On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision notified to Willy Orlandi by letter of 20 September 1977 by which the Selection Board for Competition No COM/B/155 refused to admit him to the tests relating to that competition;**

2. **Orders the Commission to pay the costs.**

Mackenzie Stuart Sørensen Touffait

Delivered in open court in Luxembourg on 5 April 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 MARCH 1979 [1]

Mr President,
Members of the Court,

1. The present case concerns a Community official (Mr Orlandi) who applied in 1977 to take part in an open competition (COM/B/155) for the constitution of a reserve for future recruitment in Category B, but was not admitted to the written tests because the selection board considered that his qualifications did not meet the requirements stated in the competition notice.

1 — Translated from the Italian.

After that decision Mr Orlandi wrote without success to the chairman of the examining board, pointing out that his "Diplôme des Cours Techniques Secondaires Supérieurs" was regarded by the Belgian authorities as equivalent to the "Diplôme d'Humanité" and that, in a previous competition for which he had entered, the same certificate had been accepted as satisfying the requirements stated in the competition notice (requirements identical to those laid down in the later competition COM/B/155).

Nor did the Commission accept the complaint which Mr Orlandi subsequently lodged pursuant to Article 90 of the Staff Regulations. Therefore, on 17 May 1978, he submitted the application with which we are now concerned, maintaining that the decision not to admit him to the competition was vitiated by an insufficient statement of reasons, infringement of secondary rules of law and misuse of powers and claiming that the Court should therefore annul that decision and the entire competition procedure including the appointments of candidates considered suitable.

2. The defendant objects that the application is inadmissible on the ground that it was submitted too late. It points out that, according to the case-law of the Court (judgments in Case 44/71 *Marcato* v *Commission* [1972] ECR 427; Case 37/72 *Marcato* v *Commission* [1973] ECR 361; and Case 7/77 *Wüllerstorff* v *Commission* [1978] ECR 769), the administrative procedure under Article 90 of the Staff Regulations 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 decision"; it follows that in such a case Article 91 (2) should be interpreted as meaning that the application to the Court may be submitted directly, without the previous complaint through official channels. From that the defendant draws the conclusion that the period of two months during which the action must be brought should be calculated in this case from 26 September 1977, the date on which the applicant was informed of the selection board's decisions not to admit him to the written tests. But the application was not submitted until 17 May 1978; so it should be considered inadmissible.

That submission cannot be accepted. It is true that the complaint through official channels against the decision of a selection board cannot have any legal effect because the appointing authority is not competent to modify the discretionary decisions taken by a selection board (cf. on that point in particular paragraphs 7 to 9 of the decision in the judgment of 16 March 1978 in Case 7/77 *Wüllerstorff* v *Commission*, cited above). But that cannot lead to the conclusion that a candidate who, in compliance with Article 90 (2) of the Staff Regulations, follows the procedure involving a prior complaint through official channels and only later turns to the Court, is denied all judicial protection. The proper interpretation of the case-law of the Court is that, although it is not necessary to lodge a complaint under Article 90 (2) of the Staff Regulations when the decisions of selection boards are impugned, none the less compliance with that rule cannot prejudice in any way candidates' fundamental right to defend their interests in judicial proceedings.

3. Moving on to questions of substance, I shall first consider the whole of the complaint concerning the insufficiency of the statement of reasons.

The applicant was notified of the decision not to admit him to the tests for the competition in a standard letter which contained a list of four reasons and bore two asterisks in the box placed beside the second reason ("Your qualifications are not considered as being in accordance with the stated requirements"). I have already had occasion to point out in two similar cases (opinions in Joined Cases 4, 19 and 28/78 *Salerno, Authié and Massangioli* and in Case 112/78 *Kobor)* that the decisions of selection boards not to admit candidates to the written tests cannot be considered sufficiently and suitably reasoned when they merely refer, in a general manner, to the absence of one of the requirements stated in the notice. That opinion was shared by the Court, most recently, in the judgment of 30 November 1978 in the aforementioned case of *Salerno and Others.* It must be admitted that the formula used in the letter addressed by the selection board to Mr Orlandi is neither clear nor complete, the more so as the requirements laid down in the competition notice, in relation to qualifications, were described as follows:

"Candidates must have completed a course of secondary education and received a final certificate." So the letter sent to the person concerned might mean that the studies pursued were not of the desired level, or that they had not led to the award of a certificate, or that the certificate, although obtained at the end of a complete course of studies, was inadequate for other reasons (as in fact happened, although illegally in my opinion, in the present case). It is not possible to establish with certainty from the said letter for what specific deficiency in his qualifications the candidate was not admitted to the tests.

Moreover, I consider that the large number of candidates is not, as the Commission seems to suggest, such a factor as to justify an incomplete statement of reasons. I have already said in the case of *Salerno and Others* that "the unfortunate effects of the excess numbers must not be visited upon the candidates", and that, in order to avoid such a consequence, "the authority organizing a competition is bound to make preparations so that it can carry out its task in complete conformity with the rules even if there are thousands of candidates".

That the decisions of selection boards must be appropriately reasoned was recognized by the Court in the judgments, already cited, in Case 44/71, *Marcato,* Case 37/72, *Marcato* (also in the judgment in Case 31/75 *Costacurta* v *Commission* [1975] ECR 1563, and most recently in the judgment in *Salerno and Others* [1978] ECR 2403). The line followed in those cases ought to be confirmed.

4. Another ground for challenging the decision, according to the applicant, is that it involved an infringement of secondary rules of Community law inasmuch as it was based on an erroneous interpretation of the provisions of the competition notice (governed by Annex III to the Staff Regulations) relating to the preliminary assessment of qualifications for the purposes of admission to the tests.

It is a fact that the applicant possesses a certificate of advanced secondary technical education (accountancy) awarded to him on 12 June 1971 by the Institut d'Enseignement Technique de l'Etat, Tournai. That certificate states that the holder has, in the course of three years, attended 1 120 hours of classes in a number of subjects listed therein. The applicant also holds a Diplôme d'Aide-Comptable [Certificate for accountancy assistants], awarded to him on 24 June 1959 by the Ecole de Commerce du Degré Moyen, Tournai, following a four-year course involving 5 320 hours of lessons.

The Commission does not contest those points. It merely observes that the applicant's certificate does not satisfy the requirements of the notice in that it does not give access to university. I do not think that the text of the notice permits such a restrictive interpretation: indeed, as we have already seen, the notice simply stipulated that the candidate must have completed a course of secondary education and received a final certificate. With regard to secondary education the notice did not distinguish between courses which give access to university and those which lead to a vocational qualification constituting an end in itself. I would point out that, understood in this wider sense, the notice conforms completely with the third subparagraph of Article 5 (1) of the Staff Regulations which requires for recruitment to Category B "an advanced level of secondary education" and does not in fact mention possession of a certificate giving access to university. In the case under consideration the notice also stated (paragraph III B 2) that the selection board, in assessing the certificate, would take into account the differing educational systems in the Member States. In my opinion that provision provides another argument for considering the applicant's certificate adequate, since according to the Belgian regulations that certificate constitutes the culmination of a complete course of secondary education. I do not think it possible to attribute any relevance, having regard to the Belgian regulations, to the fact that the certificate concerned was awarded as a result of a course of evening classes promoted by the State for social purposes: in fact the Belgian Law of 7 July 1970 on the general structure of secondary education lays down that secondary and higher education is provided "comme enseignement de plein exercice et comme enseignement de promotion sociale" (Article 1 (1)) and does not distinguish, as regards their content and effects, between the two types of courses (ordinary or evening) through which education is provided. This all-embracing concept of education strikes me *inter alia* as being fully in accordance with the principle of the right to study, which is now included in the list of internationally protected human rights.

Moreover, that the certificate obtained at the end of a course of evening classes organized for the promotion of social aims is not an inferior qualification, as compared to the corresponding certificates acquired at the end of ordinary courses, is confirmed by the fact that it is awarded by a State examining commission. Also of significance on this same point is the fact that the Belgian State considers that certificate sufficient

for admission to competitions for posts at Grade II in the civil service (see letter of 3 November 1977 from the Belgian Ministry for Education, Annex No 9 to the application).

It is true that, in defining the criteria by which to assess candidates' qualifications, the selection board decided (as is clear from the letter of Mr Tugendhat, Annex 12 to the application) to ascertain in each case whether the qualifications "gave access to university". However, in so doing, the board arbitrarily introduced a further formal requirement for admission to the tests in addition to the criteria laid down in the notice.

In confirmation of his argument concerning the illegality of the refusal to admit him, the applicant draws attention to the fact that, on the occasion of a previous competition announced in 1975, also to constitute a reserve of administrative assistants in Category B (Competition No COM B/139), the selection board considered his qualifications sufficient. Considering that the notice of the 1975 competitions was drafted exactly as the notice of the competition with which we are concerned, one cannot fail to be sorely puzzled by the fact that two years later the same candidate has been denied recognition that he possesses suitable educational qualifications, although previously he had been properly acknowledged to possess them.

With regard to this question the Commission claims that each competition constitutes a separate procedure and that consequently no comparison may be made between the assessments made by different selection boards even though they concern the same candidates. The Commission also argues that the very large number of candidates in the competition concerned necessitated a more stringent selection at that stage of checking the conditions for admission to the written tests. It must be conceded that as a general rule each competition is independent; but it must be borne in mind that the considerations governing the assessment of the tests are not the same as those governing the assessment of the qualifications and requirements for the purpose of admission to the tests. As the Court declared in the judgments, already cited, of 14 June 1972 in Case 44/71 and 15 March 1973 in Case 37/72, while the stage at which performance in the tests is assessed "consists mainly of comparison" and so depends on the number of candidates, the stage of the previous consideration of candidates to decide whether they may be admitted to the tests, "entails the matching of the qualifications offered by the candidates against the qualifications required by the competition notice ... on the basis of objective facts".

5. The applicant goes on to complain that the selection board excluded him from the tests without taking his practical experience into consideration, and that, it is argued, is contrary to Article 5 of the Staff Regulations which lay down a requirement of experience as an alternative to different levels of education.

In fact the said Article 5 provides for three types of education (university level, advanced secondary and ordinary secondary) or, *alternatively*, equivalent experience for the purpose of recruitment to Categories A, B and C respectively, whilst the Notice of Competition COM B/155 required in addition to a certificate at least one year's practical experience in the field

chosen by the candidate. So it may be asked whether it is lawful for a notice to stipulate more restrictive conditions than those laid down for general purposes in the Staff Regulations. I would point out, however, in the first place that the said Article 5 does not relate directly to the requirements for admission to competitions, but only to the classification of the posts in various categories and to the criteria on which that classification is based. Moreover, I think that the fundamental principle which must govern the conduct of the administration in this matter is the interests of the service: to guard those interests an institution may indeed, when announcing a particular competition, lay down conditions for admission which are more restrictive than the minimum conditions laid down in the Staff Regulations. I think that in the case with which we are dealing the Commission observed that criterion when drafting the notice and that the selection board in its turn acted in conformity with the same principle in interpreting the notice, as regards this aspect, and in applying it.

Therefore I do not consider that this alleged ground of illegality exists.

Nor do I find well founded the allegation of misuse of powers, with which, moreover, the applicant charges the defendant in very general terms. In fact no evidence has emerged from any source to suggest that the Commission refused to admit Mr Orlandi to the tests in order to achieve purposes other than those connected with the necessary selection from amongst the candidates.

6. The considerations examined lead me to take the view that the application deserves to succeed: both because the selection board did not give sufficient reasons for its refusal to admit the applicant, and because it infringed the provisions in the notice relating to the requirement of educational qualifications.

But the annulment should be limited to the decision not to admit the applicant. Indeed, as we are dealing with an open competition announced for the purpose of constituting a reserve for future recruitment, the exclusion of the applicant did not affect the admission to the tests of the persons who, in the view of the selection board, possessed the necessary requirements. Consequently, as the Court has already declared in the *Costacurta* and *Salerno* cases, the applicant's rights "will be sufficiently protected if the selection board reconsiders the decision, without its being necessary to question the whole of the results of the competition or to annul appointments made in consequence thereof".

I accordingly suggest that the Court, by partially accepting the application submitted by Mr Orlandi on 17 May 1978, should annul the decision not to admit him to Competition No COM B/155 and should order the Commission to pay the costs.