OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 19 JUNE 1975 [1]

Mr President,
Members of the Court,

Of the series of proceedings brought by Mr Küster against the European Parliament, I have to deal today with the case which concerns the filling of a post as Head of Division (Grade A 3) in the Directorate-General of Research and Documentation.

This post was declared vacant by Notice No 892 of 28 September 1973. It was expressly stated that the President of Parliament had decided in the first instance to fill the post by way of promotion or transfer within the Institution. Accordingly the applicant applied on 3 October 1973. No promotion was made, however; instead, on 23 November 1973 the internal competition A/45 was opened for filling the post. Here too, the applicant submitted his application on 30 November 1973. In the course of the competition, however, his name was not entered on the list of suitable candidates on the basis of which, by decision of 15 February 1974, another candidate was appointed.

This caused the applicant on 17 March 1974 to make a formal complaint to the President of Parliament. His complaint asked for the relevant appointment to be annulled and for him to be appointed to the advertised post as Head of Division. When he received no reply, he brought an application before the Court on 16 October 1974.

In this action he is seeking to have the implied rejection of his administrative complaint declared void and a finding that the appointment based on Competition A/45 be ruled contrary to law and therefore annulled.

I should like to comment as follows on these claims:

1. In the first place we have to deal with the alleged infringement of Article 29 of the Staff Regulations.

Here the applicant argues that his suitability for promotion had been recognized by his superiors. In such a case the appointing authority is under Article 29 of the Staff Regulations obliged to make use of the possibility of promotion; an internal competition therefore ought not to have been initiated at all. Furthermore, the applicant takes the view that in any event there must be a statement that the possibilities of promotion had been considered and, if no promotion had taken place, a reason must be given. No such reason having been given, the transition to the next stage of the procedure for filling the post, i.e. the internal competition, must be regarded as defective.

A similar criticism was already made in Case 23/74 (Judgment of 12. 3. 1975, *Küster* v *European Parliament*). In my Opinion on that case I took the view that the applicant's point of view is not tenable. One cannot derive from Article 29 of the Staff Regulations an obligation to promote in the sense alleged by the applicant; rather, an internal competition may be held if factual grounds militate in favour of this course, e.g. if there is a number of candidates suitable for promotion. Moreover there is no obligation under the Staff Regulations to provide reasons for a decision refrain from promotions and to initiate an internal competition. This view was adopted by the Court; in particular it emphasized in its Judgment that the opening of an internal competition was

1 — Translated from the German.

indeed justified where several candidates suitable for promotion were entitled to be considered for filling a post.

This view ought to be adhered to. This however means that since in the present case on the basis of the statements made by Parliament there were a number of candidates suitable for promotion who were available for filling the post in question, the opening of an internal competition, to which on the basis of the Court's case-law temporary servants likewise had to be admitted, does not offend against Article 29 of the Staff Regulations. Just as in Case 23/74 the first ground of appeal cannot therefore succeed.

2. Further criticisms on the part of the applicant then relate to the competition procedure. They relate on the one hand to the appointment of the Selection Board and on the other hand to its examination of the various candidates.

(a) As in other cases — to start with this point — the applicant argued that the Selection Board had not been legally appointed. The appointment by the Secretary-General of Parliament was not correct since it was undertaken on the basis of a decision in 1971 defining the appointing authority, which had not been published or notified to the staff.

As regards this criticism, I have already said everything relevant in my Opinion on Case 23/74. As can be seen by the rejection of the action, this view was by implication adopted by the Court. The fact that there are no new arguments which would oblige one to arrive at a different assessment has been demonstrated in my Opinion on Case 88/74 *(Henrich* v *European Parliament).* I would for simplicity's sake refer to that case, i.e. to the arguments on Articles 25, 90 and 110 of the Staff Regulations and by way of conclusion merely say that reliance on the alleged lack of publication of the Secretary-General's authority to appoint selection boards certainly could not achieve an annulment of the competition procedure.

(b) As regards the conduct of the competition procedure it will immediately be seen that quite a few criticisms put forward by the applicant are identical with criticisms already made and dealt with in Cases 23/74 and 80/74. This is not surprising since, as we were assured, the same criteria applied to the conduct of the competition in question in the present case as in relation to Competition A/43.

To the extent that there may be no such alignment of criticisms I do not therefore consider it necessary once again to deal with them individually, especially since no new aspects have emerged in the present case. Let me rather in this context simply refer you to what I have said in the other Opinions. This applies for one thing to the fact that the Selection Board had an interview with the candidates and allocated marks in respect thereof. It applies further to the limited attention which was paid to the candidates' seniority. This is also the case as regards the alleged disregard of the applicant's special experience and his suitability for promotion. Finally, this also applies to the examination — alleged to have been omitted — of the candidates' ability at drafting in several Community languages, in relation to which I have said everything necessary in my Opinion in 80/74.

This therefore means that in the present context I only have to deal with three criticisms which were not raised in other proceedings. There is firstly the fact that the appointed candidate was, under the heading 'seniority', awarded five points, although he had only been a temporary servant. Then there is the fact that both the applicant and the appointed official received marks under Criterion No 12 in Competition A/43 different from those in Competition A/45, and finally there is the fact that the appointed candidate was awarded seven points under Criterion

No 7, although no export under Article 43 of the Staff Regulations existed in respect of him.

In my view the following must be said here:

— The first of the points referred to is the least difficult one. The conduct of the Selection Board does not in this respect afford any grounds for cirticism. If the appointed candidate was also credited by way of period of service with work which, on the basis of a contract, he had carried out with one of the political groups of the European Parliament, this is justified if only because it certainly meant that he was intensively concerned with Community activities. One can agree to this being treated as equivalent to a period of service within the meaning of the law relating to officials, if only because it clearly accorded with the intention of the relevant criterion to allow the element 'experience in the service of the Community' to carry weight. To this extent therefore there is no error in the competition procedure.

— However, what might seem questionable are the different marks awarded to the appointed candidate and to the applicant in Competition A/43 on the one hand, and in Competition A/45 on the other. What happened is that the applicant was given six points under Criterion No 12 in Competition A/43 and three points in Competition A/45, whilst the appointed candidate was given under this criterion four points in respect of A/43 and seven points in respect of A/45; evidently this happened on the basis of a relatively short interview which took place in relation to both competitions together, and in the course of which language abilities were also verified.

However, I will immediately add that the qualms which I personally felt at the outset disappeared on closer examination, that is to say after I had heard the statements of the witness Mr Opitz.

Indeed, it must not be forgotten that the two competitions related to different posts and that his was made clear in the conditions attaching to the competitions. We were assured that the Selection Board, by adopting appropriate questions from different fields of activity, had taken this into account. The replies thereto showed the various candidates' fields of activity. Thus it is understandable that experience which a candidate had been able to acquire in the secretariat of committees would, in the competition relevant thereto, lead to higher marks. If in this context one moreover takes account of the fact that viariations such as those alleged occurred in the case of quite a number of candidates, then the criticism that the Selection Board had engaged in manipulations to the detriment of the applicant and to the advantage of the appointed candidate, cannot be regarded as proved.

I am therefore convinced that even the aspect with which I have just dealt does not justifiy a finding of error in the competition procedure.

As regards the fact that the candidate who was appointed received seven points under Criterion No 7 although, being a temporary servant, no reports within the meaning of Article 43 of the Staff Regulations existed in relation, to him, it naturally seems appropriate to point to the Judgment in Case 23/74, and this is what the applicant did. There it was stated that the attribution of points to candidates under heading No 7 can rightly be criticized in so far no periodical reports under Article 43 of the Staff Regulations existed; it is not possible to grant such candidates fictitious marks. Accordingly this seems at first sight to force upon one the conclusion that, since such events occurred, Competition A/45 was defective and that in particular the appointment of the candidate chosen by the appointing authority ought to be annulled, since without the relevant points he would not have been entered

on the list of suitable candidates in the first place.

Yet in the light of the arguments in the course of the oral procedure, I feel considerable doubt as to whether this is the finding which must result. Several considerations are relevant in this respect.

I would treat as important the reference to the principle of equality of opportunity which must be observed in carrying out a competition procedure. It is difficult to reconcile with such equality on the one hand to admit temporary servants to internal competitions and on the other hand to adopt criteria — or to manipulate them in such a way — that such servants are in practice eliminated from the race from the very start. Also interesting is the reference made by the defendant's representative to the fact that heading No 7 does not refer merely to 'notations' but also to 'appréciations professionnelles dans les institutions communautaires'. This does indeed allow consideration to be given to documents which contain assessments similar to the reports within the meaning of Article 43. Finally I consider it important that no *fictitious* marking did in fact take place in relation to the appointed candidate. He was not simply granted an average number of points, based on the marks of other candidates, but there was a real basis for the points awarded to him. To this extent — as was explained to us — the Selection Board took into account the fact that the candidate in question had for many years worked in the service of the political groups of the European Parliament. Besides, the members of the Selection Board, who by reason of their service with the Community were well acquainted with the candidate, could refer back to documents in his personal file which provided confirmation of their assessment.

On cannot in my view avoid treating this procedure as correct. Even proceeding from the theses contained in Judgment 23/74, there is therefore no reason for finding that the competition was defective on account of the marks awarded under heading No 7.

3. This therefore only leaves me to examine the two final criticisms made by the applicant, firstly the allegation that the appointment made was defective because the relevant candidate had in fact appeared in the final place in the list of suitable candidates and secondly, the criticism that the appointed candidate had without justification immediately been appointed to step 6 of Group A 3, which corresponded to a fictitious seniority commencing in 1962.

If my views so far are adopted, i.e. if one proceeds on the basis that the competition procedure was not defective and that the list of suitable candidates was correctly prepared, then as regards the first point one is forced to conclude that there is an absence of legitimate interest ('Klageinteresse'). This comment seems justified since the annulment of an appointment for the reason stated in no way involves the possibility of the applicant having an opportunity, since the Selection Board had in any event not placed him on the list of suitable candidates.

Apart from this one might add as regards the factual content of the criticism; admittedly the case-law (cf. Judgment in Case 62/64 and Judgement of 15. 12. 1966, *Manlio Serio* v *Commission of the EEC*, [1966] ECR 561.) recognizes the principle that the appointing authority must not, when effecting appointments on the basis of competitions, without weighty grounds, depart too far from the result of the competition, as it appears in the list of suitable candidates. In the present case there was however only an apparent disregard of this principle. What is important is that, of the candidates who appeared on the list of suitable candidates ahead of the appointed candidate, seven must be disregarded because they had their opportunity by being appointed

elsewhere. If however one only has regard to the remainder and also bears in mind that in any event the appointing authority is not bound strictly to adhere to the list of suitable candidates, then it must be conceded that in the light of the minor differences in assessment there can be no question of an appreciable deviation within the meaning of the case-law referred to, i.e. a deviation which required specific justification in the course of the legal proceedings.

As regards the second criticism — that of unlawful attribution of a higher step in the salary scale — one can confine oneself to finding that here there is in any event a lack of legitimate interest. Where there is no cause to annul the criticized appointment for other reasons, i.e. where the applicant has no prospect of himself benefiting by appointment to the post in question, then one also cannot concede to him an interest in the observance of the rules contained in the Staff Regulations as regards the appointment to a particular step within a salary group. In other words, this part of the criticized decision does not amount to an act adversely affecting the applicant.

It therefore seems certain that even the points just dealt with do not provide a legal basis for the claims made.

4. Finally there remains to be discussed a claim which the defendant makes in its rejoinder. This refers to a phrase used by the applicant in the reply and is for an order that the allegation that the Selection Board had manipulated the procedure be deleted from the reply.

On this point I should like to say that one can certainly take the view that the applicant has in this context used rather strong terms. In the final resort, however, his criticism probably said no more than does many an allegation of abuse of discretion. I would therefore consider it sufficient if the Judgment were to make it clear that there is no basis for this allegation. A specific order to delete does not seem to me appropriate, but I leave the decision on this point to the Court.

5. On the basis of the aforementioned comments I would suggest that the action brought by Mr Küster be rejected as unfounded and that the costs of the proceedings be decided in accordance with Article 70 of the Rules Procedure.