REPORT FOR THE HEARING
delivered in Case 161/87 *

I — Facts and Procedure

Notice of Internal Competition No CC/A/8/85 for the recruitment to a post in career bracket A 7/A 6 in 'Unit A — Administration Department' attached to the President's office was published by the Court of Auditors on 24 June 1985.

The applicants and 12 other officials applied to take part in that competition. In a document dated 2 August 1985 and described as a final report, the Selection Board stated that none of the 14 candidates had been admitted to the written tests. Letters to that effect were sent to the applicants on the same day. Nevertheless, following a meeting with the Head of the Personnel and Administration Division of the Court of Auditors, the Selection Board decided pursuant to the second paragraph of Article 2 of Annex III to the Staff Regulations to give all candidates the opportunity to furnish additional observations with regard to the decision refusing them admission.

By letters dated 28 October 1985 the Selection Board informed the applicants that it had confirmed the decisions of 2 August 1985 rejecting their candidatures.

On 30 October 1985 the Court of Auditors wrote to all the candidates in the competition informing them that the appointing authority had suspended the procedure pending the possible institution of court proceedings. By a memorandum of the same date the applicants requested the appointing authority to communicate to them in a legally binding manner the date on which the period provided for in Article 91 of the Staff Regulations began to run as regards the decisions of the Selection Board. In reply, by a letter also dated 30 October 1985, the appointing authority informed the applicants that a complaint directed against a decision of a selection board appeared to be pointless, since the institution concerned had no authority to annul or amend the decisions of a selection board, and that the only legal remedy open to those concerned by such a decision lay in appealing direct to the Court of Justice.

By a letter dated 30 October 1985, Mr Muysers lodged a complaint under Article 90 of the Staff Regulations against the decisions of the Selection Board refusing to allow him to take part in the competition. By a letter dated 5 November 1985 the Court of Auditors referred to the contents of the letter dated 30 October 1985 sent by the President of the Court of Auditors.

Four candidates, namely Mr Schwiering, Mr Hoyer, Mr Neumann and Mr Maurissen, brought actions for the annulment of the Selection Board's decisions of 2 August and 28 October 1985 refusing to allow them to take part in the competition. By judgments of 23 October 1986 in Case 321/85 *Schwiering* [1986) ECR 3199), and in Joined Cases 322 and 323/85 *Hoyer and Neumann* [1986] ECR 3215), and of 4 February 1987 in Case 417/85 *Maurissen* [1987) ECR 551), the Court of Justice annulled the aforementioned decisions.

* Language of the Case: German.

Consequently, the Selection Board resumed its task after the two members appointed by the appointing authority had been replaced at their own request, and the four candidates who had brought legal proceedings were admitted to the written tests relating to the competition.

By a letter dated 31 March 1987 the applicants requested that their candidatures should be considered. That request was rejected by separate letters of the President of the Court of Auditors dated 22 April 1987.

On 15 and 19 May 1987 respectively Mr Tülp and Mr Muysers each lodged a complaint. Those complaints were rejected by the Court of Auditors on 26 May 1987.

By an application lodged at the Court Registry on 1 June 1987, the applicants brought this action seeking the annulment of the decision of the Court of Auditors of 29 April 1987 refusing to allow them to take part in the competition.

By an application for interim measures lodged on the same day, the applicants, pursuant to Article 83 of the Rules of Procedure, sought the suspension of the competition procedure either *sine die* or until the delivery of judgment in the main action. By order of 3 June 1987 the President of the Second Chamber, having heard the views of the Advocate General, dismissed the application for interim measures.

The applicants did not lodge a reply.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The applicants claim that the Court should:

(1) Declare the present application admissible;

(2) Declare the application well founded;

(3) Annul the rejection of the applicants' candidatures;

(4) Order the Court of Auditors to pay the costs.

The Court of Auditors contends that the Court should:

(1) Declare the application inadmissible;

In the alternative,

(2) Declare the application unfounded;

(3) Order the applicants to pay the costs, including the costs of the proceedings for the adoption of interim measures.

In addition, the Court of Auditors proposes that the Court 'should give a ruling under Article 91 of the Rules of Procedure without considering the substance of the case (Article 91 (1) and Article 92 (2) of the Rules of Procedure)'.

III — Submissions and arguments of the parties

A — *Admissibility*

The applicants claim that the application is admissible. The decision rejecting their candidatures constitutes a measure adversely affecting them since it substantially curtails their career prospects. They state that the application was lodged within the prescribed period.

The Court of Auditors contends that the application is inadmissible because the validity of the Selection Board's decisions of 2 August 1985 which are at issue in this case is no longer open to challenge. The period prescribed by Article 91 of the Staff Regulations was not complied with.

The applicants failed to avail themselves of the appropriate remedy even though they were informed on numerous occasions in writing and orally of the remedies available to them and despite the fact that their attention was drawn to the relevant case-law of the Court and in particular its judgment of 14 July 1983 in Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421.

Although Mr Muysers submitted a complaint under Article 90 of the Staff Regulations, it follows from the Court's aforementioned judgment of 14 July 1983 (*Detti*) and from its judgment of 5 April 1977 in Case 117/78 (*Orlandi* v *Commission* [1979] ECR 1613) that the Selection Board's decision was no longer open to challenge because the prescribed period for bringing an action before the Court of Justice had expired.

It is not possible, when an act adversely affecting a person has not been challenged within the prescribed period, to cause time to start running again by subsequently submitting a request which seeks in effect to correct the act adversely affecting him (see the Court's judgments of 15 May 1985 in Case 127/84 *Esly* v *Commission* [1985] ECR 1437; of 10 July 1986 in Case 153/85 *Trenti* v *Economic and Social Committee* [1986] ECR 2427; of 26 September 1985 in Case 231/84 *Valentini* v *Commission* [1985] ECR 3027; and of 7 May 1986 in Case 191/84 *Barcella and Others* v *Commission* [1986] ECR 1541).

The Court's judgments of 23 October 1986 in *Schwiering* v *Court of Auditors*, and *Hoyer and Neumann* v *Court of Auditors* and that of 4 February 1987 in *Maurissen* v *Court of Auditors* do not conflict with the defendant's argument. Although the Court has recognized in its decisions that it is possible for a person to once more call in question an act adversely affecting him, even after the expiry of the prescribed period for taking action, if new facts present themselves, that can be done only by submitting a request under Article 90 of the Staff Regulations within the prescribed period after the emergence of the new facts. No new factor has emerged in this case. The legal proceedings instituted by Mr Schwiering, Mr Hoyer, Mr Neumann and Mr Maurissen in the course of the same competition for which they were also candidates originated in circumstances which were completely different from those in this case. In this case the Selection Board based its decisions of 2 August 1985 relating to the applicants on the fact that it considered that the requirement laid down in point IV.2 of the notice of competition had not been satisfied. On the other hand the Selection Board's decisions relating to Mr Hoyer and Mr Neumann were based on the requirements laid down in point IV.3 of the notice of competition, concerning 'Knowledge of languages', and that relating to Mr Schwiering on the requirement laid down in point VII entitled 'Applications'. In the case of Mr Maurissen, whose position was, from the outset, distinct, the Selection Board's decision was based on the failure to comply with point IV.1 (b) of the notice of competition and that decision was annulled

by the Court of Justice essentially on formal grounds.

In contrast to the position with regard to the other candidates, the appointing authority did not consider that the Selection Board had unlawfully refused to allow the applicants in this case to take part in the competition.

B — *Substance*

The applicants state that the Court of Auditors suspended the competition procedure and that no decision rejecting their candidatures was communicated to them. Its present attitude could be regarded as justified only if it had considered the Selection Board's decisions to be valid and had consequently published a 'liste d'aptitude néant' (list of suitable candidates containing no names).

The Court made it clear in the grounds of its judgment of 23 October 1986 relating to Mr Hoyer and Mr Neumann that the whole competition procedure was invalidated. The Court expressly emphasized that the appointing authority had to recommence the whole competition procedure following publication of a new notice and if necessary the appointment of a new selection board. The Court of Auditors appointed a new selection board but it did not publish a new notice, which it justified on the ground that it had itself suspended the procedure. By now excluding the two applicants from the procedure it is in breach of the principle of the protection of legitimate expectations.

The Court of Auditors has failed to comply with Article 176 of the EEC Treaty since in its aforementioned judgments of 23 October 1986 and 4 February 1987 the Court of Justice specified what the Court of Auditors' obligations were and it should have complied with those indications.

The Court of Auditors is also in breach of the principle of the legality of administrative acts in so far as it is not adopting and has not adopted the measures necessitated by the factual and legal situation. In addition, it has failed in its duty to have regard to the welfare of the applicants whose vocational interests were not adequately taken into account. Finally, the Court of Auditors' decision to reject the applicants' candidatures is based not on the interests of the service but solely on the fear of laying itself open to legal proceedings instituted by candidates who have been admitted to the tests.

The Court of Auditors submits observations on the substance of the case purely as a precautionary step and solely on the basis that the Court rules that the principal claims are admissible.

The Court of Auditors contests the statement that no 'rejection' was communicated to the applicants. The Selection Board's decisions of 2 August 1985 were confirmed by letters sent to the applicants on 28 October 1985. It was the Selection Board which rejected the applicants by those decisions and not the appointing authority. The Selection Board's decisions had always been considered to be valid by the appointing authority and there was no need to carry out a further examination of their validity.

It is not true to say that the Court of Justice indicated that the competition procedure was to be recommenced. As the applicants failed to institute proceedings before the Court within the prescribed period, the appointing authority was under no obligation to take any step whatsoever. Consequently, the applicants' allegation that the appointing authority's conduct in that respect was in breach of the principle of the protection of legitimate expectations is unfounded.

The applicants are manifestly labouring under a misapprehension as to the powers of the appointing authority and of the Selection Board in relation to competitions, and in that connection the Court of Auditors refers to the Court's judgments of 14 June 1972 in Case 44/71 (*Marcato* v *Commission* [1972] ECR 427), of 26 February 1981 in Case 34/80 (*Authie* v *Commission* [1981] ECR 665) and of 14 July 1983 (*Detti*, cited above).

The defendant has not failed in its duty to have regard to the welfare of the applicants. In addition, it has complied with Article 176 of the EEC Treaty and completely fulfilled its obligations.

Finally, as regards the costs, the Court of Auditors takes the view that the applicants should be ordered under the second paragraph of Article 69 (3) and the second part of Article 70 of the Rules of Procedure to pay the costs, including the costs of the proceedings for the adoption of interim measures.

T. F. O'Higgins
Judge-Rapporteur