no way bind the Selection Board or influence its judgment, the more so since the Board was not required to take cognizance of it.

Third submission

The *applicant* considers that the post in question had been reserved for a person of a specific nationality and that it was necessary to appoint Mr Capuano whose previous appointment to that post had been annulled by the Court. Following that annulment the defendant had decided to dispense with the procedure of appointment through promotion or transfer in which Mr Capuano, as a member of the temporary staff, could not take part. Finally, Mr Capuano was appointed after an internal competition to which he was the only person admitted and this is contrary to the very concept of a competition. It must be open to question whether there can still be a competition when only one candidate is admitted.

The *defendant* observes that the applicant is unable to furnish any serious evidence in support of his statements.

The specific qualifications of the successful candidate in the competition and his thorough experience in particular in the potato sector show that the outcome of the competition is perfectly logical and in any case that it cannot, in itself, constitute evidence of misuse of powers. The Selection Board exercised its full powers in complete independence, in strict compliance with the conditions laid down in the notice of competition.

Finally, the defendant emphasizes that a distinction must be drawn between the proceedings for annulment directed against the decision refusing to admit the applicant to the competition and the proceedings for the annulment of the competition and of the subsequent appointment on the one hand and the inferences to be drawn on the other. Even supposing for the sake of argument that the Court were to find that the decision refusing to admit the applicant to the competition was irregular and in particular that such irregularity consisted in an inadequate statement of reasons or in an infringement of a procedural requirement the defendant does not consider that this finding must entail the annulment of the contested decisions. In this connexion it refers to the judgment of 29 September 1976 in Case 9/76 *Morello* v *Commission* [1976] ECR 1415.

The *applicant* maintains that there has been a misuse of powers because the competition for one person is contrary to the very concept of a competition. The Staff Regulations furthermore confirm this view when they lay down in the fourth and fifth paragraphs of Article 5 of Annex III that the list of suitable candidates shall wherever possible contain at least twice as many names as the number of posts to be filled.

The applicant asks whether, at any rate if several candidates have applied, it is not legally necessary, as soon as it has been decided that only one candidate may enter, to dispense with the competition and instead to hold an open competition.

The *defendant* states that the relevant provisions of the Staff Regulations do not contain anything prohibiting competitions with a single candidate. Further, in practice this situation is not unusual in internal competitions.
Finally it should be recalled that the sole concern of the Selection Board at the stage of the examination of qualifications is to check that such qualifications meet the conditions in the notice of competition; the provision laying down that "wherever possible at least twice as many names as the number of posts to be filled" shall be put forward only applies to drawing up the list of suitable candidates after the tests.

### IV — Oral procedure

The parties presented oral argument at the hearing on 13 October 1977.

At the request of the Court the Commission produced documents which have been put on the file.

The Advocate General delivered his opinion at the hearing on 1 March 1978.

## Decision

1 The applicant, by an application which was registered on 12 January 1977, requested the annulment of the decision of the Selection Board in Internal Competition COM/1149/75 not to admit him to that competition together with the annulment of the competition itself and of the subsequent appointment of another candidate.

2 The competition in question was for a post of Principal Administrator in the Tobacco, Hops, Potatoes and Other Specialized Crops Division of the Organization of Markets in Specialized Crops, Fisheries Directorate of the Directorate General for Agriculture.

3 The notice of competition listed under Eligibility, in particular at 1 (b): "Thorough knowledge* of economic and technical problems in the sectors involved, particularly the potato market (production, trade, prices) in Community and non-Community countries" and at 1 (d): "Thorough experience relevant to the post"; the asterisk at 1 (b) refers to a footnote stating: "If this is not clear from their application papers, candidates must make a written statement to the effect that they do possess such knowledge".

4 By a note of 16 November 1976 the Selection Board for the competition notified the applicant of its decision not to admit him to the competition on the grounds that he did not fulfil the above-mentioned conditions.

Admissibility

5 The Commission, the defendant, considers that the application is inadmissible first because the applicant has failed to comply with Article 90 of the Staff Regulations of Officials in that he commenced proceedings without first submitting a complaint and further because he has no longer a legal interest in the annulment of the contested measures since, after 1 January 1977, he too was promoted to Grade A 5, the same grade as that of the post which he sought.

6 With regard to the first point Article 91 (2) of the Staff Regulations in fact provides that an appeal to the Court of Justice shall lie only if the person concerned has first availed himself of the administrative procedure laid down in Article 90.

7 Nevertheless this procedure is devoid of purpose where a complaint is directed against the decisions of a Selection Board in a competition since the appointing authority is not empowered to review such decisions.

8 Accordingly the general plan both of the administrative procedure and of the court procedure militates against an interpretation of Article 91 (2),

which if taken literally, would merely result in a futile prolongation of the procedure.

9 The applicant thus correctly interpreted the Staff Regulations when he took the view that the condition in Article 91 refers only to measures which the appointing authority can review.

10 With regard to the second point, namely the circumstance that in his new position the applicant could only be assigned to the post in question by transfer does not imply that he has no interest in the annulment of the contested competition and in the appointment made on the basis thereof.

11 In fact the argument that if there are no financial benefits or enhanced official status it is impossible to recognize a substantial interest in performing a certain duty, disregards the interest which an official or servant may have in preferring some duties to others.

12 The objection of inadmissibility thus cannot be upheld.

Substance

13 The applicant makes three submissions.

14 The decision of the Selection Board failed to comply with the legal requirements in that it did not contain an adequate statement of reasons.

15 The decision is unfounded in fact and accordingly is vitiated by errors of law or of fact and is therefore *ultra vires*.

16 Finally, in the alternative, the decision is vitiated by misuse of powers since everything points to the fact that the procedure followed by the Selection Board was intended to reserve the post in question for a person of a specific nationality whose previous appointment to that post had, moreover, been annulled by the Court on a previous occasion.

17 In the circumstances of the present case these submissions should be considered as a whole.

18 The applicant relies on the fact that the conditions on the basis of which his application was rejected were extremely detailed and at any rate more detailed than those set out in Vacancy Notice COM/646/72 for the same post, and maintains that those conditions had been "made to measure" in order to admit only a single candidate to the competition, who in fact was declared eligible and subsequently appointed.

19 Nevertheless the Commission has been able to establish, by producing a number of recent vacancy notices, that some time ago it introduced the practice of setting out as clearly as possible the kind of candidate which it is seeking.

20 In comparison with the conditions stated in similar documents the conditions of eligibility for the competition are not excessively detailed.

21 Subsequently the Selection Board considered that the applicant did not fulfil the condition: "Thorough knowledge of economic and technical problems in the sectors involved, particularly the potato market . . .".

22 In fact the documents submitted by the applicant in support of his application and in order to obtain admission to the competition failed to establish a thorough knowledge in the relevant spheres.

23 Since the above-mentioned footnote, to which reference was made in the notice of competition, placed special emphasis on the need to produce evidence or a statement from candidates that they possessed thorough knowledge in these spheres, the Selection Board was entitled to consider that failure to provide information indicated a serious lack of such knowledge.

24 Likewise the applicant's career does not show that he possesses "thorough experience relevant to the post".

25 It must in any case be found that with regard to both conditions the documents submitted with the application of the candidate who was accepted indicate that be was more suitable.

26 Accordingly, although the background to the application in question may give rise to some doubts, consideration of the circumstances has not revealed either an error of fact or of law or misuse of powers.

27 In that situation, the Selection Board has provided a sufficient statement of reasons for its decision by indicating the conditions of eligibility which it considered were not met by the applicant's application.

28 The complaints accordingly cannot be upheld and the application must be dismissed.

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

30 The applicant has failed in his submissions.

31 Nevertheless, under Article 70 of the Rules of Procedure in proceedings brought against them by servants of the Communities institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

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

Bosco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 16 March 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

## OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 1 MARCH 1978

*My Lords,*

This case is a sequel to Cases 81-88/74 *Marenco and others* v *Commission* [1975] ECR 1247, in which the Court annulled a number of appointments that had been made by the Commission to its staff on 22 October 1973, the reason for such annulment being that those appointments had been made in breach of the provisions of Articles 7 and 27 of the Staff Regulations to the effect that no post may be reserved for nationals of any specific Member State.

Among the applicants in that group of cases was the applicant in the present case, Dr Bernhard-Diether Ritter von Wüllerstorff und Urbair. Among the persons whose appointments the Court annulled was Mr Eduardo Capuano, whose appointment had been to an A 5 post in the "Tobacco, Hops, Potatoes and Other Specialized Crops" Division of the "Organization of Markets in Specialized Crops, Fisheries" Directorate of the Directorate General of Agriculture.

In fact, Mr Capuano's tenure of that post continued uninterrupted despite the decision of the Court. Following that decision, the contract under which he had been engaged as a member of the temporary staff of the Commission down to the date of his appointment was renewed until, as from 1 February 1977, he was re-appointed to the post on the basis of a competition. It is his own exclusion from that competition that the applicant challenges in the present case.

The relevant facts are these.

In January 1976 the Commission published Vacancy Notice COM/1149/75, advertising the post (Annex 3 to the Application). The duties attaching to the post were there described in the following terms:

"Administrative, advisory and supervisory duties, involving:

— establishment of a common organization of potato markets, bringing the organization into operation, and studies and analyses relating to the potato market;