JUDGMENT OF THE COURT (SECOND CHAMBER) OF 26 OCTOBER 1978 [1]

Augusta Claes (née Agneessens) and Others v. Commission of the European Communities

Case 122/77

1. *Officials — Recruitment — Competition — Selection Board — Assistance of examiners in an advisory capacity — Conditions*
   (Staff Regulations, second paragraph of Article 3 of Annex III)

2. *Officials — Recruitment — Competition — Selection Board — Drawing up a list of suitable candidates — Number of candidates to be included*
   (Staff Regulations, paragraph 5 of Article 5 of Annex III)

1. The second paragraph of Article 3 of Annex III cannot be understood as enumerating exhaustively the cases in which a selection board may legitimately have recourse to the assistance of examiners in an advisory capacity and, in particular, does not prevent a selection board from having recourse to such a procedure in cases where the large number of candidates involved in a competition would otherwise prevent the selection board from completing its work within a reasonable period. It is necessary, however, for the selection board to retain ultimate control over the procedures and its discretionary power.

2. The stipulation in the fifth paragraph of Article 5 of Annex III that the list of suitable candidates shall wherever possible contain at least twice as many names as the number of posts to be filled is only a recommendation to the selection board, intended to facilitate decisions of the appointing authority, and whether or not it is followed depends on the nature and circumstances of the competition, the number of candidates and their qualifications.

In Case 122/77

AUGUSTA CLAES (NÉE AGNEESSENS) residing at 18 Avenue Baneik, Wezembeek- Oppem (Belgium),

ANDRÉE OP DE BEECK (NEE DEWEER) residing at 166 Langue Lozenastraat, Antwerp (Belgium),

HELGA KOTTOWISKI (NÉE DUMÉNIL) residing at Via Burghiera, Laveno-Mombello (Italy),

1 — Language of the Case: French

VIOLETTA FERRARI, residing at 35 Rue Froissart, Brussels (Belgium),

MARCELLE MONFORT, residing at 5 Avenue Belle Étoile, La Hulpe (Belgium),

CHRISTEL MONTAG, residing at 2/20 Via Esperia, Ispra (Italy),

MARYSE NICAISE, residing at 19 Avenue des Nénuphars (Bte 23), Brussels (Belgium),

MATHILDE OBERT, residing at 1 Via Esperia, Ispra (Italy),

MAGGY PEREIRA, residing at 2 Rue Kleindal, Linkebeek (Belgium),

ANGELA SALMOIRAGHI, residing at 22 Square Hoedemaekers, Brussels (Belgium),

WILHELMINA SCHEFFELAAR, residing at 16 Rue Willems, app. 113, Brussels (Belgium),

GABRIELLA VAN AALST, residing at 3 Avenue E. de Thibault, Brussels (Belgium),

SIMONE NAGELS (NÉE VAN DE RUTTE) residing at 77 Maurice Despretlaan, Sterrebeek (Belgium),

SIMONE VAN DOESELAER, residing at 35 Rue Scailquin (Bte 67), Brussels (Belgium),

IRÈNE VAN DOOREN, residing at 158 Steenweg op Edingen, Asse (Belgium),

Officials of the Commission of the European Communities, represented by Jacques Putzeys and Xavier Leurquin, Advocates at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of G. Nickts, Huissier de justice, 17 Boulevard Royal,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio-Allo, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Plateau de Kirchberg,

defendant

APPLICATION for the annulment of the decision of the selection board in Internal Competition No COM/BS/14/75 concerning the drawing-up of a list of 114 suitable candidates and the annulment of the decision of the appointing authority pursuant to that competition,

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, M. Sørensen and A. Touffait, Judges,

Advocate General: G. Reischl
Acting Registrar: F. Kohl

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the conclusions and submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Regulation No 1473/72 of the Council of 30 June 1972 (Official Journal, English Special Edition 1972 (III), p. 703) created new basic posts of senior secretarial assistant and secretarial assistant classified under Category B and relating respectively to career brackets B 3/B 2 and B 5/B 4. At the same time a certain number of posts in Category C were reclassified under Category B and a competition was organized in 1973 to fill the new posts.

The subsequent reclassification of C posts to B posts resulted in a further competition organized in 1976. On 19 July 1976 the Commission drew up the notice of Internal Competition No COM/BS/14/75, the text of which was published in Administrative Information No 106 of 27 July 1976. It announced a competition on the basis of qualifications and possibly on tests for the purpose of drawing up a reserve list of secretarial assistants in career bracket B 5/B 4.

At point II (1) the notice specified the conditions of admission to the competition relating to qualifications and practical experience as follows:

"Certificates, diplomas, etc. and practical experience

Either A:

1. Advanced secondary education, with certificate, and at least six years' experience of Category C duties in the fields described under 'Nature of Duties' as executive secretary, principal secretary or shorthand-typist or in some other similar capacity appropriate to those duties and
2. A total of five years' service with the Communities as an official or other servant or
3. At least 15 years' practical experience in the fields described under 'Nature of Duties'.

Or B:

1. At least 12 years' practical experience of Category C duties as executive secretary, principal secretary or

shorthand typist or in some other similar capacity appropriate to the duties described under 'Nature of Duties' and

2. A total of 11 years' service with the Communities as an official or other servant."

Point II (2) related to the linguistic knowledge required of candidates. Point II (3) of the notice was worded as follows:

"Where possible, the selection board will mention on the list of candidates satisfying the requirements set out in this notice those whose qualifications they consider to be the best, having regard for this purpose to the candidate's individual file (general and specialized training, age, length and nature of practical experience, staff reports, etc.).

In the event of the number of candidates eligible by virtue of their qualifications exceeding the number of posts available by 30% or more, the selection board may decide to submit the listed candidates to the following tests in order to reduce their number: . . ."

A list of 775 candidates was drawn up by the appointing authority in accordance with Article 4 of Annex III to the Staff Regulations. The selection board first met on 29 September 1976 to decide which of the candidates could be admitted on the basis of the conditions set out in point II (1) of the notice of competition. That first stage of the work of the selection board was completed on 13 October 1976 when a list of 550 eligible candidates was drawn up, which, according to the Commission, included all the applicants save Mrs Scheffelaar.

At the same time the selection board appointed a board of examiners comprising a chairman and 10 members drawn equally from representatives of the administration and the staff and entrusted with considering the qualifications of the eligible candidates and proposing a list of candidates on the basis thereof to the selection board. It appears from the minutes of the meetings of the selection board that the board of examiners had to have regard to the following criteria:

"Education, general and special experience, age, length of service and seniority, vocational qualities to be considered on the basis of the staff reports and any other matters which the examiners shall properly be able to take into account for the purpose of drawing up its draft list."

In order to determine these guidelines the selection board and the examiners held a joint meeting on 15 October 1976. The examiners then proceeded initially to make a provisional selection solely on the basis of so-called "objective" criteria, with reference to the grade, age, length of service and seniority and the certificates of the candidates. At the end of this selection the examiners drew up a list of 247 candidates. At the beginning of November the selection board was informed of this result and of the combination of the criteria on which it was based. The selection board then invited the examiners to pursue their work by considering the vocational qualities of the candidates. They considered the personal files of all the eligible candidates and requested the Directorates General and departments concerned to check the objective facts taken into account at the stage prior to selection and to give an assessment of the candidates. On 2 December 1976 they submitted a report to the selection board relating to the execution of its instructions, together with a list of candidates considered the most deserving of appointment to the posts in question. Annex II to the report indicates the so-called "objective" criteria and shows that the candidates fulfilling the conditions for admission to the

competition were at that stage divided into two groups in each Directorate General or department, namely: those to be taken into consideration and those not to be taken into consideration. After meeting again three times the selection board on 10 December 1976 drew up a list of suitable candidates containing 114 names. This was published in the Staff Courier of 13 December 1976. The names of the applicants were not on that list. By letters dated 11 March 1977 the applicants submitted a complaint through official channels under Article 90 (2) of the Staff Regulations asking for the annulment of the results of competition COM/BS/14/75. By letters dated 12 July 1977 the Commission dismissed those complaints.

At the end of November 1977, 109 of the 114 suitable candidates were appointed to posts in Grade B 5.

After 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

1. The *applicants* claim that the Court should:

— Annul the Commission's decision, notified by letters of 12 July 1977, rejecting the applicants' complaint submitted under Article 90 (2) of the Staff Regulations;

— Annul the decision of the selection board for Internal Competition No COM/BS/14/75 concerning the drawing-up and the contents of a list of 114 suitable candidates;

— Annul the decision of the appointing authority to make appointments consequent upon that competition;

— Order the opposite party to pay the costs.

In their reply the applicants add the following claims:

— Order production of the entire administrative file on the competition in question or at least the documents referred to in the reply as being relevant to the Court's judgment;

— In that event, give the applicants leave to file a supplemental statement following an opportunity to take cognizance of the said new documents.

2. The *Commission* contends that the Court should:

— Dismiss the application as inadmissible in respect of one of the applicants and unfounded in its entirety;

— Order the applicants to pay the costs.

III — Submissions and arguments of the parties

1. Facts

(a) The *applicants* observe that it was the examiners who determined the combination of the so-called "objective" criteria. This appears from Annex II to the report of 2 December 1976 which the examiners made to the selection board regarding the execution of their instructions.

The Directorates General were asked to give an assessment only in relation to the candidates meeting the so-called "objective" criteria. This is apparent from Annex II to the report of 2 December 1976 of the examiners to the selection board and from the information bulletin of the Staff Committee of 25 February 1977.

It is not moreover possible in the present state of the file to know with certainty whether the examiners considered the personal files of all the

eligible candidates and in particular their staff reports.

It is clear in any event that at its meetings on 6, 7 and 8 December 1976 all that the selection board did was to consider the proposals of the examiners without checking the qualifications and merits of the other candidates excluded from those proposals.

(b) In the *Commission's* view it is apparent from the examiners' report to the selection board and the annex thereto that the examiners confined themselves to proposing to the selection board guidelines which the selection board approved, since it then invited the examiners to continue their work by taking into account the other criteria set out in their instructions.

The opinion of the Directorates General was sought in respect of all candidates admitted to the competition. The information given by the Staff Committee in this respect was erroneous. Of course the latter had not been given particulars of the work of the selection board.

The fact that at this stage of their work neither the examiners nor the Directorates General who were consulted confined themselves to checking the correctness of the said objective particulars in respect of candidates in the group "not to be taken into consideration", but that they also considered their qualifications from the point of view of all the criteria is confirmed by the aforementioned report. Mention is made therein of "exceptions, unanimously agreed by the examiners, relating to specially qualified and deserving officials who have performed or are performing secretarial duties of undoubtedly heavy responsiblity". Those "exceptions" related to candidates whom the examiners proposed to the selection board to include in the list of suitable candidates although from the point of view of the so-called "objective" criteria they belonged to the group "not to be taken into consideration". The Commission is in a position to prove that 25 of the successful candidates included by the selection board in the list of suitable candidates were from the group described as "not to be taken into consideration".

2. Admissibility

(a) The *Commission* points out that one of the applicants, Mrs Scheffelaar, was not admitted to the competition and she was informed of this by letter dated 26 October 1976. Because the admissions stage could not be questioned any annulment could apply only to matters subsequent thereto. Accordingly Mrs Scheffelaar has no interest in the action since the contested decisions do not adversely affect her.

(b) *Mrs Scheffelaar* observes that she lodged a preliminary complaint to which the Commission replied without mentioning the fact that she had been excluded from the competition. On the contrary, her complaint was dismissed on the ground that "in allotting the vacant B posts it was necessary to choose 114 candidates" from among a total of 550 who had the qualifications referred to in the notice of competition. The applicant could thus infer that she was included in the list of eligible candidates. The Commission must show that it was not so by producing the said list. Even if the Commission does provide such proof the applicant has been misled and the Commission ought therefore to be ordered to pay the costs of her application.

A. The first submission of the applicants

1. The first submission is that the decisions which the applicants are seeking to have annulled violate the general principles on the methods by which a selection board for a

competition based on qualifications reaches its verdict and the first paragraph of Article 30 of the Staff Regulations, and that there was an incorrect application of the second paragraph of Article 3 of Annex III to the Staff Regulations.

This irregularity consisted principally in the selection board's considering the drawing-up of the list of suitable candidates in the presence of a group of examiners. Since it was a competition based on qualifications only the selection board provided for in the first paragraph of Article 30 of the Staff Regulations was entitled to consider the verdict. According to the second paragraph of Article 3 of Annex III to the Staff Regulations examiners may be appointed only where there is a competition based on tests.

There was, moreover, further irregularity in the fact that the selection board considered it necessary to appoint examiners to determine the criteria to be applied for comparing the qualifications acquired in the various Member States. A selection board cannot thus delegate powers and by the same token restrict its own.

2. The *Commission* first of all stresses the fact that the applicants have not shown evidence that the use of examiners adversely affected the objectivity of the competition. The fact that the examiners were chosen equally from staff and administration is on the contrary such as to offer the candidates guarantees comparable to those offered by the selection board itself.

There is nothing in the case-law or the principles of Community law or national law to prevent recourse to examiners in a competition based on qualifications. On the contrary, the laws of public administration protect the freedom of the selection board in the organization of its work. Accordingly, in the absence of any formal prohibition, the selection board is at liberty to have recourse to examiners.

The first paragraph of Article 30 of the Staff Regulations has no special provision on this issue.

The second paragraph of Article 3 of Annex III to the Staff Regulations should not be interpreted as prohibiting the appointment of examiners at the stage when the qualifications of the candidates are being considered. First of all, the general principle of the freedom of the selection board in the organization of its work is scarcely compatible with restrictions on such freedom based on an argument *a contrario*. Moreover, the *ration legis* would also appear to be opposed to a restrictive interpretation: the provision in question satisfies the need of allowing the selection board in the most frequent case (namely that of a competition based on qualifications and tests) to receive assistance at the materially most onerous and crucial stage, that of the tests. It was at that same stage of the comparative consideration of the merits of the candidates that the examiners were involved in the competition in question.

The criterion, according to the case-law of the Court, is that the selection board should retain "ultimate control over the procedures and its discretionary power": Case 90/74, *Deboeck* v *the Commission* ([1975] ECR 1123). The facts show that this was the position in the present case.

3. The *applicants* in reply say that it is irrelevant whether recourse to examiners could have adversely affected the objectivity of the competition. The Commission overlooks the fact that disregard of essential procedural requirements leads to the annulment of the consequent decisions. The applicants do not know, moreover, whether there has been a misuse of powers, since the whole file has not been produced.

The applicants stress that, save exceptionally and for a specific reason, nothing is permitted which is capable of affecting the independence of the selection board.

They refer to the fact that the selection board alone decided on the admission of candidates to the competition on the basis of the conditions contained in point II (1) of the notice of competition. It cannot be alleged that without the assistance of third persons the selection board encountered insurmountable obstacles in fulfilling its taks.

The *ratio legis* of the second paragraph of Article 3 of Annex III to the Staff Regulations arises from the necessity to derogate from the rigidity of the general principle so that the selection board may receive assistance at the materially most onerous stage. That exceptional power is exercisable only in respect of written tests and practical tasks, such as marking.

The judgment of the Court in Case 90/74 *Deboeck* does not support the Commission's view because the competition in question in that case was based on qualifications and tests.

The applicants allege further that the selection board was not able to retain ultimate control over the procedures and its discretionary power, contrary to the aforementioned judgment.

There was a first misuse of powers in the fact that the board of examiners was instructed to take into account any other matters which it considered relevant for the purpose of drawing up its draft list. It is not apparent from the file whether these were mandatory criteria imposed on it or guidelines leaving it complete freedom.

On the other hand, it appears that without having been empowered to do so the examiners decided: to relate the so-called "objective" criteria to the criteria considered to be subjective; to make a preliminary selection on the basis of the objective criteria; on the combination to be made in the grouping of those criteria; to choose 247 candidates on the basis of those criteria. Since the selection board did not question that selection, it therefore delegated one of its essential powers: to decide between the candidates chosen at the time of the preliminary selection and also to take into account those who were not selected at that stage but who had exceptional merit or who had exercised special responsibilities.

Another sub-delegation of powers lay in the assessment sought from Directorates General. This classification was probably used to draw up the list proposed to the selection board by the examiners on 2 December 1976. The minutes of the meetings of the selection board on 6, 7 and 8 December 1976 do not show what consideration was undertaken during those meetings or whether all the qualifications of all the candidates were reconsidered. The applicants allege, finally, in this respect that in answer to their complaint the Commission replied that it was necessary to appoint examiners to determine the criteria to be applied to ensure a fair comparison of the qualifications obtained in the various Member States.

4. The *Commission* alleges in its rejoinder that it is not possible to infer from the judgment of the Court in Case 90/74 *Deboeck* that it is improper to have recourse to examiners in all cases other than those expressly provided for in the second paragraph of Article 3 of Annex III to the Staff Regulations.

There is no justification for saying that that article is limited to authorizing recourse to examiners for written tests. To say that the marking of written tests is a practical task is an abuse of the language, since it is a complex matter leading to a subjective assessment.

Reference to the fact that the selection board was able on its own to consider the case of the 775 candidates to decide as to their admission is irrelevant: it is apparent from the notice of competition that that task was less complex than consideration of the qualifications.

Nor can the Commission accept the argument that if the selection board was able to retain charge and control of the work of the examiners it could have dispensed with them.

Regarding the powers of the examiners the applicants are confusing the concept of a decision with that of a proposal. The Commission, moreover, does not consider itself authorized to reveal particulars of the work of the selection board. In addition, it follows from the judgment of the Court in Case 90/74 *Deboeck* that it is sufficient for the Court to be in possession of facts allowing it to conclude that the selection board was always in a position to exercise its powers. The same argument is also valid regarding the intervention of the Directorates General.

B. The second submission of the applicants

1. The submission here is that there has been an infringement both of the general principle of the equality of candidates admitted to a competition and of the first paragraph of Article 30 and Article 6 of Annex III to the Staff Regulations. The infringements are alleged to be that the selection board first of all drew up a provisional list of suitable candidates on the basis of so-called "objective" criteria and then submitted that list for comment to the Directorates General. The applicants consider that all the candidates admitted to a competition based on qualifications should be treated in the same way. The secret nature and independence of the deliberations of a selection board moreover prevent it from seeking at such time and on the basis of a preliminary selection the opinion of the Directorates General.

2. Regarding the alleged violation of the general principle of the equality of candidates, the *Commission* refers to the facts of the case. In particular it stresses that the merits *stricto sensu* of the candidates, namely the staff reports in particular, were considered in the case of all eligible candidates.

The procedure of consulting the Directorates General was conceived in such a way that each representative of a department was required to give an opinion only of eligible candidates in the particular department. He could not, therefore, have a global picture of the competition and intrude this upon his assessment of the officials whom he knew directly. The objective of this procedure was to allow the selection board fully to assess the merits of the candidates in accordance with the provisions contained on this subject in point II (3) of the notice of competition.

3. In their reply the *applicants* claim further unfairness in that the candidates who did not satisfy the objective criteria were chosen according to another criterion, namely their exceptional merit. These candidates do not satisfy all the conditions since they do not fulfil the objective criteria.

Regarding the secrecy of the work of the selection board the applicants in their replies state that it follows from the judgment of the Court of 14 June 1977 in Case 73/76 *Costacurta* v *Commission* ([1977] ECR 1163) that if the secrecy of the work of the selection board is violated when the decision has not yet been taken the regularity of the decision is open to question, and more especially where the breach of secrecy is capable of adversely affecting the guarantees as to the regularity of the proceedings. In the present case it was above all the disclosure to the Direc-

torates General of a list made up of two groups, one to be taken into consideration and the other not, which was in breach of the secrecy of the proceedings of the selection board. It is wrong to claim that since the representatives of the Directorates General did not have a global picture of the competition they could not assess whether the list was going to be amended: the candidates who did not satisfy the so-called "objective" criteria were not included among those eligible unless they showed exceptional merit. Further, the approximate number of posts vacant and candidates to be selected in each Directorate General was known. Classification by order of merit was undertaken within the Directorates General so that it was not necessary to have global picture of the competition in order to have, in advance, a virtually certain knowledge of the chances of candidates according to their position in the classification of the first group drawn up by each Directorate General.

Regarding the necessary independence of the selection board from any influence, which principle is implicitly contained in the first paragraph of Article 30 of the Staff Regulations, the applicants consider that the classification of the candidates by the Directorates General into the group to be taken into consideration is an encroachment upon the choice which the selection board must undertake independently.

4. The *Commission* takes the view that to require candidates who did not satisfy the objective criteria to show especially high qualifications in relation to the other criteria in order to be included in the list of suitable candidates was simply the effect of a reasonable weighting made by the selection board as between the various criteria used for consideration of the qualifications.

Regarding the observation of the applicants that candidates who did not meet the objective criteria were successful, the Commission observes that at that stage there were no predetermined conditions which the candidates had to fulfil: it follows from the notice of competition that only the conditions of admission were mandatory.

According to the Commission the selection board did not reveal any information which, in the words of the judgment of the Court in Case 73/76 *Costacurta*, "was capable of affecting the guarantees as to the regularity of the proceedings of the selection board": the objective and the effect of obtaining the views of the Directorates General were to have similar information on all the candidates in order to be better able to assess their qualifications.

The applicants' claim that the number of candidates to be selected in each Directorate General was known is disproved by the results of the competition, which show that there is no regular correlation between the number of candidates admitted by each Directorate General and the corresponding number of successful candidates.

C. The third submission of the applicants

1. The *applicants* submit here that the second paragraph of Article 30 and the fifth paragraph of Article 5 of Annex III to the Staff Regulations have been infringed in the first place because the selection board drew up a list of suitable candidates containing 114 names, whereas such a list ought to contain at least twice as many names as the number of posts to be filled. The fact that a provisional list containing 250 names was drawn up shows that it was possible to draw up a list containing twice as many names of successful candidates. In acting thus the selection board deprived the appointing authority of its discretion and exceeded its powers.

The second paragraph of Article 30 and the fifth paragraph of Article 5 of Annex III to the Staff Regulations were also infringed in that the appointing authority merely asked the selection board, which has only advisory powers, to draw up a list of suitable candidates, the number of whom should be equal to the number of vacant posts. The appointing authority ought itself to exercise its power of appointment and should not delegate or restrict that power.

2. The *Commission* considers that it is apparent from reading the provisions of the Staff Regulations cited in support of the third submission that the selection board is under no obligation in respect of the number to be included in the list of suitable candidates: the sole effect of the second paragraph of Article 30 is to require the appointing authority to fill the vacant posts exclusively from the list of suitable candidates; the wording of the fifth paragraph of Article 5 of Annex III to the Staff Regulations makes it clear that the selection board is not bound to any specific number in drawing up the list of suitable candidates: it is simply requested "wherever possible" to include at least twice as many names as the number of posts to be filled. Mandatory rules in the matter are not consistent with the principle of the independence of the selection board and its necessary freedom of judgment.

Moreover, there is nothing to show that the selection board was able to include a larger number in the list of suitable candidates. The Commission considers this issue to be outside the jurisdiction of the Court. The only fact which the applicants rely on is that "a provisional list containing 250 names was drawn up". This argument is reasonable only if the selection board had drawn up a preliminary provisional list based on all the criteria contained in point II (3) of the notice of competition and then, by raising the requirements based on those same criteria, had drawn up a second and more restrictive definitive list of suitable candidates, which was not the case: the first list containing 234 names was drawn up solely on the basis of the so-called "objective" criteria. The second stage consisted in combining that first method of selection with the results of a second consideration of the qualifications of all the candidates, based this time on criteria relating to the duties performed by them and an assessment of their merits *stricto sensu*.

The applicants in any event have no legitimate interest to pursue on this issue: the candidates in the competition would have obtained no additional guarantee if the selection board had extended the list of suitable candidates.

3. In reply, the *applicants* state that the *ratio legis* of the fifth paragraph of Article 5 of Annex III to the Staff Regulations is to prevent the selection board from taking the place of the appointing authority by drawing up a list of successful candidates equal, or approximately equal, to the number of vacant posts. It is for the selection board to show that the qualifications of the candidates were insufficient, so that it was impossible to draw up a longer list; this was not done.

4. In its rejoinder, the *Commission* observes that it is incorrect to claim that the appointing authority required the selection board to include in the list of suitable candidates a number roughly equal to that thought to be allowed for in the budget. Assuming, however, for the sake of argument that such mandatory instructions had been given to the selection board they would not have been bound by it and consequently would not have been capable of vitiating the competition. It is apparent, on the other hand, from the notice of competition that two kinds of solution were contemplated by the appointing authority, namely, on the one hand, the

case where the selection board would draw up a list of candidates exceeding by 30 % the number of posts available in the budget, and, on the other hand, the case where consideration of the qualifications would produce a list smaller in number.

At the hearing on 29 June 1978 the applicants, represented by X. Leurquin and J. Putzeys, and the Commission of the European Communities, represented by its Agent, Mme Sorasio-Allo, made oral submissions. At the same hearing Mme Napoli, the chairman of the selection board for Internal Competition No COM/BS/14/75, replied to questions put by the Court and by the applicants.

The Advocate General delivered his opinion at the hearing on 5 October 1978.

Decision

1 The application is essentially for the annulment of the decision of the selection board for Internal Competition No COM/BS/14/75, concerning the drawing-up and the contents of a list of 114 suitable candidates and the annulment of the appointments made consequent upon that competition.

2 The competition in question was organized as an internal competition based on qualifications and possibly on tests to constitute a reserve of secretarial assistants in grades 5 and 4 of Category B following the reclassification of some 100 posts previously classified in Category C.

3 The list of candidates drawn up by the appointing authority and forwarded to the chairman of the selection board in accordance with Article 4 of Annex III to the Staff Regulations contained 775 names, from which the selection board selected 550 candidates as fulfilling the conditions defined in the notice of competition in respect of qualifications and vocational experience.

4 All the applicants save one are among the candidates so admitted.

5 After having recourse to the assistance of a board of examiners the selection board at the end of its proceedings drew up a list of suitable candidates containing 114 names which did not include those of the applicants.

6 Finally, 109 candidates from those 114 were appointed to the posts in question.

First submission

7 The applicants claim, in the first place, that the first paragraph of Article 30 of the Staff Regulations was infringed because the selection board called upon examiners to draw up the list of suitable candidates, whereas the second paragraph of Article 3 of Annex III to the Staff Regulations authorizes recourse to examiners only for certain tests and in so doing provides in addition that such examiners shall serve only in an advisory capacity.

8 The second paragraph of Article 3 of Annex III cannot, however, be understood as enumerating exhaustively the cases in which a selection board may legitimately have recourse to the assistance of examiners in an advisory capacity and, in particular, does not prevent a selection board from having recourse to such a procedure in cases where the large number of candidates involved in a competition would otherwise prevent the selection board from completing its work within a reasonable period.

9 It is necessary, however, for the selection board to retain ultimate control over the procedures and its discretionary power.

10 That condition has been satisfied in the present case.

11 It is apparent from the particulars supplied during the course of the proceedings that the selection board not only controlled the establishment of the criteria according to which the matters to be taken into account in accordance with the notice of competition were to be assessed, but also followed the work of the examiners at all stages in order, on the basis of the proposals submitted by the examiners, itself finally to draw up the list of suitable candidates to be submitted to the appointing authority.

12 This submission therefore cannot be accepted.

Second submission

13 The applicants further claim that the general principle of the equality of candidates admitted to a competition as well as Article 6 of Annex III to the Staff Regulations, according to which the proceedings of the selection board are to be secret, were infringed by the fact that a provisional list of suitable candidates was submitted, to obtain their opinion, to the departments and Directorates General to which the candidates belonged.

14 It is apparent, however, from the explanations given to the Court that each department or Directorate General was questioned by the selection board about all the candidates admitted to the competition who were in the service of the department or Directorate General in question, and not merely, as the applicants appear to imagine, about the candidates who were included in a provisional list because they satisfied certain criteria for the purpose of a preliminary selection.

15 That procedure therefore respected the principle of the equality of candidates in a competition.

16 It further appears that the purpose of seeking the opinion of the departments and Directorates General was to provide the selection board with additional information regarding the candidates and that the opinions sought related only to those who were in the service of each department or Directorate General in question.

17 The departments and Directorates General were thus not in a position to influence improperly the proceedings of the selection board or to have knowledge of those proceedings in a way likely to breach their secrecy.

18 This submission must also be rejected.

Third submission

19 Finally, the applicants claim that the second paragraph of Article 30 of the Staff Regulations and the fifth paragraph of Article 5 of Annex III were infringed in that the selection board drew up a list of suitable candidates containing only 114 names, that is to say a number of candidates which exceeded only slightly the number of vacant posts, although such a list ought if possible to have contained at least twice as many names as the number of posts to be filled by the competition.

20 In this respect it has not been shown, as the applicants allege, that the appointing authority required the selection board to limit the list of suitable candidates to a number not appreciably in excess of the available budgetary resources.

21 If, nevertheless, the selection board decided to restrict the list of suitable candidates in such manner this cannot vitiate the result of its proceedings.

22 The fifth paragraph of Article 5 of Annex III is only a recommendation to the selection board, intended to facilitate the decisions of the appointing authority, and whether or not it is followed depends on the nature and circumstances of the competition, the number of candidates and their qualifications.

23 In the present case the manner in which the selection board drew up the list of suitable candidates was justified by the nature of the competition and the very large number of posts to which the competition related.

24 This submission must therefore also be rejected.

25 The application must therefore be dismissed as unfounded.

26 In these circumstances it is unnecessary to consider the objection made by the Commission to the admissibility of the application regarding one of the 15 applicants.

Costs

27 According to Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

28 The applicants have failed in their submissions.

29 However, according to Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by servants of the Communities are not recoverable.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application.**

2. **Orders the parties to bear their own costs.**

Mackenzie Stuart Sørensen Touffait

Delivered in open court in Luxembourg on 26 October 1978.

A. Van Houtte
Registrar

Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 5 OCTOBER 1978 [1]

Mr President
Members of the Court

Regulation No 1473/72 of the Council (Official Journal, English Special Edition 1972 (III)) introduced new classifications of certain basic posts, including that of secretarial assistant (Category B 5/B 4), into Annex I of the Staff Regulations.

After the Budgetary Committee, in application of that regulation, had resolved to reclassify a certain number of C posts into B posts at the Commission, the latter in July 1976 held Internal Competition No COM/BS/14/75 in order to draw up a reserve list of secretarial assistants in career bracket B 5/B 4. Selection was to be made on the basis of qualifications and if necessary, at the discretion of the selection board, on the basis of tests, but these did not take place. The conditions of admission, namely school-leaving qualifications and practical experience, as well as certain matters to which the selection board had to pay attention in drawing up the list of suitable candidates, were set out in the notice of competition.

1 — Translated from the German