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;

— 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 related to potato diseases."

The qualifications required were stated to be:

— "University education, with degree or diploma, or equivalent practical experience.

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

— Experience of carrying out the work involved in managing the common organization of the agricultural markets.

— Thorough experience relevant to the post."

The asterisk led to a footnote saying "If this is not clear from their application papers, candidates must make a written statement to the effect that they do possess such knowledge".

There was some discussion at the hearing about the fact that both the duties attaching to the post and the qualifications required for it were described in that vacancy notice in more exacting terms than they had been in the vacancy notice of 1972 on the basis of which Mr Capuano had been appointed to the post in 1973 (Annex 2 to the Application). In particular the duties had not then been stated to include "quality and marketing standards, and problems related to potato diseases", nor had the description of the qualifications included the words "particularly the potato market (production, trade, prices) in Community and non-Community countries". It looked as though those additions might have been introduced in order to make the requirements of the vacancy notice especially fit Mr Capuano's qualifications. The Commission was however able to persuade me that a finding that that was so would not be justified. It seems that a practice has grown up since 1974 of making vacancy notices, at least of posts in the Directorate General of Agriculture, more precise and exacting in their requirements. The Commission put in a bundle of vacancy notices published in 1974 illustrating that practice. At all events, the applicant does not, in this action, challenge the validity of the vacancy notice.

The vacancy notice drew four applications for the post, including that of the applicant, who was then an official of Grade A 6 in the "Wine, Spirits and Derived Products" Division of the same Directorate.

The application papers put in by the applicant consisted of a form that he had completed in some other connexion as long before as 1 December 1966 (Annex XI to the Rejoinder) and of a short undated supplement thereto (Annex VI to the Defence). The contents of those two documents are important because they were the only documents relating to the applicant that were before the Selection Board appointed for the competition in question.

The first of them showed that the applicant was born in 1933. It traced his education from the time when he went to primary school in 1943 to the time when he emerged with the degree of Doctor in Agricultural Sciences from the Munich Technical College ("Techn. Hochsch.") in 1962. That record showed that, in so far as he had any specialized agricultural knowledge, it was of dairy farming. The document then set out the employments he had

held. They were of two kinds: jobs he had had in Germany between 1957 and 1962 and jobs he had held at the Commission since joining its staff in 1963. Their descriptions evinced no specialization on his part except in matters pertaining to dairy products.

The second document was so short that I think it best to quote it in full. The original of it was in German but we have been supplied by the Commission with a translation of it into French (pursuant to Article 29 (3) of the Rules of Procedure). That translation reads as follows:

"Je suis affecté depuis le 1. 12. 1970 à la division VI/D/2 (Vin). Dans le cadre de cette division, je traite les règlements et documents de travail concernant la politique des prix, le trafic des marchandises, les aides, questions monétaires, les affaires d'élargissement, les interventions, les procédures d'infraction et les questions écrites.

Je possède de très bonnes connaissances des langues française et anglaise, par écrit et oralement, j'ai de bonnes connaissances de la langue néerlandaise et certaines notions des langues italienne et suédoise."

Thus in neither of those documents was there any indication that the applicant was particularly knowledgeable about potatoes or the potato market. Indeed the word "potato" nowhere appeared in either of them. Nor did the applicant avail himself of the invitation contained in the footnote to the vacancy notice to state that he had a thorough knowledge of that market.

Each of the four persons who responded to the vacancy notice was senior enough to be appointed to the post by way of promotion or transfer, and Mr Driesprong, who was the Director in charge of the Directorate in question, was asked through Mr Bruns, an Assistant to the Director General of Agriculture, to make an assessment of their respective qualifications in relation to those set out in the vacancy notice. This Mr Driesprong did in a note to Mr Bruns dated 18 February 1976, in which he explained that his assessments were based not only on the candidates' application papers but also on interviews he had had with them (Annex II to the Defence).

We were told on behalf of the applicant that he in fact had given to Mr Driesprong in writing further information about himself (Annex 8 to the Application). This disclosed that, between 1952 and 1954, he had worked first with a firm concerned with the selection of seeds and secondly on a research farm 150 of whose 350 hectares were under potatoes exclusively with a view to the production and propagation of new varieties, and that, subsequently, he had, during vacations, worked on farms in various countries on a number of which potatoes were grown.

Mr Driesprong's assessment of the applicant was as follows:

"Ce candidat, affecté actuellement à la division VI-D-2, est appelé à gérer, pour le secteur de sa compétence, l'ensemble des dispositions en matière de prix, d'interventions sur le marché, d'échanges intra et extra communautaires et d'aides d'État, tel que spécifié dans le règlement d'organisation commune de marché. En outre, il a pu, au cours de ses activités antérieures à son entrée dans les Services de la Commission, accumuler des expériences poussées en ce qui concerne la culture de la pomme de terre sous tous les aspects ainsi que de sa commercialisation non seulement à l'intérieur de la Communauté mais aussi dans un certain nombre de pays tiers.

Le candidat possède donc des connaissances approfondies du secteur des pommes de terre et une expérience de plusieurs années en matière de gestion d'organisations communes de marchés agricoles, tant dans le secteur laitier que dans celui du vin."

Mr Driesprong concluded:

"M. von Wüllerstorff répond de par sa formation de base,. son expérience, ses occupations antérieures et présentes, et ses connaissances linguistiques, parfaitement aux qualifications requises pour le poste annoncé dans l'avis de vacance. Il est, dès lors, à mon avis le candidat qui devrait être appelé à occuper le poste.

Je vous propose donc de faire le nécessaire afin que M. von Wüllerstorff soit nommé sur le poste publié sous le numéro COM/1149/75."

Strong reliance and emphasis were naturally placed on behalf of the applicant on that opinion expressed by the Director concerned, who knew him well. However, the Director General, Mr Rabot, did not agree with Mr Driesprong. In a note addressed to Mr Baichère, the Director General of Personnel and Administration, dated 13 May 1976 (Annex III to the Defence), he gave it as his opinion that none of the candidates fully met the requirements of the post. The applicant, in his view, lacked specific and technical knowledge of the sectors involved, and none of the candidates could be regarded as clearly better than the others. He concluded that a competition based on written and oral tests should be held. It seems reasonable to suppose that Mr Rabot had it in mind that Mr Capuano, the current holder of the post, could not, as a member of the temporary staff, be a candidate for it at the "promotion or transfer" stage of the recruitment procedure.

In the result a Notice of Internal Competition COM/1149/75 based on qualifications and writen and oral tests was published, giving as a deadline for the receipt of applications 18 October 1976. The descriptions in that notice of the duties attaching to the post and of the qualifications required of candidates did not differ in any respect here materially from those that had been contained in the vacancy notice.

Three applications were received in response to that notice, one from the applicant, one from Mr Capuano, and one from a Mr Udo Wartenberg who, like Mr Capuano, had not been a candidate at the "promotion or transfer" stage.

The first meeting of the Selection Board took place on 16 November 1976. Its chairman was Mr Bruns and there were four other members. One of them, however, described as the "representative" of the Staff Committee, declined to take part in the proceedings, not because of anything to do with the circumstances of the actual case, but because of a policy that had apparently been adopted by the Staff Committee to the effect that its "representatives" should not take part in selection boards for single posts. The other three members of the Board (apart from Mr Bruns) were the Head of the "Tobacco, Hops, Potatoes and Other Specialized Crops" Division, the Head of the "Recruiting, Appointments and Promotions" Division of the Directorate General of Personnel and Administration and a member of the Legal Service of the Commission. There was in the pleadings a good deal of assertion and counter-assertion (none of it supported by any evidence) as to whether Mr Driesprong had been, or ought to have been, invited to be a member of the Board. As to that, I think it enough to say that there was no legal requirement that he should be a member of it and that, since he had already committed himself to a view as to how the post should be filled, it would probably have been unfair that he should be a member.

At that first meeting the Board went through the process called for by the first paragraph of Article 5 of Annex III to the Staff Regulations, i.e. the process of examining the candidates' application papers (or "files") so as to see whether they met the requirements set out in the notice of competition. As a result the

Board rejected the candidatures of the applicant and of Mr Wartenberg, in each case on the ground that that candidate lacked a "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 also lacked any "thorough experience relevant to the post" — see the Selection Board's Report (Annex XII to the Rejoinder). Mr Capuano was thus the only person admitted to the competition.

By a note dated 16 November 1976 (Annex 1 to the Application), the applicant was informed of the decision excluding him. The Selection Board's reasons for that decision were conveyed to him on a form that had been filled in on behalf of the Board and signed by its members (Annex V to the Defence). As so filled in the form confined itself to stating that neither the Applicant nor Mr Wartenberg fulfilled requirements II (1) (b) and (d) of the conditions laid down under the heading "Eligibility" in the Notice of Competition. Condition II (1) (b) was that the candidate should have a "Thorough knowledge of economic and technical problems in the sectors involved, particularly the potato market (production, trade, prices) in Community and non-Community countries". Condition II (1) (d) was that he should have "Thorough experience relevant to the post".

Strictly speaking the question is not at issue in this case whether Mr Capuano fulfilled the requirements of the notice of competition. But I think it only fair to him and to the Selection Board to say that his application papers, to my mind, indicated that he did fulfil them (see Annex VII to the Defence). The Commission also referred us to a *curriculum vitae* of Mr Capuano (Annex VIII to the Defence) which, seemingly, was not before the Selection Board, but which I think it may be appropriate to compare with the supplementary information given by the applicant to Mr Driesprong (Annex 8 to the Application). That *curriculum vitae* appears to me, in so far as it can be regarded as relevant at all, to confirm the impression that Mr Capuano did have the qualifications called for by the notice of competition.

At all events, Mr Capuano, having undergone a written test on 23 November 1976 and an oral test on 30 November 1976, succeeded in the competition, so that his name alone appeared on the list of suitable candidates in the Selection Board's report. He was appointed to the post in question on 28 January 1977, with effect from 1 February 1977.

In the meantime, by a decision of the Commission dated 8 December 1976, the applicant had, with effect from 1 January 1977, been promoted to a grade A 5 post in another Directorate of the Directorate General of Agriculture, namely the Directorate responsible for the European Agricultural Guidance and Guarantee Fund.

In this action the applicant claims that the Selection Board's decision refusing to admit him to the competition should be declared void (and consequently that the competition and the appointment made as a result of it should also be declared void) on three grounds: first that that decision was inadequately reasoned, second that it was based on errors of fact and/or law, and third that it constituted a misuse of power.

No evidence was adduced to support the allegation of misuse of power. The Court was invited to infer such a misuse from the facts as a whole. I do not for my part think that such an inference is to be drawn from them, not least because it would imply a finding that there was a conspiracy involving all the members of the Selection Board.

Nor do I think that the decision was inadequately reasoned or that it proceeded from any error of fact, much

less of law. There is no difficulty in seeing why the Selection Board rejected the Applicant's candidature. On the papers before them there was nothing to show that he had the required qualifications. Nor would that have been shown even if they had had before them the additional information that he had supplied to Mr Driesprong. The circumstance that he had worked when young on farms where potatoes were grown, even a research farm, was not a fact from which it could readily be concluded that he had a thorough knowledge of the potato market "(production, trade, prices)" in the Community and elsewhere. The only thing that told in the Applicant's favour was Mr Driesprong's opinion, but it was an opinion from which Mr Rabot had differed and which, in any case, could not bind the Selection Board. Indeed there was no reason why any member of that Board, other than Mr Bruns himself, should have known of it.

That being so I do not think it necessary to take up Your Lordships' time with a discussion of the authorities that were cited to us as to what constitutes adequate reasons for a decision such as this: Cases 44/71 and 27/72, the second and third *Marcato* cases [1972] 1 ECR 427 and [1973] 1 ECR 361, Case 31/75 the second *Costacurta* case [1975] ECR 1563, Case 9/76 the *Morello* case [1976] ECR 1415, and Case 73/76 the third *Costacurta* case [1977] ECR 1163. I will say only that, of those authorities, it seems to me to be the *Morello* case that is closest to the present case.

That is enough to dispose of this action.

I must however, for the sake of completeness, deal with two points that were raised on behalf of the Commission as to the admissibility of the action.

The first arose from the fact that the action was brought directly before the Court without the applicant having previously lodged a complaint under Article 90 (2) of the Staff Regulations.

This is not a novel problem.

Your Lordships will remember that in each of the second and third *Marcato* cases, where the relevant events had occurred before the amendment of Articles 90 and 91 of the Staff Regulations by Council Regulation No 1473/72, and thus before it became obligatory for an official to lodge such a complaint prior to commencing proceedings in this Court, the Court held that it was pointless for an official who wished to challenge a decision of a Selection Board to lodge such a complaint, since the appointing authority had no power to annul or modify the decision, and that his correct course was at once to initiate proceedings before the Court.

In the second *Costacurta* case, where the relevant events had occurred after the amendment of Articles 90 and 91 of the Staff Regulations, and where the applicant had followed the procedure laid down in the Staff Regulations as so amended by lodging an administrative complaint, the Court held that:

"Since in the present case the events took place when the new Staff Regulations were applicable, it would be contrary to the rules of fairness to hold it against the applicant for having followed the procedure clearly laid down in Articles 90 and 91 as amended."

In so doing the Court appears, to have disagreed with the opinion I had expressed ([1975] ECR at pp. 1575-1577) that the law had been changed by the amendment of the Staff Regulations and that, moreover, a complaint lodged under Article 90 (2) against a decision of a Selection Board need not always, in practice, be pointless, at all events if promptly forwarded to the Selection Board.

In the *Morello* case, Mr Advocate General Mayras (who had previously, in the third *Marcato* case, expressed views analogous to mine — see Rec. 1973 (I) pp. 375-376) accepted that the law as laid down by the Court in the second *Costacurta* case was to the contrary effect (see Rec. 1976, pp. 1423-1424). In the *Morello* case the Court itself did not find it necessary to deal with the point.

In the present case the Commission has paid me the compliment of reviving and developing the points that I made in the second *Costacurta* case. I have, naturally, in that respect, great sympathy with the Commission, particularly as I fear that the law as it appears to have been laid down in the second *Costacurta* case may be a source of unnecessary litigation before this Court. As the Commission, however, pointed out, the essential thing, in a field such as this, is that the law should be certain. Community officials and the Community Institutions must know what the correct procedure is. For that reason I am of the opinion that Your Lordships should not give effect to the Commission's point. If, however, Your Lordships should be so impressed by the legal and practical considerations that cast doubt on the correctness of the ruling in the second *Costacurta* case as to be led to think that that ruling requires reconsideration, the right course would in my opinion be for Your Lordships to refer the point to the full Court under Article 95 (3) of the Rules of Procedure. The Applicant has in fact covered himself against the risk of the present action being held inadmissible by making an administrative complaint and bringing another action (Case 107/77) based on its rejection. The proceedings in that action have been stayed pending the decision in the present action.

The second point on admissibility taken by the Commission is founded on the fact that the Applicant was promoted to a post in grade A 5 with effect from 1 January 1977. The Commission pressed this point much more vigorously that it did the first. The Commission's contention was that that promotion deprived the applicant of any legitimate interest in prosecuting the present action, in that the annulment of the decision excluding him from the competition could bring him no benefit as regards either rank or seniority.

In support of that contention the Commission relied on a rule of Belgian law to the effect that an official may not challenge another's appointment to a post if he has himself been appointed in the meantime to another post in the same grade in circumstances such that he has no less seniority in that grade than if he had himself been appointed to the disputed post (see Journal des Tribunaux No 50001 of 11 June 1977 p. 391, footnote (13)). It seems that a similar rule may prevail in Italy (see Cons. Stato, IV Sez., 27. 5. 1970 n. 382, Rass. 1970, I, p. 848). I can find, however, no trace of such a rule in the law of any of the other Member States, though admittedly, in the case of many of them, this is because their laws do not recognize any right for officials to challenge each other's appointments.

I should not expect to find such a rule in Community law. To Community officials, as to most other men, rank and seniority may matter less than "job satisfaction" and future prospects. This was expressly recognized by the Court in Case 35/72 *Kley* v *Commission* [1973] ECR 679 at p. 688 where it was held that an official may challenge a transfer effected against his wishes on the grounds that:

"Even though a transfer decision may not affect the material interests or rank of an official it may, having regard to the nature of the duty in question, and to the circumstances, adversely affect the morale and the future prospects of the employee concerned."

The same point is implicit in earlier cases, such as Case 21/70 *Rittweger* v *Commission* [1971] ECR 7, where the Court entertained an action for annulment of an appointment to a post to which the applicant in that case could have been appointed simply by transfer (see p. 15) and Case 79/74 *Kuster* v *Parliament* [1975] ECR 725, where the Court held that, to the extent to which the conditions of eligibility contained in a vacancy notice had the effect of excluding the applications of officials "eligible for transfer or promotion", the vacancy notice amounted to an act "adversely affecting those officials" (at p. 730).

The Commission submitted that, if the present action were held admissible, the result would be a curtailment of the discretion of appointing authorities in making or refusing transfers. It seems to me, however, that underlying that submission is the very confusion of thought that Mr Advocate General Trabucchi denounced in the *Kley* case (at pp. 696-698) i.e. the confusion between, on the one hand, the kind of circumstances in which an act may be held adversely to affect an official within the meaning of Article 91 of the Staff Regulations, so as to render an action by him challenging that act admissbile, and, on the other hand, the kind of circumstances in which that act may be held unlawful, so as confer on the official a substantive right to its annulment.

The Commission also contended that, whatever might be the position in other cases, the present Applicant had evinced no particular devotion to any particular kind of job. He had in five years applied for no fewer than eighteen A 5 posts in a great diversity of spheres and had recently accepted a transfer to the new Directorate General of Fisheries. The Commission concluded that the present action was brought not to vindicate his interests, but to champion a principle. As to that I would say, first, that there is nothing wrong in litigating for a principle and, secondly, that we are concerned with the question whether, objectively speaking, the applicant had a sufficient interest to bring this action and not with the question whether in his heart of hearts he really yearns for the post to which Mr Capuano was appointed.

I would therefore reject the Commission's second ground for contending that the action is inadmissible.

I would, however, for the reasons I have already stated, hold that the action fails as a matter of substance and, accordingly, leave the parties to bear their own costs.