OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 1 JUNE 1965[1]

Mr President,
Members of the Court,

A notice published in the EEC Commission Staff Information Bulletin of 16 August 1963 announced the holding of Internal Competition No 165-A in order to recruit a reserve of 120 administrators in Grades A7-A6. This reserve was intended to fill posts which were vacant or likely to become vacant or be created before 31 December 1964 and which were not filled by the promotion or transfer of other officials. The competition was to take place on the basis of qualifications. The notice prescribed the qualifications or diplomas, the professional experience and the knowledge of languages required in order to be admitted to the competition; it specified that candidates might be required to attend an interview with the Selection Board in order to demonstrate that they possessed a knowledge of languages and other skills necessary for the duties to be performed.

269 officials or servants of the Commission submitted their applications, and 130 of them were entered on the list of suitable candidates drawn up on 5 February 1964 by the Selection Board on completion of its proceedings. Information later submitted to you shows that, at 31 January 1965, 55 of the candidates on this list had been appointed administrators on the basis of the competition and assigned to posts within the various Directorates or Departments of the Commission.

These proceedings have given rise to two applications which you have decided to join. Application 18/64 was lodged on 12 May 1964 by Mr Alvino and 18 other officials, certain of whom had already filed a complaint with the Commission through official channels; none of these applicants held university qualifications, supported by a degree, and all were considered by the Selection Board not to possess equivalent experience in employment; for this reason their names did not appear on the preliminary list of candidates who met the requirements set out in the notice of competition, as provided for in the first subparagraph of Article 5 of Annex III to the Staff Regulations. On the same day Application 19/64 was lodged by Miss Benoit and two of her colleagues, all of whom possessed university degrees but whose names did not appear on the list of suitable candidates provided for in Article 30 and in the fifth paragraph of Article 5 of Annex III to the Staff Regulations.

Although, as will be seen, certain of the submissions refer to one application rather than the other, the amended conclusions which are set out in detail in the replies are identical and refer to the various stages in the procedure since the notice of competition was issued. You are requested to rule that this notice of competition and, as far as is necessary, the decisions to hold the competition and to publish the notice, are null and void; the applicants are also contesting the decision of the Commission of 19 June 1963 concerning the composition of Selection Boards in competitions. In particular, you are requested to annul Competition No 165-A on the grounds of the irregularity of the composition of the Selection Board and the conditions under which the competition was held with 'all the consequences that this entails both in fact and in law, in particular as regards the appointments made on the basis of the competition'. In

1 — Translated from the French.

other words you are requested to annul them. Finally, the applicants leave to the discretion of the Court the question of the annulment of the express or implied decisions of the Commission adopting the results of the competition and the lists drawn up in consequence thereof.

A — Admissibility

Both in its written statements and before the Court the defendant institution has formally contested the admissibility of the conclusions before you on several grounds which I shall set out before attempting to provide a general answer to them.

1. First of all, by reason of the collective nature of the applications and of the lack of purpose or of lawful purpose, for these two factors are connected. The Commission does not deny that several parties may, by means of a single application, request the annulment of a single measure or even of several measures where such measure or measures affect them all adversely in the same way. But it points out that in the reply the applicants expressly withdrew that part of their original conclusions which claims the annulment of the decisions of the Selection Board not to enter their names on the preliminary list or on the list of suitable candidates. These were individual decisions, peculiar to each applicant and taken in his own particular case, on an issue in which their several interests were more likely to conflict than to converge: it might be in the interest of applicant A not to see the name of applicant B on the list on which he wished his own name to appear. For this reason these decisions could not justify a joint application. However, once these conclusions are set aside, what questions remain? The applicants leave to your discretion the question of the possible annulment of the Commission's adoption of the results of the competition; they have withdrawn the conclusions against the refusal of the Commission to meet the complaints submitted through official channels by certain of their members; they do not specify the decisions taken or to be taken following the constitution of the reserve for future recruitment which they are asking you to annul. All that remains is the notice of competition, the composition of the Selection Board and the competition procedure itself, the outcome of which was not disputed. According to the defendant institution the applicants have no sufficient interest in any of the above matters to render their applications admissible.

A second ground of inadmissibility: the applications were lodged out of time, at least in so far as they refer to the notice of competition communicated to interested parties by publication on 16 August 1963 in the Staff Information Bulletin and not contested within the prescribed time-limit. Will it be said that this act is only the first link in a chain from which it cannot be dissociated? The defendant institution replies that the notice is issued by the Commission which alone has power to order the competition to be held, but that this power is then ceded to the Selection Board for the remainder of the procedure. The distinction between the authorities who are involved in the successive stages of this procedure renders it impossible for the act of one such authority to be contested, after the expiry of the requisite time-limit, at the same time as the subsequent acts of another authority.

2. I shall ask you to set aside the plea of inadmissibility put forward by the Commission and shall base my argument to this end on the analysis given by your case-law of the procedure employed in recruitment and in particular in competitions. As you pointed out in your judgments in *Ley* (12 and 29/64 of 31 March 1965), *Rauch*

(16/64 of the same day) and *Alfieri* (35/64 of 7 April 1965), the recruitment procedure is made up of several interdependent acts in which various bodies within the institution take part: first, the authority which declares the vacancies and decides to hold the competition—secondly, the Selection Board which is called upon to draw up the list of suitable candidates from which the appointments will be made. It is in fact the content of this list and the consequent appointments which adversely affect the candidates whose names were not chosen, either by the Selection Board or by the appointing authority. Thus, when the later acts involved in such a procedure take place, it is possible for the applicants to raise the irregularity of earlier acts inseparable from them even after the expiry of the time-limits; more precisely, you have not accepted the objection that these acts may be performed by different authorities.

The features of the competition procedure itself also justify the existence in this case of joint applications, at least within certain limits which in my opinion have not been exceeded. The various candidates whose names were not chosen have an equal interest in claiming that there was an infringement of the rules concerning the notice of competition, the composition of the Selection Board or the procedure followed by it. They have the same interest in the annulment of the list of candidates admitted to the competition or the list of suitable candidates on which their names do not appear as in the appointments made on the basis of the latter. Of course, the joint nature of the applications prevents a consideration of the particular situation of each candidate and it is for this reason that the subject of this application cannot be the annulment of the decision of the Selection Board, refusing to enter the names of the applicants on the lists provided for in the first and fifth paragraphs of Article 5 of Annex III, since these decisions concerned each candidate individually and were made on the basis of the particular situation of each one. Moreover, if you are dealing with two applications, this is because certain submissions concern not this or that applicant, but this or that group of applicants in whose name these applications were lodged; in my opinion, therefore, procedural requirements are observed.

During the oral procedure the applicants clearly presented their final submissions for the annulment of the notice of competition and of the competition itself with all the necessary consequences, that is, the annulment of the appointments made on the basis of this competition. If a communication from the Commission was necessary before the names of the 55 appointees were known, the defendant institution is wrong to criticize the applicants for the vagueness of their conclusions on this point since it is the result of its own actions. In my opinion the joint interest of the applicants in these various annulments is indisputable; we must therefore consider the merits of their submissions which I shall do by following the order adopted in the report of the hearing.

B — Merits

Before examining the various submissions I should like to consider the very concept of a competition for the purpose of constituting a 'reserve for future recruitment', as this is the first time that you have heard argument on such a procedure,

This concept only appears in the final subparagraph of Article 29 (1) of the Staff Regulations and then as a kind of corrective to the system which is generally adopted in the European Communities. Usually, when a specific post becomes vacant, the institution

tries to fill the vacancy by a transfer within the institution, by promotion or transfer from another institution, or by a competition held specially for that purpose. In such cases the object of such a competition is clearly defined; the candidates know exactly to which post they will be assigned and the necessary skills are described precisely in terms of this post. However, although this procedure enables the best candidate to be appointed, it has the disadvantage of increasing the number of competitions and delaying recruitment. On the other hand, the 'reserve for future recruitment' enables the administration to establish a reserve of officials who will be able to take up posts at a given level without delay as soon as they fall vacant or are created. It is a more flexible system and, as you have heard, establishes a versatile reserve; it combines in one and the same competition candidates who will later be called on to fulfil differing duties at the same level. In this it resembles the system adopted in the public service in several Member States, in particular, in Belgium and France. Without going into argument on the merits of the system and how widely it can be used, it is enough to point out that, although Article 29 of the Staff Regulations provides for its use in circumstances with which I shall deal later, the provisions of the Staff Regulations and of Annex III taken as a whole clearly refer to a competition which is held in respect of one or several specific posts, a point which raises several practical difficulties as regards this case.

I

(a) First, the applications contest the *legality of the notice of competition.* You will first dismiss the classic submission that this notice was published and the competition organized without any general provisions for giving effect to this point in the Staff Regulations having been drawn up according to Article 110; there was no consultation with the Staff Committee or the Staff Regulations Committee and the measures taken were not brought to the knowledge of the staff. Your judgment in *Rauch* in fact held that, as regards the organization of competitions, the Commission of the EEC was not bound to adopt such 'general provisions' within the meaning of Article 110 of the Staff Regulations.

(b) Secondly, the applicants maintain that there was an infringement of Article 1 of Annex III which provides that the notice of competition must be drawn up after consulting not only the Joint Committee, which was done, but also 'those responsible for the department or departments concerned'. Since the competition concerned the recruitment of administrators for all the departments of the Commission, all the directors should have been consulted beforehand; no such consultation in fact took place. Here you see the difficulty to which I referred. The authors of the Annex clearly envisaged a competition held to fill one or several specific posts; in such a case those responsible for the department concerned may usefully be consulted on the tasks involved in the posts to be filled, the qualifications or the degree of experience necessary and, where applicable, the knowledge of languages required in view of the special nature of the posts, all of which is information which should appear in the notice of competition. However, where a general reserve is being constituted and where the competition concerns all the directorates equally, it is not clear what significance should be given to consultation with these heads of department or what safeguard it would give to the candidates. Considered from this angle it is not untrue to say, with the defendant institution, that the department actually concerned was the recruitment department within the Directorate of Personnel. I shall

suggest that you accept that the 'reserve for future recruitment' referred to in Article 29 of the Staff Regulations falls outside the terms of Annex III which cannot therefore be applied to this case, and that for this reason you dismiss this submission.

(c) Thirdly—and this submission pertains to Application 18/64 brought by the candidates without degrees—the notice of competition added to the requirements of the second subparagraph of Article 5 (1) of the Staff Regulations by requiring candidates to have professional experience equivalent to university education, *as supported by a degree.*

This submission must surely be set aside on the basis of the wording alone. Although, when it defines the duties in Category A, Article 5 refers to a 'university education', without requiring a degree, Annex III which is an integral part of the Staff Regulations provides that the notice of competition must specify in particular 'the *diplomas* and other evidence of formal qualifications or the degree of experience required for the posts to be filled'. Thus the notice at issue in fact conformed with the requirements of the Annex. Let me add that production of a diploma is the normal method by which a candidate proves his abilities, particularly in cases of competitions on the basis of qualifications.

(d) Furthermore, Applications 18 and 19/64 both maintain that the notice of competition infringed the provisions of Annex III by providing that candidates might be required to attend an interview with the Selection Board in order to demonstrate that they possess the knowledge of languages and other skills necessary for the duties to be performed. Such a requirement contravenes the very concept of a competition on the basis of qualifications, transforming it into a competition on the basis of tests; had the latter been intended, the notice of competition should have indicated, in accordance with Article 1 of the Annex, what kind of tests were involved and how they were to be marked.

In my opinion, this requirement in the applications demonstrates the distinction between the verification in question and the procedure applied in competitions on the basis of tests. There was no syllabus, no examination and no marks. It was merely a question of checking the accuracy of the statements made by candidates as to their *qualifications*. It is obvious that such a vertification may be made as regards a knowledge of languages and I consider it to be equally acceptable as regards 'other skills'. The applicants no doubt remember that the Selection Board was composed only of officials from the Directorate-General of Administration and thus conclude that it was qualified to assess the experience obtained by candidates in specialized departments. I say once again that there was no question of holding an examination, merely of checking qualifications—which is why the checking only took place when such qualifications did not appear convincing in themselves. I consider that this procedure is likely to be adopted by any Selection Board above a certain level, even if its members are not specialists.

(e) Finally, I come to a submission which was only raised expressly in the reply. The authors of the Staff Regulations provided for competitions to constitute a reserve for future recruitment in order to fill posts in Categories C and D, and possibly even in B4 and B5, but not for posts in Category A. Moreover, such a competition must necessarily be *external* (this term does not appear in the Staff Regulations which employs the phrase *open* competition).

The Commission strongly disputes the admissibility of this submission which, in its opinion, contravenes Article 42 of the Rules of Procedure as it cannot be justified on the basis of one of the

matters of law or of fact which came to light in the course of the written procedure. Your case-law is, however, extremely liberal, in particular your judgment in *Ley* referred to above which you gave contrary to my opinion. It appears that a submission may be raised during the proceedings where it is to be integrated into an argument put forward by the defence, when it constitutes a reply or as it were a counter-attack to this argument. If this is so, it may even be admitted that; by basing its argument on an interpretation of Article 29 of the Staff Regulations concerning the reserve for future recruitment, the defendant was enabling the applicants for their part to refer to the same Article in order to establish the illegality of the conditions in which the competition in dispute had been organized. However, even should this submission be regarded as admissible, I consider neither of these views to be well founded.

First, the statement that a competition for the purpose of constituting a reserve for future recruitment may only be held for posts in Category C or D is a mere assertion which is not supported by any provision in the Staff Regulations or by any legal principle. Secondly, I do not believe that any decisive argument may be drawn from the wording of Articles 27 or 29 or from your judgments to establish that such a competition must necessarily be 'external'. I do not consider the *Lassalle* case, often referred to by the applicants, to be decisive. Although in this case Mr Advocate-General Lagrange had recalled the primacy given by the Staff Regulations to promotion and internal preferment, a competition is still, according to Article 45, obligatory before an official may be transferred from one category to another. This principle also applies to the present case in which the posts to be filled occupy the lowest grades in Category A. My predecessor did not exclude the idea that such a change of category, unlike promotion, could be regarded as recruitment in the proper sense. Moreover, the issue in this case is the choice between an internal and 'external' competition which the applicants wrongly submit may also be used to engage candidates who are not yet in the institution. To make such a submission is to disregard the fact that the texts speak of *open* competitions which established officials may also enter. Article 29 of the Staff Regulations is no more decisive. After stating that the competition procedure is laid down in Annex III, it adds: 'This procedure may likewise be followed for the purpose of constituting a reserve for future recruitment'. The Annex in question in fact refers to all types of competitions, whether on the basis of either qualifications or tests, or of both qualifications and tests, all of which, however arranged, may be either internal or open. There is no evidence in this Annex for the assertion that a reserve for future recruitment cannot be constituted by means of an internal competition.

II

I shall now leave the subject of the notice of competition in order to consider the *composition of the Selection Board*. The applicants list various points in the 'directives' drawn up by the Commission on 19 June 1963 which, in their opinion, are infringed by this composition. However, the very word 'directives' precludes any question of a regulation binding on an institution, in particular as the directives state 'that they shall not prejudice any organizational measures subsequently taken by the Commission as regards competitions, such as . . . the constitution of reserves for future recruitment'. In fact no such measures were taken and the High Authority was free to determine the composition of the Selection Board for Competition No 165-A as it thought fit. Let me add that these directives, which

appear in the file, are clearly intended to apply to competitions to fill specific posts and, as the Commission has maintained from the beginning, do not apply to the constitution of a reserve for future recruitment involving all the directorates.

III

Thirdly, the applicants are contesting the *competition procedure.* In order to appreciate the scope of their criticisms I shall first compare the requirements of the notice of competition with the conditions set by the Selection Board, as shown by the minutes of its proceedings annexed to the file. The first of these documents shows that only candidates who have had a university education, as supported by a degree, or who possess equivalent experience in employment will be admitted to the competition. In addition, all candidates must possess at least three years' experience of appropriate employment.

The minutes show how the Selection Board understood its task. When considering applications from candidates possessing a university degree, it calculated the period of experience in employment which could be presumed, treating it as beginning on the date on which the degree was conferred and including therein the time spent in statutory military service. It applied the same rules *mutatis mutandis* to candidates without degrees. However, as the latter were required to show that they had obtained equivalent experience in employment, the Board adopted the following criteria: having regard to the duration of university studies it fixed the amount of experience required at six years; it took into account the activities of the candidates both before and during their employment in the institution: finally, it considered that the level of such activity must be comparable to that of an official who has attended a university, as evidenced by a degree, and performing the duties appropriate to Category A within the meaning of Article 5 of the Staff Regulations. On the basis of these various criteria it drew up the list of candidates who, as holders of degrees or otherwise, failed to meet the required conditions and could not be admitted to the competition. All that remained was to prepare the list of suitable candidates. To this end the Selection Board considered existing reports in the case of candidates who were already officials and the assessments of superiors in the case of auxiliary staff.

(a) This procedure is criticized by the applicants on several grounds. First—and this is undoubtedly the most difficult of the submissions before you—the applicants in Case No 18/64 criticize the Selection Board for having imposed an additional requirement by considering only experience obtained in employment over a period of six years to be equivalent to university education level, as supported by a degree. The Commission replies that the Court has no power to deal with this criticism as the adoption of such a criterion is the prerogative of the Selection Board, which alone is responsible for assessing the merits of the candidates. Moreover, it is an objective criterion, as it takes account of the normal period of university studies and of the fact that this period of six years has been adopted in other competitions in Category A.

This reply is not convincing for two reasons: first, because when called upon to draw up the list of candidates who meet the requirements of the notice of competition the Selection Board is not required to fix 'criteria' as it must do at the next stage of the procedure when assessing the qualifications in order to draw up the list of suitable candidates. It is for the appointing authority to specify in the notice of competition the diplomas and other qualifications or the level of experience required and this level cannot be divorced from the period over which the candidate has

obtained this experience. The Selection Board is only required to verify that the candidates actually meet the requirement of experience fixed by the competent authority. This, at any rate in my opinion, follows from Article 1 and 5 of Annex III and it is confirmed by the notice of vacancy drawn up in the *Rauch* case on which you were called on to give judgment. After requiring candidates to give evidence of an advanced level of secondary education or of equivalent experience in employment that notice was careful to specify that professional experience obtained over a period of *at least six years* may be regarded as equivalent to the possession of a diploma appropriate to an advanced level of secondary education.

Even if this argument is not adopted, or if it is considered that the Selection Board had necessarily to supplement any lack of precise information in the notice of competition, the question remains whether its assessment is not vitiated by misuse of powers. On this point I have the most serious doubts. As it is not disputed that university degrees may be obtained in certain Member States after four years of study—a statement to this effect by a member of the Selection Board appears in the minutes —it is maintained in the rejoinder that it is not this period but that 'generally assigned to such studies' which must be taken into consideration.

I do not share this view. If a university degree can be obtained in four years, then to require experience of six years in employment is to fail to respect the concept of equivalence; the comparison should not be made on the basis of the average period of study but on the basis of the shortest period. In my opinion, therefore, the Selection Board exceeded its powers in such a way as to vitiate the entire competition procedure.

(b) The other criticisms of the proceedings of the Selection Board need not detain us long. First, contrary to the assertion in Application 18/64, it is incorrect to state that the Selection Board failed to observe the necessary equality between the candidates on the grounds that only certain of them were requested to give evidence of their qualifications, while some referred to the university examinations which they had taken and others, not content with filling in the special application form, added supplementary information giving details of all their qualifications. The Board was justified in requesting proof of any doubtful matters but was not required to verify that which had been properly established. As regards the details given of examinations or qualifications, each candidate was entitled to provide as much information as he considered useful and no restrictions were placed on this point; this is a question of the personal initiative of each candidate for which the Selection Board is not responsible.

(c) A more difficult question is whether the Selection Board was entitled, in order to assess the merits of each candidate, to take into account the reports made on them. This submission is presented slightly differently in each application. Application 19/64, made by candidates who possessed degrees but did not appear on the list of suitable candidates by reason of their reports which were regarded as inadequate if only by comparison with other similar candidates, questions the legality of such a criterion which, it claims, should only be applied to cases of promotion. On the other hand, Application 18/64, brought by candidates without degrees, maintains that although unfavourable reports were taken into account against the university-educated candidates, those favourable to the non-university candidates were disregarded. This is another example of a breach of the principle of equal treatment of candidates.

Let me set aside at once this last submission, which is based on a misapprehension. It is clear from the un-

equivocal wording of the minutes that these reports were only considered by the Selection Board in drawing up the list of suitable candidates, that is, only as regards those candidates who were already admitted to the competition. If, *in fact*, the only candidates eliminated in this way were the holders of university degrees this in no way implies that those who did not possess degrees were not treated in the same way. As regards the applicants in Case No 18/64, they cannot complain that their favourable reports were not taken into account, since the stage at which they were eliminated occurred before the Selection Board considered them.

The question remains, however, whether, contrary to the statement in Application 19/64, the Selection Board really had the power to apply this criterion. By virtue of Article 45 these reports must be taken into account in matters of promotion but does this also apply to a competition on the basis of qualifications? I am inclined to reply in the affirmative; the Selection Board must assess the *qualifications* of candidates and this is a general expression which covers not merely diplomas but all the testimonials of which the candidates avail themselves as well as their services. The quality of the latter should be considered as well as the quantity or duration and on quality the report is the best guide. To give an absurd example: would it be wise to enter on a list of suitable candidates a servant whose university qualifications were brilliant but whose reports were deplorable? For this reason, in spite of some hesitation, I would suggest that you set aside this submission.

IV

Since, in the light of your judgment in *Rauch*, the applicants withdrew at the hearing their criticism of the admission of auxiliary staff, to an internal competition, you are only required to rule on a point which you have often met, that is, the *absence of reasons* for the decisions informing the applicants of their results. Contrary to what has been said, you have refused to apply Article 25 of the Staff Regulations either to competitions on the basis of tests or to competitions on the basis of qualifications. You can only follow your case-law.

In short, of all the submissions before you only one appears to be justified but as it concerns the requirement imposed by the Selection Board, of six years experience in employment it is sufficient to affect the entire competition procedure: preparation of the list of those admitted to the competition and the list of suitable candidates as well as the appointments made on the basis of the latter. If you accept my opinion you will, as you are asked to do, annul not only these measures but the resulting appointments. I am fully aware of the difficulties likely to be caused by such annulments to the running of the departments, but I see no means of avoiding it.

The submission which gives rise to annulment was only raised in Application 18/64 and the identical conclusions in Application 19/64 are thus admissible although none of the submissions made therein can be regarded as well founded. What is to be the outcome of this application? Either, as the two cases have been joined, you abstain from giving an express ruling on those conclusions which have been dealt with elsewhere. Or—and this seems more logical—you find that by reason of the annulment ordered in the first application there is no need to make any ruling in the second. I suggest you adopt this solution. The costs should be borne wholly by the defendant institution.

I am therefore of the opinion that

— as regards Application 18/64, the Court should annul the competition proceedings held as a result of Notice of Competition 165-A and the appointments of assistant administrators made on the basis of the list of suitable candidates drawn up by the Selection Board in this competition;

— as regards Application 19/64, the Court should state that no ruling need be given in this application;

— finally, the costs of the action should be borne by the Commission of the EEC.