OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 23 OCTOBER 1975 [1]

Mr President,
Members of the Court,

The proceedings with which I shall today concern myself amount to some extent to a continuation of Case 79/74. I can therefore, in so far as the facts of the case are concerned, confine myself to just a few remarks.

The two sets of proceedings originate in the fact that the European Parliament decided to fill a Grade A 3 post in its Directorate-General for Committees and Inter-Parliamentary Delegations. *Inter alia* a thorough knowledge of the English language was required in this connexion.

For that reason Mr Küster who is an official of the European Parliament in Grade A 4, instituted proceedings — Case 79/74 — against the first steps in the procedure for filling the post, namely Competition No 1059. As we now know, he was unsuccessful. By its judgment of 19 June 1975 the Court expressly declared that the linguistic requirements referred to were justified, and that an interest of the service could be discerned in this respect.

Even before the end of these proceedings, Parliament passed to the second stage of the procedure for filling the post — the first stage under Article 29 of the Staff Regulations consists, as we know, in the consideration of possibilities of promotion or transfer — and thereupon initiated Internal Competition No A/50.

Mr Küster took part. In addition however and after he had without success complained against the initiation of the competition he again appealed to the Court and brought the present proceedings. In his view Internal Competition No A/50 ought not to have been instituted. The terms of his application accordingly ask for a finding in this sense.

In ought further to be mentioned that the competition at issue has meanwhile come to an end. Whilst in the course thereof the Selection Board placed Mr Küster on the list of suitable candidates, another applicant was in fact appointed, and it must be added, contrary to the applicant's original assumption, this was not a British or Irish national but an official of Netherlands nationality.

In considering the legal issues in this case it must be said at the outset that only a part remains of the original points at issue.

Bearing in mind the judgment in Case 79/74 the defendant Parliament has abandoned its objections against admissibility. This was clearly right, for the thesis which it had originally adopted, that is to say that *one* action suffices for the purpose of arguing the applicant's point of view, was not tenable since it was only in the second action — that is, the present one — that it could be claimed that infringement of Article 29 (1) (a) of the Staff Regulations had occurred.

Also on the basis of the judgment in Case 79/74 the applicant has abandoned a part of the arguments which he originally put forward. This too was clearly right, for if the criticism of the requirement of a thorough knowledge of the English language in relation to the

1 — Translated from the German.

first stage of the procedure for filling the post cannot stand, then the same must of course apply to the next step, that is to say the internal competition.

Accordingly there now only remain two heads of claim to be examined: one being that of infringement of Article 29 (1) (a) of the Staff Regulations and the other being one of misuse of powers.

As regards the alleged failure to observe Article 29 (1) (a) of the Staff Regulations, the applicant refers to the fact that he has repeatedly been found eligible for promotion and that he was also placed on the list of suitable candidates in Competition No A/50. He was therefore undoubtedly eligible for promotion and under Article 29 of the Staff Regulations this ought to have been taken into account. He claims however that in the present case one is forced to the conclusion that the possibility of promotion was not even examined; at any rate the Parliament was unable to quote any factual grounds for disregarding the applicant's prospects of promotion.

A similar complaint has already been made by the applicant in Case 23/74. In my Opinion on that case I explained how Article 29 (1) (a) of the Staff Regulations is to be interpreted. I still adhere to this view. Meanwhile the Court also has ruled upon the matter. From the judgment in this case it can be clearly seen that where there are several persons eligible for promotion the appointing authority may very well arrive at the conclusion that in the interests of the service and of objectivity it is desirable to hold an internal competition.

It seems to me that if only in the light of this fact it is possible to arrive at a negative judgment on the head of claim with which I am now concerned.

For in its defence the defendant Parliament expressly referred to the grounds of judgment in that case. Accordingly one may well assume that the circumstances of the present case are similar to those in Case 23/74, namely that evidently there were several candidates eligible for promotion who were available for filling the post advertised. If such is the case however one cannot really object, but on the contrary is forced to recognize as correct the view that the Parliament did not undertake to fill the post within the framework of the first stage provided for by the Staff Regulations, but that in the interest of an objective consideration of several applicants it arranged for a competition.

Even if one considers this an inadequate reason — possibly on the ground that the defendant Parliament had made no detailed statements as to the composition of the group of candidates — one can hardly doubt that there is another consideration which is very much to the point. It relates to the argument on the part of the Parliament that the consideration given to filling the post by way of promotion under Article 29 (1) (a) had not produced any satisfactory result. One must really not forget that in the filling of a post by way of promotion the requirements attaching to the post also play a part. in the present case, according to the terms of the competition, these were a thorough knowledge of the English language. In these circumstances and after all that has emerged it does not seem surprising that it was not possible in the course of the promotion procedure, that is on the basis of the application and the personal file of the applicant, to arrive at the conclusion that the applicant complied with these requirements. In the application which started the present proceedings there is after all in relation to the applicant only a reference to a 'bonne connaissance active et passive de l'anglais' (p. 2) and of a 'connaissance assez étendue de la langue anglaise' (p. 5). This is in line with the applicant's remarks in the preceding Case 79/74. On p. 2 of the application it is stated: 'L'avis de vacance

1059 avait prévu l'occupation du poste par promotion or mutation, n'ignorant pas un instant qu'il ne pouvait y avoir aucun candidat mutable ou promouvable, qui remplirait la condition de la connaissance approfondie de la langue anglaise.' On p. 4 of the rejoinder there is added to the finding that the applicant had a 'bonne connaissance de l'anglais' the question: 'Pourrait-il soutenir que cette connaissance est approfondie, tant qu'il ne présente pas un diplôme universitaire d'étude de la langue?' Just as clear are the rather reserved statements in the applicant's application of 2 April 1974 and the data originating with him contained in the report of 5 December 1973 prepared under Article 43 of the Staff Regulations. In the application there is only a reference to the fact that since 1959 the applicant has made use of all his linguistic abilities both orally and in writing — this refers to all the official languages, except Danish. The applicant's comments in the report made on him under Article 43 of the Staff Regulations relating to him only state, in relation to the other official languages, that is to say, the languages other than Danish and French, that in the course of his activities since 1959 he has had an opportunity of using them.

It is therefore not really surprising that despite the applicant's recognized eligibility for promotion the appointing authority of the Parliament did not wish to effect a promotion to the post advertised on the mere basis of the data existing in relation to the applicant and included in his personal file, but gave its preference to a competition procedure in which this very matter of the knowledge of languages could be subjected to precise verification in an oral test.

Accordingly one certainly cannot take the view that the initiation of the internal competition ought to be annulled on the ground of a disregard of Article 29 (1) (a) of the Staff Regulations.

As regards the remaining complaint to be examined, namely that of misuse of power, one must in the light of the judgment in Case 79/74 disregard two facts which the applicant would have liked to see taken into consideration as relevant factors. These are first the fact that a thorough knowledge of the English language was required for the advertised post and secondly the alleged statements of a high official of the Parliament according to which the post was reserved for a British national.

In support of the applicant's argument there thus only remain two factors: First, the fact that the applicant was not considered in connexion with the filling of an A 3 post although the reports on him under Article 43 of the Staff Regulations were favourable, and althougn on three occasions in the course of competitions he was put on the list of suitable candidates. Secondly, he argues as relevant the fact that although the competition provided for an oral test of knowledge of languages and of other knowledge required for the post, yet under the heading 'Knowledge of languages' at the most 10 points could be granted whilst a maximum of 40 points was provided in respect of qualifications.

As regards the first point of this argument it really suffices on the one hand to refer to the judgments which provide that the fact that the applicant was left out of account in the course of a promotion procedure does not provide any ground for complaint and on the other hand to realize that the applicant was not selected in the course of the competitions because candidates who were awarded higher marks were preferred to him. These events certainly do not point to misuse of powers.

As regards the second point the Parliament has referred in particular to the judgment in Case 23/74. According to this judgment in the circumstances which are relevant in these proceedings there can only be a question of misuse of powers where the criteria laid down for a competition lead to candidates' being

arbitrarily placed at a disadvantage. Accordingly there exists an appreciable margin of discretion in this field and it is clear that the required proof is only provided where that margin is exceeded. In my view there can be no question of this in the present case. At any rate I do not consider it clearly inappropriate if in the course of a competition greater weight is attached to an applicant's qualifications and to his factual knowledge then to his knowledge of languages.

Accordingly the allegation of misuse of powers can likewise not succeed.

Summarizing my views I can only suggest that the application be rejected as unfounded and, as is usual in such cases, that a decision be adopted in accordance with Article 70 of the Rules of Procedure.