OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 8 MAY 1974 [1]

Mr President,

Members of the Court

The object of this application is the annulment of acts of the Council, by which two officials were appointed to posts of administrators. It has been brought by three applicants; with regard to the admissibility of the application, applicants Nos 2 and 3 present no special problem: they are officials of the Council and display a legitimate interest in the cancellation of appointments which adversely affected their status. Applicant No 1 on the other hand is the Amalgamated European Public Service Union (Union Syndicale), a union composed of officials and other servants of the European institutions and other European organisations located in Brussels.

The fact that a union is here appearing as applicant has caused the Council to put in a *plea of inadmissibility,* lodged on 27 October 1973, and to submit that the Court should *give a ruling on this matter before considering the merits,* pursuant to Article 91 (4) of the Rules of Procedure.

By Order of 13 February 1974 the First Chamber of the Court referred the case to a plenary session of the Court of Justice, pursuant to Article 95 (2) of the Rules of Procedure. At that plenary session, the Court decided to rule on the plea before considering the merits and without any preparatory inquiry.

The parties made their oral observations at the hearing on 21 March 1974, and the case now awaits judgment.

I — Scope of the plea

We must first examine the scope of the plea of inadmissibility raised by the Council. The latter requests in fact that the application should be declared inadmissible not only insofar as it is brought by the Union Syndicale, whose right of action in proceedings of this kind is, as we shall see, open to doubt. The plea is also directed against the applications by the two officials, insofar as the latter are associated with the application in their capacities as officers or members of the Union Syndicale. The plea should not be taken wholly seriously on this point. The two applicants have in fact made it quite clear that they have made and are pursuing their applications in their own names, on their own behalf and for the protection of their own interests. They may well be members, even officers, of the Union Syndicale, or of any other association — that has no significance here; the fact is that they would have been able to take part in the competition procedure for the filling of the posts in issue, if such a competition had been held. There can be no doubt as to the legitimate interest of both officials in their application or as to their right of appeal under Article 91 of the Staff Regulations, since they have lodged complaints pursuant to Article 90.

II — Discussion of the plea

1. We must first consider what the Union Syndicale in fact is, and what it represents according to the Staff Regulations of officials of the European Communities.

The Union Syndicale is a union of officials and other servants of those institutions and other organizations of the European Communities located in Brussels. Its Rules were adopted by a general meeting of its members and came into force on 25 January 1973. At

1 — Translated from the German.

present it is directed and represented by an executive committee elected on 29 January 1973. The union is affiliated to the Public Services International (PSI), whose headquarters are in London, and is associated thereby with the European Confederation of Free Trade Unions (ECFTU) and the International Confederation of Free Trade Unions (ICFTU), whose headquarters are in Brussels. According to its Rules (Article II (1)) the main purpose of the union are as follows:

'— to serve and defended the economic, social, professional and moral interests of its members and of the whole staff,

— to share the objectives and principles of the PSI, the ECFTU and the ICFTU by means of practical solidarity with European and international labour.'

These main purposes are given fuller exposition in Article II (2) of the Rules and are expressed as the determination to defend the independence, permanent nature and quality of the European public service, to collaborate in its formation and to work for the adaptation of its structures and of conditions of work to the requirements of a modern and humanitarian multi-national administration.

We must now further consider the extent to which the status of unions is more closely defined in Community law.

Article 24 a, added to the Staff Regulations by amending Regulation No 1473/72 of the Council of 30 June 1972, reads as follows:

Officials shall be entitled to exercise the right of association; they may in particular be members of trade unions or staff associations of European officials.'

The authors of the Staff Regulations therefore allow officials and other servants of the institutions of the Communities to join union organizations on the basis of the fundamental right of freedom of association. By so doing they expressly recognize the existence of trade unions and staff associations, as well as their activities and the performance of their especial tasks. This recognition would be undermined if the authors of the Staff Regulations were enabled to refuse to the organization which it has recognized as existent in this way all power to represent its members' interests. The question merely remains, within what limits unions can exercise this power.

The Council believes it can show that, in its capacity as author of the Staff Regulations, it traced the limits in relation to the matter at issue here. In fact it opposed an addition, proposed by the European Parliament, to the abovementioned Article 24 a according to which, in disputes before the Court of Justice between the Community and any person to whom the Staff Regulations apply, the union or professional organization to which that person belongs should be allowed to intervene in the dispute 'if such intervention is justified by the general interest of the staff'. In the Council's view the fact that the authors of the Staff Regulations had expressly refused to approve a formally introduced, concrete proposal that the union be given wider possibilities for appearing before the Court leads to the conclusion that the union cannot appear before the Court of Justice.

This appears to me to be at the very least a venturesome interpretation. The Council's position seems to me to be based rather upon that institution's view of the separation of powers. This would correspond with leaving the Court, as the protector of the legal order, to draw from the recognized existence of the unions the conclusions which legal logic suggests to be appropriate. It is for the Court to ascertain the extent of legal capacity, just as it is also for the Court to judge proceedings with relation to its relevance in law.

The unions have been accepted into the legal life of the Community; consequently they have acquired rights and duties under legal provisions which

have recognized the right of association and its practical exercise in various fields. It is incumbent upon the Court of Justice to decide whether such rights or duties in fact exist in particular cases.

2. In the present case it has to be decided whether unions have the right to 'be party to legal proceedings' before the Court. In reaching this decision the Court must carefully distinguish between the right to appear as an intervener and the right to bring the application.

I believe it is quite possible that unions can take part in proceedings before the Court of Justice as interveners. Whereas Article 34 of the Protocol on the Statute of the Court of Justice of the ECSC states that natural or legal persons establishing an interest in the result of any case submitted to the Court may intervene in that case, Article 37 of the Protocol on the Statute of the Court of Justice of the EEC and Article 38 of the Protocol on the Statute of the Court of Justice of the EAEC lay down, after especial mention of the Member States and institutions of the Community, whose right of intervention appears to be unlimited, that the same right shall be open to any other person *establishing an interest in the result of any case submitted to the Court,* save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community. These Articles doubtless also apply to staff cases, which are dealt with in the Treaties themselves (Article 179 EEC Treaty, Article 152 EAEC Treaty) and in the Staff Regulations, as a special implementing Regulation, Article 91 (5) of which settles the details. The question whether, according to these provisions, the right to intervene is also enjoyed by unions, appears to me to have been answered in part by the earlier case law of the Court of Justice. First, the right of associations to intervene was confirmed (Order of 24 October 1962 in Joined Cases 16 and 17/62 — *Confédération nationale des producteurs de fruits et légumes and 3 other applicants v Council of the EEC,* Rec. 1962, p. 999). This decision was based on the fact that the expression 'any other person' was 'intended in its very widest possible sense'. This does not mean that it is open to any legal entity, however constituted, to appear as intervener; it was very rightly pointed out (in the Order of 14 November 1963 in Case 15/63 — *Claude Lassalle v European Parliament,* Rec. 1964, p. 109) that 'it is not to be assumed that the authors of the Treaties wished to extend the opportunities to intervene to the point of allowing intervention by entities lacking legal personality or even its basic aspects'. The judgment continues that 'these aspects include independence and responsibility even if limited'. These conditions are fulfilled by unions such as the Union Syndicale, as I have previously described it. Accordingly, intervention by the Union Syndicale would have been quite possible in this case.

However, the Union Syndicale chose to act differently. It brought an application in its own name.

We must therefore consider whether and under what circumstances it is admissible for a union to bring an application in its own name.

Comparative jurisprudence allows us to make a concise but exact survey of the way this problem is solved in those Member States whose public service is organized according to legislation which is more or less equivalent to the Staff Regulations of our Communities.

Let me begin with the most restrictive solutions and conclude with the widest ones. The view seems to have gained acceptance everywhere that unions may be parties to proceedings before the courts. According to the country, discussion of the right of action includes mention of the extension of legal capacity, of entitlement to bring an action, of the right or legitimate interest in an action etc. We will remain in the practical sphere and consider the facts. In the Netherlands the unions would certainly have no right of action in a

case similar to that under consideration. In the Federal Republic of Germany the right of action of unions in defined, exhaustively enumerated cases is expressly laid down by law. In the majority of States the interest to be established must be a collective interest and not a personal interest. Thus, in particular in Great Britain, a union which is a party to a contract between employer and employee has a right of action, whether the contract is required by law or is the result of negotiations between the parties. In general terms, a union often has a right to be a party to legal proceedings only insofar as it is simply a matter of protecting the interests of the 'association' formed by its members; this is so in Italy, in Luxembourg, in Ireland and in Denmark. The right of action seems to be widest in France. In that country a union can challenge an individual act, not when it has direct effect only with regard to a single party, but when it adversely affects all those union members who would have benefited from an act which was not adopted (Decision of the Conseil d'État of 12 June 1959, *Syndicat chrétien du Ministère de l'Industrie et du Commerce,* published — with the opinion of Mr H. Mayras — in the Recueil Lebon, p. 360). And finally, in Belgium, since 1967 (following a Decision of the Conseil d'Etat of 12 July 1967, Case law of the Conseil d'Etat p. 71) a decision can be injurious to the collective interests represented by a union, even if that decision is given in an individual case, when it is bound to affect, albeit only at some future date, several members of the group of persons represented by the union.

It is clear that only in Belgium — where the cited case law was sharply criticized — would the Union Syndicale's action have had a small chance of being declared admissible. Everywhere else the right of action of unions is limited in its extent by the fact that the legal personality attributed to the unions is purely *functional* and only operates to the extent necessary to achieve the aims which the legislature and the courts jointly acknowledge to be normal for a union. The right of action therefore everywhere reflects the conception which is held of the unions, of their power to represent interests and their role in social life. It may be concluded from this that there is no such thing within the European Communities as an *actio popularis* brought by the unions for the representation of the interests of employees, but rather that there is general acceptance that unions can only appear before the courts in cases where there is a threat to the interests on account of which and for the protection of which they were established.

If we apply this information to the case in hand we must conclude that the Union Syndicale, the representative nature of which is not in dispute, has brought an application with the object of annulling individual acts. If this application demonstrates an infringement of the Staff Regulations, it does so for the protection of the particular interests of two persons who have brought applications on their own behalf, those applications being admissible. In that case, where does the collective interest lie? Does it lie in the denunciation of behavior, the repetition of which would represent an ever-increasing infringement of the Staff Regulations? But such an interest is purely hypothetical; until the contrary is proved, it has not arisen and does not exist. For example, if the Council had made a unilateral decision to conduct appointment procedures generally in a way which differed from that laid down in the Staff Regulations, the position would be completely different. The question would then arise whether the Union Syndicale had a collective interest to represent and protect. That is however a purely hypothetical case.

I would finally put forward one further consideration, namely that the admission of applications brought by the unions on behalf of their members in pursuance of

personal interests might restrict the freedom of officials to decide whether in fact they wish to undertake proceedings against a decision of their employers. This seems to me incompatible with the right of self-determination.

There remains to discuss a possibility which was briefly touched upon in the oral procedure: can one regard the Union Snydicale's application as a mere 'subsidiary application', joined to those of the two applicant officials Massa and Schots, and therefore place less emphasis upon the requirements as to admissibility? In my view this cannot be so, since the Treaties, the Protocols on the Statute of the Court of Justice and our Rules of Procedure do not envisage such a possibility, and to introduce, by means of Judge-made law, a possibility, the effects of which cannot be accurately forecast, would be a hazardous way to introduce innovations. Moreover, the possibility of intervention already exists for this purpose, under the conditions outlined above.

It is my opinion, on the basis of the foregoing, that:

1. The applications brought by the officials Massa and Schots should be declared admissible, and no decision on costs should be made before the final Judgment.

2. The Union Syndicale's application should be declared inadmissible, and this party should be ordered to pay the costs attributable to its application.