In Case 148/79

WALTER KORTER, an official of the Council of the European Communities, residing in Brussels, represented by Hans-Georg Hornung, an Advocate in Trier, with an address for service in Luxembourg at the Chambers of Pierre-Paul Schleimer, 78 Grand'Rue,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Pierre L. Prum, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Maître Prum, 22 Côte d'Eich,

defendant,

APPLICATION for an order compelling the Council to take a decision susceptible to legal action on the applicant's request for a change of posting,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Summary of the facts

On 11 August 1978 the General Secretariat of the Council published Staff

Note No 189/78 informing its officials that a post for an Administrator in Grade A 7/A 6 was temporarily vacant for one year in Directorate-General E. Directorate III (accession negotiations).

Officials interested in that post who thought that they possessed the qualifications required were invited to submit their application for a transfer to the Personnel Branch no later than 29 September 1978. Officials already holding a post in Grade A 7/A 6 were eligible to apply.

The Staff Note stated that it was not necessary to complete an application form; a note accompanied by a brief *curriculum vitae* was sufficient.

Referring to that Staff Note, Walter Korter, an Administrator with the General Secretariat of the Council since 1 October 1973, requested a transfer by a note dated 27 September 1978.

By a note dated 6 February 1979 the head of the Personnel Branch informed Mr Korter that no application had been accepted for the vacant post.

On 23 February 1979 Mr Korter wrote to the Director of Administration questioning whether the person who wrote the note of 6 February was empowered to sign it and seeking clarification in that regard. Mr Korter indicated that he had just been informed that the note of 6 February should be regarded as an administrative act adversely affecting him. That description seemed questionable to him: the act in question contained no reference to the appointing authority; the power to sign is valid only if it derives from the express and personal delegation of the Secretary-General, which was not the case here.

In reply to his note of 23 February 1979 Mr Korter was informed on 19 March 1979 that no application for transfer had been taken into consideration by the person responsible in the department in question and that the head of the Personnel Branch was empowered to sign communications which, like that of 6 February, are purely informative in nature.

By a note of the same day Mr Korter asked the administration when the appointing authority intended to take a decision on his application of 27 September 1978 for a transfer, bearing in mind the time-limit laid down in Article 90 (1) and (2) of the Staff Regulations.

On 25 April 1979 the administration once more informed Mr Korter that the note of 6 February was an informatory step in the context of a procedure which is initiated when a post falls vacant. The applications submitted during such a procedure are sent by the administration to the head of the department in question, who has full discretion either to accept one of the applications or to propose another solution. Officials who have submitted an application always receive a reply from the administration. It is not for the appointing authority to reply to applications submitted in such a procedure.

On 26 April 1979 Mr Korter submitted a complaint under Article 90 of the Staff Regulations to the Secretary-General of the Council asking him as the appointing authority to accede to his application of 27 September 1978 for a transfer or at least adopt a decision in the proper form.

By a letter of 27 June 1979 the Secretary-General of the Council informed Mr Korter that his request did not constitute a complaint within the meaning of Article 90 of the Staff Regulations, as the requirements of that provision were not fulfilled: the appointing authority had not taken any decision concerning him; it could not, under a procedure which was not laid down by the Staff Regulations and which clearly specified the authority empowered to make the choice, adopt a measure provided for by the Staff Regulations. The note of 6 February 1979, which was purely for information and was not a decision within the meaning of Article 7 of the Staff Regulations, was signed by the competent official.

II — Written procedure

Mr Korter commenced this action on 25 September 1979.

By a separate document lodged on 6 December 1979 in accordance with Article 91 (1) of the Rules of Procedure, the Council, the defendant in the action, requested the Court to dismiss the application as inadmissible without going into the substance of it. By a document lodged on 30 January 1980 the applicant submitted his observations on the preliminary objection raised by the Council. By an order dated 13 February 1980 the Court (Second Chamber) decided to deal with the preliminary objection together with the substance of the case and to reserve the costs.

Thereafter the written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, it invited the Council to notify it in writing of the outcome of the staff note of 11 August 1978 and the reasons why it did not in the end accept any of the applications submitted to it pursuant to that note; at the same time the applicant was requested to state in writing the purpose of the decision that he seeks by means of the action and his interest in that decision. Both parties complied with those requests within the period allowed.

III — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Reject the plea of inadmissibility raised against the application;

(b) Order the Council to take a decision susceptible to legal action on his application for a transfer submitted on 27 September 1978;

(c) Order the Council to pay the costs.

The *Council* claims that the Court should:

(a) Declare the application inadmissible;

(b) In any event, dismiss it as unfounded;

(c) Decide as to the costs in accordance with the provisions applicable.

IV — Submissions and arguments of the parties during the written procedure

A — Admissibility

The *Council* considers the application to be inadmissible for several reasons.

(a) Lack of object

The negative attitude expressed by the Secretary-General of the Council on 27 June 1979 cannot be regarded as an act adversely affecting the applicant; his application for a transfer had already been the subject of a decision of the administration on 6 February 1979.

The letter from the Secretary-General cannot be viewed as an express rejection of the application for a transfer: it simply confirmed that the note of 6 February 1979 had been signed by the competent official and was merely intended to regularize the situation from the administrative point of view.

Nor can the Secretary-General's letter be viewed as coming under Article 90 (2) of the Staff Regulations on the ground that the appointing authority "failed to adopt a measure prescribed by the Staff Regulations": a decision has been taken and the application represents an attempt to secure a second decision on the same matter.

(b) Lack of an interest to sue

If, as the applicant alleges, the note of 6 February 1979 constituted an act adversely affecting him, he could have brought an action against that act. However, according to the case-law of the Court of Justice, a claim for a declaration that an administrative act was irregular and for an order requiring the appointing authority to adopt another such measure must be dismissed as vexatious if such a measure cannot benefit the applicant.

If, on the other hand, the letter of 6 February 1979 was only informative in nature, it was signed in the proper form. A "decision" by the appointing authority would therefore have no purpose.

All the application seeks is an order compelling the appointing authority to take a decision which may be challenged by legal action. The best that the applicant can obtain is a decision repeating in another form the answer already given to his complaint, which would be pointless. A member of staff is not entitled to demand in the abstract the application of provisions of the Staff Regulations without asserting that they affect his personal rights.

(c) Failure to comply with provisions of the Staff Regulations

Although described by the applicant as "a complaint pursuant to Article 90 of the Staff Regulations", the applicant's request of 26 April 1979 can be no more than one of those requests which an official may make at any moment to the appointing authority. It cannot constitute a complaint within the meaning of Article 90. Neither of the two conditions required by the Staff Regulations is fulfilled; there was no decision adversely affecting the applicant taken by the appointing authority nor any failure by that authority to adopt a measure prescribed by the Staff Regulations.

(d) Absence of ground for complaint

Neither the note of 6 February 1979, which was purely informative in nature, nor the letter from the Secretary-General

of the Council of 27 June 1979, a decision in answer to a complaint, constitutes an administrative act adversely affecting the applicant. There is therefore no basis for the proceedings before the Court.

Furthermore, there is no question of any discrimination against the applicant in relation to other officials and as regards his own position.

The *applicant* challenges the relevance of the arguments put forward by the Council in support of its plea of inadmissibility.

(a) Object of the action

The express refusal by the Secretary-General of the Council to take a decision should be interpreted either as a failure to adopt a measure required by the Staff Regulations or as an express rejection of the applicant's request for a transfer. The applicant has not challenged the decision taken by the Secretary-General in regard to his complaint; but he does challenge the express refusal to take a decision as to his transfer.

The Council's argument to the effect that the applicant's request for a transfer had already been the subject of a decision contained in the administration's note of 6 February 1979 is not borne out by the documents contained in the papers placed before the Court and cannot be accepted: first, only the Secretary-General is empowered to decide on applications for transfer from officials in Category A; secondly, if the letter of 6 February 1979 was purely informatory as the Council claims, it cannot constitute a decision within the meaning of Article 7 of the Staff Regulations but only an informatory note not having any legal effect.

The competent authority did not take a valid decision on the application for a transfer. The applicant is not responsible for the fact that the ambiguous conduct of the Secretary-General of the Council might equally be regarded as an express refusal of the measure being sought. Furthermore, that point does not in the final analysis affect the object of the action or the admissibility and merits of the application.

The applicant lodged a complaint, not because his point of view was not shared by the administration, but because, "no decision has yet been taken on his request by the competent authority under Article 7 of the Staff Regulations".

(b) Interest to sue

The refusal, at first implied and then express following the complaint made by the applicant, to take a decision on his request for a transfer is, in the applicant's view, an act adversely affecting him in so far as his legal position has been affected by it.

The applicant has an interest in obtaining legal protection in this case. Contrary to what the Council states, he can obtain something other than a "repetition in another form of the answer to his complaint": the Council itself admits that the Secretary-General's answer to the complaint should in any event be in a different form and the question whether the answer can only be unfavourable remains open because, as the Secretary-General has not intervened in the proceedings, the only authority capable of having an overall perspective of the interests of the service has not yet exercised his power of appraisal.

The applicant has an undeniable interest in receiving the independent legal protection afforded by the proper

application by the appointing authority of the provisions of the Staff Regulations and, more specifically, in an examination of his application for a transfer solely in regard to the interests of the service and without regard to nationality (Article 7 of the Staff Regulations), in having a proper statement of the grounds on which the decision to reject his application was based (Article 25) and in the adoption of a decision on his complaint (Article 90). It is important for his legal position that a decision be taken the validity of which is susceptible to judicial review.

The applicant has an interest in the adoption of a decision to transfer him in accordance with the Staff Regulations. It would enable him to further his knowledge, abilities and interests in a new post; that interest still exists, as his application has not been rejected either impliedly or expressly. A fresh complaint is out of the question.

The interest of the applicant in having a decision taken as to his transfer is not affected by the fact that the appointing authority has taken measures in relation to third parties which entail a decision in regard to him.

The subjective interest of the applicant in taking legal action will also continue to exist in the future: he is entitled to have his future applications for a change of posting dealt with by the competent authority by means of decisions adopted within the framework of and in compliance with Articles 7, 25 and 29 of the Staff Regulations. The applicant cannot be expected to wait for ever for a transfer decision under Article 7 of the Staff Regulations, which the Secretary-General refuses to take, or for a measure taken in regard to a third party which, owing to the Secretary-General's practice, would never become known to him.

B — Substance

(a) Infringement of Article 7 of the Staff Regulations

The *applicant* contends that the Council is not observing Article 7 of the Staff Regulations in this case.

Under the Council Decision of 14 May 1962 determining the appointing authority for the General Secretariat of the Council (Official Journal, English Special Edition 1963-1964, p. 4) the Secretary-General exercises the powers conferred on the appointing authority as regards the application of Article 7 of the Staff Regulations. The second subparagraph of Article 7 (1) of the Staff Regulations gives the applicant the right to "apply for a transfer within his institution"; such a transfer is subject to a decision by the appointing authority.

Staff Note No 189/78 of 11 August 1978 expressly concerned applications for a change of posting (transfer); thus the appointing authority clearly intended to consider the options available under Article 7 (1) of the Staff Regulations. It subsequently refused, wrongly, to exercise the power which that provision expressly confers upon it.

Article 7 is none the less applicable in this case.

The Additional Negotiating Protocol concluded on 5 April 1978 between the Secretary-General of the Council and the trade unions provides under Part IV (Mobility) that:

"Any post which becomes available, with the exception of posts to be filled by transfer on health grounds and of the posts referred to in point III. 5 of the Annex to the Negotiating Protocol of 12 June 1975, shall be communicated to the staff in the form of a notification of

transfer, together with a description of the duties and an invitation to submit applications.

The immediate superior shall be at liberty to choose either from candidates applying for transfers as a result of such notification or from other candidates. This choice may be made only in accordance with the criteria of the interests of the service."

That Protocol cannot constitute an amendment to the Staff Regulations; in particular, it does not involve any transfer of power.

The appointing authority of an institution and the trade unions may, within the framework of the provisions of the Staff Regulations, limit their powers by entering into agreements or making the exercise of those powers subject to certain procedures; however, it is not permissible for such agreements to infringe the Staff Regulations in any way or to amend them. The Council alone, as the institution empowered to adopt regulations, has the power to amend the Staff Regulations.

It is therefore wrong to contend that since the implementation of the Additional Negotiating Protocol it no longer rests with the Secretary-General to decide on the transfer requested.

The fact that the procedure introduced by the Protocol is not envisaged by the Staff Regulations does not legally exempt the Secretary-General from his duty to take a decision in accordance with Article 7 (1). The fact that on completion of the several stages of that procedure the immediate superior did not in the end accept any candidate does not in any way alter the legal situation as regards the powers of the Secretary-General. He should have notified the applicant by a reasoned decision that he was not granting his application for a change of posting; however, by his communication of 27 June 1979 he expressly refused to do so.

Contrary to the opinion expressed in that communication by the Secretary-General it is plain from the case-law of the Court of Justice that Article 7 of the Staff Regulations is applicable to any change of posting, whatever its nature.

The view that Article 7 has not been amended but simply revoked is just as untenable; the result of that would be that a transfer could no longer take place at the General Secretariat of the Council pursuant to Article 7.

If, on the other hand, the Secretary-General believes that as a result of the combined effect of Article 7 and the procedure laid down in the Additional Negotiating Protocol he may take only a positive decision, so that he may therefore take a decision only in the event that the immediate superior accepts one or more candidates, that is a serious breach of the principle of equal treatment. It is not compatible with the principle of the legal equality of officials that only the candidate accepted by the immediate superior should obtain a decision capable of being challenged by legal action, whilst unsuccessful candidates, who are adversely affected by the rejection of their applications, are left without any legal remedy.

In accordance with the Staff Regulations there can be only one uniform interpretation of the legal concept of "application for a transfer"; different legal effects cannot be derived from the same legal concepts contained in the Staff Regulations on the basis of complementary procedures.

In the final analysis it rests with the appointing authority to take a decision, favourable or not, on the application for a transfer.

The action is well-founded owing to the refusal of the Secretary-General to apply Article 7 of the Staff Regulations, if only in a manner unfavourable to the applicant.

The *Council* denies that Article 7 (1) of the Staff Regulations is applicable in this case.

The note of 6 February 1979, intended simply to inform applicants, merely constituted an administrative measure within the context of the Additional Negotiating Protocol; it was not a decision under Article 7 or an individual decision within the meaning of Article 25 of the Staff Regulations.

Following the signing of the Additional Negotiating Protocol the administration elaborated a procedure to enable officials who had applied for a vacant post to be informed as quickly as possible of the outcome of their applications. That administrative communication does not affect the rights and duties of officials and does not have to be reasoned. In the present case the administration announced an opportunity for a transfer and invited those officials interested to submit their applications; it was a preliminary and purely informative procedure. The applicant had himself adhered to the provisions of that procedure, which was laid down by the Additional Negotiating Protocol.

The reference to Article 7 of the Staff Regulations has no justification. That provision governs the assignment of officials to their posts by appointment or transfer; an official is given the opportunity to apply for a transfer within the institution to which he belongs but he must submit his application to the appointing authority. In this case the applicant did not make such an application; he simply notified the head of the Personnel Branch of his interest in the post declared vacant by Staff Note No 189/78. It is apparent from the context in which the applicant's application was submitted as well as from its description and content that it was not an application for a transfer within the meaning of Article 7 of the Staff Regulations, which should have been addressed, not to the immediate superior, but to the appointing authority in completely different circumstances.

Consequently the appointing authority was not required to reply to the request which is the subject-matter of the dispute; since it did not have to take a decision it cannot be challenged on account of its failure to do so.

(b) Infringement of Article 25 of the Staff Regulations

The *applicant* refers to the case-law of the Court of Justice, which, in a case where a candidate was not admitted to tests, held that the objective grounds for a refusal, and in particular the considerations on which the selection is based, should be communicated to the person whose application has been rejected. That minimum requirement also applies to a measure to transfer officials who are already in the service of the Council.

In the present case the applicant was notified of a decision by the Secetary-General which gave no indication of the reasons on which it was based. Since it was a negative decision, and thus an act adversely affecting him, Article 25 of the Staff Regulations should have been complied with.

The *Council* contends that no application was submitted to the appointing authority and that no decision was taken under the Staff Regulations which required immediate communication in writing to the official concerned. Consequently the conditions for the

application of Article 25 were not fulfilled.

In any event, it follows from the case-law of the Court of Justice that the appointing authority is not under a duty to state the reasons on which it bases its decision not to accept an application, since such a statement of reasons might be prejudicial to an applicant.

(c) Infringement of Article 90 of the Staff Regulation

The *applicant* alleges that by not treating a complaint as a complaint and by purporting to answer it clearly outside the framework of Article 90 the Secretary-General of the Council decided as to the requirements for the admissibility of an action in the place of the Court of Justice. The applicant's request, expressly designated a complaint under Article 90 and submitted through his immediate superior, was not answered as a complaint by the Secretary-General. To maintain that no complaint within the meaning of Article 90 was submitted to the Secretary-General and that the reply of 27 June 1979 does not come under that provision either is an error of law.

The appointing authority must reply to a complaint designated as such in accordance with the provisions of the Staff Regulations, or take an implied decision rejecting the complaint; it is not for the appointing authority to determine whether or not there is a complaint or whether or not an action brought against the reply to a complaint is admissible. It is plain from Article 91 (2) that only the Court of Justice has jurisdiction to determine those questions. The communication of 27 June 1979 constituted a usurpation of jurisdiction and was therefore unlawful.

In the *Council's* view, the applicant's letter of 26 April 1979 was not in fact a complaint within the meaning of Article 90 of the Staff Regulations. The procedure followed in this case is governed by the Additional Negotiating Protocol; that procedure is purely informative in nature.

V — Oral procedure

At the sitting on 4 December 1980 the applicant, represented by Mr Hornung, and the Council, represented by Mr Prum, presented oral argument.

The Advocate General delivered his opinion at the sitting on 29 January 1981.

Decision

1 By application lodged at the Court Registry on 25 September 1979, Mr Korter, an administrator at the General Secretariat of the Council, brought an action to obtain a formal decision from the appointing authority on his application for a change of posting which he submitted on 27 September 1978 pursuant to a notice published by the administration.

2 From the file it appears — and these facts are not disputed — that on 11 August 1978 the General Secretariat of the Council published Staff Note No 189/78 with the heading "Application for a change of posting (transfer)". That notice informed officials of the General Secretariat of the Council that a post for an administrator in Grade A 7/A 6 was temporarily vacant for one year in Directorate-General E, Directorate III (accession negotiations). After describing the duties involved and the qualifications required the notice invited interested officials to submit an application for a change of posting to the administration in the person of the head of the Personnel Branch. Only officials already occupying a post in Grade A 7/A 6 were eligible to apply. The notice stated that there was no need to complete an application form; a note accompanied by a brief *curriculum vitae* was sufficient.

3 In response to that notice, on 27 September 1978, the applicant submitted to the head of the Personnel Branch an application for a change of posting. On 6 February 1979 that official sent him a note stating: "In reply to your request for a transfer to Directorate III of Directorate-General E, I regret to inform you that no application has been accepted."

4 After that communication the applicant exchanged correspondence with the administration; in particular he challenged the right of the person who had signed that reply to do so. The administration replied that the communication in question was "purely informative" in nature (letter dated 19 March 1979) and the applicant insisted on having a formal decision taken by the appointing authority in reply to his application.

5 Having failed to obtain satisfaction, on 26 April 1979 the applicant sent a formal complaint to the Council pursuant to Article 90 of the Staff Regulations of Officials. He requested that either the application which he had submitted on 27 September 1978 should be accepted or at least the appointing authority should take a decision on that application in accordance with Article 7 of the Staff Regulations.

6 In his reply of 27 June 1979 the Secretary-General of the Council, referring to the Additional Negotiating Protocol concluded in Brussels on 5 April 1978 between the Secretary-General and the staff trade-union organizations (hereinafter referred to as the "Protocol of 5 April 1978", the text of which was published in Staff Note No 77/78 of 14 April 1978), informed the applicant that he could not regard his letter as a complaint within the meaning of Article 90 of the Staff Regulations and added: "It is clear that, whilst the appointing authority has never taken a decision in this matter in your case, there is no question of it having 'failed to adopt a measure prescribed by the Staff Regulations' in the case of a procedure which is not even laid down in the Staff Regulations and in which it is clearly stated who is to make the choice."

7 As to the substance of the complaint, the Secretary-General confirmed the reply already given by the administration to the effect that the person in charge of the Personnel Branch, to whom the applicant had sent his application, was the person empowered to sign the letter of 6 February 1979 refusing that application.

8 In conclusion the Secretary-General observed that the note addressed by the Head of the Personnel Branch to the officials who had submitted applications under the procedure begun by Staff Note No 189/78 was simply an organizational measure, taken pursuant to the Protocol of 5 April 1978, and not a decision within the meaning of Article 7 of the Staff Regulations, which he claimed has no application in this case.

9 It is against that communication from the Secretary-General that the applicant has brought his action within the prescribed period. In his application Mr Korter advances a number of arguments alleging non-compliance by the Council with Articles 7, 25 and 90 of the Staff Regulations. The thrust of his argument is that the procedure begun by Staff Note No 189/78 was a transfer procedure within the meaning of Article 7 of the Staff Regulations; as a result, a reasoned decision should have been adopted in accordance with the second paragraph of Article 25 of the Staff Regulations. As it concerned an official in Category A, that decision should have come from the Secretary-General of the Council himself, acting in his capacity as appointing authority for that category of officials, as stipulated by Council Decision 63/9 of 14 May 1962 (Official Journal, English Special Edition 1963-1964, p. 4). Accordingly, in his communication of 27 June

1979, the Secretary-General failed in his duty to adopt a definite position although a formal complaint under Article 90 of the Staff Regulations had been made to him. The applicant considers that the Protocol of 5 April 1978, to which the Secretary-General refers for justification of the administration's conduct, could not derogate from the mandatory requirements of the Staff Regulations.

10 By a separate document lodged pursuant to Article 91 of the Staff Regulations the Council challenged the admissibility of the action and requested the Court to determine that issue without going into the substance of the case. After taking cognizance of the applicant's observations, by an order dated 13 February 1980 the Court (Second Chamber) decided to deal with the preliminary objection and merits together.

11 The Council's principal contention is that the action be dismissed as inadmissible. It submits that the procedure begun by Staff Note No 189/78 was merely an "administrative measure" adopted pursuant to the Protocol of 5 April 1978, in which paragraph (1) of Part IV (Mobility) provides that:

"Any post which becomes available, with the exception of posts to be filled by transfer on health grounds and of the posts referred to in point III.5 of the Annex to the Negotiating Protocol of 12 June 1975, shall be communicated to the staff in the form of a notification of transfer, together with a description of the duties and an invitation to submit applications.

The immediate superior shall be at liberty to choose either from candidates applying for transfers as a result of such notification or from other candidates. This choice may be made only in accordance with the criteria of the interests of the service."

12 The Council submits that when viewed in the light of that provision the communications sent to the applicant were purely for information and cannot be regarded as decisions for the purpose of Articles 7 or 25 of the Staff Regulations.

13 As far as the substance of the case is concerned, the Council claims that it lawfully exercised its discretion with regard to the applications which were submitted to it after publication of the notice and that it is clearly established

by the case-law of the Court that the unfavourable reply given to the applicant did not have to state the reasons on which it was based.

14 In answer to a question put to it by the Court, the Council stated that the publication of Staff Note No 189/78 attracted four applications; one was held to be inadmissible and although the remaining three applicants, including the applicant in this case, fulfilled the formal conditions they did not meet the specific requirements laid down for the vacant post.

15 Examination of the papers placed before the Court and of the arguments advanced by the parties makes it evident that the main cause of the dispute resides in the uncertainty surrounding the nature of the vacancy advertised in Staff Note No 189/78 in regard to the provisions of the Staff Regulations. That notice mentioned a post as an administrator provisionally vacant for one year and invited officials interested to submit "an application for a change of posting"; however, only officials already occupying a post in the same category and grade as the post to be filled were eligible to apply. According to the Staff Note the vacant post, which was connected with the Council's work concerning accession negotiations, called for particular qualities such as the ability to analyse and assimilate data, a sense of organization and method, the capacity to adapt to new fields and a thorough knowledge of languages.

16 It seems from that notice as a whole that an official from the Secretariat was to be given the chance to prove his abilities in a special field of activity for a limited period and without any change of grading under the Staff Regulations. Hence, it is doubtful whether on an objective view the change of posting referred to in that notice corresponds to the concept of transfer within the meaning of Article 7 of the Staff Regulations, which envisages permanent postings which as such have a direct bearing on officials' career prospects. The notice out of which the dispute arose was ambiguous in this regard, in so far as it implied that there was a possibility of a "transfer", but started a procedure which was not in keeping with the requirements of the Staff Regulations as regards transfers properly so called. That uncertainty continued during the course of the successive complaints of the applicant

until the letter of 27 June 1979 in which the Secretary-General refused to regard the procedure begun by Staff Note No 189/78 as a procedure for a transfer properly so called, in spite of the words used.

17 It appears from the foregoing that the applicant's complaints had some justification in so far as he was protesting against the fact that the position of officials under the Staff Regulations may be affected by parallel procedures not covered by the safeguards in the Staff Regulations. However, at the same time it must be said that he has not been able to demonstrate the existence of an act adversely affecting him within the meaning of Article 90 of the Staff Regulations, even though after publication of the announcement in Staff Note No 189/78 the administration decided not to consider any of the applications submitted. As the Council has rightly pointed out, the applicant had no right to the post for which he applied. Since the administration has discontinued the procedure in issue, the applicant has no interest in seeking to obtain a formal decision in the context of that procedure.

18 Thus it follows that the action is inadmissible.

Costs

19 However, the foregoing should be taken into account in the allocation of costs. It seems in fact that the occurrence and continuation of the dispute were due in part to the attitude of the Council's administration, especially to the legal ambiguity which it maintained in regard to the nature, under the Staff Regulations, of the possible transfer announced in Staff Note No 189/78 and to its refusal to give the applicant any explanation of the reasons for its action, which were disclosed only during the proceedings before the Court. Under those circumstances the applicant cannot be criticized for having brought an action in response to what he had reason to regard as arbitrary conduct on the part of the administration in relation to him. Accordingly, it is proper to apply the second subparagraph of Article 69 (3) of the Rules of Procedure, which states that: "The Court may order even a successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur."

20 Therefore the Council should be made to bear the whole of the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the Council to pay the whole of the costs, including those of the applicant.**

Pescatore Touffait Due

Delivered in open court in Luxembourg on 26 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 29 JANUARY 1981 [1]

Mr President,
Members of the Court,

1. This case concerns the transfer procedure for a Community official within one of the institutions. The facts may be summarized briefly. A "Staff Note" from the General Secretariat of the Council dated 11 August 1978 and numbered 189/78 informed interested officials in Grade A 7/A 6 that they could request transfer to a post which had become vacant for one year in Directorate-General E, Directorate III, in relation to the requirements of the service arising out of negotiations for the accession of new Member States. Mr Korter submitted his application for the post on 27 September 1978 but by a note

1 — Translated from the Italian.