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.

The notices contained an outline of the duties connected with each post and the conditions as to eligibility for those posts. It was further stated that the posts would be filled according to the procedure laid down in the Staff Regulations, that is to say, pursuant to Articles 4 and 29.

As was made clear by a communication of 3 January 1973, two officials formerly in Grade B1 were appointed by decision of 22 December 1972 to two of the vacancies notified.

The applicant, who is also an official of the Council, in Grade B3, claims that this decision is contrary to the Staff Regulations because no competition procedure was followed. Such a competition procedure is compulsorily laid down for cases such as this by Article 45 (2) of the Staff Regulations, which states:

'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition.'

Although Article 29 (2) of the Staff Regulations provides that a procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of Grade A1 or A2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications, it is claimed that this provision applies only in respect of the appointment to posts of persons not yet appointed as officials. In addition, in the cases to which the applicant refers the conditions of Article 29 (2) cannot be said to have been fulfilled.

In accordance with Article 90 (2) of the Staff Regulations the applicant conveyed this view by way of a complaint to the Secretary General of the Council on 29 March 1973, claiming that the beforementioned decisions should be reversed. By letter of 12 June 1973, following the death of one of the officials named in her complaint, the applicant withdrew the latter in so far as it referred to that official.

The applicant received no reply to this complaint. Therefore, on 24 October 1973, she brought an application before the Court of Justice, claiming that the Court should;

1. Annul the Council's Decision of 22 December 1972, appointing official X to one of the posts forming the subject-matter of Vacancy Notice No 84/72;
2. Annul all decisions prior to or accompanying this decision of appointment and which are connected therewith, in particular in so far as they concern the non-application of the competition procedure and the application of 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 official X.

The Council contends that the Court should dismiss the application.

I should like to make the following remarks as to the applicant's claims:

1. It should first be ascertained whether, in publishing the decision regarding the appointment of an official to one of the notified posts in Grade A6 the Council infringed provisions of the Staff Regulations, in that Article 29 (2) of the Staff Regulations, referred to by the Council, is relevant only for the appointment to posts of persons who are not yet employees of the Communities (so-called external appointments), and in that, according to Article 45 (2) of the Staff Regulations, where an official is promoted from one category to another a competition must be held.

The Council firmly refutes this point of view. It is convinced that Article 29 (2) of the Staff Regulations is relevant not only for first recruitment, that is to say for external appointment, but also in general terms for any type of competition procedure. As for Article 45 (2), it does not peremptorily lay down that a competition must be held, but merely refers in general to the provisions

relating to appointment contained in the chapter entitled Recruitment, including Article 29 (2).

Let us begin the examination of this controversy with an interpretation of Article 29 (2). If in fact it is only to be taken into account for cases of external appointment, that is to say, not for officials of the Communities who are to be moved to a higher category, there would be no point in raising the question whether Article 45 (2) excludes recourse to Article 29 (2) in the case of movement from one category to another.

In support of her view the applicant adduces arguments based in the main upon the wording of the provisions of the Staff Regulations. She points to the fact that Article 29 (2) is concerned with 'recruitment', and claims that Article 28, which deals with the appointment of officials, contains, in subparagraph (d), with reference to the competition procedure, an express reservation relating to Article 29 (2). Moreover, she invokes the principle of the *ratio legis*. In her opinion, it is only when an official is originally recruited that there can be any sense in dispensing with the competition procedure, since to require this could lead to a situation where a person specially qualified for a post could not be found in the service of the Community. Finally, she refers to the opinion of the former Advocate-General Lagrange in relation to Article 29 (2).

Clearly, the last of these arguments carries the least weight, since the relevant opinion was concerned with an examination of an entirely different problem. The statement was simply made there, quite incidentally and without any deep study of the point which concerns us, that Article 29 (2) concerns the recruitment of candidates who are not yet in the service of the Communities.

Next, as regards the arguments based upon an exegesis of the text, it is important to point out immediately that the concept 'recruitment', as used in Article 29 (2), does not necessarily bear the interpretation placed upon it by the applicant. In principle, it might be sufficient to state that in Article 29 (2) the expression 'recruitment' is used merely in respect of Grades A1 and A2 officials, not — as is of relevance in this case — in respect of other grades. However, I will not leave it at that. Analysis of the general scheme of the Staff Regulations shows that the concept 'recruitment' must in fact not be understood in the narrow sense of appointment to the service, that is to say in the sense of external appointment. Rather, it is a general concept which, understood correctly, embraces all possible forms of appointment to posts. To this extent the Council is correct in referring to the fact that Article 4 in Title I ('General Provisions') contrasts appointments with promotions. It shows that there are two ways of filling a vacancy, namely: promotion, which according to the definition contained in Article 45 is effected by appointment to the next higher grade, and all other types of appointment. This last concept therefore includes all possible forms of appointment to vacancies, not only transfer within the institutions (Article 29 (1) (a)) and transfer of officials from other institutions (Article 29 (1)(c)) — neither case involves a change of grade — but also the filling of posts on the basis of a competition procedure, whether a competition internal to an institution or internal to the Communities, in which all servants may take part, or an open competition to which persons not employed by the Communities are also admitted.

A similar line of argument may be adduced from Article 7, which deals with appointment and transfer, and makes clear by this juxtaposition that 'appointment' is a general concept.

It is further of interest that Chapter 1 of Title III also supports this view. It is headed 'Recruitment' but contains, as is clear from Article 29, rules for the various ways of filling vacancies, with the exception of promotion, to which a

special chapter is devoted in Title III. Although it is true that the majority of provisions in the Chapter headed 'Recruitment' in which this term is employed deal with the appointment of officials, this is not always so, as is shown especially by Article 32. As regards in particular Article 28, upon which, in view of the argument adduced from subparagraph (d), the applicant lays so great an emphasis, in my view the Council has convincingly demonstrated that this Article is by no means relevant in respect only of the original recruitment of an official, but also above all for other ways of filling posts, that is to say, including those ways in which recourse is had to officials of the Communities. In fact in such cases it may also be necessary to conduct an examination as to the requirement relating to nationality and possible exceptions thereto, as to the fulfilment of military service obligations, as to the requirements relating to the appropriate character references as to suitability for the performance of duties, as to the required physical fitness and as to the requisite knowledge of languages.

Finally, the following remarks are also important in relation to the arguments which may be adduced from the text of the Staff Regulations. Quite clearly, Article 29 (1) contains general rules for the filling of posts, in that it provides for a number of tests to be carried out in a given order. Article 29 (2) then admits of exceptions in specified cases in relation to the competition procedure. This drafting technique, that is to say the enumeration of exceptions in a subparagraph to a provision of general application, certainly supports the view that the provision creating the exceptions is also of fundamental relevance for all means of filling vacancies. If this had not been intended, the authors of the Staff Regulations would no doubt either have devoted a special article to the provision creating the exceptions or otherwise made quite clear that only a limited application was intended, for which, as I have already shown, the use of the term 'recruitment' is not sufficient.

Although thus far an analysis of the provisions and the concepts used therein supports the interpretation put forward by the Council, mention must also be made — and this is by no means an insignificant matter — of a consideration concerning the objective of this legislation. According to the Staff Regulations (cf. Articles 3 and 5 of Annex III) the competition procedure is so structured that an independent selection board considers a number of candidates and thereafter draws up a list of suitable candidates, from which the appointing authority chooses the one to be appointed. Therefore the procedure presupposes a number of candidates of a comparable standard. It therefore follows that the application of this procedure — seen purely in the context of the present case — is pointless when it is a question of filling a post requiring special technical knowledge, that is to say where the post requires qualifications possessed only by a single candidate or by a very limited number of candidates (cf. Euler, Europäisches Beamtenstatut, vol. 1, p. 265). On the basis of this fact it must be recognized that Article 29 (2) is general in scope and that its application is not restricted to external appointments. If in fact the provision were to be narrowly interpreted the consequence of this, in a case where an official was eligible for a certain post on account of his special qualifications, would be that a competition would nevertheless have to be held or that only an outsider could be appointed. Both solutions would clearly be unacceptable, the first, because a pointless competition would have to be held, the second, because it would not take account of the interests of European officials, who have priority in appointment procedures under the system contained in the Staff Regulations.

It is my opinion, on all the above grounds, that Article 29 (2) must also be

applied when a post requiring special technical knowledge is to be filled by an official of the Communities.

It further remains to be considered — this being the second point of relevance in relation to the first ground of complaint — whether Article 45 (2) makes a competition procedure mandatory for a case of promotion to a higher category, with the result that in such circumstances Article 29 (2) is not applicable. In this connexion the applicant refers to the wording of Article 45 (2), which she compares in particular with that of Article 28 (d). Furthermore, she makes reference to findings reached in the judgment in Joined Cases 55 to 76, 86, 87 and 95/71 (Judgment of 13 July 1972, *Besnard and others* v *Commission of the European Communities,* Recueil 1972, p. 543) and in the opinion in Case 15/63 (Judgment of 4 March 1964, *Lassalle* v *European Parliament,* [1964] ECR, 40).

It must also be stated in this connexion that the opinion cited by the applicant and the judgment upon which she relies do not necessarily support her point of view. The judgment in question (Recueil 1972, pp. 562 et seq.) does not deal with the problem which concerns us here, but solely with the question whether Article 46 must also be applied in the event of a change of category. Article 45 (2) is mentioned in passing, although in effect it is merely repeated verbatim. The position is similar with regard to the opinion in Case 15/63 ([1964] ECR 47). Furthermore the latter contains (at p. 46) the statement that access to a new service or to a new category can *normally* only take place after competition, which leads to the conclusion that this rule may be waived in exceptional cases.

If the textual comparison proposed by the applicant is considered closely it may indeed be conceded that Article 45 (2) could support the argument that a competition is mandatory in the event of a change of category precisely because it states that such a promotion may be effected 'only on the basis of a competition', whereas Article 29 (2) states that 'a procedure other than the competition procedure' may be adopted. It is also a matter for thought that, unlike Article 28 (d), Article 45 (2) contains no reservation with regard to Article 29 (2). However, there are good grounds for not adopting the interpretation put forward by the applicant.

It should be stated here that it is a commonly accepted fact that such arguments, based upon the text, are of no great value in interpreting subordinate Community legislation. On the other hand, it is important to note that Article 45 (2) constitutes a statement as to *promotion* procedure, and that its main significance lies in the fact that it excludes promotion in cases of change of category.

Furthermore, we should here recall the objective of Article 29 (2), mentioned above. In fact it may be said that the result of attempts to interpret Article 45 (2) is predetermined by what we observed in regard to Article 29 (2). For if it is true that a competition for the filling of a post requiring special technical knowledge is pointless and that Article 29 (2) therefore also applies in respect of internal appointments, it appears illogical to exclude the applicability of Article 29 (2) precisely in cases of a change of category. If this were done the consequence, in situations where an official from a lower category was eligible for appointment to such a post, would be either that a pointless competition would have to be held or that the appointing authority would be restricted to accepting candidates in the same category as the post to be filled or external candidates. Such a result can hardly be welcomed if a sensible interpretation of the Staff Regulations is being advocated, that is to say an interpretation which takes account of the furthering of the careers of officials of the Communities.

I am therefore in agreement with the Council when it states that Article 45 (2) is to be understood in the sense of a general reference to the rules for competitions as they are laid down in Article 29, that is to say, in conjunction with Article 29 (2).

Moreover, it cannot be objected that this conflicts with the underlying reasoning of Article 45 (2), which does not permit the appointing authority to effect changes of category by means of selection. In this connexion the Council has rightly remarked that the filling of every post even after a competition has been held, is a matter of selection by the appointing authority. The decisive factor therefore is not that a selection has been effected but rather that there has been no competition in the context of the promotion procedure on the basis of merit. However, there can be no question of a competition in the lastmentioned sense in connexion with the application of Article 29 (2) and therefore the interpretation which I have put forward is in fact not in conflict with Article 45 (2).

All this leads to the conclusion that the arguments put forward in support of the first ground of complaint do not justify a declaration that the application should be upheld.

2. In a second ground of complaint the applicant claims, in the alternative in case Article 29 (2) of the Staff Regulations should also apply to the appointment to a post of an official from a lower category, that the procedure used to fill the post nevertheless displays various points of weakness. On the one hand, neither in the Vacancy Notice nor in any subsequent published document was it made clear that Article 29 (2) was to be applied. On the other hand, the applicant claims that there was no sufficient statement of reasons for the application of this provision. Furthermore, the substantive conditions of Article 29 (2) were also not fulfilled, that is to say that this was not a case of appointment to a post requiring special qualifications.

The following remarks may be made in respect of these objections:

(a) With regard to the question whether advance notice must in fact be expressly given by the appointing authority that it intends to fill a post on the basis of Article 29 (2), it is certainly not sufficient merely to refer to the fact that such an obligation is not grounded *expressis verbis* in the Staff Regulations. Doubtless there are also incumbent upon the employer obligations which are given no formal expression and arise as it were from the very nature of the case. To this extent it may be relevant in the present connexion that a Vacancy Notice, that is to say the publication of a decision to fill a vacancy, may arouse hopes and stimulate applications from candidates in the relevant institution who are eligible for promotion or transfer. Bearing this in mind, one may say that, in accepting that the case involves a post requiring special qualifications for which it is unlikely that there will be a large number of applicants, the appointing authority is bound by reason of its duty of care towards its employees to make this fact quite clear, so as to avoid any unfounded hopes and unnecessary submission of applications. I would not hesitate here to speak at least of a *nobile officium;* it also seems to me that one may justifiably speak, as did Mr Advocate-General Dutheillet de Lamothe in Joined Cases 45 and 49/70 (Judgment of 26 May 1971, *Bode* v *Commission of the European Communities,* Recueil 1971, p. 483), of a corresponding legal duty.

If this is agreed it will be seen that in the present case this duty was not fulfilled. Certainly, the general reference to Article 29 appearing in the Vacancy Notice is not sufficient. One might well therefore speak of a failure to observe appointment procedures.

Whether or not the omission to which I have referred may in fact be described

as an infringement of an essential procedural requirement, such as to render the appointment procedure invalid and to require the annulment of the resulting appointment, or whether in respect of the legality of the appointment it is solely relevant that the post does in fact require special qualifications and that the appointed candidate possessed such qualifications, is another question. I should like to leave this question to one side. But I would emphasize that in the event of a decision in favour of the lastmentioned possibility, that is to say if the application is dismissed, the abovementioned circumstance should at least be taken into account in reaching a decision as to costs and that the Court should not reject out of hand the fact that the bringing of this application was at least partially induced by the applicant's ignorance of the way in which the post was to be filled.

(b) As regards the second objection, that is to say, lack of any statement of reasons for the decision regarding the application of Article 29 (2), the case-law of the Court already contains a clear finding allowing conclusions to be drawn in relation to the present case.

In fact in Joined Cases 45 and 49/70 (Recueil 1971, p. 477) the Second Chamber, in agreement with the opinion of the Advocate-General, emphasized — although without being able to base its assertion on any particular text — that a decision to have recourse to the procedure mentioned in Article 29 (2) 'must be accompanied by a statement of reasons so that the Court of Justice may review its legality should the need arise.' This is intended to mean a formal statement of reasons, that is to say of the reasons at the time of the adoption of the decision at issue, not merely the giving of reasons in the context of proceedings before the Court. This is made quite clear in paragraph 19 of the Grounds of that judgment, where it is stated that it must be evident from the decision of the appointing authority whether the latter has examined with all due care whether the conditions for the application of Article 29 (2) were in fact fulfilled.

Clearly, the Council did not fulfil this requirement. No special reasoning is given in the actual Vacancy Notice, which merely states the normal functions of a Grade A6 post and the conditions normally required for appointment to such a post, and this can moreover — contrary to the Council's opinion — not be justified by reference to the fact that the Council has no detailed list of posts along the lines of those of the other institutions, and that for this reason Vacancy Notices posted by the Council are in general couched in rather vague terms. Furthermore, no special reasoning is discernable in other decisions concerning the application of Article 29 (2). Finally, no such statement of reasons in adequate form can be found either in the decision appointing official X, since it merely repeats the wording of Article 29 (2), and does not explain the extent to which the post in question requires special qualifications.

If the Court does not wish to depart from the abovementioned case-law of the Second Chamber (which in my view could only be done by a plenary session of the Court, before which the matter would have to be brought pursuant to Article 95 (2) of the Rules of Procedure) it must bring a finding of improper conduct of the appointment procedure, which, as in the abovementioned Case, would justify the Court in declaring the disputed procedure to be unlawful, with the further consequence that the appointment decision in issue could not stand.

(c) In this event the examination of the case could be closed and the applicant's further objection, that the appointment of official X did not fulfil the substantive conditions of Article 29 (2), need not further be discussed. However, to cover all eventualities, and as briefly as possible, I should like to say a few words on this point.

We must bear in mind that, as was emphasized in the judgment in Joined Cases 45 and 49/70, the application of Article 29 (2) because it is a provision creating an exception, 'is subject to very strict conditions of form and of substance, corresponding both to the needs of the service and the legitimate interests of officials'. In other words, this matter is governed by particularly rigid criteria.

Seen in this light, it is obviously meaningless for the Council to have stated that the case at present under consideration is one of a very few in respect of which recourse is had to Article 29 (2). Even if, amongst the several thousand appointment decisions which the Council has taken up to now, Article 29 (2) has only seldom been of relevance, this of course does not constitute proof that the conditions for its application were present.

In the same way I do not believe it to be important whether or not this is a matter of the regrading of the post which official X already occupied, and whether this regrading was justified by an appreciable increase in the duties to be performed as well as an alteration in their nature. Of course, we are speaking here of the creation of a new post, as moreover is clear from Vacancy Notice No 84/72. In filling such a post it may be that the previous occupant does in fact have a greater chance of success; however, the rules contained in the Staff Regulations can certainly not be dispensed with and it is also not permitted, according to the case-law of the Court (Case 28/72, Judgment of 12 July 1971, *Tontodonati* v *Commission of the European Communities* [1973] ECR 779), to recognize that the previous occupant of a post has a claim to be appointed to that post.

The only relevant factor therefore is whether the Council has in fact succeeded in showing that the post in question requires 'special qualifications' within the meaning of Article 29 (2).

During the course of the proceedings the Council has outlined the functions relating to the post in question. Its remarks may be summarized as follows: the functions consist in coordinating the composition, duplication, translation and distribution of documents and the delegation and supervision of this work. We were assured that these duties are of enormous importance for the smooth functioning of the work of the Council, for the various daily meetings of the Council's departments and of the Council itself, and it would be unthinkable for an interruption to occur in this field, as would necessarily be the case if a new official had to become accustomed to the work.

Statements such as these by an institution of the Communities must certainly not be treated lightly. However, in my view, there is still an appreciable measure of doubt as to whether the purport of the Council's remarks is really sufficient to meet the requirements of Article 29 (2). I am not here taking into consideration the information which has also been supplied to the effect that there are no special training establishments for such duties and no corresponding degrees, since this is clearly true of many other posts in the administration, without such posts becoming posts requiring special qualifications. Indeed, the impression may well be gained that the activity such as has been described to us does exist here and there in national and international administrations, and that the duties are such as could be mastered in a relatively short time by competent officials. At all events, it is hard to conceive that such posts involve functions which require quite special qualifications which may be obtained only over long periods of time and in respect of which Euler's remarks in his commentary on Article 29 may be applied, where he states that the characteristic for the application of Article 29 (2) is the scarcity of candidates.

On these grounds I have no hesitation in stating further that the Council has not furnished proof, in a material particular, of the existence of the requirements of Article 29 (2), and that this constitutes a further ground for annulment.

This is sufficient for a judgment of the case; it is not necessary to go into the further complaints made by the applicant, in particular that of misuse of powers, which is said to be justified by the fact that even before publication of the Vacancy Notice a decision on the filling of the post had in practice already been taken.

3. It is therefore my opinion that the application is both admissible and well founded. Pursuant to the present system contained in the Staff Regulations, according to which a complaint through official channels is a mandatory requirement and proceedings must be brought against the implied rejection of that complaint, the implied rejection of the complaint through official channels submitted by the applicant in which the latter requested that the appointment of official X be annulled, must be declared void, it being incumbent upon the Council in complying with such a judgment to reverse the decision mentioned in the complaint. In view of the outcome of the proceedings the Council must be ordered to pay the costs.