JUDGMENT OF THE COURT (SECOND CHAMBER)
15 MARCH 1973 [1]

Antonio Marcato
v Commission of the European Communities

Case 37/72

Officials — Recruitment — Examination of Applications — Duties of the Selection Board
(Staff Regulations of the European Communities, Annex III, Article 5,)

The Selection Board has a duty to give sufficient reasons for the results of the matching of paper qualifications produced by candidates with the qualifications required by the notice of competition.

In Case 37/72

ANTONIO MARCATO, official of the Commission of the European Communities, represented by Me Arendt, avocat-avoué, assisted by Me Tonia Schaefer, avocat-avoué, both of the Luxembourg Bar, having chosen his address for service in Luxembourg in the chambers of Me Arendt, 34b, rue Philippe-II,

applicant

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Pierre Lamoureux, acting as agent, having chosen its address for service in Luxembourg at the offices of its legal adviser, Emile Reuter, 4, Boulevard Royal,

defendant

Application for annulment of the notice of competition COM/184/71 and certain subsequent decisions,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, H. Kutscher (Rapporteur) and M. Sørensen, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: French.

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. The applicant, born on 25 March 1928, entered the service of the Commission in 1958, as night watchman. With effect from 1 January 1962, he was established as usher in grade D 2. On 1 September 1963, he was promoted to grade D 1.

After following a course for operators run by the Belgian Bull Machine Company from 19 October to 28 November 1962, he obtained an operator's certificate. On 1 October 1963, he was appointed clerk in grade C 3 and after completing six months' probation, attached as machine operator to the mechanical accounting service. On his own initiative he followed an advanced course on third generation computers at Milan in December 1966, at the end of the course he obtained the IBM company's diploma for 360 computers. Since 1966, he has carried out the duties of programmer and supervisor.

2. In 1971, the Commission published the notice of internal competition COM/184/71 to fill four posts for deputy assistants in the Directorate-General of Personnel and Administration, specialized mechanical accounting branch. The notice, which imposed no condition as to age, included the following:

'I — Nature of duties

To carry out under supervision operating techniques, in particular:

— the preparation of JOB cards, the supervision of operations involving storage of cards, tapes etc.; checking of emerging documents

or

— programme for 3rd generation computer working an Operating System.

II — Conditions of admission to the competition

1. Qualifications or diplomas required and practical experience

— Advanced level of secondary education, evidenced by a certificate, or practical experience at an equivalent level;

— elementary knowledge of programming, use of COBOL, FORTRAN, or a similar language.

— .....

2. .....'

The applicant having submitted his application, the Head of the Personnel Division informed him by memorandum of 1 December 1971 that 'after examining your application the Selection Board has not found it possible to admit you to the competition.' In reply to the applicant's letter of 17 January 1972 the Head of the 'Recruitment, Appointments, Promotion' Division, by memorandum of 25 January 1972 informed him that this decision had been taken on the ground that he did not satisfy the conditions laid down in paragraph II (1) of the notice of competition.

On 23 February 1972, the applicant submitted to the appointing authority a complaint within the meaning of Article 90 of the Service Regulations, seeking the annulment of the competition in

question for irregularity of form an unjust exclusion from the list of candidates. This complaint lodged on 28 February 1972, remained unanswered.

On 27 June 1972, the applicant lodged the present application.

3. The written procedure has been duly completed. On the report of the Judge-Rapporteur, after hearing the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preliminary inquiry. The Court, however, requested

— the applicant to explain at the hearing the reasons he relied upon to justify his claim to an elementary knowledge of programming, use of Cobol, Fortran or a similar language,

— the Commission

  — to produce the file of competition COM/184/71;

  — to explain at the hearing why it considers that the applicant does not satisfy the relevant conditions of the notice of competition COM/184/71 and whether this opinion refers only to practical experience at a level equivalent to advanced secondary education or also to 'elementary knowledge of programming, use of Cobol, Fortran or a similar language'.

The parties have complied with these requests.

The parties presented oral argument at the hearing on 25 January 1973. The Advocate-General presented his opinion at the hearing on 8 February 1973.

II — Submissions of the parties

The *applicant* seeks, in substance,

— primarily, the annulment

  — of the notice of competition COM/184/71

  — of the decision contained in the memoranda of 1 December 1971 and 25 January 1972;

  — in so far as is necessary, of the implied rejection of the complaint of 23 February 1972 resulting from the Commission's silence in regard thereto;

  — of the appointments made as a result of the competition in question;

— as a subsidiary point, that he be given an opportunity to prove he possesses skills which the Selection Board refused to recognize;

— whatever the result of the case, that the Commission should be ordered to pay the costs.

The *Commission* submits that the application should be dismissed as inadmissible or as unfounded and that the applicant should be ordered to pay the costs.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

1. First plea: Infringement of Article 1 (1) (g) of Annex III of the Staff Regulations

The *applicant* maintains that the impugned notice of competition does not comply with the provisions of Article 1 (1) (g) of Annex III of the Regulations as it stood at the time of the measures in dispute. This notice made no mention of the age limit or of any extension of the age limit in the case of staff with at least one year's service. The applicant relies upon the judgment of the Court (First Chamber) of 22 March 1972 (Costacurta v Commission, competition, 78/71, Rec. 1972 p. 163 et seq.) which annulled a competition on the same ground.

The *Commission* replies that the facts of the present case are different from the

facts of Case 78/71, where the age of the candidates ranged from 28 to 58 years. In the present case, of the fourteen candidates other than the applicant, thirteen were much younger than he, while the fourteenth had not reached the age of 50 on the date for lodging applications.

In these circumstances the ground relied upon is inadmissible because irrelevant. An age limit of 50 or 60 years would not in any way have altered the conditions of the competition, whereas the effect of an age limit of 40 years would have been to eliminate the applicant's own candidature. Furthermore, in an internal competition, as in this case, it would not be in the interest of candidates who were Community officials to see an age limit set which would prevent them from building up a career; nor did the interests of the service require such a limit.

The *applicant* denies that fixing an age limit of 40 years would have had the effect of eliminating him; given the fact that he had been in the Commission's service for fourteen years, he would have benefited from the extension of the age limits in the case of staff with at least one year's service, provided for by Article 1 (1) (g) of Annex III of the Regulations . . .

In any case, this provision, as it stood at the time, constituted a formal requirement for an age limit to be indicated. This result is reached:

— from an argument *e contrario,* based on the fact that, of the specific requirements which a notice of competition must legally include by virtue of paragraph (1) cited above, only two may be omitted at the discretion of the administration ((f) '*where applicable* the knowledge of languages' .... (i) '*any* exceptions pursuant to Article 28 (a)')

— from the fact that Regulation No 1473/72 of the Council (Euratom, ECSC, EEC) of 30 June 1972 (OJ No L 160 p. 1) which came into force on 1 July 1972 replaced the previous text of (g), which remains applicable in the present case, by the following words '*where appropriate,* the age limit . . .' This shows that the interpretation given to the former wording by judgment 78/71 was correct.

The *Commission* holds that the applicant's argument as to extension of age limit clearly proves that the setting of such a limit in the case in question would have been pointless.

As to the revision of the Regulations on the disputed point, the discussions and debates relative thereto make it clear that fixing an age limit is merely discretionary and that this limit need be indicated only in cases where it is necessary.

2. Second plea: infringement of Article 25 of the Regulations and of Article 5 of Annex III

According to the applicant, these provisions, requiring a statement of reasons for any decision adversely affecting an official, and also for the report of the Selection Board, were infringed by the fact that the Commission, in order to justify the elimination of his candidature, merely reproduced verbatim the passage from the competition notice relating to the relevant qualifications (memorandum of 25 January 1972), whereas the applicant claims these qualifications (cf. infra, third ground). The applicant relies on the judgment of the Court (First Chamber) of 14 June 1972 (Marcato/Commission, 44/71) whereby the comparison of the qualifications offered by the candidates with the requirements set by the competition notice, 'being made on the basis of objective facts known to each of the candidates in so far as concerns his own case, the reasons for the conclusions reached must be sufficiently stated.'

The *Commission* replies that in the light of the judgment cited this application may well be inadmissible as being out of time, since the Court held that the official must impugn the Selection Board's decision directly before the

Court without previously lodging a complaint. This judgment stated that the institutions have no power to annul or modify the decisions of a Selection Board nor to annul the appointment of candidates on the grounds that the Board's report was out of order. Accordingly it could be held that the applicant ought to have hastened to apply to the Court as soon as he knew of the said judgment, given in a case to which he was a party, instead of waiting to do this until 27 June 1972. At this date the time for lodging an application had already expired, the dates of notification of non-admission to the competition being 1 December 1971 and 25 January 1972. The Commission realises, however, that such a sanction might seem very harsh and states that it leaves the matter to the discretion of the Court.

The *applicant* replies that the three-months limit set for an application to the Court expired before judgment was given in Case 44/71. The short lapse of time between this judgment and the filing of the present application is justified by the fact that the applicant had to prepare his papers and that he had hoped to get satisfaction from the Commission. In submitting a complaint to the Commission in the first place, he acted in accordance with general practice. This method of approach by officials was, besides, laid down as a rule by Article 39 of Regulation No 1473/72 already mentioned, a provision modifying Article 91 of the Regulations with the result that an official's application is henceforth inadmissible unless a complaint has previously been lodged with the appointing authority.

The fact that the Commission has no powers over the Selection Board's decision cannot excuse the illegality of the latter's report.

The *Commission* replies that the Selection Board, in indicating that the applicant did not fulfil the conditions fixed by the competition notice, merely stated a patently obvious fact.

3. Third plea: Misuse of powers

The *applicant* points out that none of the candidates at the competition in question coming, as he did, from the mechanical accounting service, possessed a certificate of advanced secondary education. In these circumstances, the Selection Board was bound to investigate whether the candidates had had practical experience of an equivalent level, had an elementary knowledge of programming and knew how to use Cobol, Fortran or a similar language.

The applicant on this point relies on the following facts:

— that since his attachment to the mechanical accounting service (1 October 1963) he carried out the work entrusted to him zealously and conscientiously to the entire satisfaction of the departments concerned.

— that in 1966 he obtained a diploma from the IBM company for 360 computers: this was not the case with any of the candidates admitted to the disputed competition.

— that having progressively adapted himself to recently developed methods, he worked chiefly on computers 360/30, 360/40 and 360/50; the professional skills of which he gave proof were the subject of a certificate from the technico-commercial manager of the IBM Company of Belgium.

The sound practical experience which the applicant thus gained in the computer field is equivalent to a certificate of an advanced level of secondary education. In refusing to recognize this experience, the Selection Board probably took into account the internal report on the applicant for the years 1967 to 1969; but this was a subjective estimate on the part of an immediate superior and an intrusive element foreign to the terms of the competition. The misuse of powers arises from the fact that the administration has placed itself in a

situation contradicting its own acts; by entrusting to the applicant the work allotted to him, it has itself recognized that he possessed adequate practical experience.

The *Commission* contends that the applicant cannot claim to have acquired, in the course of his present duties, practical experience equivalent to a certificate of an advanced level of secondary education. The duties appropriate to grades 2 and 3 of category C are those which, according to the terms of Article 5 (1), fourth subparagraph, of the Staff Regulations, correspond to 'clerical duties which require a secondary education or equivalent professional experience', whereas in accordance with the third subparagraph of the same paragraph it is the occupations in category B which consist in 'executive duties which require an advanced level of secondary education . . .'. The Commission relies on the judgment of the Court (Second Chamber) of 14 July 1965 (Alvino and others v Commission, competitions, Joined Cases 18 and 19/64, Rec. 1965, p. 972) on the question of professional experience equivalent to university education evidenced by a diploma.

The applicant's offer to prove his possession of the practical experience in question is inadmissible. On the one hand, the Court has repeatedly held that the estimate of the aptitudes and skills of its officials is within the sole competence of the administration; and on the other hand it is quite clear that the applicant could not have gained this experience in the course of the duties he has carried out up to the present time.

The *applicant* replies that the Commission's argument amounts to saying that an official of category C can never reach category B although the aim of competitions is precisely to make possible such a change of category in a suitable case. (cf. Article 45 of the Regulations). The practical experience envisaged in the disputed competition notice must necessarily be that gained by an official of category C in the exercise of his duties. When beginning in this category the person concerned must have a secondary education or equivalent professional experience; it is quite clear that in the course of his employment carried out within the institution over a prolonged period he gains experience at a level equivalent to advanced secondary education.

The Commission's argument is contradicted by the facts. Of the fifteen candidates who presented themselves for the disputed competition, fourteen belonged to categories other than category B, even including category D; of these fourteen candidates, only two had certificates of advanced secondary education; nevertheless all the candidates were admitted to the competition except the applicant and one other official.

The experience gained by the applicant having been equal, if not superior, to that of the other candidates, the Selection Board has seriously disregarded the principle of equality.

The *Commission* contends 'that it appears difficult and even impossible, by the exercise, even if prolonged, of a particular skill or by carrying out operations of a particular complexity or standard to acquire practical experience corresponding to a different skill or operations of a higher complexity or standard.'

It is not correct to say that adherence to this principle implies that officials of category C can never reach category B. It can happen that officials with a certificate of advanced secondary education or with equivalent practical experience gained in previous employment before their recruitment by the Communities, have agreed to be employed in category C or that officials follow advanced studies and courses which eventually qualify them for a higher post.

At the hearing the *applicant* replied to the question, put by the Court, on what grounds he considered he could justify 'an elementary knowledge of program-

ming, use of Cobol, Fortran or a similar language . . .' On the order of the Commission he had undergone a period of practical training, run by the IBM Company at Brussels, from 12 November to 27 December 1968. This training included several courses, one of them a complete course in the Cobol language.

Similarly at the hearing, the *Commission,* in reply to questions from the Court and to the allegations of the applicant, confirmed that the applicant had been employed as a machine operator in category C with no duties requiring knowledge at the level of advanced secondary education. It was correct that the administration had tried to get the applicant to carry out the work of a programmer, but the results had not been very satisfactory.

The functions of a machine operator are in substance purely clerical in character, in contrast with those of programmers which are intellectual operations. Programming consists in breaking down a problem into a series of very small logical operations, together forming a continuous chain of syllogisms without any fault of logic. Further, this series of operations has to be translated into a 'language', the 'languages' most commonly used being those called Cobol and Fortran.

Neither in the applicant's personal file, nor in the competition file, is there to be found any indication leading to the conclusion that the applicant was acquainted with programming and could use a language of the Cobol or Fortran type.

Grounds of judgment

1 The application is for the annulment of the notice of competition COM/184/71, of the decision of the Selection Board not to admit the applicant to the competition of which notice was given, of the negative decision implicit in the silence observed by the Commission on the complaint on this subject submitted by the applicant on 23 February 1972, and of the four appointments made as a result of the said competition.

On the first plea

2 The applicant points out that the impugned competition notice did not comply with the requirements of Article 1 (1) (g) of Annex III of the Staff Regulations as it stood at the time of the measures in dispute, in so far as it fixed neither an age limit nor an extension of age limit applicable to staff with a minimum of one year's service with the Communities.

3 The Commission claims that this plea is inadmissible because irrelevant.

4 An age limit of 50 or 60 years would, (it is contended) scarcely have altered the conditions under which the competition was held, whereas by settling a maximum age of 40, the Commission would have eliminated the applicant's candidature from the start.

5 Besides, in the case of an internal competition, the setting of an age limit would have been contrary to the interst of officials making a career.

6 The setting of an age limit could only have resulted either in eliminating the applicant himself from the competition, which would have been directly contrary to his interest, or else in eliminating other, possibly qualified, candidates, which in the circumstances cannot be recognised as a legitimate interest of his.

7 Further, it is apposite to point out that owing to the alteration introduced into Annex III of the Staff Regulations by Regulation 1473/72 (OJ No L 160 p. 1) the inclusion of an age limit has been expressly made optional, so that the annulment of the competition notice would not give the applicant satisfaction.

8 For these reasons the plea is inadmissible.

9 As a consequence the submissions seeking the annulment of competition notice COM/184/71 must be rejected.

On the second plea

10 The applicant complains that the Selection Board and the Commission did not give reasons sufficient in law for the Board's decision not to admit him to the disputed competition.

11 The Commission raised the question of the inadmissibility of the plea on the ground of its being out of time.

12 Since the institutions do not have the power to annul or to modify the decisions of a Selection Board, a complaint about such decisions addressed to the appointing authority is devoid of purpose and cannot therefore perserve the right to submit an application.

13 If this argument is accepted, it follows that an application directed against this decision which was communicated to the applicant by memoranda of 17 and 25 January 1972, ought to have been submitted by the end of April 1972 at the latest, whereas this was not done until 27 June 1972.

14 The prior approach to the Commission is explained by the officials' custom of not bringing acts adversely affecting them directly before the Court, but of addressing themselves first, even though unnecessarily, to the appointing authority.

15 In view of this situation, it appears just to accept the plea as admissible.

16 The report of the Selection Board appointed for internal competition (COM/184/71 of 16 November and 10 December 1971, states that after examining the applications 'the Board finds (a) that the candidates whose names follow do not fulfil the conditions set by the competition notice and are consequently not admitted to the competion, more particularly on the following grounds: lack of advanced secondary education evidenced by a certificate or equivalent professional experience ... Marcato; lack of elementary knowledge of programming, use of Cobol, Fortran or a similar language ... Marcato ...'

17 The administration's memorandum of 1 December 1971 merely informed the applicant that the Selection Board had not admitted him to the competition, whereas in its memorandum of 25 January 1972, in reply to a letter from the applicant seeking to know the grounds of this decision, the administration confined itself to repeating the formula appearing in the Board's report and reproduced above.

18 The task of a Selection Board is made up of at least two separate stages, in the first place, an examination of the applications in order to select the candidates admitted to the competition, and in the second place an examination of the abilities of the candidates for the post to be filled in order to draw up a list of suitable candidates.

19 Whilst the second stage consists mainly of comparison, and is accordingly covered by the secrecy inherent in the task of a Selection Board, the first, particularly where the competition is based on formal qualifications, entails the matching of the qualifications offered by the candidates against the qualifications required by the competition notice;

20 Since these must be matched on the basis of objective facts which are moreover known to each candidate in his own case, the results must be supported by sufficiently clear reasons.

21 This was not so in the present case; the Selection Board's report and the administration's memorandum of 25 January 1972 merely indicated the qualifications in which the applicant was considered to be deficient whereas, at first sight, his practical experience might seem comparable to that of the other candidates admitted.

22 Accordingly, the Selection Board's decision not to admit the applicant to the competition, the Commission's implied decision rejecting the applicant's complaint of 23 February 1972, as well as the four appointments made as a result of the competition in question, must be annulled.

23 The applicant having won his case on the second plea, there is no need to examine the third plea.

Costs

24 Unter the terms of the first paragraph of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

25 The Commission has substantially failed in its submissions and must therefore pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral arguments of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of the European Communities, especially Article 1 (1) (g) of Annex III as it stood prior to 1 July 1972;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

The Court (Second Chamber)

hereby

1. **Annuls the decision of the Selection Board in competition COM/184/71 not to admit the applicant to the competition, the implied decision of the Commission rejecting the applicant's complaint of 23 February 1972, and the four appointments resulting from the said competition.**
2. **Orders the Commission of the European Communities to bear the costs of the proceedings.**

Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 15 March 1973.

A. Van Houtte — Registrar

P. Pescatore — President of the Second Chamber