taken on the basis of the conditions laid down in the notice, inasmuch as only the decision applying them affects his legal position individually and enables him to ascertain with certainty how and to what extent his personal interests are affected. The principle applies equally where the conditions for admission set out in the notice leave no margin of discretion to the selection board and pose no problems of interpretation as regards their application, having regard to the circumstances of the case.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

16 September 1993 *

In Case T-60/92,

Muireann Noonan, a member of the auxiliary staff of the Court of Justice of the European Communities, residing in Luxembourg, represented by James O'Reilly, Senior Counsel, of the Bar of Ireland, with an address for service in Luxembourg at the office of René Diederich, Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by John Forman, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

in the matter of the admissibility, at the present stage of the proceedings, of the action for the annulment of the decision of the Selection Board for Competition COM/C/741 not to admit the applicant to the competition, notified to her on 9 June 1992,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: C. W. Bellamy, President, A. Saggio and C. P. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 4 May 1993,

gives the following

Judgment

Facts and procedure

1 Muireann Noonan, a member of the auxiliary staff of the Court of Justice of the European Communities, applied to take part in Open Competition COM/C/741, which was organized by the Commission of the European Communities in order to constitute a reserve of English-language typists (C5/C4) (OJ 1991 C 333A, p. 11, Annex A to the application).

2 By letter dated 9 June 1992 (Annex C to the application) she was informed of the Selection Board's decision to reject her application in accordance with point II (Eligibility for Admission to the Competition) B (Special Conditions) 2 (Certificates and Diplomas required) of the competition notice on the ground that she had completed a university course and obtained an honours degree in French and Italian literature at University College, Dublin.

3 The abovementioned provisions in the competition notice were worded as follows:

'The following are not eligible, under penalty of exclusion from the competition and/or subsequent disciplinary measures under the Staff Regulations:

(i) candidates with a degree or diploma qualifying them to enter an A or LA competition (see table attached to the Guide);

(ii) candidates who are in the final year of such a course.'

As regards degrees and diplomas awarded in Ireland, the abovementioned table attached to the Guide to Candidates Taking Part in Interinstitutional Competitions or in Open Competitions Organized by the Commission (hereinafter 'the Guide'), which was also published in OJ 1991 C 333A, just before the competition notice in question, required a university degree for admission to A and LA competitions.

4 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 21 August 1992, she sought the annulment of the abovementioned decision of the Selection Board, notified to her on 9 June 1992, not to admit her to the competition. She claimed, in essence, that barring graduates from C competitions was contrary to the Staff Regulations of Officials of the European Communities and incompatible with the general principle of equal treatment and the freedom to pursue trade or professional activities.

5 The Commission did not lodge a defence on the substance of the case, but raised an objection on the admissibility of the action; the objection was registered at the Registry of the Court of First Instance on 23 September 1992. The applicant lodged her observations on the objection of inadmissibility on 15 October 1992. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided, pursuant to Article 114(3) of the Rules of Procedure, to open the oral procedure, limited to consideration of that objection, without any preparatory inquiries. The oral procedure took place on 4 May 1993.

Forms of order sought by the parties

6 The *applicant* claims that the Court should:

— dismiss the defendant's objection of inadmissibility;

— or, in the alternative, make an order joining it to the substance of the action, and

— order the defendant to pay the costs of this step in the proceedings.

The *defendant* contends that the Court should:

— dismiss the action of the applicant as inadmissible;

— order the applicant to pay the costs of the action.

Pleas in law and arguments of the parties

7 In support of its objection of inadmissibility the Commission submits that an official may not, in support of proceedings brought against a decision of a selection board for a competition, put forward submissions based on an irregularity in the competition notice, when he has not challenged in good time the provisions of the notice which, in his view, adversely affect him. The Commission relies in particular on the judgment of the Court of First Instance in Case T-132/89 *Gallone* v *Council* [1990] ECR II-549, paragraph 20. It maintains that in this case the applicant did not lodge a complaint against the competition notice within three months of its publication, as required by Article 90 of the Staff Regulations.

In support of its argument the Commission emphasized during the oral procedure that the case fell under Article 179 of the EEC Treaty, and not Articles 173 and

184. In that context a competition notice was a general act capable of adversely affecting candidates, regardless of whether the competition was internal or open. The Commission concluded that it was necessary to distinguish between a plea based, as in this case, on the unlawfulness of a condition in the competition notice, which could be relied on only within the time-limit running from the date of publication of the notice, and a plea based on the wrong application of that condition, which was admissible in an application for the annulment of the individual decision applying the condition.

8 The applicant contends that the action is admissible. She first draws the Court's attention to the fact that she seeks the annulment not of the competition itself, but merely of the decision of the Selection Board not to admit her. Any candidate may challenge a selection board's final decision, which concerns him or her directly and individually, and at the same time contest the legality of all the procedural steps leading to that decision. She bases her argument on the approach taken by the Court in, *inter alia*, Case 34/65 *Alfieri* v *Parliament* ([1965] ECR 261, at p. 266) and explained in the following terms by Advocate General Gand in his Opinion in that case: 'Recruitment is a complex administrative operation. It consists of a necessary series of decisions: declaring that a competition will be held, allowing a candidate to enter for it, and going on to the final decision which is the appointment of an official. The persons concerned can without doubt bring complaints against each of these preliminary acts, in so far as they constitute actual administrative decisions, provided that they do so within the prescribed time-limit which starts to run from notification or publication, whichever is the case. But they do not have to do so. They can wait until the final decision against which they may plead the illegality of any one of the decisions contributing to it, even if the time-limit for contesting them directly has expired' (*idem*, at p. 270). The applicant cites to the same effect the judgments of the Court of Justice in *Ley* v *Commission* (Joined Cases 12/64 and 29/64 [1965] ECR 107, at p. 118), in *Rauch* v *Commission* (Case 16/64 [1965] ECR 135, at p. 143), in *Alvino and Others* v *Commission* (Joined Cases 18/64 and 19/64 [1965] ECR 789, at p. 797) and in *Costacurta* v *Commission* (Case 78/71 [1972] ECR 163).

9 Next, the applicant observes that the defendant's objection of inadmissibility is based entirely upon a line of case-law which began with the judgment of the Court of Justice in *Adams* v *Commission* (Case 294/84 [1986] ECR 977). She points out

that in his Opinions in *Gavanas* v *ESC and Council* (Case 307/85 [1987] ECR 2435 at pp. 2444, 2448 and 2449) and *Sergio and Others* v *Commission* (Cases 64/86, 71/86 to 73/86 and 78/86 [1988] ECR 1399, at pp. 1410 and 1417) Advocate General Lenz criticized the *Adams* case and proposed that the Court of Justice should return to its previous case-law.

10 In that context the applicant not only challenges the correctness of the approach adopted in *Adams*; during the oral procedure she also claimed that the facts in her case were in any event clearly distinguishable from those in *Adams*.

11 Her first submission in that regard is that the decision in *Adams* is unsatisfactory in two respects: in the first place it is based on the false premise, she claims, that the competition notice is directly challengeable, and in the second place the reasoning in the judgment, which refers to the principles of legal certainty, the protection of legitimate expectations and good administration, does not in any event stand up to scrutiny.

12 The first reason is that the competition notice in her case was not an act capable of adversely affecting her. She states that the mere submission of an application form cannot give an individual *locus standi* to bring proceedings against a competition notice, which is an act of general application of no direct and individual concern to candidates. The latter are in that respect in a similar position to that of tenderers with regard to an invitation to tender, who may challenge only the decision adopted on their tender and not the invitation to tender itself which determines in advance and objectively the rights and obligations of traders who wish to participate in the tender procedure. Only when an individual decision is communicated to the person concerned can he challenge, by means of an objection of illegality based on Article 184 of the EEC Treaty, the validity of previous measures which form the legal basis of the individual decision which is being contested, as the Court of Justice held in *Simmenthal* v *Commission* (Case 92/78 [1979] ECR 777, paragraph 39).

13 Secondly, the applicant maintains that the reasoning in the *Adams* judgment, which, in the defendant's view, further justifies holding the application inadmissible, is incorrect. The applicant first of all rejects the argument based on the principle of legal certainty. She criticizes what she sees as the inconsistency in refusing to allow a candidate to challenge the lawfulness of a competition notice at the end of the recruitment procedure while allowing him to rely, at that stage, on any unlawful act committed by the selection board, which also leads to legal uncertainty. In those circumstances, the applicant is of the opinion that the availability of an opportunity to challenge the legality of certain steps in a recruitment procedure before that procedure has been concluded does not impose an obligation to challenge them by a separate action at that stage. Moreover, it is difficult to understand how a claim solely for the annulment of an individual decision not to admit a candidate, the applicant herself in this case, to Competition COM/C/741, and not for the annulment of that competition in its entirety, could offend against the principle of legal certainty. Furthermore, the Commission's argument that the competition notice must be challenged within three months of its publication would make the notice virtually unchallengeable. The challenge would have to be made before or at the time of submitting the application form, which could jeopardize the chances of recruitment of the person concerned.

14 Nor does the principle of the protection of legitimate expectations, also referred to in the *Adams* judgment, justify the defendant's view. On the contrary, it follows from that principle that the applicant has a legitimate expectation that her application will be dealt with according to law. If her application has been unlawfully rejected, her legitimate expectation can therefore be protected only by a judgment on the substance of her action, which would not affect the legitimate expectations of other candidates because all the results and the appointments made in consequence of the competition would stand irrespective of the outcome of the action.

15 The applicant also maintains that by virtue of the principle of the protection of legitimate expectations she is entitled to expect that her application will be dealt with in accordance with the terms of the competition notice and the accompanying Guide. She points out that Section C (Competition Procedure) 3 of the Guide states under the heading 'Procedure after the submission of applications' that 'Candidates who feel that a mistake has been made regarding eligibility have 30 days from the date postmarked on the letter stating that they have been excluded from the competition in which to ask for their application to be reconsidered. The Selection Board will then reconsider the application and decide whether the complaint

is justified' (Annex A to the application, p. 5). In addition, point IV of the competition notice, entitled 'Reconsideration of Applications', states 'Any candidate who feels that a mistake has been made regarding eligibility may ask to have his/her application reconsidered. Within 30 calendar days of the date postmarked on the letter stating that he/she has been excluded from the competition, the candidate should send the letter quoting the number of the competition to the chairman of the Selection Board, care of the Recruitment Unit' (Annex A to the application, p. 12). The applicant concludes from this that, even assuming the defendant's view to be correct, the defendant is estopped, by virtue of the principle of the protection of legitimate expectations, from asserting that the present action is inadmissible, since both the competition notice and the accompanying Guide give candidates the impression that they have a remedy if they are not allowed to participate. In that respect, the applicant cites the judgment of the Court of Justice in *Mulder* v *Minister van Landbouw en Visserij* (Case 120/86 [1988] ECR 2321, paragraphs 21 and 26).

16 Finally, the applicant challenges the third reason given in the *Adams* judgment, relating to the principle of sound administration. She asserts that if, at the end of a selection procedure, no judicial remedy were available against defects in the competition notice, this would lead to a proliferation of premature actions brought by persons with no concrete interest in the outcome of the proceedings.

17 At the hearing the applicant also maintained that the *Adams* approach could not, in any event, be transposed to her case because, as she emphasized, the facts of the two cases are wholly distinguishable. In particular, she points out that *Adams* was concerned with an internal competition which covered by definition a more limited category of persons. In addition, the competition procedure in that case stretched over two-and-a-half years. In her case, however, the competition was an open competition, open *erga omnes*, and the decision not to admit her which she is challenging was communicated to her on 9 June 1992, less than four months after she had submitted her application, on 11 February 1992. The applicant also points out that in *Adams* the 53 applicants asked the Selection Board to reconsider its decision not to admit them to a subsequent stage of the competition and only three of them submitted a complaint within the time-limit. Consequently, the Court was ruling in that case principally on the issue — wholly unrelated to this case — of whether such a request may have the effect of extending procedural time-limits.

The Court's assessment

18 The Court must rule, at this stage in the proceedings, on the question whether the application challenging the decision of the Selection Board not to admit the applicant to Open Competition COM/C/741, in accordance with the conditions for admission set out in the competition notice, is admissible, when the notice was not challenged within the time-limit laid down in Articles 90 and 91 of the Staff Regulations, running from the day on which it was published.

19 A preliminary observation to be made is that the case falls under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and lies outside the scope of Article 173 of the Treaty, in particular as regards admissibility. It is therefore governed solely by the conditions set out in those provisions of the Staff Regulations, in particular as regards time-limits for bringing actions and the nature of the contested act, which must be one capable of adversely affecting the applicant.

20 The defendant has raised an objection of inadmissibility on the ground that the applicant, who holds an honours degree from University College, Dublin, failed to challenge in due time the contested provisions in the competition notice, which excluded *inter alia* candidates holding a university degree.

21 The Court considers that although the applicant was entitled to challenge directly within the appropriate time-limits the competition notice, which, by including conditions preventing her from participating, constituted a decision by the appointing authority adversely affecting her within the meaning of Articles 90 and 91 of the Staff Regulations (see *inter alia* the judgment of the Court of Justice in Case 79/74 *Küster* v *Parliament* [1975] ECR 725, paragraphs 5 to 8), she cannot thereby be barred from bringing this action against the individual decision not to admit her to the competition, on the ground that she failed to challenge the competition notice in due time.

22 The first paragraph of Article 5 in Annex III to the Staff Regulations states that the selection board shall draw up a list of candidates who meet the requirements set out in the competition notice. In this case (see point III, paragraph 2, of the competition notice) the Selection Board must determine, for each candidate, whether that candidate meets the special and/or specific conditions laid down in the notice and may therefore be admitted to the tests. In particular, it must ascertain whether the qualifications of each candidate satisfy the conditions specified in the notice (see point III, paragraph 3, of the notice). Each candidate must be informed by letter whether or not he has been admitted to the competition (see point III, paragraph 5, of the notice), and each candidate not admitted must be told why (see Section C, paragraph 3(d), of the Guide). A candidate refused admission may ask to have his application reconsidered (see point IV of the notice).

23 The Court takes the view that a candidate in a competition must not be deprived of the right to challenge all the elements, including those defined in the competition notice, comprising the justification for the individual decision concerning him taken on the basis of the conditions laid down in the notice, inasmuch as only the decision applying them affects his legal position individually and enables him to ascertain with certainty how and to what extent his personal interests are affected. The principle applies in the same terms where, as here, the conditions for admission set out in the notice leave no margin of discretion to the selection board and pose no problems of interpretation as regards their application, having regard to the circumstances of the case.

24 That approach emerges from the case-law of the Court of Justice, which has held admissible pleas based on the unlawfulness of a competition notice which was not challenged in due time, when those pleas concerned the statement of the reasons for the implementing decision which was being challenged. In particular, the Court held in *Simonella* v *Commission* (Case 164/87 [1988] ECR 3807, paragraph 19) that such a plea 'must be rejected in so far as it concerns [the unlawfulness of the notice itself], but must still be considered in so far as it concerns the reasons on which the contested decision is based'. Applying that principle, the Court decided to consider in that case the merits of the plea that the competition notice was unlawful in so far as it failed to indicate the marks to be allocated to qualifications and tests in the competition. That judgment is wholly in keeping with the line of decisions of the Court of Justice which commenced with *Adams* (cited above) and was refined in *Sergio* (cited above).

25 In *Adams* the Court stated in paragraph 17 of the judgment that candidates must challenge in good time the provisions of a competition notice which, in their view, adversely affected them because 'were it otherwise, it would be possible to challenge a competition notice long after it had been published and after most or all of the operations carried out in connection with the competition had already taken place, and that would be contrary to the principles of legal certainty, legitimate expectation and sound administration'. It is important to note that in that case, the pleas based on the unlawfulness of the competition notice, which were dismissed as inadmissible, were not argued by the applicants in relation to the statement of reasons for the decisions not to admit them to the tests, which were at issue in the application. Those decisions were in fact based on the Selection Board's assessment of the applicants' qualifications and experience. In that context, however, the applicants merely claimed, in essence, that the competition was intended to enable a reserve list to be drawn up for the recruitment to three kinds of post which were so different that it would be impossible to adopt a common standard for them in one and the same competition, and that the notice did not mention what marks were to be attributed to the qualifications and tests. As far as their complaints were concerned, however, the applicants did not challenge the lawfulness in substance of the criteria used and the marks awarded by the Selection Board.

26 In *Sergio*, cited above, the Court further defined the scope of the principle laid down in *Adams*, and stated expressly that 'failure to challenge a competition notice within the time-limit laid down does not prevent an applicant from relying on irregularities occurring in the course of the competition, even if the origin of those irregularities may be found in the wording of the competition notice' (paragraph 15). In that case the Court held that the written pleadings indicated, and the oral procedure had confirmed, that the pleas in question related only to the competition notice and must be dismissed because the notice had not been challenged in good time. Applying that case-law the Court held, as has already been mentioned above, in paragraphs 17 and 19 of the judgment in *Simonella* that the 'irregularities occurring in the course of the competition' referred to in *Sergio* were to be understood as irregularities 'vitiating the conduct of the competition itself', in so far as they concerned the reasons on which the contested decision was based (to the same effect see also Case 181/87 *Agazzi Leonard* v *Commission* [1988] ECR 3823, paragraph 24, and Case T-50/91 *De Persio* v *Commission* [1992] ECR II-2365, in which the Court of First Instance considered with regard to the substance of the case the lawfulness *vis-à-vis* the Staff Regulations of the individual decision rejecting the applicant's candidature on the ground that she did not meet the condition of

belonging to the same category, grade or career bracket as that of the vacant post, described in the competition notice).

27 It is not necessary to examine more closely the applicant's argument that the Court's judgment in *Adams* departed from previous case-law. It is clear from the analysis set out above that where a plea based on the alleged unlawfulness of the competition notice which was not challenged in due time concerns the statement of reasons for the contested individual decision, the Court has held that such a plea is admissible. In those specific conditions, the Court has therefore not departed from the approach which may be discerned in the case-law prior to *Adams* and which is set out in particular in *Alfieri* (cited above), in which it held that 'having regard to the close connection between the different measures comprising the recruitment procedure, it must be accepted that in an action contesting the latest steps in such a procedure the applicant may contest the legality of earlier steps which are closely linked to them' (second paragraph of the grounds of judgment), which was relied on by the applicant. It is clear from the judgment in *Adams*, construed in the light of the subsequent judgments of the Court cited above, that it is only where there is no close connection between the statement of reasons for the challenged decision and the plea at issue that the latter must be declared inadmissible, in accordance with the mandatory rules governing time-limits for bringing actions, which may not be derogated from in such a case as this without offending against the principle of legal certainty.

28 That being so, the defendant's argument at the hearing that the admissibility of the pleas concerning the unlawfulness of the competition notice and relating to the grounds for the individual decision not to admit the candidate must be considered in the light of the particular circumstances of the case cannot be accepted. In particular, it would be incompatible with the principle of legal certainty and the legal remedies which must be available to the candidates concerned to make the admissibility of such pleas subject to the requirement that there be ambiguity or uncertainty inherent in either the conditions set out in the notice or their application, having regard to the circumstances of the individual case. The use of such criteria would pose difficult problems for a candidate faced with the need to decide when to bring an action.

29 It follows that in this case the pleas based on the unlawfulness of the conditions for admission laid down in the competition notice must be declared admissible inasmuch as they concern the grounds for the contested decision. In this case the Court notes that there is such a connection between the pleas relied on by the applicant and the reasons given in the contested decision: the applicant seeks the

annulment of the refusal to admit her on the ground, essentially, that the refusal is based on a condition for admission laid down in the competition notice which by excluding candidates who hold university degrees breaches, in effect, the provisions of the Staff Regulations, the general principle of equal treatment and the principle of the freedom to pursue trade or professional activities.

30 Consequently, the objection of inadmissibility raised by the Commission must be dismissed.

Costs

31 Article 87(1) of the Rules of Procedure of the Court of First Instance provides that a decision as to costs shall be given in the final judgment or in the order which closes the proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The application is admissible in its entirety.

2. Costs are reserved.

Bellamy Saggio Briët

Delivered in open court in Luxembourg on 16 September 1993.

H. Jung C. W. Bellamy

Registrar President