

By order dated 24 June 1964, the Court (Second Chamber) rejected the applicant's request for the grant of legal aid, reserving the costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Staff Regulations of officials of the European Economic Community and the European Atomic Energy Community;

Having regard to the Conditions of Employment of Other Servants of these Communities;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities and in Particular Articles 69 and 70 thereof;

THE COURT (Second Chamber)

hereby :

1. Dismisses Application No 16/64 as unfounded;
2. Orders the applicant to bear the costs including those relating to the request for the grant of legal aid, but not including the costs incurred by the defendant.

Donner

Strauß

Monaco

Delivered in open court in Luxembourg on 31 March 1965.

A. Van Houtte

Registrar

A. M. Donner

President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND  
16 FEBRUARY 1965<sup>1</sup>

*Mr President,  
Members of the Court,*

A notice 143/B, published in the EEC Commission Staff Information Bulletin

dated 16 August 1963, announced to persons interested that a competition internal to the institution was to be held on the basis of qualifications for a post as an assistant B3/B2 at the London

<sup>1</sup> - Translated from the French.

office of the Press and Information Department of the Communities. It was stated that an attempt to fill the post by transfer or promotion had failed, and that the competition was open to members of the auxiliary staff as well as to officials. Candidates were to submit their applications to the Recruitment Division 'before 9 September 1963 at the latest' on a special form for which a receipt would be given. Amongst those who applied were in particular Miss Rauch, who was at that time a Grade C1 official in the Recruitment Division, and Miss Kurz, who had been taken on from 15 February 1964 to fill the vacant post in London as a member of the auxiliary staff. By a decision dated 20 February 1964 the Committee of Chairmen appointed Miss Kurz. Miss Rauch, who was placed second on the list of suitable persons by the Selection Board, initiated the present proceedings before you, namely Case 16/64, on 29 April 1964.

She asks you to annul both the decision to admit Miss Kurz to competition 143/B and to place her on the list of suitable persons and, so far as necessary, the decision of the appointing authority to accept this list as it stood without looking into Miss Kurz's right to take part in the competition. Finally, she asks you to annul the decision of the said appointing authority to appoint this member of the auxiliary staff to the vacant post.

I

1. The submissions which she makes in her application and in her reply are many, but the statement of her submissions makes it clear at once which is the one which raises the most important question of principle and which must be dealt with first. Is a competition internal to the institution, mentioned in Article 29 (1) (b) of the Staff Regulations, only open to officials as

Miss Rauch says it is? Or is it also open, as the Commission thinks, to auxiliary staff, it being noted that if so then by parity of reasoning it must also be open to temporary staff?

According to the Commission this submission is inadmissible. It says that the decision to allow auxiliary staff to take part in the competition was included in the Vacancy Notice and in the Notice of Competition, which were duly published and the legality of which the applicant did not dispute within the time-limit laid down by Article 91 of the Staff Regulations for appeals to the Court in staff cases. Therefore it is not admissible for Miss Rauch, in asking you to annul measures taken by the Selection Board for the competition, or by the appointing authority which are limited to the application of earlier decisions, to raise objections which in reality only concern those earlier decisions.

This claim of inadmissibility should be set aside. Even if proceedings are out of time as regards a measure which is both a decision adversely affecting a person and the first stage of a complex administrative procedure—which seems to be the case both as regards the Vacancy Notice, according to your decision in *Lassalle v European Parliament*, and as regards the Notice of Competition—the illegality of these measures may be alleged in support of an appeal against the decision which terminates the procedure—in this case the appointment of Miss Kurz. On this point I can do no better than refer you to the opinion which I delivered in the case of *Ley*, 12 and 29/64.

We must therefore decide as to the value of this submission. In support of their arguments both Miss Rauch and the Commission refer in succession to the provisions of Regulation No 31 of the Council and the intention of those who drew it up, and then the case-law represented by your judgment in the

case of Wollast, née Schmitz, of 19 March 1964. I shall now examine these various arguments.

Regulation No 31 sets up both the Staff Regulations of Officials of the EEC (as well as of the EAEC) and, in a second section, the Conditions of Employment of 'Other Servants' of the Communities, in particular temporary staff and auxiliary staff.

Article 1 of the Staff Regulations defines officials as persons appointed 'as provided in these Staff Regulations to an established post on the staff of one of the institutions of the Communities'. With certain exceptions their recruitment is rendered conditional, particularly by Article 28 (d), upon success in a competition under the procedure laid down by Annex III. Neither Article 28 (d) nor Annex III deals exclusively with general or external competitions.

I turn now to Article 29 which as I have recently had occasion to mention lays down the various methods to which the appointing authority may have recourse in order to fill vacant posts. These are in order:

- Promotion or transfer within the institution;
- The holding of competitions internal to the institution;
- Applications for transfer made by officials of other institutions of the three Communities;
- Finally the other sorts of competitions.

Miss Rauch points out that the competitions internal to the institution come between two other procedures on this list: promotion or transfer. These only apply to persons who are already officials. Therefore, she says, competitions internal to the institution must also apply only to officials.

As the Commission points out, the argument is not decisive. This is because the procedures set out in subparagraph (a) and (c) are methods of recruitment without competitions. While it is true

that under Article 28 (d) no-one may be appointed as an official unless he has been successful in a competition, the admission of 'other servants' to internal competitions is not in itself incompatible with this rule of the Staff Regulations. The applicant then objects that this interpretation would be unjust. It would mean that in order to be appointed to the same post an official would have to take two competitions, one for initial recruitment, and another to be promoted, but auxiliary staff would only have to take one competition which could be described as the one for promotion. Why would that necessarily be contrary to the Staff Regulations? These Regulations make a competition mandatory for appointment as an official on entering the service, and then, by virtue of Article 45 (2), for promotion from one category to another. At this stage an official may very well find himself competing with persons from outside the institution who will be taking such a competition for the first time.

Since there is no definition in the Staff Regulations and in particular in Article 29 (1) (b) as to what 'competitions internal to the institution' is to mean, one is forced to fall back on the Conditions of Employment applicable to auxiliary staff. And it will be seen at once that the Staff Regulations and the Conditions of Employment, different as they may be, form two parts of one and the same Regulation which thus deals with all the types of staff at the disposal of the Communities.

The fact that the position of auxiliary staff is different from that of officials is self-evident. The auxiliary does not have the official's stability. The auxiliary's link with the institution is contractual; he can only be engaged for a precise task which must not include assignment to a post included in the list of posts, except when he does so as a replacement for a limited period. The actual period of his employment, including any possible renewal of his contract, shall

not exceed one year. He does not come under the social security scheme applicable to officials. But in spite of all these differences it remains a fact that the relationship between him and the institution is a relationship of public law. It is in order to help the institution to carry out its task that he is recruited. Article 54 of his conditions of employment makes most of the provisions of Title II of the Staff Regulations, dealing with the rights and obligations of officials, applicable to him. Finally, by virtue of Article 7 of the Conditions of Employment if he has a contract for an indefinite period he is entitled to vote in elections and stand for election to the Staff Committee provided for in Article 9 of the Staff Regulations, and the Joint Committee may be consulted by the institution or by the Staff Committee on any question of a general nature concerning auxiliary staff no less than temporary staff. These points are enough to show that officials and auxiliaries are not divided into water-tight compartments. They work under different legal frameworks, in different conditions and in different capacities, but in doing so they work together in the pursuit of objectives which are those of the Community. Auxiliaries are already 'inside' the institution.

In my view this means that we must accept that in the absence of any provision to the contrary in Article 29 they must be able to take part in internal competitions. They thus enter into competition with officials, but even though it is generally admitted that the Staff Regulations are largely based on the system of internal preference, why should this be limited to officials to the exclusion of auxiliary—or temporary—staff, who already take part to a certain extent in the institution's work? Moreover it would scarcely be realistic to overlook the point that the Communities would have little chance of recruiting these servants whom they need, if they did not give them from the beginning

certain possibilities of establishment with wider and more favourable conditions than for those coming from outside.

Besides, the answer which I suggest to you seems to me to be in line with the judgment of the First Chamber in Case 18/63, Wollast, née Schmitz, of 19 March last. You are familiar with this case. A member of the auxiliary staff whose contract would in the ordinary course of events have expired on 31 January 1963 secured annulment of the decision not to prolong her contract beyond this date because the disciplinary nature of the reasons for this decision did not seem to you to be sound in law. Since, at the time when the decision was annulled, an internal competition had been announced with a view to filling the post which she occupied, your order expressly required the defendant institution to allow the applicant to take part in the competition.

It is true that Mrs Wollast had been given employment for the first time on 28 July 1959, and Miss Rauch's counsel as a result argues that she was a 'false auxiliary' and goes on to say that the solution in her case cannot also be applied to 'genuine auxiliaries' namely those who, like Miss Kurz, were engaged after 1 January 1962. But, since this latter date which was when the Staff Regulations came into force, Mrs Wollast's position had been modified and was governed by a new contract made under the rules laid down by Regulation No 31 for the 'other servants' and in compliance with the conditions laid down in Article 99 of the new Conditions of Employment. Furthermore I have not found anything in your judgment in Case 18/63 which supports the distinction which the applicant claims to establish restricting the scope of the decision which you took, and this is so in spite of her lengthy observations on this point. Your decision has the result of admitting to an internal competition an auxiliary whose contract was, at the time when the competition was held,

governed by Regulation No 31 just as Miss Kurz's contract was.

Finally, it is of little importance that Miss Kurz may, as the applicant asserts in her reply, have been mistakenly considered as an auxiliary when she should in fact have been looked upon as a member of the temporary staff. Supposing that to be true it seems to me to be without significance as members of the temporary staff have at least as close a relationship with the institution as auxiliary staff, if not more so. Therefore I would suggest that you discard this submission and come now to Miss Rauch's other arguments which will not detain us so long.

2. The applicant claims in the second place that the appointment of Miss Kurz took place in breach of Article 52(b) of the Conditions of Employment of Other Servants as laid down by Regulation No 31. This Article limits the actual period of employment of auxiliary staff to one year, including any renewal of their contracts. Yet the decision of the Committee of Chairmen appointing Miss Kurz took place on 20 February 1964 whereas she was no longer validly a member of the auxiliary staff in the service of the Commission as from 15 February 1964, since she had been engaged on 15 February 1963.

The Commission gives a double reply to this submission. First of all Article 52(b) only applies, it says, as regards dealings between the institution, the member of the auxiliary staff and the budgetary authority. Thus the applicant is not in a position to rely upon it. In the Commission's view the purpose of Article 52 is to deny to members of the auxiliary staff the right to be kept on in their posts beyond the period of one year; it does not, however, create any obligation on the part of the administration to put an end to the contract of employment when this period runs out. The interests of the service and the impossibility of turning instead to an official or a member of the temporary staff might lead the

institution to keep an auxiliary at his post after the expiry of the legal time-limit, rather than give employment to a new and less experienced auxiliary.

I appreciate the practical force of this argument based on expediency, but from the legal point of view it is not really convincing. Article 52 says that the *actual* period of employment shall not exceed one year, and this seems to me to exclude the possibility of the prolongation of employment beyond the prescribed time-limit. Furthermore admission to an internal competition presupposes that the person concerned is in the service of the institution at that time. Therefore it cannot be open to the institution to continue a person's employment irregularly when he no longer fulfils the conditions required for being an auxiliary, and then admit him, also irregularly, to a competition. Furthermore the other candidates may certainly be heard to say that this provision of Regulation No 31 like all other provisions relating to recruitment must be respected.

I think the defendant institution is on firmer ground when it draws attention to the fact that although the Committee of Chairmen took its decision on 20 February 1964, the written procedure asking for its approval of this appointment was initiated on 13 February, that is to say, before the expiry of the period of one year laid down in Article 52. I would go even further than the Commission because it seems to me that in order to decide whether a person fulfils the conditions required for taking part in a competition it is necessary to consider the position at the date when it is announced, not when the procedure terminates in an appointment. When Miss Kurz applied, the year in question was far from having run its course. I suggest that you reject this submission.

3. I suggest that you should give the same treatment to the last submission in the application according to which the 'choice of the Commission should have

stated the reasons on which it was based' in accordance with Article 25. It will be noted that although the submission is drafted in this way Miss Rauch agrees that the letter which she received told her that she had not been chosen and does not contest the decision contained in it, but the decision which involved the appointment of Miss Kurz.

Accordingly the decision explicitly contested referred, according to the administration, to the list of suitable candidates upon which the name of the candidate chosen appeared.

Besides, I do not think that the draftsmen in drawing up Regulation No 31 intended that Article 25, which deals with specific decisions adversely affecting officials, should extend to appointments consequent upon a competition. Your decision concerning promotions in the Raponi judgment can also be applied, and for the same reasons, to appointments. The appointing authority has a complete freedom of choice in selecting a candidate from the list of suitable persons. I do not see what a purely formal requirement to state reasons would provide in the way of an effective safeguard of the interests of either successful or unsuccessful candidates.

## II

The reply adds six new submissions to the three contained in the original application.

1. Two of these—the sixth and the ninth—based respectively on infringement of Article 1 of Annex II and of Article II of the Commission's Internal Regulations were expressly withdrawn at the hearing. The remainder are only admissible, having regard to Article 42 (2) of the Court's Rules of Procedure, if they are based on matters of law or of fact which have come to light in the course of the written procedure.

2. So far as the fifth submission is concerned this is very doubtful. In this submission Miss Rauch complains that the

defendant institution did not first adopt general provisions for giving effect to the competition procedure along the lines laid down in Article 110 of the Staff Regulations with which you are well familiar. The applicant knew at the time when she lodged her application that the Commission had not applied Article 110. At all events it was certainly not the written procedure which revealed to her the fact that the Commission had not so acted.

In any event supposing you were to take the view that the submission can properly be put forward I would suggest that you reject it for the reasons which I gave in Cases 12/64 and 29/64. The rules of the Staff Regulations concerning competitions do not give rise to difficulties of interpretation such as necessarily to call for general provisions for giving effect to them before they may be applied.

3. As regards the seventh submission regarding the conditions in which the competition was conducted the Commission also objects that it is not admissible. It was a competition based on qualifications. The Notice of Competition required candidates to have first, certain qualifications or certificates and vocational experience, and, secondly, knowledge of languages. It announced that the knowledge of languages and other knowledge required for carrying out the duties concerned would be investigated by means of an interview with the Selection Board. The applicant states that in fact the Selection Board carried out actual tests which it referred to as 'interviews'.

In support of her assertion the applicant mentions a certain number of questions which she says were put to her, either about Community legislation or about English political life. They thus transformed the competition into a competition on the basis of tests which she says was not organized in accordance with Annex III. Although it is not your task to substitute your own judgment for that

of the Selection Board, nevertheless you must, the applicant says, review the way in which it formed its decisions and you must be in a position to check whether the Selection Board asked the two candidates questions of equal difficulty, and whether it applied equal standards in assessing knowledge of languages in the two cases—which she disputes. But no-one was better placed than Miss Rauch to know, from the moment when she lodged her application, what the interview which she had had with the Selection Board consisted of, and whether the questions which were asked of her were of a nature such as to transform a competition on the basis of qualifications into a competition on the basis of tests or on both qualifications and tests. So this submission regarding the conditions in which the competition was carried out does not seem to me to be admissible.

If on the contrary it be thought that the information which she obtained during these proceedings from the minutes of the Selection Board's deliberations, including the marks given to each of the two candidates featuring on the list of suitable persons, constitutes such a fact which has 'come to light in the course of the written procedure', nevertheless I think the submission must be rejected. The assessment of the comparative merits of the candidates, which has not been proved to be based on inaccurate points of law or of fact, and the marks given to each of the candidates, come within the discretionary powers of the Selection Board.

4. However, it cannot be said that the fourth submission, to the effect that Miss Kurz applied after the expiry of the time-limit laid down in the Notice of Competition is also inadmissible. This strikes me as a rather difficult question both in law and in fact.

According to the terms of the Notice of Competition published on 16 August 1963, candidates were to deliver their applications to the Recruitment Division,

against the issue of a receipt, 'before 9 September 1963 at the latest'. Taken literally this wording would appear to mean that the time-limit expired on the evening of 8 September. However, it can be taken that this amounts to inaccurate drafting and that it must be read as meaning that the time-limit is 9 September, which is what the general note at the head of the whole list of competitions published in this issue of the bulletin says. A further point is that the applications were to be made on a special form signed by the employee.

What actually happened was as follows. On 9 September the Recruitment department recorded the receipt of a letter from the head of the London Information Office stating that Miss Kurz, who would certainly apply, was on holiday and that it had not been possible to get in touch with her in time. It further stated that pending her being able to fill in the form herself he was enclosing an application—obviously not signed by the person concerned. A file was opened and on 13 September Miss Kurz's confirmation arrived, stating that as she had been travelling on holiday in France with no fixed address she had not been able to get news about the announcement of the competition and of the conditions in time.

Miss Rauch emphasizes that the date 9 September is to be accepted only with caution because the administration has not produced the special register in which the applications are entered in numerical order. But does this register exist, and what provision states that it must be kept? Miss Rauch emphasizes in particular the fact that according to the special form the application must be signed by the applicant, which was not done in this case, at least not within the time-limit laid down in the Notice of Competition.

Legally and practically it is very important for this time-limit to be observed and it is binding on the administration

as well as on candidates. So I was at first tempted to accept the submission as well founded. Whatever the reasons may have been for which Miss Kurz was not able to send in her application herself in the form and within the time-limit laid down, it was for her to keep sufficiently in touch with her office during her holiday to guard against any eventuality.

On reflection such a solution seems to me to insist excessively upon formality if it be accepted that the deviation from the precise conditions as to form and time-limit was not in this case aimed at allowing the candidate some unfair advantage. I do not think it was. The letter from the head of the London Office carries a date which the applicant's counsel rightly calls 'an odd squiggle' and which I read as a six. It arrived at the recruitment office on the ninth, as is witnessed by the arrival date-stamp, and thus within the time-limit, and I do not see any reason for disputing the evidential value of this date-stamp. It is true that the letter is not from the candidate, but her head of department writes in her name, and presents himself as her agent. What is more, he is

right in his interpretation of her intentions because almost straight away Miss Kurz confirms that she is a candidate, this time in proper form. So I would advise you to find that in this case no breach of the rules laid down in the Vacancy Notice took place.

5. There remains one last submission based on the minutes of the meetings of the Selection Board and which is presented as follows: the Selection Board says that it took two criteria into account, namely knowledge of languages and vocational experience (shown as an aggregate out of ten marks), whereas it should have stated the marks obtained by each of the candidates for each of these two criteria.

But by virtue of Article 5 of Annex III, where the competition is on the basis of qualifications it is for the Selection Board to determine how candidates' qualifications are to be assessed. This is what the Selection Board did, and since there is no precise provision to the contrary, I do not think that there was anything to require it to mark linguistic and practical knowledge separately.

To my mind none of the submissions can in the last resort be accepted.

Therefore my opinion is :

- that Miss Rauch's appeal be rejected;
- and that each of the parties should bear its own costs, in accordance with Article 70 of the Rules of Procedure.