

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 7 FEBRUARY 1980¹

*Mr President,
Members of the Court,*

The issue in the present case is whether a decision of a Selection Board for a competition not to admit a candidate to the prescribed tests is lawful.

The applicant applied on 7 November 1978 to enter the competition held in order to draw up a reserve list for the recruitment of Italian-speaking translators (male or female) which was announced by Notification of open competition Council/LA/170 (Official Journal C 231 29 September 1978, p. 6). The notification of competition provided *inter alia* that the examination would be conducted on the basis of qualifications and tests and that the Examining Board would draw up a list of the candidates meeting the conditions of eligibility for the competition and would select from that list those who were to be admitted to the tests. Further, paragraph 7 of Section II headed "Procedure" of the Notice of provisions relating to the organization of open competitions on page 2 *et seq.* of the same Official Journal reads:

"The proceedings of the Selection Board are secret. Consequently candidates will be informed neither of the reasons for not admitting them to the tests nor of the marks obtained by them".

The Council, after confirming receipt of the applicant's application, informed him by a letter in Italian dated 5 March 1979 of the following:

"With reference to your application to enter the above-mentioned competition I

regret to inform you that the Selection Board has not entered your name on the list of candidates who have been admitted to the tests.

As provided for in paragraph 7 of Section II of the Notice preceding the Notification of open competition (cf. Official Journal C 231, p. 3) the proceedings of the Selection Board are secret. I am accordingly unable to make known to you the reasons for the decision not to admit you to the tests".

Thereupon the applicant commenced proceedings on 5 June 1979 in which he claimed that the Court should annul the said decision and order the defendant to pay the costs.

My view on these claims is as follows.

As the Court has consistently held in its decided cases an administrative complaint is not a prerequisite to bringing actions against the decisions of a Selection Board. The present application has been filed within the period of three months laid down in Article 91 (3) of the Staff Regulations and is consequently admissible.

The applicant's action is based primarily on the formal defect that no reasons were given. In accordance with a general legal principle any decision adversely affecting a person must state, at the time when it is made, the grounds upon which it is based, so that, on the one hand, that person is enabled to challenge it if

¹ — Translated from the German.

necessary, and, on the other hand, the Court, in the event of an appeal to it, can undertake a judicial review. The Court has for that reason also consistently held that adequate reasons are to be given for decisions of the Selection Boards. It is of special importance that the obligation to state the reasons upon which decisions are based is not called in question by Article 6 of Annex III to the Staff Regulations which merely provides that the proceedings of the Selection Board shall be secret. The aim of this article is to keep internal deliberations and discussions secret but it does not prohibit the candidate's being informed of the outcome of those deliberations. Paragraph 7 of Section II of the said Notice of provisions relating to the organization of open competitions, according to which candidates will be informed neither of the reasons for not admitting them to the tests nor of the marks obtained by them, is therefore unlawful or at least inapplicable in so far as the reasons why a candidate was not admitted to the tests were withheld from him.

As against that the Council calls attention to the fact that the proceedings of a Selection Board in a competition based on qualifications and tests in accordance with the first, third and fourth paragraphs of Article 5 of Annex III to the Staff Regulations are divisible into various stages. First the list of candidates who meet the requirements set out in the notice of competition is drawn up, then the Selection Board determines how candidates' qualifications are to be assessed and reconsiders the qualifications of the candidates in order to draw up a list of the candidates admitted to the tests. Only if candidates are not admitted to the competition do

they receive a decision, which according to the case-law of the Court must state the reasons on which it was based. The letter in question of 5 March 1979 to the applicant was sent as part of the second stage, after the applicant had been admitted to the competition. During that stage the qualifications which have been put forward have to be assessed with reference to the list to be drawn up of candidates admitted to the tests. This proceeding of the Selection Board is subject, as is also shown by the case-law of the Court, to the obligation of secrecy under Article 6 of Annex III to the Staff Regulations which is intended to guarantee the independence of the Selection Board. The said provision leads to a derogation from the duty to give a statement of reasons and that was what the Council intended to give expression to in the Notice of provisions relating to the organization of open competition.

I am unable to agree with the Council's interpretation of the law.

There is no need to lay special emphasis on the fact that decisions, which adversely affect the citizen shall state the reasons upon which they are based. This general legal principle derives from the principle of the rule of law ("Rechtsstaatsprinzip"), which also forms part of the Community legal order, and is embodied in Article 15 of the ECSC Treaty, Article 190 of the EEC Treaty and Article 162 of the EAEC Treaty and also in the second paragraph of Article 25 of the Staff Regulations. The meaning and purpose of this obligation to give a statement of the reasons for decisions adversely affecting a person, is to allow the person to form an opinion on the question whether the decision has been made in a lawful manner or is defective, so that its legality may be challenged (cf. judgment of 30 November 1978 in Joined Cases 4, 19 and 28/78 *Enrico M. Salerno, Xavier Authié and Giuseppe Massangioli v*

Commission of the European Communities [1978] ECR 2403 and judgment of 5 April 1979 in Case 112/78 *Dorothea Kobor née Sonne v Commission of the European Communities* [1979] ECR 1573); it follows therefore that the statement of reasons must be notified to the person concerned together with the decision adversely affecting that person. As the applicant has rightly stressed the reasoned report of the Selection Board, which according to the sixth paragraph of Article 5 of Annex III to the Staff Regulations is to be forwarded *only to the appointing authority*, does not satisfy this requirement.

The basic principle underlying the obligation to state the reasons upon which decisions are based is not, in accordance with the proper view and contrary to the opinion expressed, overridden either by Article 6 of Annex III to the Staff Regulations according to which the proceedings of the Selection Board shall be secret. The meaning and purpose of that article is merely, on the one hand, to guarantee the independence of the members of the Selection Board and, on the other hand, to prevent candidates from getting confidential information about the other competitors. This objective is upon a proper construction of this provision to be taken into account in drawing up the statement of reasons.

For the rest it may be noted in passing that the Council does not appear to be convinced of the obligation to maintain absolute secrecy about the proceedings of the Selection Board, since it offered in the course of the procedure to produce to the Court the reasoned report, which according to the sixth paragraph of Article 5 of Annex III to the Staff Regulations includes any comments its members may wish to make, with the result that the relevant contents would

have come to the knowledge of the applicant, although not in time.

The argument that the principle of secrecy completely overrides the principle that there is an obligation to give a statement of reasons, as the defendant believes, is not especially to be inferred from the case-law of the Court either. The Court in its judgment of 14 June 1972 in Case 44/71 *Antonio Marcato v Commission of the European Communities* [1972] ECR 427, in its judgment of 15 March 1973 in Case 37/72 *Antonio Marcato v Commission of the European Communities* [1973] ECR 361 and in its judgment of 4 December 1975 in Case 31/75 *Mario Costacurta v Commission of the European Communities* [1975] ECR 1563 has made it clear how the Selection Board has to examine the applications in order to decide which candidates may be admitted to the competition. It distinguishes between the first stage of a competition and the next one, namely the examination of the abilities of the candidates for the posts to be filled, and comments that, 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 against the qualifications required by the notice of competition on the basis of objective facts known to each candidate in his own case. For that reason the judgments which I have quoted, in which the issue was admission to a competition as such, all came to the conclusion that the results of this matching must be "supported by sufficiently clear reasons". That does not however mean that no reasons at all have to be given for the proceedings during the second stage, in so far as they relate to the selection of candidates admitted to the examination, *vis-à-vis* candidates who have not been admitted. The Court on the contrary intended to express its view that in cases

of non-admission during the second stage account is also if necessary to be taken, in the drawing up of a statement of reasons, of the requirements of the duty to maintain secrecy, whereas this is unnecessary in the case of refusal to admit candidates to the competition which was the issue to be decided in the said cases. This simply means that, when a decision is taken not to admit a candidate to the tests, there is no need to give the candidate concerned particulars permitting any inference to be drawn as to the deliberations within the Selection Board or indeed as to the qualifications of other competitors. Nevertheless the statement of the reasons upon which the decision is based, which is notified to the candidate, must be drawn up in such a way that the reasons for his exclusion are made clear to him and judicial review is facilitated for him.

However in this case the finding must be recorded that no reasons at all have been given for the defendant's refusal to admit the applicant to the tests of the competition. Instead the letter of 5 March 1979 merely refers to paragraph 7 of Section II of the Notice of provisions relating to the organization of open

competitions in respect of which, as we have seen, the Council has adopted an interpretation which does not accord with Article 6 of Annex III to the Staff Regulations. Since the applicant did not have in his possession a decision admitting him to the competition he was unable, as he was not acquainted with the particulars of the competition, to find out the actual shortcoming which accounted for his not being admitted to the written tests. The letter is ambiguous in that it does not indicate whether the applicant was not admitted to the competition as such because he failed to fulfil the conditions for admission or whether his application was only rejected at the second stage of the competition.

Even if with full knowledge of the competition procedure he had been able to determine that his application had been rejected only at the stage at which qualifications were examined with due regard to the principles laid down previously for assessing them, he was unable owing to the inadequate statement of reasons to establish whether that examination was carried out objectively and without any arbitrariness.

I therefore submit that the decision of 5 March 1979 informing the applicant that he had not been admitted to the tests in Competition Council/LA/170 be annulled because of the formal defect that there was no statement of the reasons upon which it was based and that the Council be ordered to pay the costs.