JUDGMENT OF THE COURT (FIRST CHAMBER) OF 5 DECEMBER 1974 [1]

Claudette Van Belle v Council of the European Communities

Case 176/73

Summary

1. *Officials — Recruitment — Special procedure — Application to candidates who are officials.*
(Staff Regulations, Article 29 (2))

2. *Officials — Recruitment — Special procedure — Application — Strict interpretation — Promotion of an official from one category to another — Not permissible.*
(Staff Regulations, Articles 29 (2), 45 (2))

1. Under certain conditions and in exceptional circumstances Article 29 (2) allows the substitution of a different recruitment procedure for inter-institutional or open competitions. This procedure applies, without distinction, to all those who would have been eligible to enter those competitions. It is neither just nor in the interest of the service that the said procedure should be applied only in respect of candidates who are not officials, in view of the fact that it is substituted for a competition from which candidates who are also officials could not have been excluded.

2. Article 29 (2), by reason of its exceptional character, must be strictly interpreted and cannot take precedence over the rule formulated, in a general and unconditional manner, in Article 45 (2).

In Case 176/73

CLAUDETTE VAN BELLE, an official with the Secretariat-General of the Council of the European Communities, living at the Moulin of and at Bornival-lez-Nivelles, Rue Bois d'en bas, Belgium, represented by Marcel Grégoire, advocate at the Cour d'Appel, Brussels, 68, Rue Camille Lemonnier, 1060

1 — Language of the Case: French.

Brussels, with an address for service in Luxembourg at the Chambers of Tony Biever, advocate at the Court, 83, Boulevard Grande-Duchesse Charlotte

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, 170, Rue de la Loi, 1040 Brussels, represented by Mr Sacchettini, Legal Adviser with the Secretariat-General of the Council at Brussels, with an address for service in Luxembourg at the office of P. Lamoureux, Legal Adviser to the Commission of the European Communities, 4 boulevard Royal,

defendant,

Application for the annulment of the Council's decision of 22 December 1972, published on 3 January 1973, appointing Charles Goetz to a post as Administrator in Grade A6 (Notice of Vacancy No 84/72), of all other related decisions and of the implied rejection of the complaint made in this matter by the applicant,

THE COURT (First Chamber)

composed of: C. Ó Dálaigh, President, R. Monaco and J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: G. Reischl,
Registrar: A. Van Houtte,

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

1. The applicant is an official in Grade B3 with the Secretariat-General of the Council.

On 8 August 1972 two Vacancy Notices, No 84/72, relating to three posts as Administrator in Grade A6, and No 86/72, relating to two posts as Administrator in Grade A6, were posted up by the defendant.

By decisions of 22 December 1972, published on 3 January 1973, the defendant appointed to two of these posts officials in Grade B1, Roger Brisaer and Charles Goetz, who were therefore promoted out of their category to Grade A6.

2. By letter of 29 March 1973 the applicant lodged a complaint within the meaning of Article 90 (2) of the Staff Regulations, requesting that the decisions of 22 December 1972 be withdrawn and that the procedure for appointment to the vacant posts concerned be reopened. By letter of 12 June 1973 this complaint was withdrawn in so far as it concerned the decision to appoint Roger Brisaer, whose death had occurred meanwhile. Since, for the rest, the complaint remained unanswered, Miss Van Belle lodged the present application against the decision appointing Charles Goetz and against all earlier and accompanying decisions, in particular the decision not to make use of the competition procedure and to apply Article 29 (2) of the Staff Regualtions, and against the implied decision rejecting the complaint of 29 March 1973. This application, dated 22 October 1973, was registered at the Court on 24 October 1973.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court (First Chamber) decided not to undertake any preparatory enquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

1. Annul the defendant's Decision of 22 December 1972, published on 3 January 1973, appointing Charles Goetz to one of the posts forming the subject-matter of Vacancy Notice 'Council No 84/72';
2. Annul all decisions prior to and/or accompanying this decision of appointment and which are connected therewith, in particular the decision not to fill the vacant post in issue by means of the competition procedure, as well as the decision to apply Article 29 (2) of the Staff Regulations;
3. Annul the implied decision rejecting the applicant's complaint of 29 March 1973, in so far as it concerns the decision to appoint Charles Goetz;
4. Order the defendant to pay all the costs of the proceedings.

The defendant submits that the Court should:

dismiss the application as unfounded and order the applicant to bear the costs.

III — Submissions and arguments of the parties

A — The *first submission* in the application is based upon the infringement of Articles 29 (1) and (2) and 45 (2) of the Staff Regulations. The appointment of Charles Goetz, an official in Grade B1, to a post in Grade A6, in the absence of a competition, is alleged to be in violation of Article 29 (1), according to which, unless a vacant post can be filled by promotion or transfer within the institution or from other institutions, the competition procedure must be followed.

Moreover, the way in which Article 29 (2) was applied on the occasion of the appointment at issue is said also to be illegal because that provision allows of recourse to a procedure other than the competition procedure only for the recruitment of officials in Grades A1 and A2 and, in exceptional cases, for posts requiring special qualifications, this last

being a condition which is not fulfilled in the case in point.

Finally, there is also said to have been an infringement of Article 45 (2) of the Staff Regulations, according to which promotion from one category to another shall be effected only on the basis of a competition.

In its *statement of defence* the Council claims that the Staff Regulations envisage two ways in which a post may be filled:

(a) recruitment, which is regulated by Chapter 1 (Recruitment) of Title III, and in particular by Article 29, and based upon the organization of competitions;

(b) advancement, regulated by Chapter 3 (Articles 43 to 46: Reports, advancement to a higher step and promotion) of Title III of the Staff Regulations, the method of advancement being that of promotion.

Article 45 (2) should be interpreted as excluding promotion for movement to a higher category and it therefore refers to the organization of competitions pursuant to Chapter 1 of Title III and in particular to Article 29, the reference being to the whole of Article 29, including paragraph (2), since this provision contains all the rules applicable to competitions.

The rules of the first Chapter apply to all competitions: internal, inter-institutional or open. Everything to do with competitions is covered by the term 'recruitment', since even an internal competition may be said to constitute a kind of fresh recruitment, because by its conditions and in its results it effaces all concepts of grade and seniority, and because the career (grade and step) of the successful candidate who is appointed recommences on an entirely fresh basis. Internal competitions are therefore governed by the whole of Article 29, that is to say, as much by paragraph (2) as by paragraph (1), and the applicant's argument that paragraph (2) and the derogation from the rule regarding competitions which it contains apply only to external recruitment cannot be accepted. Accordingly, Article 29 (1) cannot be infringed by the fact that recourse is had to the exception expressly provided for in Article 29 (2).

There has therefore been no infringement either of Article 29 (1) and (2) or of Article 45.

In her *reply* the applicant examines and challenges the interpretation put forward by the Council, both as regards Article 45 (2) and Article 29 (2).

The wording of Article 45 (2) is clear: a competition is, in any event, obligatory in the case of promotion from one category to another.

This argument has already been accepted in the case-law (Judgment of 13 July 1972, Joined Cases 55 to 76, 86, 87 and 95/71, *Besnard et al,* Recueil 1972, p. 562 and opinion of Mr Advocate-General Lagrange in Case 15/63, *Lassalle,* [1964] ECR, 40) and is confirmed both by the fact that Article 29 (2) applies only to external recruitment and by a comparison between Articles 28 and 45 of the Staff Regulations. Article 28, concerning external recruitment, constitutes an express exception to the general rule concerning competitions, in that it refers to Article 29 (2), whereas Article 45 (2) contains no such reference. This difference in drafting makes it clear that a change of category may never be effected except on the basis of a competition.

Moreover, this provision is not, as the defendant maintains, a mere reference to the rules concerning competitions but a substantive rule requiring a competition for promotion from one category to another.

It cannot be stated that the applicant's argument would lead in any respect to absurd conclusions, as is wrongly maintained by the Council. The fact that an exception may be made to the rule concerning competitions in relation to external recruitment, whereas promotion from one category to another on the basis of 'selection' is prohibited, is

explained by the fact that the institutions must be able to effect external recruitment of highly specialized personnel who would not perhaps be willing to undertake the formalities of a competition. This consideration is not valid in respect of promotion from one category to another, involving as it does officials already in the service who are subject to the Staff Regulations and to the principle of equality. It is in fact the Council's argument which leads to absurd conclusions since, having stated that promotion from one category to another may not be effected by selection, it nevertheless maintains that such selection is lawful in this case.

When it speaks of 'recruitment', therefore, Article 29 (2) is merely concerned with the entry into the public service of persons who are not yet officials.

The applicant supports this interpretation by reference to the opinion of Mr Advocate-General Lagrange delivered prior to the judgment of 4 March 1964 (Case 15/63, *Lassalle v European Parliament,* [1964] ECR 45) and the judgment of the Court of 15 December 1966 (Case 62/65, *Serio,* [1966] ECR 569).

Although Mr Advocate-General Lagrange agreed in the opinions cited above that the concept 'recruitment' might possibly be extended to cover promotion between categories, he nevertheless stated that in particular Article 29 (2) appeared clearly *'to apply to the recruitment of candidates who are not yet officials.'*

The applicant therefore concludes that Article 29 (2) refers exclusively to 'external' recruitment, that is to say to the entry into the service of persons who are not yet officials.

In its *rejoinder* the Council states that the parties are agreed that Mr Goetz was appointed in pursuance of Article 29 (2) and that movement between categories may not be effected by promotion.

The Council challenges the contention that as a substantive rule Article 45 (2) can refer only to the procedural rules contained in Article 29, that is to say, only to the first paragraph of that Article and not to the second. Forming as it does the second paragraph of an article devoted to promotion which itself forms part of a chapter entitled 'Reports, advancement to a higher step and promotion', Article 45 (2) can be a substantive rule only as regards promotion and not as regards competitions. It refers to the whole competition system, including substantive and procedural rules and exceptions.

The Council recalls that, in its opinion, the Staff Regulations lay down two methods by which a post may be filled: promotion (Articles 45 and 46) and recruitment (Chapter 1 of Title III). If promotion is not permitted the method employed must be that of recruitment. The rules relating to external and internal recruitment are not merely identical, but a single set of rules applies to both. All the rules, methods and exceptions contained in the Chapter on 'Recruitment' apply both to internal and to external recruitment.

A close analysis of Article 29 (2) shows that it is only in respect of officials in Grades A1 and A2 that recourse may not be had to other servants of the Communities (internal recruitment without competition), but that such recruitment is possible for specialized posts in other grades.

The conclusions drawn by the applicant from Article 28 (d) are said to be erroneous. Although it is indeed stated at the beginning of Article 28 that 'An official may be appointed only on condition that...', this provision nevertheless applies equally to internal recruitment. Although it is frequently the case in the event of internal recruitment that a check has already been made at the time of the first appointment of the official to ensure that the conditions required by Article 28 were fulfilled, nevertheless, as a matter both of fact and of law, this check must be made afresh. The requirements as to nationality, military service, character, physical

fitness and satisfactory knowledge of another language of the Communities may in fact have altered since the time when the official was first recruited.

The Council is at pains to point out that, contrary to the applicant's statement, recourse to Article 29 (2) does not in any sense lead to 'appointment by selection.' In the Communities, where promotion on the basis of seniority does not exist, such selection is the classic form of promotion. The exercise of a choice, pursuant to Article 29 (2), for the purpose of appointment according to the Staff Regulations is a different matter.

B — As a subsidiary matter the applicant makes a second submission based upon the infringement of Article 29 (2) of the Staff Regulations. In the event of the latter's being held to be applicable, even in cases of internal recruitment and notwithstanding Article 45 (2) of the Staff Regulations, its application presupposes that certain formal and substantive conditions have been fulfilled, which was not and is not so in this case.

In the first place, recourse may be had to Article 29 (2) of the Staff Regulations only if the Vacancy Notice or, at the very least, a subsequently published document, has made this possibility known. Vacancy Notice No 84/72, concerning, in particular, the post as administrator in Grade A6 to which Charles Goetz was appointed, did not state that Article 29 (2) of the Staff Regulations might be applied. The statement at the end that 'the posts set out above will be filled according to the procedure laid down in the Staff Regulations (cf. Articles 4 and 29) is clearly insufficient, while the title referred only to the second paragraph of Article 4 and Article 29 (1) (a) of the Staff Regulations.

Secondly, reasons must be stated for a decision to apply Article 29 (2) (Judgment of 26 May 1971, Joined Cases 45 and 49/70, *Bode,* Recueil 1971, pp. 476 and 477). The applicant requests that the Court should ascertain whether this decision, which must have preceded the appointment but of which she has no knowledge, contains an express statement of reasons, in the absence of which no review of the legality of the recourse to the procedure of Article 29 (2) is possible.

Thirdly, recourse to Article 29 (2) is authorized only *'in exceptional cases ... for recruitment to posts which require* special qualification', the two phrases of the sentence constituting one and the same condition (opinion of Mr Advocate-General Dutheillet de Lamothe, in Joined Cases 45 and 49/70, *Bode,* Recueil 1971, pp. 482-483). It is clear from the qualifications required by Vacancy Notice No 84/72, namely:

(a) completion of studies at university level attested by a degree or possession of an equivalent level of vocational experience;

(b) a thorough knowledge of one of the languages of the Communities and a satisfactory knowledge of another language of the Communities.

that this was not a post requiring special qualifications, since these are only the normal qualifications for posts as administrator in Grade A6.

In its *statement of defence* the Council claims that in fact this was a case of regrading of a post from Category B to Category A. For nearly fifteen years Mr Goetz has undertaken very special duties within the Secretariat-General which do not correspond to tasks undertaken in any other administrative body, in particular the coordination of the branches responsible for the composition, typing, duplication, translation and distribution, all at very short notice, of a large number of documents. The vast increase in the Council's work long ago led the Secretary-General to consider that the post should be one in Category A. It is therefore the post itself held by Mr Goetz which has evolved from being a post involving 'executive duties' into a post involving 'administrative and advisory duties'. Although the regrading

of posts is essentially a budgetary operation, it is none the less true that an official who satisfactorily discharges the duties corresponding to the regraded post must, by the appropriate channels provided under the Staff Regulations, remain in charge of the amended duties — the nature of which remains unchanged — in the post which they dictate. The channels provided under the Staff Regulations can only be, in the case of a change of category, one of those contained in Article 29 of the Staff Regulations, that is to say, a competition or recourse to paragraph (2) of that article. A competition would have been pointless since, by definition, Mr Goetz was the best qualified to undertake these duties, while the latter require special qualifications, there being no training corresponding to this sort of work. Moreover, the necessary quality, rapidity and precision of the work within the Council would have been disrupted if another candidate had had to be instructed in the work.

It is therefore clear that recourse to Article 29 (2) was had by reason of the special, technical nature of the post, which meant that 'only a limited number of persons already highly specialized and having unusual knowledge and experience were eligible for it' (Opinion of Mr Advocate-General Dutheillet de Lamothe, Joined Cases 45 and 49/70, *Bode,* Recueil 1971, pp. 482 and 483).

The application of Article 29 (2) appears therefore to have been entirely well-founded.

Moreover, the Vacancy Notice stated that Article 29 would be applied and the Staff Regulations do not require that it be stated that paragraph (2) of that provision is to be applied. In its judgment in Joined Cases 45 and 49/70, *Bode* (Recueil 1971, p. 465), the Court did not follow the Advocate-General, who had been in favour of such a statement.

Although it appears unnecessary to justify the decision making the appointment, this being a case of the regrading of a post in respect of a single official who continued to undertake the same duties, the Council nevertheless acted according to the rules laid down by the Staff Regulations, as is shown by the following recital from the decision: 'Whereas the post to be filled requires special qualifications and the chosen candidate has shown that he possesses these qualifications'.

In her *reply* the applicant claims that the argument regarding the regrading of the post, as adduced by the Council, may be challenged on two grounds.

First, the 'regrading' of the post led in any case to the creation of a new post, as is clear from Vacancy Notice No 84/72. Whether or not this was a case of regrading, the conditions for the application of Article 29 (2), both formal and substantive, should have been fulfilled.

Secondly, the arguments put forward by the Council as evidence of the alleged regrading of the post show that the appointment of Mr Goetz had been decided in advance and that the defendant merely looked through the Staff Regulations to find a rule which, in its opinion, would allow it to achieve its objective. The applicant claims that there was here a misuse of powers.

As regards the formal conditions of Article 29 (2), it is strictly necessary that the decision to resort to Article 29 (2) should be mentioned in the Vacancy Notice or in a document published subsequently. The opinion of Mr Advocate-General Dutheillet de Lamothe in Joined Cases 45 and 49/70 *(Bode,* Recueil 1971, pp. 483-484) leaves no doubt in this respect. It is not true to say that the Court did not follow the Advocate-General on this point; the Court did not give a ruling, since the absence of a statement of reasons was sufficient in itself to entail the annulment of the contested measures.

As for the duty to give a formal statement of reasons for having recourse to Article 29 (2), this subsists, even in the event of the 'regrading' of a post,

wherever the institution makes use of the exceptional procedure contained in Article 29 (2). It is not sufficient to state in the decision making the appointment that the post to be filled requires special qualifications and that the candidate chosen has shown that he possesses these qualifications. The reasons must also be stated (Judgment of 26 May 1971, Joined Cases 45 and 49/70, *Bode,* Recueil 1971, p. 477) and an explanation given as to why the post at issue was not filled by way of a competition.

As regards the substantive conditions of Article 29 (2), the concepts 'exceptional case' and 'post which requires special qualifications' must be strictly interpreted and thoroughly checked. It appears from the wording of Vacancy Notice No 84/72 that the qualifications required and the nature of the duties were quite usual and normal for an administrator in Grade A6. If it is accepted that they may be classed with the qualifications and duties with which Article 29 (2) of the Staff Regulations is concerned, this would amount to saying that the exception is the rule, and it is difficult to see when the normal procedure of Article 29 (1) could still be applied.

The applicant notes that, according to the Council, Mr Goetz is the person best qualified to undertake the duties connected with the 'regraded post'. It is not however the purpose of Article 29 (2) to permit the occupier of a post to remain in that post, even if the latter is regraded to the point where it becomes a completely new post which, because of this fact, must be declared vacant. Moreover, for the purposes of Article 29 (2), for posts corresponding to grades other than Grades A1 and A2, the possibility of dispensing with the competition procedure is not dependent upon the *qualifications of the candidates* for the vacant post, but, according to the actual wording of the Staff Regulations, the *special qualifications required for the post.* The need for such qualifications is not clear in the present case.

In its *rejoinder* the Council recalls that the Vacancy Notice did indeed state that Article 29 would be applied, that the Staff Regulations do not require that mention should be made of recourse to paragraph (2), and that the regrading of the post justifies the decision with regard to the appointment, since the Council made sure that the conditions required by Article 29 (2) were fulfilled and metioned the fact in the recitals to the decision itself.

The reliance placed upon the judgment of the Court of 26 May 1971 (Joined Cases 45 and 49/70, *Bode,* Recueil 1971, p. 465) leads the Council to emphasize that the detailed rules for the implementation of the Staff Regulations, in so far as regards the conditions for appointment to a post, are entirely different for the Commission and for the Council, in two fundamental areas. For the Commission there exists an 'organigramme' (detailed list of posts) which determines the duties corresponding to each post, whether occupied or vacant. In the words of the 'procedural Rules' laid down by Decision of the Commission of 14 February 1968, supplemented by the Decisions of 25 November 1970 and 20 February 1971, published in the Staff Courier No 175 A of 1971, a Vacancy Notice shall specify 'in general the career bracket, the starting grade to which an official may be promoted, the administrative unit within which the post falls, the place of work, a description of the type of duties and the main qualifications required, as well as calling for applications'. Descriptions of posts with the Secretariat-General of the Council, on the other hand, are extremely vague and there is no organigramme or detailed list of posts. Appointments and promotions are generally made in the aggregate from grade to grade. Another difference lies in the fact that with the Commission Vacancy Notices constitute an invitation to apply whereas those of the Council merely give notice that a post appearing in the table of the establishment plan has been declared vacant by the appointing authority and

may therefore be filled. This is the reason why there are only very slight differences between Annex I to the Staff Regulations (basic posts and corresponding career brackets) and the description of posts with the Council. This is also the explanation for the simplified wording of the Council's Vacancy Notices. Thus Vacancy Notice No 84/72, which constitutes the formal expression by the authority of its wish to fill the post, mentioned Article 29 in the body of the text to indicate that the post might be filled by either of the two means available under Article 29.

As regards the special qualifications required for the post, it is the Council's opinion that the post occupied by Mr Goetz, regraded to Category A, appeared, after comparison with comparable functions in other institutions, specialized to a degree where it would have been impossible to find another official capable of filling it, without jeopardizing the proper functioning of the institution.

In short, the contested appointment:

— owed its special character to the regrading of the post,

— was made pursuant to Article 29 (2), there being no text prohibiting the application of this provision to officials already in the service of the Communities,

— was decided on the basis of a Vacancy Notice drawn up in the context of the Council's own methods of appointment,

— takes account of the 'exceptional nature' of the recourse to Article 29 (2); not only is this merely one case as against more than 2 000 appointments made pursuant to Article 29 (1), but the post itself is highly specialized in character.

The oral observations of the parties were presented at the hearing on 24 October 1974.

The Advocate-General delivered his opinion on 20 November 1974.

Law

1 The proceedings instituted by application of 22 October 1973, lodged at the Court on 24 October 1973, are concerned, in essence, with the annulment of the Council decision of 22 December 1972 appointing Charles Goetz, an official with the Council in Grade B1, to a post as administrator in Grade A6.

2 This appointment was made in application of Article 29 (2) of the Staff Regulations of Officials, according to which a recruitment procedure other than that of a competition may be adopted, in exceptional cases, for posts which require special qualifications.

3 The applicant claims, first, that the contested decision could not have been taken in application of the said paragraph (2) because that provision is concerned only with the recruitment of persons not yet in the service of the

Communities and cannot be used where, for the purpose of filling a vacant post, servants already in office are to be considered.

4 Article 29, which forms part of the chapter in the Staff Regulations devoted to recruitment, governs the various means of filling a vacant post.

5 It lays down, for this purpose, that examination shall be made, in order of preference, first of the possibilities of filling the post by promotion or transfer within the institution where the vacancy has occurred, next of the possibility of holding competitions internal to that institution, and, thirdly, of applications for transfer made by officials of other institutions.

6 It is only if these possibilities are seen to be inadequate that the procedure for competitions on the basis either of qualifications or of tests or of both qualifications and tests may be followed.

7 In this case, as appears from Article 29 of the Staff Regulations read in conjunction with Article 1 (1) (a) of Annex III thereto, this amounts either to inter-institutional competitions or to open competitions.

8 The Staff Regulations do not therefore distinguish between internal competitions and external competitions, but between internal competitions and open competitions, these last being those to which both candidates from outside the institutions and others, already having the status of official or servant, are admitted.

9 It follows that where, under certain conditions and in exceptional circumstances, Article 29 (2) allows the substitution of a different recruitment procedure for inter-institutional or open competitions, this procedure must be capable of application, without distinction, to all those who would have been eligible to enter those competitions.

10 It is neither just nor in the interest of the service that the said procedure should be applied only in respect of candidates who are not officials, in view of the fact that it is substituted for a competition from which candidates who are also officials could not have been excluded.

11 The applicant objects that it is illogical to apply Article 29 (2) to servants already in office because the decision to have recourse to this provision necessarily implies a prior decision not to hold an internal competition to fill the post at issue.

12 In her opinion, it cannot be accepted that the appointing authority can at one and the same time be of the opinion that there is no call to hold a competition internal to the institution because it is already recognized that the persons eligible to participate therein do not fulfil the conditions necessary to fill the vacant post, and yet, on the basis of Article 29 (2), appoint a person who, because he was already in the service of the institution, should have entered the said competition.

13 The skills required of the occupant of a post requiring special qualifications may be of a kind such that, in exceptional cases, the competition procedure, whether for internal or open competitions, is inappropriate for the assessment of those skills.

14 No doubt such circumstances only occur, as moreover is indicated by paragraph (2) of Article 29, in exceptional cases, such that the application of this provision is subject to very strict conditions of form and of substance; it cannot however be discounted.

15 Moreover, although it may be accepted that an open competition may, in certain circumstances, appear inappropriate for the purpose of filling a vacant post, there is no reason why the same might not possibly be true in the case of an internal competition, especially as the detailed rules for these two types of competition are identical.

16 It may therefore be concluded that by applying Article 29 (2) in respect of a servant already in office the defendant did not infringe this provision.

17 The applicant claims, secondly, that in any case Article 45 (2) of the Staff Regulations does not allow recourse to be had to Article 29 (2) for the purpose of the promotion of an official from one category to another.

18 According to Article 45 (1) of the Staff Regulations: 'Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the

official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.'

19 According to Article 45 (2): 'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition.'

20 In the defendant's view, this latter provision merely rules out the possibility of promotion where a vacant post is filled by the movement of an official from one category to another, but refers, in respect of other cases, to the different recruitment possibilities provided for by Article 29, in both paragraph (2) and paragraph (1).

21 Article 45 (2) does not have the purely negative scope attributed to it by the defendant, but, on the contrary, formulates a fundamental rule corresponding to the organization of the Community public service into different categories requiring distinct qualifications.

22 The very words 'only on the basis of a competition' indicate not only that promotion is not possible but that only a competition is admissible.

23 Moreover, if the provision at issue were concerned only to exclude promotion, while leaving open the possibility of other methods of recruitment, it would be superfluous, since promotion is already ruled out for the purposes of movement between categories by Article 45 (1).

24 Moreover, Article 29 (2), by reason of its exceptional character, must be strictly interpreted and cannot take precedence over the rule formulated, in a general and unconditional manner, in Article 45 (2).

25 The submission is well founded and the contested decision must be annulled.

Costs

26 In pursuance of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

27 The defendant has failed in its submissions and must therefore be ordered to pay the costs.

On those grounds,

THE COURT, First Chamber,

hereby:

1. **Annuls the Decision of the Council of 22 December 1972 appointing Charles Goetz to a post as administrator in Grade A6;**
2. **Orders the defendant to bear the costs.**

C. Ó Dálaigh R. Monaco J. Mertens de Wilmars

Delivered in open court in Luxembourg on 5 December 1974.

A. Van Houtte
Registrar

C. Ó Dálaigh
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 20 NOVEMBER 1974 [1]

Mr President,

Members of the Court,

On 8 August 1972 the Council of the European Communities published two Vacancy Notices, Nos 84/72 and 86/72. According to Notice No 86/72 two posts in Grade A6 were vacant, and according to Notice No 84/72 three posts in Grade A6 would be vacant as soon as the posts mentioned in Vacancy Notice No 83/72 had been filled by way of promotion.

1 — Translated from the German.