tration. In order to comply with that requirement it is essential that the administration should be in a position to know the complaints or wishes of the person concerned. On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the legal basis nor the subject-matter of the complaint.

Consequently, after the expiry of the time-limit for bringing an application directly before the Court an official who, although not obliged to do so in a matter concerning a decision of a selection board, has preferred to make a complaint through administrative channels first may not submit to the Court conclusions with a subject-matter other than those raised in the complaint or put forward heads of claim based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint, but must be closely linked to it.

3. No provision of the Staff Regulations or general principle of law requires that a member of the Selection Board should be present during the written tests of a competition.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 13 March 1986 *

Mr President,
Members of the Court,

1. By an application lodged on 22 January 1985 Messrs Rihoux, Derungs, Van Sinay and Raatz, Community officials in Category B, asked the Court to annul (a) the written and oral tests in competition COM/A/390 and (b) the decision of the Selection Board not to include them in the list of suitable candidates.

On 21 December 1983 the Commission of the European Communities published a notice of an open competition based on tests (COM/A/390, Official Journal 1983, C 345, p. 10), to constitute a reserve of administrators in Grades A 7 and A 6 qualified to carry out the study and checking of technical data and statements of operational accounts provided by nuclear installations subject to the provisions on safeguards. The tests were of two kinds: the first, written,

* Translated from the Italian.

consisted of a 'series of multiple choice questions to assess the candidate's knowledge in the relevant field'; the second was an 'interview . . . for the purpose of assessing . . . the candidate's general knowledge and knowledge of languages and suitability for the duties described . . . ' in the notice of competition. Inclusion in the list of suitable candidates depended on the fulfilment of a two-fold condition: candidates had to obtain an aggregate of at least 60 marks in the two tests, including not less than 30 marks in the oral test.

The applicants applied to take part in the competition and were admitted to the tests. On 11 July 1984 the Selection Board informed them that their results did not meet the above requirements and that it could not therefore include them in the list of suitable candidates. All four applicants submitted complaints against that decision (within the meaning of Article 90 (2) of the Staff Regulations). Their complaints were identical in content: the written test, they said, did not correspond to the description given in the notice of competition, and since in this case the written and oral results were evaluated together the tests must be annulled in their entirety. On 20 November 1984 Commissioner Burke rejected those complaints. He stated that in organizing the written tests the Selection Board had fully complied with the conditions indicated in the notice of competition and added that since they had not passed the oral test the four applicants could not in any event be included in the list of suitable candidates. The applicants then brought these proceedings.

2. In support of their applications they make two main submissions:

(1) failure to comply with the provisions of the Staff Regulations in three respects:

(a) irregularity of the written and oral tests,

(b) failure to comply with the obligation of secrecy in connection with the work of the Selection Board and

(c) breach of the principle of equal treatment; and

(2) misuse of powers, with regard to the decision not to include the applicants in the list of suitable candidates.

In its defence, the Commission has raised an objection of inadmissibility against the application in so far as it contains allegations of irregularity in the oral tests, breach of the obligation of secrecy and misuse of powers. Those submissions, says the Commission, were not raised in the complaints and cannot therefore be raised for the first time in the proceedings before the Court. The Court must therefore limit itself to an examination of the alleged irregularity of the written tests.

Relying on the Court's case-law, the applicants reply that the submission of a complaint against the decision of a selection board 'lies outside the scope of the provisions of the Staff Regulations in view of the fact that the appointing authority has no power to annul or amend the decisions of a selection board. . . . If, nevertheless, the person concerned sends the appointing authority a complaint through official channels, such a step, whatever its legal significance may be, cannot have the consequence of depriving him of his right to apply directly to the Court . . . '. (judgment of 30 November 1978 in Joined Cases 4, 19

and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403; judgment of 14 July 1983 in Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421). In such circumstances, therefore, it is absurd to requre that the subject-matter of an application to the Court, the only effective form of legal protection, and the submissions made therein, should be identical to those of an unnecessary and pointless step taken before the institution of legal proceedings.

The Commission, for its part, argues that where a candidate does submit a complaint all the logical procedural consequences should be inferred from his conduct; in particular, the subsequent application to the Court must be based on the submissions raised in the pre-contentious stage. Otherwise the authorities would be placed in the unreasonable position of being obliged to reply first of all to specific complaints and then later, before the Court, to different allegations.

3. The Commission's argument raises an old problem which has not yet been resolved: the relationship between the complaint and the application to the Court when the proceedings concern a decision of a body such as, in this case, a selection board, which arrives at its decisions quite independently and is not subject to the control of the appointing authority. The Court has already held on several occasions that in such cases 'a complaint to the Commission through official channels . . . appears to be pointless . . . and the only legal remedy open to those concerned by such a decision lies in a direct application to the Court.' But, as the Court has also pointed out, it may happen that the official submits the complaint and waits for a decision on the part of the appointing authority; in such cases his action, even though redundant from the administrative point of view, does not result in the forfeiture of his right to bring proceedings before the Court but has the effect of extending the time-limit for bringing such proceedings.

It must be borne in mind that that solution, adopted for the first time in the judgment of the Court of 14 June 1972 (Case 44/71 *Marcato* v *Commission* [1972] ECR 427) was not accepted by the Council. In Regulation No 1475/72 of 30 June 1972 amending the Staff Regulations (Official Journal, English Special Edition 1972 (III), p. 703), it provided that 'an appeal to the Court of Justice of the European Communities shall lie only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein' (first indent of Article 91 (2) of the Staff Regulations). That amendment did not, however, bring the Court to change its opinion. Faced with the same problem after the entry into force of that regulation the Court held that 'the condition in Article 91 refers only to measures which the appointing authority can review' (judgment of 16 March 1978 in Case 7/77 *Von Wüllerstorff und Urbair* v *Commission* [1978] ECR 769).

The uncertainty caused by that contrast between the legislation and the Court's case-law had immediate consequences; some officials, after submitting a complaint against the decision of a board, brought the matter before the Court forthwith, even though the Staff Regulations require, as a condition of admissibility, that the complaint should have been 'rejected by express decision or by implied decision' (second indent of Article 91 (2)). Taking the view that the right to bring an action is a right which cannot be renounced by the person concerned and 'is therefore not capable of being affected by his individual behaviour', the Court held that for the purposes of admissibility the question whether or not a decision has been given on

the complaint is irrelevant (*Salerno* [1978] ECR at p. 2414). Indeed, in its judgment in *Von Willerstorff* the Court has already held that 'the general plan both of the administrative procedure and of the Court procedure militates against an interpretation of Article 91 (2) which, if taken literally, would merely result in a futile prolongation of the procedure'.

Let us therefore consider the objection in this case. It is clear that in the light of those cases (that is to say, of the irrelevance, in the Court's view, of the complaint) there is no foundation for the Commission's assertion that the complaint and the application to the Court must have the same subject-matter. In my view, however, that conclusion may be questioned. Taking into account the limits placed on the Court's jurisdiction in staff matters and the problems which the cases referred to above continue to raise, I am inclined to doubt its legitimacy.

4. As the Court is aware, Article 179 of the EEC Treaty gives the Court jurisdiction in disputes between the Community and its employees 'within the limits and under the conditions laid down in the Staff Regulation'. Article 91 of the Staff Regulations provides that the Court has jurisdiction to hear an application only if the official has previously submitted a complaint and that complaint has been rejected. In the absence of an express derogation it must be concluded that that provision applies to all disputes, including those concerning the decision of a selection board. I admit that where the appointing authority cannot modify such a decision, to submit a complaint and wait for a decision on it (without which no action will lie) may be superfluous and simply delay the resolution of the case. That is not always the case, however, and it is not always true that the complaint is pointless.

I should observe first of all that with regard to the decisions which may be made by a selection board a distinction must be drawn between those which are purely administrative in nature and those which concern the merits of the candidates. Only the latter are by their nature exempt from the control of the appointing authority and, in the light of the cases cited above, may be directly challenged before the Court. The others remain subject to the rule laid down in Article 91. Let us suppose, for example, that the board decides to set a test not mentioned in the notice of competition: clearly, in order to challenge such a decision a complaint must first be submitted, and an application may be brought to the Court only if that complaint is rejected.

Clear though it may be in theory, however, that distinction is not always easy to make in practice: many candidates therefore adhere to the rules laid down in the Staff Regulations and submit a complaint. It should be added that even when it concerns a decision which cannot be impugned by administrative means a complaint may be useful. As a rule the appointing authority will notify the selection board of the contents of the complaint; the board may decide that the complaint is justified and therfore revoke its own decision, thus avoiding Court proceedings. Conversely, if

the complaint is rejcted, the person concerned (who will often be unfamiliar with the peculiarities of Community competitions) may find the reasons advanced by the appointing authority convincing and therefore decide not to bring the matter before the Court. In both cases, it seems to me, the complaint will have benefited the person making it and will in any event have achieved its purpose.

Having said that, I accept, as I did in my opinion in the *Detti* case, that when challenging a decision of a selection board a person may choose between the submission of a complaint and an immediate application to the Court. That possibility, let me now add, does not mean that he can make free with the procedural rules. A candidate who does make a complaint submits to the rules governing complaints laid down in the Staff Regulations; he is thus bound to comply with them and in particular to wait for the decision of the appointing authority. The same is true of the Court, whose jurisdiction, under Article 179 of the Treaty, is subject to the limits laid down by the same provisions. In cases of this nature, where a persons submits a complaint to the appointing authority he thereby exercises a right guaranteed by the Staff Regulations; it cannot therefore be said, as it was in *Salerno*, that his conduct 'lies outside the scope of the provisions of the Staff Regulations'. Far from being ineffective, moreover, such conduct is, as we have just seen, consistent with the criteria of usefulness and certainty which apply to any pre-contentious procedure. Finally, the submission of a complaint does not have the effect of 'extending' the time-limit for bringing an appliction to the Court: an application may certainly still be brought, but subject to the conditions laid down in Article 91 (see the judgment in *Detti*, paragraph 17).

That that interpretation of Article 91 is correct may also be inferred from the recent and perhaps ground-breaking decison of the Court in Case 259/84 *Strack* v *Parliament*. In October 1984 Mr Strack brought proceedings challenging a decision of the Selection Board in Competition No PE/27/A refusing to set a new date for tests which he had not been able to attend. Some time later he also submitted a complaint. Without considering whether that decision was subject to administrative review the Court held in an order made on 31 January 1985 [1985] ECR 453) that since there had been no decision on the complaint before the application was brought the Court was *manifestly without jurisdiction* to hear the matter.

May it be said that that decision indicates a new departure by the Court? I hope so. My view is in any event settled. When challenging a decision of a selection board a person who elects to submit a complaint through administrative channels is bound by the procedural rules laid down in the Staff Regulations.

5. Having established that even in cases such as this the submission of a complaint through administrative channels is preliminary to, rather than independent of, an application to the Court, we must now determine to what extent the applicant is bound, in making his application to the Court, by the terms of his complaint.

The answer to that question is not difficult. It should be borne in mind first of all that the object of Article 91 of the Staff Regu-

lations 'is to enable and encourage an amicable settlement of a difference which has arisen between officials or servants and the administration; in order to comply with this requirement it is essential that the administration be in a position to know the complaints or requests of the person concerned. On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage changed neither the cause nor the subject-matter of the complaint' (judgment of 1 July 1976 in Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, at p. 1152). The Court had previously held that under that provision 'the subject of . . . an appeal must be the act or omission which gave rise to the complaint and, in making their submissions and argument to the Court, the parties are not bound by the wording of the complaint or of the decision rejecting it' (judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099).

I conclude from those cases that a person who challenges an administrative decision cannot subsequently, before the Court, change the cause or subject-matter of his complaint; that is to say, he cannot request the annulment of a *different* act which he says has adversely affected him, or accuse the institution concerned of *different* unlawful conduct.

In their complaint concerning the written tests Messrs Rihoux, Derungs, Van Sinay and Raatz simply contended that the Selection Board had not observed the conditions set out in the notice of competition. In their application brought on 22 January 1985, on the other hand, they also criticize the oral tests (or rather alleged irregularities in the way in which they were conducted), assert that certain information was divulged which should have remained secret, and argue that the decision not to include them in the list of suitable candidates was void for misuse of powers: what are these if not complaints of different unlawful acts, or, in the words of the decison in *Sergy*, complaints which the administration was not in a position to know when an amicable settlement was still possible? That question is, I think, sufficient in itself to justify the conclusion that the allegations concerned cannot be raised before the Court.

Since I thus consider the defendant's objection to be well founded I shall confine myself to an examination of the submissions concerning the alleged irregularities in the way in which the written tests were conducted: that is to say, the only complaint regarding the procedure followed by the Selection Board which appears in both the complaint and the application to the Court.

6. That complaint is based on three grounds. The applicants assert first of all that at the beginning of the written test they were made to undergo a psychological test consisting of logical problems and mathematical exercises. That test was intended to permit the Board not to assess the candidates' knowledge of the subject-matter of the competiton but to determine their 'psychological profile'. In any event, the notice of competition did not provide for such a test, and the result was that the duration of the actual written test itself was reduced from the two hours originally envisaged to 95 minutes. The conditions set out in the notice of competition were therefore not respected, contrary to article 1 (e) of Annex III to the Staff Regulations.

Secondly, they allege, the 'actual written test' was interrupted for about 10 minutes because of a translation error in the German version of the test paper. Not only did that interruption reduce the duration of the test yet further, it also disrupted it.

Finally, at the tests which the applicants sat in Luxembourg only a secretary was present, whereas at the other examination centres, in particular Brussels, members of the Board were present. Candidates at those other centres were thus placed at an advantage, contrary to the principle of equal treatment, since they could ask the members of the Board for clarification of the questions set.

Those submissions are unfounded. It appears from the reply of Commissioner Burke to the applicants' complaint that the Selection Board divided the written test, composed of a 'series of multiple choice questions', into four sets of questions intended to assess the capacity of the candidates to carry out duties concerning the study and checking of operations in nuclear installations subject to the provisons on safeguards: part A, technical and theoretical matters (academic knowledge); part B, technical applications; part C, mathematical and logical problems; part D, aspects of Commission Regulation (Euratom) No 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards (Official Journal 1976, L 363). The questions in part C were to be answered without the aid of a calculator; that is why, said Mr Burke, it was given before the other parts, in which the use of a calculator was permitted.

In the light of that explanation the organization of the tests seems to me to have been entirely in accordance with the conditions and purposes set out in the notice of competition. The assertion that the first set of questions constituted a test intended to establish the psychological profile of the candidates is not only refuted by Mr Burke's statements; the report of the Selection Board also tends to disprove it, inasmuch as the report states that the results of that test were examined according to the same criteria as those of the other tests. Apart from that, I do not find it plausible that a 25 minute test of logic and mathematics should suffice to establish a candidate's psychological profile, when it is well know that tests used for that purpose involve quite different questions and in general last two or more hours.

With regard to the second submission, the defendant admits that the German version of the questions in part D contained an error which was corrected in the course of the exam. In the report of the Selection Board, however, it is stated that that error affected only the tests given at Karlsruhe and that the Board automatically added 0.58 marks, the value of the mistranslated question, to the results of candidates who sat the tests there (that compensation is in accordance with the criteria of objectivity and of equal treatment required by the Court in such cases; see the judgment in *Detti*). It is clear, moreover, that the disturbance caused by the incident in question was not sufficient to justify the annulment of the entire test.

Finally, with regard to the breach of the principle of equal treatment, it is sufficient to point out that no provision of the Staff Regulations requires that members of the selection board should be present at the places where written tests are held; indeed that may be materially impossible when the competition is held at the same time in several centres, as in this case. The last submission is therefore also unfounded.

7. In view of the foregoing considerations I propose that the Court dismiss the application brought on 22 January 1985 by Messrs Rihoux, Derungs, Van Sinay and Raatz against the Commission of the European Communities, and order that the parties bear their own costs, in accordance with Article 70 of the Rules of Procedure.