JUDGMENT OF THE COURT (FIRST CHAMBER)
22 MARCH 1972[1]

Mario Costacurta
v Commission of the European Communities

Case 78/71

Summary

1. Officials — Recruitment — Notice of competition — Specifications — Aim
(Staff Regulations of Officials, Annex III, Article 1)

2. Officials — Recruitment — Notice of competition — Specifications — Age-limit for the candidate — Importance — Posts without age-limit — Mention of this obligatory in the notice of competition
(Staff Regulations of Officials, Annex III, Article 1)

1. The purpose of the specifications set out in Article 1(1) of Annex III to the Staff Regulations of Officials is to ensure that in every case where a post is to be filled by means of a competition the conditions of recruitment are adapted as closely as possible to the requirements of the post to be filled. When they laid down the obligation to state those conditions in the notice of competition the authors of the Staff Regulations intended to preclude the appointing authority from justifying the exclusion of certain candidates by relying on conditions of recruitment which were not properly notified in advance to all the persons concerned.

2. Amongst the conditions of recruitment of officials age may well constitute an important factor regarding the quality and efficiency of the official to be recruited. Although the age of an official may be of no matter where certain posts are concerned this possibility must be regarded as exceptional by reason of the special nature of such posts. In such a case the notice of competition must indicate that there is no age-limit.

In Case 78/71

MARIO COSTACURTA, an official of the European Communities, represented by Ernest Arendt, Avocat-avoué, residing in Luxembourg, assisted by Nicolas Decker, Avocat, residing in Luxembourg, with an address for service in Luxembourg at the Chambers of Ernest Arendt,

applicant,

1 — Language of the Case: French.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Giorgio Pincherle, with an address for service in Luxembourg at the office of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application for the annulment of Notice of Internal Competition COM 152/70 and of the appointment of certain candidates,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner and R. Monaco (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and of the procedure

The facts and the course of the procedure may be summarized as follows:

1. Mr Mario Costacurta entered the service of the ECSC in 1966 as an employee in the Office for Official Publications and was appointed to an established post in Grade C 3 from 1 October 1968.
In 1966 and in 1967 he applied for a post as an assistant proofreader of Italian mother tongue (Grades B3-B2) with the Office for Official Publications. Accordingly he took part in a competition based on qualifications in which his application was rejected and in an internal competition based on tests in which he was included in the list of suitable candidates.
Finally on 6 April 1970 he applied for a post of proof-reader of Italian mother tongue with the same office; the vacancy was advertised by Vacancy Notice No COM 152/70 published in Staff Courier No 106 of 19 March 1970. This application was afterwards treated as an application for Internal Competition COM 152/70 held on 17 July 1970 to recruit five proof-readers of Italian mother tongue.
In this last competition the appointing authority notified the applicant on 2 February 1971 that he had not been included in the list of suitable candidates.

Five candidates were included in this list and appointed to the vacant posts, that is to say, four former free-lance (or self-employed) proof-readers who were appointed as temporary staff in B 3 on 1 June 1970 (Mrs G. Pasquini and Mrs T. Colombo and Mr G. Mendosa and Mr G. Laviola) and one as an official in C 3 (Mr E. Benedusi).
On 26 March 1971 the applicant submitted a complaint within the meaning of Article 90 of the Staff Regulations which was registered on 23 April 1971 and related to his inclusion in the list of suitable candidates and the outcome of the competition. Since he did not receive a reply to this complaint within the period of two months the applicant lodged the present application on 18 August 1971.

2. Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.
The parties presented oral argument at the hearing on 18 January 1972.
The Advocate-General delivered his opinion at the hearing on 26 January 1972.

II — Conclusions of the parties

The *applicant* claims that the Court should:

I. Rule that the present application is admissible;

II. Rule that it is well founded in substance.

Accordingly:

(1) rule that Notice of Competition COM 152/70 must indicate the age-limit together with the extension of the age-limit applicable to servants employed for at least one year;

(2) rule that the Commission has violated the principle that regard must be had to the eligibility of the applicant for promotion.

Accordingly:

Annul the decisions which have been taken and refer the matter back to the Commission for reconsideration.

III. Order the defendant to bear the costs and expenses of the proceedings.

The *defendant* contends that the Court should:
— dismiss the application as unfounded;
— order the applicant to bear the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

(a) *Infringement of Article 1(1)(g) of Annex III to the Staff Regulations*

The *applicant* asserts that Notice of Internal Competition COM 152/70 does not conform to the provisions of Article 1(1)(g) of Annex III to the Staff Regulations in that it fails to mention either the age-limit or the extension of the age-limit in the case of servants of the Communities who have completed not less than one year's service. Specification of the age-limit was intended to oblige the administration to give priority to young persons in recruiting. Failure to specify it thus renders null and void the disputed notice of competition. When it emphasized the restrictive nature of the list contained in Article 1(1)(g) of Annex III the Court itself held that the provisions expressly set out in this article are essential and binding. Since the age of the candidates who were formerly free-lance varied from 28 to 58 the appointing authority refrained from fixing an age-limit in order to benefit certain candidates.
The *defendant* replies that the appointing authority must remain free to prescribe or omit an age-limit when it recruits an official by competition. The requirement in Article 1(1)(g) of Annex III of the Staff Regulations is merely intended to prohibit the appointing authority from in-

troducing an age-limit by a means other than that of notice of competition or from applying such a limit without having expressly mentioned it in the notice of competition. In addition the internal competitions held by the Commission have never prescribed age-limits whilst the external competitions held by the other institutions do not always lay down an upper age-limit.

In this connexion the *applicant* observes that the wording itself of Article 1(1)(g) of Annex III to the Staff Regulations indicates the binding nature of the formalities which it prescribes. The appointing authority is not entitled to exercise its discretion in this matter save in the two cases expressly referred to in the Regulations (Article 1(f) and (i)). Furthermore the fact that an age-limit is rarely laid down cannot provide a subsequent justification for the irregularity of the competition since such an omission is contrary to the Staff Regulations.

The *defendant* replies that from a legal point of view it would be much more logical not to require the appointing authority to fix such a limit on every occasion even when it intends to recruit suitable candidates of any age and at the same time to refrain from discriminating in any other way on the basis of age. Whilst it is true that Article 1 of Annex III to the Staff Regulations 'sets out the matters which the notice of competition must specify' (Judgment 35/64) and 'eight precise points which must appear in the notice' (Opinion in Case 35/64) it is also perfectly clear that those same points are not actually required to appear in all notices of competitions. This is stated explicitly regarding subparagraphs (f) and (i) and also regarding subparagraph (g) for the reasons set out.

(b) *Violation of the principle that regard must be had to eligibility for promotion*

The *applicant* then indicates that after the four former free-lance employees who took part in Internal Competition COM 152/70 were appointed to the temporary staff shortly before the opening of the competition and that after the tests had been held they were no longer in the service of the Office for Official Publications as temporary staff. The haste with which this appointment was thus made can scarcely be explained otherwise than by the fact that the administration wished to enable the four former free-lance employees to take part in the said competition. It has thereby failed to observe the principle that regard must be had to the eligibility of officials for promotion. The *defendant* maintains on the other hand that it was in accordance with accepted principles and the decisions of the Court for the free-lance employees to take part in the competition. Furthermore the fact that the status of those former free-lance employees changed from contractual employees to temporary staff is just and in the interests of the service since the persons in question had been in the service of the Commission for many years and in fact worked full-time for the Office for Official Publications with the same working hours as all the other officials and servants. Since the persons recruited as established officials were selected by means of a competition based on test and as this competition was properly held it is not clear how any provision of the Staff Regulations or principle of law could have been violated in this case.

The defendant finally disputes certain allegations contained in the official complaint and the doubts which the applicant ostensibly endeavours to cast on the proper course of the recruiting procedure.

Regarding the problem of the free-lance or independent proof-readers, the *applicant* objects that their legal status indicates that they are employees under private law bound to the Office for Official Publications by an ordinary contract of employment which confers upon them neither the right nor the qualification to take part in an internal competition. In the present case at the time when the competition procedure opened and when the tests were held the former free-lance employees in question were no longer in the service of the Office for Official Publications as temporary staff and thus were not entitled to take part in the competition in dispute.

The *defendant* states that it appreciates the difference between the contractual status of the free-lance employees and the system for temporary staff, asserting that at the time of Notice of Competition COM 152/70, which was dated 17 July 1970, and the expiry of the period for lodging applications, fixed as 31 July 1970, the former free-lance employees in question had already been appointed to the temporary staff (their appointment dated from 1 June 1970) and were thus entitled to take part in this competition.

Grounds of judgment

1 The application is for the annulment of Internal Competition COM 152/70 for five posts of assistant proof-reader of Italian mother tongue in career bracket B3-B2 with the Office for Official Publications of the European Communities and of the appointment of Mrs Giovanna Pasquini and Mrs Teresita Colombo and Mr Giuseppe Mendosa, Mr Eduardo Benedusi and Mr Giovanni Laviola to the said posts.

2 The applicant claims first that since the notice of competition fails to mention an age-limit it infringes Article 1(1)(g) of Annex III to the Staff Regulations which requires that such notice 'must specify the age-limit and any extension of the age-limit in the case of servants of the Communities who have completed not less than one year's service'.

3 According to Article 28 of the Staff Regulations an official may be appointed only on condition that 'he has, subject to Article 29(2) passed a competition based on either qualifications or tests, as provided in Annex III'.

4 Furthermore Article 29 expressly provides that Annex III lays down the competition procedure.

5 Those provisions consequently require that there shall be specified in the notice of competition, in accordance with the express wording of Article 1(1)(g), the age-limit and the extension of such limit.

6 Setting an age-limit thus amounts to securing an advantage in favour of servants already in the service.

7 The purpose of the specifications set out in Article 1(1) of Annex III is to ensure that in every case where a post is to be filled by means of a competition the condi-

tions of recruitment are adapted as closely as possible to the requirements of the post to be filled.

8 When they laid down the obligation to state those conditions in the notice of competition the authors of the Staff Regulations intended to preclude the appointing authority from justifying the exclusion of certain candidates by relying on conditions of recruitment which were not properly notified in advance to all the persons concerned.

9 Amongst these conditions age may well constitute an important factor regarding the quality and efficiency of the official to be recruited.

10 Although the age of an official may be of no matter where certain posts are concerned and the field of recruitment for them should be as wide as possible, they must be regarded as exceptional by reason of their special nature.

11 In such a case the notice of competition must indicate that an age-limit has not been considered necessary.

12 Since the appointing authority has failed to specify the age-limit in the notice of competition in dispute this notice does not comply with Article 1(1)(g) of Annex III to the Staff Regulations.

13 Consequently Competition COM 152/70 and the decisions following on it making the appointments must be annulled.

14 In these circumstances it is unnecessary to consider the other submissions in the application.

Costs

15 Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

16 The defendant has failed in its submissions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials of the European Communities, especially Article 29 and Article 1(1) of Annex III;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Annuls Competition COM 152/70 and the decisions appointing Mrs Giovanna Pasquini and Mrs Teresita Colombo and Mr Giuseppe Mendosa, Mr Eduardo Benedusi and Mr Giovanni Laviola;**

2. **Orders the Commission of the European Communities to bear the costs of the proceedings.**

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 22 March 1972.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber