OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 2 July 1986 *

Mr President,
Members of the Court,

1. In 1985, with a view to filling a permanent post of administrator in Career Bracket A 7 — A 6, the Court of Auditors, in its capacity as Appointing Authority, organized Internal Competition No CC/A/8/85. In that connection it published a Notice of Competition and appointed a Selection Board.

Fourteen members of staff submitted applications. The Selection Board took the view that they did not satisfy the requirements for admission to the tests laid down in the notice. It therefore did not admit any of the candidates to the competition, even though the Appointing Authority had made clear that in its view certain provisions of that notice should be given a more flexible interpretation.

Four of the candidates, Henri Maurissen, Harmut Schwiering, Volker Hoyer and Manfred Neumann brought actions before this Court in connection with the decisions of the Board concerning them. The oral procedure in respect of Mr Maurissen's application has been fixed for 23 October 1986. Mr Schwiering's case will be dealt with in a separate opinion to be delivered at today's sitting.

2. Let us therefore examine the applications lodged by Mr Hoyer and Mr Neumann whose cases were joined by an order of the Court of 9 April 1986 in view of the connection between them.

The Notice of Competition contained the following provisions:

'IV — *Eligibility:*

To be admitted to the competition, candidates must:

...

3. ... possess a thorough knowledge of one official language of the European Communities and satisfactory knowledge of a second official Community language. Knowledge of a third language would be appreciated.

In view of the nature of the duties, knowledge of French is required.

The Selection Board will study the candidates' files and draw up a list of applicants who meet these requirements, and who will therefore be admitted to the tests.

V — *Competition*

The competition will be held on the basis of qualifications and tests:

...

B — *Tests*

1. *Nature of the tests:*

...

(c) oral test to assess the candidates' knowledge of languages as indicated under paragraph IV (3) above.'

* Translated from the French

In their application forms Mr Hoyer and Mr Neumann entered the following comments regarding their knowledge of French:

reading: good

writing: fair

speaking: fair

On that basis and in the light of its interpretation of the abovementioned notice the Selection Board refused to admit the applicants to the test. It took the view that:

In the first place, the nature of the vacant post and the interests of the service made it necessary for the candidates' knowledge of French to be at least 'good' as regards 'reading', 'writing' and 'speaking', the headings contained in the application form;

Secondly, the provisions of paragraph IV of the Notice of Competition required it at the admission stage to select from the candidates those whose stated knowledge — subject to subsequent verification by means of the oral test provided for — could meet the required level. Such an approach was justified in view of the fact that it is in no candidate's interest 'to indicate a level of knowledge lower than his actual level' (report of the Selection Board to the Appointing Authority dated 28 October 1985).

The decision refusing to admit them to the tests was notified to Mr Hoyer and Mr Neumann by the Chairman of the Selection Board on 2 August 1985. The two candidates were invited to submit their comments. This they did, stating the grounds on which they contested the measure adopted in relation to them. By letters addressed to them dated 28 October 1985 the Selection Board maintained its position.

On 30 October 1985 the Appointing Authority informed all of the candidates in the competition that it did not wish to publish a 'blank' list of suitable candidates and that, consequently, the procedure was suspended pending any actions that might be brought.

3. The applicants claim that the Court should annul the decisions of the Selection Board on the following grounds:

By requiring a specific level of knowledge of French, the Selection Board introduced a condition for admission to the tests which did not appear in the Notice of Competition;

It did not verify objectively, by means of the oral tests envisaged for that purpose, the subjective assessment made by each candidate of his own knowledge of French.

4. The Court of Auditors, the defendant, submits that the applications are well founded.

It draws attention to its persistent disagreement with the Selection Board and notes, whilst expressing regret that it should be the case, that the Court's decisions, in particular its judgment of 14 July 1983 in Case 144/82 (*Detti* v *Court of Justice of the European Communities* [1983] ECR 2421) rule out any possibility for the Appointing Authority to amend or annul the decisions of a Selection Board, even when they clearly contain serious errors. The Court of Auditors takes the view, however, that where, as in this instance, there is no dispute between the parties to the proceedings, the Appointing Authority should itself have the power to override such decisions. That would, however, require a change in the Court's case-law.

5. No objection was raised to the admissibility of the application. As the Court has held, decisions of a Selection Board assessing the merits of a candidate may be the subject of a direct application to the Court (Case 144/82 *Detti* cited above; and judgment of 14 June 1972 in Case 44/71 *Marcato* v *Commission* [1972] ECR 427).

As regards the substance, in my view the applications must be allowed.

Although it is for the Selection Board to ascertain that the candidates meet the conditions of eligibility for the competition, it may exercise that power only by relying on objective factors such as university degrees or an attestation provided by a competent body certifying professional experience corresponding to the conditions of equivalence and duration laid down in the notice of competition.

In the Notice of Competition in question knowledge of the French language was required but no indication as to the level demanded was given. At the admission stage, the Selection Board would therefore have been justified in refusing to admit to the tests any candidate who stated that he had no knowledge of French.

In any other case, the required level of knowledge, which the Selection Board was indeed bound to assess in view of the nature of the duties to be carried out, should have been ascertained by means of the oral tests envisaged for that purpose. Any other decision to eliminate candidates, based on the subjective assessment on the ground that candidates 'generally tend to overestimate the level of their knowledge' (report of 28 October 1985 cited above) — a proposition which cannot be taken as a general rule — would be, as in this case, contrary to the Selection Board's duty of objectivity and the principle of equal treatment as between the candidates.

6. There is therefore no problem in annulling the contested decisions, thus removing not so much a dispute, since there is no point of contention between the parties, as a legal impasse. To do that, there is no need to change the case-law, which the defendant urges the Court to do and for which the legal conditions, to mention only those, are not, in my view, satisfied in this case. The Court of Auditors in its capacity as Appointing Authority did not think that it should quash the contested decisions in place of the Court. The Court need not therefore rule on the question whether it had the power to do so.

The Court of Auditors states, however, that it considered that possibility, in particular after having read my Opinion in the *Williams* case (judgment of 16 October 1984 in Case 257/83 [1984] ECR 3547). In my view, it was well advised not to annul the decisions. Such a power of annulment would in fact undermine the independence of the Selection Board and therefore the guarantee of impartiality owed to the candidates.

I would add that it seems to me that I have been misunderstood. In the Opinion to which the defendant refers I merely drew attention to the fact that, although Article 5 of Annex III to the Staff Regulations 'empowers the Selection Board to establish "a list of candidates who meet the requirements set out in the notice of competition"', that provision cannot be interpreted as 'depriving the appointing authority of

power, and even the duty, to ascertain whether any candidate included in the list of suitable candidates by the Selection Board actually meets the requirements laid down by the Appointing Authority itself with regard to diplomas or experience'.

That does not mean that the Appointing Authority may annul the decision of a Selection Board where the decision contains irregularities but that it is under a duty, *in exercising its own power*, not to make an unlawful appointment.

Consequently, I propose that the Court should annul the contested decisions and that the defendant institution should be ordered to pay all the costs.