COM/938/72, COM/931/72, COM/947/72 and COM/948/72 and dismisses Applications 81 to 86/74 as regards the remainder of the conclusions therein;

3. Orders the applicants and the defendant in Cases 87/74 and 88/74 to bear their own costs;

4. Orders the defendant to bear the costs as regards Applications 81 to 86/74.

Monaco Mertens de Wilmars O'Keeffe

Delivered in open court in Luxembourg on 29 October 1975.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 16 OCTOBER 1975

My Lords,

These eight actions were joined by an Order of the First Chamber of the Court dated 5 December 1974. In each action the applicant seeks, essentially, a declaration that nine appointments made by the Commission to its staff on 22 October 1973 were invalid.

The circumstances in which those appointments, and certain others, were made are stated by the Commission to have been as follows (Defence p. 6 and Rejoinder pp. 8 & 9). In 1972, the Commission became concerned to remedy what it describes as a 'situation of geographical imbalance' in the composition of its staff at A 4 - A 5 level. According to the Commission, that imbalance had resulted from the implementation of the Merger Treaty and it consisted in there being, at that level, too few officials of Italian nationality. To illustrate the point the Commission has produced statistics showing, among other tings, that, at 30 June 1972, there were on its staff a total of 735 officials in grades A 4 and A 5, of whom 239 were nationals of Benelux countries, 181 were German nationals, 167 were French, 142 were Italian and 6 were nationals of countries that were not, at all events then, Member States. The Commission considered that the need to remedy this 'imbalance' was rendered urgent by the imminent accession of the three new Member States. At some time in 1972, it decided, in agreement with the Council acting as budgetary authority, to create,

in anticipation of the 1973 budget, 20 supernumerary posts. The formal record of that decision is to be found in a Minute of 25 October 1972 which has been put in evidence by the Commission (Annex 1 to the Rejoinder). That Minute in fact makes no mention of any 'geographical imbalance' or of any intention to award the posts in question to Italians. On the other hand another document put in by the Commission, a table showing how the posts were eventually filled (Annex 2 to the Rejoinder), is headed 'Répartition des emplois crées en 1972, en surcharge par anticipation sur le budget 1973, pour reduire un déséquilibre géographique dans la carrière A 5 - A 4'. This suggests that the posts were created in order to be available for Italian nationals. Whether that is so, or whether the decision to create the posts and the decision to make them available for Italian nationals were taken independently, does not seem to me to matter. What matters is that the Commission accepts that its intention was that Italian nationals should be chosen to fill the posts.

The conclusion seems to me inevitable that the Commission had embarked on an unlawful course.

Article 7 (1) of the Staff Regulations provides:

'The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade (OJ C 12 of 24. 3. 1973).'

Article 27 provides:

'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.

Officials shall be selected without reference to race, creed or sex.

No posts shall be reserved for nationals of any specific Member State (OJ C 12 of 24. 3. 1973).'

As Mr Advocate-General Lagrange pointed out in Case 15/63 *Lassalle* v *Parliament* [1964] ECR at p. 40 (Rec. 1964, p. 79), those provisions reflect the contradiction that exists between two perfectly laudable objects: on the one hand the object of ensuring that, within the staff of each Community Institution, there is a reasonable proportion of nationals of each Member State and, on the other hand, the object of ensuring, both in the interests of the service and in fairness to the members of the staff, that appointments are made on the basis of individual merit rather than on the basis of nationality.

In a number of cases the Court has shown how, as a matter of interpretation of Articles 7 and 27, the contradiction is to be resolved: see *Lassalle* v *Parliament* [1964] ECR at pp. 37-38 (Rec. 1964, pp. 72-74), Case 62/65 *Serio* v *Commission* [1966] ECR 561 (Rec. 1966, p. 813), Case 17/68 *Reinarz* v *Commission* Rec. 1969, p. 61 and Case 79/74 *Küster* v *Parliament* [1975] ECR 725.

It emerges very clearly from those cases that the rule that no post may be reserved for nationals of a particular Member State is paramount. It is only where the qualifications of the candidates for a post are substantially equivalent that an appointing authority should, in order to maintain or restore a geographical balance among its staff, take into account the criterion of nationality. This is because the desirability of maintaining a geographical balance is a factor of less weight than the interests of the service and the need for due recognition of the individual merits and legitimate aspirations of officials. As Mr Advocate-General Roemer said in the *Reinarz* case, the maintenance of a

geographical balance is a secondary consideration. (Rec. 1969, p. 83).

The Commission relies very much on the *Serio* case, where it was held that the appointing authority had been entitled to appoint a Belgian in preference to the applicant, who was Italian, although the applicant had been placed first on the relevant list of suitable candidates. But of course, my Lords, there is no rule that an appointing authority must always choose the person who is first on the list of suitable candidates. Moreover that case was a particularly strong one on its facts. The vacancy to be filled had arisen in a Directorate, that of Administration and Personnel, whose functions, it might well be thought, made it necessary, in the interests of the service itself, that its staff should have as great a variety of national experience as possible. Its establishment was six and its existing staff consisted of a Frenchman, a German, and three Italians. It would have been almost perverse to appoint a fourth Italian to it, unless he were indeed an exceptional candidate.

It is not, I think, in dispute that, in this case, Italian nationals were appointed to all twenty of the newly created posts. The table put in by the Commission (Annex 2 to the Rejoinder) shows that, of those twenty posts, thirteen were filled pursuant to Article 29 (1) of the Staff Regulations — six of them by promotion or transfer under Article 29 (1) (a), four on the basis of an internal competition under Article 29 (1) (b), and three in a way that is not specified. The remaining seven posts were filled in exercise or purported exercise of the powers conferred by Article 29 (2). It is these seven appointments that are challenged in the present actions, together with two others, also of Italian nationals, which were made at the same time and in the same way. The Commission has not sought to draw any distinction between the seven and the two.

Your Lordships will remember that Article 29 (2) provides that:

'A procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of Grade A 1 or A 2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications (OJ C 12 of 24. 3. 1973).'

The applicants challenge the nine appointments in question, first on a number of grounds involving the interpretation of Article 29 (2) and secondly on the ground that those appointments, having regard to the rule that no post may be reserved for nationals of a particular Member State, were made in misuse of the powers conferred by that provision.

I have, I think, said enough to show that, in my opinion, the applicants must succeed on the latter ground, subject to certain points that were taken by the Commission as to the admissibility of some of the actions — points to which I shall come — and subject also to this that, in my opinion, that ground is better regarded as resting on a direct infringement of the provisions of the Staff Regulations than on a misuse of powers: see in this connexion per Mr Advocate-General Lagrange in the *Lassalle* case [1974] ECR at p. 42 (Rec. 1964, p. 82).

That being so, I need notice only briefly the points raised by the applicants as to the interpretation of Article 29 (2).

The first was that the powers conferred by that provision are exercisable by an appointing authority only when recruiting from outside, whereas here the nine appointments in question were of persons who were already temporary staff of the Commission. This point was not however pressed by the applicants in view of the Judgment of the Court in Case 176/73 *Van Belle* v *Council* [1974] ECR 1361. Nor, in my opinion, in view of that Judgment, could it have been.

Secondly there were raised on behalf of the applicants three points reflecting the

three grounds on which, in Cases 45 and 49/70 *Bode* v *Commission* (Rec. 1971 (1), p. 465), Mr Advocate-General Dutheillet de Lamothe invited the Second Chamber of the Court to declare void the appointment there in question.

The first of those grounds was that an appointing authority should not exercise the powers conferred by Article 29 (2) without first publishing in the Official Journal of the Communities either a notice of cacancy or some subsequent document announcing the fact that the relevant appointment was to be made, or might be made, in exercise of those powers.

Your Lordships know how highly I respect and regard the opinions of Mr Advocate-General Dutheillet de Lamothe. For the first time, however, I find myself bound to express an opinion differing from his. There is no provision either in the Staff Regulations or in any other relevant legislation that expressly imposes on an appointing authority the obligation suggested by him. I have read and re-read his reasoning in support of his view, and also the submissions of Counsel for the applicants on the point, without finding them convincing. They demonstrate at the most, I think, that there are circumstances in which it must be wise for an appointing authority, before exercising its powers under Article 29 (2), to give wide publicity to the fact that it is seeking candidates for a post of an exceptional kind, be it a post in Grade A 1 or Grade A 2, or a post in a lower Grade requiring 'special qualifications'. But neither the reasoning of Mr Advocate-General Dutheillet de Lamothe nor the submissions of Counsel for the applicants demonstrate, to my mind, that the appointing authority is in every case under a legal obligation to give such publicity, much less that it is under an obligation to give that publicity in a particular way.

The second ground relied upon by Mr Advocate-General Dutheillet de Lamothe in the *Bode* case was that upon which the Second Chamber eventually founded its Judgment, viz. that the decision of the Commission in that case had been inadequately reasoned.

There is this in common between the decision of the Commission in the *Bode* case and its nine decisions in the present case that both the former and the latter were taken under the 'written procedure'. It was, I think, accepted by the Second Chamber in the *Bode* case that, where that procedure is adopted, it is enough if the reasons for the decision appear from the documents that are submitted to the Members of the Commission by its Secretariat-General. Indeed, my Lords, that must, I think, be right, in view of the very nature of that procedure. It would be absurd to expect reasons to be given by Commissioners whose silence is, under the relevant procedure, to be interpreted as signifying assent.

The reason why, in the *Bode* case, the Second Chamber declared the decision of the Commission void was that it did not there appear, from the documents submitted to the Members of the Commission, why it was considered that the case was 'exceptional' or that the post in question required 'special qualifications.'

That criticism cannot be made of the corresponding documents in the present nine cases.

A criticism that can, I think, be made — and here I open a parenthesis — is of the manner in which those documents have been brought before the Court. They are to be found in the personal files of the nine persons who were appointed to the posts in question. The Commission did not take the trouble to annex copies of those documents to its pleadings. It merely referred us to the files, which it had lodged at the Registry. This is an inconvenient procedure and I do not think that it accords with the requirements of Article 37 of the Rules

of Procedure of the Court. I express the hope that the Commission will henceforth annex to its pleadings copies of any documents on which it relies, even if those documents are in fact in the files lodged at the Registry.

I revert to the case. The documents submitted to the Commission, in anticipation of each of the nine appointments here in question, consisted of a Note dated 12 October 1973 addressed by a Deputy Secretary-General of the Commission to its Members setting out what was proposed and annexing a fuller Note explaining in detail why it was proposed. The only puzzling thing about these Notes, in view of the avowed purpose of the Commission in making the appointments, is that nowhere in them is there any reference to the desirability of appointing a candidate of Italian nationality in order to remedy the 'geographical imbalance' that was causing concern to the Commission. The authors of the Notes have not however been cross-examined, so I refrain from further comment on this, as I do, for the same reason, of comment on a number of other oddities in the documents contained in the files, such as Notes written long before the appointments were actually made, about the payment of the removal expenses of the persons who were appointed and the prolongation of their temporary contracts, Notes that seem to have been written on the footing that their appointments had already been decided upon.

The third ground relied upon by Mr Advocate-General Dutheillet de Lamothe in the *Bode* case was that a perusal of the Notice of Vacancy in that case evinced that no 'special qualifications' within the meaning of those words in Article 29 (2) were required for the post there in question. It was submitted on behalf of the applicants that the same was true of the nine Notices of Vacancy in the present case. My Lords, I think that, whilst it may be true in the case of some of them, it is manifestly not true in the case of others. For example Notice of Vacancy COM/943/72 called for a 'Connaissance approfondie de la réglementation italienne dans le domaine viti-vinicole'. I should have thougth that that was, clearly, a 'special qualification'.

There remains for me to deal with the points taken by the Commission as to the admissibility of these actions.

The first of these points concerns Cases 87/74 and 88/74, where the applicants ceased, by resignation, to be officials of the Communities before their applications were lodged. I do not doubt, my Lords, that that point is well-taken.

I do not overlook that Articles 90 and 91 of the Staff Regulations, when they refer to 'any person to whom these Staff Regulations apply', refer to past and potential officials as well as to actual ones. But that does not mean that a person can bring an action under the Staff Regulations in the outcome of which he has no greater interest than any other member of the general public. A comparative examination of the laws of the Member States on the subject of the admissibility of actions brought to challenge official appointments shows that, even in the two countries whose laws are the most liberal in that respect, namely Belgium and France, such an action cannot be brought by a person after he has resigned from the public service: see, as to Belgian law, Mast, Précis de Droit Administratif Belge, p. 388, and Falys, La recevabilité des recours en annulation des actes administratifs, p. 155; and, as to French law, Auby and Drago, Traité de Contentieux Administratif, 2nd Edition, Tome II, p. 225. I conclude that, in each of Cases 87/74 and 88/74, the action must be dismissed, the parties, having regard to Article 70 of the Rules of Procedure, bearing their own costs.

The second point raised by the Commission as to the admissibility of

the actions is to the effect that, in order to be entitled to sue for a declaration that a particular appointment is void, an official must . himself have been a candidate for that appointment. The Commission points out that, in these cases, all the Applicants sue for declarations that all nine appointments were void, whereas none of them was a candidate for all the posts, and some were candidates for none.

My Lords, I think that this argument fails to take account of the fact that, under the procedure prescribed by Article 29 (1) of the Staff Regulations, there are two stages at which it is possible for an official to become a candidate for a vacant post, viz. first when the notice of vacancy is published and secondly, if the appointing authority decides to hold a competition, when the notice of competition is published. At the first stage only those who wish to be considered for promotion or transfer need apply. Those who do not wish to be so considered, either because they have insufficient seniority to qualify for promotion or transfer, or for other reasons, can wait for the second stage. Here the only opportunity that was given to officials to become candidates for the posts in question was at the first stage. But who can say that, if the Commission had not been blinded to the requirements of the Staff Regulations by its concern for geographical balance, it would not have decided to hold a competition and so afforded officials a second and wider opportunity of becoming candidates for the posts?

The third and last point raised by the Commission as to the admissibility of the actions might well, I suspect, have had a fair chance of at least partial success, had the Commission properly developed it. It was to the effect that not all the Applicants had the qualifications required for all the posts in question. I do not doubt, my Lords, that the Commission is right when it says that an official cannot sue for a declaration that a particular appointment is void if it is shown that, on no possible view, had he the qualifications required for that post. But the Commission did not here condescend to particularity as to which of the applicants lacked the qualifications required for which of the posts. It contented itself with taking the point in general terms and inviting the Court to look at the Notices of Vacancy. But to look at the Notices of Vacancy in total ignorance of the individual qualifications of the applicants was hardly a fruitful operation. I think the Commission here overlooked what is a general rule in all litigation, viz. that it is for the party who relies on particular facts to plead and prove those facts.

In the result I am of the opinion that in Cases 81 to 86/74 Your Lordships should declare the appointments in question void and order the Commission to pay the costs.