OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 11 JANUARY 1979 [1]

Mr President,
Members of the Court,

1. The application lodged against the Commission by Mrs Hélène Martin on 27 February 1978 is for the annulment of the procedure in an internal competition for which the applicant had applied; she took the written test and was not admitted to the oral tests. In this competition (Competition COM/680/75) there occurred three events upon which Mrs Martin bases her three grounds for the application, in other words: (a) the member of the selection board apointed by the Staff Committee attended the first meeting of that board only to state that he would not take part in the work; he did not in fact subsequently take part in that work. The applicant maintains that this violated the principle that the presence of all members of the selection board is a condition for the validity of all competitions; (b) the topic set by the selection board for the written test corresponded to the subject dealt with for two years previously by the other applicant, who was, as a member of the temporary staff, performing the tasks relating to the post put up for competition. This fact, she alleges, is contrary to the principle of equality of treatment of the applicants; (c) the outcome of the competition was the "establishment" of Mr Ferrandi, the member of the temporary staff. This shows that the procedure had been initiated for a specific purpose, that of satisfying the personal interests of Mr Ferrandi: hence the defect of abuse of powers.

I shall examine the three problems in the order in which I have summarized them.

2. It is clear from the documents on the file of the case that the local Staff Committee in Brussels informed the selection board for the competition in question by letter of 26 September 1977 that Mr Alonso, appointed as "staff representative" on that board, had received instructions to "refrain from taking any part in the work". The letter recalled the point of view expressed by the Joint Committee in favour of the abolition of individual competitions, as well as the opinion unfavourable to Competition COM/680/75 put forward at the same meeting. Finally, it specified that the fact that Mr Alonso refrained from taking part in the activities of the selection board was an instruction under Article 21 of the Staff Regulations and Article 1 of Annex II.

The report of the selection board referred in its turn, in point 2 thereof, to the fact that at the beginning of the meeting (held on 14 November 1977) the "representative of the Staff Committee" read and then handed to the chairman the above-mentioned letter, requesting that it should be annexed to the report. "The other members", the report continues, "took note of the contents of the letter in question and decided to

1 — Translated from the Italian.

continue their work". From this point onwards the report always speaks of the activities and the decisions *of the selection board;* however, it is evident that that board was acting in the absence of Mr Alonso, one of its members.

The two parties to the case naturally differ in the appraisal of the effects of that absence. I have already stated that the applicant invokes the principle that a selection board for a competition can only act validly when all its members take part. In addition, she considers that the fact that the member appointed by the Staff Committee — whom Article 3 of Annex III to the Staff Regulations mentions specifically — was absent is a particularly serious case of illegality and emphasizes that the result of the competition was necessarily influenced by the fact that throughout the work the selection board was incomplete. Still according to the applicant, the fact that the Staff Committee is in the nature of an internal body should have led the Commission of the European Communities to try at least to replace Mr Alonso as soon as he had made known his attitude. However, the defendant states that it acted in accordance with the principle of the continuity of the public service in view of the general obstructive policy adopted by the Staff Committee and observes that, faced with a policy of this kind which had been expressly stated, there had been no point in trying to replace Mr. Alonso.

It seems to me to be necessary first of all to recall that the official appointed by the Staff Committee is in every respect a member of the selection board: this may be deduced clearly from the above-mentioned Article 3 of Annex III to the Staff Regulations. For this reason it is inappropriate to put forward the argument expressed by the defendant that the presence of that official is a safeguard given to the staff which the Staff Committee may also waive: this possibility of waiver cannot be permitted. It is equally inappropriate on the other hand to compare the selection board for a competition to a joint committee which can clearly act only if all its full members (or, in their absence, alternates) are present (see Article 3 of Annex II to the Staff Regulations). This point of view was mentioned by the applicant; it is however refuted by the strictly unitary nature of a selection board for a competition in which it is impossible to imagine that there is a requirement that the interests of the institution and the interests of the staff should be balanced. Nor, on the other hand, does it seem to me to be correct to consider that the official appointed by the Staff Committee is a "representative" of the Committee or of the staff; on a selection board for a competition each member has an individual and independent position and its activities are therefore not performed in the name and on account of others, nor can it protect the interests of a category.

The truth is that whatever the mechanism for the appointment of one or other member of a selection board, all members are in the same position once they have been appointed (unless of course they are assistants who have only an advisory vote). In the present case there is no doubt that the appointments were regular: the board consisted, in accordance with the above-mentioned Article 3 of Annex III to the Staff Regulations, of a chairman, three persons appointed by the appointing authority and an official appointed by the Staff Committee (and, in addition, a secretary whose position is uncertain: her signature does not appear at the foot of the report). For this reason it is only necessary to inquire in general terms whether a board which has been properly set up can act in the absence of a member.

The judgment of 1 April 1971 in Case 76/69, *Dietrich Rabe* v *Commission of the European Communities* [1971] ECR 297, forms a useful, though not decisive, precedent in the case-law of this Court. One aspect of this case was the fact that a member of the examining board who was absent on the date of the interview with the applicants had signed the report and declared that he approved the work of the board. The Court held that this was unlawful because the absent member "by agreeing expressly with the conclusions of the selection board, ... gave the impression of being as well informed about each of the candidates as the other members of the selection board, whereas in reality he was not present at the interview". The Court added: "The possibility cannot be ruled out that if all the illegal acts mentioned above had not been committed the selection board, as well as the appointing authority, might have come to a different decision". In his opinion, Mr Advocate General Dutheillet de Lamothe had stated: "In certain systems of law governing public administration, which tend to equate the rules on the deliberations of an examining selection board with those on the operation of a court, this fact would by itself, without its being necessary to look into the effects which it may have entailed, be such as to render the competition illegal". Again, with regard to the decisions of the Italian Consiglio di Stato and of the French Conseil d'Etat, which reflect such an attitude, he stated: "These decisions all derive from the idea that it is impossible to know what conclusions the selection board would have reached had all the members been present at every meeting".

It seems to me that the *ratio decidendi* of the above-mentioned judgment in the Rabe case is the requirement that all members of the board should be equally in a position to judge the candidates. That implies the requirement that all the members should actually and consistently take part in the work of a selection board. Although the Court had held in the Rabe case that the activities of the board were lawful in spite of the absence of one member the signature of the report as approved by that member was irrelevant and therefore incapable of invalidating the procedure. In general two considerations can then be formulated along the same lines as the above-mentioned decisions in previous cases. In the first place, the fact that a selection board is composed of several members is a safeguard for the applicants who know that the final decision will be the result of a confrontation between technical experience and different points of view; it is therefore right that the competition boards can reach a decision only when all their members are present. Secondly, when there are no rules as to the *quorum* (as occurs in the case of the competitions governed by the Staff Regulations of Officials) it is impossible to determine what minimum number is sufficient for the board to come to a valid decision; to state that the presence of a simple majority of the number of members is sufficient comes up against the objection that in such a case a decision by a majority of those present would be the outcome of the wishes of a minority of the members (or would be absolutely impossible in the case of a board composed of three members).

I am aware that the argument which I have adopted carries the risk of effective obstruction by the Staff Committee when that Committee adopts the attitude which it held in the present case and in other similar cases. In this respect I

should however like to make some observations. On the one hand it does not seem to me that the Staff Committee has the power to bind with alleged "instructions" an official which it has appointed to sit on a selection board. That official, who, as I have already said, cannot correctly be classified as a "staff representative", is however personally responsible for the attitude he has adopted on the selection board for a competition. On the other hand, the statement that he does not wish to take part in the work of an examination board amounts to resignation from that board. The institution which has organized the competition should therefore draw from this the same conclusions as in the case of resignation and set in motion the procedure for a fresh appointment. Only if that procedure is fruitless or reproduces the "impasse" situation which arose from the previous appointment can the institution maintain that it has proved to be impossible to comply with Article 3 of Annex III as regards the participation in the selection board of a member appointed by the Staff Committee and that the fact that it is impossible authorizes it to set up a selection board composed solely of persons appointed by the appointing authority.

In the present case none of those circumstances occurred. The selection board, faced with the refusal by the member appointed by the Staff Committee, calmly carried on with its work and the competent Community institution did not try to replace that member. The applicant however is correct in saying that the results of the competition were affected by the absence of one of the members of the board. In my opinion, this fact establishes the invalidity of the procedure.

3. I shall now pass on to the second of the questions stated at the outset. The subject of the written test in the competition in question was worded as follows: "Community relations with the Mediterranean countries: association or non-preferential system". The notice of competition stated that the written test would consist of an essay on the topic of the Mediterranean countries (point III (1)). In fact the post put up for competition was in the Relations with the Countries of Southern Europe Division (within the Directorate General for External Relations) with the particular task of "Co-ordination with the Directorate General for Development and Co-operation concerning overall problems relating to the Mediterranean area: Portugal, Spain, Malta, Greece, Turkey, Yugoslavia and Cyprus".

The defendant in this case has admitted that the other applicant to the competition, Mr Ferrandi, had, during his period of employment as a member of the temporary staff of the above-mentioned service, dealt first with matters connected with Turkey and then with the file on Yugoslavia. As regards the tasks performed by the applicant between 1 July 1975 and the date of the competition, the defendant, in reply to a question put by this Court, stated that Mrs Martin had been concerned with specific training programmes and projects financed by the European Development Fund and had also carried out missions in three of the African, Caribbean and Pacific group of countries. Those activities however were still in a field quite different from that provided for in the notice of competition.

It is clear that Mr Ferrandi benefited from the fact that he had already performed for two years the duties corresponding to the post put up for competition. This favourable circumstance could not of course prejudice his right to take the

competition. However, the selection board, knowing the applicant's past history (it should be observed that it was necessary for that selection board first to establish which of them possessed the experience appropriate for the task!), should have taken care not to make even more distinct the advantage of one applicant over another so as to compromise the equality of the chances of success. The subject of the written test could therefore quite well have concerned, in complete adherence to the notice, general problems relating as a whole to the Mediterranean countries with which the Community has relations or even problems relating to Mediterranean countries other than Yugoslavia and Turkey. In contrast to this, the topic set enabled Mr Ferrandi to draw on his particular experience to illustrate the problem of association (in the case of Turkey) and that of the non-preferential system (in the case of Yugoslavia). In those circumstances, it seems to me that the applicant's complaint should be accepted: the principle of the equality of treatment of the applicants for a competition is an important aspect of the wider principle of equality and should have been adhered to scrupulously, especially by a board which had, ever since the beginning of the work, been accused of having chosen the successful applicant in advance (see the above-mentioned letter of 26 September 1977 from the Staff Committee containing a postscript as follows: "According to the information in the possession of the Committee... Mr Ferrandi will be the successful applicant").

4. The question of abuse of powers remains to be considered. According to the applicant, the objective pursued by the defendant in publishing the competition was not the interests of the service but the appointment of the person who occupied the post as a member of the temporary staff. To prove this argument, the applicant mentions the following facts: the first vacancy notice for the post in question was published in September 1974 (Vacancy Notice COM/1440/74) but was annulled in March 1975; Mr Ferrandi was employed as a member of the temporary staff in May 1975; the second vacancy notice appeared in July 1975 (Vacancy Notice COM/680/75), but nevertheless the promotion or transfer procedure (in which Mr Ferrandi was not able to take part) was not continued; another two years passed before notice was given of the internal competition and when that occurred the notice contained conditions which were more favourable than those contained in the vacancy notice (in the latter a *good* knowledge of the problems arising in relations between the Community and the Mediterranean countries was required; however, for the purposes of the competition, mere knowledge of those problems was sufficient). The viewpoint adopted by the Joint Committee and the Staff Committee in relation to the competition in question — a negative opinion from the first and a forecast that Mr Ferrandi would be successful from the second — confirmed, according to the applicant, that the procedure was designed for a specific person, thus becoming a "phoney competition".

There is no doubt that if notice is given of an internal competition for the sole purpose of appointing to the vacant post the applicant who is actually chosen the procedure is invalid for abuse of powers (see in this connexion the judgment of 28 September 1976 in Case 105/75, *Franco Giuffrida* v *Council of the European Communities* [1976] ECR 1395). It is necessary however for this

irregularity, in view of the normal general objectives of every competition, to be supported by appropriate evidence: in the Giuffrida case, the defendant institution had admitted that the real purpose of the internal competition which was then being contested was that of "remedying the anomalous administrative status of a specific official"; moreover, the conditions of the competition appeared to have been laid down to fit the successful applicant. In the present case the situation is different and it seems to me that reliable evidence of abuse of powers has not been put forward.

I summarized at the outset the arguments put forward by the applicant. The annulment in 1975 of the vacancy notice published in 1974 does not seem to me to be of any importance since it concerns an event prior to the employment of Mr Ferrandi as a member of the temporary staff. The fact that the vacancy notice published in July 1975 was followed only by the notice of competition of 1977 does not necessarily mean that the administration was waiting for Mr Ferrandi's experience to develop: he could also have considered himself adversely affected by the delay in a competition for which he certainly wished to apply. The discrepancy between the vacancy notice and the notice of competition occurred, according to the defendant, because the latter accepted a suggestion made by the Joint Committee. The viewpoint of that committee and the Staff Committee with regard to the competition was, as we have seen, the reflection of a wider policy. As regards, finally, the prediction that Mr Ferrandi would be successful, there is no need to deny that he began with an advantage in that he had already performed the duties relating to the post put up for competition and was competing with only one strong rival.

All this does not of course preclude the possibility that the "establishment" of Mr Ferrandi may have been relevant at the date on which the internal competition in question was published; however, this is not in my opinion sufficient for the purpose of speaking of an abuse of powers. Such a defect would exist if it were proved that in *place* of the normal purpose for which a competition is published (to choose the most suitable person to fill a post) *at the date of publication of the notice* the objective pursued was to appoint a specific person to the post. However the circumstances brought out by the applicant do not constitute evidence to that effect.

5. Having regard to the preceding considerations and taking into account in particular the procedural defect arising from the functioning of the selection board for the competition in the absence of one member and of the violation of the principle of the equality of treatment of the applicants, I conclude by suggesting to the Court that it should annul the procedure in Competition COM/680/75 and order the Commission to pay the costs.