OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 13 JULY 1976

My Lords,

'Misuse of powers' has been said to be 'often pleaded but seldom proved'. In my opinion, in this case, it has been proved.

On 18 February 1975 the Secretariat-General of the Council published Notice of Internal Competition Council/A/108. (I must break the narrative to mention that the Italian text of that Notice is Annex 2 to the application. At my request, the Council supplied the Court with a copy of the English text, and it is to this text that I have referred in preparing my Opinion. The language of the case is however French. Despite Article 29 (3) of the Rules of Procedure, the French text of the Notice has not been placed before us. Surprisingly, in the circumstances, Counsel for the applicant made, at the hearing, submissions based on certain niceties of language in the French text. I propose to ignore them, partly because those niceties are not reflected in the English text and partly because the submissions in question do not, in my opinion, make any difference to the result of the case. But I do think that it would be better if Counsel for parties to litigation in this Court were to adhere to its Rules of Procedure).

To return to the facts, the Notice in question announced that the Secretariat-General was to hold an internal competition to fill a vacant post of principal administrator in the career bracket A 5/A 4 and that the appointment would be at grade A 4. It was stated that the duties of the person appointed would be 'in the regional policy sector'.

Under the heading of 'Examination Procedure and Conditions of Eligibility' it was stated, among other things, that the competition would be on the basis of qualifications and that:

'In view of the duties to be performed, the following requirements must be met:
(a) education to university level, attested by a diploma, or equivalent professional experience;
(b) having performed category A duties for at least 6 years and held the secretariat for meetings of Council working parties or committees for at least 4 years.'

The publication of that Notice took place in an atmosphere which was, to say the least, controversial.

On 7 November 1974 the Amalgamated European Public Service Union (more commonly known, I think, as the 'Union Syndicale') had published a circular (Annex 8 to the application) describing a number of cases in which it considered that the Council had disregarded or was proposing to disregard the spirit and intent of the Staff Regulations. Among those cases was one described, under the heading 'Passage d'un fonctionnaire de la catégorie "L/A" à la catégorie "A" (du grade L/A 4 au grade A 4)' and with the footnote 'Il s'agit d'un fonctionnaire de nationalité italienne', in the following terms:

'Il s'agit d'un autre cas flagrant de la théorie selon laquelle tout est possible pour ceux qui ont des "Saints au paradis", à savoir un piston efficace.

Nous ne connaissons pas encore à quelle ruse l'Autorité aura recours pour essayer de détourner le Statut et donner ainsi satisfaction à la demande de la délégation italienne.

Nous constatons seulement que, sous n'importe quelle forme, un tel passage de

catégorie constitue *une discrimination injustifiée* à l'égard des autres fonctionnaires du cadre L/A qui se sont soumis dans le passé ou qui seront obligés de se soumettre à l'avenir à des concours généraux pour accéder au grade de base (A 7) de la catégorie A.

Nous croyons nécessaire de mettre en garde l'Autorité à ce sujet en lui rappellant que notre Organisation ne manquera pas d'avoir recours à tous les moyens qui pourraient s'avérer nécessaires pour l'empêcher de mener à bien cette opération.'

On 14 November 1974 the Secretary-General of the Council issued a Staff Notice (Annex 9 to the application) which was intended as a refutation of the contents of the circular issued by the Union Syndicale. This Notice contained the following passage:

'— la question du passage d'un fonctionnaire L/A 4 au grade A 4, suite à un concours, a été envisagée dans le souci de pallier les anomalies d'une situation de fait déjà ancienne, qui s'est créée grâce à une excessive mansuétude de l'Administration; la possibilité d'une telle situation ne se présentera plus. Les mesures seront prises pour que, très bientôt, chacun accomplisse les tâches qui sont celles de sa catégorie ou de son cadre.'

From the pleadings in this action, from some of the annexes thereto (particularly Annex 1 to the defence) and from admissions made on behalf of the Council at the hearing, it transpired that the facts underlying that rather cryptic interchange were that a certain official of Grade L/A 4 on the staff of the Council, namely Signor Emilio Giovanni Martino, had for many years in fact performed duties appropriate to an official of Category A. Among these duties were those of secretary of various Council working parties, including in particular a working party on regional policy. He had also had experience of representing the Council at other meetings concerned with regional policy. Signor Martino was Italian and the Secretariat-General of the Council had been approached by the Italian delegation at the Council with a view to his being given the grade appropriate to the duties he was performing, namely A 4. According to the applicant that approach amounted to strong pressure; according to the Council it amounted merely to the expression of a wish.

I do not for my part think it material what the degree of pressure was. The crucial fact in my opinion is that the Council's purpose in holding the competition in question was, on its own admission, to enable Signor Martino to be re-graded A 4. The situation would, in all relevant respects, have been just the same if the Council had decided to adopt that course on its own initiative, without any intervention by the Italian delegation.

The reference in the Union Syndicale's circular to 'une discrimination injustifiée' was due to the fact that up to then all the L/A officials of the Council who had transferred to Category A had done so as the result of competitions held on the basis of qualifications and tests and had been appointed in the first instance to grade A 7, even though some of them had previously been in grade L/A 6 or even L/A 5 (see Annex 3 to the Reply). I am not sure that the Union Syndicale was right in describing those competitions as open competitions ('concours généraux'). From other evidence in the case I suspect that they were internal competitions. But this does not, I think, matter.

Two persons applied to take part in Competition Council/A/108, namely Signor Martino and the applicant, who was an official of grade A 5 in the Legal Service of the Council. He, incidentally, is also Italian.

The Report of the Selection Board (Annex 7 to the Defence) was dated 30

April 1975. The Selection Board placed the names of both Signor Martino and the applicant on the list of suitable candidates. It placed that of Signor Martino first. This it did, as it explained, for a number of reasons. Signor Martino had been in the service of the Council for 8 years longer than the applicant. He had performed duties pertaining to Category A for 10 years, whereas the applicant had done so for only 7 years. Signor Martino also had the greater experience in the field of regional policy and he more clearly fulfilled the requirement of having 'held the secretariat for meetings of Council working parties or committees for at least 4 years'. The only thing that told in favour of the applicant was that he had the better academic qualifications.

On 20 May 1975 the Secretary-General of the Council appointed Signor Martino to fill the 'vacant' post. (The Italian text of the Secretary-General's Decision to that effect is Annex 3 to the defence).

On 30 May 1975 the applicant submitted under Article 90 (2) of the Staff Regulations a complaint against Signor Martino's appointment. This was rejected by the Secretary-General of the Council by a letter dated 16 September 1975. Save as I shall hereafter mention, nothing turns upon the contents of that complaint or of that letter (Annexes 6 and 6 b to the application).

On 3 October 1975 the Applicant brought the present action in which he claims a declaration that Signor Martino's appointment was void, and ancillary relief.

In support of his claim the applicant puts forward what are really four contentions, though they are pleaded as three, the last two being lumped together.

The first contention is that, in transferring Signor Martino from the L/A Service to Category A on the basis of a competition taking into account qualifications only, the Secretary-General was in breach of an arrangement he had made with representatives of the staff of the Council (seemingly the Union Syndicale, and perhaps other Trade Unions, and the Staff Committee) and which was recorded in a letter signed by him on 21 March 1973 to which was annexed what was described in that letter as a 'directive' to the Directorate of Administration (Annex 7 to the Application).

Part III of that 'directive' was headed 'Concours Internes' and was, omitting immaterial passages, in the following terms:

'Des concours internes au Secrétariat Général seront organisés pour le passage vers les catégories A, B et C ainsi que, le cas échéant, vers le Cadre L/A, afin de permettre aux membres du personnel qui en ont les capacités de passer à une catégorie ou cadre supérieur conformément aux dispositions du statut.

Ces concours auront lieu tous les trois ans pour le passage vers la catégorie A et le Cadre L/A et tous les deux ans pour le passage vers les autres catégories ...

Afin d'assurer l'égalité de traitement entre tous les fonctionnaires, les concours internes auront lieu sur titres et épreuves donnant les mêmes garanties de sélection que les concours généraux tout en étant adaptés au caractère interne du concours et aux types d'emplois à pourvoir.
...

La liste d'aptitude établie par le jury suite à un concours sera publiée. Les emplois ouverts par ce concours seront pourvus par nomination de candidats inscrits sur cette liste. Celle-ci expirera lorsque les emplois mis à concours internes auront été pourvus. Toutefois, s'il reste des candidats sur la liste, l'Autorité investie du pouvoir de nomination pourra, à titre exceptionnel et sans préjudice du recours à des concours généraux, pourvoir

d'autres emplois rendus vacants pendant la période considérée. Lors de la détermination des emplois à pourvoir par concours internes au cours de la période ultérieure, il sera tenu compte des emplois éventuellement ainsi pourvus en excédent de ceux mis à concours pour la période considérée.

Si l'autorité investie du pouvoir de nomination envisage de demander la modification du classement catégoriel de certains emplois, elle prend l'avis d'une Commission *ad hoc* ayant la même composition que la Commission consultative d'avancement pour la catégorie A avant de saisir l'instance budgétaire. Si la modification est décidée, des concours internes sur titre pourront, à titre exceptionnel, être prévus après avis de la Commission paritaire.

Avant la fin de juillet 1973, une étude sera effectuée par la Commission paritaire pour déterminer:

— les modalités générales d'application de ce système de concours internes périodiques et notamment le pourcentage d'emplois à mettre à concours pour chaque catégorie sur l'ensemble des emplois nouvellement créés dans cette catégorie, exception faite des emplois accordés dans le cadre de l'élargissement;

— les critères généraux concernant, pour le passage vers les différentes catégories, les conditions d'accès aux concours et la nature des épreuves afin d'assurer l'adaptation de celle-ci aux types d'emplois à pourvoir.

Le système de concours internes sera d'application pour pourvoir les emplois vacants à attribuer à des fonctionnaires déjà en service et qui ne pourraient être pourvus par voie de promotion ou de mutation'.

The contention of the applicant based on that arrangement (which I shall henceforth call for convenience 'the 1973 Arrangement') gave rise to argument on two questions:

(1) Whether the 1973 Arrangement was legally binding on the Council; and

(2) Whether, if so, it precluded the Secretary-General from holding an internal competition based on qualifications alone in circumstances such as those of the present case.

Of course, if I am right in thinking that the applicant is in any event entitled to succeed on the ground of 'misuse of powers', those questions are of academic interest only. But it is, I think, proper that I should express my opinion on them.

It is not suggested on the part of the applicant that, in entering into the 1973 Arrangement, the Secretary-General was exercising any statutory power. In particular it is not suggested that the Arrangement could be regarded as having been adopted under Article 110 of the Staff Regulations. This would have involved a different procedure and in particular consultation of the Staff Regulations Committee. The only basis, therefore, on which the arrangement could be held to be legally binding is the principle in Case 81/72 *Commission* v *Council* [1973] 1 ECR 575. This, indeed, is the authority on which the applicant relies.

The difficulty that lies in his way in so doing seems to me to be this.

As was expressly underlined in the Judgment in *Commission* v *Council*, the decision of the Court in that case rested upon the circumstance that the arrangement there in question formed part of 'the Council's implementation of the task assigned to it by Article 65 of the Staff Regulations', which left to the Council 'the choice of the means and forms best suited to carry out an emoluments policy in conformity with the criteria laid down by Article 65'. The Council was, the Court held, 'free to divide up the decision-making process into successive phases ... and to decide certain questions of principle first, in

order to facilitate the application of subsequent implementing measures'. In entering into the arrangement in question 'the Council had gone beyond the stage of preparatory consideration and had entered on the phase of decision-making'. The Council accordingly, in making the arrangement, had been 'acting within the framework of the powers relating to the remuneration of the staff conferred on it by Article 65' (see paragraphs 6 to 9 of the Judgment). It was in those circumstances that the arrangement was held to give rise to legitimate expectations on the part of the staff, which the Court would protect.

If the applicant is to succeed here, the 1973 Arrangement must be interpreted, not merely as instituting the system of periodical (in the case of competitions for entry into Category A, triennial) internal competitions to which it expressly refers, but also as implicitly precluding the Secretary-General from ever holding any other internal competition at all, except in the case of what the Arrangement calls 'la modification du classement catégoriel' of a post. Quite certainly the Arrangement cannot be interpreted as permitting the Secretary-General to hold an *ad hoc* competition for a particular post so long only as it is a competition on the basis of both qualifications and tests. There is nothing in the terms of the Arrangement that gets anywhere near to doing that.

But it seems to me that, if the Arrangement implicitly precluded the Secretary-General from ever holding any internal competition for a Category A post other than one of the triennial competitions envisaged by the Arrangement itself, it went far beyond forming part of any 'decision-making process' by the Secretary-General 'acting within the framework of' any power conferred on him by the Staff Regulations. It involved an undertaking on his part to ignore an express provision of the Staff Regulations, namely Article 29 (1) (b).

Your Lordships will remember that Article 29 (1), omitting the last paragraph which is not material for present purposes, provides:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institution;

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.'

There was, it so happened, much argument in this case (in another context, to which I shall come) as to the interpretation to be given to that provision, which, as the Council pointed out, is closely related to, and must be interpreted together with, Article 4 of the Staff Regulations.

That Article, Your Lordships remember, is in these terms:

'No appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations.

Vacant posts in an institution shall be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled.

If the vacancy cannot be filled by transfer, promotion or an internal competition, it shall be notified to the staff of the three European Communities.'

In argument it was almost suggested that there was, as to the interpretation of

Articles 4 and 29 (1), a conflict of authority between, on the one hand, the Judgments of the Court in Case 21/70 *Rittweger* v *Commission* (Rec. 1971 (1) p. 7, at p. 15) and Case 55/70 *Reinarz* v *Commission* (ibid. p. 379, at p. 384), on which the Council relied, and, on the other hand, the Judgment in Case 176/73 *Van Belle* v *Council* [1974] ECR 1361, at p. 1370, and my own Opinion and the Judgment of the Court in Case 90/74 *Deboeck* v *Commission* [1975] ECR 1123, at pp. 1140 and 1133 respectively, on which the applicant relied. I do not think, my Lords, that there is any such conflict.

The combined effect of Articles 4 and 29 (1), as laid down in those authorities, seems to me to be this. Whenever there is in an Institution a vacant post which requires to be filled, the appointing authority must first notify the fact to the staff of that Institution. This enables members of that staff who wish to apply for promotion or transfer to the post, and who are eligible for such promotion or transfer, to apply for it. Equipped with their applications, if any, the appointing authority must then consider whether the vacancy can be filled by promotion or transfer. It is not however bound so to fill it just because there are candidates qualified for promotion or transfer. It may seek to get better candidates by other means. Of these, the first that it must consider is a competition internal to the Institution. If – and only if – it rejects the possibilities of promotion, transfer and an internal competition, it must notify the vacancy to the staffs of the other Community Institutions and then consider what applications for transfer have been made by members of those staffs. After that come the possibilities of a 'competition internal to the Institutions' and of an 'open competition' mentioned in Annex III.

So it could not in my opinion have been lawful for the Secretary-General of the Council to have agreed in advance with the representatives of the staff of that Institution that, if a post fell vacant in Category A at some time in the interval between two of the triennial competitions that the 1973 Arrangement envisaged, he would ignore the possibility of filling that post by internal competition, and pass straight from consideration of the possibilities of promotion or transfer within the Institution to notification of the vacancy to the staffs of the other Community Institutions. Nor would it be any answer to say (as the applicant – to give him credit – did not say) that names might remain available on the list of suitable candidates established by the last triennial competition or that the post might not need to be filled promptly, so that the filling of it could wait until the next triennial competition.

I need not therefore discuss other points put forward on behalf of the Council in answer to the applicant's first contention, such as the point that one has only to look at Articles 5 (2) and 66 of the Staff Regulations to see that Category A is not 'superior' to the L/A Service, so that the 1973 Arrangement cannot have been concerned with entry into Category A from the L/A Service; or the point that that Arrangement expressly called for a study by the Joint Committee of the measures required to implement it, an incantation that led to nothing. Nor need I take up Your Lordships' time in considering the somewhat arid argument that developed between Counsel as to whether the 1973 Arrangement constituted a 'decision' or not. It is enough to say that, if it was meant to bear the interpretation contended for by the Applicant, it was unlawful.

I turn to the applicant's second and third contentions, with which I can deal more briefly.

His second contention is that the Secretary-General, in appointing Signor Martino straight to Grade A 4, after a competition on the basis of qualifications only, whereas all previous appointees to

Category A from the L/A Service had been appointed to Grade A 7 after competitions on the basis of both qualifications and test, had committed a breach of the principle of 'equality of treatment' of members of the staff — a principle of which the existence is recognized in such Judgments of the Court as that in Case 48/70 *Bernardi* v *Parliament* (Rec. 1971 (1) p. 175, at p. 185) and is admitted by the Council — and also a breach of Article 5 (3) of the Staff Regulations, which provides:

'Identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service'.

In my opinion, however, the unfair or 'unequal' treatment of staff involved here is bound up with the misuse by the Secretary-General of his powers. If the Secretary-General's purpose in holding competition Council/A/108 had been simply to ascertain objectively what suitable candidates for the vacant post were available from among the staff of the Council, with a view to the appointment of the most suitable of them to that post, his action would have been unimpeachable. If, in those circumstances, the most suitable candidate had turned out to be a member of the L/A Service, it could not have been a bar to his appointment that previously no member of that Service had been able to compete, or at all events had been successful in competing, for any Category A post higher than A 7, or that previous competitions in which members of the L/A Service had taken part had been on the basis of qualifications and tests.

The applicant's third contention is that the Secretary-General was in breach of Article 29 (1) of the Staff Regulations, because he did not, before deciding to hold the competition, consider whether the post could be filled by promotion or transfer. It was in this context that the argument about the interpretation of Articles 4 and 29 (1), to which I have referred arose. But in truth it seems to me that the parties are here at issue as to the facts.

In his letter of 16 September 1975 rejecting the applicant's complaint under Article 90 (2), the Secretary-General asserted that he had considered the possibility of filling the post by promotion or transfer. In its defence the Council seemed to admit that he did not and merely to contend that, as a matter of law, he was not bound to. In the rejoinder, however, and again at the hearing, it was said on behalf of the Council that the possibility had been considered.

I confess that, in view of other admissions made on behalf of the Council, to which I have referred, I am inclined ot suspect that the Secretary-General considered the possibility of filling the post by promotion or transfer only in the sense that he considered whether it was open to him to appoint Signor Martino to the post in question by one or the other of those methods. But one cannot condemn a party on mere suspicion. If I thought that the result of the case turned on the determination of this issue, I would invite Your Lordships to order an inquiry as to the relevant facts.

There remains the applicant's fourth contention, upon which, as I have already abundantly indicated, I am of opinion that he is entitled to succeed.

The applicant bases this fourth contention on the fact, which is not really disputed, that the Secretary-General's purpose in holding Competition Council/A/108 was to enable Signor Martino to be appointed to the vacant post. The applicant says of course that this constituted a misuse of powers. He also says that it constituted a breach of Articles 7 and 27 of the Staff Regulations inasmuch as, since those Articles forbid the reservation of a post

for nationals of a specific Member State, they must a fortiori forbid the reservation of a post for a particular individual.

In my opinion the relevance of Articles 7 and 27 here is rather broader and more positive than that. It lies in the fact that those Articles prescribe the criteria to which an appointing authority should have regard in recruiting and appointing officials.

It may incidentally be observed that, in employing for 10 years an official of the L/A Service to perform Category A duties, the Council was in breach of Article 7, which requires the appointing authority to 'assign each official ... to a post in his category or service which corresponds to his grade'. The reality seems to be that it was in order to extricate the Council from that false position, without risk of hardship to the official concerned, that the Secretary-General held the Competition here in question.

I need not take up much of Your Lordships' time in discussing the concept of misuse of powers. I need refer only to the illuminating Opinion of Mr Advocate-General Lagrange in Case 3/54 *ASSIDER* v *High Authority* (Rec. 1954 — 55 at p. 149 *et seq.*), where he examined the concept by reference to the laws of the six original Member States, and to the postscript to that Opinion which he added in Case 8/55 *Fédération Charbonnière de Belgique* v *High Authority* (Rec. 1955 — 56 at p. 251 *et seq.*). Mr Advocate-General Lagrange defined 'misuse of powers' as the exercise by a public authority of its powers for a purpose other than that for which they were conferred on it (see in particular Rec. 1955 — 56 at p. 253). That definition is classic. I will add only that the principle that it enshrines is familiar also in English law. The leading authority for the existence of that principle in English law is a case in the House of Lords, *Westminster Corporation* v *London and North Western Railway* [1905] A.C. 426 (see particularly the observations of Lord Macnaghten at p. 432 and those of Lord Lindley at p. 439).

The Council's main line of defence to the charge of misuse of powers was that at every step leading to the appointment of Signor Martino the correct procedure had been punctiliously observed. My Lords, this may or may not have been so. There is for instance the doubt as to whether the Secretary-General considered the possibilities of filling the post by promotion or transfer. But whether it was so or not is immaterial. It is of the very nature of a misuse of powers that it has nothing to do with the observance or non-observance of procedural requirements. The vice of it lies not in the manner in which the relevant powers are exercised but in the purpose for which they are exercised. It lies in the fact that, as Lord Lindley put it in the *Westminster Corporation* case, the powers are used as a 'cloak to screen' an unlawful act.

Another argument put forward on behalf of the Council was based on the proposition that Signor Martino could have been appointed to the post in question by way of transfer, without a competition, since the L/A 4 and A 4 grades are of equal status. Whether that proposition is correct depends upon the interpretation to be given to Article 45 (2) of the Staff Regulations, which provides:

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

That provision has, I believe, generally been interpreted in practice as requiring a competition for transfer from the L/A Service to Category A. Whether it actually does so or not need not in my opinion be decided in this case. Assuming in the Council's favour that the Secretary-General did have power to transfer Signor Martino to the post in

question without a competition, the fact is that he did not exercise that power. Moreover, if he had exercised it for the purpose, not of appointing the most suitable person to the post, but of curing the irregularity in Signor Martino's position, he would have been guilty of a misuse of power, just as he was in pursuing that object by means of a competition.

In the result I am of the opinion that Your Lordships should —

1. Declare void Competition Council/A/108 and the resultant decision of the Secretary-General of the Council dated 20 May 1975 appointing Signor Emilio Martino to a post of Principal Administrator in Grade A 4; and

2. Order the Council to pay the costs of this action.