identical previous decision is admissible in so far as it appears that the second decision actually replaced the first and cannot be regarded as merely confirming it.

3. An official cannot rely, in support of an action brought against a decision not to admit him to a competition, on submissions alleging irregularities in the competition notice if he did not challenge in good time the provisions of that notice which, in his view, adversely affected him. Were it otherwise, it would be possible to challenge a competition notice long after it had been published and after most or all of the operations carried out in connection with the competition had already taken place, and that would be contrary to the principles of legal certainty, legitimate expectation and sound administration.

4. In the context of a competition the Selection Board is called upon to assess factors known to the candidates, whether it be qualifications which they hold, tests which they have undergone or periodic reports of which they are aware and on which they have had an opportunity to comment. That constitutes a guarantee that the competition will be properly conducted and a protection against arbitrariness, inasmuch as the candidates are aware of all the factors which entered into the Selection Board's assessment and are therefore well placed to contest that assessment if they consider that it is wrong.

If, on the other hand, the Selection Board bases its decision at least in part, as it did in this case, on factors such as information supplied by, and the opinions of, the candidates' superiors, of which the candidates concerned have no knowledge, they have no opportunity to defend themselves against statements made by third parties which, though they may well be perfectly correct, may also be incorrect for one reason or another. The fact that candidates did not have an opportunity to state their views on the opinions expressed on them by their superiors, account of which was taken by the Selection Board, constitutes a breach of a principle governing the competition procedure which justifies annulment of decisions refusing to admit those candidates.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 12 December 1985

My Lords,

In this case 53 officials of the Commission, at all material times employed in Category C, ask the Court to annul an internal competition number COM/B/2/82 and the steps taken in connection with it. In particular they seek the annulment of the

selection board's refusal to admit them to the tests in the competition and the nomination of others which were made as a result of the competition.

The notice of internal competition related to a reserve list of administrative, secretarial and technical assistants in career bracket Grades 5 and 4 of Category B. The reserve list was initially to be valid until 31 December 1983 but has been extended to 31 December 1986.

Eligibility to enter the competition depended upon the candidate satisfying specified conditions as to current grade and duties, length of service and age. All the applicants were eligible for, and were admitted to, the competition.

Applications had to be made on a single application form and a special annex in which the candidate had to state his education and any diplomas he had gained, the posts he had held with his experience in them and his knowledge of shorthand typing in the various languages.

Having considered these forms and

'(i) an interview with those candidates who satisfy the conditions for admission to the competition whenever the selection board considers this would assist it to judge the candidates' ability to carry out duties in a higher category and

(ii) where necessary, an interview with the candidates' superiors, normally at the level of Assistants to the Director-General, to collect information and opinions about the candidates' ability to perform duties in Category B',

the selection board was required to decide which candidates should be admitted to tests, and, in consultation with each candidate, to determine the type of test which he should undertake.

The tests might be either a period of training and practical exercises or a task to show that the candidate possessed the requisite qualities, the selection board drawing up the appropriate criteria and, if it so decided, appointing assessors.

Approximately 860 candidates applied; approximately 40 were found not to be eligible for the competition. The selection board was then faced with the formidable task of setting up out of those remaining a reserve list, from which 100 posts were expected to be filled during the validity of the list.

The first task of the board was clearly to establish its procedures. It was obliged to and did consider the application forms, the annexes and the accompanying documents. It decided to, and did, examine the personal files of the candidates. It drew up a questionnaire which was submitted to an assistant in each Directorate-General in respect of the candidates in that Directorate-General. When many of the assistants refused to fill in the questionnaires, the board decided to, and did, interview all the relevant assistants in relation to candidates admitted to the tests. In its view fairness required that such interviews take place in respect of all of the candidates and not just those where the selection board required further information.

When it began its labours in January 1982 the selection board decided that it would interview those candidates who seemed 'doubtful' or 'negative'. By March 1984, when it had proceeded further, it decided that, in view of the material which it had, it appeared unnecessary to interview any of the candidates since such interview was not likely to give essential complementary information. Instead, on the basis of the files and the interviews with the assistants, it classified the candidates into six groups. At the top were (5) those who were currently exercising functions at the B, BS, BT level, and (4) those who possessed all the potential qualities to carry out such functions immediately. At the bottom came those (2) whose potential was clearly insufficient (1) whose potential was almost non-existent and (0) who had no potential for the posts in question. That left a middle group (3) — those who had some, though insufficient, of the qualities required to exercise the B functions in question.

Groups (5) and (4) gave a total of 221 candidates who either satisfied the requirements for one or more of the B, BS or BT employments. Since by this time it was contemplated that 151 posts would need to be filled within 3 years, this number of 221 was taken as the reserve list. By a large majority, two members voting against the decision, it was decided by the selection board that they would not re-examine the candidates in the middle group (3). For those candidates who were put on the list the board worked out what they thought were the appropriate tests.

All the present candidates received a letter in June 1984 telling them that the jury had not included them on the list of those who were to proceed to the test. They were also told that the board had looked at their files and their application forms and had taken into account an interview with the representative of the appropriate Directorate-General or service, and that the board had had regard to such matters as experience, education and mobility.

All the candidates, it seems, asked for further information. Three of them, Mrs Seube, Mrs Basch and Mr Pelliccione, it is said, made immediate complaints under the Staff Regulations.

All the candidates received a letter of 7 September 1984 which said that the board had re-examined the applications but that no new element had been shown to allow them to change their decision. The letter then referred to the parameters adopted, such as experience, education and periodic reports; it recounted the board's consideration of the dossier and the interviews and the decision to take all those who had already exercised, or had all the qualifications to exercise, the B functions.

The present proceedings were registered at the Court on 10 December 1984. The Commission takes the point that they are inadmissible as being out of time.

By December 1984 it was clearly too late to attack the validity of the 1982 notice of competition and the letter of June 1984 giving the initial decision, except to the extent that two or three had made a complaint under the Staff Regulations about the letter.

Whether in these proceedings it is possible to challenge the validity of the letter of 7 September 1984 depends on whether that

letter is a mere confirmation of the decision given in the June letter (in which case it cannot be challenged) or whether it is a fresh decision. The line between the two is not always easy to draw; it is also undesirable to discourage the selection board or the Commission, as the case may be, from really having a second look at a decision, by too readily holding that such a review starts time running again. It is plainly arguable, as the Commission contends, that the second letter in this case merely gives a more detailed explanation of the decision already given. On the other hand, on the material before the Court, it seems to me that the selection board really did re-examine the cases in depth as it was asked to and did take a new decision that these particular candidates should not proceed to the tests. That is borne out by the fact that many others besides the present applicants applied for the initial decision to be reviewed and the board as a result of the re-examination admitted 18 of the candidates whom it had previously rejected.

For my part I would accordingly accept that these proceedings were in time and admissible in so far as they seek to challenge the decision of 7 September 1984 in respect of all the applicants. It is, therefore, unnecessary to consider whether Mrs Basch, Mrs Seube and Mr Pelliccionne were in time to challenge the June decision.

As to the substance, the applicants contend, firstly, that the competition set out to establish a reserve list for three different types of function, administrative assistants, secretarial assistants, and technical assistants. These functions and the career structure of the holders of the posts, it is said, were so different that it was impossible to set a common level in a competition of this kind. I regard this as a challenge to the competition itself, and would hold it to be inadmissible as out of time. If it were admissible I would not accept, despite some differences between the functions and despite the fact that some candidates' applications were amended for manifest error in that they had applied for the wrong function, that the differences were so great between the various posts that the competition was thereby rendered invalid.

Secondly, it is said (a) that the competition notice was defective in that contrary to Article 1 (d) of Annex III to the Staff Regulations, it did not specify 'the diplomas and other evidence of formal qualifications or the degree of experience required for the posts to be filled'; and (b) that, if the parameters indicated in the letter of June 1984 and 7 September 1984 are to be regarded as specifying the qualifications or experience, they were given too late. The first part (a) again is largely a challenge to the notice of competition and is out of time, as is part (b) insofar as it challenges the June letter. I do not in any event accept that this is a valid point. The notice of competition specifies the level and years of experience required. The application form and the special annex are referred to in the notice of competition. The form indicates that details of education and diplomas are required; professional experience has to be stated and details of shorthand and typing skills given. This kind of competition at this particular level may well call for experience

as much as paper qualifications and the decision can lawfully be based on an overall assessment of these.

It is then said (as the sixth ground) that the nature of the tests indicated in section III(2) of the notice of competition is in breach of Article 1 (e) of Annex III of the Staff Regulations which requires that 'where the competition is on the basis of tests, what kind they will be and how they will be marked'. Here it is said that the tests were not specified; in so far as indicated they do not amount to an examination in the usual sense of the term, they provide for different tests for different candidates and they do not indicate a system of marking. This contention is in my view clearly inadmissible as being a challenge to the notice of competition. Since the applicants did not take the tests they cannot attack them as such in their own case.

Then come three grounds based on what the board did (grounds 5, 3 and 4). It is said to be unlawful to take as a batch those who were already exercising B category functions since, without looking at their merits, they were given an immediate ticket of admission without any real competition between them and the others. This is perhaps not a very safe course to take since some of the candidates who were admitted may not have been exercising B functions satisfactorily and may not be as capable as those still exercising C functions at the relevant time. On the other hand some criteria had to be adopted to reduce the number of 800 to a manageable list and the safeguard lies in the fact that the more able will be separated from the less able in the course of the tests and on an overall view of the periodic reports and qualifications. I do not, accordingly, accept that what the selection board did in this respect was unlawful.

The applicants then criticise the fact that the assistants were interviewed in all cases (rather than 'where necessary'); some of the assistants could not have known the applicants, they might be influenced by personal motives to keep or to encourage the departure of candidates and the results are said to have been uneven within divisions. It was difficult to compare reports from different sub-divisions. Moreover none of the applicants was called for an interview and had no chance to know what the assistants had said.

I consider that the board was entitled to decide that it would not interview any candidates, but having initially decided to see the doubtful or negative candidates, I find it unsatisfactory that the middle group (those having some of the necessary qualities) were not reconsidered, as the minority of the board thought right. It would have been possible to interview them to clear doubts, since the other groups were clearly in or clearly out of the competition. I would not, however, be prepared to quash on that ground alone.

On the other hand, it seems to me to have been quite wrong for the board to hear the assistants without the applicants having any knowledge of what the assistants said. No records have been produced even at this stage as to what was said, even though it appears that notes were kept by those present. What was said may have been, and

probably was, wholly accurate; it may have been demonstrably wrong or based on a misunderstanding which could have been clarified. The applicants knew what was in the documents accompanying their application form. They had had a chance to comment on their periodic notations. These were all taken into account. Equally even if the views of the assistants were not conclusive, it is plain on the evidence that they were taken into account. Fairness required that the applicants should have had the chance to comment on what was said. That it was not done is, in my opinion, a defect which vitiates the board's decision in respect of each of the present applicants and I consider that it should be set aside on that ground alone. The rules of natural justice were quite plainly not observed.

I add that I find it wholly unsatisfactory that some of the members of the board or their alternates acted as representatives of the Directorates-General in this respect for several of the candidates, even if they did not then take part in the decision on their particular candidate or candidates. Such a course is bound to create suspicion and cannot be justified in view of the number of people from whom the Director-Generals' representatives could have been chosen.

As a seventh catch-all ground the applicants contend that the procedure adopted violated all the provisions of Annex III and all the other applicable rules of procedure. In the circumstances it is unnecessary to say more about this particularly as details are not given.

Despite the prodigious and dedicated effort of the members of the board, and particularly the chairman, in my view the decision to refuse to allow the applicants to proceed to the tests should be quashed, the reserve list still being in existence. It is not clear how many of the applicants in the present case were in the middle third group and in other groups; in any event I would make no distinction between the applicants.

On the other hand, it does not seem to me to be right or necessary that the decision admitting other candidates to the tests, or selecting them for the reserve list, should be struck down. Those decisions stand. All the present cases, however, must be reviewed, the rules of natural justice being observed, to see which if any of the candidates should proceed to the tests.

Accordingly, I conclude:

(a) That the decision not to admit the applicants to the tests in internal competition COM/B/2/82 should be annulled;

(b) That the Commission should pay the applicants' costs.