statement of the reasons on which it is based to enable the person concerned to judge whether the decision is well founded or whether it is tainted by a defect such as to enable its lawfulness to be challenged.

That requirement is not fulfilled if, in a letter addressed to a candidate not admitted to the tests in reply to his request for an individual explanation, the selection board does not indicate the way in which the criteria for selection were applied and the information supplied by the candidate's superiors might have led to the conclusion that he did not have all the potentialities for performing duties at the level of the category referred to in the competition notice.

REPORT FOR THE HEARING
delivered in Case 206/85 *

I — Facts and procedure

In July 1982, the Commission published the competition notice for Internal Competition COM/B/2/82, based on qualifications and tests, to constitute a reserve of administrative assistants, secretarial assistants and technical assistants in Grades B 5 and B 4.

The applicant submitted her application and was admitted to the competition but was later informed, by letter from the Head of the Recruitment Division dated 15 June 1984, that the Selection Board, after undertaking a comparative consideration of the applications and basing its assessment on a series of factors such as working experience before and after recruitment, general and/or special training, further training, staff reports, the duties performed at the date on which the application was received and mobility, had decided that it could not place her name on the list of candidates admitted to the tests.

The applicant then asked the Selection Board to inform her of the reasons for which it had refused to admit her to the tests.

By letter of 7 September 1984, the Head of the Recruitment Division informed Miss Beiten that the Selection Board had reconsidered her application and confirmed its decision. It was also apparent from that letter that the Selection Board had decided to admit to the tests only candidates already performing duties at the level of Category B/BS/BT or having all the potentialities for performing such duties.

* Language of the Case: French.

On 7 December 1984, Miss Beiten submitted a complaint against that decision which was rejected, first impliedly, then expressly by a letter from the defendant dated 19 April 1985.

Miss Beiten brought an action for the annulment of the decision of 4 July 1985 not to admit her to the tests.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber), having decided to open the oral procedure without any preparatory inquiry in Joined Cases 122 and 141/85 *Todaro* and *Dufrane*, and in Case 206/85, called upon the Commission to indicate before 16 December 1986 the position it intended to adopt towards the applicants in those cases in the light of the judgments of the First Chamber of 11 March 1986 in Cases 293 and 294/84, which also concerned Competition COM/B/2/82 ([1986] ECR 967 and 977).

In a letter dated 15 September 1986, the Commission replied that the Selection Board for Competition COM/B/2/82 intended to reopen the competition procedure in regard to the applicants at the stage which, according to the Court, the correct procedure had not been followed in order to obtain from them, by asking them the same questions which had previously been put orally to their immediate superiors, the candidates' own replies to those questions.

By a telex message of 24 October 1986, the applicants' lawyer in the abovementioned cases applied for an adjournment of the hearing, which had been fixed for 13 November 1986, on the ground that the applicants had in the mean time been admitted to the tests in the competition and that a close examination of the situation, which could lead to a decision favourable to the applicants and, therefore, to the withdrawal of the applications, was still being undertaken in regard to other persons concerned, including Miss Beiten.

By order of 2 July 1987, the Court (First Chamber) decided to join Case 206/85 to Case 141/85 *Dufrane* for the purposes of the oral procedure and the judgment.

Since the Court (First Chamber) took note that Miss Beiten no longer envisaged the withdrawal of her application, it fixed a date for the hearing.

Following the death of Mrs Dufrane Cases 141 and 206/85 were separated once again by Order of 27 October 1987.

II — Conclusions of the parties

Miss Beiten claims that the Court should:

(1) Declare the action to be admissible and well founded;

(2) Declare void the decision notified to the applicant on 7 September 1984 whereby the Commission informed her that the Selection Board for Internal Competition COM/B/2/82 refused to permit her to take part in the tests in the aforementioned competition;

Declare void the implied decision rejecting the complaint lodged by the applicant on 7 December 1984;

(3) Alternatively, should the Court uphold the action on the basis of the third submission:

Declare void the aforementioned decisions and the selection made by the Selection Board for the purpose of admission to the tests in the aforementioned competition, and all other actions and steps taken as a consequence thereof including appointments made on the basis of the results of the competition;

(4) In any event, order the defendant to pay the costs.

The *Commission* contends that the Court should:

Dismiss the application as inadmissible and without foundation;

Make an appropriate order as to costs.

III — Submissions and arguments of the parties

A — *Admissibility*

According to the *Commission* the essential problem in deciding on the admissibility of the application is whether the Selection Board, after it reconsidered Miss Beiten's application, adopted a new decision or merely confirmed the decision which had been notified to the applicant on 15 June 1984.

In that regard, it should be observed that the letter of 7 September 1984 is in the following terms: 'The Selection Board confirms its decision not to place your name on the list of candidates admitted to the tests since no additional factor has arisen which would permit it to modify the decision previously adopted'.

That letter does not therefore contain a new decision but merely gives information to a candidate who was not admitted to the tests and who asked for a more detailed explanation of the reasons why her application had been rejected.

The *applicant* denies that the aforementioned letter of 7 September 1984 could have constituted in her case a mere confirmation of the decision of 15 June 1984. The new decision is not to be found in the contents of that letter but in the fact that it was preceded by a reconsideration of her application. It should be noted that in this case the documents on the matter refer expressly to a reconsideration of the application.

Furthermore, since the applicant received from the Head of the Recruitment Division an acknowledgment of her letter indicating that the Selection Board would consider her complaints at the earliest possible date and that she would be informed as soon as possible of the results of that consideration, she was entitled to assume that the period for bringing an action would begin to run only from the date of a new decision, positive or negative, which would be communicated to her.

B — *Substance of the case*

The *applicant* puts forward three submissions in support of her application.

The first submission alleges an infringement of the second paragraph of Article 25 of the Staff Regulations and Article 5 of Annex III thereto as well as an infringement of essential procedural requirements inasmuch as neither the Selection Board's decision nor the decision rejecting the applicant's complaint contains anything, however summary, to indicate the reasons on which it is based. Neither the letter of 15 June 1984 nor that of 7 September 1984, sent after the reconsideration, nor the reply to the complaint, nor the administrative file, reveals the reason why the Selection Board

considered that the applicant was not already performing all the duties at the level of Category B or, at very least, did not possess all the potentialities for performing such duties.

In her second submission, alleging an infringement of Article 5 (3) of the Staff Regulations and the general rules and principles of law, in particular, the principles of equality and distributive justice and the principle that administrative measures must be based on legally admissible grounds, the applicant claims that the contested decision wrongly considered that she was not performing all the duties at the level of Category B or, at very least, that she did not possess all the potentialities for performing such duties.

In reality, the fact that, in the post Miss Beiten has occupied since 1979 in the Registry of Directorate-General IV, she succeeded an official in Category B is itself sufficient to show that she is performing duties at the level of Category B. In the alternative, she claims that she possesses all the potentialities for performing such duties inasmuch as she has not only already performed duties at Category B level but has also attended a course on the keeping of archives and received a certificate as a result thereof. That course was precisely a preparatory course for the performance of Category B duties, with the result that the applicant must at very least be regarded as possessing all the potentialities for performing such duties.

The applicant's third submission alleges an infringement of Article 5 (3) of the Staff Regulations and the third and fourth paragraphs of Article 5 of Annex III thereto as well as the purpose of the competition procedure and the principles of equality and distributive justice, inasmuch as the Selection Board, after establishing two different groups of candidates with a view to admission to the tests in the competition, decided to admit to those tests only candidates placed in the first group, that is to say, those already performing the duties of a Category B level or possessing all the potentialities for performing such duties.

That submission is put forward in the alternative, because it is made only in the event that, contrary to the applicant's view, it should be regarded as not established that she was already performing all the duties of a Category B level or, at very least, that she did not possess all the potentialities for performing such duties.

The criterion for admission to the tests applied by the Selection Board is not legally admissible for the following reasons:

(a) It is discriminatory, inasmuch as it gives a decisive advantage to those candidates to whom duties at a higher level had already been assigned, to the detriment of all the others;

(b) It fails to take account of the purpose of the competition procedure, which is to enable any person who fulfils the conditions laid down for taking part in it to demonstrate his qualifications and capacities, irrespective of circumstances unrelated to those qualifications and capacities;

(c) It is not a criterion for assessing qualifications within the meaning of the third paragraph of Article 5 of Annex III to the Staff Regulations, having regard, on the one hand, to the fact that the mere exercise of the duties corresponding to a higher category cannot constitute an acceptable criterion in the absence of an assessment of the way in which those duties were performed and, on the other

hand, to the fact that the possession of all the potentialities for performing certain duties is not a criterion, but a conclusion in regard to which it is, precisely, necessary to know on what predetermined criteria it is based.

The abovementioned criterion is, contrary to the opinion of the defendant, discriminatory both in regard to admission to a competition and in regard to admission to the tests in a competition. The list of the candidates who meet the requirements set out in the competition notice is determined, as is that of the candidates admitted to the tests, 'after examining the files'.

Finally, even if the fact of having performed duties corresponding to a higher category at the same time constitutes proof of the qualifications necessary to perform such duties, it may in no way be deduced from this that those who have not had that opportunity do not possess such qualifications and, consequently, they may not be prevented from providing proof of such qualifications, precisely in a competition the purpose of which is to establish the existence of such qualifications.

The *Commission* denies, in the first place, that the contested decision does not contain a sufficient statement of the reasons on which it is based.

The abovementioned letter of 7 September 1984 did not merely indicate the general criteria adopted by the Selection Board but stated precisely the parameters drawn from the application forms completed by the candidates themselves, on which the Selection Board based its consideration of the applications in accordance with the competition notice. Having regard to the very large number of candidates, the Selection Board could not be required to explain in detail to each of them why and to what extent the performance of any particular duty showed that a candidate possessed all the potentialities for performing the duties at the level of Category B.

With regard to the second submission, the Commission observes that, according to the settled case-law of the Court, in a case such as the present one the Selection Board has a wide discretion which may not be reviewed by the Court other than in cases of manifest error. The arguments put forward by the applicant do not, on their own, make it possible to affirm that she was already performing duties at Category B level or that she possessed all the potentialities for performing them or, consequently, to maintain that the Selection Board committed a manifest error of assessment in that regard. Contrary to the applicant's opinion, there are no *juris et de jure* presumptions binding the Selection Board in regard to the assessment of the potentialities of candidates for performing the duties corresponding to Category B. Although the performance of such duties over a certain period may certainly constitute a factor to be taken into consideration by the Selection Board, the latter formed its assessments on the basis of a series of factors set out in the letter sent to the applicant on 7 September 1984.

In reply to the third submission, the Commission contends that, although admission to the competition was to take place and did take place on the basis of purely objective factors, namely the conditions laid down in the competition notice, admission to the tests represented a process of selection carried out 'after examining the files' and following which the

Selection Board, in the exercise of its discretion, admitted to the tests those candidates best qualified to take part in them. There is therefore no discrimination, since the exclusion of candidates from the tests was the result of an assessment of their files.

The applicant's conclusion that the establishment by the Selection Board of two groups of candidates was contrary to the purpose of the competition procedure is just as unfounded. In that regard, it must be pointed out firstly that the fact of being already assigned to duties corresponding to a higher category constitutes in regard to a competition designed to permit admission to that category a circumstance which it is appropriate to take into account. Secondly, that circumstance is wholly objective and corresponds to the purpose of a competition procedure, which is to select the best candidates. Thirdly, the fact of performing the duties corresponding to a higher category does in fact constitute a criterion of assessment since that assessment is based not merely on the staff reports but on the whole of the file.

Finally, the Commission considers that since the Selection Board made its assessments on the basis of criteria laid down in advance, it complied fully with the third paragraph of Article 5 of Annex III to the Staff Regulations according to which the assessment of the candidates' qualifications is to be made on the basis of predetermined criteria.

G. Bosco
Judge-Rapporteur