Having regard to the Staff Regulations of officials of the European Economic Community and of the European Atomic Energy Community, especially Articles, 29, 30, 31, 90 and 91 as well as Annex III thereto;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of 5 February 1965 appointing Mrs Marie-Thérèse Louwage to Grade B4;**
2. **Orders the defendant to pay the costs of the action.**

Strauß Donner Monaco

Delivered in open court in Luxembourg on 14 December 1965.

A. Van Houtte
Registrar

W. Strauß
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 NOVEMBER 1965[1]

Mr President,
Members of the Court,

Mr Domenico Morina was engaged by the European Parliament on 17 November 1958 under a so-called Brussels contract, at a salary corresponding to that of the present Grade C3, and was subsequently integrated by a decision of 13 December 1962 and promoted to Grade C1, Step 1, with effect from 1 March 1962.
He applied to participate in Internal Competition No B 10, notice of which was given on 1 October 1962, to fill a vacant post of administrative assistant (career bracket B5-B4) in the Directorate-General of Administration. The notice specified that the post was to be filled at Grade 5 and that the competition was to be on the basis of qualifications; it mentioned as qualifications required a good, general, secondary education or experience of an equivalent level in employment. In addition, candidates were required to have a very extensive knowledge of one of the official languages of the Communities and a good knowledge of another official language and, for administrative reasons, a good knowledge at least of French was required.
Mr Morina was informed that his name was included in the list of suitable

1 — Translated from the French.

candidates drawn up at the end of the Selection Board's work, but it was another candidate appearing in this list, Mrs Louwage, who, by decision of 19 November 1964, was appointed to the vacant post with effect from 1 December 1964 and was classified in Grade 5. Subsequently, she was promoted by a decision of 5 February 1965 to Grade 4, again with effect from 1 December 1964.

It was in these circumstances that on 17 February 1965 Mr Morina made an application to the Court for the annulment of Internal Competition No B 10 and, consequently, of the decision of 19 November 1964 promoting Mrs Louwage to the career bracket of administrative assistant in Grade B5. In his conclusions he also seeks the annulment of this servant's promotion with retroactive effect to Grade B4. He asks you to order that the competition on the basis of qualifications be reheld under the conditions previously laid down and between the same candidates validly admitted to the competition. Finally, he wishes you to order the production of certain documents by the defendant, in particular those relating to the qualifications and appointments of Mrs Louwage, and seeks to be allowed to prove by any means that his own qualifications are better than those of the candidate who was preferred to him.

I

The Parliament raises various pleas of inadmissibility to the conclusions thus presented. It claims first of all that Mr Morina's request for the annulment of a competition, that is, of a collection of measures, is inadmissible and that only a request for the annulment of an individual measure whose legality he challenges would be admissible. Of course, he could argue for the annulment of the decision of 19 November 1964 appointing Mrs Louwage to the vacant post but, in order to do that, he merely challenges the list of suitable candidates drawn up by the Selection Board. As this Board enjoys an unfettered power of discretion, a discussion of the value of his qualifications is irrelevant, it is claimed, and his offer of proof is inadmissible. Finally, the Parliament alleges that criticism of the subsequent decision classifying Mrs Louwage in Grade 4 is not admissible either because, as the applicant himself is an official in Category C, he is not eligible for promotion within Category B and therefore has no legal interest in requesting the annulment of the decision in question.

None of these pleas of inadmissibility seem to me capable of being accepted.

In the first place, it is clear that the applicant requests the annulment of the work of the Selection Board, which he considers to be irregular and which has consequently invalidated Mrs Louwage's appointment. Although the Selection Board enjoys a power of discretion—as does the authority which appoints—that power is not unfettered and must be exercised within the framework of both the Staff Regulations and Annex III thereto and the conditions laid down by the notice of competition. Thus in your judgment of 14 July 1965 in the case of Alvino and Others you noted that, as the Selection Board for a competition on the basis of qualifications acted *ultra vires* and thus invalidated the drawing up of the list of candidates admitted to the competition, the competition was illegal and could not constitute the legal basis for decisions of appointment or promotion. You consequently annulled the competition itself and the appointments made on the basis of the results thereof. It is therefore admissible for Mr Morina to criticize the work of the Selection Board for Competition No B 10 and to rely on the irregularity with which he declares it is tainted in order to seek the annulment of the decision of 19

November 1964 appointing Mrs Louwage to Grade B5.

There remains the decision of 5 February 1965. Its form differs from that of the previous decision only by a reference to the allocation of a new B4 post in the detailed list of posts then recently published in the Official Journal. It is not limited to promoting Mrs Louwage to Grade B4 with effect from 1 December 1964, that is to say, with retroactive effect to the same date on which the decision embodying the results of the competition was taken; it specifies in Article 3 that it 'rescinds and replaces the decision as to promotion of 19 November 1964'. According to its wording, it constitutes the actual, definitive decision of appointment following upon the competition; as Mr Morina participated in the competition, it is admissible for him to challenge the measure which brought it to a close without exposing himself to the objection that the fact of his belonging to Category C prevents him from criticizing a promotion within Category B for which he is not eligible. There is even less possibility of doing so by the fact that during the oral procedure the European Parliament, in seeking to justify the grant of this grade by considerations based on the second paragraph of Article 46 of the Staff Regulations, maintained that if Mr Morina had been placed first and appointed he would also have benefited by retroactive promotion to that grade, once the B4 post was available.

Perhaps one might with pure logic rather contest the admissibility of the conclusions directed against the first decision, since at the date when the application was lodged it had already been rescinded and therefore had no further legal existence. But this would be taking logic and paradox to extremes and would fail to appreciate the fictitious element to be found in any rescission with retroactive effect of an administrative measure. To the extent that the new decision is challenged before the Court and has not therefore acquired a definitive character, it is difficult henceforth to refuse to accept the existence of the decision which it allegedly replaces.

II

I shall therefore examine in turn whether the various criticisms made by Mr Morina of the decisions which he challenges are well founded.

1. In order to dispute the regularity of the steps taken and, consequently, the appointment of Mrs Louwage, he bases his argument essentially on the fact that it was a competition on the basis of qualifications and that the Selection Board incorrectly assessed the value of his qualifications compared to those of the candidate who was placed first. During the written procedure he listed his qualifications and the assessments made of him by his superiors and insisted on the production of Mrs Louwage's personal file, which you did not consider it necessary to order. Subsequently, the European Parliament voluntarily produced the report of the Selection Board and it was upon this document that the arguments at the hearing centred.

You are in possession of these minutes which comprise eight pages of typescript. The Selection Board first defines how it sees its task, taking into account the notice of competition; it concludes that without restricting itself to considering the level of studies followed it must examine the abilities of the candidates, as exhibited by their personal files, in the six areas which it enumerates. However, as these various qualifications are not of the same importance, it will be necessary 'after examining them separately, not simply to add them together but to compare them by balancing them one against the other'.

In fact, after analysing the qualifications

of the various candidates in the areas enumerated by it, the Selection Board carefully compares their positions before drawing up the list of suitable candidates in order of merit.

Mr Morina makes two criticisms of the operations described above. First, as to method: in order to conform to the provisions of the third paragraph of Article 5 of Annex III, the Selection Board should have established the criteria on which it intended to base its assessment before examining the qualifications of each individual candidate; it should also have decided the number of points or the coefficient to be given to each qualification considered by it.

The minutes show that, contrary to what the applicant maintains, the Selection Board did define the criteria to be applied before any examination of the individual positions of the candidates. On the other hand, I do not consider that it was obliged to draw up an actual scale not prescribed by any provision; in deciding to balance the various qualifications under examination one against the other, it seems to me to have adopted an irreproachable method.

The applicant also challenges the various criteria adopted by the Selection Board and the importance which it attributes to them. His criticisms are varied but they are all based more or less closely on the identification of 'qualifications' with 'university qualifications'. As the notice of competition required candidates to have had a good, general, secondary education, the person who can produce the best certificates is necessarily the person with the highest qualifications. Mr Morina considers that as he is a doctor of law, and is the only candidate able to put forward such a degree, he should have been placed first in the list of suitable candidates. However, the Selection Board considered that it had to look more generally at the 'merits' of the candidates in all areas capable of showing their suitability to hold the post competed for, and I think that one cannot in fact limit qualifications to university qualifications.

The Selection Board took into account the following factors in its examination: scholastic and university qualifications or equivalent experience in employment —reports on performance of duties previously obtained in the service—results obtained in previous competitions—knowledge of languages—grade and seniority in that grade—seniority in the service.

Mr Morina particularly criticizes the Selection Board for having taken into consideration reports on the candidates' performance of their duties, a practice which, he claims, is condemned by the judgment in the Alvino case. Contrary to his belief, your judgment did not touch on this point, which was in fact raised by certain of the applicants. But I personally consider, as I said then, that since it is a matter of weighing up the merits of candidates already in the service, it is perfectly logical to look particularly to the manner in which they have demonstrated these merits in the exercise of their duties. As to the reports made on the applicant, in part flattering and in part reserved, it was for the Board to judge the importance which it considered had to be attributed to such assessment. Mr Morina points out in particular that according to the report of the Selection Board, two reports by his immediate superiors, which he considers to be essential, were not included in his personal file; even supposng there to have been an administrative irregularity, it has no influence on these proceedings, since it is not disputed that the Selection Board was in fact aware of those documents.

Finally, another complaint: the Selection Board was not permitted to take account, as it did, of results obtained by the candidates in previous competi-

tions. This practice is certainly blameworthy if the Selection Board merely modelled its assessment on that of its predecessors; but I do not think that it can be criticized for having taken this factor among others into account in order to judge the suitability of those under consideration.

Although, by reason of the lively criticisms of such a complete and conscientious report, I have been led to discuss it in some depth, I do not intend, however, to disregard the wide powers which the authors of the Staff Regulations intended to give to the Selection Board. The Board's freedom is only limited in two respects: observance of the provisions of the Staff Regulations and of the notice of competition and its duty not to base its decisions on incorrect findings of fact. But, subject to these reservations, it has the right, within the framework of criteria which it has duly laid down, freely to form its judgment on the respective merits of the different candidates and you cannot substitute your assessment for that of the Board. In this case I consider that the steps which it took are not tainted with any irregularity. As the decision of 19 November 1964 appointing Mrs Louwage to the vacant post has been criticized only on the basis of the procedure followed by the Selection Board, I am of the opinion that you should reject the conclusions seeking its annulment.

2. Mr Morina also challenges the due form of the decision of 5 February 1965 which, in rescinding the previous decision with retroactive effect, appoints Mrs Louwage to Grade B4 with effect from 1 December 1964. I have already said that I consider his conclusions to be admissible, but are they well founded?

The notice of competition concerning the post of administrative assistant (career bracket B5-B4) specified that the post was to be filled at Grade B5 and it was in fact at that grade that Mrs Louwage was first appointed. How can one define and justify the decision which almost immediately granted her Grade B4 with retroactive effect?

The defendant institution tells us first of all that it is not a question of promotion which could only have occurred after six months from the acquisition of the grade and in accordance with the procedure laid down by Article 45 of the Staff Regulations; on this point I agree with its contention. It adds that it is not a question of a 'primary' appointment either, but a regularization of an administrative position carried out in accordance with the requirements of the Staff Regulations and the budget, but here I should say that, in whatever way it is described, it has the same effect as a 'primary' appointment, as it is retroactive.

The requirements to which the Parliament refers are as follows: before entering the competition, Mrs Louwage held Grade C1, at a salary equal to that of Grade B4; as the second paragraph of Article 46 of the Staff Regulations provides that an official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade, she should in any event have been appointed to Grade B4 straight away. This was not done because at the time of the notice of competition and also of her appointment there was no post available in that grade, but as such a post was allocated in the detailed list of posts published in the Official Journal of 1 December 1964 the defendant institution considers that it was obliged to give Mrs Louwage the benefit of it immediately. On the applicant's alluding to the grant of a compensatory allowance, the Parliament replies that such a solution is not provided for by the Staff Regulations and, in the absence of such a provision, must be considered to be illegal.

I have much hesitation in following

this line of argument. It is true that in certain cases the Staff Regulations allow the grant of a compensatory allowance, since this was the system applied to Mrs Louwage before the creation of the B4 post, as appears from the letter of 24 November 1964 sent to her by the Director-General of Administration referring, moreover, to the provisions of the second paragraph of Article 46 of the Staff Regulations. I do not see why this system was not subsequently continued, as Article 46 merely guarantees the promoted servant a level of salary.

Furthermore, it appears little in conformity with the Staff Regulations, which are based on the system of career brackets, immediately to appoint a servant who has been through the competition procedure to the higher grade of the career bracket. This would lead to the elimination of promotion as a means of filling vacant posts, even though it appears as the first of the methods provided for by Article 29 of the Staff Regulations.

In this particular case, it must be emphasized above all that the vacancy notice expressly provided that the post would be filled at Grade B5. This statement once made inevitably had the effect of discouraging certain servants, at least of Grade C1 with only a limited interest under these conditions of progressing out of Category C, from entering the competition. We know from the examples of the applicant and Mrs Louwage that not all were discouraged, but it is probable that, in the absence of that statement, the competition would have attracted other candidates.

Must it therefore be considered that the disputed provision of the vacancy notice bound the appointing authority? Whilst recognizing that it is questionable, I am inclined to answer in the affirmative. I do not believe in fact that Article 46 of the Staff Regulations necessarily obliged the post to be filled at Grade B4 as soon as it appeared in the detailed list of posts, and the provision of the vacancy notice was not therefore in conflict with the Staff Regulations; in fact, the soundest reasons of natural justice and good faith militate in favour of the observance of that provision. An appointment announced after a competition must conform to the provisions of the measure initiating that competition; it must remain within the limits of what has been announced to the servants in order to invite applications. If not those servants can only have the false but inevitable impression that the administration has not done all that it should have done for the competition to be held with sufficient knowledge of the conditions. Once the appointment has been announced in conformity with the vacancy notice, the official appointed has the opportunity of attaining a higher grade by means of promotion, as soon as he has acquired sufficient seniority, in competition with those in the same grade. It is essentially for reasons of natural justice, therefore, that I consider that the decision of 5 February 1965 must be annulled, leaving Mrs Louwage in Grade B5 which she holds by virtue of the decision of 19 November 1964.

Moreover, as the applicant has had a part of his conclusions accepted, it seems to me that one half of the costs should be borne by the European Parliament.

To conclude, I am of the opinion that the conclusions of the application challenging the decision of the Secretary-General of the European Parliament of 19 November 1964 appointing Mrs Louwage an administrative assistant in Grade B5 with effect from 1 December 1964 should be rejected

and that the decision of 5 February 1965 appointing her to Grade B4, again with effect from 1 December 1964, should be annulled.

I am of the opinion, in addition, that the European Parliament should bear one half of the costs incurred by Mr Morina.