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

In Case T-166/99,

Luis Fernando Andres de Dios, residing in Brussels, Belgium,

Maria Soledad García Retortillo, residing in Cáceres, Spain,

Suzanne Kitlas, residing in Brussels,

Jacques Verraes, residing in Brussels,

represented by J.-N. Louis, G. Parmentier and V. Peere, lawyers, with an address for service in Luxembourg,

applicants,

supported by

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

intervener,

* Language of the case: French.

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

defendant,

APPLICATION 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),

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, hereinafter 'Decision 1999/307', 'the contested decision' or 'the contested act').

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

9 From 1986 to 1995 the four applicants all worked for the Schengen Secretariat, for periods of differing length: Mr de Dios for over four years, Ms Retortillo for over a year and a half, Ms Kitlas for over three years, and Mr Verraes for over six years. At the time of bringing the present action, they were working either on a freelance basis or as members of the Commission's staff.

10 According to the applicants, the creation of about 70 permanent posts in the Council was provided for, in order to enable the General Secretariat of the Council to carry out the new tasks resulting from the integration of the Schengen *acquis*.

Procedure

11 By application lodged at the Registry of the Court of First Instance on 9 July 1999, the applicants brought the present action.

12 By separate document lodged at the Registry on 22 September 1999, the Council raised a plea of inadmissibility, pursuant to Article 114 of the Rules of Procedure of the Court of First Instance.

13 By order of 2 December 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 applicants.

14 On 6 December 1999 the applicants submitted observations on the plea of inadmissibility.

15 The intervener submitted observations on that plea on 25 January 2000.

16 By order of 9 March 2000, the Court of First Instance (Second Chamber) joined the plea of inadmissibility raised by the Council to the substance.

17 By letter of 6 July 2000, the applicants stated that they would not file a reply.

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

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

20 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

21 The applicants claim that the Court should:

— annul the contested decision;

— order the Council to pay the costs.

22 The intervener supports the form of order sought by the appellants.

23 The Council contends that the Court should:

— dismiss the action as inadmissible or unfounded;

— order the applicants to pay the costs.

Admissibility

24 The present action was brought on the basis of Article 230 EC. By the action the applicants complain that Decision 1999/307 makes it impossible for them to be appointed as officials in the General Secretariat of the Council, since they do not belong to the class of persons referred to in that decision.

25 The action must therefore satisfy the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, under which any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Arguments of the parties

26 While conceding that Decision 1999/307 is not formally addressed to them, the applicants submit that it is of individual concern to them within the meaning of the fourth paragraph of Article 230 EC (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 106). The decisive factor which differentiates the applicants from all other persons follows from Article 1(2) of Decision 1999/307, which redefines the 'Schengen Secretariat', for the purposes of the contested decision. Under that provision, the Secretariat no longer consists of all the persons working there, but solely of the persons who fulfil the conditions set out in Article 3 of Decision 1999/307. Only the 'Schengen Secretariat' thus redefined is the subject of integration into the General Secretariat of the Council.

27 According to the applicants, a defined group of persons who are excluded from the integration in question and are therefore affected adversely by the contested decision is thus distinguished *a contrario*. These are the persons who formed part of the Schengen Secretariat but, because they do not fulfil the above conditions of integration, are not covered by the new definition in Article 1(2).

28 The applicants observe that at the time when the contested decision was adopted the number and identity of the persons who would be adversely affected by it were known, or at least could be ascertained. The applicants were among those persons. Moreover, the change in the situation of those persons originated in the *ad hoc* redefinition of the Schengen Secretariat by Decision 1999/307. By excluding the applicants a priori from the proposed recruitment, the Council was in breach of its obligations, in particular the obligation to establish a recruitment procedure consistent with the relevant provisions of the Staff Regulations and the

obligation to take account of the situation of the applicants, who have qualifications which are equivalent or even superior to those of the persons recruited pursuant to the contested decision.

29 The intervener stresses the interest of all Community officials in the decision on the substance of the case, in that observance of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') is essential for the public service. As regards the admissibility of the action, it considers that the pleas and arguments put forward by the Council are closely linked to the substance of the dispute.

30 The Council submits that the action must be declared inadmissible. The applicants are neither addressees of Decision 1999/307 nor individually concerned by it.

31 In so far as the applicants claim to have skills relating to the Schengen *acquis* equivalent or superior to those required by the contested decision, the Council submits that the applicants must show that they are distinguished individually in the same way as the person to whom the act in question is addressed. Since Decision 1999/307 is an act of a general nature addressed to the appointing authority of the Council, the applicants are unable to demonstrate that they are distinguished individually in that way.

32 In so far as the applicants allege that the contested act has the effect of definitively excluding them from the class of persons eligible for integration into the General Secretariat of the Council, the Council contends that the applicants are excluded from the scope of the contested act because, like many other European nationals, they do not satisfy the objective conditions in Article 3(e) of the act. They have

not produced any evidence to show an intention on the part of the Council to exclude them individually, or to show a causal link between the Council's knowledge of their individual situation and the contested act.

33 The Council submits, finally, that it had no obligation to take account of the particular situation of anyone at the stage of determining, in the contested act, in general and objective terms the arrangements for recruitment which were intended to meet the requirements deriving from the Schengen *acquis* and its own needs.

Findings of the Court

34 It is common ground that the applicants are not addressees of Decision 1999/307. Article 6 of that decision states that it is addressed solely to the Secretary-General of the Council. Moreover, in their observations on the plea of inadmissibility, the applicants abandoned the argument originally put forward in their application that the contested decision was addressed to them, submitting instead that it is of direct and individual concern to them. It is also common ground that the applicants do not satisfy the conditions for integration laid down in Article 3(e) of the contested decision.

35 The Court must therefore consider whether the contested act constitutes a 'decision' of individual concern to the applicants within the meaning of the fourth paragraph of Article 230 EC, looking not to the form in which the act was adopted but exclusively to its substance (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9). It should be noted here that the Court of Justice has held, since the judgment in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471, at 498, that the term 'decision' in the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC) has

the technical meaning employed in Article 189 of the EC Treaty (now Article 249 EC) (order in Case C-168/93 *Gibraltar and Gibraltar Development Corporation* v *Council* [1993] ECR I-4009, paragraph 11).

36 A decision as so defined is distinguished from an act of a legislative nature, and the criterion for distinguishing between them lies in the general application or otherwise of the measure in question (order in *Gibraltar and Gibraltar Development Corporation*, paragraph 11). An act cannot be regarded as constituting a decision if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged generally and in the abstract (order in *Confédération nationale des producteurs de fruits et légumes*, at p. 479; Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, paragraph 9; and order in Case T-107/94 *Kik* v *Council and Commission* [1995] ECR II-1717, paragraph 35).

37 In the present case, therefore, the Court must analyse the nature of Decision 1999/307, and in particular the legal effects it is intended to produce or actually produces.

38 Decision 1999/307, adopted on the basis of Article 7 of the Protocol, under which the Council is to 'adopt the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council', fixes those detailed arrangements by defining, in Article 1(2), the Schengen Secretariat for the purposes of the proposed integration as consisting of 'persons fulfilling the conditions laid down by Article [3(e)]'. Under Article 2 of the decision, 'by way of derogation from the Staff Regulations and subject to a check on compliance with the conditions specified in Article 3... the [appointing authority]... may appoint to the General Secretariat of the Council the persons referred to in Article 1 of this Decision as probationer officials'. Under Article 3, the appointing authority 'may make the appointments provided for in Article 2 after checking that the persons concerned... were employed at the Schengen Secretariat on 2 October 1997... and were actually performing duties there [and] were still employed at the Schengen Secretariat on 1 May 1999'.

39 Those rules make use of objective, general criteria to determine the class of persons eligible for integration into the General Secretariat of the Council, and *a contrario* the class of persons definitively excluded from the possibility of integration. Moreover, by providing that the arrangements for integration are by way of derogation from the Staff Regulations — whose system of recruitment is undoubtedly of a legislative nature — the contested decision establishes a system distinct from that of the Staff Regulations, which, albeit *sui generis*, is also of a legislative nature. Decision 1999/307 thus applies to objectively determined situations and produces legal effects with respect to two categories of persons envisaged generally and in the abstract, namely those who fulfil the conditions laid down for integration and those who do not.

40 It is true that Decision 1999/307 affects the situation of the applicants by excluding them from the possibility of integration, whereas a person who satisfies the conditions laid down in the decision may benefit therefrom. However, the fact that the contested decision may have different specific effects for the individuals to whom it applies cannot deprive it of its general and abstract character (see Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraph 36, and the order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 37).

41 Nor is the legislative nature of Decision 1999/307 called into question by the argument that on 1 May 1999 the Council already knew the persons affected by it. The general application and hence the legislative nature of a measure are not affected by the fact that it is possible to determine the number or even the identity of the persons to whom it applies at a given moment, as long as it is established that it applies by virtue of an objective legal or factual situation, defined in relation to the objective of the measure (orders in Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel* v *Commission* [1998] ECR II-3533, paragraph 52 and the cases cited there, and Case T-114/99 *CSR Pampryl* v *Commission* [1999] ECR II-3331, paragraph 46).

42 The objective of the contested decision, as stated in recital 3 in the preamble, was to ensure that, when the Schengen *acquis* was integrated into the framework of the European Union, application and development of the provisions relating to the *acquis* continued in conditions which ensured that they functioned properly. In those circumstances, the Council had every interest in making sure that the practical implementation of the proposed act was not liable to compromise the attainment of that objective, in particular as a result of an insufficient number of persons capable of fulfilling the conditions for integration, without that being able to transform the contested decision into a bundle of individual decisions.

43 In any event, possible knowledge of the only potential beneficiaries of the contested decision cannot cast doubt on the legislative nature of that decision as regards the class of persons who are definitively excluded from its scope because they do not satisfy the conditions for integration it lays down.

44 Consequently, the contested act, despite being entitled a 'decision', is a measure of general application which applies to objectively determined situations.

45 However, the case-law states that, in certain circumstances, such an act may be of individual concern to some persons concerned (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13, and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19). In such a case, a Community act could be of a legislative nature and at the same time, *vis-à-vis* some persons concerned, be in the nature of a decision (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 50). That is the case if the act in question affects a legal or natural person by reason of certain attributes which are peculiar to him or by reason of circumstances which differentiate him from all other persons (*Codorniu*, paragraph 20).

46 In the light of that case-law, it must be ascertained whether, in the present case, the applicants are affected by the contested act by reason of certain attributes peculiar to them or by reason of circumstances which differentiate them, with respect to the measure, from all other persons.

47 The applicants submit that they are individually distinguished as a result of the Council's failure to establish a recruitment procedure consistent with the relevant provisions of the Staff Regulations, in which they could have taken part. In this connection, they accuse the Council, in their third plea on the substance, of abuse of procedure and misuse of powers. They also say that the Council ought to have taken account of their particular situation, in that they possess qualifications which are equivalent, or even superior, to those of the persons recruited pursuant to the contested decision.

48 However, by this argument the applicants are attempting to contest the lawfulness of Decision 1999/307. Examination of their argument therefore concerns the substance of the case. As the Court has already held in its order in *Molkerei Großbraunshain and Bene Nahrungsmittel* (paragraph 62 and the cases cited there), such an argument, by which the applicants complain that the institution deprived them of procedural rights, is irrelevant for the purpose of assessing the admissibility of an action brought against a legislative measure — which is in principle presumed to be lawful — unless the institution's choice is shown to constitute an abuse of procedure. It is settled case-law, however, that there is abuse of procedure, which is merely one form of misuse of powers, only if there is objective, relevant and consistent evidence to show that the contested act followed an objective other than that pursued by the rules in question.

49 On this point, it should be noted, to begin with, that the plea of abuse of procedure and misuse of powers is no more, in the present case, than a mere general allegation with no specific evidence.

50 Moreover, there is nothing in the case-file which might suggest that the Council chose the integration procedure at issue in order to deprive the applicants of a competition procedure in which they might have been able to take part, so that the contested decision was the outcome of 'a procedure which was vitiated in its entirety' (see, to that effect, the order in *Molkerei Großbraunshain and Bene Nahrungsmittel*, paragraph 63 and the cases cited there).

51 On the contrary, as the Court has held in today's judgment in Joined Cases T-164/99, T-37/00 and T-38/00 *Leroy and Others* v *Council* [2001] ECR II-1819, paragraphs 58 to 68, 74 and 75, firstly, Article 7 of the Protocol allowed the Council to adopt the detailed arrangements for integration of the Schengen Secretariat which the applicants contest, and, secondly, the fixing in Decision 1999/307 of a reference period extending from 2 October 1997 to 1 May 1999 was not arbitrary in relation to the objective pursued, namely the recruitment of experienced staff in conditions which assured the proper functioning of the integration of the Schengen *acquis* (recitals 3, 4 and 6 in the preamble to the contested decision).

52 Those considerations suffice to rule out, at the stage of examination of the admissibility of the present action, the possibility that the Council's choice of the integration procedure at issue, including the reference period of 2 October 1997 to 1 May 1999, instead of the recruitment procedure provided for by the Staff Regulations may distinguish the applicants individually for the purposes of the fourth paragraph of Article 230 EC.

53 In the context of their complaint concerning the recruitment procedure set up by the contested decision, the applicants also complain that the Council failed to take account of their particular situation. The reply to that can only be that the Court of Justice and the Court of First Instance have already held actions for annulment of a measure of a legislative nature to be admissible where there was an overriding provision of law which required the body responsible for the act to take the applicants' particular circumstances into account (see, to that effect, Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335, paragraph 90 and the cases cited there). However, the applicants have not cited any overriding

provision of law which required the Council to take into consideration the situation of persons who, like them, are excluded from the scope of Decision 1999/307. Moreover, there is no such provision in primary Community law relating to the integration of the Schengen *acquis*. The applicants cannot therefore rely on this individualising factor.

54 For the same reason, the argument that the applicants belong to a closed class of individuals must be rejected. For the existence of such a class to be a relevant factor distinguishing the persons in question individually in relation to a legislative act, it is settled case-law that the institution adopting the contested act must have been under an obligation to take account, at the time of adoption of the act, of the particular circumstances of those individuals (see the order in Case T-60/96 *Merck and Others* v *Commission* [1997] ECR II-849, paragraph 58 and the cases cited there, and the order of the President of the Court of Justice in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council and Commission* [2000] ECR I-8797, paragraph 46 and the cases cited there). In the present case, there was no such obligation on the Council.

55 In so far as the applicants refer to the length of time for which they worked for the Schengen Secretariat, permitting them to acquire the experience and skill required for integration into the General Secretariat of the Council, it must be stated that these are not attributes peculiar to them or circumstances which differentiate them from all other persons. It suffices to point out that many other persons are in principle capable of performing tasks within the Council relating to the Schengen *acquis*, for example officials serving with the national authorities who worked together with the Schengen Secretariat, persons with university qualifications relating to the Schengen *acquis* or lawyers specialising in the field, without thereby satisfying the conditions for integration laid down in the contested decision. The fact that each of the applicants worked for the Schengen Secretariat during a certain period — which moreover expired long before

Decision 1999/307 was adopted — is not therefore capable of distinguishing them individually in relation to other persons who, like them, do not fulfil the conditions for integration prescribed in that decision.

56 For all those reasons, the applicants may not be regarded as individually concerned by the contested decision. Since they do not satisfy that condition of admissibility laid down in the fourth paragraph of Article 230 EC, there is no need to consider whether they are directly concerned.

57 The present action must therefore be declared inadmissible.

Costs

58 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. Since the applicants have been unsuccessful and the Council has applied for costs, they must be ordered to bear their own costs and jointly and severally to pay those of the Council.

59 In accordance with the third subparagraph of Article 87(4) of the Rules of Procedure, Union syndicale-Bruxelles, the intervener in support of the form of order sought by the applicants, must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the applicants to bear their own costs and jointly and severally to pay those of the Council;**

3. **Orders the intervener to bear its own costs.**

Meij Potocki Pirrung

Delivered in open court in Luxembourg on 27 June 2001.

H. Jung A.W.H. Meij

Registrar President