an assessment which must by its nature be discretionary, it attaches to those qualifications in relation to the requirements of the post to be filled. However, the determination of those criteria before the Selection Board has examined the candidates' files may be open to challenge.

# OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 28 November 1985 *

*Mr President,*
*Members of the Court,*

A. The subject-matter of the proceedings with which I shall be dealing in this Opinion is the decision of the Court of Auditors of the European Communities (the defendant) of 25 November 1983 [1] to appoint Mr K, a translator who has intervened in this case, to the post of principal translator in Grade LA 5 and the legality of the competition procedure leading to that appointment. That decision and the competition which led to it (Competition No CC/LA/20/82) is challenged by Mrs Androniki Vlachou (the applicant), who also took part in the competition but with less success.

1. The applicant completed her university studies in 1971 and then worked for a period outside the Community institutions. In 1981, after passing a competition, she entered the service of the European Parliament. With effect from 1 March 1981 she was appointed a probationary official in Grade LA 7, Step 3, as a translator.

The applicant was then recruited as a reviser by the Court of Auditors under a contract dated 8 December 1981. She was initially engaged as a member of the temporary staff in Grade LA 5, Step 2, for a two-year period starting on 1 December 1981. [2]

On the expiry of that contract the applicant was engaged for a further year as a translator in Grade LA 6, Step 3, under a contract dated 25 November 1983.

The applicant then took part in Internal Competition No CC/LA/14/83 and was appointed a probationary official with effect from 1 March 1984. In view of her qualifications and experience she was classified in Grade LA 6, Step 3, in accordance with Article 3 (1) of Decision No 81/5 of the Court of Auditors of 3 December 1981 on the classification of staff. On 1 December 1984 she became an established official.

2. In order to fill one of the two posts in Career Bracket LA 5/4 planned for the Greek section of its translation department, the Court of Auditors published a Notice of Internal Competition No CC/LA/20/82 (reviser/principal translator) [3] on 26 April 1983. The competition was held 'on the basis of qualifications and tests'.

* Translated from the German.

1 — Annex 9 to the defence.

2 — Annex 1 to the defence.

3 — Annex 7 to the application.

Like Notice of Competition No CC/LA/-4/83, the notice states that appointment will normally be made at the starting grade, namely Grade LA 5.

One of the conditions for admission to the competition was, according to paragraph V.2. of the competition notice, 'at least six years' practical experience at senior level, in work related to the post to be filled'.

The duties attached to the post were described as follows:

'To revise translations and, where necessary, produce translations not requiring revision;

To supervise terminological, documentation or other specialized work in the linguistic field;

To participate in the training of translators.'

The applicant took part in the competition but was not appointed because she was placed only second on the list of suitable candidates drawn up by the Selection Board.

On 2 June 1983 the Court of Auditors published Notice of Inter- Institutional Competition No CC/LA/4/83 for the purpose of filling a post of head of translation group/reviser in Career Bracket LA 5/4.[4] Paragraph V.2. of the notice laid down an entrance requirement of 'at least 10 years' practical experience at senior level, in work related to the post to be filled'. The duties attached to the post were described as follows:

'To head the Greek translation section;

...'.

4 — Annex 10 to the defence.

(There followed the same details as those set out in Notice of Competition No CC/LA/20/82).

In its final report, the Selection Board in Competition No CC/LA/4/83 found that none of the candidates met the entrance requirements, in particular that of 'at least 10 years' practical experience at senior level, in work related to the post to be filled' referred to in paragraph V.2. of the notice. By a letter dated 30 September 1983, the Court of Auditors informed the applicant that the Selection Board had decided not to admit her to the competition. That communication is the subject-matter of the proceedings in Case 162/84.

3. On 29 June 1983 the Selection Board in Competition No CC/LA/20/82 met for the first time. Its members were the head of the translation department of the Court of Auditors, a head of division of Greek nationality and a principal translator in the Danish translation section of the Court of Auditors (Mr D, who has intervened in this case) who was the third member designated by the Staff Committee. At that meeting the Selection Board decided to admit Mr K and Mrs Vlachou to the competition.

It further decided in principle the criteria according to which candidates' university degrees and experience were to be assessed and then proceeded to assess them. At the same time it fixed the date for the tests and decided to call upon the head of the Greek medium and long term translation section of the Commission in Luxembourg to act as an examiner in the marking of the written tests.

After conducting and marking the tests the Selection Board drew up its final report for

the appointing authority together with the list of suitable candidates on which Mr K was placed first with 104 marks and the applicant second with 96 marks. The Selection Board had in particular awarded the following points for their qualifications and for the written and oral tests:

Mr K: 56, 33, 15 = 104 points

applicant: 54, 26, 16 = 96 points

The applicant thus obtained the minimum number of marks (60% of 160 possible marks) which, according to paragraph VII of the notice of competition, were needed in order to be shortlisted.

Beneath the signatures on the report Mr D added a handwritten note stating his view that the marks awarded to the candidates by the Selection Board gave a true picture of the candidates' relative merits.

On 20 July 1983 the Court of Auditors published its list of suitable candidates drawn up at the end of Competition No CC/LA/20/82.

By a request dated 17 November 1983 the applicant brought the matter to the attention of the Court of Auditors and informed it that Competition No CC/LA/20/82 was irregular and that the results of the competition and the list of suitable candidates were invalid.

The applicant requested the Court of Auditors to direct the Selection Board to disclose the criteria on the basis of which it had awarded marks and secondly to consider whether it was possible to amend the order of the successful candidates by taking account in particular of two and a half years' additional experience in her case.

By a decision dated 25 November 1983 [1], the Court of Auditors appointed Mr K to the post of principal translator in Grade LA 5, Step 1, with effect from 1 December 1983 on the basis of the list of suitable candidates drawn up in Competition No CC/LA/20/82.

By a complaint dated 17 February 1984 [5], the applicant challenged the decision of the Court of Auditors to appoint Mr K a principal translator. She took the view that Mr K did not possess the experience required to be admitted to the competition. Furthermore, the appointing authority had infringed the principle of equal treatment by failing to give the applicant enough points for her experience and failing to give her full credit for her university degree. Finally, she points out that, under Article 14 of the Staff Regulations, the member of the Selection Board nominated by the Staff Committee (Mr D) should not have officiated in the competition because he was 'on very intimate terms' with one of the candidates (Mr K) at the time of the competition.

In the end the applicant asked the Court of Auditors to rescind the Selection Board's decisions to admit Mr K to the competition and to include him in the list of suitable candidates, alternatively to amend the decision of the Selection Board and place the applicant first on the list of suitable candidates and in any event to rescind the appointment of Mr K as a principal translator.

1 — Annex 9 to the defence.

5 — Annex 9 to the application.

That complaint was rejected by the Court of Auditors by decision of 9 March 1984. [6] In essence that decision is based on the provisions governing the competition procedure which do not permit the appointing authority to interfere in the organization or the course of the proceedings of a Selection Board whose assessments are unimpeachable. It adds that, according to the case-law of the Court of Justice, an appointing authority may not depart without weighty reasons from the order of names in a list of suitable candidates drawn up by a Selection Board.

4. Conclusions of the parties

The *applicant* claims that the Court should:

(i) annul the decision of the Selection Board in Internal Competition No CC/LA/20/82 admitting Mr K to the said competition and in consequence annul the same Selection Board's decision to place Mr K on the list of suitable candidates;

(ii) annul the decision of 25 November 1983 to appoint Mr K to the post of principal translator in the division referred to in that decision;

(iii) order the Court of Auditors to pay the costs.

The *Court of Auditors* contends that the Court should:

(i) dismiss the application as inadmissible and unfounded;

(ii) order the applicant to pay the costs.

5. By orders dated 14 November 1984 the Court of Justice allowed the applications of Mr K, the rival candidate, and Mr D, the member of the Selection Board, to intervene in support of the submissions of the Court of Auditors; however, Mr D was granted leave to intervene only in so far as his submissions refuted the applicant's allegation that he had infringed Article 14 of the Staff Regulations.

6. (a) At the hearing the Court of Auditors described the proceedings of the Selection Board in Competition No CC/LA/20/82. In the light of that information and having regard to the minutes of the Selection Board's two meetings, its proceedings may be reconstructed as follows:

At its first meeting on 29 June 1983 the Selection Board decided first of all that Mr K and the applicant satisfied the entrance requirements for the competition.

As far as the candidates' experience was concerned, the Selection Board found that both had more than six years' experience. It then found that neither of the candidates could produce evidence of six years' experience as a reviser. In view of that finding, the Selection Board decided not to insist on 'at least six years' experience at senior level, in work related to the post to be filled' but only to require experience as a translator, that is, at a less senior level.

(b) Next, the Selection Board determined the criteria according to which marks were to be awarded for university degrees and experience. It decided to award up to 40 marks for a university degree and up to 10 marks for additional academic qualifications.

Practical experience was to be marked as follows:

36 marks (6 marks for each year or 0.5 marks for each month of service) for

6 — Annex 10 to the application.

experience gained at the Court of Auditors or in other Community institutions and

14 marks (2.3 marks for each year or 0.2 marks for each month) for experience gained outside the Community institutions.

As the reason for awarding more than two and a half times as many marks for experience gained within the Community institutions as for experience gained outside the institutions, the Court of Auditors stated as follows:

The Selection Board had before it documents from Greece relating to the candidates' previous experience. In this case, however, those documents were of an extremely doubtful nature especially as regards one of the candidates. There was a very vague declaration to the effect that the candidate in question had practical experience acquired in Greece. The Selection Board was not convinced that she actually had that experience. Nevertheless, since it did not wish to refuse the evidence provided or could not do so, the Selection Board accepted it but decided to give considerably more weight to her experience acquired in the Community institutions than to her experience gained outside them.

(c) The Selection Board then gave marks for the candidates' qualifications.

The examination certificate from the University of Salonika produced by Mr K contained the comment 'very good' and gave an assessment figure of 7 2/16 (out of 10). The Selection Board awarded Mr K 29 marks for that degree, although, according to the general criteria it had previously laid down, a mark of only 28.5 would have been appropriate.

The comment on the certificate from the University of Athens produced by the applicant is only 'good' but no assessment figure is given. Taking the view that 'good' corresponded to a mark of between 5 and 6, the Selection Board took the middle value and awarded the applicant 22 marks. However, it emerged from documents subsequently provided to the Court of Auditors that the applicant's degree assessment was 6.04 (out of 10). The Court of Auditors has now acknowledged that the applicant should have been credited with 24 marks.

For his experience in the Community institutions, the Selection Board credited Mr K with 16 marks for 31 months' of service. According to its general criteria, however, it should have awarded only 15.5 marks for 31 months.

For her 28 months' experience in the Community institutions, the applicant was awarded 14 marks plus an extra 5 marks for her work as a reviser at the Court of Auditors, making a total of 19 marks.

The award of an extra 5 marks for experience as a reviser has no basis in the general criteria laid down for the allocation of marks.

For his experience outside the Community institutions, Mr K was awarded 11 marks for 62 months. Application of the general criteria would have given 12 marks.

For her nine years and six months' experience, the applicant was awarded 13 marks. If the Selection Board had applied the criteria which it had itself adopted, she should theoretically have received 22 marks here but since the general criteria set an upper limit of 14 marks, the maximum mark of 14 should have least have been awarded.

In explanation of this 'calculation', the Court of Auditors has stated that the allo-

cation of 13 marks rather than 14 marks was due to an error of calculation. However, to offset that error, the number of marks awarded to Mr K was reduced.

(d) Lastly, the Selection Board took decisions on how the competition was to proceed, and in particular on the appointment of an examiner, how the tests were to be organized and how they were to be marked.

(e) Then, on 15 July 1983, at the end of the tests, the Selection Board drew up its final report containing the individual marks and the list of suitable candidates and forwarded it to the appointing authority.

B. In this Opinion I shall state my own views immediately after setting out the applicant's contentions, the defence of the Court of Auditors and the observations of Mr D. Mr K's submissions do not require separate examination because in substance they are the same as the defence submissions of the Court of Auditors.

1. Admissibility of the application

(a) The Court of Auditors objects that the application is out of time, at least as regards the conclusions concerning the decisions of the Selection Board. The list of suitable candidates was published on 20 July 1983. For that reason alone the complaint lodged on 17 February 1984, seven months after the publication of the contested decision, is inadmissible and consequently this application as well.

The applicant, however, argues that the decisions of the Selection Board and the drawing up of the list of suitable candidates were preparatory measures in relation to the appointment of Mr K. Such preparatory measures may not be challenged as such; instead, it is necessary and sufficient to challenge the final and definitive measure adversely affecting the applicant, namely the appointment of Mr K.

(b) In my view, the question whether the claims for the annulment of certain decisions of the Selection Board are independent claims may be left open. The applicant would certainly have no interest in contesting those decisions without challenging the appointment of Mr K by the appointing authority.

Moreover, it may be inferred from the decided cases of the Court of Justice that decisions of Selection Boards are not normally open to challenge *per se*; the action must be directed against the final decision of the appointing authority instead. In a judgment dating back to 14 December 1965 [7], the Court of Justice stated:

'The proceedings of the Selection Board cannot, in principle, be challenged as such since the Board is not a body empowered to take decisions binding on officials; the proceedings are merely preparatory acts, so that their illegality may only be questioned in an application directed against the decision to which they were a preliminary.

The applicant himself, however, has acknowledged this in his application, since he declares that it is directed "in particular" against the appointment of Mr P. The application directed against the appointment is therefore admissible and the conclusions seeking the annulment of the assessment need only be considered as arguments against the decision making the appointment.'

In principle, therefore, the decisions of a Selection Board, from the admission of

7 — Judgment of 14 December 1965 in Case 21/65, *Domenico Morina* v *European Parliament*, [1965] ECR 1033, at p. 1039.

applicants to a competition to the drawing up of the list of suitable candidates, are preparatory measures. That conclusion is not contradicted by the Court's judgment of 9 February 1982 in *Kohler*[8] according to which the appointing authority is largely bound by the result of the competition and must normally appoint the candidate placed first. As the Court has stated, the appointing authority may indeed depart for weighty reasons from the order laid down in the list of suitable candidates but it must explain such a decision clearly and fully.

So, although the drawing up of the list of suitable candidates is undoubtedly a form of preliminary decision, the actual decision lies with the appointing authority which must in the end decide on the appointment.

The objection of inadmissibility is therefore unfounded.

2. (a) The applicant argues first of all that Mr K, her rival in the competition, did not satisfy the entrance requirements set out in the notice of competition. He should therefore not have been admitted to the competition because he did not have the necessary experience, namely 'at least six years' practical experience at senior level, in work related to the post to be filled', which was a post of reviser/principal translator. The applicant also points out that an identically composed Selection Board in a subsequent competition for a post of head of section — Competition No CC/LA/4/83 in which the notice of competition stipulated a requirement of practical experience which, except for the number of years, was in identical terms — interpreted the entrance requirements as meaning that a minimum amount of experience as a reviser or head of section or in both capacities was needed.

The Court of Auditors points out that, according to the case-law of the Court of Justice, the appointing authority has no power to examine the results of the deliberations of a Selection Board or the bases on which it took its decisions. It therefore has no power to check whether the Selection Board's decision to admit Mr K to the competition was correct. In any case, the applicant's legal interest in challenging the Selection Board's decision to admit Mr K must be in doubt since she herself was admitted to the competition on the basis of the same interpretation of the entrance requirements which she now challenges.

(b) The question to be determined at this juncture is whether the above-mentioned admission requirement is an objective criterion susceptible to judicial review or whether it is a criterion which requires an evaluation by the Selection Board. In the latter case, the substance of the Selection Board's decisions would not be open to review since it would enjoy a measure of discretion; the only question to be examined would then be whether the procedure was properly carried out.

The notice of competition refers to 'at least six years' practical experience at senior level, in work related to the post to be filled'. As is stated in the notice of competition, the post to be filled is a post of reviser/principal translator.

8 — Judgment of 9 February 1984 in Joined Cases 316/82 and 40/83, *Nelly Kohler* v *Court of Auditors of the European Communities*, [1984] ECR 641.

However, the notice does not indicate what is meant by experience 'at senior level'. The admission requirements are not therefore framed in such a way that it is possible to determine whether they are satisfied simply by applying objective criteria.

It was therefore necessary for the Selection Board to determine the criteria for the admission of candidates *before* admitting them to the competition so as to be able to decide upon their admission on the basis of those criteria. That duty arises from the incomplete wording of the notice of competition and from Article 5 of Annex III to the Staff Regulations. According to the first paragraph of that article, the Selection Board must initially only examine the candidates' files and draw up a list of candidates who meet the requirements set out in the notice of competition. However, if the requirements of the notice of competition are not directly applicable on their own but require a value interpretation by the Selection Board, the Board must lay down the criteria for the interpretation of the entrance requirements before examining whether candidates qualify for admission.

If it did not set out those criteria in advance, the Selection Board would subsequently not be in a position correctly to draw up the list of suitable candidates provided for in the sixth paragraph of Article 5 of Annex III to the Staff Regulations in the prescribed manner, which must include a reasoned report.

In this context I therefore think that it is necessary to apply by analogy the third paragraph of Article 5 of Annex III where a criterion in a notice of competition which has not been set out in sufficient detail requires a value judgment by the Selection Board.

However, the minutes of the Selection Board's meeting on 29 June 1983 contain no indication that it laid down those criteria for the interpretation of the admission requirements. The minutes merely state that, after deliberation, the Selection Board decided to admit the two candidates to the competition.

That conclusion, namely that the Selection Board did not lay down criteria for the interpretation of the admission requirements, at least not *before* examining the candidates' files, is borne out by the statements of the Court of Auditors at the hearing.

The Court of Auditors stated in fact that the requirement of practical experience at a senior level was first discussed when the two applications were examined. On the view that neither of the candidates could be admitted if strict requirements were imposed, it was agreed only to require experience at a *less* senior level, namely experience as a translator.

That step on the part of the Selection Board is incompatible with Annex III to the Staff Regulations. Since, in my view, the third paragraph of Article 5 of Annex III must be applied by analogy where admission requirements are not sufficiently specific, that is to say where, as in the case of the assessment of qualifications, the criteria for their assessment must be laid down in advance, I can refer to the judgment of the Court of Justice of 14 December 1965 in *Morina*[9], in which the Court stated:

9 — Judgment of 14 December 1965 in Case 21/65, *Domenico Morina* v *European Parliament*, [1965] ECR 1033. That judgment, which concerned the Staff Regulations of the EEC and the EAEC (Regulation No 31 (EEC), 11 (EAEC), Official Journal, English Special Edition (1959-62), p. 135), is equally applicable to the Staff Regulations of the European Communities because the wording of Annex III is the same in each case.

'More particularly, by failing to set out the criteria according to which it made its assessment of the qualifications, the Selection Board omitted from its report a factor which was essential to support the statements contained therein; it thereby infringed the provisions in the sixth paragraph of Article 5 of Annex III to the Staff Regulations . . . '.

Those statements of the Court of Justice are fully applicable in this case. The same is true of the subsequent reasoning given in that judgment, which was as follows:

'[The provisions of the sixth paragraph of Article 5 of Annex III to the Staff Regulations] . . . must be considered requirements of substance. The criteria of assessment should be fixed in order to ensure that the qualifications are assessed objectively and without any possibility of arbitrariness. In addition, the requirement that the report be "reasoned" enables the appointing authority to exercise its discretion with judgment, which means that it needs to be informed of both the general criteria employed by the Selection Board and the manner in which these were applied by the Board to the persons appearing on the list of suitable candidates. These requirements were also imposed in the interests of candidates, so that infringement of them adversely affects the unsuccessful candidates within the meaning of Article 91 of the Staff Regulations.'

It is clear from the minutes of the Selection Board's meeting on 29 June 1983 and the statements of the Court of Auditors in the course of the oral procedure that the Selection Board did not establish those criteria. For that reason alone the Selection Board's decision to admit both candidates to Competition No CC/LA/20/82 must be considered unlawful.

3. (a) The applicant further complains of a breach of the principle of equal treatment inasmuch as in allocating marks the Selection Board not only failed to take adequate account of the fact that she had twice as much experience as the rival candidate but also gave him extra points for his class of university degree even though there was no provision for this in the notice of competition.

In this connection as well the Court of Auditors submits in defence that it is precluded from interfering with the Selection Board's assessments.

(b) The first point to be made is that paragraph VI.A.2. of the notice of competition regarding the 'Marking of qualifications' provides that university degrees or equivalent professional experience are to be marked out of 50. That fact alone refutes the applicant's contention that marks should not have been awarded for university degrees.

As far as the assessment of practical experience is concerned, it should be noted that the Selection Board laid down general criteria providing for the award of 6 marks for each year of experience acquired within the Communities up to a maximum of 36 marks, and 2.3 marks for each year or 0.2 marks for each month of experience outside the Communities, up to a maximum of 14 marks.

However, those criteria were not established *before* but *after the examination* of the candidates' files. That was done with the *declared aim* of preventing the applicant's considerably longer experience outside the Communities from being taken into account in full.

What I said in part 2 with reference to the Court's judgment in *Morina* applies here with still greater force: the Selection Board failed to lay down criteria for the assessment of qualifications *before assessing*

them. It thereby infringed essential procedural requirements because 'the criteria of assessment should be fixed in order to ensure that the qualifications are assessed objectively and without any possibility of arbitrariness'. [7]

On the contrary, it deliberately selected the criteria of assesssment with the aim of putting one of the candidates at a disadvantage. That is precisely the opposite of what the Court of Justice meant by an objective assessment without any possibility of arbitrariness.

This is therefore another, graver procedural irregularity.

It is no answer to argue, as the Court of Auditors has done, that the documents produced by the applicant were not wholly free of doubt. It was the Selection Board's task to look into the value of those documents in order to decide whether or not they could be taken into account. It was not legally permissible, however, initially to accept them and then deliberately undervalue them.

4. I need only briefly discuss the other errors committed by the Selection Board, which are described in part A.6.(c) above and concern the faults in carrying out simple calculations. If the Selection Board — of the Court of Auditors — made errors of calculation, they were nearly all at the expense of the applicant.

I would only point out in passing that, according to the notice of competition, up to 100 marks were to be awarded for qualifications whereas in the tests themselves only 60 marks could be obtained. If the competition procedure was manipulated to the disadvantage of a particular candidate at the stage of the assessment of qualifications, it was difficult, if not impossible, to overcome that handicap at the second stage, namely in the tests.

5. I propose to deal only briefly with the applicant's remaining submissions.

(a) (i) The applicant contends that the principle of protecting legitimate expectation was infringed because members and senior officials of the Court of Auditors categorically promised her that her appointment as an established official was a mere formality.

The Court of Auditors denies this.

(ii) Whether the applicant was given any such assurances at the time of her entry into the service of the Court of Auditors may remain an open question. It is irrelevant because the Staff Regulations, in particular in Article 29, prescribe a formal procedure for the appointment of officials, so that any assurances implying the contrary would be unlawful and therefore not binding.

(b) (i) The applicant further alleges a breach of Article 5 (3) of the Staff Regulations, which provides that identical conditions of recruitment and service career are to apply to all officials belonging to the same category or the same service. Several members of staff in the same grade as the applicant, including the other Greek translators, were appointed officials after only an *ad hoc* interview and not on the basis of a competition.

The Court of Auditors' only reply to that assertion is that it is unsubstantiated and therefore to be rejected.

(ii) The applicant has not in fact indicated to what extent she was adversely affected by the procedure applied in the case of the appointment of other officials. Furthermore

7 — Judgment of 14 December 1965 in Case 21/65, cited above.

it should be pointed out that under Council Regulation No 662/82 of 22 March 1982 [10] the appointing authority was empowered, until 31 December 1982, to depart from certain mandatory provisions of the Staff Regulations in favour of Greek nationals. Until that date, therefore, it was open to the Court of Auditors to adopt a simplified recruitment procedure for staff of Greek nationality.

If, however, the applicant was referring to different recruitment procedures which would not be compatible with the Staff Regulations, the answer must be that she has no right to be treated in the same favourable but unlawful way.

(c) (i) The applicant further challenges the composition of the Selection Board on the ground that none of its members had sufficient knowledge of languages to be able to mark the second written test (revision of a translation into Greek). The examiner appointed under the second paragraph of Article 3 of Annex III for the purposes of marking the tests also took part in the setting of the written tests, which was unlawful.

The Court of Auditors contends that it is permissible to appoint one or more examiners to act in an advisory capacity. Furthermore, it is clear from the chronology of the Selection Board's proceedings that the examiner had not taken part in the setting of the tests.

(ii) The second paragraph of Article 3 of Annex III to the Staff Regulations does indeed permit the appointment, for certain tests, of one or more examiners serving in an advisory capacity. The Court of Auditors was all the more justified in taking that step because the task was precisely to create a Greek translation section within its Language Service so that officials with the appropriate linguistic qualifications were not yet even available. Moreover, the members of the Selection Board appointed by the Court of Auditors included, besides the Head of its Translation Department, a Greek head of division from within its administration, so that there can be no question of the Selection Board's being composed of unqualified members. It was also appropriate to appoint the Head of the Greek Section of the Commission's Medium and Long-term Translation Department in Luxembourg as an examiner.

Lastly, the applicant has not shown that the examiner just mentioned had taken part in the setting of the tests. The Court of Auditors' contention that, although the Selection Board set the tests and designated an examiner on 29 June 1984, the Court of Auditors did not invite the examiner to take part in the conduct of the competition until 1 July 1983 seems plausible.

(d) The applicant has not adduced sufficient evidence in support of her contention, which is disputed by the Court of Auditors and the intervener Mr D, that certain members of the Selection Board were prejudiced against her and should not therefore have been allowed to take part in its work.

This applies to the allegation that Mr K, the rival candidate, and Mr D, one of the members of the Selection Board (the two interveners), were on very intimate terms. Even though the handicap unlawfully placed on the applicant by the Selection Board and the handwritten comment which Mr D added to the Selection Board's final report may be regarded as containing some indication of the Board's prejudice against her,

10 — Council Regulation introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of the Hellenic Republic to the Communities (Official Journal L 78, p. 1).

it is not sufficient to regard the facts alleged by the applicant as proved.

The same also goes for the allegation that the examiner was prejudiced against the applicant because she had taken part in a decision adversely affecting the examiner's sister. The documents of the Selection Board which may be of relevance in this connection — namely, the assessments of the written and oral tests, in which the examiner must have had a decisive influence on the other members of the Selection Board because of his linguistic abilities — do not disclose any intention to handicap the applicant. At all events, in the oral test she obtained a slightly better mark than the rival candidate; only in the written tests were her marks clearly worse. Although only two candidates took part in those tests, the applicant has not at any rate alleged that anonymity was not maintained in the written tests.

6. (a) Finally I should briefly examine the argument of the Court of Auditors that, according to the decisions of the Court of Justice, it not empowered to annul or amend the Selection Board's decisions. A selection board, it argues, is sovereign and independent, so that the appointing authority is neither empowered nor called upon to inquire into the regularity of the Selection Board's proceedings.

(b) Stated in such general terms, the argument of the Court of Auditors is incorrect.

The Selection Board is certainly independent as regards the objective assessment of qualifications and performances in tests. That is clear, *inter alia*, from the Court's judgment of 9 October 1974 in *Campogrande*, [11] its judgment of 16 March 1978 in *Wüllerstorff* [12] and its judgment of 9 February 1984 in *Kohler*. [8]

However, the independence of the Selection Board relates only to the *objective assessment* of qualifications and performance in tests, as dealt with in the judgments cited: examination of a candidate's ability (*Campogrande* judgment), verification of relevant experience (*Wüllerstorff* judgment) and appraisal of ability to perform the relevant duties (*Kohler* judgment).

The Selection Board's independence in those matters does not, however, dispense it from having to comply with *legal provisions*. Mr Advocate General Gand made this point aptly in his Opinion in the *Vandevyvere* case: [13] 'It is certain that the freedom of the Selection Board is limited by its duty to conform to the legal provisions governing the competition: general provisions, rules of all kinds for the competition, which may for example lay down the exact character of the tests and the weighting to be given to each of these. On the other hand, its independence is complete when, within the limits indicated above, it evaluates the respective qualities of the various candidates and gives them marks or a grading.'

That distinction between the obligation to comply with legal requirements and discretion in matters of evaluation is

8 — Judgment of 9 February 1984 in Joined Cases 316/82 and 40/83, *Nelly Kohler* v *Auditors of the European Communities*, [1984] ECR 641.

11 — Judgment of 9 October 1974 in Joined Cases 112, 144 and 145/73, *Anna-Maria Campogrande and Others* v *Commission of the European Communities*, [1974] ECR 957.

12 — Judgment of 16 March 1978 in Case 7/77, *Bernhard Diether Ritter von Wüllerstorff und Urbair* v *Commission*, [1978] ECR 769.

13 — Case 23/64, *Thérèse Vandevyvere v European Parliament*, [1965] ECR 157.

important in determining the powers of an appointing authority over a Selection Board. It is true that in its judgment in the *Wüllerstorff* case, cited above, the Court stated that it was pointless to go through the complaints procedure where a complaint concerned the decisions of a Selection Board in a competition since the appointing authority was not empowered to alter such decisions. However, that statement can apply only to cases in which the Selection Board has made *assessments in a proper manner* within the limits of the tasks assigned to it. It can no longer apply, however, where the Selection Board *ignores legal provisions*, since despite its independence in factual matters it is not empowered to do so.

The appointing authority is therefore not only empowered but under a duty to check whether the proceedings of Selection Boards are regular and to set aside any unlawful decisions of a Selection Board, provided only that it respects its independence in the assessment of qualifications and the marking of tests.

This is also dictated by the requirements of a practical and effective system of legal protection. It is unreasonable to oblige an official adversely affected by the patently unlawful conduct of a Selection Board to take the much longer route of appealing to the Court of Justice when the appointing authority already has the means of granting redress to the aggrieved official in the administrative procedure laid down in Article 90 of the Staff Regulations.

However, this was not done by the defendant in this case.

7. In summary it must be stated that a number of decisions of the Selection Board in Competition No CC/LA/20/82 were unlawful so that the Selection Board could not forward a valid list of suitable candidates and reasoned report to the appointing authority.

Since there was no properly constituted list of suitable candidates, the decision of the Court of Auditors of 25 November 1983 to appoint Mr K a principal translator in Grade LA 5 was also unlawful. That decision must therefore be annulled.

8. Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. In view of the fact that the defendant is solely responsible for the decision which must be annulled, it seems reasonable that it should be made to bear only the applicant's costs. Consequently, the interveners must bear only their own costs.

C. In the light of all the foregoing, I propose that the Court should declare and rule as follows:

(1) Decision No 3931 of the Court of Auditors of 25 November 1983, appointing Mr K a Principal Translator is annulled;

(2) The defendant is ordered to pay the costs of the proceedings save for those incurred by the interveners;

(3) The interveners shall bear their own costs.