On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of the selection board in Internal Competition No COM/BS/4/79 of 24 September 1979 refusing to admit the applicant to the said competition;**

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

Pescatore Touffait Due

Delivered in open court in Luxembourg on 18 December 1980.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 4 DECEMBER 1980 [1]

Mr President,
Members of the Court,

1. The action brought by Mrs Tiberghien by application dated 9 November 1979 raises for your consideration a subject which is not new, namely, the requirements which, if it is to be lawful, must be satisfied by a selection board's decision not to admit one of the candidates to the tests in a particular competition.

1 — Translated from the Italian.

I shall briefly summarize the facts.

In July 1979 the applicant submitted her application to take part in an internal competition based on qualifications, Competition No COM/BS/4/79, the purpose of which was to constitute a reserve list of secretarial assistants in career bracket B 5/B 4. She was not admitted to the competition as the selection board decided that she did not have the experience amounting to at least 16 years of duties of the kind performed in Category C which the notice required of those who had not completed advanced secondary education certified by a diploma. Faced with this refusal Mrs Tiberghien first requested a fresh assessment of her own position (by letter of 22 August 1979); then, the request having been denied, she brought the present action. She maintains that the selection board wrongly assessed her experience and in addition failed to consider the qualifications she had acquired through certain in-service training courses dealing specifically with secretarial work. On those grounds she requests the annulment of the decision refusing to admit her to the above-mentioned competition.

2. There can be no doubt as to the admissibility of the application. The fact that no complaint against the decision in question was submitted through official channels in accordance with the procedure in Article 90 (2) of the Staff Regulations is irrelevant: in fact, as this Court has stated on a number of occasions, the requirement of submitting the complaint provided for in Article 91 (2) of the Staff Regulations, on which the admissibility of the subsequent action before the Court depends, "is devoid of purpose where a complaint is directed against the decisions of a selection board in a competition since the appointing authority is not empowered to review such decisions" (judgment of 16 March 1978 in Case 7/77 *Von Wüllerstorff und Urbair* [1978] ECR 769, paragraph 7 of the decision). It follows that the above-mentioned Article 91 is to be construed as meaning that the requirement of a prior complaint through official channels "refers only to measures which the appointing authority can review", a category which does not embrace a decision concerning admission to competitions.

3. I shall now proceed to examine the first criticism put forward by the applicant. I have already said that in the absence of a certificate of studies at advanced secondary level (which the applicant does not possess) the notice of the competition imposed the requirement of 16 years' specific experience (of secretarial duties). At the same time the candidate was also required to have been in the service of the Community, as an official or other servant, for a total period of 11 years. The two conditions were, however, set out independently of each other. It is not clearly stated whether, and to what extent, the experience was to have been acquired in the service of the Communities. In my opinion, therefore, experience acquired in whole or in part in the course of employment with bodies other than the Communities should be regarded as sufficient for the purposes of the competition. The only matters specified in the notice concerned the duration of such experience and the nature of the work (described, moreover, more or less approximately as "category C duties, as an executive secretary, principal secretary secretary/shorthand typist *or similar duties*").

The applicant stated in her application to take part in the competition that she had performed secretarial work for various employers for approximately nine years (from 1954 to 1964) and subsequently for nine years and six months in the service of the Commission. She thus claimed a total period of experience greater than the 16 years laid down in the notice. In notifying Mrs Tiberghien of the decision not to admit her to the competition the selection board did not contest either the duration or the quality of the work carried out prior to 1965 but confined itself to stating that the candidate did not possess the requisite experience of at least 16 years. It is true that in the course of the oral procedure the agent for the defendant institution stated in reply to a question from the President that the Commission "would find it exceedingly difficult to accept" that the work performed by Mrs Tiberghien while she was employed in the private sector was equivalent to that habitually performed by Community officials in Category C, as required by the Notice of Competition. Such a statement, however, apart from being ambiguous and belated, is in conflict with the position adopted in this regard by the Commission in Mr Debois's letter of 24 September 1979 to the applicant (Annex 25 to the application). That letter explained the selection board's decision by stating: "Your experience in the service of the Commission as a secretary/shorthand typist in at least Grade C 3 for the period from 1 February 1976 to 31 December 1978 (two years and 11 months), *together with your experience of a similar nature during the period prior to your entry into the service* (8 October 1954 to 16 March 1964: nine years and six months) does not add up to the 16 years required". That shows that the specific experience acquired between 1954 and 1964 with employers other than the Commission was acknowledged without difficulty.

4. The central issue in this dispute is thus the evaluation of the experience gained by the applicant in the service of the Commission between March 1965 and February 1974. Mrs Tiberghien claims that she performed in career bracket C 3/C 2 the duties of a secretary/shorthand typist from 1 February 1965 to 31 July 1974. During that time, however, she was classified as a "clerical officer", that is to say, an official with administrative rather than secretarial duties. That explains the selection board's disregard of the period from 1965 to 1974 when it was assessing the requirement of the applicant's experience. But, according to the applicant, the discrepancy between the duties actually performed and the formal classification is to be put down to negligence on the part of the administration. In order to have a better understanding of the extent of the issue it should be noted that, according to the Staff Regulations of Officials (see Article 5 (4) and Annex I), the basic posts corresponding to careers in Grades C 2 and C 3, are those of "clerical officer" and "secretary/shorthand typist". The tasks attaching to the different basic posts are described in the decision of the Commission on the definition of posts and assignment of duties (published in Staff Courier No 272 of 4 September 1973). It explains that in the context of Category C, career bracket C 2/C 3, a "clerical officer" is an official engaged in

administrative work for which a minimum of instructions are given and whose execution expressly "necessitates judgment and method on the part of the official". There is no description, however, of the duties corresponding to the basic post of secretary/shorthand typist. The explanation for that may be that the title itself contains a sufficient description of the type of work. However, two quite different types of work are involved and that is why the administration makes it a requirement for admission to certain competitions that candidates have acquired certain experience in either the one or the other type of work taken separately. In the circumstances it is obvious that all officials have an interest in having the duties which they actually perform officially recognized, for admission to some competitions might indeed depend on just such recognition.

In the case in question it has been established that during the period between 1 February 1965 and 1 July 1974 the applicant performed the duties of a shorthand typist. On her request (dated 28 February 1979) the Commission expressly acknowleged that fact in the letter of 21 November 1979 which bears the signature of the Director-General for Personnel and Administration. Yet the selection board, as has been seen, did not accept that the applicant possessed the above-mentioned experience; that is shown in the notification of her exclusion from the competition which is dated 10 August 1979, as well as in the later note which has already been referred to and which was sent to the applicant on 24 September 1979.

There thus appears to be a discrepancy in the assessments issued by the administration with regard to one and the same subject on two different occasions separated by a very short space of time. The candidate has been adversely affected by the fact that the recognition of her secretarial duties came immediately after the closing of the competition. It should therefore be asked whether the fact that the administration failed to take the duties actually performed by the applicant into account for the purpose of her admission to the competition makes the decision in question defective.

5. In my opinion the selection board should have started from the fact that the applicant indicated in her application form that she had worked as a secretary for more than nine years in the service of the Commission. The fact that she appeared none the less to have been classified in the basic post of secretary/shorthand typist for a much shorter period, and in the post of clerical officer for a period which coincided to a large extent with that referred to in the application form, should have led the selection board to ascertain from the administration the true state of affairs. In any case, after the applicant had complained in her letter of 22 August 1979 about the inaccurate assessment of her experience and requested that the error be rectified, the Commission should have appreciated the need to undertake the appropriate investigations. Had it done so, it would have found in Mrs Tiberghien's personal file ample documentation concerning the work she actually performed and the attempts made by her to obtain a classification which matched her duties; in particular it would have learned that as the preceding 16 July she had requested the "regularization" of her administrative position, that is, the formal recognition of the

duties actually performed. And there is no reason for doubting that in reply to a request from the selection board the administration would have adopted the position which it later adopted, after the competition had already been completed, in its aforementioned letter of 21 November 1979 which was sent to the candidate finally acknowledging the duties she had performed in a secretarial capacity for over nine years.

For its part the administration had a duty to supply the selection board in good time with all the necessary information for assessing the candidate. In similar cases this Court has held that omissions such as that here described vitiate a decision not to admit a candidate to a competition on the ground that they amount to an infringement of an essential procedural requirement. I would recall the judgment given on 9 June 1964 in Joined Cases 94 and 96/63 *Bernusset* [1964] ECR 297 in which the Court stated that application forms should be "evaluated only with considerable care in a manner requiring as objective a consideration as possible of the merits of the candidates" and that the appointing authority should supplement "its information by consulting the personal files of the candidates". I would recall also the judgment given on 1 April 1971 in Case 76/69 *Rabe* [1971] ECR 297 according to which failure on the part of the administration to send to the selection board documents relating to the qualifications required for admission of candidates to a competition "constitutes a procedural defect on which [the applicant] is entitled to rely" (see, in particular, paragraphs 5 to 8 of the decision). In substance, those decisions are inspired by the principle that when assessing applications from persons who have worked for Community institutions, selection boards must make use of all the assessment documents which the administration has in its possession and which may be found in the personal files (examination of which is in any event indispensable) or elsewhere. Should a person's situation be found to be subject to doubt, as in the case of a discrepancy between work actually performed and the official classification of the post, the administration is bound to define its position and resolve those doubts as soon as may be, in order to enable the selection board to take a decision regarding the admission of the candidate on the basis of firm and clearly defined facts. From that it follows logically that any decision adopted without full cognizance of the relevant circumstances of each candidate is vitiated on the ground of infringement of an essential procedural requirement.

In my opinion, those are the criteria on the basis of which the case at present under discussion should be resolved. The decision whereby the selection board refused to admit the applicant to the competition must be held to be vitiated on the ground of infringement of an essential procedural requirement, and therefore annulled.

6. It does not appear to me, on the other hand, that the decision in question has infringed Article 24 of the Staff Regulations as the applicant asserts in her second claim. That article lays down, in the third and fourth paragraphs thereof, that the Community "shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own

interests" and that "such training and instruction shall be taken into account for purposes of promotion in their careers". According to Mrs Tiberghien's argument, in assessing her experience the selection board failed to take into account the knowledge gained by her in attending various in-service training courses in 1973 and 1974 and that is in conflict with the above-mentioned duty of the administration to take further training undergone by officials into account for the purpose of their careers.

In fact, the failure to acknowledge the secretarial experience acquired by the applicant in the service of the Commission for a period of over nine years has nothing whatsoever to do with the duty to take into account the participation of an official in further training. The Court is aware that, in this case, the Notice of Competition required secretarial experience gained by performing the appropriate duties for a certain number of years. Participation in in-service training courses could not compensate for any possible absence of such experience. It is also pertinent to add that the administration's duty to take into account further training undergone by the official is laid down by the Staff Regulations in relation to the development of careers (see the fourth paragraph of Article 24), whilst in the present case the applicant sought to take part in a competition for entry into a career other than that which she had been working in. That is a further reason for ruling out useful reliance on Article 24 of the Staff Regulations.

7. In view of all the above-mentioned considerations I am of the opinion that the application should be granted. I therefore propose that the Court annul the decision of the Commission of 10 April 1979 whereby the applicant was not permitted to participate in Internal Competition No COM/BS/4/79, based on qualifications, for secretarial assistants. The defendant institution should, moreover, be ordered to pay the applicant's costs.