

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

22 March 1995 \*

In Case T-586/93,

**Petros Kotzonis**, an official of the Economic and Social Committee of the European Communities, resident in Brussels, represented by Olivier Slusny and Marcel Slusny, of the Brussels Bar, with an address for service in Brussels at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

**Economic and Social Committee of the European Communities**, represented by Dominique Lagasse, of the Brussels Bar, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service of the Commission of the European Communities, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: French.

APPLICATION for annulment, first, of the decision of the Economic and Social Committee to follow the procedure laid down in Article 29(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') in order to fill a post declared vacant by notice of vacancy No 62/91, secondly, of the decision of the Economic and Social Committee to reject the applicant's candidature for the said post and, thirdly, of the decision appointing Mr B. as a director in the General Secretariat of the Economic and Social Committee,

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

composed of: B. Vesterdorf, President, D. P. M. Barrington and A. Saggio, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 November 1994,

gives the following

**Judgment**

**Facts**

Since 1 June 1991 the applicant has held a Grade A 3 post of head of division as a financial controller at the Economic and Social Committee (hereinafter 'the ESC').

From 1981 to 31 May 1991, he had been a head of division, at Grade A 3, at the Court of Auditors working in various areas concerning the control and management of Community funds.

- 2 By vacancy notice No 62/91, published on 23 October 1991, the ESC opened the procedure for filling the post of director, at Grade A 2, in Directorate A, Advisory Work, of the ESC. The qualifications required in the vacancy notice were:

‘— a university degree, or equivalent experience,

— extensive experience in running a major administrative unit,

— a thorough knowledge of economic issues,

— a thorough command of one Community language and satisfactory knowledge of another; knowledge of a third Community language would be an advantage.’

- 3 The vacancy notice further stated that the appointing authority would give priority to considering whether the vacant post could be filled by promotion or transfer, but other officials could indicate their intention of taking part in an internal competition to be organized, if necessary, at a later stage in the recruitment procedure. Finally the notice stated that the post might be reassigned under a possible reorganization of ESC departments in 1992.

4 Thirteen officials of the ESC submitted candidatures within the time-limit set by the vacancy notice. The candidates included one Grade A 2 official of the ESC, ten Grade A 3 officials of the ESC, of whom the applicant was one, and two Grade LA 3 officials of the ESC, including Mr B., a Spanish national, who had been head of the Spanish translation division since he entered the ESC's service in 1989.

5 At its 359th meeting on 26 November 1991, the Bureau of the ESC, the body responsible, under Article 8 of its Rules of Procedure (OJ 1986 L 354, p. 1), for the organization and working of the ESC, examined the candidatures for the vacant post. In the case of the two Grade LA 3 officials and one of the Grade A 3 officials who did not yet have the requisite minimum period of two years' service for the purpose of promotion under Article 45(1) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'), it was entered in the minutes that their candidatures would be taken into consideration if an internal competition were arranged.

6 At its 361st meeting on 28 January 1992, the Bureau of the ESC decided to follow the recruitment procedure laid down in Article 29(2) of the Staff Regulations. On 24 March 1992, when the Council had given its consent to that decision in accordance with Article 57 of the ESC's Rules of Procedure, Recruitment Notice ESC/62/91 concerning the post in question (hereinafter 'the recruitment notice'), was published in the *Official Journal of the European Communities* (OJ 1992 C 73 A, p. 1.) By letter of 31 March 1992, the Chairman of the ESC informed the applicant of the decision to follow the said recruitment procedure and told him that his candidature would 'receive fresh examination under the procedure set out in Article 29(2), unless he decided otherwise'. Within the time-limit set by the recruitment notice, a hundred or so persons working both within the ESC and outside that institution submitted candidatures.

7 It is apparent from the file that, in order to help it in the selection procedure, the Bureau of the ESC appointed an *ad hoc* group consisting of six members which

found on preliminary consideration of the candidates' files that 80 of them did not meet the requirements set out in the recruitment notice. After hearing the candidates, the *ad hoc* group selected the six candidates it judged to be the best qualified. Among those six short-listed candidates were the applicant, Mr B. and Mr V., Grade A 3 head of division in the ESC Agriculture and Fisheries Directorate and a Spanish national. In a note of 2 February 1993, the applicant described the latter as 'the candidate considered to have the best chance of being chosen'.

8 At its 374th meeting on 23 February 1993, the Bureau of the ESC decided, upon a vote by secret ballot, to propose to the Council, in accordance with Article 57 of the Rules of Procedure of the ESC, that Mr B. should be appointed to the vacant post. That proposal was notified to the Council by a letter of 25 February 1993 from the Chairman of the ESC. The other candidates were then informed, by letters of 1 March 1993 from the Secretary-General of the ESC, that their applications had not been successful.

9 By decision of the President of the Council of 10 May 1993, Mr B. was promoted to Grade A 2 and appointed director in the ESC General Secretariat as from 1 May 1993. That decision was amended by a decision of the President of the Council of 30 June 1993 appointing Mr B. as director in the ESC General Secretariat as from 1 June 1993.

10 Meanwhile, on 25 May 1993 the applicant had submitted through official channels a document headed 'complaint against the Economic and Social Committee on the basis of Article 90(2) of the Staff Regulations', in which he alleged that Articles 7, 25, 27, 29 and 45 of the Staff Regulations had been infringed. The ESC did not reply to that document within the period of four months prescribed by Article 90(2) of the Staff Regulations.

## Procedure

- 11 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 22 December 1993, the applicant brought the present action.
- 12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. However, the Court requested the parties to answer a number of questions in writing.
- 13 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 24 November 1994.

## Forms of order sought

- 14 The applicant claims that the Court should:
- annul the decision of the Bureau of the ESC stating that his candidature had not been accepted;
  - annul the decision of the Bureau of the ESC to follow the recruitment procedure provided for in Article 29(2) of the Staff Regulations;
  - annul the decision appointing Mr B. as director in the ESC Secretariat;
  - order the defendant to pay the costs.

15 The ESC contends that the Court should:

— declare the action inadmissible, or at least unfounded;

— consequently dismiss it and make an appropriate order as to costs.

## Admissibility

### *Arguments of the parties*

16 The ESC maintains that the action is inadmissible on the ground that it is based on a complaint which is itself inadmissible. In support of its argument, the ESC points out first that the document headed 'Complaint', submitted on 25 May 1993, does not contain any request and is not directed against a specific decision but 'against the Economic and Social Committee'.

17 Secondly, the ESC claims that the document in question, in so far as it relies on a breach of Article 29(2) of the Staff Regulations, was manifestly lodged outside the three-month period prescribed by Article 90(2) of the Staff Regulations.

18 The applicant denies that his complaint was unclear and maintains that it had to be directed against the ESC as the institution involved.

- 19 The applicant considers that he was entitled to submit his complaint, even in so far as it alleged breach of Article 29(1) of the Staff Regulations, within a period of three months from notification of the decision rejecting his candidature, namely from 2 March 1993, the date on which he received the letter of 1 March 1993 from the Secretary General of the ESC.

### *Findings of the Court*

- 20 First of all, the Court of First Instance considers that the burden of the first objection of inadmissibility raised by the ESC must be interpreted as being that the document headed 'Complaint against the Economic and Social Committee on the basis of Article 90(2) of the Staff Regulations' did not constitute a complaint within the meaning of that provision and that the condition that the proper administrative procedure should be followed before a direct action is brought was not therefore satisfied.

- 21 In that respect, it should be noted that it has been consistently held that the precise classification of a letter or note is a matter for the Court alone and not for the parties. Moreover, it is also clearly settled that an official's letter which, without expressly requesting withdrawal of the decision in question, clearly seeks an amicable settlement of the official's complaints or a letter which clearly expresses the applicant's intention to challenge a decision adversely affecting him constitutes a complaint (see, for example, the order of the Court of First Instance in Case T-115/92 *Hogan v Parliament* [1993] ECR II-895, paragraph 36).

- 22 In the present case, the Court finds that it is apparent from the actual heading of the document, submitted through official channels in accordance with Article 90(3) of the Staff Regulations, that it is a complaint within the meaning of Article 90(2) of the Staff Regulations.



- 23 Furthermore, it is equally apparent from the contents of the document that the applicant is challenging the decision appointing Mr B. as director in the General Secretariat of the ESC as well as the decision rejecting his own candidature. The applicant thus contends in particular that those decisions were taken in breach of Articles 7, 25, 27, 29 and 45 of the Staff Regulations, which can only be understood as meaning that the applicant was asking that those decisions be withdrawn, although he did not do so expressly.
- 24 Since the decisions referred to in the document submitted by the applicant on 25 May 1993 were acts adversely affecting him inasmuch as they had a direct and immediate effect on the applicant's legal status, the Court concludes that the document did indeed constitute a complaint within the meaning of Article 90(2) of the Staff Regulations, as the applicant maintains.
- 25 As regards the ESC's second objection of inadmissibility, to the effect that the complaint was submitted after expiry of the time-limit prescribed in Article 90(2) of the Staff Regulations, it relates only, as the ESC itself accepts, to that part of the complaint based on breach of Article 29(1) of the Staff Regulations. While in the context of the complaint as such it is unnecessary to consider whether it was lodged out of time in so far as it alleges breach of Article 29(1), such late submission cannot in any event render the application inadmissible.

### **Admissibility of the claims for annulment of the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations**

- 26 The ESC maintains that the application is inadmissible in so far as it seeks annulment of the ESC Bureau's decision of 28 January 1992 to follow the procedure laid down in Article 29(2) of the Staff Regulations because the applicant did not lodge a complaint against that decision in good time.

- 27 The applicant claims that at that time he did not need to submit a complaint against that decision.
- 28 The Court notes first of all that it is settled case-law that only acts or decisions producing binding legal consequences likely directly and immediately to affect the applicant's interests by significantly changing his legal situation may be the subject of an action for annulment (see the judgment in Case T-6/93 *Pérez Jiménez v Commission* [1994] ECR-SC II-497, paragraph 34).
- 29 It should moreover be borne in mind that in staff cases measures whose purpose is to prepare a decision are not acts adversely affecting officials within the meaning of Article 90(2) of the Staff Regulations and may therefore be challenged only incidentally in an action brought against annulable acts (see, most recently, the judgment in *Pérez Jiménez v Commission*, cited above).
- 30 In this case, the applicant's legal situation was not immediately affected by the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations, which did not exclude the applicant's participation in that procedure, since the Secretary-General informed him by letter of 31 March 1992 that his candidature would be considered. It follows that at that stage the applicant was not required to lodge a complaint against that decision.
- 31 However, it is settled case-law that the conditions of admissibility for an action, laid down in Articles 90 and 91 of the Staff Regulations, are a matter of public policy and that the Community court may therefore consider them of its own motion (see, for example, the order of the Court of First Instance in Case T-34/91 *Whitehead v Commission* [1992] ECR II-1723 and the judgment of the Court of First Instance in Case T-130/89 *B v Commission* [1990] ECR II-761). In those circumstances, even though the ESC has not raised an objection of inadmissibility in this respect, the Court considers that the claims for annulment of the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations must be held

to be inadmissible inasmuch as they concern a preparatory measure which does not amount to an act adversely affecting the applicant (to the same effect, see *B v Commission*, cited above).

- 32 The fact that those claims are found to be inadmissible does not prevent the applicant from pleading, in support of his claims directed against the annullable acts, that the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations was improper (see above, paragraph 29).

## Substance

- 33 The applicant puts forward five pleas: infringement of Article 29 of the Staff Regulations; infringement of the duty to consider the comparative merits of the candidates; misuse of powers or abuse of procedure and infringement of Articles 7 and 27 of the Staff Regulations; infringement of Article 45 of the Staff Regulations; and lastly infringement of Article 25 of the Staff Regulations.

### *The plea concerning infringement of Article 29 of the Staff Regulations*

- 34 This plea is in essence that the ESC was bound to follow the various stages of procedure set out in Article 29(1) of the Staff Regulations, that the recruitment notice was flawed in that its wording was not the same as that of the vacancy notice and that there was no justification for the decision to follow the procedure laid down in Article 29(2).

- 35 The ESC challenges the admissibility of this plea in so far as it alleges that the recruitment notice was flawed, on the ground that the applicant has no interest in putting it forward. Furthermore, the ESC asserts that in any event the applicant should have submitted a complaint against the recruitment notice within three months of its publication.
- 36 In the circumstances of the case, however, the Court considers it appropriate to proceed directly to an examination of the substance of the plea.

### Arguments of the parties

- 37 The applicant maintains that the various procedural stages set out in Article 29(1) of the Staff Regulations should have been followed in the order indicated and that this requirement was not complied with by the ESC.
- 38 He also observes that the recruitment notice did not refer to any specific post but only to the recruitment of a director. The duties described in the vacancy notice, however, were those relating to a director's post in Directorate A — Studies and Advisory Work. Here, the applicant points out that Mr B. was finally assigned to a director's post in the Communications Directorate, involving quite different duties from those of a director in Directorate A — Studies and Advisory Work. The applicant claims that the ESC therefore breached its own self-imposed legal limits. In support of his argument that there was consequently an infringement of Article 29 of the Staff Regulations, he refers to the judgment of the Court of Justice in Case C-343/87 *Culin v Commission* [1990] ECR I-225 and to the judgment of the Court of First Instance in Case T-58/91 *Booss and Fischer v Commission* [1993] ECR II-147, in particular paragraph 72.
- 39 As regards the decision to follow the procedure laid down in Article 29(2), the applicant further maintains that the Bureau of the ESC already had a sufficient

number of candidates from whom to make a choice in the promotion or transfer procedure since, among the thirteen persons who submitted candidatures, were one director and twelve heads of division.

40 Relying on the wording of Article 29(2) of the Staff Regulations and on the judgment of this Court in Joined Cases T-18/92 and T-68/92 *Coussios v Commission* [1994] ECR-SC II-171, at paragraph 58, the ESC disputes the applicant's interpretation that the various procedural stages set out in Article 29(1) of the Staff Regulations ought to have been followed in the order indicated.

41 As regards the applicant's point that the recruitment notice did not refer to a specific post, the ESC states that the notice was perfectly in keeping with the vacancy notice. Moreover, the fact that Mr B. was assigned to a director's post in the Communications Directorate was simply the result of the ESC's reorganization of its departments, a reservation to that effect being expressly made in both the recruitment notice and the vacancy notice.

42 The ESC also explains that because the post to be filled was a senior one and only thirteen officials had submitted candidatures when the vacancy notice was published, the Bureau of the ESC took the view that it was essential to have as many candidatures available as possible, including external ones.

### Findings of the Court

43 It is settled case-law that the use of the term 'whether' in Article 29 of the Staff Regulations clearly indicates that the appointing authority is not bound absolutely

to adopt the measures therein mentioned but merely to consider in each case whether they are capable of resulting in the appointment of a person of the highest standard of ability, efficiency and integrity (see, most recently, the judgment in *Coussios v Commission*, cited above, at paragraph 98). It follows that the applicant's argument that the ESC was bound to follow, in the order indicated, the various stages of procedure set out in Article 29(1) of the Staff Regulations is unfounded.

44 As regards the lawfulness of the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations, it is settled case-law that the appointing authority is not obliged to carry through a recruitment procedure once it has been initiated but possesses discretionary power to extend its field of choice in the interests of the service (see, most recently, the judgment of the Court of First Instance in Case T-38/89 *Hochbaum v Commission* [1990] ECR II-43, at paragraph 15). Secondly, the Court finds that in the present case the applicant has not put forward any evidence to demonstrate that the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations was not taken in order to widen the field of choice of the appointing authority or that its judgment that such widening was desirable was wrong in law or in fact. The mere fact that thirteen candidates, including one director and twelve heads of division, had submitted candidatures under the promotion or transfer procedure does not necessarily mean that the appointing authority had enough choices open to it.

45 As to the wording of the recruitment notice, although the appointing authority has wide discretion in comparing the candidates' merits and reports, it must exercise it within the self-imposed limits set in the vacancy notice (see, for example, the judgments in *Culin v Commission*, cited above, at paragraph 19 and in *Booss and Fischer v Commission*, cited above, at paragraph 72). Where, as in the present case, the appointing authority decides to proceed from an internal recruitment procedure to a recruitment procedure open to external candidates and at the same time decides

that the candidates who applied in the internal recruitment procedure are automatically to be taken into consideration in the recruitment procedure open to external candidates, the same principle must accordingly be applied with regard to the conditions set out in the vacancy notice and those set out in the recruitment notice. As the Court of Justice has held, if it were open to the institutions to change the conditions of participation from one stage of the procedure to the next, in particular by making them less strict, they would be at liberty to organize external recruitment procedures without having to consider internal candidates (judgment in Joined Cases 341/85, 241/86, 258/86, 259/86, 262/86 and 266/86, 222/87 and 232/87 *Van der Stijl and Cullington v Commission* [1989] ECR 511, at paragraph 52).

46 In the present case, however, the observed difference between the two notices is only that the recruitment notice does not mention that the post to be filled is that of director in Directorate A — Studies and Advisory Work. Since the qualifications required are unchanged, the Court considers that such a difference cannot have any effect whatever on either the conduct of the recruitment procedure or the final appointment decision.

47 Furthermore, the vacancy notice expressly mentions the possibility that the post might be reassigned. In those circumstances, the failure to mention the new director's exact responsibilities in the recruitment notice cannot in any case be regarded as altering the requirements stated in the vacancy notice.

48 Consequently, that plea, even supposing it to be admissible, must be rejected in any event.

*The plea of breach of the obligation to consider the comparative merits of the candidates*

Arguments of the parties

49 The applicant claims that no consideration of the comparative merits of the candidates took place. He disputes that the letter of 27 January 1993 from the Chairman of the ESC informing the members of the Bureau of the ESC that they might inspect the applications and the files relating thereto and sending them a second copy of the confidential documentation drawn up by the *ad hoc* preselection group demonstrates, as the ESC maintains, that such a comparative examination was actually carried out. Referring to the interpretation of Article 45 of the Staff Regulations given by this Court in Case T-25/90 *Schönherr v ESC* [1992] ECR II-63 and by the Court of Justice in Case C-115/92 P *Parliament v Volger* [1993] ECR I-6549, he requests the Court to order the ESC to produce the said documents.

50 Finally, the applicant alleges that the decision to proceed to the recruitment procedure laid down in Article 29(2) of the Staff Regulations was taken without prior consideration, required by Article 45 of the Staff Regulations, of the comparative merits of the personal files and staff reports of the candidates who had already submitted their candidatures. Furthermore, at that stage there did not even exist a staff report for Mr B.

51 The ESC refers to the fact that the decision to appoint Mr B. to the vacant post was taken at the end of a procedure the length of which precisely demonstrates the care taken by the ESC to carry out a detailed comparative study of the candidatures. Referring to the abovementioned letter of 27 January 1993 from the Chairman of the ESC, it claims that that letter shows that all the documents mentioned therein were taken into consideration by the Bureau of the ESC.



52 Furthermore, the ESC notes that even though Mr B. had no staff report when the decision was taken to follow the procedure laid down Article 29(2) of the Staff Regulations, this fact is of no consequence since Article 45 applies only to the promotion procedure.

### Findings of the Court

53 First, the Court finds that the applicant has put forward no evidence capable of establishing that the decision to follow the procedure laid down in Article 29(2) of the Staff Regulations was adopted without prior comparison of the candidatures already submitted or that the final decision appointing Mr B. to the vacant post was taken without such a comparison being undertaken. On the other hand, as the ESC maintains, it is clear from the documents before the Court that the Bureau of the ESC was in possession of all the personal files of the 20 preselected candidates and of the report of the *ad hoc* preselection group containing the results of the group's comparison of all the candidatures submitted under the procedure commenced pursuant to Article 29(2) of the Staff Regulations.

54 The Court would add here that there are no grounds for ordering the ESC to produce all the candidates' individual files since they are irrelevant in ascertaining whether or not the comparative merits of the candidates were considered.

55 Finally, since it is not disputed that Mr B.'s candidature could not be taken into consideration in the promotion or transfer procedure, the Court must find that the fact that the Bureau of the ESC did not have his staff report at that time could have no effect on the course of the recruitment procedure.

56 Consequently, this plea is unfounded.

*The plea of misuse of powers or abuse of procedure and of infringement of Articles 7 and 27 of the Staff Regulations*

Arguments of the parties

57 This plea has several parts. The first part is that the ESC infringed Articles 7 and 27 of the Staff Regulations by reserving the vacant post for a national of a particular Member State, namely a Spanish national. In this context the applicant alleges that when the former Chairman of the ESC took up his duties at the ESC, he promised that a Grade A 2 director's post would be assigned to a Spanish official. According to the applicant, that promise made by the Chairman of the ESC overshadowed the whole recruitment procedure, the sole purpose of which was to ensure that a Spanish official was appointed. He asserts that at the time of the final vote, a Spanish official expressly declared that 'the post of director is intended for a Spanish official and there is no question of any candidate other than a Spanish official being appointed'.

58 In his reply, the applicant adds that the Spanish official nominated by the former Chairman of the ESC to fill a post as director was Mr B. Y. V. Nevertheless, the *ad hoc* preselection group did not prefer Mr B. Y. V.'s candidature. However, in order to keep the promise made by the former Chairman of the ESC, the *ad hoc* preselection group short-listed two Spanish officials among the last six candidates despite the fact that they were among the Grade A 3 officials most recently recruited to the service.

59 The applicant mentions the names of witnesses who, he claims, could confirm his assertions. He also refers to certain correspondence between the ESC and various Spanish persons, dating from 1989 and 1990, which in his view shows that certain Spanish personages had intervened in order to obtain a Grade A 2 post for Spanish officials.

60 On the basis of that evidence, and referring to the judgments of the Court of Justice in Case 15/63 *Lassalle v Parliament* [1964] ECR 57 and Case 85/82 *Schloh v Council* [1983] ECR 2105, the applicant alleges that the ESC has misused its power.

61 In the second limb of this plea the applicant claims that the *ad hoc* preselection group performed tasks and took decisions which, under Article 57 of the Rules of Procedure of the ESC, were the responsibility of the Council. Furthermore, he disputes that the Bureau of the ESC remained in control of the decisions to be taken throughout the appointment procedure.

62 Thirdly, the applicant points out that there was no justification for Mr B.'s appointment to the vacant post and that the Bureau of the ESC did not take account of his abilities and experience in comparison with Mr B.'s. He considers that he satisfied the requirements set out in the vacancy notice and in the recruitment notice and that he was indisputably better qualified than Mr B. On that point, the applicant observes that Mr B. is about eight years younger than he and was formerly a diplomat. Moreover, the applicant states that Mr B. did not have a thorough knowledge of economic issues, which was an express requirement in both the vacancy notice and the recruitment notice.

63 Finally, the applicant disputes that the ESC was entitled to take into consideration the fact that the post might possibly be reassigned under a reorganization of ESC departments, since that eventuality was not mentioned in the Spanish version of the

recruitment notice. He considers that no reorganization of ESC departments took place in any event.

64 Fourthly, the applicant states that when the Bureau of the ESC took the decision to propose to the Council to appoint Mr B. to the director's post at issue, the members of the Bureau failed to take account of the duties to be entrusted to the new director.

65 Lastly, the fifth part of the plea is to the effect that there was a 'set-up' designed to secure the appointment of a Spanish official without applying clear and transparent criteria, which he says is proved by the fact that the Council first promoted Mr B. to the post of director in question and then replaced that decision with an alleged appointment.

66 As regards the first part of the plea, the ESC contends that the applicant's argument that Mr B.'s appointment was the result of a misuse of powers is mere speculation on the applicant's part. In particular, it denies that the correspondence between the ESC and various Spanish personages can be regarded as evidence of such misuse.

67 According to the ESC, the applicant's allegations are, moreover, refuted by the fact that Mr B. Y. V. was not even short-listed by the *ad hoc* preselection group among the six candidates considered to be the best qualified, even though the applicant claims that the former chairman of the ESC had decided to choose him.

68 Lastly, the ESC points out that the Court of Justice has in any event held that if upon a comparative examination candidates' qualifications prove to be substantially the same the appointing authority may give preference to the criterion of nation-

ality. The appointing authority also has greater freedom of choice in the case of Grade A 1 and A 2 officials than in the case of officials in lower grades.

69 As regards the second part of the plea, the ESC states that the short-listing group confined itself to preparing way for the deliberations of the Bureau of the ESC and denies that it was given powers belonging to the Council.

70 As to the third part of the plea, the ESC points out that the decision to appoint Mr B. was taken on the basis of a comparative study of the various candidatures and that all the candidates' abilities and experience were taken into account by the Bureau of the ESC.

71 Regarding the fourth part of the plea, the ESC observes that the decision concerning the filling of the post of director was postponed to the meeting of the Bureau of the ESC on 23 February 1993, precisely in order to take account of the requirements of the new organization plan.

72 Finally, with regard to the fifth part of the plea, the ESC contends that in its decision of 30 June 1993 the Council merely corrected an error contained in the decision of 10 May 1993.

### Findings of the Court

73 First of all, the concept of misuse of powers has a precise meaning which refers to cases in which an administrative authority has used its powers for a purpose other

than that for which they were conferred on it. Secondly, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (judgment of the Court of First Instance in Case T-80/92 *Turner v Commission* [1993] ECR II-1465, at paragraph 70).

74 In the present case, the evidence relied on by the applicant in support of his contention that Mr B.'s appointment was the result of a misuse of powers is irrelevant.

75 In the first place, even supposing that the former chairman of the ESC had promised that Mr B. Y. V., as a Spanish official, would receive a Grade A 2 post in the near future, such a promise could not have been binding on the members of the Bureau of the ESC. Moreover, the Court finds that Mr B. Y. V. was not even on the short-list of six candidates considered the best qualified by the *ad hoc* preselection group, which shows that any promise made by the former chairman of the ESC had no effect on the course of the recruitment procedure in any case.

76 Secondly, the correspondence mentioned by the applicant contains no evidence to suggest that the decision appointing Mr B. was vitiated by a misuse of powers. Besides, that correspondence predated the time when the procedure at issue began.

77 Thirdly, examination of the documents before the Court reveals no evidence to suggest, as the applicant alleges, that the *ad hoc* preselection group performed tasks which, under Article 57 of the Rules of Procedure of the ESC, were the Council's. As the Court of Justice has held, that provision must be interpreted as meaning that the ESC was not prevented from carrying out the appointment procedure with the

tacit approval of the Council and Commission, which moreover took part in the act which closed the procedure (judgment in Case 307/85 *Gavanas v ESC and Council* [1987] ECR 2435, paragraphs 17 to 20). Furthermore, the documents before the Court show that the task of the *ad hoc* preselection group was simply to assist the Bureau of the ESC in the stage leading to its final decision. It is settled case-law that during the phase preparatory to such decisions the appointing authority may bring in an advisory body of which it is free to determine the composition and responsibilities (see most recently the judgment of the Court of First Instance in Case T-11/91 *Schlob v Council* [1992] ECR II-203, paragraph 47).

78 Fourthly, the applicant claims that the Bureau of the ESC did not take into account the duties to be entrusted to the new director, whereas the minutes of the Bureau meeting of 26 January 1993 show that the final decision of the Bureau was postponed to a later date specifically in order to take account of the duties to be performed by the new director after the reorganization of ESC departments. Consequently, this allegation is also without foundation. In that respect, the Court finds in any event that it is apparent from the January 1992 and June 1993 plans for the organization of ESC departments that such a reorganization did in fact take place, as the ESC has claimed. Moreover, as regards the fact that the Spanish version of the recruitment notice did not mention the possible reassignment of the post as a result of departmental reorganization, it is sufficient to find that the applicant has no interest in complaining about that omission. As raised by the applicant, who is a Greek national and who submitted his candidature on the basis of the previous vacancy notice, that complaint does not relate personally to him and he may not legitimately put it forward (see, to the same effect, the judgment of the Court of Justice in *Schlob v Commission*, cited above, at paragraph 14, and the judgment of the Court of First Instance in Case T-3/92 *Latham v Commission* [1994] ECR-SC II-83, at paragraph 53).

79 Fifthly and finally, the Court finds that there is no evidence to suggest that the sole purpose of the Council decision of 30 June 1993 amending the previous decision of 10 May 1993 and appointing, instead of promoting, Mr B. as a director in Grade A 2 was other than to correct a clerical error, as the ESC maintains.

80 At this stage in its reasoning, it is necessary for the Court to examine the applicant's arguments concerning the qualifications required in the recruitment notice.

81 Account must be taken here of the fact that the post to be filled was a Grade A 2 post and that it is settled case-law that, when comparing the merits of candidates for such a post which entails great responsibilities and in assessing the interests of the service, the appointing authority has a wide discretion. The Court's review must accordingly be confined to the question whether, having regard to the various considerations which influenced the administration in making its assessment, the administration, after following a procedure untainted by irregularity, has remained within reasonable bounds and has not used its power in a manifestly incorrect way or for purposes other than those for which it was conferred upon it (see, for example, the judgment of the Court in Case T-20/89 *Moritz v Commission* [1990] ECR II-769, paragraph 29).

82 Furthermore, in comparing candidates' merits, the appointing authority must proceed on the basis of an assessment of all the qualifications of each candidate possessing the necessary qualifications in relation to the qualifications which are desirable for the post to be filled. In that regard, the Bureau of the ESC was entitled to take into consideration the possible implications of the reorganization of ESC departments for the duties to be performed by the new director especially since the possibility of such a reorganization was mentioned in both the vacancy notice and the recruitment notice.

83 In the light of those principles, the Court considers that the documents before it reveal no evidence to support the conclusion that the appraisal of the candidates' merits was vitiated by error of fact or law .

84 With regard to the question whether Mr B. possessed 'a thorough knowledge of economic issues', it is apparent from the documents produced by the ESC in response to a question from the Court that the determination of the Bureau of the



ESC that Mr B. had, during his studies and working life, gained the necessary knowledge, cannot be regarded as vitiated by an error of fact or law.

85 In the light of all the facts and considerations set out above, the Court finds that the applicant has not provided the Court with any objective and relevant evidence of misuse of powers by the defendant. Consequently, there is no need to hear the witnesses named by the defendant.

86 The Court would point out that, as the ESC has maintained, it is settled case-law that the appointing authority may make nationality the prevailing criterion in order to maintain or restore a geographical balance provided that it has first established on the basis of a comparative examination that the qualifications of the candidates are essentially the same (see, in particular, the judgment of the Court of Justice in *Schloh v Council* [1983], cited above, at paragraph 26). For that reason also, the Court considers that it would in any event be pointless to hear the applicant's witnesses.

87 This plea must therefore be rejected.

*The plea of infringement of Article 45(2) of the Staff Regulations*

Arguments of the parties

88 The applicant claims that Article 45(2) of the Staff Regulations was infringed since, according to that article, Mr B. could be transferred from the Language Service to

Category A only after a competition and in this instance there was no competition. He adds that, although Council Regulation (EEC, Euratom, ECSC) No 3947/92 of 21 December 1992 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (OJ 1992 L 404, p. 1, hereinafter 'Regulation No 3947/92') does contain rules allowing for derogations to be made from Article 45(2) of the Staff Regulations, the ESC had still not at that time adopted any implementing provisions.

89 As regards the ESC's claim that Article 45(2) of the Staff Regulations is not applicable in the context of the procedure laid down in Article 29(2) of the Staff Regulations, the applicant maintains that the general rules on the career of officials, which include Article 45(2) of the Staff Regulations, must also be complied with in the context of such a procedure.

90 According to the ESC, Article 45(2) of the Staff Regulations is inapplicable in the context of a recruitment procedure under Article 29(2) of the Staff Regulations. The object of that procedure is precisely to give the appointing authority maximum choice. Since the procedure followed had been opened to external candidates, it must with all the more reason have been open to internal candidates in another service.

### Findings of the Court

91 Article 45(2) of the Staff Regulations provides that: 'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition'. There is no dispute that the third and fourth paragraphs of Article 45, which were added by Regulation No 3947/92 and make it possible to derogate from the second paragraph, are inapplicable in this case.

92 As regards the interpretation of Article 45(2) of the Staff Regulations, the Court of Justice held in its judgment in Case 176/73 *Van Belle v Council* [1974] ECR 1361 that this provision formulates a fundamental rule corresponding to the organization of the Community public service into different categories requiring distinct qualifications, and that Article 29(2), by reason of its exceptional character, must be strictly interpreted and cannot take precedence over the rule laid down, in a general and unconditional manner, in Article 45(2). It should be borne in mind that that case concerned the appointment of an official, previously in Grade B 1, to a post in Grade A 6. According to the Council, that appointment was made following a procedure based on Article 29(2) of the Staff Regulations which in exceptional cases may be used for posts requiring special qualifications. The Court of Justice annulled the appointment on the ground that Article 45(2) of the Staff Regulations allowed officials to be transferred to a higher category only on the basis of a competition. Nevertheless, the Court of First Instance considers that the case-law ought to be reconsidered.

93 First, the Court would point out that, under Article 29(1) of the Staff Regulations, the ordinary procedures available to the Community institutions for the purpose of filling vacant posts are promotion, transfer, the organization of competitions internal to the institution and, lastly, the transfer of officials from other Community institutions. It is also clear from that paragraph that it is only after considering in each case whether those procedures are capable of leading to the appointment of a person of the highest standard of ability, efficiency and integrity that the appointing authority may commence the procedure for competitions on the basis of qualifications, or of tests, or of both qualifications and tests. The Court concludes that since Article 45(2) of the Staff Regulations provides that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition, it precludes such transfer or promotion by means of the other ways of filling posts mentioned in Article 29(1) of the Staff Regulations.

94 Secondly, Article 29(2) of the Staff Regulations provides that: 'A procedure other than the competition procedure may be adopted by the appointing authority for

the recruitment of Grade A 1 or A 2 officials'. It is therefore apparent that the procedure laid down in Article 29(2) of the Staff Regulations may, where appropriate, replace the competition procedure. None the less, in accordance with the principle of proper administration, before following the procedure laid down in Article 29(2) the institutions must consider in each case whether the recruitment procedures listed in Article 29(1) are capable of leading to the appointment of a person of the highest standard of ability, efficiency and integrity.

95 Thirdly, it is apparent from Article 28(d) of the Staff Regulations that the appointing authority may open the procedure laid down in Article 29(2) of the Staff Regulations even to candidates from outside the Community institutions who have not passed a competition. It follows that the purpose of Article 29(2) is to enable the appointing authority, where necessary, to have the greatest possible number of candidatures entering into consideration for recruitment as officials at Grades A 1 and 2 or, in exceptional cases, for filling posts which require special qualifications.

96 Finally, both the Court of Justice and the Court of First Instance have in more recent decisions held that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition (judgment of the Court of Justice in Joined Cases 269/84 and 292/84 *Fabbro and Others v Commission* [1986] ECR 2983 and in Case 279/85 *Misset v Council* [1987] ECR 3187, and judgment of the Court of First Instance in Case T-50/91 *De Persio v Commission* [1992] ECR II-2365). However, those decisions did not address the question whether an official may be transferred from one service to another or promoted from one category to another on the basis of a procedure under Article 29(2) of the Staff Regulations.

97 In the light of the foregoing considerations, the Court considers that Article 29(2) of the Staff Regulations is undoubtedly of an exceptional nature and, as held by the

Court of Justice in *Van Belle v Commission*, cited above, must therefore be strictly interpreted. However, the Court considers that such a strict interpretation is required only in relation to the conditions to be satisfied before the appointing authority may resort to the Article 29(2) procedure. Once those conditions have been satisfied, however, any restriction of the candidatures which may be taken into consideration under that procedure would go against the very purpose of that procedure, as defined above.

98 Consequently, the Court of First Instance considers that Article 29, read as a whole, must be construed as meaning that the exceptional procedure provided for by Article 29(2) replaces the competition procedure in all respects and in no case can the commencement of that procedure prevent the appointing authority from taking into consideration candidates who could have taken part in the competition procedure if followed. It follows that in allowing an official to be transferred from one service to another or promoted from one category to another by means of a competition, Article 45(2) of the Staff Regulations must be interpreted as meaning that such transfer or promotion is also possible where the appointing authority has duly substituted, for commencement of a competition procedure, adoption of the alternative procedure provided for by Article 29(2) of the Staff Regulations.

99 The Court also considers that an interpretation to the effect that Article 45(2) of the Staff Regulations means that transfers from one service to another or promotions from one category to another are prohibited, even in a procedure adopted under Article 29(2), would be unfavourable to officials of the institutions as opposed to external candidates. Such unfavourable treatment would be contrary to the very principles on which Article 29 of the Staff Regulations is based, since Article 29(1) generally gives preference to candidates who are already officials. The Court considers that such an interpretation cannot therefore be accepted.

100 It follows from the foregoing that this plea must also be dismissed.

*The plea of infringement of Article 25 of the Staff Regulations*

## Arguments of the parties

101 According to the applicant, Article 25 of the Staff Regulations was infringed in that the letter of 1 March 1993 from the Secretary-General of the ESC rejecting his candidature contained no reasons.

102 The ESC states that the only formal decision taken was that appointing Mr B. to the vacant post. It denies, therefore, that there was any infringement of Article 25 of the Staff Regulations inasmuch as the letter informing the applicant that his candidature had been unsuccessful did not state reasons. The ESC further argues that Article 25 of the Staff Regulations is applicable only to decisions adversely affecting the rights of officials and that the right to be appointed following a recruitment procedure based on Article 29(2) of the Staff Regulations does not fall within its scope.

103 Lastly, with reference to the judgment of the Court of Justice in Case C-242/90 P *Commission v Albani and Others* [1993] ECR I-3839 and to the judgment of the Court of First Instance in *Coussios v Commission*, cited above, the ESC argues that annulment of the decision appointing Mr B. to the director's post in question would in any case constitute an excessive penalty for any unlawful act committed.

## Findings of the Court

104 The letter from the Secretary-General of 1 March 1993 informing the applicant that his candidature had been rejected contained no reasons for its rejection. Furthermore, the applicant received no reasoned decision for the rejection of his candidature before he brought his action before the Court, the failure to reply to his com-

plaint being deemed, by virtue of Article 90(2) of the Staff Regulations, an implied decision rejecting it.

105 According to settled case-law, while the appointing authority is not bound to give reasons for its decisions to promote officials to candidates who are not promoted, it is required to provide reasons for its decision to reject a complaint made under Article 90(2) of the Staff Regulations by a candidate who was not promoted, the reasons for that decision being deemed to be identical to those for the decision against which the complaint was made (see, for example, *Coussios v Commission*, cited above, paragraph 69). This case-law applies equally in the case of a decision making an appointment taken at the end of a procedure based on Article 29(2) of the Staff Regulations (see to the same effect the judgment of the Court of First Instance in Joined Cases T-160/89 and T-161/89 *Kalavros v Court of Justice* [1990] ECR II-871). Moreover, as the Court has already held in *Coussios v Commission*, cited above, the total absence of reasons for an appointment decision cannot be made good by explanations provided by the appointing authority following the bringing of an action, since at that stage such explanations no longer fulfil their function, which is, first, to provide the person concerned with sufficient information to assess whether the rejection of his candidature was well founded and to decide whether it would be appropriate to bring an action before the Court and, secondly, to enable the Court to exercise its power of review.

106 The plea that no reasons were given for the rejection of the applicant's candidature is therefore well founded.

107 However, the Court has to consider what consequences should follow in the instant case from breach of the duty to provide reasons for the rejection of the applicant's candidature. According to settled case-law, it is necessary to take into account not only the interests of applicants who have been the victims of unlawful acts but also the interests of third parties whose legitimate expectations might be

injured if applications for annulment were upheld (see, most recently, *Coussios v Commission*, cited above). That is why at the hearing the Court asked the parties whether, supposing that the Court reached the conclusion that only the plea of failure to state reasons should be upheld, they could agree on the penalty to be attached to the unlawful act committed.

108 Since the parties could not agree on the penalty, the Court must point out that, given its unlimited jurisdiction in proceedings concerning pecuniary matters, it may, even in the absence of proper conclusions to this effect, order the defendant institution to pay compensation for the non-material damage caused by its fault (see, in particular, the judgment of the Court of Justice in Case 24/79 *Oberthür v Commission* [1980] ECR 1743, point 14). In this case, the Court of First Instance considers that annulment, for lack of reasons, of the decision rejecting the applicant's candidature and, in consequence, of the decision appointing Mr B. as director in the General Secretariat of the ESC would constitute an excessive penalty for the unlawful act committed, having disproportionate adverse effects on Mr B.'s rights, and that an award of compensation constitutes the form of reparation which best meets both the applicant's interests and the requirements of the service.

109 In assessing the damage suffered, it is necessary to bear in mind that the applicant had to bring legal proceedings in order to learn the reasons for the decision rejecting his candidature. In those circumstances, the Court assessing the damage suffered *ex aequo et bono*, considers that an award of ECU 2 000 represents appropriate compensation for the applicant (see also *Coussios v Commission*, cited above, paragraph 108).

## Costs

110 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. Since the applicant, although



unsuccessful in his claims, had to bring this action in order to obtain reasons for the decision rejecting his candidature, the Court considers that the ESC, which has failed on one head, must be ordered to pay half the applicant's costs besides its own.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Orders the Economic and Social Committee to pay the applicant the sum of ECU 2 000 by way of damages for breach of administrative duty;**
2. **Dismisses the remainder of the application;**
3. **Orders the Economic and Social Committee to bear its own costs and half of the applicant's costs, the other half to be borne by the applicant himself.**

Vesterdorf

Barrington

Saggio

Delivered in open court in Luxembourg on 22 March 1995.

H. Jung

B. Vesterdorf

Registrar

President