2. Orders each party to bear its own costs.

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 29 September 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 16 SEPTEMBER 1976 [1]

Mr President,
Members of the Court,

Mr Carmelo Morello entered the service of the Commission of the European Communities on 1 February 1973 as an administrator in career bracket A 7/A 6 in the Directorate-General for Competition with particular responsibility for inquiries within undertakings. He was placed in Grade A 6, Step 2 in view of the studies which he had completed and of his professional experience.

Following a vacancy notice for two posts in the Security Office in Brussels advertised in the Staff Courier of 21 January 1974, a notice of a competition based on qualifications and oral tests for these two posts was, more than 18 months later, published in the Staff Courier on 4 August 1975 and displayed in the usual places. It was stated that applications submitted following the vacancy notice did not need to be renewed.

The applicant submitted his application for these two posts on 13 August 1975 and, curiously, the details relating to the application are contained in a form dated 15 March 1973 thus prior to the date on which the applicant officially made his application.

By a letter of 3 November 1975 he was informed that the Selection Board had been unable to allow him to take part in these competitions. On 29 January 1976 the applicant lodged the present application for the annulment of this refusal to admit him to the competition and, consequently, for the annulment of the competition procedures and the two appointments made as a result of them.

In support of his application he first relies on the argument that the contested decision did not state the reasons on which it is based. In the alternative he argues that if the Selection Board thought that his qualifications were insufficient and inadequate with regard to the requirements stated in the notice

1 — Translated from the French.

of competition, it has made a wrong assessment and has therefore based its decision on erroneous reasons either of fact or of law.

The administration in fact informed him only after the lodging of this application, on 12 February 1976, that the reasons for his exclusion were, according to the report of the Selection Board, 'in particular, the lack of extensive experience relevant to the post, preferably acquired in government or international service'. For this reason the applicant further argues in his reply that the reasons stated are inadequate.

I — Although at least up to the oral stage of the proceedings, the Commission does not contest the admissibility of this application, it nevertheless raises doubts as to the admissibility of the grounds relied on as they were not raised in the course of the pre-litigation stage or because since the lodging of the application the applicant, it is alleged, has had no interest in relying on them.

1. In my opinion it seems contradictory to require the applicant, as does the Commission, to submit a prior complaint (Article 91 (2) of the Staff Regulations of Officials) relying on the argument based on the fact that no reasons were stated for the measure informing him that the Selection Board had not admitted him to the tests and to recognize that he may subsequently contest by means of an application to the Court either the absence, the adequacy or the inaccuracy of those reasons without previously having lodged a complaint (since even the appointing authority would be unable to amend or annul such a decision by the Selection Board). The procedure of prior complaint is not envisaged for the purpose of opposing a measure which merely notifies the contents of a decision and which does not itself adversely affect the individual.

The case-law of the Court (Judgments of 14 June 1972 in Case 44/71, *Marcato* v *Commission* [1972] ECR 427, and of 4 December 1975 in Case 31/75, *Costacurta* v *Commission* [1975] ECR 1563) imply that in this case as well the applicant cannot be required to have complied with the formality of lodging a prior complaint and, according to the judgment of the Court of 12 March 1975 in Case 23/74 *(Küster* v *Parliament* [1975] ECR 365), it is not necessary that the grounds relied on in the application before the Court were previously put forward in the complaint.

2. Secondly, according to a judgment of the Court of 13 July 1972 in Joined Cases 55 to 76, 86, 87 and 95/71 *(Besnard and Others* v *Commission* [1972] ECR 564) an interest in bringing an action is a condition for the admissibility of the applications and not for the admissibility of the lines of argument: the fact that the reasons for his exclusion were communicated to the applicant after he had lodged his application and that this notification gives him satisfaction in this respect does not remove his interest in bringing the action which must be assessed on the date on which he lodges the application.

Furthermore the reasons given to the applicant in the letter of 12 February 1976 are criticized by him in his reply from both the point of view of inadequacy and inaccuracy. The justification for putting forward this argument, which is new, it is true, is that it is based on factors which became apparent during the written procedure. Finally the Commission does not appear to be serious in maintaining its objections of inadmissibility; I must therefore give my opinion both on the argument based on the inadequacy of the grounds given and on that based on their factual or legal inaccuracy.

II — It is correct that the validity of the first argument is closely linked to that of the second but the proposition may also be reversed and it may be said that the validity of the second argument is

dependent on the assessment of the first or, more exactly, if the Court has to find that the grounds were inadequate, an examination of whether they were based on facts which were substantially correct and of such a nature as to justify the decision in law would be superfluous. I shall therefore deal with matters in the order followed in the report for the hearing.

1. In this respect I shall make the following observations:

Article 25 of the Staff Regulations of Officials provides that 'Any decision adversely affecting an official shall state the reasons on which it is based'. While it is correct, as the Commission maintains, that an official is not adversely affected by the fact that the true content of the reasons which caused a Selection Board to decide not to admit the official to the tests for a competition were communicated to him after the notification of that refusal to admit him, this only applies on condition that the grounds were adequately set out by the Selection Board in its report to the appointing authority. I have some doubts in this respect.

It must be remembered that the competition in question was a competition *on the basis of qualifications and oral tests.* In such a case according to the provisions of Article 5 of Annex III to the Staff Regulations of Officials the Selection Board should proceed as follows:

1. after examining the candidates' files, it must draw up a list of candidates who meet the requirements set out in the notice of competition;
2. as the competition is on the basis of qualifications, the Selection Board must, after determining how candidates' qualifications are to be assessed, consider the qualifications of the candidates appearing on the list provided for above;
3. finally, as the competition is also on the basis of tests, the Selection Board must state which of the candidates on the list are to be admitted to the tests.

The prior selection of the candidates is in principle solely based on 'the matching of the qualifications offered by the candidates against the qualifications required by the notice of competition' (Judgment of 14 June 1972, in Case 44/71, *Marcato* v *Commission* [1972] ECR 435, Judgment of 15 March 1973 in Case 37/72, *Marcato* v *Commission* [1973] ECR 361, and Judgment of 4 December 1975 in Case 31/75, *Costacurta* v *Commission* [1975] ECR 1563). The Selection Board may only and must only take account of the information supplied by the candidates. However in the present case the notice of competition for the two posts for which the applicant applied did not specify in what field the required certificates were to have been acquired; it also contained an express provision whereby 'in order to ensure that the candidates comply with the conditions for admission, the Selection Board *may* undertake, by means of an interview with the candidates:

— an additional examination of the diplomas and other documents relating to qualifications and of the statements of the candidates concerning the necessary qualifications;
— a test of their linguistic skill'.

Admittedly this is merely an option for the Selection Board contained in the second paragraph of Article 2 of Annex III whereby candidates 'may be required to furnish additional documents or information'. However, use of this option is furnish additional documents or information'. However, use of this option is particularly desirable where the competition is one in which qualifications play a predominant part and where the application form was completed a long time before the work of the Selection Board (more than two years in the case of the applicant) and not specifically for the purposes of the competition.

In addition cases of doubt may arise as is shown by the present example. National diplomas and qualifications may cover different circumstances. The duties involved in the posts to be filled consisted not only in the enforcement of the security rules in force but also in the preparation of the proposals and measures necessary for this purpose.

At that time the duties of the applicant included supervisory and inspection duties and in particular he stated that before his entry into the service of the Commission he had carried out the tasks of clerk to a commune in Italy for six years. As the Commission admits that 'the Selection Board therefore could not know that the applicant had in fact carried out police duties' in the context of his duties, as he maintains in his application, for which the Selection Board cannot be blamed although one of its members was Italian, it would have been in accordance with good administration for the Selection Board to have ensured that this statement was true as expressly provided in the notice of competition.

In view of the wide power held by the Selection Board at this stage of the competition, as the appointing authority can only exercise its choice amongst the candidates on the list of suitable candidates (which, contrary to the intention of Article 5, did not contain at least twice as many names as the number of posts to be filled) the guarantees attached to the examination of qualifications and 'the ways and means' whereby this examination is carried out must be scrupulously observed and the Selection Board's duty to state the reasons for its report to the appointing authority must be particularly strict (Judgment of 12 December 1956 in Case 10/55, *Mirossevitch* v *High Authority* Rec. 1955-1956, p. 387 and Judgment of 15 December 1966 in Case 62/65, *Serio* v *Commission of the EAEC* [1966] ECR 572).

2. There exists a second anomaly which appears to me to be more serious and which perhaps explains why the reasons were inadequate. I said that in the case of competitions on the basis of qualifications and tests the qualifications of the candidates chosen after an initial selection had subsequently, so to speak, to be examined no longer with regard to the requirements called for in the notice of competition but compared with each other and had to be assessed according to the criteria laid down by the Selection Board, as the candidates' admission to the final oral tests must be dependent on this assessment.

In his opinion delivered in the Morina case (Case 21/65, *Morina* v *Parliament* [1965] ECR 1033 at 1042) Mr Advocate-General Gand asked 'What needs are these requirements designed to fulfil?'. His answer was that 'A competition on the basis of qualifications is, of course, the one most vulnerable to subjective assessments, and the type of qualifications which may be taken into consideration may vary considerably between competitions. By requiring that the criteria of assessment be fixed in advance, the authors of the Staff Regulations intended to ensure that the discretion allowed the Selection Board should yet be exercised within the bounds of a framework previously established and objectively determined'.

For some reason the Selection Board dispensed with this formality. If it had complied with it it would have been led to define the criteria on which it intended to rely in assessing the standard and length of the extensive professional experience required of the candidates. While, as the Commission, in my opinion correctly, points out that there 'is consequently no question in the course of the examination of the admissibility of candidates of undertaking a comparative analysis of their files', that is what is required by Article 5 of Annex III at the stage of preliminary admissibility and that is what the Selection Board did in

the course of the initial selection thus, so to speak, telescoping the two stages of the proceedings.

I am not sure that the applicant has no interest in relying on this irregularity as in his case there was found to be a *complete* lack of experience, not merely a lack of *extensive* experience and only the candidate who, although admitted to the oral tests, was not finally chosen could in fact rely on this. The fact that the Selection Board failed to have a preliminary interview with the applicant (unless the individual interview which the applicant had with the President of the Selection Board replaces it, which is not alleged by the Commission) and that it did not establish such criteria is certainly not unconnected with the fact that the 'general' reasons which were finally given to the applicant and which I can easily believe could have been given to him without difficulty had he merely asked for them, even if he did not realize this, were of a very brief nature. On the other hand he only learned what he wanted to know at the stage of the oral procedure.

I do not believe that such a method can serve to avoid court actions even if in the short term it spares the administration the need for long explanations. German law is particularly stringent with regard to the reasons for decisions having individual effect and this Court itself has also laid down strict rules in this respect. The applicant's lawyer, who acted in the *Groupement des Fabricants de Papiers Peints de Belgique* case and whose arguments were upheld in the judgment of this Court of 26 November 1975 (Case 73/74, *Groupement des Fabricants de Papiers Peints de Belgique* v *Commission* [1975] ECR 1491), believed correctly that he could rely on the case-law of this Court. In respect of this first point therefore I am inclined, on the authority of the decided cases which I have mentioned above (Judgments of 14 December 1965 in Case 21/65, *Morina* v *Parliament supra;* of 14 June 1972 in Case 44/71, *Marcato* v *Commission supra;* of 15 March 1973 in Case 37/72, *Marcato* v *Commission supra;* and of 4 December 1975 in Case 31/75, *Costacurta* v *Commission supra)* to declare that the applicant is correct, in particular as no objection was raised to such an explanation since 'the matching is carried out on the basis of objective factors which are moreover known by each of the candidates in his own particular case'.

III — In the course of the written procedure and principally during the oral procedure the Commission was at pains to explain that, finally, the choice of the appointing authority could not have been better than the one actually made. It was only at that final stage of the proceedings that it agreed to undertake a detailed comparative analysis of the files of all the candidates, both those who were not admitted to the tests and those who were admitted and were finally proposed, thus revealing to the Court with no difficulty the 'confidential nature of the work of the Selection Board'.

In this respect the information supplied by the Commission appeared to me to be decisive.

In view of the tasks entailed in the two posts to be filled in the Security Department of the Commission the notices of competition required, quite correctly, that the candidates should have acquired, preferably in government or international service, extensive experience of the duties involved in the security of persons, buildings and documents and the protection of confidential information.

The duties which the applicant carried out and continues to carry out in the Directorate-General for Competition bear no relation to such tasks. The duties of an inspector of undertakings of the common market in matters relating to competition in no way concern security problems.

As for the duties of clerk to the commune of which the applicant had experience in Italy from 1966 to 1973 they are certainly of a purely administrative nature. Although he is an official of the State, appointed by the Ministry for the Interior, a clerk to the commune is responsible, under the authority of the Mayor, for managing the various services of the commune; although he is thus called upon to administer the staff of these services, in particular the officials of the municipal police force, the clerk to the commune himself does not perform any police duties. Furthermore these tasks, which are the responsibility of the mayor, themselves only concern local public order. Particularly in rural communes they are in no way comparable to the security tasks involved on the scale of an international institution such as the Commission of the European Communities. It was in fact in rural communes the population of which was no more than from one thousand to five thousand inhabitants that the applicant worked for the local authority as clerk. At this level even the direct exercise of police responsibility would bear no relation to the extensive experience of security duties required for the protection of the functioning of a Community body.

In view of the details supplied at the hearing by the Commission it is therefore evident that neither as a former clerk to the commune in his country of origin nor as inspector in the Directorate-General for Competition could Mr Morello have acquired such experience.

Finally therefore I conclude that the application must be dismissed. In view of this solution there should be no need for the Court to examine the objection of inadmissibility raised in the course of the oral procedure by the Commission on the grounds that the application was submitted belatedly. Mr Morello was informed of the exclusion of his application by a letter of 3 November 1975 signed by the Head of the Appointments and Promotion Division and he only lodged his application on 29 January 1976, that is, more than two months later. However solely upon the notification of this letter could the period for lodging an application start to run. I do not know on what date the applicant received notification as the administration has supplied no information in this connexion. On the other hand it was only on 12 February 1976 that on behalf of the Commission the same Head of Division communicated to the applicant the reasons with which the selection board justified the exclusion of his application. Therefore it is only from that date that Mr Morello was able usefully to discuss, in full knowledge of the facts, the decision of the Selection Board.

In these circumstances I consider that the objection of inadmissibility which the Court would have had to examine even of its own motion, cannot be upheld and I suggest that the Court should dismiss the application on the substance of the case.

However in view of the dilatory manner in which the Selection Board acted and the reluctance of the Commission to state its reasons I suggest that the Court relieves the applicant of the costs which should in principle be borne by him.