# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
27 June 2001 *

In Joined Cases T-164/99, T-37/00 and T-38/00,

**Alain Leroy**, former employee of the Economic Union of Belgium, the Netherlands and Luxembourg (Benelux) seconded to the Schengen Secretariat, residing in Grimbergen, Belgium,

**Yannick Chevalier-Delanoue**, official of the Council of the European Union, residing in Brussels, Belgium,

**Virginia Joaquim Matos**, residing in Montijo, Portugal,

represented by G. Vandersanden and L. Levi, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: French.

supported by

**Union syndicale-Bruxelles,** established in Brussels, represented by S. Parmesan, lawyer, with an address for service in Luxembourg,

intervener in Case T-164/99,

v

**Council of the European Union,** represented by M. Bauer and F. Anton, acting as Agents, and A. Bentley, Barrister,

defendant,

APPLICATION — in Case T-164/99 — for annulment of Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (OJ 1999 L 119, p. 49) and — in Cases T-37/00 and T-38/00 — for annulment of Decision 1999/307, of various decisions of the Council appointing other persons to posts within that institution, and of the implied decisions of the Council not to appoint the applicants to any of those posts, and for damages,

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

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2001,

gives the following

## Judgment

### Legal background

1 On 14 June 1985 and 19 June 1990 some Member States of the European Union signed agreements in Schengen on the gradual abolition of checks at common borders. Those agreements, as well as related agreements and the rules adopted on the basis of those agreements, are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice.

2 The Treaty amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C 340, p. 1), which

was signed in Amsterdam on 2 October 1997 and entered into force on 1 May 1999, includes a Protocol integrating the Schengen *acquis* into the framework of the European Union (OJ 1997 C 340, p. 93, 'the Protocol'). The Schengen *acquis* comprises the abovementioned agreements and rules, listed in the annex to the Protocol.

3 The first subparagraph of Article 2(1) and Article 7 of the Protocol read as follows:

'*Article 2*

1. From the date of entry into force of the Treaty of Amsterdam, the Schengen *acquis*, including the decisions of the Executive Committee established by the Schengen agreements which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, without prejudice to the provisions of paragraph 2 of this Article. From the same date, the Council will substitute itself for the said Executive Committee.

...

*Article 7*

The Council shall, acting by a qualified majority, adopt the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council.'

4 Pursuant to the latter provision, on 1 May 1999 the Council adopted Decision 1999/307/EC laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (OJ 1999 L 119, p. 49).

5 According to recitals 3 and 4 in the preamble to Decision 1999/307, 'the aim of this integration is to ensure that, when the Schengen *acquis* is integrated into the framework of the European Union, application and development of the provisions relating to the *acquis* continue in conditions which ensure they function properly', and 'the detailed arrangements for this integration should make it possible, on the one hand, to limit recruitment to the administrative needs arising for the General Secretariat of the Council from the new tasks it will have to perform and, on the other hand, to check the competence, efficiency and integrity of those recruited'. Recital 6 in the preamble states that the General Secretariat of the Council is thereby to be enabled to 'cope efficiently with the needs arising from integration of the Schengen *acquis* into the framework of the European Union'.

6 Articles 1 to 3 of Decision 1999/307 provide:

'*Article 1*

1. The aim of this Decision is to determine the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council.

2. For the purposes of this Decision, the Schengen Secretariat is defined as consisting of persons fulfilling the conditions laid down by Article [3(e)].

*Article 2*

By way of derogation from the Staff Regulations [of Officials of the European Communities] and subject to a check on compliance with the conditions specified in Article 3 of this Decision, the [appointing authority] within the meaning of Article 2 of the Staff Regulations may appoint to the General Secretariat of the Council the persons referred to in Article 1 of this Decision as probationer officials of the European Communities within the meaning of the Staff Regulations and allocate them to one of the posts included to that end in the staff complement of the General Secretariat of the Council for the 1999 financial year in the category, service, grade and step determined in accordance with the correlation table annexed hereto.

*Article 3*

The [appointing authority] may make the appointments provided for in Article 2 after checking that the persons concerned:

(a) are nationals of one of the Member States;

(b) have fulfilled any obligations concerning statutory military service;

(c) produce the necessary character references for the performance of their duties;

(d) are physically fit to perform such duties;

(e) provide the supporting documents proving that:

(i) they were employed at the Schengen Secretariat on 2 October 1997 either as a member of the Benelux College of Secretaries-General incorporated into the Schengen Secretariat, or as a member of staff having an employment contract with the Benelux Economic Union, or as a statutory member of staff of the Benelux Secretariat incorporated into the Schengen Secretariat and were actually performing duties there,

(ii) they were still employed at the Schengen Secretariat on 1 May 1999, and

(iii) they were actually performing duties at the Schengen Secretariat on the dates referred to in (i) and (ii), involved in applying and developing the Schengen *acquis*, assisting the Presidency and delegations, managing financial and budget matters, translating and/or interpreting, documentation or secretarial work, with the exception of technical or administrative backup duties;

(f) provide all supporting or other documents, diplomas, qualifications or certificates proving that they have the level of qualification or experience required to perform the duties in the category or service into which they are to be integrated.'

7 Article 5 of Decision 1999/307 states that it is to 'enter into force on the date of its adoption' and 'apply as from 1 May 1999'.

8 Article 6 states that it 'is addressed to the Secretary-General of the Council'.

## Facts

*Case T-164/99*

9 Mr Leroy worked in the Schengen Secretariat as a translator from 12 February to 9 June 1996 under a fixed-term contract. From 10 June 1996 to 30 March 1998 he was then employed as a translator in that secretariat on several occasions on a freelance basis. Finally, from 1 April 1998 to 30 April 1999, he worked in the

secretariat as a translator and terminologist under a contract of indefinite duration concluded with the Benelux Economic Union.

10 That contract contained the following provision, in clause 6:

'The present recruitment may not be regarded as an entitlement to employment — but nor is it excluded — in the European Union in the framework of the integration of the General Secretariat.'

11 The applicant, concerned about the risk of not being integrated into the General Secretariat of the Council, addressed several letters to that institution early in 1999, setting out his personal situation, in view of the forthcoming application of Article 7 of the Protocol. He drew attention to the fact that although he had not been a contractual member of the staff of the Schengen Secretariat on 2 October 1997, he had carried out translation work for the secretariat on a freelance basis throughout the reference period envisaged for the purposes of integration.

12 In reply to those letters, the applicant was informed that the date of 2 October 1997 was of essential importance for the determination of the persons who might be entitled to apply for a post in the General Secretariat of the Council.

13 The applicant's contract of employment was subsequently terminated with effect from 30 April 1999, and he was not among those integrated into the General Secretariat of the Council.

*Case T-37/00*

14 Mr Chevalier-Delanoue has been a translator in the French division of the language service of the Directorate for Translation and Document Production of DG A of the Council ('the language service') since 1993.

15 From 1 January 1998 he was eligible for promotion to grade LA 5. On that basis, he was on the list of officials with the necessary seniority on 1 October 1998. However, he was not placed on the list of officials recommended for promotion in respect of 1998.

16 Following the entry into force of Decision 1999/307, Ms R., a former member of staff of the Schengen Secretariat, was appointed pursuant to that decision to a post in grade LA 5 in the French division of the language service.

17 The applicant considers that, by taking that recruitment decision, the appointing authority necessarily took an implied decision not to promote him on that date to that post in grade LA 5, which had been released under the budget.

18 On 28 July 1999 he brought a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'). The complaint was rejected by decision of 22 November 1999, notified to the applicant on 26 November 1999.

19 In December 1999 the applicant was promoted to grade LA 5 with retroactive effect from 1 August 1999.

*Case T-38/00*

20 Ms Joaquim Matos was successful in a competition organised by the Council in 1996 for the constitution of a reserve for recruitment of translators of Portuguese mother tongue. By the date on which her application to the Court was lodged, she had not yet received an offer of recruitment from the Council. The reserve list was still effective and the applicant was in third place on it.

21 Following the entry into force of Decision 1999/307, four former members of staff of the Schengen Secretariat were appointed to posts in grade LA 7 in the Portuguese division of the language service.

22 The applicant considers that, by taking that recruitment decision with effect from 1 May 1999, the appointing authority necessarily took an implied decision not to appoint her to one of those posts, which had been released under the budget.

23 On 28 July 1999 she brought a complaint under Article 90(2) of the Staff Regulations. The complaint was rejected by decision of 22 November 1999, notified to the applicant on 26 November 1999.

## Procedure

24 By applications lodged at the Registry of the Court of First Instance on 9 July 1999 (Case T-164/99) and 24 February 2000 (Cases T-37/00 and T-38/00), the applicants brought the present actions.

25 By separate documents lodged at the Registry on 22 September 1999 and 26 April 2000, the Council raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance in each of those cases.

26 On 22 November 1999, 30 May 2000 and 13 June 2000, the applicants submitted observations on those pleas.

27 By order of 22 November 1999, the President of the Second Chamber of the Court of First Instance gave Union syndicale-Bruxelles leave to intervene in support of the form of order sought by the applicant in Case T-164/99.

28 On 25 January 2000 the intervener submitted observations on the plea of inadmissibility in Case T-164/99.

29 By orders of 9 March and 26 June 2000, the Court of First Instance (Second Chamber) joined the pleas of inadmissibility raised by the Council to the substance.

30 By order of 4 August 2000, the President of the Second Chamber of the Court of First Instance joined Cases T-164/99, T-37/00 and T-38/00 for the purposes of the further written procedure, the oral procedure and the judgment.

31 By letter of 11 September 2000, the intervener stated that it would not submit a statement in intervention.

32 In Cases T-37/00 and T-38/00, the Council decided not to submit a rejoinder.

33 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

34 The parties presented argument and answered the questions put by the Court at the hearing on 7 March 2001.

## Forms of order sought by the parties

35 In Case T-164/99, the applicant claims that the Court should:

— annul Decision 1999/307;

— order the Council to pay the costs.

36 The intervener supports the form of order sought by the applicant.

37 In Case T-37/00, the applicant claims that the Court should:

— annul Decision 1999/307;

— annul the decision to appoint Ms R. to a post in grade LA 5 in the French division of the language service;

— annul the consequent implied decision not to appoint him to such a post;

— order the Council to draw all the legal consequences necessary to restore his rights;

— in the alternative, order the Council to make good the pecuniary and non-pecuniary damage suffered, assessed provisionally at EUR 1, together with interest for late payment from 1 May 1999;

— order the Council to pay the costs.

38 In Case T-38/00, the applicant claims that the Court should:

— annul Decision 1999/307;

— annul the decision to appoint Mr D.S.S., Ms R.C.d.S., Ms R.G. and Ms G.L. to four posts in grade LA 7 in the Portuguese division of the language service;

— annul the consequent implied decisions not to appoint her to such a post;

— order the Council to draw all the legal consequences necessary to restore her rights;

— in the alternative, order the Council to make good the pecuniary and non-pecuniary damage suffered, assessed provisionally at EUR 1, together with interest for late payment from 1 May 1999;

— order the Council to pay the costs.

39 The Council contends that the Court should:

— dismiss the actions as inadmissible or unfounded;

— order the applicants to pay the costs.

## Admissibility

40 The present actions were brought, in Case T-164/99, on the basis of Article 230 EC and, in Cases T-37/00 and T-38/00, on the basis of Articles 90 and 91 of the Staff Regulations. The applicants seek, first of all, the annulment of Decision 1999/307. Further, in Cases T-37/00 and T-38/00, it is argued that the decisions appointing former members of staff of the Schengen Secretariat to posts in the language service and the implied decisions not to appoint the applicants to those posts are measures implementing Decision 1999/307. All the applicants submit that the question of the admissibility of their actions is closely linked to the consideration of the substance of the actions. They state that Decision 1999/307 affects them individually in that, pursuant to that decision, they were unable to benefit from the integration procedure (Case T-164/99) or from a proper procedure for filling the posts in question (Cases T-37/00 and T-38/00). In their view, this derives from the fact that Decision 1999/307 was taken in breach of the mandatory provisions of the Staff Regulations on the recruitment of officials and of Article 7 of the Protocol. They also submit that the Council introduced an arbitrary criterion in that decision. Finally, they claim that if their actions succeed the Council will have to take new measures in order to eliminate the consequences of the illegality thus found.

41 The Council, on the other hand, claims that the applications are inadmissible on the ground that Decision 1999/307, whose scope does not extend to the situation of the applicants, is not of individual concern to them within the meaning of the fourth paragraph of Article 230 EC (Case T-164/99) and does not constitute an act adversely affecting them within the meaning of Articles 90 and 91 of the Staff Regulations (Cases T-37/00 and T-38/00).

42 The question of the admissibility of the actions proves to be closely linked to the examination of their substance, so that it is necessary first to consider the substance.

## Substance

43 In support of their claim for annulment, the applicants raise several pleas, some of which overlap. All the applicants assert that Decision 1999/307 is unlawful principally on the grounds, first, that it was adopted in breach of Article 7 of the Protocol, certain provisions of the Staff Regulations, the hierarchy of legal rules and the principle of non-discrimination, and, second, that it is vitiated by an error of law.

44 In the alternative, the applicants in Cases T-37/00 and T-38/00 allege breach of the second subparagraph of Article 24(1) of the Treaty establishing a single Council and a single Commission of the European Communities ('the Merger Treaty') — now Article 283 EC —, Article 10 of the Staff Regulations and essential procedural requirements. In those cases, it is further submitted that the decisions appointing five former members of staff of the Schengen Secretariat to posts in the language service and the decisions not to appoint the applicants to the posts in question are unlawful on the grounds of breach of the principles of protection of legitimate expectations, regard for the interests of officials, and sound management and good administration.

45 In Case T-164/99, the intervener raises two additional pleas, breach of the second subparagraph of Article 24(1) of the Merger Treaty, and lack of a legal basis for Decision 1999/307.

46 It appears convenient to group these pleas and start by considering together those alleging breach of Article 7 of the Protocol, Article 24 of the Merger Treaty, Articles 7, 10, 27 and 29 of the Staff Regulations, the principle of the hierarchy of legal rules, and essential procedural requirements.

*The pleas of breach of Article 7 of the Protocol, Article 24 of the Merger Treaty, Articles 7, 10, 27 and 29 of the Staff Regulations, the principle of the hierarchy of legal rules, and essential procedural requirements*

Arguments of the parties

47 The applicants argue that the Council cannot rely on Article 7 of the Protocol as justification for Decision 1999/307. While that provision requires it to integrate the Schengen Secretariat into its own General Secretariat, the Council should, when laying down 'the detailed arrangements for the integration', have chosen the most appropriate means. Furthermore, the wording of Article 7 does not refer expressly to the recruitment of the staff of the Schengen Secretariat, but concerns the integration of the functions of that secretariat as a body.

48 According to the applicants, Article 7 of the Protocol clearly could not authorise the Council to lay down detailed arrangements for integration which infringed

the recruitment provisions of the Staff Regulations and general principles of law. Article 7 of the Protocol thus derogates from the general law, namely Article 24(1) of the Merger Treaty, only from the procedural point of view: the Council can act without a proposal from the Commission and without consulting the other institutions, a reflection of the urgency and the exceptional nature of the situation.

49 The applicants deduce that, if the institutions are given new tasks to perform, they may recruit additional staff only within the framework of the Staff Regulations or the Conditions of Employment of other servants of the European Communities. While agreeing that the staff of the Schengen Secretariat were in principle the best qualified to carry out identical or equivalent functions within the General Secretariat of the Council, the applicants submit that under Article 7 of the Protocol the Council was merely to give particular attention to those staff.

50 As to the tasks entrusted by the Council to the five former members of staff of the Schengen Secretariat whose appointment is at issue in Cases T-37/00 and T-38/00, the applicants in those two cases say that these are not specific tasks linked to the Schengen *acquis* for which specific experience was required. Their tasks are of the same kind as those of all the translators in the French and Portuguese divisions of the language service. Consequently, contrary to what is stated in recitals 4 and 6 in the preamble to Decision 1999/307, that decision did not integrate the tasks performed by the staff of the Schengen Secretariat.

51 From the point of view of the hierarchy of legal rules, the applicants observe that the Protocol does not amend the Community Treaties but applies them. With respect to the comparison of the legal status of Decision 1999/307 with that of the regulation enacting the Staff Regulations, adopted pursuant to Article 24 of the Merger Treaty, the applicants emphasise that the decision is internal by nature, since it is addressed to the Secretary-General of the Council. Such a

decision must not in any way be contrary to the provisions in the nature of a regulation laid down by the Staff Regulations concerning external recruitment. Unlike such a decision, the Staff Regulations were adopted in the form of a regulation, that is, a mandatory act of general application creating rights for officials.

52 The applicants state that the fundamental and exclusive rule on access to the Community public service — subject to the exceptions provided for in Article 29(2) of the Staff Regulations, which may not validly be relied on in the present case — is recruitment by competition. Consequently, even though the Council was authorised to act urgently and in accordance with an exceptional procedure, it should first have identified the posts necessary for ensuring continuity of the activities connected with the Schengen *acquis* and then recruited persons belonging to the Schengen Secretariat by competition. It would thus have been perfectly possible for the Council to comply with both the requirement of integration under Article 7 of the Protocol and the recruitment procedure in accordance with the Staff Regulations.

53 Moreover, only a competition answers the purposes of Article 27 of the Staff Regulations, the keystone as regards recruitment within the Community institutions, under which recruitment is to be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis. In the absence of valid derogating rules introduced by Decision 1999/307, both Article 27 and Article 29 of the Staff Regulations were disregarded by the Council.

54 In Case T-164/99, the intervener submits that Article 2 of the Protocol lays down a specific system of adoption by unanimity of the measures necessary for the application of the Schengen *acquis* to the thirteen Member States mentioned in Article 1 only. By contrast, the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council are, under Article 7 of the Protocol, expressly excluded from that specific system, as it provides that the detailed arrangements are to be adopted by a qualified majority

of all the Member States. The Council cannot therefore claim that Article 7 authorises it to derogate from the requirements of the second subparagraph of Article 24(1) of the Merger Treaty.

55 Finally, in Cases T-37/00 and T-38/00, the applicants submit that the failure to organise a competition prior to appointing the five former members of staff of the Schengen Secretariat meant that the Council was unable to ensure the recruitment of officials with the qualities specified in Article 27 of the Staff Regulations. Yet the interest of the service, enshrined in Article 7 of the Staff Regulations, requires that only persons who possess those qualities be appointed. The recruitment of the five former staff members in question therefore disregards the interest of the service.

56 The applicants argue, in the alternative, that it may well be asked whether Decision 1999/307, whose legal status is inferior to that of the Staff Regulations, entails amendments to those regulations. Amendments to the Staff Regulations are subject, however, to the procedure under Article 24 of the Merger Treaty, which was not complied with in this case. Moreover, under Article 10 of the Staff Regulations, the Staff Regulations Committee had to be consulted. That provision was not complied with either. More generally, the Council thus disregarded essential procedural requirements.

57 The Council replies that the intention of Article 7 of the Protocol is precisely to confer on it power to adopt an autonomous recruitment scheme, distinct from the provisions of the Staff Regulations. Moreover, that article is a provision of primary law which has equal ranking in the hierarchy of legal rules to Article 24 of the Merger Treaty and is superior to the Staff Regulations. In so far as the applicants allege breach of the Staff Regulations, the Council therefore considers that the complaint is unfounded, since in Decision 1999/307 it set up an exceptional system which came under a provision of primary law. Finally, there is

no 'fundamental rule' superior to the Staff Regulations which prescribes that the only method of access to the public service is by competition.

Findings of the Court

58 It should be noted, to begin with, that the Protocol is annexed to the Treaty establishing the European Community and, as is apparent from the Final Act of the Treaty of Amsterdam (OJ 1997 C 340, p. 115), was adopted by the fifteen Member States. By virtue of Article 311 EC, the Protocol is therefore an integral part of the EC Treaty. Consequently, it has the same legal status as that Treaty (see, to that effect, Joined Cases T-7/98, T-208/98 and T-109/99 *De Nicola* v *EIB* [2001] ECR-SC I-A-49 and II-185, paragraph 90) and contains provisions of primary law.

59 It must also be pointed out that the first subparagraph of Article 2(1) of the Protocol provides for the integration of the Schengen *acquis* into the framework of the European Union from the date of entry into force of the Treaty of Amsterdam, and the substitution on that date of the Council for the Executive Committee established by the Schengen agreements. The integration of the relevant instruments and the designation of the body responsible for the management of the Schengen *acquis* were thus already brought about by that provision.

60 In those circumstances, nothing prevents Article 7 of the Protocol, under which the Council is to 'adopt the detailed arrangements for the integration of the Schengen Secretariat' into its own General Secretariat, from being interpreted by the Council as authorising it and — bearing in mind that it already had the right,

under Article 21 of its Rules of Procedure in the version in force at the material time (OJ 1993 L 304, p. 1), to organise the General Secretariat itself as regards both tasks and staff — even obliging it to integrate the staff of the former Schengen Secretariat.

61 As regards the detailed arrangements for this integration, the Protocol, which has the status of primary law, did not require the Council to follow a particular procedure. Contrary to the applicants' argument, no other provision of primary law imposed such an obligation on it. In particular, the second subparagraph of Article 24(1) of the Merger Treaty, relied on by the applicants, far from itself establishing a recruitment system of general application, does no more than empower the Council to adopt the Staff Regulations and the Conditions of Employment, without laying down guiding rules or principles for that purpose.

62 The Council was therefore authorised, under Article 7 of the Protocol, to establish a recruitment scheme independent of the provisions of the Staff Regulations and the Conditions of Employment for the purposes of integrating the former members of staff of the Schengen Secretariat, in order to ensure continuity of application of the Schengen *acquis* within its own General Secretariat. Moreover, it is settled case-law (Case C-249/87 *Mulfinger and Others* v *Commission* [1989] ECR 4127, paragraph 10 and the cases cited there) that the Staff Regulations and the Conditions of Employment do not constitute an exhaustive body of rules prohibiting the employment of persons otherwise than within the framework of those rules.

63 So, while the Council was free to choose one of the possibilities for recruitment available under the Staff Regulations and the Conditions of Employment instead of adopting Decision 1999/307, neither the principles alleged by the applicants — in particular the principle that access to the Community public service is reserved to persons successful in open competitions — nor Articles 7, 27 and 29

of the Staff Regulations can affect the lawfulness of that decision. Those principles and articles have the same status in the hierarchy of legal rules as the contested decision, namely that of secondary law.

64 Furthermore, since Article 7 of the Protocol confers powers on the Council which are distinct from those provided for in the second subparagraph of Article 24(1) of the Merger Treaty for the purposes of the integration in question, and since Article 2 of Decision 1999/307 expressly states that its provisions are 'by way of derogation from the Staff Regulations', the latter cannot in any way have been amended by that decision. It follows that the provisions regulating such amendment, in particular Article 10 of the Staff Regulations, were not infringed.

65 That conclusion is not affected by the fact that the Staff Regulations and the Conditions of Employment are in the nature of regulations, while the act challenged in the present case is classed as a decision. It must be noted that it is not a decision of a purely internal or individual nature, but an act *sui generis* which, although addressed to a single addressee, the Secretary-General of the Council, nevertheless determines objectively and generally the class of persons eligible for integration into the General Secretariat of the Council, and *a contrario* the class of persons definitively excluded from eligibility for integration. Moreover, by providing that the detailed arrangements for integration actually adopted derogate from the Staff Regulations, whose system of recruitment is undeniably of a legislative character, Decision 1999/307 establishes a system distinct from that of the Staff Regulations, of the same character, which the appointing authority of the Council is responsible for implementing.

66 Nor can the fact that the Council assigned some of the former members of staff of the Schengen Secretariat who were integrated into its General Secretariat not to functions connected with the Schengen *acquis* but to general tasks cast doubt on the lawfulness of Decision 1999/307. First, those individual measures, which are part of the internal organisation of the service, occurred after the adoption of the decision. Second, after its integration into the General Secretariat of the Council, the Schengen Secretariat ceased to be a separate body. There was thus nothing to prevent any of the persons integrated into the staff of the Council from being

given general tasks, provided that realisation of the objective of coping efficiently with the needs arising from integration of the Schengen *acquis* (sixth recital in the preamble to Decision 1999/307) is not jeopardised. Nothing in the case-file permits the conclusion that there was such a risk.

67 For the reasons set out above, the argument put forward by the intervener in Case T-164/99 (see paragraph 54 above) must also be rejected. It suffices to observe that the Protocol has the same legal status as the Merger Treaty, so that Article 7 of the Protocol allowed the Council to establish an autonomous system of recruitment, independently of the Staff Regulations and the Conditions of Employment and outside the scope of the second subparagraph of Article 24(1) of the Merger Treaty.

68 Consequently, the pleas of breach of Article 7 of the Protocol, Article 24 of the Merger Treaty, Articles 7, 10, 27 and 29 of the Staff Regulations, the principle of the hierarchy of legal rules, and essential procedural requirements must be rejected.

*The plea of error of law*

Arguments of the parties

69 By this plea the applicants allege that there was no objective justification for the choice of 2 October 1997 as the date to be used for determining the persons working in the Schengen Secretariat eligible for integration into the General Secretariat of the Council. The date was purely arbitrary and bore no relation whatsoever to the criterion which should have been used, namely the examination of the qualifications and skills of the staff concerned. The date,

that of the signature of the Treaty of Amsterdam, produced no legal effect either as regards the Council or as regards the 'Schengen authorities'; it merely obliged the Member States to carry out the necessary ratifications for the Treaty of Amsterdam to enter into force. The only relevant date was that of the entry into force of the Treaty of Amsterdam, 1 May 1999. According to the applicants, the persons working in the Schengen Secretariat who could be integrated — in accordance with detailed arrangements which necessarily had to comply with the principle of recruitment by competition — into the General Secretariat of the Council should have been identified at that date.

70 In Case T-164/99, the applicant asserts that the arbitrariness of the date of 2 October 1997 is particularly obvious in his case, because he worked in the Schengen Secretariat from February 1996. He was employed there as a freelance translator at the end of 1997 and then under a contract of indefinite duration from 1 April 1998. He could therefore claim more experience than some of the members of staff of the Schengen Secretariat who were recruited on the basis of Decision 1999/307.

71 He also puts forward a second complaint, that of breach of his contract of employment. Referring to clause 6 of that contract (see paragraph 10 above), he claims that he could legitimately expect to be integrated into the General Secretariat of the Council, had the criteria chosen not been the artificial and unlawful ones used in Decision 1999/307 and had a competition been organised. That clause in the applicant's contract had not been revoked or amended by his employer, the 'Schengen authorities'. Since Decision 1999/307 emanated from a third party, as regards the contract in question, it could not change the content of the contract.

72 In the reply, the applicant qualified this second complaint by submitting that clause 6 of his contract of employment must be interpreted as meaning that it was not permissible for all possibility of subsequent recruitment by the Council to be excluded. By failing to organise a competition and by choosing 2 October 1997

as the reference date, however, the Council prevented him from being included in the integration procedure.

73 According to the Council, the fact of having been employed in the Schengen Secretariat on 2 October 1997 is an objective criterion which ensures that persons eligible for integration have a certain experience. In so far as the applicant in Case T-164/99 complains that it breached his contract of employment, the Council points out that it was not a party to that contract. There was therefore no act by the Council which could have given rise to any hope in the applicant's mind as to future recruitment. The clause relied on by the applicant is not capable of justifying such a hope.

Findings of the Court

74 The date of 2 October 1997 is that of the signature of the Treaty of Amsterdam, which includes the Protocol. On that date it thus became clear that, subject to the subsequent ratification of that Treaty, the staff of the Schengen Secretariat would be integrated into the General Secretariat of the Council, the detailed arrangements for which would be adopted by the Council.

75 In those circumstances, the Council cannot be criticised for having, in the autonomous recruitment scheme introduced by Decision 1999/307, determined the class of persons eligible for such integration by fixing at 2 October 1997 the beginning of the period during which those persons had to have been employed in the Schengen Secretariat. Since the Council was authorised to determine the detailed arrangements for integration independently of the Staff Regulations and the Conditions of Employment by taking account of the position of the persons employed in the Schengen Secretariat, it was entitled to avert an artificial increase in the number of those persons after the principle of integration had become

public knowledge on 2 October 1997. The choice of the date of 2 October 1997 cannot thus be regarded as arbitrary.

76 As regards the position of the applicant in Case T-164/99, it should be recalled that on 2 October 1997 he was working as a freelance translator. He did not thus fulfil the conditions of Article 3(e)(i) and (ii) of Decision 1999/307. The Council cannot be criticised for requiring, in that provision, the presence of a stable relationship between the employees eligible for integration and the Schengen Secretariat over the period from 2 October 1997 to 1 May 1999. On the contrary, the Council was entitled to presume generally that only those persons, in particular those linked to the Benelux Economic Union by a contract of employment, had the continuous experience necessary to preserve the 'memory' of the Schengen Secretariat, and to exclude from consideration the position of self-employed members of staff. Moreover, by producing a certificate stating that he was employed as a 'freelance on several occasions... from 10 June 1996 to 30 March 1998', the applicant has not shown that from 2 October 1997 his relationship with the Schengen Secretariat was sufficiently stable to be assimilated to the employment relationships referred to in Article 3(e)(i) and (ii) of the contested decision.

77 In so far as he also relies on his contract of employment with the Benelux Economic Union, it suffices to observe that that contract merely leaves open the possibility of his integration into the General Secretariat of the Council, but without imposing any obligation on the Council. Such a contract cannot have given rise to a legitimate expectation on the part of the applicant that he would actually be integrated. Moreover, in his reply, the applicant reduced the complaint of breach of his contract of employment to the argument that his chance of being recruited by the Council had been excluded by the selection of 2 October 1997 as reference date and by the failure of the Council to organise a competition. It was held above that, by choosing that date and by not organising a competition for the purposes of the integration at issue, the Council did not act unlawfully in such a way as to cast doubt on the validity of Decision 1999/307.

78 Consequently, this plea cannot be accepted either.

*The plea of lack of a legal basis for Decision 1999/307*

79 In Case T-164/99, the intervener points out in its observations on the plea of inadmissibility that the Treaty of Amsterdam and the Protocol, Article 7 of which provides for the adoption of the detailed arrangements for the integration of the Schengen Secretariat, entered into force on 1 May 1999. Decision 1999/307 was adopted in the framework of the written procedure. All the Member States sent their decisions, in writing, to the General Secretariat of the Council before midnight on 30 April 1999. Decision 1999/307 was therefore adopted on 30 April, not 1 May 1999. Consequently, that decision was adopted on the basis of provisions which had not yet entered into force. The applicant submits, in the alternative, that the legal basis of a decision must exist at the time when the written procedure is opened, which was not the case here.

80 The Court observes that it is common ground that the General Secretariat of the Council requested its members to communicate their agreement, opposition or abstention in respect of the proposed decision in the written procedure, pursuant to Article 8 of the Council's Rules of Procedure, and stated that the replies should arrive before 12 noon on 1 May 1999. In this connection, it should be noted that it has consistently been held that a provision of secondary Community law must, as far as possible, be given an interpretation consistent with the provisions of the Treaty and the general principles of Community law (Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9 and the cases cited there). That case-law may legitimately be applied to the constituent documents of the procedure for creating an act of secondary Community law, where the question is whether that procedure complied with the primary law on the basis of which the act was adopted.

81 In the present case, as regards the determination of the precise date on which Decision 1999/307 was adopted, there is no reason to suppose that the Council intended to adopt that act when its legal basis did not yet exist. On the contrary, the written procedure chosen in this case included a clear and precise element, namely the time-limit of 12 noon on 1 May 1999 for the replies to arrive, which

enables the adoption of the decision to be attributed, in accordance with the above case-law, to a date after the entry into force of the Protocol. The date of adoption of Decision 1999/307 must therefore be regarded as that of the closure of the written procedure, 1 May 1999, at 12 noon.

82 Finally, no provision of primary Community law prohibited the Council from opening the written procedure with a view to adoption of Decision 1999/307 before the entry into force of the Protocol. On the contrary, since the Protocol made it necessary to adopt implementing measures, the principle of good administration required the preliminary work leading to the adoption of those measures, including the adoption procedure proper, to be started before the entry into force of the Protocol, in order for them to be applicable from a date as close as possible to that of the entry into force.

83 The plea must therefore, in any event, be rejected as unfounded.

*The pleas of breach of the principle of non-discrimination and of the principles of protection of legitimate expectations, regard for the interests of officials, sound management and good administration*

Arguments of the parties

84 According to the applicants, the failure to organise a competition meant that it was not possible to assess whether the persons integrated pursuant to Decision

1999/307, in particular the five former members of staff of the Schengen Secretariat mentioned above, actually had the qualifications and skills needed to occupy posts within the Council. They point out that those former members of staff do not exercise functions connected with the Schengen *acquis* for which specific experience would be required. They thus received more favourable treatment, discriminatory in relation to the treatment of the applicants, in breach of the rules of the Staff Regulations, as a result of the failure to organise a competition with a view to the integration at issue and of the fact that the applicants were unable to benefit from the integration procedure at issue or from a regular procedure for filling the posts in question.

85 In Cases T-37/00 and T-38/00, it is submitted that the appointments of the five former members of staff mentioned above and the decisions not to appoint the applicants to the posts in question must be regarded as unlawful on additional grounds relating specifically to the law of the Community public service.

86 First, the applicants had a legitimate expectation that the Council would comply with the Staff Regulations. In particular, they were legitimately entitled to hope to be able to follow a career in the Council and be appointed in accordance with the relevant reserve list, without wrongful interference with their rights. By deciding to recruit the five former members of staff mentioned above, the Council thus disregarded the principle of the protection of legitimate expectations. Second, the Council is subject to a duty to have regard to the interests of all its staff. That means that it must take into consideration the interests of the service and may not disregard the individual interests either of its officials or of the persons who have been successful in competitions and seek employment in the public service. By deciding to appoint the five former members of staff mentioned above, the Council took no consideration of the personal situation of the applicants.

87 Finally, the principle of sound management and good administration was also disregarded by the Council, inasmuch as that principle requires, for appointment

decisions, transparency and provision of information and indeed prior consultation of the persons responsible for the group in which the newly appointed official will be working. That did not happen in the present case. More generally, in the applicants' view, the proper management of the service requires the appointment of the official of the highest standard within the meaning of Article 27 of the Staff Regulations. If that is not done, the service is not constituted in the best possible way.

88 According to the Council, none of the principles relied on was infringed in the present case.

Findings of the Court

89 As none of the other pleas put forward to contest the lawfulness of Decision 1999/307 has been upheld, the applicants cannot claim that the integration, by derogation from the Staff Regulations, of the persons covered by that decision breached the principles and rules of the Staff Regulations referred to above. There is therefore nothing to prevent the Council from placing the persons thus exceptionally integrated in an equal position to its members of staff who have been, or will be, recruited on the basis of the Staff Regulations.

90 It follows that the Council was not obliged to take account of the individual situation of the applicants in Cases T-37/00 and T-38/00 before integrating the five former members of staff of the Schengen Secretariat mentioned above. Nor could the applicants have a legitimate expectation that the Council would refrain from implementing the integration at issue, in order to benefit the progress of their own careers.

91 As to the circumstance complained of by the applicants that some of those former members of staff perform general tasks rather than tasks specifically linked with the Schengen *acquis*, the Court has already held (see paragraph 66 above) that the Council was not prevented, after the integration of those members of staff, from giving some of them general tasks.

92 As regards, finally, the alleged breach of the principle of non-discrimination, it suffices to note that that principle means that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 116 and the cases cited there). In the present case, since the former members of staff of the Schengen Secretariat were integrated on the basis of an autonomous scheme of recruitment, the applicants cannot validly claim that the rules of the Staff Regulations concerning recruitment and the qualifications of officials should be applied to those members of staff.

93 Consequently, the pleas of breach of the principles of non-discrimination, protection of legitimate expectations, regard for the interests of officials, sound management and good administration must also be rejected.

94 As none of the pleas put forward in support of the claims for annulment has been upheld, those claims must be dismissed in their entirety.

95 The same applies, in any event, to the claims for compensation in Cases T-37/00 and T-38/00, which were merely appended to the claims for annulment without being supported by any specific plea or argument.

96 Accordingly, the applications must be dismissed as a whole, without there being any need to rule on their admissibility.

## Costs

97 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings.

98 However, under Article 88 of the Rules of Procedure, in proceedings between the Communities and their servants the institutions are to bear their own costs. That rule applies also to proceedings brought by persons claiming the status of Community servant (see, to that effect, Case T-37/93 *Stagakis* v *Parliament* [1994] ECR-SC I-A-137 and II-451, paragraph 24).

99 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order interveners other than the Member States, the States parties to the Agreement on the European Economic Area, the institutions and the EFTA Surveillance Authority to bear their own costs.

100 In those circumstances, in Case T-164/99, which comes under Article 230 EC, the applicant must be ordered to pay all the costs apart from those incurred by the intervener, which must be borne by the intervener. In Cases T-37/00 and T-38/00, which come under Article 236 EC, the parties are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the actions;

2. In Case T-164/99, orders the applicant to bear his own costs and pay those incurred by the Council, and orders the intervener to bear its own costs;

3. In Cases T-37/00 and T-38/00, orders the parties to bear their own costs.

Meij Potocki Pirrung

Delivered in open court in Luxembourg on 27 June 2001.

H. Jung
Registrar

A.W.H. Meij
President