OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The case on which I am giving my opinion today follows on Case 77/74 brought by the same applicant against the European Parliament ([1975] ECR 949). I therefore do not need to say much about the facts.

On 28 September 1973 the Parliament gave notice of a vacancy for a Head of Division (Grade A 3) in the Directorate-General of Research and Documentation. The post was not filled by a promotion or transfer but Internal Competition No A/45 was initiated on 23 November 1973. The applicant was among those who took part. However, he was not even included on the list of suitable candidates in the competition and accordingly did not obtain the appointment which went to a Mr K. The applicant however successfully attacked the appointment in Case 77/74.

The Parliament did not thereupon order a new recruitment procedure and a new competition. It relied instead on the list of suitable candidates drawn up by the Selection Board in Case A/45. By decision of the President of the Parliament of 15 September 1975 the official W. who had been placed seventh on the list was promoted Head of Division in Grade A 3 with effect from 1 October 1975.

The applicant does not consider this procedure valid. He therefore sent a formal complaint to the appointing authority on 24 October 1975. He claimed in it that the Parliament had not correctly executed the judgment in Case 77/74 according to which the whole recruitment procedure needed to be examined and begun again. Fruther the applicant gave details of the defects he alleged in the competition. Finally he demanded that the appointment of the official W. should be annulled and he himself appointed Head of Division, if necessary after another competition.

Since he did not receive an answer within the prescribed period on 18 March 1976 he lodged the present application in which he makes three claims — that the Court should:

— Rule that the implied decision rejecting the applicant's complaint is void and of no effect;
— Rule that the promotion of Mr X. is void and of no effect; and
— Rule that the post offered by Vacancy Notice No 892 and Internal Competition A/45 may be filled only by means of a fresh procedure.

In my view the following may be said on this:

1. I can deal very briefly with an objection to admissibility raised by the Parliament. The latter has claimed that the appointment of Mr W. is not an act adversely affecting the applicant since his name was not on the list of suitable candidates in Competition A/45 and therefore he could not have been appointed after the annulment of the appointment which was the subject of Case 77/74.

In my opinion this view is just as unfounded as a similar objection to Case 77/74 would have been. This is not to adopt the applicant's argument that every appointment relating to a post in Grade A 3 adversely affects his chances of

1 — Translated from the German.

promotion. The decisive factor is that the applicant once again criticizes the way in which the competition was conducted. If this is substantiated it might in certain circumstances lead to a declaration that the procedure is invalid and must therefore be reopened; it cannot therefore be ruled out that as far as his prospects of appointment are concerned there might be for him a new and possibly more favourable position as a result of the present action. This suffices to show an interest in bringing an action.

2. With regard to the applicant's claims I shall deal first with that alleging that the appointment of Mr W. as a result of Competition No A/45 represents a disregard of the judgment in Case 77/74 of 10 July 1975.

As the Court knows, in that judgment objection was made that the successful candidate had been attributed points under the heading 'General reports and professional assessments within the Community institutions' although he had not been the subject of a report. Since without these points he would not have been included in the list of suitable candidates, the appointment of the official concerned was annulled.

There is no doubt in my mind that this judgment is limited to the annulment of the said appointment — the purport is quite clear — and that there is no question of annulling the whole competition. In this the judgment moreover keeps to the claims which the applicant himself made as appears from the application having regard to the matters in dispute as alleged by the applicant and the content of his complaint through official channels.

I am quite certain also that no duty to hold a new competition can be inferred from the grounds of the judgment. As we have seen, all that was criticized was the giving of points to temporary servants on the basis of a particular criterion; further it was expressly stated that there was no need to examine the other claims relating to the competition, that is, it remained open whether they were justified. However, the irregularity found clearly did not relate to the competition as a whole. Account could be taken of the criticism voiced in this respect simply by leaving this official out of consideration, especially as Mr K. was the only temporary servant who had taken part in the competition and had been included in the list of suitable candidates.

The fact that after the judgment in Case 77/74 was given there was no new competition, can accordingly not be regarded as non-compliance with the judgment.

None of the special arguments advanced by the applicant alters in any way the validity of this conclusion. This applies first to the fact that in the judgment in Case 77/74 the claim was expressed as including an application for the annulment of Internal Competition No A/45. On the one hand this is obviously incorrect having regard to the claims actually made by the applicant and on the other hand the effects of a judgment are not determined by such matters but solely by the operative part of the judgment and the *supporting grounds of judgment.* The same is true as regards the fact that the Parliament in that case was ordered to bear the costs. This is simply due to the fact that the claim was successful. This in no way supports the argument that the Court accepted all the allegations in the claim.

3. A second objection made by the applicant is that it is impossible in a case such as the present to appoint an official who did not contest the previous appointment and its basis and that such an official cannot benefit from a judgment which did not appertain to him.

This objection is obviously unfounded. Even its premise is erroneous. Judgments of annulment are measures having the

force of law and thus have an effect *erga omnes*. On the basis of the legal position thus created and having regard to the grounds given by the Court the administration has to adopt a new measure. In doing this it can, if as in the present case it is a question of filling a vacancy, certainly have recourse to officials who took part in the contested competition but to whom the criticism voiced does not apply. There are no good reasons apparent for restricting the administration's discretion as advocated by the applicant.

4. I can deal in a similarly brief manner with the further objection that the appointment of Mr W was not previously brought to the knowledge of the Bureau of the Parliament as provided for in a parliamentary document (Doc. PE (BUR 1912) of 12 December 1962).

It is sufficient to say that the Parliament has shown by means of an extract from minutes that the said requirement has been observed. In so far as it was further alleged that this was not mentioned in the decision itself, it may be said that this does not matter since it was obviously not an essential requirement of form. Moreover it may be doubted whether reliance on any such defect would help the applicant, for it is fairly clear that upon an annulment of the appointment for such a reason the same appointment would be made again in compliance with the formalities and the applicant would therefore have no prospect of being appointed in place of Mr W.

5. The applicant further complains that the contested decision speaks of 'promotion'.

This also seems to me no ground for annulment. I said all that was necessary on this in my opinion in Case 123/75 which related to a similar matter. It may be added here, and further reasons are unnecessary, that here again reliance on this objection would not help the applicant.

6. A further group of objections relates to the basis of the contested decision, namely Competition No A/45. In principle their admissibility cannot be doubted for the case-law has already shown that in the case of an action for annulment of an appointment the preparatory measures may be contested as well. It does not matter that the objections were already the subject of Case 77/74. We are now concerned with another appointment and moreover it was not necessary in the said case to deal with all the objections made by the applicant. Perhaps reservations are called for in so far as the applicant in the present case has simply contented himself with referring to his observations in the other case. I have in mind the attitude adopted by the Court in Joined Cases 19 and 65/63, *Satya Prakash* v *Commission of the EAEC* [1965] ECR 533.

If this however is overlooked, as in Case 4/69, *Alfons Lütticke GmbH* v *Commission of the European Communities* [1971] ECR 336, the following may be observed briefly on the substance of the applicant's objections: In so far as the applicant refers to his remarks in Case 77/74, I need not deal with them again in detail here. I have said all that is necessary with regard to them in my opinion in Case 77/74. I will simply refer to this now and to the conclusion that there is no cause to declare the competition unlawful.

At most an additional observation is required on the objection raised for the first time in the present proceedings that the Selection Board did not take account of the fact that the applicant acted as Head of Division for a certain time. The applicant relies on the fact that this temporary posting has in the meantime been officially recognized by a decision of the President of the European Parliament of 28 May 1975. Further he refers to the evidence of the witness Opitz in an earlier case according to which had the temporary posting been

considered it would have led to a higher assessment under one of the particular criteria to which the Selection Board had to have regard.

To begin with it seems to me questionable whether this factor was in fact also significant in the context of Competition No A/45, which was not concerned with filling a post in the secretariat of a committee where the applicant had temporarily acted as Head of Division. If this is assumed however it must be recognized on the other hand that even if the applicant had received a few more points from the Selection Board, he would not have been included on the list of suitable candidates with a total of 61 points. It may therefore be assumed that a corresponding correction of the results of the selection procedure would not have led to another decision on filling the post in question, especially as Mr W., the official in fact appointed, received 67·5 points in the competition. The applicant accordingly has no actionable interest in this respect either and it is thus clear as a whole that his criticism of the competition cannot lead to an annulment of the contested decision.

7. Finally there remains the objection that the appointment in question is not in the interests of the service. On this the applicant alleges that the official appointed has previously concerned himself only with questions of agriculture and thus has no special qualifications for the post referred to in the notice.

This is my view can quite simply be met, as has been done by the Parliament, with the observation that the official appointed was included in the list of suitable candidates drawn up by the Selection Board and after comprehensive considerations of all the necessary factors it cannot be doubted that this list has been correctly drawn up. Thus the appointment is in fact justified; I do not consider it necessary to require additional proof that it was in the interests of the service.

8. Since none of the objections made by the applicant is valid, it only remains for me to propose that the whole application should be rejected as unfounded and that an order for costs be made in accordance with Article 70 of the Rules of Procedure.