1. Dismisses Application 33/67;

2. Orders the parties to bear their own costs.

Strauß Trabucchi Pescatore

Delivered in open court in Luxembourg on 28 March 1968.

A. Van Houtte W. Strauß

Registrar President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 29 FEBRUARY 1968[1]

Mr President,
Members of the Court,

On 20 March 1967 the Secretary-General of the Councils, the appointing authority, published Vacancy Notice 15/67 for a post of principal administrator in Grade A4 (career bracket A5–A4). It specified that the duties of the post involved 'administrative and advisory duties of a legal nature relating in particular to Netherlands law and public international law in the fields of activity of the European Communities'. Apart from a legal training evidenced by a university degree, the requirements were 'an extensive knowledge of Netherlands law and of public international law as well as professional experience over a considerable period in the application of these branches of law'.

This is the decision which Mr Kurrer, an official in Grade A5 of the secretariat of the Councils has sought in vain to have withdrawn under the procedure laid down in Article 90 of the Staff Regulations and which he now asks you to consider. He further asks you to annul the Notice of Open Competition No 36 published on the following 4 July for recruitment of a principal administrator in Grade A4 on the basis of the vacancy notice which I have analysed.

No question arises as to the admissibility of his application. The two contested measures do in fact constitute decisions which may affect him adversely, having regard to the established case-law of the Court. On the other hand the force of his arguments does give rise to awkward questions on certain points.

1. The applicant first disputes the competence of the Secretary-General as the appointing authority to define in the terms which he used the post declared vacant which he decided to fill.

It is, he says, for the institution itself, that is to say for the Council, under Article 5(4) of the Staff Regulations to define the duties and powers attaching to each post. In fact the decision of the Council of 7 October 1963 contained only a very general description: in particular it was limited, for Grades A4 and A5 to which the career bracket of principal administrator corresponds, to the terms 'advises a department of the institution' or 'undertakes advisory or supervisory duties under the authority of a Director or Head of Division'. It was thus possible, by reason of the 'polyvalence' of the posts in this career bracket, to fill vacancies therein by promoting an official of the secretariat; the appointment of candidates from outside the institutions was thus restricted to the lowest grades of the category.

It is clear that Vacancy Notice 15/67, in specifying further requirements for the post to be filled, goes beyond the Council's definition. The applicant does not expressly

1 — Translated from the French.

dispute the fact that a post may in certain cases have its special requirements, but argues that these cannot be simply set out in a vacancy notice published by the Secretary-General within the framework of Article 4 of the Regulations; these must be laid down by a decision of the institution itself under Article 5(4). Only the authority which has defined the posts in general terms is empowered to express its definition in greater detail when there is a question of a specific post.

This theory gives rise to a number of observations. The first is that the definition mentioned in Article 5(4), which moreover is in practice the same for the various institutions, is of necessity in very general terms and is laid down for the most usual cases; it is not therefore to be expected that it should cover the individual requirements of a particular post. This inevitable lack of precision has given rise to difficulties in cases where the holders of certain posts have had to be classified at the time of entry into force of the Staff Regulations and you have had an example of these difficulties in the *Richard Müller* case (Case 28/64 [1965] E.C.R. 237).

The second observation is that the Secretary-General appears to find both in the Staff Regulations and the authority delegated to him by the Councils, sufficient powers to define the post to be filled. Under Article 17 of the rules of procedure of the Councils, the latter are assisted by a secretariat under the authority of a Secretary-General. It is they who determine the organization of the secretariat but by decisions of 14 May and 12 June 1962 they assigned to the Secretary-General all powers vested in the appointing authority in respect of all servants other than those in Grade A1. Moreover, so far as these powers are vested in him, it is for the Secretary-General not merely to publish the vacancy notice but first to decide that the vacancy has to be filled. This decision can indeed be taken only in the light of the actual duties to be undertaken in the post and this means that the person taking the decision must be able to assess the special abilities required for a given post, in other words to define the post accurately.

The applicant's theory that this power lies only in the Council seems somewhat fanciful. So far as the institution does not itself exercise the power to organize the secretariat which it has put under the Secretary-General's direction, it must be admitted that he is empowered to take the necessary measures to ensure the running of the services or, to put it more precisely, saying that a principal administrator in the Legal Department must meet this or that requirement in order to carry out a particular task does not seem to me to go beyond the power to make assessments and decisions which it is acknowledged that the Secretary-General has.

Admittedly in the course of the proceedings Mr Kurrer has stressed that the contested vacancy notice did not follow the practice hitherto adopted in the secretariat of restricting itself to the definition of duties laid down by the Council in 1963. The institution has replied that it had not 'set out' these very general conditions and laid down specific requirements save in those fairly rare cases in which the exigencies of the service called for it. By way of example it has cited the posts of financial comptroller, head of archives and nurse. These are indeed very special cases, but however far back the relative vacancy notices may go—the actual date seems to me immaterial in the present case—the cases establish that what has been the most common practice has been no absolute rule; of itself this practice could not establish a legal principle, disregard of which would institute an illegal act. Moreover it cannot be taken that technical considerations which led to a precise definition of the post of financial comptroller are valid *mutatis mutandis* for that of assistant in the Legal Department.

2. In the second place the applicant raises the objection that the definition of the post in the contested vacancy notice restricts the freedom of judgment both of the Promotions Committee set up by decision of 26 May 1964 and of the Joint Committee mentioned in Article 9 of the Staff Regulations and in Article 1 of Annex III. In fact the very strict requirements set out in this notice do not leave the first of these bodies with complete freedom of action to consider the comparative merits of candidates with a view to making a promotion, this being the first method which the Staff Reg-

ulations lay down for filling a vacant post. These conditions also restrict the freedom of action of the Joint Committee which must be consulted at a later stage before the publication of the vacancy notice.

This observation is certainly correct but be it noted that it would apply equally if the post had been defined by the Council itself and not by the Secretary-General. Moreover the bodies in question are consultative bodies and their opinion must be based on the nature of the post to be filled; it is for the appointing authority to lay down the requirements which it considers are called for by the post and it is for the Promotions Committee and the Joint Committee after perusal of this outline plan to give their opinion. I see nothing illegal in this.

3. More serious is the applicant's complaint that the vacancy notice infringes Article 27 of the Staff Regulations which provides that no posts shall be reserved for nationals of any specific Member State. The requirements which it lays down, namely a thorough knowledge of Netherlands law combined with professional experience over a considerable period in the application of this branch of the law are intended to reserve the contested post for a candidate of Dutch nationality.

The institution contends that it had no such intention. It does however admit the obvious, that in general a Dutch national is better suited than a candidate from another country to meet the requirements laid down, but these were only laid down to meet the needs of the Legal Department; in fact it appeared necessary that this department should include an official of sufficiently high rank, specializing in Dutch law. The applicant finds this argument the less convincing in that the department includes no Belgian or Luxembourg official. Why should a knowledge of the law of one of the Benelux states be any more essential then a knowledge of the law of the other two states?

I will not go further into this as the assessment of service requirements and of the order in which they must be met rests with the authorities of the institution, provided that there has been no misuse of powers, and this has not been established. In particular it does not seem that any decisive conclusion can be drawn from the date from which the competent authority considered that it needed to have a specialist on Netherlands law in the Legal Department or from the fact that when other vacancies occurred in this department it was not considered necessary to specify the abilities required.

On the other hand we must consider whether—and this is a legal problem—the vacancy notice is contrary to Article 27 of the Staff Regulations as the applicant claims, and I think that the answer must be in the negative. I quite agree that the notice sets out no requirement as regards nationality; on the other hand the requirements of special knowledge and experience which it lays down can *from a legal standpoint* be fulfilled by candidates of various nationalities. Undoubtedly this legal standpoint is somewhat theoretical and a Dutch candidate seeking the post is actually better placed than a candidate of another nationality, but this does mean that the post is reserved for a Dutch candidate. Indeed this is forbidden by the Staff Regulations.

4. However, the most awkward submission rests on the fact that the vacancy notice refers to a post of Principal Administrator in *Grade A4*. Again the subsequent notice of open competition states that recruitment will be to this grade and at the same time specifies that the career bracket relates to Grades 5 and 4 of the category. Can you then start by recruiting to the higher grade of a career bracket covering two grades?

The applicant in reliance on Article 5 of the Staff Regulations contests this. The wording in fact does no more than indicate that the grades 'are divided into career brackets ordinarily containing two grades' that certain posts correspond to each career bracket. So no inference can be drawn from this Article alone to the effect that a post may not be filled by competition for the higher grade which it carries. Recourse must accordingly be had to Article 31 of the Staff Regulations which must be linked with Article 29 both of which appear in the Chapter headed 'Recruitment' and this moreover is what the applicant does.

It is first to be noted that the term 'post' can be looked at from two different angles and can in fact have two different meanings: from the point of view purely of the Staff

Regulations the post of principal administrator, for example, so far as it corresponds to a career bracket covers the two Grades A4 and A5; from the point of view of the budget on the other hand, or from the point of view of the body concerned, there exists a given number of posts of principal administrator in Grade A4 and the rest are in Grade A5, the budgetary authorities watching very carefully to see that the number of posts authorized in one or other of the grades is not exceeded. Viewed from this angle there exists a number of individual posts and vacancies occur in Grade A4 or Grade A5 according to circumstances.

Now let us turn to Article 29. This provides first that in order to fill 'a vacant post' (no distinction being made between a vacant post in the lower or in the higher grade of a career bracket) the procedure for an open competition must be followed, but only after the various possibilities such as promotion or transfer within the institution, competitions internal to the institution or transfer from another institution (Article 29(a)(b) and (c)) have been exhausted. Indeed an open competition to fill a given post can only logically result in appointment of the successful candidate to the grade allotted to the post (and not necessarily to the lowest grade of the career bracket).

Here however we must bring in Article 33, the provisions of which are admittedly rather obscure. This Article reads:

'1. Candidates *thus selected* shall be appointed as follows:
— officials in Category A or the Language Service: to the *starting* grade of their *category* or service;
— officials in other categories: to the *starting* grade for the *post* for which they have been recruited.'

It will be seen that the rules are not the same for the posts in Category A as for other categories. Paragraph (2) on the other hand provides that the appointing authority may depart from the abovementioned provisions in respect of grades below A3 by up to one third as regards posts becoming vacant or by up to half as regards newly created posts, this departure from the provisions being applied by groups of six posts to be filled in each grade.

It follows from these provisions that appointments in Category A must be made to the starting grade of that category since paragraph (2) does not allow classification in a higher grade. So, when only a given fraction of all vacant posts in each grade of this category can be filled by recruitment above the starting grade, the remaining fraction is reserved for internal appointments as provided in Article 29(a) to (c). It also follows that the appointing authority may only hold an external examination to fill the vacant post, which by definition is allocated to a particular grade, if the provisions of paragraph (2) allow it legally to appoint the candidate who has been successful to a grade other than the starting grade of the category (as to this see the authorized work of Euler: Europäisches Beamtenstatut (European Staff Regulations), Part I, p. 271).

If however these conditions are fulfilled, Article 31 does not prevent an appointment made to a grade other than the starting grade of the category from being made to the higher grade of the post or career bracket. On the basis of the provisions, the attitude adopted by the Council accordingly appears to me to be justified.

The fact remains that some objections can be raised to this practice. Is not something of the concept of a career being taken away if the servant recruited is straightway put into the higher grade? But this is a criticism which arises rather from administrative convenience and I do not think that it alone can vitiate the contested decisions.

None of the submissions made appears to me in fact to be wellfounded and I am of opinion:

— that Mr Kurrer's application should be dismissed and

— that the costs should be borne by the applicant, subject to the provisions of Article 70 of the Rules of Procedure.