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

Mr President,
Members of the Court,

1. For a summary of the facts I refer to Cases 322/85 and 323/85.

Hartmut Schwiering was another candidate in Competition No CC/A/8/85. He was not admitted to the tests on the ground that part VII of the Notice of Competition stipulated that applications should be 'accompanied by documents attesting to the candidate's education and professional experience' and that he had failed to produce the originals or certified true copies of the required documents.

It appears from the report of the Selection Board of 28 October 1985 that certain members of the Board considered that photocopies which were not certified to be true copies could not be accepted as supporting documents and accordingly it was decided to proceed on the basis of the reply of the Head of the Personnel and Administration Division to two questions which had been submitted to him on 25 July 1985 as to whether there existed any case-law of the Court of Justice concerning supporting documents and the criteria for determining whether a document produced by a candidate can be regarded as a supporting document.

The replies were essentially as follows:

(i) The candidate had to make all the necessary supporting documents available to the Selection Board, which did not have access to the individual files held by the administration;

(ii) The candidate could, at the Board's request, supply additional information concerning the documents already submitted in connection with his application; and

(iii) A supporting document had to be either an original document or a true copy thereof certified by an authorized body.

On the basis of those guidelines, by a letter of 2 August 1985, the Chairman of the Selection Board notified Mr Schwiering that he could not be admitted to the tests because he had failed to produce supporting documents complying with the abovementioned rules.

By a letter of 22 August 1985 Mr Schwiering was invited to subit his comments. He maintained that as far as he was aware the definition of supporting documents applied by the Selection Board was not to be found either in the Notice of Competition or in the case-law of the Court. In general, where candidates were required to produce originals or certified copies, a clear stipulation to that effect was included in the notice of competition. It was not the practice of the Court of Auditors to impose such a requirement for internal competitions or even for certain interinstitutional competitions.

By a memorandum of 4 October 1985, the Head of Personnel and Administration drew

* Translated from the French.

the Board's attention to the fact that by virtue of the second paragraph of Article 2 of Annex III to the Staff Regulations they could, if in doubt, request candidates to provide any additional documents or information. At the same time he pointed out that since the competition was an internal competition with a limited number of candidates the 'well-understood' duty to have regard to the welfare of officials required the Board to apply that provision. Finally he pointed out that, in contrast to notices of open competitions, the notice in question did not at that stage of the procedure require the production of originals or certified copies.

The Selection Board, seeing a contradiction in the two interpretations provided by the same administrative authority and anxious not to give the impression that it could have been influenced 'in particular by the identities of the candidates', refused to alter its criteria. Accordingly, by a letter of 28 June 1985 it informed Mr Schwiering that it stood by its decision of 2 August 1985.

Mr Schwiering's application refers the Court to his letter of 22 August 1985. He adds that the Board failed to have sufficient regard to the duty to provide for the welfare of officials of the institution, and that, in particular, ought to have asked the candidates concerned to have copies of the documents produced certified as true copies of the originals or it ought to have taken into account the observations of the applicant and of the Head of Personnel and Administration.

2. As in the two cases referred to above, the Court of Auditors contends that the application is admissible and well founded. It takes the view that the explanations given by the Board are not legally justified having regard to the conditions laid down in the Notice of Competition and expresses its surprise that the Board did not consider it necessary to alter its position in the light of the applicant's observations and the position clearly formulated by the appointing authority in its memorandum of 4 October 1985. Here again, the Court of Auditors expressed its regret that, according to the case-law of the Court, it cannot annul or amend the decisions of a Selection Board. On that point I would refer to my Opinion delivered today in Cases 322 and 323/85.

3. As regards the particular problem raised in this case, namely the question of supporting documents, in its judgment of 25 April 1978 in Case 74/77 *Allgayer* v *Parliament* [1978] ECR 977 the Court had to consider whether the submission of a copy of a diploma, which had not been certified as a true copy of the original, accompanying an application form in an open competition, was valid. The relevant notice stipulated that documents relating to diplomas and educational qualifications should be supplied in the form of copies certified as true copies of the original documents and it was even stated that photocopies which had not been certified as true copies would not be accepted. The Selection Board had nevertheless admitted the applicant to the tests. The Court held that:

(i) 'The instructions contained in the notice of competition properly so-called, that certified true copies of diplomas or

other academic qualifications should be sent, only amount to practical advice to candidates, to whom any documents produced are not returned.

(ii) It is therefore for the Selection Board to determine whether the documents produced by a candidate are such as to justify that candidate's being allowed to enter for the competition to be held' (paragraph 4 of the decision).

In the present case the Notice of Competition contained no stipulation in that respect. It follows, *a fortiori*, on the basis of the abovementioned decision, that the Board could not impose on the applicant a condition which, even where it appears expressly in the Notice of Competition and is not complied with, does not appear to be of a decisive nature. On the other hand, it may be argued that the same judgment states that it is for the Board to determine whether the documents produced are authentic. In reply to that argument it must be stated that the Board cannot insert a condition which did not appear in the Notice of Competition, unless it is based on a legal provision, the case-law of the Court or an established practice, without giving the candidates an opportunity to satisfy that requirement by producing additional documents.

It is stated in the memorandum of 4 October 1985 that mere photocopies which have not been certified to be true copies are accepted as supporting documents for certain internal competitions at the Court of Auditors. It follows that, even if there were grounds for applying a stricter policy in the future, the existing practice required the Selection Board in Competition No CC/A/8/85, having regard to the duty to provide for the welfare of officials, to take into consideration the wording of the notice of competition and the practices of the institution, of which it must have been aware since they were pointed out to it by the appointing authority. Clearly, as Mr Advocate General Reischl stressed in his Opinion in Case 74/77, the second paragraph of Article 2 of Annex III to the Staff Regulations did not in principle impose on the Selection Board any obligation to request additional documents. However, the duty to provide for the welfare of officials, in the light of previous practice, turned that possibility into a requirement. That duty, which is based on German administrative law ('Fürsorgepflicht'), is not mentioned in the Staff Regulations of Officials, but the Court has acknowledged that it applies to the Community public service. It means in particular that, where a public authority takes a decision concerning an official, it must take into account not only the interests of the service but also those of the individual official concerned (see the judgment of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 22 of the decision at p. 1697; also the judgment of 9 December 1982 in Case 191/81 *Plug* v *Commission* [1982] ECR 4229, paragraph 21 at p. 4247).

Consideration of the different aspects of this case lead to the conclusion that sufficient effort has not been made to achieve the 'balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants' (*Kuhner*, cited above, paragraph 22 of the decision). No doubt the Selection Board was, as it pointed out in its report to the appointing authority of 28 October 1985, confronted with the contradictions contained in the successive opinions which the administration of the defendant institution communicated to it and its anxiety not to be accused of partiality. It is nevertheless true that, not being bound by those opinions, it was under

a duty not simply to add a restrictive condition to the text of the Notice of Competition and that if it decided pursuant to its discretionary power to adopt a new requirement, it had to give the candidates concerned the opportunity to satisfy that requirement since the Staff Regulations contain a provision to that effect.

Consequently, I propose that the Court should annul the decisions taken on 2 August and 28 October 1985 by the Selection Board in Internal Competition No CC/A/8/85 organized by the Court of Auditors in so far as they concern the refusal to admit Hartmut Schwiering to that competition. I propose that the defendant institution should be ordered to pay all the costs.