

In Joined Cases 12 and 29/64

ERNEST LEY, an official of the Commission of the European Economic Community, represented and assisted by Marcel Slusny, Advocate of the Cour d'Appel, Brussels, lecturer at the University of Brussels, with an address for service in Luxembourg c/o Mrs Ley-Heinen, 27 avenue la de Gare,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the offices of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application concerning the procedure for recruitment followed by the Commission in order to fill the post which was the subject of Vacancy Notice No 403,

THE COURT (Second Chamber)

composed of: A. M. Donner, President of Chamber, W. Strauß and R. Monaco (Rapporteur), Judges,

Advocate-General: J. Gand

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts which form the basis of the present dispute may be summarized as follows:

By Vacancy Notice No 403 which appeared in EEC Commission Staff Information Bulletin No 16 of 29 October 1962, a vacant post in Grade A/3 (in

Division IV, A/2) was notified to the staff of the Commission.

Among the applications lodged was that of the applicant, a Principal Administrator (Grade A/4) with Directorate-General IV.

A 'notification of vacant posts at the Commission of the EEC' was published in the same Bulletin and read as follows:

'Servants who are not already established in a grade equal to or immediately below the grade corresponding to the post to be filled, together with auxiliary staff interested in the vacant post, are invited to apply in writing to the Directorate-General of Administration, without an application form or other documents, in a sealed envelope without identifying the sender. On the envelope, and below the address shall be written the following:

're: Vacancy Notice No . . .'

This number shall be followed by a capital B. The aim of this procedure is merely to ascertain whether there are candidates who would wish to participate in a competition internal to the institution (Staff Regulations, Article 29 (1) (b)) if the post cannot be filled by promotion or transfer. If no-one expresses an interest, a competition will not be held; if the reverse is the case, the procedure for competitions will be followed for this post, for which there will be a new vacancy notice.'

The applicant was 'established in the grade immediately below the corresponding grade for the post to be filled'.

At its meeting of 26 February 1964, the Commission decided not to fill the post in question by promotion (Staff Regulations, Article 29 (1) (a)). After considering whether to hold an internal competition (Article 29 (1) (b)), it further decided not to hold such a competition and thus to pass to the transfer procedure (Article 29 (1) (c)).

By letter of 9 March 1964, the applicant submitted a complaint to the Commission wherein:

- he demanded an explanation of the reasons for the Commission's decision not to promote him, despite his qualifications and merits;
- he stated that he considered that the Commission was not entitled to proceed with an internal competition if

it had decided not to fill the vacant post by promotion;

- he stated that he was informed that this post must be reserved for a person of Italian nationality.

The transfer procedure was carried out by Note No 3089/IX/64-1 of 13 March 1964.

On 6 April 1964 the applicant made Application 12/64. At the same time he made an application for the adoption of an interim measure, namely that the Commission should be ordered to suspend the recruitment in hand. This request was dismissed by order of the President of the Court of 4 May 1964, and the applicant was ordered to bear his own costs.

On 9 July 1964 the applicant lodged, in addition, Application 29/64 against the same decisions as were the subject of Application 12/64.

Considering that it could not accept any of the applications put forward for transfers, the Commission on 28 July 1964 decided not to fill the vacant post in the service by that procedure and to organize a general competition on the basis of qualifications and written tests, under Article 29 (1) of the Staff Regulations. The vacancy notice was published in the Official Journal of the European Communities of 10 October 1964. The applicant lodged his application for the post, at the same time submitting, on 17 December 1964, a complaint against the publication of that notice.

II—Conclusions of the parties

In the applications, the *applicant* claims that the Court should:

- '1. Declare null and void Vacancy Notice No 403, the 'notification of posts vacant with the Commission of the EEC' appearing at page 3 of EEC Commission Staff Information Bulletin No 16 of 29 October 1962

- and, if necessary, the decisions of the Commission which gave rise to those publications;
2. Declare null and void the deliberations of the Commission of 26 February 1964 whereby it was decided not to fill the post in question by promotion or transfer, and not to hold internal competitions but to solicit applications from officials in the other institutions of the three Communities;
 3. Rule that the Commission should be ordered to pay all the costs of the proceedings.'

In the replies he adds the following: 'Take official note that the applicant declares that he maintains the conclusions of his application, with the exception of (3) which should be supplemented to read as follows:

Order the Commission to pay the entire costs of Application 12/64R for the adoption of an interim order.

Alternatively:

1. In accordance with the second paragraph of Article 21 of the Protocol on the Statute of the Court of Justice of the EEC require the institutions not being parties to the case to state what interpretation they have until now given in practice to Article 29 (1) (a) and (b) and in particular whether:
 - (a) when there are applicants for transfer or promotion, they consider that *ipso facto* the latter should be taken into account for the internal competition;
 - (b) if, when they consider that they should not fill a post by transfer or promotion, they organize an internal competition, that is:
 - if candidates have put themselves forward for the procedure under Article 29 (1) (a);
 - in any circumstances.
2. Order the defendant to produce all the following documents:

- (a) the complete minutes of the 249th meeting of the Commission of the EEC;
- (b) the complete minutes of the 252nd meeting of the Commission;
- (c) that part of the minutes of the 263rd meeting of the Commission relating to the appointment of Mr Schlieder as Head of Division;
- (d) the special minutes of the 263rd meeting of the Commission;
- (e) the directives relating to the appointment of the Selection Board for the competition (Executive Secretariat S/01965/63);
- (f) the invitations addressed to Mr Ricciardi and Mr Rossignolo for the interviews of 12 and 13 August 1963; and all the documents relating to the financial conditions of their stay in Brussels;
- (g) the letters addressed on 24 March 1964 to professors in six Italian universities and to the Italian Treasury Minister soliciting candidates for the post in question.'

The *defendant* contends, in both cases, that the Court should:

- dismiss as inadmissible the application made by Mr Ley in so far as it is directed against Vacancy Notice No 403 and against the notification of posts vacant with the Commission of the EEC published in EEC Commission Staff Information Bulletin No 16 and to the extent that it contests the order of the Court in Application 12/64R for the adoption of an interim measure;
- dismiss Application 29/64 as inadmissible;
- declare that both applications are unfounded under all heads of claim;
- order the applicant to bear his own costs in accordance with the relevant provisions and in any even his costs in Case 29/64.

III—Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

With regard to Case 12/64

On admissibility

1. The *defendant* states that the application is inadmissible in so far as it is directed against Vacancy Notice No 403 and the 'notification' accompanying that notice. Since the appeal was introduced more than 17 months after the publication of the said notice and 'notification', it is not within the period laid down by Article 91 (2) of the Staff Regulations.

Moreover, the applicant has no direct and personal interest in contesting these measures, since they do not adversely affect him in this case. First, he has no right to have the post to be filled and is not unjustly excluded by the description of the functions and of the qualifications required as they appear in the disputed vacancy notice. Secondly, the contested 'notification' is not a decisive factor but merely contains instructions with regard to the conditions for lodging the application forms.

The *applicant* replies that, even accepting the argument, admitted by implication by the Court, that the vacancy notice in fact constitutes a decision, the question remains whether that measure must necessarily be contested immediately, or whether the party claiming to be injured by it may wait until the final stage of the recruitment procedure has arrived. The first solution exposes the institutions—in the case of administrative requests or complaints—and the Court—in the case of formal appeals—to endless chains of applications. On the other hand, the second is more realistic and indeed support may be found for it in the French Conseil d'Etat.

Having stated the above, the *applicant* affirms that he has a legal interest in taking proceedings in the present case. With regard to the contested vacancy notice, it forms part of a series of measures ending in his dismissal, so that he has an interest in requesting the annulment of the initial measure. Moreover, under the very terms of Articles 90 and 91 of the Staff Regulations, the staff are entitled to have legality respected in the application of those Regulations.

Moreover, the disputed 'notification' was such as to mislead officials so classified as to be eligible for promotion to the vacant post, since it induced them not to put forward their application for the internal competition. And it was precisely on the basis of the erroneous belief that there were no candidates for such a competition that the defendant decided not to proceed with one.

In the rejoinder, the *defendant* objects that, even if the vacancy notice and the disputed 'notification' must be considered as preliminary measures in a complex administrative operation, the final act of that operation would in this case be not the decision to commence the transfer procedure (Article 29 (1) (c) of the Staff Regulations), but the appointment of an official or the decision not to fill the disputed post.

With regard to the right of officials to have legality respected, it must be observed that this does not of itself constitute a condition of admissibility for introducing an appeal within the meaning of Article 91 of the Staff Regulations. The exercise of the right to legality is in fact limited by the condition imposed upon the applicant of having a direct and personal interest in disputing the legality of the contested measures.

2. The *defendant* maintains moreover that the submission of infringement of the Staff Regulations raised in the rejoinder is inadmissible because it has been raised out of time.

The *applicant* objects that what is here at issue is not a submission, but a new argument or the development of submissions already invoked in the application. This ground of complaint is really based on facts unknown to the applicant before lodging the statement of defence and its schedules and the production in the course of the proceedings of certain documents on the part of the Commission, since the information furnished by it initially was incomplete. In any event, it could have been raised by the Court of its own motion.

3. Finally the *defendant* states that the submission relating to the inaccuracy of the reasons on which the decisions of 26 February 1964 were based relates to an infringement of the law rather than to the infringement of an essential procedural requirement (Article 25 of the Staff Regulations) invoked in the application and that it should be dismissed as inadmissible in so far as it was explicitly mentioned for the first time in the reply.

On the substance of the case

First submission

This submission relates to *Vacancy Notice No 403* (and the 'notification' appended thereto).

The *applicant* maintains that the procedure of the vacancy notice and the recruitment procedure referred to in Articles 4 and 29 of the Staff Regulations are irregular in that they were not effected by general provisions adopted by the Commission in accordance with Article 110 of the Staff Regulations and notified to the staff. In this connexion he states that the said Articles 4 and 29 together with Article 30 and Annex III to the Staff Regulations are provisions insufficiently clear to suffice by themselves and concludes from this that the contested measures are null and void on the grounds of lack of competence, infringement of an essential

procedural requirement and infringement of the Treaty or of a rule of law relating to its application (for example, the Staff Regulations).

The *defendant* replies that the wording of the said provisions is sufficiently clear for them to be applied in the absence of the general provisions provided for in Article 110 of the Staff Regulations.

Second and third submissions

These submissions relate in particular to the 'notification' attached to Vacancy Notice No 403.

The *applicant* maintains that that 'notification' (together with the decision on which it is based) should be annulled on the same grounds as those invoked against Vacancy No 403. It is moreover vitiated on the ground of misuse of powers, since it prevented the officials concerned, such as the applicant, from putting forward their applications for the internal competition (and led the Commission to conclude that in this case there were no grounds for organizing this competition) since the Staff Regulations in no way preclude officials eligible for transfer or promotion from participating in such a competition.

The *defendant* replies that the contested notification does not adversely affect the right of officials eligible for promotion to participate in the internal competition. The sole aim of this notification was to make it easier for the Commission to consider whether to hold an internal competition, in case none of the candidates eligible for promotion or transfer was chosen. If following this consideration it had been decided to proceed with this competition, there would have been nothing to prevent the applicant from participating in it.

On the other hand, the officials eligible for promotion who apply for a post have no right that an internal competition should follow when their applications are not accepted within the

framework of promotion. Pursuant to Article 29 (1) (b) of the Staff Regulations, the appointing authority always remains free to consider whether to proceed with such a competition.

Fourth submission

This submission relates to the *decision of 26 February 1964*, that is: (a) not to promote the applicant; (b) not to proceed with an internal competition and, therefore, to commence the transfer procedure.

1. The *applicant* claims that these decisions are null and void because of misuse of powers on the ground that their aim is to confer the vacant post on a person of Italian nationality who is not even in the Community institutions. Such an aim is contrary to Articles 7, 27 and 45 of the Staff Regulations and the view propounded by the Court in *Lassalle v European Parliamentary Assembly*.

In this connexion, the *applicant* sets out a whole series of considerations relating to the situation on 26 February 1964 of Directorate-General IV and in particular of Directorate A, particularly from the point of view of geographical allocation (reply, pp. 6 to 10), and also to the chronological sequence of events relating to the dispute (reply, pp. 11 to 19), from which it emerges that the Commission's aim in the present case was to appoint an official of Italian nationality to the vacant post solely to satisfy a criterion of geographical allocation.

He states that it is open to him to prove misuse of powers and that this can emerge from circumstances foreign to the decision, and draws the attention of the Court to several facts which seem to him clearly established (reply, pp. 33 to 35).

2. In his reply, moreover, the *applicant* analyses the content of Article 29 (1) of the Staff Regulations, concluding therefrom that the contested decisions of 26 February 1964 are not only

vitiated by misuse of powers, but also involve an infringement of the Staff Regulations.

In the first place he disputes the interpretation given to this Article by the Commission. He states that he agrees in principle that the appointing authority has a discretion to consider promotion and transfer and that it may therefore, if it thinks fit, refrain from proceeding to that stage of recruitment, provided for in Article 29 (1) (a), naturally always subject to observance of the rules laid down by the Court on promotion, and provided that the decisions taken are not based on incorrect findings of fact, are not vitiated by misuse of powers and are guided solely by the interest of the service. But he disputes that the appointing authority can avail itself of the same power with regard to the following stage of recruitment, proceeding to an internal competition (Article 29 (1) (b)). This second stage is obligatory, as it provides for the appointment of a selection board (Article 30 of the Staff Regulations) and the officials have a very strong interest in being judged by a selection board composed of officials and including in particular a representative of the staff, whilst in the case of promotion they are judged exclusively by the appointing authority which often takes into account expediency and general policy (geographical allocation, for example).

He then states that the correct interpretation of Article 29 (1) of the Staff Regulations emerges from the following factors:

— *the spirit of the provision*, from which it appears that the system laid down by the Staff Regulations is one of internal preference which would be meaningless if the appointing authority could at its discretion decide to disregard not only the first stage of recruitment (transfer or promotion), but also the second (internal competition);

- *the interpretation given to the Staff Regulations by other institutions*, the stage of internal competition having always been respected by the Commission of the EAEC and by the High Authority of the ECSC.
- *the interpretation given to Article 29 by the defendant itself*, which emerges by implication from the last sentence of the disputed 'notification' appended to Vacancy Notice No 403.

The *defendant* replies as follows:

1. With regard to the *ground of complaint of misuse of powers*, the applicant's argument is without foundation, since the contested decisions are justified by reasons solely derived from the interest of the service. Attention to maintaining a geographical balance in the recruitment of staff is entirely legitimate when it coincides with the interest of the service and makes it possible to achieve the aim contained in Article 27 of the Staff Regulations. It becomes illegal when it renders the rôle of nationality the principal—or only—criterion of selection (cf. also the judgment of the Court in *Lassalle v European Parliamentary Assembly*).

The course of action followed by a Member of the Commission (Mr von der Groeben) and by Directorate-General IV in order to recruit an Italian official was strictly related to the original proposal put forward to the Commission, to recruit by means of the procedure in Article 29 (2). Since this proposal was not approved the said course of action became pointless and irrelevant to the present case.

Finally the defendant stresses that the practice with regard to the powers deduced by other institutions from Article 29 (1) of the Staff Regulations in no way binds the Commission, since that practice was determined to a very large extent by the particular circumstances relating to recruitment in each institution.

2. With regard to the *ground of complaint of infringement of the Staff Regulations*, the system of internal preference established by Article 29 (1) of the Staff Regulations renders it obligatory for the appointing authority, in considering the various means of recruitment, to have regard to the order of precedence established therefor, but it is not automatically bound by it. The administration thus maintains a discretion to appraise whether each of these means is, in a particular case, liable to result in the recruitment of an official 'of the highest standard of ability, efficiency and integrity' (first paragraph of Article 27 of the Staff Regulations).

In the present case, an internal competition would probably have produced only those candidates whose qualities the appointing authority had already appraised within the framework of Article 29 (1) (a).

Finally the defendant states its attitude to the claim for measures of inquiry put forward by the applicant. It explains that the documents have already been produced, pointing out that the note on the appointment of the Selection Board is appended as a schedule to the statement of defence in Case 19/64 and states the reasons for which it considers itself unable to produce the minutes of the 263rd meeting of the Commission (cf. rejoinder, p. 22 in connexion with the alternative conclusions of the application enumerated under 2).

Fifth submission

This submission relates to the *same decisions* as the preceding submission.

The *applicant* maintains that the statement of reasons for the decisions of the Commission of 26 February 1964 are insufficient or inaccurate.

In the first place they infringe Article 25 of the Staff Regulations in accordance with which any decision adversely affecting an official shall state the reasons on which it is based. The de-

cision not to fill the vacant post by means of promotion is a general decision affecting all the officials who lodged applications: in the circumstances it is irrelevant to invoke the case law of the Court in *Raponi v Commission of the EEC*. It is clear that the decision not to proceed with the internal competition adversely affects those officials who, like the applicant, would have lodged their applications for the competition, if it had not been for the limitation imposed by the 'notification' annexed to the vacancy notice.

But the statements of reasons for the disputed decisions are insufficient and inaccurate even apart from the provisions of Article 25 of the Staff Regulations. The first of these two decisions does not make clear that all the conditions provided for by Article 45 have in this case been fulfilled (thus, it is not clear that the Commission consulted the personal files of the candidates in order to consider their comparative merits). The second decision is based on factual inaccuracies since, *inter alia*, it proceeds from the assumption that no candidate wished to participate in the internal competition, whilst the officials who, like the applicant, wished to do so, were not permitted to lodge their applications.

The *defendant* objects that, since the contested decisions are general decisions, they are not obliged to give the *formal statement of reasons* prescribed by Article 25 of the Staff Regulations. That is obligatory only in the case of individual decisions adversely affecting the person to whom they are directed, whilst the impugned decisions relate solely to the organization of the recruitment procedure. The same holds good for the decision closing the stage of the procedure referred to in Article 29 (1) of the Staff Regulations.

With regard to the allegation that *inaccurate reasons* form the basis for the contested decisions, this ground of complaint relates to an infringement of law

rather than an infringement of Article 25 of the Staff Regulations. It is moreover without foundation.

With regard to the *decision not to fill the vacant post by means of promotion*, the consideration of comparative merits referred to in Article 45 is obligatory in the case of a positive decision to promote, but it has no purpose when, following an individual consideration of the applications, the administration decides not to proceed with promotion.

The said decision was adopted, moreover, on the basis of a scrupulous consideration of the applications made and on the basis of the numerous factors of which the Commission was informed or was already aware. Finally, reference to the personal files of the candidates does not constitute an indispensable procedural formality in the promotion procedure which must be complied with even when, as in the present case, it is shown to be pointless, since the Commission was already in possession of other information of established objectivity.

With regard to the *decision not to hold the internal competition*, no official, other than those who lodged their applications for promotion, showed any interest in the post in question. The Commission therefore considered it pointless to hold this competition, as it had grounds for believing that, within the framework of the internal competition, the appointing authority would only be faced with candidates on whom it had already expressed an opinion with regard to possible promotion.

With regard to the order in Application 12/64 R for the adoption of an interim measure.

The order in question, issued by the President of the Court on 4 May 1964, dismissed the applicant's claim for suspension of the recruitment procedure in progress and ordered the applicant to bear his own costs.

The *applicant* stresses in the reply in Case 12/64 that, pursuant to Article

86 (4) of the Rules of Procedure, the order of the President of the Court in an application for the adoption of an interim measure shall have only interim effect. Moreover, since, in the applicant's view, those Rules do not deal with the question of the costs relating to such applications, the said order ought to have reserved the costs. The Court is thus entitled to give a fresh ruling on this problem and to consider whether, in this case, the application for suspension made by the applicant was at this point plainly without foundation so that the costs could not go the same way as those in the original case. In this connexion it must be recalled that:

- for an application to be considered as well founded, it is necessary and sufficient, *inter alia*, that there should be a definite risk of injury, and not only of irreparable injury;
- that the suspension of operation of a decision must be ordered in all cases where, as in the present, continuing a procedure could lead the administration to create vested rights for third parties and consequently a situation which could only with difficulty be reversed;
- this last principle has been admitted by the President of the Court in his order in the application for the adoption of an interim measure in *Lassalle v European Parliamentary Assembly*.

The *defendant* replies that, pursuant to Article 86 (1) of the Rules of Procedure, no appeal shall lie from an order for suspension and other interim measures in applications for the adoption of such measures and the only consequence which may be deduced from Article 86 (4) is that such an order shall be without prejudice to the decision of the Court in the original case.

After referring to its observations lodged in the application for the adoption of

an interim measure with regard to whether the order is well founded, it states that the jurisdiction of the President of the Court to give a decision as to costs in an application for suspension is derived from the provisions of Article 69 (1) of the Rules of Procedure, since these provisions also cover instances where the Rules confer on the President of the Court the power of decision by means of an order.

With regard to Case 29/64

On admissibility

The *defendant* maintains that the present appeal is inadmissible, irrespective of any connexion it may have with the complaint of the applicant of 9 March 1964.

In this *latter case*, the inadmissibility of the appeal arises from the fact that it was filed after the expiration of the period of three months provided for by Article 91 of the Staff Regulations. On the expiration of this period, the legal action brought in Application 12/64 must be considered as definitively instituted and the defendant can only avail himself of rights acknowledged as his in that case. In other words, one of two things:

- either Application 29/64 only repeats, in its submissions, the submissions and arguments admissible within the framework of Application 12/64, and, in this case, it seems that they are pointless and irrelevant;

- or else Application 29/64 puts forward submissions which are inadmissible within the framework of Application 12/64, as they have been invoked out of time, and, in this case, they only relate to extricating the applicant from this bar.

In the *first case* the inadmissibility of the appeal arises:

— with regard to the vacancy notice and the disputed ‘notification’ from the fact that the complaint of 9 March 1964, after which the present appeal was introduced, does not relate to those measures;

— with regard to the decisions of 26 February 1964, from the fact that the implied rejection of the complaint of 9 March 1964 does not constitute a new decision in relation to those already contested in Application 12/64, but only confirms those decisions.

On the other hand, in the same disputed question, it is not possible to aggregate the period of three months with that of four months provided for in Article 91 of the Staff Regulations by taking advantage of a complaint submitted in the meantime.

The *applicant* begins by stating that he has filed the present appeal ‘as a precaution’, that is to say, to avoid being time-barred, in case the fresh arguments which he had to invoke in Case 12/64, on the basis of the documents produced by the defendant on 6 May 1964, and the factors contained in the statement of defence, were considered by the Court as fresh issues, invoked for the first time in the reply, and for this reason inadmissible.

Application 29/64 is admissible for the same reasons which justify the admissibility of Application 12/64.

The distinction between preparatory measures and measures having the nature of a decision as well as between measures having the nature of a decision which may be severed from the definitive measure and those in which this is not the case also plays a part within the framework of the present appeal.

Having stated this, the applicant explains that only the third and fourth submissions of Application 12/64 are concerned in the present application in the sense that the annulment of the

measures referred to by these submissions is now claimed not only on the ground of misuse of powers, but also on the grounds of lack of competence, infringement of an essential procedural requirement and infringement of the Staff Regulations, in particular Articles 4 and 29, for the reason that:

(a) *with regard to the disputed ‘notification’*, it is not required that an official who applies for promotion should necessarily apply for an internal competition, as the official is in any event taken into consideration for this competition;

(b) *with regard to the decisions of 26 February 1964*, the appointing authority is required to hold an internal competition and thus respect the successive stages of the recruitment and appointment procedure provided for by Article 29 of the Staff Regulations.

The applicant disputes moreover that the appeal is inadmissible for the reasons taken from the content of his complaint of 9 March 1964. That complaint does not follow the formal criteria of ordinary administrative appeals. As soon as the question of the application of Article 29 of the Staff Regulations was put, the Commission was obliged to consider the legality of the entire recruitment procedure followed in the case.

Moreover, an appeal to the Court in no way precludes the administration from giving a favourable reply to an administrative application relating to the same subject as that appeal. This is particularly to be noted in *Cohen v EEC* and *Oberthür v EEC*.

As to the substance of the case the applicant refers to the line of argument developed at pages 19 and 21 in the reply in Case 12/64, and stresses that it was only after reading the documents produced by the defendant after lodging the application in this case that the decision not to promote

him was shown not only to be vitiated on the ground of misuse of powers, but also as being contrary to the Staff Regulations and the principles laid down by the Court in *Rapponi v EEC*, *Bernusset v EEC* and *De Pascale v EEC*.

The *defendant* disputes—as a subsidiary matter in relation to the questions of admissibility—that the said submissions are well founded, and in this connexion invokes the arguments summarized above in relation to Case 12/64.

IV—Procedure

The procedure followed the normal course.

By order of 21 July 1964, the Second Chamber of the Court decided to join the two cases for the purposes of procedure and judgment.

Upon hearing the report of the Judge-*Rapporteur* and the opinion of the Advocate-General, the Second Chamber of the Court decided not to make any preparatory inquiry.

Grounds of judgment

With regard to Case 12/64

On admissibility

(1) The present application is directed *inter alia* against Vacancy Notice No 403 and the notification of posts vacant at the Commission published in the EEC Commission Staff Information Bulletin of 29 October 1962.

The *defendant* maintains that the application is out of time and must therefore be dismissed as inadmissible so far as it is directed against these measures.

Since the recruitment procedure comprises several interdependent measures, this objection would be tantamount to requiring persons concerned to bring as many actions as the number of acts adversely affecting them contained in the said procedure. Having regard to the close connexion between the different measures comprising the recruitment procedure, it must be accepted that in an action contesting later steps in such a procedure, the applicant may contest the legality of earlier steps which are closely linked to them.

The grounds of complaint invoked by the applicant against the disputed notice and notification may therefore be taken into consideration by the Court in its appraisal of the legality of the decisions of 26 February 1964 which constitute the main subject-matter of the application.

(2) In the reply, the applicant raises for the first time the submission of infringement of Article 29 (1) of the Staff Regulations in connexion with the decisions of 26 February 1964.

Under the terms of Article 38 (1) (c) of the Rules of Procedure, the application shall contain a brief statement of the grounds on which the application is based; Article 42 (2) of the same Rules forbids the raising of a fresh issue in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure.

In this case the defendant in its statement of defence put forward the argument that the appointing authority is, pursuant to Article 29 (1) (b) of the Staff Regulations, bound to consider whether to hold competitions internal to the institution, and in this connexion has a discretionary power of appraisal.

In support of his submission, the applicant puts forward the opposite argument, namely that the appointing authority is always bound to organize such a competition when the vacant posts cannot be filled through the recruitment procedure by means of promotion or transfer. It must therefore be concluded that the issue in question is based on matters of law which came to light in the course of the written procedure, and that it is admissible under Article 42 (2) of the Rules of Procedure.

On the substance of the case

With regard to the submission of misuse of powers

The applicant accuses the Commission of misuse of powers against him, in that in this case the recruitment procedure followed is only to be accounted for by the intention to engage an official of a given nationality for the vacant post.

In support of this ground of complaint he makes certain allegations and puts forward offers of proof.

The factors which he invokes are not such as to prove that the appointing authority had the aim alleged.

In fact it cannot be determined whether these allegations are well founded until the recruitment procedure is closed and the candidate chosen by the Commission is finally appointed.

The offers of proof submitted in this connexion are not capable of substantiating these allegations.

The present submission should therefore be rejected.

With regard to the submission of infringement of Articles 25 and 45 of the Staff Regulations

The applicant claims that the decisions of 26 February 1964 were based on incorrect grounds and infringe Article 25 of the Staff Regulations.

He also alleges that Article 45 of the Staff Regulations was infringed in that, prior to adopting the decision not to promote him to the vacant post, the Commission did not undertake a consideration of the comparative merits of each candidate, in accordance with the said Article, in particular by consulting their personal files.

In this case it is established that, having considered filling the vacant post by means of promotion, the Commission decided that there was no need for it to employ that means of recruitment.

Since any possibility of promotion was thus removed from the outset, Article 45 did not apply.

The applicant is wrong in considering that the decision not to fill the vacant post by means of promotion required a statement of reasons.

In fact, since such a statement of reasons is not required for decisions of promotion, it is all the less imperative for the outcome of a consideration of the question whether to adopt promotion.

The other decisions concerned have the aim moreover of following the recruitment procedure provided for in Article 29 of the Staff Regulations, and are only of an internal nature.

The provisions of the said Article 25 of the Staff Regulations are therefore not applicable in this case.

Since a statement of reasons for the contested decisions is not necessary in this case, the submission put forward must consequently be rejected.

With regard to the submission of infringement of Article 29 (1) of the Staff Regulations

The applicant maintains in addition that in deciding not to organize an internal competition the Commission infringed Article 29 (1) of the Staff Regulations.

In support of this ground of complaint he alleges that, although the said Article allows the appointing authority to consider whether the vacant posts should be filled by means of promotion or transfer, it renders obligatory, however, the holding of a competition internal to the institution, if no promotion or transfer can be decided upon.

This interpretation meets with the difficulty that Article 29 (1) (b), just like Article 29 (1) (a), only requires the said authority to consider 'whether' to adopt the measures in question.

The use of the term 'whether' clearly indicates that the appointing authority is not bound absolutely to adopt these said measures, but merely to consider in each case whether they are capable of resulting in the appointment of an official of the highest standard of ability, efficiency and integrity. In so considering, the appointing authority must take into account both the particular requirements of the post to be filled, viewed within the general framework of the departments, and the available officials.

The Commission was therefore not bound to hold an internal competition.

For these reasons, it must be concluded that the Commission has not in this case infringed Article 29 (1) of the Staff Regulations and that the present submission is therefore unfounded.

With regard to the conclusions against the order in Application 12/64 R for the adoption of an interim measure

In his order of 4 May 1964 the President of the Court ordered the applicant to bear the costs incurred by him in the application for the adoption of an interim measure.

The applicant requests the Court to give a new ruling on the question of costs. In this connexion he pleads that, under the terms of Article 86 (4) of the Rules of Procedure, an order in such an application shall only have an interim effect and that the costs should therefore be reserved.

This request is contrary to Article 86 (1) of the Rules of Procedure under the terms of which no appeal shall lie from an order in such an application.

These conclusions must therefore be dismissed as inadmissible.

With regard to Case 29/64

The applicant made the present application with the sole aim of raising an issue which, in Case 12/64, was raised for the first time in the reply and might thereby be considered inadmissible.

The two applications relate to the same decisions and contain the same conclusions.

The applicant himself describes his application as having been made 'as a precaution' or by way of amendment to the earlier application.

As the alleged issue was considered to be admissible within the context of Application 12/64, the present application has become pointless.

It must therefore be dismissed as inadmissible.

Costs

Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

However, under the terms of Article 70 of the same Rules, in proceedings by servants of the Communities institutions shall bear their own costs.

The applicant has failed in all his conclusions.

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 Article 179 of the Treaty establishing the European Economic Community;
Having regard to Articles 4, 25, 29, 45, 90 and 91 of the Staff Regulations;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69, 70 and 86 (1);

THE COURT (Second Chamber)

hereby:

1. Dismisses Application 12/64 as being unfounded;
2. Dismisses Application 29/64 as being inadmissible;
3. Dismisses the request for revision of the order made in Application 12/64 R for the adoption of an interim measure as inadmissible;
4. Orders the applicant to pay the costs of the actions, with the exception of 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
DELIVERED ON 4 FEBRUARY 1965¹

*Mr President,
Members of the Court,*

Applications 12 and 29/64 which have been brought before you by Mr Ley, a Principal Administrator with the Commission of the EEC, not only pose delicate problems of admissibility and procedure, but also require you to resolve the interpretation and application of various articles of the Staff Regulations of the EEC with regard to the detailed rules on recruitment and promotion.

Under the terms of Article 4 of these Regulations, vacant posts in an institution shall be notified to the Staff of that institution once the appointing authority decides that the vacancy is to be filled. To this end, Article 29 provides that that authority shall consider

whether to promote or to transfer staff, and whether to hold an internal competition, and also to consider requests for transfer by officials of other institutions. That Article also provides for open competitions which may take different forms, and even for recourse to be had to a recruitment procedure other than competition for the selection of officials in Grades A1 and A2 and in exceptional cases for posts requiring special qualifications.

All this emphasizes the fact that filling a vacant post is a complex operation which commences with the decision to fill the vacant post and ends with the decision appointing its new occupant. Within the bounds of this procedure are interposed the different steps which I have indicated, the various procedures employed to select the holder of the

1 - Translated from the French.