In Case 30/76

BERTHOLD KÜSTER, an official at the European Parliament, residing in Luxembourg, represented by Victor Biel, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Victor Biel at 18 A, rue des Glacis,

applicant,

v

EUROPEAN PARLIAMENT, represented by its Secretary-General, Hans Robert Nord, acting as Agent, assisted by Alex Bonn, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Alex Bonn, 22 Côte d'Eich,

defendant,

Application for the annulment of the appointment made by the European Parliament on 15 September 1975 to till the vacancy which was the subject-matter of Internal Competition A/45.

THE COURT (First Chamber)

composed of: A. M. Donner, President of Chamber, A. O'Keeffe and G. Bosco, judges,

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

gives the following

JUDGMENT

Facts

The facts, procedure, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. By judgment of 10 July 1975 in Case 77/74 [1975] ECR 949) brought by Mr Berthold Küster against the European Parliament the Court annulled the decision of the European Parliament appointing Mr Gerard Kieffer to the Grade A 3 post which was the subject of Internal Competition A/45. The Court found that Mr Kieffer, as a temporary servant not subject to a periodic report had received fictitious marks under this

heading. The Court therefore held that such marking was irregular and that it was of such a kind as adversely to affect the applicant.

Following this judgment the Parliament made a new choice in the context of the same Internal Competition A/45 and by decision dated 15 September 1975 appointed Mr Roger Würth to the vacancy.

The applicant took the view in particular that the judgment of the Court involved the annulment not only of the appointment of Mr Kieffer but also of the competition following which the appointment had been made and lodged on 24 October 1975 a complaint under Article 90 of the Staff Regulations.

Since there was no answer to this complaint, the applicant brought the present action on 18 March 1976.

2. After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court (First Chamber) decided to open the oral procedure without a preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'(a) Rule that the implied decision rejecting his complaint to the appointing authority on the subject of the appointment of Mr Würth to the A 3 post is void and of no effect and therefore,

(b) Rule that the "promotion" of Mr Würth is void and of no effect and accordingly annul it,

(c) Rule that the post offered by Vacancy Notice No 892 and Internal Competition A/45 may only be filled by means of a fresh procedure for this purpose,

(d) Order the Parliament to bear the entire costs of the proceedings.'

The *defendant* contends that the Court should:

'— Rule that the application is inadmissible;

— Alternatively rule it to be unfounded;

— Make an order as to costs in accordance with the applicable provisions.'

III — Submissions and arguments of the parties

The *applicant* considers that the European Parliament by limiting itself to a new appointment to the post in question has not complied with the judgment of the Court of 10 July 1975 in Case 77/74, the objective of which was 'the annulment of Internal Competition A/45 and of the appointment made thereunder'. It is obvious, even if the Court did not say so expressly, that Internal Competition A/45 and the appointment of Mr Kieffer resulting from this competition were 'inseparable'. The fact that in the said case the Court gave a ruling on only one submission in the application and as a result of this submission annulled the decision of appointment in question is because it considered that it was superfluous in these circumstances to consider the other submissions. In doing so it did not resolve all the questions affecting the legality of the procedure for the competition with the result that so long as the complaints relating to these questions were not defined the competition could not serve as a legal basis for other appointments in place of the one annulled.

These complaints relate to different wrongful aspects of the competition such as:

— The marks awarded to the applicant which do not take account of the fact that he had for eight and a half months filled the post of First Secretary to a Committee.

— The constitution of the Selection Board, which was appointed by an

authority with no powers in the matter, namely the Secretary-General. The fact that the Bureau by decision of 7 and 8 October 1971 delegated to the Secretary-General power to appoint the Selection Board in no way removed the irregular nature of its constitution since the delegation of power was not brought to the attention of the staff.

In addition the appointment which is the subject of the present action is incompatible with the principle that a person may not benefit from a judgment which does not relate to him since the candidate appointed has not contested the appointment of Mr Kieffer which he did not regard as adversely affecting him.

With regard more particularly to the appointment of Mr Würth it is moreover irregular by reason of the fact that it mentions in its grounds Article 45 of the Staff Regulations on promotion and is described in its operative part as 'promotion' whereas it refers at the same time to the results of Internal Competition A/45.

The applicant concludes that all the facts taken together, considered also in the light of those referred to in his previous applications, constitute an accumulation of evidence of the existence of a misuse of powers with regard to him.

The *defendant* raises first of all the inadmissibility of the action, for the appointment in question is not of such a kind as to adversely affect the applicant. Since Mr Küster was not included in the list of suitable candidates drawn up by the Selection Board in Competition A/45, he could not in any event have been appointed to the vacancy with the result that he cannot in the present case have any dispute with the candidate appointed.

Assuming, however, that the action is admissible nevertheless the claim that the Court should declare that a fresh procedure should be put in motion to fill the post in question must be found to be inadmissible.

First, the operative part of the judgment leaves no doubt in this respect since it annuls only the decision in question. Secondly, the Court stated in the grounds of judgment that the irregularity which it found was of such a kind as to involve 'the annulment of the appointment' and therefore 'the appointment of Mr Gérard Kieffer resulting from Competition A/45 must therefore be annulled'. In doing this the Court gave judgment in accordance with the statement of claim as formulated by the applicant in his conclusions and reproduced by the Court at the commencement of the gounds of judgment. In these circumstances it is irrelevant that the judgment was headed as including the annulment of Competition A/45 as being part of the claim. Thirdly, it is not correct to say that the competition and the appointment of Mr Kieffer were 'inseparable'. The irregularity of that appointment does not affect the competition as a whole. It is due to a fact peculiar to temporary servants admitted to the internal competition in question and Mr Kieffer was the only temporary servant participating in the competition. Fourthly, it cannot be admitted that the annulment of the appointment of Mr Kieffer could not benefit Mr Würth since the latter did not ask for it. The effect of an annulment by the Court of an appointment is *erga omnes*. Further, in refusing to consider all the issues in Case 77/74 the Court followed an established practice with the result that it is not possible to infer from this fact the slightest support for submissions which have not been considered.

With regard more particularly to the substance of the action the defendant makes, *inter alia*, the following observations:

— The complaints with regard to Competition A/45 made in Case

77/74 were likewise made against Competition A/43 in Case 23/74 and the Selection Board and the criteria of selection which it adopted were the same in both competitions. The judgment in Case 23/74 decided that such criteria did not constitute a misuse of powers or an infringement of the rights under the Staff Regulations.

— The Court in Case 23/74 has already considered the question relating to the temporary posting of Mr Küster to the post in question and rejected the argument based on this fact. Nevertheless both in Competition A/43 referred to in Case 23/74 and in Competition A/45 the Selection Board took account, with regard to the temporary posting, both of the facts and the law relating thereto at the time.

— The complaint alleging no power on the part of the Secretary General to appoint the Selection Board was made in the previous cases and dismissed by the Advocate-General in the context of those cases. The Court did not give a ruling on it but neither did it accept it.

— With regard to the complaint that the appointment in question was not previously brought to the attention of the Bureau, it is to be remembered that the President of the Parliament informed the Bureau at the meeting on 16 September 1975 of the proposal to appoint Mr Roger Würth (cf., Annex 1 to the defence).

— The wording adopted by the decision in question referring to Article 45 of the Staff Regulations is in accordance with a wide-spread practice which until now has not given rise either to misunderstanding or argument. In brief it is not contrary to the true position since a candidate who enters a higher grade of his category is for practical purposes promoted. In any event the contested decision shows clearly that the appointment of Mr Würth was the result of Internal Competition A/45.

The *applicant* in reply on the subject of admissibility says that since the action brought against the appointment of Mr Kieffer was judged admissible (Case 77/74), it is difficult to see why the present action should by contrast be inadmissible. The appointment of Mr Würth adversely affects the applicant in the same way as did that of Mr Kieffer.

On the substance of the case the applicant pursues the submissions already put forward in the application stressing more particularly as follows:

— The submissions which were made against Competition A/45 in Case 77/74 and on which the Court did not pronounce are as valid in the context of the present case. So long as the said submissions have not been dealt with by the Court the competition cannot be regarded as a sufficient legal basis to justify the appointments especially as the appointment of Mr Kieffer is firmly connected with Competition A/45.

— It is not possible to regard the title of the judgment, in which annulment of the competition is mentioned, as having no legal significance.

— Neither the applicant nor his counsel had been informed of the statement of the President of the European Parliament with regard to the difficulties created by the judgment in Case 77/74. It is, to say the least, surprising that the decision to appoint Mr Würth contains no reference to an opinion of the Bureau.

— With regard to the temporary posting held by the applicant which the Selection Board did not take into account either in Competition A/43 or in Competition A/45, it should not be forgotten that although the Selection Board was not aware of this fact at the time of Competition A/43, the fact that the applicant had held the temporary posting was well known at the time of Competition A/45. In any event this fact was known when Mr Würth was appointed.

The applicant concludes by insisting that there is a misuse of powers with regard to him as is shown by all the facts adduced by him during the various actions he has brought against the European Parliament.

The *defandant* insists in its rejoinder that the appointment in question was made by the European Parliament with strict regard for the judgment of the Court, on the basis of the results of the competition and in accordance with the interests of the service.

The applicant's repeated criticisms on this subject involve malicious and unjustified insinuations and are not very consistent *inter se.*

After protesting against the manner in which the applicant in his reply distorts the meaning and scope of the statements by the defendant, the latter refers to its defence and observes that the reply does not adduce any new factors requiring to be examined or rebutted. With regard in particular to the title of the judgment it suffices to refer to Article 63 of the Rules of Procedure where the matters which must be included in all judgments are set out. With regard to the alleged lack of grounds for the contested decision the applicant omits to cite the legal provisions under which the decision in question should have mentioned the opinion expressed by the Bureau on the information received from the President of the European Parliament.

Finally, it cannot be accepted that submissions which have not been made in the context of the present action but which have been evoked by way of reference to previous cases can constitute a valid legal basis for the claims in the present action. Such submissions cannot be regarded as admissible.

The defendant concludes that there is nothing casting doubt on the legality of the contested measure. The working of the Selection Board and the factual objectives underlying this judgment rule out not only any infringement of the Staff Regulations but also any misuse of powers.

IV — Oral procedure

Oral observations were made by the parties at the hearing on 14 October 1976.

The Advocate-General delivered his opinion at the hearing on 11 November 1976.

Law

1 By an application lodged on 18 March 1976 the applicant claimed the annulment of the decision appointing Mr Roger Würth taken by the European Parliament on 15 September 1975 as a result of Internal Competition A/45.

2 This decision was taken by the European Parliament in place of the decision appointing Mr Gérard Kieffer taken on 14 February 1974 as a result of the same internal competition and annulled by the Court in its judgment of 10 July 1975 in Case 77/74, *Berthold Küster* v *European Parliament* [1975] ECR 949.

3 The applicant alleges that to comply with this judgment the appointing authority ought to have withdrawn not only the decision appointing Mr Gérard Kieffer but also the whole competition on which it was based and accordingly to have organized a new recruitment procedure to fill the vacancy.

4 Since the appointing authority has confined itself to substituting the appointment of Mr Roger Würth for that of Mr Gérard Kieffer it has, according to the applicant, disregarded its obligations under the first paragraph of Article 176 of the EEC Treaty and the first paragraph of Article 149 of the EAEC Treaty.

5 Further the applicant maintains that there are several irregularities in the appointment of Mr Roger Würth.

Admissibility

6 The defendant objects that the action is inadmissible in so far as the applicant claims that the decision in question has been taken by the European Parliament in disregard of the judgment of the Court of 10 July 1975 in Case 77/74.

7 In its opinion that judgment does not involve the annulment of Internal Competition A/45 but only of the appointment of Mr Gérard Kieffer of 14 February 1974, so that the claims in the present action are in this respect incompatible with the scope of the said judgment.

8 It cannot be contested that those to whom a judgment of the Court annulling an act of an institution is addressed are directly concerned with the way in which the institution executes the judgment.

9 They are therefore entitled to request the Court to rule on any failure by the institution to perform its obligations under the provisions applicable.

10 For these reasons the action must be declared admissible.

Substance

11 (1) The applicant maintains that to conform with the judgment of the Court of 10 July 1975 in Case 77/74 the European Parliament ought to have initiated a new recruitment procedure to fill the vacancy.

12 It is alleged that it is all the more necessary to initiate such procedure since the judgment of 10 July 1975 gave a ruling on only one claim in the action and thus did not settle the whole question concerning the regularity of Competition A/45.

13 According to the aforesaid judgment the applicant claimed that the Court should 'rule that the promotion which took place on the basis of Competition A/45 is irregular and illegal and accordingly annul the same'.

14 The part of the judgment headed 'Law' begins with the statement that the applicant is asking the Court 'to annul the implied rejection ... and consequently to annul the appointment of Mr Gérard Kieffer ...'.

15 The operative part of the judgment 'annuls the appointment of Mr Gérard Kieffer resulting from Competition A/45'.

16 It thus clearly appears that the judgment regarded the main objective of the action as the annulment of the appointment of Mr Kieffer and as concerning the competition procedure only in so far as this had led to the appointment and judgment was given accordingly.

17 Therefore the submission is unfounded and must be rejected.

18 (2) The applicant claims further that Competition A/45, which led to the contested appointment, was conducted irregularly in several respects such as to involve the annulment of that appointment.

19 In support of the action the applicant maintains that the Selection Board for this competition was illegally constituted since the Secretary-General of the

European Parliament had appointed the members of the Selection Board under a power delegated for this purpose by the Bureau of the Parliament and that the delegation was invalid since it was not brought to the attention of the staff in the manner laid down by the provisions of the Staff Regulations.

20 The applicant maintains that such a delegation would have been valid only if it had been posted up or published in accordance with Article 25 of the Staff Regulations.

21 The second paragraph of Article 110 of the Staff Regulations provides: 'All such general provisions ... shall be brought to the attention of the staff', but does not specify the manner in which this must be done.

22 Although Article 25 of the Staff Regulations lays down the manner in which decisions relating to specific individuals are to be published, it does not specify the manner of publication of acts which have a general scope or measures which relate to a division of powers within the institution.

23 The delegation of power in question involves a generally accepted division of powers within the institution.

24 In any event it is established that it was notified not only to the Directors General of the institution, the Chairman of Groups, the Secretariat and the Control Office, but also to the Staff Committee established under Article 9 of the Staff Regulations which provides that the Committee shall, *inter alia,* represent the interests of the staff *vis-à-vis* their institution and 'maintain continuous contact between the institution and the staff'.

25 In view of this the contested delegation of power is legally valid without its being necessary to consider whether such delegation constitutes a measure referred to by the second paragraph of Article 110 of the Staff Regulations.

26 The applicant further maintains that the marks awarded to him by the Selection Board for the competition do not take account of the fact that he held the post of First Secretary of a Committee on a temporary basis from 1 September 1973 to 20 May 1974.

27 The competition in question was initiated by notice dated 23 November 1973 and closed on 14 February 1974.

28 Thus at the time when the list of suitable candidates on which the contested measure is based was drawn up by the Selection Board for the competition, the applicant was filling the temporary post which had not yet been the subject of a decision by the appointing authority regarding 'determination of administrative status' of the applicant within the meaning of the third paragraph of Article 25 of the Staff Regulations.

29 In these circumstances it cannot be maintained that the Selection Board was bound, when it drew up the list of suitable candidates, to take account of such a temporary post which at that time was a *de facto* situation and not yet sanctioned by a formal decision of the appointing authority recorded in the personal file of the applicant.

30 Moreover it appears from statement supplied by the defendant which the applicant has not been able to rebut that the Selection Board when it drew up the said list of suitable candidates did in fact take account of all the features of fact and of law relating to the administrative position of the applicant at the time.

31 The applicant further point out that the contested decision in referring to the 'result of the competition' mentions Article 45 of the Staff Regulations relating to promotion and expressly states in the operative part that the successful candidate has been 'promoted' to the vacant post.

32 For this reason he says that the said decision is irregular because imprecise or contradictory reasons are given for it.

33 The applicant moreover states that insufficient reasons are given for the contested decision in that it contains no reference to the opinion of the Bureau obtained by the President of the European Parliament on the proposal to appoint Mr Roger Würth.

34 The recruitment procedure followed in the present case clearly shows that the appointment in question was made as a result of an internal competition and thus leaves no doubt as to the legal basis of the act.

35 Therefore the lack of precision pointed out in the statement of reasons is not of a decisive nature and cannot affect the validity of the contested decision.

36 Further with regard to the absence from the statement of reasons for the decision in question of a reference to the opinion of the Bureau, having regard to the provisions of the Staff Regulations it does not appear that the validity of the decision depends on mention of such an opinion.

37 For these reasons the present application must be dismissed as unfounded.

Costs

38 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

39 The applicant has failed in his submissions.

40 However, under the terms of Article 70 of the Rules of Procedure, the costs incurred by institutions in actions brought by servants of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the action as unfounded;**
2. **Orders each party to bear its own costs.**

Donner O'Keeffe Bosco

Delivered in open court in Luxembourg on 25 November 1976.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber