test papers marked by the same examiner. There is no irregularity if the methods of marking do not differ from one to another candidate and the selection board retains the power to make the final assessment.

3. The secrecy of the proceedings of selection boards for competitions was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures. Consequently, observance of this secrecy precludes the divulging of the attitudes adopted by individual members of selection boards and also the disclosure of any details relating to individual or comparative assessments of candidates. However, it does not preclude the mere communication of a procedural decision concerning the actual way in which the marking is to proceed, which has no effect on the objective conduct of the selection board's proceedings.

# REPORT FOR THE HEARING
## delivered in Case 40/86 *

## I — Facts

1. By a decision of 16 March 1981, Mr Georges Kolivas was appointed as a probationary official in Grade LA 7 in the Commission's Directorate-General IX, and was appointed as an established official in the same grade by a decision of 16 December 1981.

2. In Opinion No 2/76 of 26 April 1976, the Commission's Joint Committee took the view that it was inappropriate for the appointing authority to be represented in that capacity on selection boards for competitions. It recommended the creation of restricted selection boards composed of a president, a member designated by the appointing authority and a member designated by the Staff Committee, supplemented by an adequate number of alternate members and examiners so that any problems concerning the functioning of the boards could be resolved. The Joint Committee recommended that, in the case of competitions organized exclusively to fill posts in a given Directorate-General or department, the appointing authority should not appoint as president of the selection board a member of the Directorate-General or department concerned. It was stated in the aforesaid opinion that certain members of the Joint Committee were aware that it would be difficult at the outset to apply that principle to the language service.

3. In 1982 the Commission decided to organize internal competitions to fill

* Language of the Case: French.

vacancies for Greek-language principal translators and revisers.

4. On 7 April 1983 the President of the Central Staff Committee, Mr Foucault, sent a memorandum to the Director for Personnel, Mr Valsesia, rectifying the minutes of the meeting held on 25 March 1983 with the Director-General for Personnel and Administration, Mr Morel, to discuss the proposals to organize Internal Competitions Nos COM/LA/10/82 and COM/LA/11/82. In that memorandum, Mr Foucault stated that Mr Morel had agreed that, in order to avoid any criticism, the competitions should be organized with a selection board that was totally independent of the Greek translation unit as then constituted. Mr Valsesia replied, in a memorandum received on 13 April 1983, that he had no 'recollection of any decision to set up selection boards upon such drastic conditions', but that it was envisaged, so as to afford the fullest possible guarantees, that selection boards would consider the appointment of external examiners in order to have test papers marked twice, if necessary by calling upon colleagues in the translation divisions of other institutions in order to ensure the observance of the 'Community style'. As for the selection boards themselves, however, Mr Valsesia believed that one of the three members (including the president) should logically be drawn from the Greek translation units as then organized.

5. In reply to a letter from the Staff Committee of 21 June 1983 concerning the appointment of Mr Christoyannopoulos as chairman and of Mr Stefanidis as deputy chairman of the selection boards for the competitions concerned, Mr Morel wrote to Mr Foucault on 28 June 1983 advising him that the administration had no intention of calling in question the spirit of Opinion No 2/76 but that, even at the time, certain members of the Joint Committee were aware of the difficulty of applying it to the language service. Mr Morel stated that it was clear from the exchange of memoranda in April 1983 between Mr Valsesia and Mr Foucault that it was possible for the chairman of the selection boards to be drawn from the Greek translation units; the composition of the selection boards was to be maintained and steps had been taken in order to ensure strict objectivity in the marking of the tests.

6. After Competitions No COM/LA/10/82 and No COM/LA/11/82 had taken place, Mr Foucault sent a memorandum to Mr Morel on 19 December 1983 in which he wrote that the decision to entrust the chairmanship of the selection board, including the deputy chairmanship, to the heads of the units to which practically all the candidates belonged appeared to have given rise to certain disadvantages, quite apart from the compatibility of that decision with Opinion No 2/76 of the Joint Committee, and Mr Foucault asked for a meeting to discuss the methods for organizing the second round of competitions to fill the vacancies for Greek-language revisers and principal translators in 1984.

In his reply of 6 January 1984, Mr Morel stated that he did not anticipate any difficulties in discussing the matter and that it had been agreed in March 1983 to organize, at the beginning of 1984, a second round of internal competitions (on the same conditions) for the posts still to be filled.

7. At the beginning of 1984, the Commission organized a second series of competitions; the applicant took part in two competitions, on the basis of tests, to draw up internal reserve lists, namely COM/LA/4/84 and COM/LA/5/84, which took place in November 1984. The selection board was composed of the following members:

Chairman: Mr A. Clarke
Deputy Chairman: Mr G. Junior

Member: Mr A. Christoyannopoulos
Substitute member: Mr D. Stefanidis

Member of the Central Personnel Committee: Mr R. van Campenhout
Substitute member: Mr Morgan

Mr Christoyannopoulos was Head of the Commission's Greek Translation Division in Brussels until August 1985 when he was transferred to another division. Mr Stefanidis was Head of the Commission's Greek Translation Service, now the Greek Translation Division, in Luxembourg. He has sat on selection boards since August 1985.

The notices of competition stated that the written tests would be marked from 0 to 20 and that candidates who had obtained at least 12 out of 20 marks in each of the four written tests would be admitted to the oral tests.

8. As the marking was still in progress in May 1985, Mr Christoyannopoulos, according to the minutes of the Staff Committee meeting held on 10 June 1985, submitted a report on 15 May 1985 at an information meeting in Brussels on the work of the selection board in order to allay the concern of his staff. Also according to those minutes, since a substantial discrepancy had been found in most of the test papers assessed by the two external examiners, the selection board had unanimously decided, according to Mr Christoyannopoulos, to have the papers marked a third time by an outside expert likewise chosen in agreement with the staff representative; moreover, in order to ensure anonymity, the candidates' papers had been renumbered. Mr Stefanidis provided his staff in Luxembourg with similar information.

9. By a letter of 28 May 1985, the Head of the Recruitment Division, Mr Junior, acting at the request of the selection boards for the competitions, informed the chairman of the Central Staff Committee about the insuperable difficulties which had arisen in discussions concerning the problems connected with the written tests and which had led 'to a complete breakdown of the spirit of cooperation which might be detrimental to the candidates' interests'. In those circumstances, Mr Junior asked the Staff Committee to replace its representative whilst the selection boards would continue their work in the meantime with the substitute member. The Staff Committee did not accede to that request.

10. By letters of 13 November 1985, the applicant was informed by Mr Junior that, in view of the results of the written tests, the selection board was unable to admit him to the oral tests. According to the aforesaid letters, the applicant's marks had not been high enough in three of the four tests in Competition No COM/LA/4/84 and in one of the four tests in Competition No COM/LA/5/84.

11. On 2 December 1985, the applicant wrote to Mr Junior asking him to disclose

the marks awarded to him by each of the three examiners.

12. Mr Junior replied to him on 18 January 1986 that the selection board had decided that it could not disclose how it had arrived at the decisions concerning him, since the proceedings of selection boards for competitions are secret.

**II — Written procedure and conclusions of the parties**

1. The application submitted by Mr Georges Kolivas was lodged at the Court Registry on 12 February 1986.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry. The Commission was requested to reply in writing to a question from the Court, and did so within the period prescribed.

3. *Mr Georges Kolivas,* the applicant, claims that the Court should:

(1) Before giving judgment, order the defendant:

to produce the minutes of the meetings of the selection boards;

to disclose the results of the assessments made by the two Greek external examiners and by the third examiner;

to disclose the name and position of the third examiner;

to hear the members of the selection boards for the disputed competitions and, in particular, the member designated by the Staff Committee whose replacement was sought;

(2) Annul the decisions of the selection boards for Competitions Nos COM/LA/4/84 and COM/LA/5/84 not to admit the applicant to the oral tests in those competitions; the applicant was informed of those decisions by letters sent to him on 13 November 1985 by Mr Junior, Head of the Recruitment Division;

(3) Order the defendant to pay the whole of the costs.

(4) The *Commission,* the defendant, contends that the Court should:

(1) Dismiss the application as unfounded;

(2) Give a decision as to costs in accordance with the law, subject to all reserves.

**III — Submissions and arguments of the parties**

In support of his application, *Mr Kolivas* relies on three submissions:

A — Infringement of the third and fourth paragraphs of Article 5 of Annex III to the Staff Regulations of Officials of the European Communities ('the Staff Regulations');

B — Infringement of Article 6 of Annex III to the Staff Regulations;

C — Breach of the general legal principles of the protection of legitimate expectation and fairness.

A — *Infringement of the third and fourth paragraphs of Article 5 of Annex III to the Staff Regulations*

1. *Mr Kolivas,* applying by analogy the reasoning used by Mr Advocate General Lenz in his Opinion of 28 November 1985 in Case 143/84 (*Vlachou* v *Court of Auditors,* in which judgment was given on 6 February 1986 [1986] ECR 481) with

reference to the judgment of 14 December 1965 in Case 21/65 (*Morina* v *Parliament* [1965] ECR 1033), argues that where admission requirements are not sufficiently specific, the selection board for a competition should, before marking the written tests and interviewing the candidates admitted to the oral tests, establish the criteria for assessing the written or the oral tests in order to ensure that the tests are marked objectively and without any possibility of arbitrariness. In this case, the selection board decided initially to have the test papers marked by two independent examiners and, after learning the results, to have the papers marked by a third examiner. No information was given on the manner in which the selection board had taken into consideration the marks awarded by each examiner. The candidates were not given any indication of the reasons for the selection boards' decisions to admit or not to admit them to the oral tests and the marks awarded to the applicant by each of the external examiners were not disclosed to him, although he had asked for them.

In those circumstances, the applicant maintains that he has no guarantee that the written papers were marked objectively and without any possibility of arbitrariness. It follows that the decisions refusing to admit him to the oral tests in the competitions in question are unlawful.

The Commission cannot merely state that the decision to have the test papers marked by a third examiner was taken only in the general interest of the candidates, and that that decision was a matter for the selection board alone and was guaranteed by the selection board's independence. That statement is contradicted by the undertakings given and by the facts themselves. The administration undertook to organize the competitions in question on the same conditions as those on which previous competitions were organized and in accordance with measures to ensure strict objectivity with regard to the marking of the tests which, in this case, involved them being marked by two external examiners who were totally independent of the candidates' superiors sitting on the selection boards for the competitions concerned.

In those circumstances, the selection board was not entitled to depart from the competition procedure, as decided upon by the administration.

It is not disputed that in the case of at least some candidates the test papers were marked by a third examiner in the presence of members of the selection board, that is to say in the presence of the candidates' superiors whose opinions may have influenced that examiner. That has a bearing on the procedure which culminated in the decision that was taken, since the candidates had no opportunity to defend themselves against statements made by their superiors, as the Court pointed out in paragraphs 23 and 24 of its judgment of 11 March 1986 in Case 294/84 *Adams* v *Commission* [1986] ECR 977 at p. 984).

According to the applicant, the third examiner and the selection board would also appear to have contravened the principle of equal treatment by agreeing to mark certain papers, and not others, in the presence of members of the selection board.

The applicant also states that he had no guarantee of the impartiality of the examiners who marked the papers the third time, contrary to the undertakings given in 1985 by the administration to have recourse, for the purpose of marking the papers twice, to translators from other institutions. It follows by implication from those undertakings that the administration pledged itself not to have the papers marked by Commission officials. That assurance would not appear to have been honoured in this case.

With regard to the letter of 28 May 1985 from Mr Junior demanding the replacement of the member of the selection board designated by the Staff Committee, the applicant considers that the selection board was not unanimous on that point.

Finally, the applicant considers that the selection board took into account only the third examiner's assessment.

On the basis of the irregularities alleged, the applicant claims that the Court should order the Commission to produce the minutes of the selection board's meetings, disclose the results of the assessments made by the two external examiners and by the third examiner, and disclose the name and position of the third examiner.

2. The *Commission* considers that the applicant's first submission is unfounded. In its view, the applicant cannot refer by analogy to *Vlachou* and *Morina* since it is not a question of insufficiently specific admission requirements. What is at issue is the objective assessment of the tests, which may be made by the selection board in complete independence, as the Court has frequently pointed out, in particular in its judgment of 9 October 1974 in Joined Cases 112, 144 and 145/73 (*Campogrande* v *Commission* [1974] ECR 957).

In this case, the selection board established the existence of a substantial discrepancy between the assessments made by the two external examiners and unanimously decided to have the test papers marked a third time by an outside expert who was required to apply the same marking criteria as those applied by the first two examiners.

According to the Commission, that decision was adopted in the interests of the candidates in order to enable the selection board to make a proper assessment of their knowledge. That decision was a matter for the selection board alone and was guaranteed by its independence. It is futile to search for a legal provision which the selection board infringed since its decision provided further guarantees for an objective assessment and for the preservation of the candidates' anonymity. The selection board did not infringe Article 5 of Annex III to the Staff Regulations by requiring the papers to be marked by a third examiner, in view of the marks awarded by the first two examiners, since it continued to supervise the procedure and retained the power to make the final assessment.

The Commission considers that the first submission is supported only by mere assumptions implying that the selection board was actuated by malice towards the applicant and that the marks awarded by the first two examiners were favourable to him. The alleged irregularities are not borne out by the documents in the file, the selection board having fixed in advance the criteria for admission to the competition and the marking criteria to be applied by the three examiners.

The Commission emphasizes that, as the appointing authority, it must respect the seletion board's objective independence with regard to the assessment of the tests.

With regard to the applicant's request for details of the marks obtained, the selection board and the administration disclosed the marks finally awarded but they are under no duty whatever to inform the candidates of their provisional marks which are not binding on the selection board.

As for the applicant's argument that the two series of competitions should have been organized 'on the same conditions', the Commission considers that those words cannot have the effect of restricting the selection board's discretion as regards the measures which it may consider necessary to adopt in order to make an objective assessment of the candidates' merits.

The selection board may well take the view that the papers need to be marked by a third examiner in one competition and not in another, but that does not mean that those competitions are no longer organized on the same conditions. Differences in assessment from one competition to another are not only inevitable but proper, as the Court held in paragraph 29 of its judgment of 9 October 1974 in *Campogrande*, cited above.

The Commission contends that the criticism of the selection board for assisting the third examiner in marking certain test papers presupposes that the anonymity of the candidates was not preserved and that the selection board was therefore able to identify them. That is a question of fact and no proof to support those suppositions has been or can be furnished. For one thing, it would have to be assumed that the selection board scrutinized the candidates' hand-writing in order to identify the candidates whose anonymity had been guaranteed. Since not a shred of evidence has been adduced in that regard, such allegations must be rejected.

In the absence of proof, the Commission proceeds from the premise that the selection board preserved the candidates' anonymity, which completely invalidates the argument that the examiner may have been influenced by opinions against which the candidates should have been given an opportunity to defend themselves.

Accordingly, the Commission considers that the third examiner did not contravene the principle of equal treatment.

The Commission adds that the applicant has failed to demonstrate that he was given any assurance that the test papers would not be marked by Commission officials, or that the alleged assurance has not been honoured.

Even if the selection board had taken into account only the marks awarded by the third examiner — and the Commission raises the question how the applicant could have obtained this information — such a decision is not open to criticism. Referring to paragraph 52 of the Court's judgment of 9 October 1974 in *Campogrande*, the Commission states that it often happens that a selection board alters the provisional marks during its deliberations, either raising them or reducing them, thus determining, for reasons which are perfectly justified, whether a candidate passes or fails. Accordingly, the selection board may also decide, if appropriate, to adopt the marks awarded by the third examiner, where the latter has marked all the papers in a given test.

In the absence of further proof, the Commission considers that no presumption can be raised that the selection board succumbed to outside pressure or was

influenced by considerations unconnected with its task and it leaves it to the Court to decide whether the documents demanded by the applicant should be produced.

B — *Infringement of Article 6 of Annex III to the Staff Regulations*

1. Mr Kolivas contends that, in its judgment of 28 February 1980 in Case 89/79 *Bonu* v *Council* [1980] ECR 553, the Court stated that the observance of the secrecy of the proceedings of selection boards precludes divulging the attitudes adopted by individual members of selection boards and also revealing all the factors relating to individual or comparative assessments of candidates.

In this case, both in Brussels and in Luxembourg, two members of the selection boards, Mr Christoyannopoulos and Mr Stefanidis, breached the secrecy of the proceedings by revealing details of the conduct of members of the selection board and, in particular, of how the Staff Committee representative had voted. This was at a time when the selection boards had not yet completed their deliberations and without regard to the consequences which those disclosures might have on the freedom of the member of the selection board who represented the staff to perform the task entrusted to him and to vote. Mr Christoyannopoulos harmed not only the general interests of the candidates in the competition but also those of the other members of the selection board, in particular the member designated by the Staff Committee.

The applicant considers that the comparison made by the Commission between the competition procedure and the promotions procedure is wholly inappropriate. Since the existence of promotion committees is not provided for by the Staff Regulations, no provision can provide that their proceedings remain secret. Furthermore, a promotions committee is under no duty to adopt a unanimous recommendation, as the Commission would appear to suggest. Finally, it is impossible to compare the deliberations of a selection board for competitions with those of a promotions committee. In any event, the disclosure by the appointing authority of the attitude taken by a staff representative during the deliberations of a promotion committee cannot justify infringing the secrecy of the proceedings of a selection board for a competition.

2. In reply, the Commission states that the applicant's second submission is unfounded in fact, since the disclosures in question were not of such a kind as to betray the secrecy of the proceedings of the selection board and the applicant has no interest in criticizing those disclosures, which do not adversely affect him in any way.

The Commission considers that the disclosures in question were made in order to allay the staff's concern and that the statement that the selection board had unanimously — and therefore with the agreement of the staff representative — considered it necessary to have the test marked by a third examiner, was designed to reassure the candidates and was not a breach of the secrecy of the proceedings. The Commission, referring to paragraphs 5 to 7 of the Court's judgment of 14 June 1977 in Case 73/76 (*Costacurta* v *Commission* [1977] ECR 1163), argues that the secrecy of the proceedings covers factors relating to the individual or comparative assessment of candidates and not general decisions adopted by the selection board in

order to organize its proceedings. It is by no means essential to conceal from the candidates the fact that a decision designed to ensure greater objectivity in the assessment of their test papers was adopted unanimously. The Court has also held that, if the secrecy of the proceedings is violated only at a time when the decision of the selection board has been taken, that cannot call in question the regularity of the decision. In this case, the decision to have the test papers marked by a third examiner had already been validly adopted at the time when Mr Christoyannopoulos made his statement.

According to the Commission, the appointing authority also draws up the list of officials eligible for promotion on the unanimous recommendation of the promotions committee, which also 'reveals' the position adopted by the staff representative.

As regards the disclosure of how the staff representative cast his vote, the Commission states that it is difficult to see in what way that could adversely affect the applicant; the vote in favour of having the test papers marked by a third examiner was a guarantee for the applicant of the regularity of the decision adopted by the selection board.

Finally, the Commission maintains that the secrecy of the proceedings was established by the Staff Regulations not in order to shield staff representatives from criticism but in order to protect candidates and to ensure the independence of the selection board when it adopts its decisions.

C — *Breach of the principle of the protection of legitimate expectation and of the principle of fairness*

1. *Mr Kolivas* states that, in view of the assurances given by the Director-General for Personnel and Administration and the Director for Personnel, as set out in particular in Mr Valsesia's memorandum of 13 April 1983, he was entitled to expect that the selection boards for the competitions would be composed of three persons not belonging to the Commission's Greek Translation Division and that the test papers would be marked by two examiners. However, the Commission had designated Mr Christoyannopoulos and Mr Stefanidis as members of the selection board, contrary to the principle of the protection of legitimate expectation, and the selection board had, after taking note of the marks awarded by those two examiners, entrusted another examiner with the task of marking the test papers, or some of them, in its presence. In so doing, the selection board also acted in breach of the applicant's legitimate expectation that the 'fullest possible guarantees', which the administration meant to give the candidates, would be observed.

Nor was it acceptable that certain members of the selection board, acting as the candidates' superiors, were able to give information about certain candidates without affording them an opportunity to reply to the comments made by their superiors. In so doing, the selection board contravened the general principle of fairness.

The applicant emphasizes that, in referring to the Opinion in *Vlachou*, the Commission fails to point out that in that case, in which Mrs Vlachou brought an action against the Court of Auditors, the examiner who was appointed was the head of a specialized translation section of another institution, namely the Commission.

The applicant maintains that it is wrong to contend that the decision to have the test

papers marked by a third examiner was taken by the selection board in the interests of the candidates. That contention is unsupported by any evidence and is purely gratuitous since the Commission cannot know the true reasons for the selection board's decision.

So far as the anonymity of the candidates is concerned, the applicant states that one of the members of the selection board and the alternate member were able to identify the candidates owing to the fact that those members were the candidates' superiors, to the limited number of candidates (15) and to the limited possibilities available to them of selecting languages and tests on the basis of their professional background and experience; the members concerned must also have known that the applicant and the other candidates would select the languages which they knew best and the subjects with which they were most familiar.

The applicant states that he is seeking an order requiring the Commission to produce the minutes of the meetings held by the selection boards and to disclose the three assessments of the test papers only because he has limited confidence in the impartiality of certain members of the selection board. He is pleased to note that the Commission has tacitly agreed to produce those minutes and to disclose those assessments and he requests the Commission to produce the documents in question before the oral procedure.

2. In reply, the *Commission* states that the applicant was never given any assurance that none of the members of the selection board would be drawn from the Commission's Greek Translation Division. On the contrary, the Staff Committee was informed by Mr Valsesia on 13 April 1983 that it would be necessary for one of the persons sitting on the selection board to be a member of that division and, moreover, that information was not called in question in the letter sent on 21 June 1983 by the Chairman of the Staff Committee to Mr Morel.

Moreover, in his Opinion of 28 November 1985 in *Vlachou*, Mr Advocate General Lenz pointed out that it was appropriate to designate as an examiner the head of the specialized medium and long-term translation section in Luxembourg.

The Commission considers that the decision to have the test papers marked a third time was a proper administrative measure which was adopted in the interests of the candidates and which is not contrary to the principle of the protection of legitimate expectation.

With regard to the anonymity of the candidates, the selection board took care to number the test papers before entrusting them to the third examiner in order to eliminate any risks. As for the argument that Mr Christoyannopoulos and Mr Stefanidis were able to identify the candidates, the Commission considers that that is tantamount to impugning their motives and that there is not a shred of evidence to support that claim. Moreover, Mr Kolivas also knows German and, from amongst the special subjects offered at the competitions, could have chosen to take either an economics paper, a technical paper or a scientific paper. The applicant is not alleging that either Mr Christoyannopoulos or Mr Stefanidis were prejudiced against him. The Commission considers that the anonymity of the candidates was preserved and that the selection board has been wholly impartial. The objectivity of the selection board and the independence of the examiners were guaranteed to a sufficient extent.

With regard to the principle of fairness, the Commission maintains that the selection board's decision to have the test papers marked by a third examiner must be

presumed to have been taken in the interest of the candidates and not with the intention of harming them, particularly as it was adopted unanimously.

The Commission is prepared to supply the Court with any information which it may need concerning the deliberations of the selection board. However, it leaves it to the Court to decide whether the applicant's doubts regarding the impartiality of the selection board are sufficient in themselves to justify the production of the documents demanded by him in the absence of any other evidence.

**IV — Answer to the question asked by the Court**

In response to a request from the Court to state the identities and the positions of the persons who marked the test papers the third time, at the instigation of the selection boards for the competitions, the Commission produced the minutes of the meetings of the selection board for Competition No COM/LA/4/84, which contain the information sought by the Court.

F. Schockweiler
Judge-Rapporteur