In Case 797/79

ANNE-MARIE TIBERGHIEN, NÉE PEUTEMAN, an official of the Commission of the European Communities, residing in Sint-Pieters-Leeuw (Belgium), represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nico Edon, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Raymond Baeyens, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the selection board refusing to admit Mrs Tiberghien to Competition No COM/BS/4/79,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts

Anne-Marie Tiberghien, née Peuteman, who is of Belgian nationality and holds a Certificat d'Examen de L'Enseignement Technique, Degrés Moyen et Normal, Section Professionnelle [Certificate of Technical Education, Middle and Standard Level, Vocational Section], entered the service of the ECSC Commission as a typist in Grade C 4 on 16 March 1964, after working as a secretary in various Belgian firms or undertakings from 8 October 1954 to 15 March 1964. She was established in that post on 14 September 1964 with effect from 1 October 1964.

On 1 March 1965, following a competition, Mrs Tiberghien was appointed as a clerical officer in Grade C 3 at the Directorate for the Dissemination of Information with effect from 1 February 1965 and on 30 July 1965 she was established in that post with effect from 1 August 1965.

From 1 January 1965 Mrs Tiberghien was paid the secretarial allowance provided for in Article 4a of Annex VII to the Staff Regulations.

After 15 September 1968 Mrs Tiberghien carried out the duties of secretary to the Director of the Directorate for General Research and Technology.

On 1 June 1971 she was assigned to the Directorate-General for Budgets.

On 14 January 1972 Mrs Tiberghien was promoted to Grade C 2, without any alteration in post, with effect from 1 January 1971.

On 10 May 1973 Mrs Tiberghien applied for a posting to the Directorate-General for Development Aid or to the secretariat of a director or head of division, that application being "a permanent application until a posting is obtained in one of the desired directorates-general". The application produced no results.

In June 1973 Mrs Tiberghien took part in an in-service training seminar for secretaries organized by the Commission.

Early in 1974 the Directorate-General for Budgets offered Mrs Tiberghien the job of setting up and maintaining the records of the Accounts Division. She accepted the offer and thus carried out the duties of a clerical officer from 1 August 1974 (until 30 April 1977). On 28 October 1974 she therefore asked that her previous status be adjusted to make the title of her post correspond to the duties she had actually performed in the past. That request was supported by a note from the Head of the Accounts and Management Division, which stated that "her whole career has been (and

continues to be) a secretarial one". The administration informed Mrs Tiberghien that her request could only be granted as the outcome of proceedings for the alteration of the post.

On 10 October 1975 Mrs Tiberghien applied for a transfer to the Grade C 2 post advertised in Vacancy Notice COM/856/75. In her application she made the following observation: "Rectification of status. I have always carried out the duties of a secretary/ shorthand typist but am classed as a 'clerical officer' ".

In March and April 1976 Mrs Tiberghien took part in a training course on the theory of record-keeping which was organized within the Commission by the Documentation, Information, Reproduction and Circulation of Documents Division, in collaboration with the Training Division.

On 20 December 1976 the Commission decided to transfer Mrs Tiberghien to a post of secretary/shorthand typist within the Directorate-General for Budgets with effect from 1 December 1976. Mrs Tiberghien acknowledged receipt, on 13 January 1977, of that notice of transfer which, she claims, is in contradiction to the duties actually performed by her and, as far as the original situation is concerned, twelve years too late.

Following a reorganization of the Directorate-General for Budgets it was suggested to Mrs Tiberghien that she carry out the duties of an accounts clerk. She accepted, but in a memorandum of 2 June 1977 informed the Director-General of her concern at the zig-zag fashion in which her career was continuing to develop.

On 13 June 1978 Mrs Tiberghien was given responsibility, within the Directorate for Financial Intervention Appropriations, for records and documentation concerning intervention appropriations in the agricultural, social, regional and environmental spheres and at the same time she also carried out the requisite secretarial and typing work. Mrs Tiberghien took up those duties on 1 July 1978.

Subsequently Mrs Tiberghien submitted an application to participate in an internal competition based on qualifications and tests, Competition No COM/B/1/78, for the constitution of a reserve list for future recruitment of administrative assistants. On 6 November 1978 she was informed that the selection board had not admitted her to the competition because she "lacked the qualifications required in the Notice of Competition", more particularly, as regards level of education, experience, diploma or certificate relating to record-keeping and experience in the duties attaching to Category C posts in the field of record-keeping.

In a letter of 13 November 1978 addressed to the Head of the Recruitment, Appointments and Promotion Division Mrs Tiberghien claimed that she fulfilled the requirements laid down in the Notice of Competition and that, in particular, she had been responsible for setting up and maintaining records for three years, namely from 1 August 1974 to 30 April 1977, and later from 1 July to 31 December 1978.

On 12 December 1978 the Chairman of the selection board wrote to Mrs Tiberghien confirming the fact that she did not meet the condition laid down in the Notice of Competition requiring, as at 31 December 1978, at least three years' experience as a principal clerical officer or clerical officer or in similar

duties in the field of record-keeping. Even if she had worked in the field of record-keeping, that was quite clearly not the case prior to 1 December 1976, the date on which she was transferred to a post of secretary/shorthand typist, or at least prior to 10 October 1975, the date of her request that her status be rectified.

On 9 January 1979 Mrs Tiberghien drew the attention of the Chairman of the competition selection board to the ambiguity of her position and the ill-effects of the description of her post on the development of her career.

In a memorandum of 11 January 1979 addressed to the Head of the Individual Rights and Privileges Division, the Head of the Recruitment, Appointments and Promotion Division requested that Mrs Tiberghien be officially informed of the alteration of her duties from those of a secretary/shorthand typist to those of a clerical officer.

On 28 February 1979 Mrs Tiberghien wrote to the Director-General for Personnel and Administration pointing out that since 1965 she had occupied the post of clerical officer when performing the duties of a secretary and the post of secretary when performing the duties of a clerical officer and asking him to take administrative steps to rectify that situation as soon as possible.

On 17 July 1979 Mrs Tiberghien submitted to the President of the Commission a complaint under Article 90 (2) of the Staff Regulations against the implied decision rejecting her request for a clear statement of the duties actually carried out by her in the Commission, namely those of secretary/shorthand typist from 1 February 1965 to 31 July 1974, and those of clerical officer (in records or accounting) since 1 August 1974.

Mrs Tiberghien submitted an application to participate in Competition No COM/BS/4/79, an internal competition based on qualifications, to be held to constitute a reserve list for future recruitment of secretarial assistants in career bracket B 5/B 4. The conditions of admission to the competition required that the candidates should:

either

(A) have completed studies at an advanced secondary level evidenced by a certificate of completion of studies, possess at least 10 years' experience of Category C duties as an executive secretary, principal secretary or secretary/shorthand typist, or of similar duties, and have been in the service of the Communities as an official or other servant for a total of five years;

or

(B) have at least 16 years' professional experience of Category C duties as an executive secretary, principal secretary or secretary/shorthand typist, or of similar duties, and have been in the service of the Communities as an official or other servant for a total of 11 years.

On 10 August 1979 Mrs Tiberghien was informed that the selection board was unable to admit her to the competition because, on the one hand, she had not completed studies at an advanced level of secondary education evidenced by a certificate of completion of studies (the requirement listed under paragraph 'A' of the notice of competition), and, on the other hand, she did not possess the experience of at least 16 years required in the notice of competition (the conditions listed under paragraph 'B').

In a memorandum of 22 August 1979 to the Chairman of the competition selection board Mrs Tiberghien defended the eligibility of her application by arguing that her duties as a secretary/shorthand typist before and after her

entry into the service of the Commission, added together, gave her experience of 19 years, a period greater than that required in the notice of competition.

On 24 September 1979 Mrs Tiberghien received confirmation of the decision refusing to admit her to Competition No COM/BS/4/79 in a memorandum from the Head of the Recruitment, Appointments and Promotion Division.

On 21 November 1979 the Director-General for Personnel and Administration informed Mrs Tiberghien, in reply to her request of 28 February 1979 for a clear statement of her administrative status and to her complaint of 17 July 1979, that the experience she had gained in the Commission was that of a secretary/shorthand typist from 1 February 1965 to 31 July 1974 and that of a clerical officer in the records section from 1 August 1974, apart from the period from 1 May 1977 to 30 June 1978 during which she performed the duties of a clerical officer in the accounting section.

That change of duties, he stated, meant that Mrs Tiberghien was no longer entitled to receive the secretarial allowance unless it was expressly requested by her superiors and it could be shown that she did secretarial work for at least 50% of her normal working hours.

In addition the letter stated:

"I am not in a position to guarantee that, should you submit an application to participate in a future B or B/S internal competition the selection board would necessarily recognize the experience referred to above as experience which may be taken into consideration for the competition in question."

On 28 November 1979 Mrs Tiberghien acknowledged receipt of the Director-General's memorandum of 21 November but indicated that she disagreed with the interpretation concerning the assessment by competition selection boards of her experience.

By a decision of the Head of the Specialized Department for Management Organization and Establishment, of 11 February 1980, Mrs Tiberghien's C 3/2 appointment was amended, with effect from 21 November 1979, as follows:

"Former appointment: secretary/shorthand typist; New appointment: clerical officer".

On 22 February 1980 Mrs Tiberghien asked the author of the memorandum of 11 February 1980 for the alteration in her appointment to be recognized as commencing on 1 August 1974. She also told him that this memorandum appeared to contradict the letter of 21 November 1979 from the Director-General for Personnel and Administration.

On 13 March 1980 the Head of the Specialized Department for Management Organization and Establishment, informed Mrs Tiberghien that "the decision of 11 February 1980 determines the date from which the C 3/2 post which you hold appears in the detailed list of posts as 'clerical officer' " — and that the decision gave proper effect to the letter of 21 November 1979.

Confirmation of this was given to Mrs Tiberghien in a letter from the Director-General for Personnel and Administration of 18 March 1980 in which it was stated that the letter of 11 February 1980 was merely intended to make clear that, as from 21 November 1979, the description of her appointment was "officially entered in the detailed list of posts in accordance with the true situation" and that it was not intended to rectify the description of all the

appointments she had held previously. There was therefore no reason whatsoever for Mrs Tiberghien to fear any restriction on the acknowledgment of the nature of the various activities contained in the letter of 21 November 1979. It was in that spirit that instructions had been given to place that letter on Mrs Tiberghien's personal file, "so that the selection boards in competitions based on qualifications before whom you appear may in future take into account your experience, irrespective of the official description of your appointments up to now".

II — Written procedure

On 9 November 1979 Mrs Tiberghien brought the present action challenging the decision of 10 August 1979 refusing to admit her to Internal Competition No COM/BS/4/79.

The written procedure followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. It invited the Commission, however, to reply at the hearing to a question concerning the difference between secretarial and administrative careers and the opportunities for moving from one to the other.

III — Conclusions of the parties

The *applicant* claims that the Court should:

— Annul the Commission's decision of 10 August 1979 refusing to admit her to International Competition No COM/BS/4/79;

— Order the defendant to pay the costs.

The *Commission* contends that the Court should:

— Dismiss the application as unfounded in both its branches;

— Accordingly, leave the costs incurred by the applicant to be paid by her.

IV — Submissions and arguments of the parties during the written procedure

Preliminary remarks

The *applicant* considers that the selection board, once placed in possession of all the requisite documentation, should have reviewed the position; it should have paid particular attention to the duties actually performed by the applicant in view of the fact that there is no description of the duties of the post of secretary/shorthand typist, and that account had to be taken "of at least 16 years' professional experience in Category C duties as an executive secretary, principal secretary or secretary/shorthand typist or of similar duties".

Had the Commission rectified the applicant's status in time, no misunderstanding could have arisen; no difficulty existed with regard to the budget: in that respect the budget includes, under running costs, permanent posts in Category and Grades C 2 and C 3 "without distinction between the posts of clerical officer and secretary/shorthand typist".

The *Commission* observes that the relevant facts concerning the applicant's true administrative situation are to be found in the documents and periodic reports contained in her personal file, in

the memorandum of 21 November 1979 from the Director-General for Personnel and Administration, in the correspondence between basic posts and careers laid down in Article 5 (4) of the Staff Regulation and Annex I thereto, in the Commission's table giving descriptions of basic posts, in the general Community budget and in the Commission's detailed list of posts. Thus, for instance, in fixing the number of posts which may be remunerated annually from personnel funds the general budget refers to a total number of permanent posts in Grade C 3 without distinguishing between the posts of clerical officer and secretary/shorthand typist; the detailed list of posts includes information on basic posts in Grade C 3 and C 2, namely secretary/shorthand typist or clerical officer, and on the holder of the post.

Moreover, it must not be overlooked that the subject-matter of the application is solely the decision of the selection board in Competition No COM/BS/4/79. In that respect it should be noted that the Notice of Competition is binding on the selection board and that in this instance the board found that, as far as the requisite qualifications or diplomas and working experience are concerned, the applicant did not, on 31 December 1978, satisfy either of the two alternatives laid down in the conditions for admission contained in the Notice of Competition.

The complaint of error in the statement of reasons upon which the decision is based

The *applicant* claims that the contested decision is defective in law because it is based on erroneous grounds.

(a) In refusing the applicant admission to the competition because she lacked the requisite experience in the duties of a secretary/shorthand typist, the Commission disregarded the fact that she had actually been performing such duties in its service for nine and a half years, leaving aside the other nine and a half years completed prior to her entry into that service. Consequently there was an infringement of the first paragraph of Article 5 of Annex III to the Staff Regulations, which provides that: "After examining these files, the Selection Board shall draw up a list of candidates, who meet the requirements set out in the notice of competition".

(b) It may be seen from her file that in reality the applicant performed the duties of a secretary/shorthand typist from 1 February 1965 to 31 July 1974, a fact acknowledged by the Commission itself.

(c) The Commission must not be allowed systematically to reject applications from an official by relying on either the duties in fact exercised or the official job description according to the circumstances. Such conduct has prejudicial effects on the progress of the official's career and that is especially so in this case where the applicant has shown exceptional ability in her work.

It is equally not permissible to disregard the duties actually performed. The true duties performed should prevail over an erroneous description of a post.

(d) An official must not be the victim of mistakes made by the Commission. In the case of the applicant the Commission failed to observe the principles of good administration, especially as the applicant had drawn attention to the discrepancy between her real duties and their description and the Commission did not take diligent steps to regularize the

situation. No blame may attach to the applicant, for she made every attempt to have her situation regularized. She should not be prevented from pursuing a career that matches her ambitions and her capabilities.

(e) The legality of making a distinction between the duties of a clerical officer and those of a secretary/shorthand typist may be questioned. Apart from the rule laid down in the first subparagraph of Article 7 (1) that posts must correspond to grades and the reference in Article 5 to the existance of career brackets generally spread over two grades, the Staff Regulations do not define the concept of a post. From that it may be inferred that, having regard to the principle of unity of the career structure, no distinction should be made between the duties of a clerical officer and those of a secretary/shorthand typist. The Commission was therefore wrong in refusing to take into consideration the duties of shorthand typist performed by the applicant in the post of "clerical officer" between 1 February 1965 and 31 July 1974.

(f) The Commission's argument that the two limbs of the heading "qualifications or diplomas required and experience" in the conditions for admission to Competition No COM/BS/4/79 are cumulative should not be accepted; they are alternatives and the applicant based her application on the conditions appearing under Point B.

Since there is no disagreement either as to a length of service of at least 11 years or as to the fact that the nine and a half years completed prior to entering the service of the Commission may be considered as amounting to sufficient experience, the only issue is the applicant's experience after her entry into the service of the Commission on 16 March 1964.

The Commission acknowledges belatedly, but without qualification, that the applicant acquired experience as a secretary/shorthand typist in its service between 1 February 1965 and 31 July 1974. As a result she has a total experience of 19 years, which exceeds the minimum required for admission to the competition. The Commission's argument runs counter to its own admission.

(g) There remains to be settled the question whether the acknowledgment of that factual position subsequent to the appointing authority's decision of rejection and its confirmation amounts to a new factor without knowledge of which the selection board could reasonably have considered that the applicant lacked the requisite experience. However, from a number of indications and facts it appears that the selection board was perfectly able to assess precisely the applicant's real experience. The selection board was thus at fault in excluding the applicant from the list of candidates admitted to the competition.

In any case, any doubt the selection board might have had is due to the Commission's lack of care and inability to achieve correspondence between the description of the applicant's post and her real duties, and was not brought about by the applicant herself.

(h) The applicant's attitude has always been consistent and logical; she cannot be blamed for having attempted to

support her legal position with arguments which are "not necessarily consistent", when that apparent "inconsistency" is merely a reflection of poor management on the part of the administration.

The *Commission* contends that the argument based on a supposed error in the grounds of the decision is unfounded.

(a) The refusal to admit the applicant to Competition No COM/BS/4/79 is justified by the fact that she does not meet the conditions laid down in the Notice of Competition regarding the "qualifications or diplomas required and experience". As is indicated in the memorandum of 24 September 1979, the assessment carried out in that regard was based both on the personal file and on Mrs Tiberghien's application form. Only her experience as a secretary/shorthand typist could be taken into consideration. The reference to experience acquired in the performance "of similar duties" enabled, on the one hand, former servants of the Joint Research Centre to be admitted and, on the other hand, experience acquired prior to entering the service of the Communities to be taken into consideration in so far as that experience was of at least the same level and the same nature as the duties of a secretary/shorthand typist.

However, the duties performed by the applicant between 16 March 1964 and 1 February 1965 do not constitute experience as a secretary/shorthand typist; similarly, in all probability, it does not seem that the experience acquired at the start of her career prior to entering the service of the Commission could have been at a level comparable to that of the duties attaching to Grades C 3 and C 2.

(b) As to the effect of the reply from the Director-General for Personnel and Administration of 21 November 1979, it should be noted that the decision of 11 February 1980 by the Head of the Specialized Department for Management, Organization and Establishment, which gives effect to the former, alters, with retroactive effect to 21 November 1979, the post occupied by the applicant from that of a secretary/shorthand typist to that of a clerical officer. However, official documents contained in the personal file or other decisions lawfully adopted on the basis of those documents are not altered thereby.

The letter of 21 November 1979 amounts, in essence, to an attempt to arbitrate which puts an end to the difficulties which had arisen concerning the applicant's administrative position, without necessarily being binding on selection boards in competitions in the future. Nor can it retroactively invalidate a decision adopted by a selection board on the basis of documents contained in the personal file which it could not, and was not intended to, alter.

Infringement of the fourth parapgraph of Article 24 of the Staff Regulations

According to the *applicant* the decision at issue is also unlawful because it disregards the fourth paragraph of Article 24 of the Staff Regulations concerning further training and instruction.

(a) That provision places an obligation on the institutions to take further training and instruction into account for the progress of an official's career.

In the present instance the applicant was able over many years to improve her skills, first by carrying out the duties of a secretary/shorthand typist and by taking on the responsibilities of an executive secretary, and later by participating in various in-service training courses for secretaries, included as part of the staff training programme introduced by the Commission, and in a training course in documentation.

By systematically refusing to acknowledge the vocational qualities acquired by the applicant, to the extent of depriving her on two occasions of her right to participate in a competition, the Commission failed in its duty to take further training into account for the progress of her career.

(b) Participation in an internal competition undoubtedly forms part of the progress of a career. An official who has participated in further training courses must be able to make use of the certificate proving completion of such additional training and the selection board must take such matters into actual consideration in internal competitions based on qualifications.

However, the Commission did not issue any certificate at the end of the training courses followed by the applicant and the competition selection board took no account of the further training courses.

Even though the new procedure making it compulsory to mention further training in periodic reports was not yet in force when the competition selection board took its decision, the selection board had a legal duty to take a candidate's further training into account in an internal competition based on qualifications, where the conditions for admission involved an assessment of experience.

The *Commission* does not dispute that further training undergone by officials should be taken into account for the purpose of their careers, but it challenges the interpretation placed by the applicant on the fourth paragraph of Article 24 of the Staff Regulations.

(a) The taking into account of further training constitutes a guideline, a general principle, to be observed as part of a personnel management policy.

Article 24 does not, however, give officials any right which, in a competition, entitles them to be included on the list of candidates fulfilling the conditions for admission by way of derogation from the qualifications or diplomas or experience required by the Notice of Competition.

Further vocational training is mentioned in the periodic reports, which are themselves examined on the occasion of a promotion or internal competition.

(b) The argument based on participation in some "seminars on secretarial work" is irrelevant: it is not stated in what way that fact alters the conditions for admission to the competition. In this case, no actual breach of any duty deriving from the fourth paragraph of Article 24 of the Staff Regulations may be ascribed to the selection board in Competition No COM/BS/4/79 or to the Commission.

V — Oral procedure

The applicant, represented by Mr Vandersanden, and the Commission, represented by Mr Baeyens, presented oral argument and replied to questions from the Court at the sitting on 30 October 1980.

On the subject of the difference between secretarial and administrative careers and opportunities for moving from one to the other, the *Commission* explained that a distinction should be made between the legal viewpoint and the factual one. In law, Article 5 (4) of and Annex I to the Staff Regulations place the basic posts of clerical officer and secretary/shorthand typist under career bracket C 3/C 2; secretarial and administrative careers are therefore one and the same.

On the other hand, the table of basic job descriptions drawn up under the second paragraph of Article 5 (4) of the Staff Regulations in fact indicates certain criteria for distinguishing, within career bracket C 3/C 2, between the posts of secretary/shorthand typist and clerical officer. In the case of the post of clerical officer, neither the heading "description of duties" nor the heading "title" refer to the performance of typing duties. Internal practice places the dividing line between the two posts according to the amount of typing done.

In the present, instance, it is established that Mrs Tiberghien has been drawing the fixed allowance under Article 4 a of Annex VII to the Staff Regulations from 1 January 1965 to date; however, according to a decision taken by the heads of administration in 1965, that allowance is only granted to officials and other servants whose immediate superiors certify that more than half of their duties consist in the use of machines with alphabetical or numerical keyboards.

It should, however, be pointed out in this regard that about 260 out of a total of 600 clerical officers receive the fixed allowance.

Owing to that circumstance, the receipt or non-receipt of the allowance can hardly serve as an infallible means of drawing a general distinction between the duties of a clerical officer and those of a secretary/shorthand typist.

As to whether there are any opportunities open to officials whose work includes duties typical of one or other of those kinds of job for transferring between the two careers, it suffices to say that according to Article 5 (4) of and Annex I to the Staff Regulations the posts of clerical officer and secretary/shorthand typist form part of the same career (and correspond to the same grades, C 2 and C 3). Thus the only possibility is of moving from the one post (job) to the other, and only to the extent to which the official in question has the requisite abilities, namely, in the case of a change from the post of clerical officer to that of secretary/shorthand typist, knowledge of shorthand typing carefully checked by means of tests (which makes that type of transfer relatively rare) and, conversely, in the case of a change from the post of secretary/shorthand typist to that of clerical officer, training and qualifications.

The *Advocate General* delivered his opinion at the sitting on 4 December 1980.

Decision

1 By application lodged at the Court Registry on 9 November 1979 Mrs Anne-Marie Tiberghien, née Peuteman, an official of the Commission of the European Communities in Grade C 2, seeks the annulment of the decision of the selection board refusing to admit her to Competition No COM/BS/4/79.

2 From the file it appears that, after being employed as a secretary by various private undertakings from 1954 to 1964, the applicant entered the service of the Commission on 16 March 1964 as a typist in Grade C 4. She was appointed to the post of clerical officer in Grade C 3 with effect from 1 February 1965 and was subsequently promoted to Grade C 2 without any alteration of post. It is not disputed that she retained that designation for the greater part of her career, the issue being whether the title of the post corresponds to the duties which she in fact performed during that period.

3 In April 1979 the applicant entered Internal Competition No COM/BS/4/79 organized for the purpose of constituting a reserve list for future recruitment of secretarial assistants in career bracket B 5/4. So far as the qualifications or diplomas required and experience were concered, the conditions for admission to that competition read as follows:

"Either A:

1. Have completed studies at an advanced secondary level evidenced by a certificate of completion of studies and possess at least 10 years' experience of category C duties as an executive secretary, principal secretary or secretary/shorthand typist, or of similar duties; and

2. Have been in the service of the Communities as an official or other servant for a total of five years.

Or B:

1. Have at least 16 years' experience of category C duties as an executive secretary, principal secretary, secretary/shorthand typist, or of similar duties; and

2. Have been in the service of the Communities as an official or other servant for a total of 11 years."

It is not disputed that the applicant entered the competition on the basis of the conditions mentioned under B.

4 In her application form the applicant pointed out that the duties she had performed during the period between 1965 and 1974 were, in fact, those of a secretary and not those corresponding to the title of her post as a "clerical officer". From her personal file it appears that as early as 1974 the applicant drew the attention of the administration to the discrepancy between her status under the Staff Regulations and the duties she was in fact performing. On 28 February 1979 she sent a formal request to the Director-General for Administration under Article 25 of the Staff Regulations in order to have her administrative status determined. In that communication she sought recognition of the fact that she had performed the duties of a secretary/shorthand typist from 1 February 1965 to 31 July 1974 and she concluded as follows:

"I request you to take administrative steps to rectify this situation as soon as possible in order to make it clear, once and for all, that I may officially pursue my career as a clerical officer concerned with records without thereby losing the benefit of my earlier career as a secretary/shorthand typist (which enables me to take part in BS competitions)."

5 That request went unanswered and on 17 July 1979 — that is, a date when the selection board was still at work — the applicant submitted to the appointing authority a formal complaint under Article 90 of the Staff Regulations seeking rectification of her administrative status.

6 On 2 August 1979 the competition selection board took its decision holding that of 564 candidates 399 met the conditions laid down by the Notice of Competition and 165 candidates, including the applicant, were eliminated as

failing to fulfil those conditions. The applicant was notified of that decision on 10 August 1979 in the form of a standard letter informing her that she did not meet the condition which is worded: "Have at least 16 years' experience on 31 December 1978 of category C duties as a secretary/ shorthand typist, or of similar duties".

7 In a letter of 22 August 1979 the applicant asked the selection board to reconsider the position, reminding them that, as was stated on her application form, her experience as a secretary before and after her entry into the service, when added together, totalled more than the minimum 16 years' practical experience required by the Notice of Competition.

8 After reviewing her position the competition selection board decided to confirm its previous decision. It appears from the letter on the matter which was sent to the applicant on 24 September 1979 that the selection board accepted the equivalent value of the applicant's employment prior to her entry into the service of the Community, that is, nine years and six months, but that, of her career subsequent to her entry into the service, it accepted only a period running from 1 February 1976 to 31 December 1978 (that is to say, two years and 11 months) as corresponding to a post of secretary/ shorthand typist.

9 On 9 November 1979 the applicant brought this action. On 21 November the Director-General for Personnel sent her a letter in reply to her request of 28 February 1979 and her complaint of 16 July 1979, whereby he agreed to the rectification of the administrative status as suggested. In particular, the Director-General acknowledged in that letter that the applicant had acquired experience as a secretary/shorthand typist with the Commission from 1 February 1965 until 31 July 1974, that is to say, a period of nine years and six months.

10 On a comparison of the terms of the final decision of the competition selection board rejecting her candidacy on 24 September 1979 with the decision of the appointing authority of 21 November 1979 it therefore appears that, objectively, the applicant has an experience of secretarial work

the duration of which satisfies that required in the notice of competition. It should also be borne in mind that the statements made by the applicant on her application form for Competition No COM/BS74/79, and the text of her complaint of 22 August 1979 represented that situation correctly.

11 It must therefore be held that the competition selection board made its decision on the basis of an assessment of the applicant's administrative status which was objectively inaccurate. Nevertheless, the fact remains that for her part the applicant did not do her utmost to inform the selection board of the steps she had taken in order to have her employment status corrected. In her application form she did not mention the request she had submitted on 28 February 1979 under Article 25 of the Staff Regulations, and in her complaint of 22 August 1979 she did not mention the complaint under Article 90 of the Staff Regulations submitted to the appointing authority on 17 July 1979.

12 Therefore the selection board, which was responsible for the management of a competition for which there was a large number of candidates, is not to be criticized for not taking the initiative of clarifying of its own motion an administrative status which had not yet been determined when it made its decision. Nevertheless, since the existence of an error of judgment on its part has been established, the decision in question must be annulled in order to enable the administration to take a fresh decision based on the position finally acknowledged by the appointing authority's decision of 21 November 1979.

Costs

13 The question of costs should be settled in the light of the foregoing. Although the applicant has obtained the annulment of the decision of which she complains, it would be inequitable to allow her to place on the Commission the burden of the costs of legal proceedings which she could have avoided by taking care to inform the selection board of the concurrent proceedings she had commenced through official channels in order to have her administrative status rectified. The power given to the Court under the first subparagraph of Article 69 (3) of the Rules of Procedure should therefore be exercised and the parties should be ordered to pay their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of the selection board in Internal Competition No COM/BS/4/79 of 24 September 1979 refusing to admit the applicant to the said competition;**

2. **Orders the parties to pay their own costs.**

Pescatore Touffait Due

Delivered in open court in Luxembourg on 18 December 1980.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 4 DECEMBER 1980 [1]

Mr President,
Members of the Court,

1. The action brought by Mrs Tiberghien by application dated 9 November 1979 raises for your consideration a subject which is not new, namely, the requirements which, if it is to be lawful, must be satisfied by a selection board's decision not to admit one of the candidates to the tests in a particular competition.

1 — Translated from the Italian.