ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 June 1999 *

In Case T-107/99 R,

María Soledad García Retortillo, freelance translator, residing at Cáceres, Spain, represented by Jean-Noël Louis, Greta-Françoise Parmentier and Véronique Peere, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

applicant,

v

Council of the European Union, represented by Martin Bauer and Diego Canga Fano, Legal Advisers, acting as Agents, assisted by Philip Bentley, Barrister, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director- General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: French.

APPLICATION for suspension of the operation, first, of Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (OJ 1999 L 119, p. 49) and, secondly, of the decisions of the Council's appointing authority appointing as officials of the European Communities and integrating into its services only persons in the service of the former Schengen Secretariat on 2 October 1997,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal and factual background

1 The Protocol integrating the Schengen *acquis* into the framework of the European Union (OJ 1997 C 340, p. 93, 'the Protocol'), annexed to the Treaty on European Union and the Treaty establishing the European Community by the final act adopting the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C 340, p. 1), incorporates the Schengen *acquis*, as defined in the

annex thereto, into the legal and institutional framework of the European Union as a form of closer cooperation.

2 Articles 2 and 7 of the Protocol provide 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.'

3 By a memorandum dated 15 April 1999 the Secretary-General of the Council forwarded to the Committee of Permanent Representatives (Coreper) two draft

Council decisions prepared by its General Secretariat, one of which, bearing the reference '7328/99 Schengen 25', provided for the detailed arrangements for the integration of the Schengen Secretariat into the Council's General Secretariat. Point 3 of that memorandum requested delegations to 'give their agreement to those draft decisions' and to 'suggest that the Council adopt them in the versions finalised by the lawyer linguists under the written procedure in operation until noon on 1 May.'

4 On 21 April 1999 Coreper decided to have recourse to the written procedure for adopting the Council's draft decision on the detailed arrangements for the integration of the Schengen Secretariat into the Council's General Secretariat.

5 The written procedure was initiated by telex no 1845 addressed by the Secretary-General of the Council to the members of the Council on 26 April 1999.

6 That telex states, *inter alia*:

'Following the decision by [Coreper] (second part) on 21 April 1999 to apply the written procedure, I would request you to state whether you agree to adopt the Council decisions in document 7581/99 SCHENGEN 29 [decision concerning the detailed arrangements for integration of the Schengen secretariat into the Council's General Secretariat] and document 7582/99 SCHENGEN 30 JAI 34.

You are requested to reply YES or NO to this question or to ABSTAIN.

...

You are reminded that the consultation process with the OSP resulted in the existence of differing views being noted in a report by the Secretary General of the Council...'

7 Telex no 1845 ended by stating the date by which the replies were to reach the Council's General Secretariat.

8 On 3 May 1999 the Secretary-General of the Council addressed to the delegations of the Member States telex no 2053 closing the written procedure initiated by telex no 1845. That telex states that 'the written procedure concerning adoption [of the Council decision concerning detailed arrangements for integration of the Schengen Secretariat into the General Secretariat of the Council] was closed on 1 May 1999' and that 'all the delegations approved adoption of that decision, in the form in which it appears in document 7581/99 SCHENGEN 29, except the Austrian delegation which abstained and the French delegation which voted against it.'

9 On 7 May 1999 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 was published in the *Official Journal of the European Communities* (OJ 1999 L 119, p. 49, hereinafter 'Decision 1999/307').

10 According to paragraph (3) of the recitals in the preamble to Decision 1999/307 integration of the Schengen Secretariat into the General Secretariat of the Council is intended 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.'

11 Articles 1 to 3 of Decision 1999/307 provide as follows:

'*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(1)(e).

Article 2

By way of derogation from the Staff Regulations 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.'

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

Procedure

13 On 30 April 1999 the applicant lodged a complaint with the appointing authority under Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') against Decision 1999/307.

14 On the same date the applicant brought an action before the Court of First Instance for annulment, first, of Decision 1999/307 and, secondly, of the decisions of the Council's appointing authority appointing as officials of the European Communities and integrating into its services only persons in the service of the former Schengen Secretariat on 2 October 1997 (hereinafter 'the appointing authority's contested decisions').

15 In a separate document, received at the Court Registry on the same day, it also sought suspension of the operation of Decision 1999/307 and of the appointing authority's contested decisions.

16 On 10 May 1999 the Council submitted its written observations on the application for interim measures.

17 Requested to reply in writing to the Council's submissions, the applicant made known her observations in a pleading lodged on 12 May 1999 which was communicated immediately to the Council.

18 By a letter dated 5 May 1999 the Kingdom of Spain, represented by Rosario Silva de Lapuerta, Abogado del Estado, of the Community Legal Affairs Department, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais, sought leave to intervene in support of the form of order sought by the defendant.

19 On 7 June 1999 the Council raised an objection of inadmissibility against the application for annulment.

20 Having regard to the case-file, the President hearing the application for interim measures considers that he has all the information necessary in order to give a decision on the application without there being any need to hear the parties' oral explanations or to grant the Kingdom of Spain leave to intervene.

Law

21 Under Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC) in conjunction with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that the circumstances so require, order suspension of the operation of the contested measure or prescribe the requisite interim measures.

22 Article 104(1) of the Rules of Procedure provides that an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. The question of the admissibility of the main action must not as a matter of principle be examined in proceedings for interim relief, but must be reserved for the examination of the main action, except where it appears to be prima facie manifestly inadmissible. To determine admissibility at the interlocutory stage where an application is not prima facie entirely inadmissible would be tantamount to prejudging the decision of the Court of First Instance on the main action (order of the President in Case T-196/98 R *Abizanda and Others* v *Commission* [1999] ECR-SC II-15, paragraph 10, and the case-law cited therein).

23 Under Article 104(2) of the Rules of Procedure applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for. Those conditions are cumulative, so that an application to suspend the operation of a

measure must be dismissed where one of them is absent (order of the President in Case T-211/98 R *Willeme* v *Commission* [1999] ECR-SC II-57, paragraph 18).

24 In the context of that overall examination, the judge dealing with the application enjoys a broad discretion to determine the manner in which those various conditions are to be examined, and that discretion must be exercised in the light of the specific circumstances of each case (order of the President in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 28).

Parties' arguments

Admissibility of the claim for interim measures

25 In its application for interim measures, the applicant, who was employed as a translator in the Schengen Secretariat from 1 January 1993 to 30 October 1994, claims that both Decision 1999/307, adopted under the written procedure at noon on 30 April 1999, and the appointing authority's contested decisions definitively deprive her of any possibility of being recruited to one of the 71 posts specially created to enable the Schengen *acquis* to be incorporated within the European Union. They are therefore decisions adversely affecting her.

26 As a candidate for one of the posts specially created to enable the Schengen *acquis* to be incorporated within the European Union, the applicant claims that her action against the Council is admissible in accordance with Article 179 of the EC

Treaty (now Article 236 EC) (to that effect, see the order in Case T-30/96 *Pereira* v *Council* [1996] ECR II-785, paragraph 24).

27 The Council contends, as a preliminary point, that the applicant is mistaken in maintaining that the date indicated in telex no 1845 is 30 April 1999. In fact, it is clear from the last paragraph of that document, produced as an annex to its pleading, that, contrary to the initial Spanish and Finnish versions which mentioned the date of 30 April 1999, the replies were to reach the Council's General Secretariat 'by noon on Saturday, 1 May 1999'. The Council concludes that Decision 1999/307 was adopted on that date, as stated in telex no 2053 dated the following 3 May (paragraph 8 above).

28 The Council goes on to contend that the application is manifestly inadmissible on three grounds.

29 First, it is premature (Case T-247/97 *Lonuzzo-Murgante* v *Parliament* [1998] ECR-SC II-317, paragraphs 42 and 43). In the first place it was brought before Decision 1999/307 was adopted, and in the second place Article 2 of Decision 1999/307 provides that the appointing authority may appoint to the Council's General Secretariat staff of the former Schengen Secretariat 'by way of derogation from the Staff Regulations' and 'subject to a check on compliance with the conditions specified in Article 3'. Yet, when the action was brought, the appointing authority had not yet adopted the contested decisions since it had not completed the checks required by Article 3 of Decision 1999/307.

30 Secondly, the applicant has no interest in bringing the action and the contested decisions do not adversely affect her.

31 The main action, brought under Article 179 of the Treaty, is manifestly inadmissible inasmuch as it seeks the annulment of Decision 1999/307, since that measure was not adopted by the Council acting as the appointing authority. In fact, Decision 1999/307 is a measure of general application based on Article 7 of the Protocol and subject to review of its legality as provided for by Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In any event, Decision 1999/307 is manifestly not of individual concern to the applicant.

32 The main action is also inadmissible inasmuch as it seeks annulment of the appointing authority's contested decisions because the applicant, who is neither a serving official nor a candidate for a post, does not have the status of a person referred to in the Staff Regulations (*Pereira*, paragraphs 24 and 26). The applicant was thus seeking a determination of the law, whereas under the case-law an applicant may put forward in support of an action for annulment only such claims as relate to the applicant personally (Case T-163/89 *Sebastiani* v *Parliament* [1991] ECR II-715, paragraph 24).

33 Finally, the Council contends that the application for interim measures does not satisfy the conditions laid down in Article 44(1)(c) of the Rules of Procedure, under which 'an application... shall state... the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.'

Conditions for granting the measures applied for

34 The applicant maintains that the condition as to urgency is satisfied since under those decisions she, together with the other Community nationals possessing equivalent, or superior, qualifications to those of employees recruited, is definitively eliminated from the scope of the contested rules on integration. Those rules do not concern appointment to a post or to a limited number of posts but appointments to all the posts specially created in order to integrate the Schengen *acquis* into the General Secretariat of the Council. Implementation of

the contested decisions would lead therefore to a substantial and irreversible alteration in the composition of the corps of officials in the General Secretariat of the Council. Those decisions are also, it is submitted, particularly serious inasmuch as they were adopted in flagrant breach of Article 24 of the Treaty establishing a single Council and a single Commission of the European Communities and of the provisions of the Staff Regulations applicable to any recruitment of officials of the European Communities.

35 There is a risk, if the suspension of operation applied for is not granted, that the appointing authority will incorporate into the Council's services officials whose competence, performance and integrity will not have been subject to verification by a selection board constituted in accordance with the provisions of Annex III to the Staff Regulations, which could compromise the independence of the European civil service.

36 Furthermore, the failure by the Council to observe the obligation incumbent on it to recruit only officials of the highest competence, performance and integrity in order to apply and develop the Schengen *acquis* is likely to cause serious and irreparable harm to all European nationals and, more particularly, to the applicant.

37 Moreover, implementation of the contested decisions would have the effect of definitively excluding the applicant from recruitment to posts created for the purposes of integrating, applying and developing the Schengen *acquis*.

38 On the existence of pleas in law prima facie justifying the grant of the interim measures applied for, the applicant refers without giving any other particulars to the pleas raised in her action for annulment. She merely stresses that Decision 1999/307 was adopted on 30 April 1999, whereas the Treaty of Amsterdam entered into force on the following day. The Council adopted Decision 1999/307

when it had no appropriate legal basis on which to do so. The applicant refers to telex no 1845 addressed by the Secretary-General of the Council to the members of the Council, stating that the replies concerning the adoption of document 7581/99 SCHENGEN 29 were to reach the Council's General Secretariat 'by noon on Friday 30 April 1999'.

39 In her pleading lodged on 12 May 1999 the applicant stresses that all the Member States communicated their decisions to the Council before midnight on 30 April 1999 with the result that, according to her, Decision 1999/307 was adopted and entered into force on 30 April 1999, not 1 May 1999. The illegality of Decision 1999/307 renders unlawful all the decisions adopted under it by the Council's appointing authority.

40 Furthermore, under the principle of the hierarchy of rules, a Council decision cannot derogate from the rules laid down in a regulation adopted after consultation with the institutions concerned and the Staff Regulations committee.

41 The appointing authority's contested decisions appointing employees of the Schengen Secretariat as officials are unlawful in so far as they were adopted in breach of Articles 4, 27, 28 and 29 of the Staff Regulations.

42 Finally, the Council is wrong to contend that paralysis of the former Schengen Secretariat would seriously affect continuity of the service. In fact the functioning of the former Schengen Secretariat could be secured, pending the organisation of general competitions to fill the specially created posts, by the recruitment of temporary agents, in conformity with the provisions of the Staff Regulations and the Conditions of Employment of other servants of the European Communities. The interests of staff members of the former Schengen Secretariat cannot warrant

infringement of the provisions of the Staff Regulations and of the Conditions of Employment of other servants.

43 The Council denies that the conditions for the grant of suspension of operation are satisfied in this case. It also considers that the balance of interests is in favour of the maintenance in force of Decision 1999/307, one of the aims of which 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.'

Findings of the President

44 Article 179 of the Treaty, which confers on the Community judicature jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment, must be construed as applying exclusively to persons who have the status of official or of servant other than local staff and to persons claiming that status (*Pereira*, paragraph 24). Articles 90 and 91 of the Staff Regulations, concerning appeals, apply not only to those who are officials but also to candidates for a post (order in Case C-126/90 P *Bocos Viciano* v *Commission* [1991] ECR I-781, paragraph 13; *Pereira*, paragraph 24) or in an open competition (order in Case T-37/93 *Stagakis* v *Parliament* [1994] ECR-SC II-451, paragraph 16).

45 In the present case it is common ground both that the applicant is neither an official within the meaning of the Staff Regulations nor an agent other than a local one under the Conditions of Employment of other servants and that Decision 1999/307 does not constitute a notice of an open competition. In light of the abovementioned case-law, the Community judicature would thus have

jurisdiction in the dispute between the applicant and the Council, as regards both the application for interim measures and the main proceedings, only if the applicant were a candidate for a post.

46 However, that is not the case. Decision 1999/307 is manifestly not intended to offer to persons other than those referred to in Article 1 the possibility of joining the Community civil service. As Article 2 of that decision expressly states, the appointing authority may appoint to the Council's General Secretariat 'the persons mentioned in Article 1' thereof 'as probationer officials of the European Communities' 'by way of derogation from the Staff Regulations and subject to a check on compliance with the conditions specified in Article 3' of that decision.

47 Since Decision 1999/307 does not afford to persons whom it does not expressly mention the possibility of seeking appointment as a Community official within the meaning of the Staff Regulations, the applicant, who does not come within the category of persons mentioned in Article 1 of Decision 1999/307, cannot be deemed to be a person to whom the Staff Regulations apply as provided for in Articles 90 and 91 thereof. The current situation differs from the situations in which actions under Article 179 of the Treaty are brought by persons successful in a competition challenging the failure by the institution which organised the competition to offer them a post (order in Case T-72/89 *Bocos Viciano* v *Commission* [1990] ECR II-57) and by a candidate for a post in respect of which a vacancy notice was published (*Pereira*).

48 It follows that the applicant ought to have brought her main action, to which the interlocutory claim is ancillary, under Article 173 of the Treaty, inasmuch as it is

claimed in that action that Decision 1999/307 makes it impossible for the applicant to be appointed as an official in the General Secretariat of the Council.

49 Accordingly, inasmuch as the main action seeks annulment of Decision 1999/307, it appears to be prima facie manifestly inadmissible.

50 The main action also seeks annulment of the appointing authority's contested decisions. In that connection, it is sufficient to point out that Article 2 of Decision 1999/307 provides that the appointing authority 'may appoint' to the General Secretariat of the Council members of staff of the former Schengen Secretariat 'by way of derogation from the Staff Regulations' and 'subject to a check on compliance with the conditions specified in Article 3'. As the Council states, without being contradicted on this point by the applicant in the pleading lodged on 12 May 1999, the appointing authority's contested decisions had not yet been adopted when the applicant brought the main action. It should be noted that in the application for interim measures the applicant did not even specify the decisions at issue.

51 Accordingly, inasmuch as it seeks annulment of the appointing authority's contested decisions, the main action is on the face of it premature and as such likewise inadmissible.

52 Moreover, with regard to the conditions for granting interim measures, it should be recalled that the urgent nature of an interim application must be assessed in relation to the need for an interim decision in order to prevent serious and irreparable harm to the interests of the party applying for the interim measure. It is for that party to prove that it cannot await the outcome of the main proceedings without suffering injury involving serious and irreparable conse-

quences (*Willeme*, paragraph 36; order of the President in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, paragraph 62).

53 In the present case the applicant has adduced no evidence to support the finding that the measures applied for are of an urgent nature as far as she is concerned. She has merely cited, by way of injury sustained, her definitive exclusion from the scope of the arrangements for integration provided for in Decision 1999/307. Thus the applicant does not state in what way the impairment of her interests brought about by Decision 1999/307, even if that were established, could be so serious as to make it impossible for her to await the outcome of the main action without the suspension of operation she seeks.

54 Accordingly, since the condition as to urgency is not satisfied, the application for interim measures must be dismissed on that ground as well, without its being necessary to examine the other pleas and arguments relied on by the applicant.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 21 June 1999.

H. Jung

Registrar

B. Vesterdorf

President