OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 10 December 1986 *

Mr President,
Members of the Court,

1. The applicant, Yves Bouteiller, who has been an official of the European Communities since 1959, seeks the annulment of the Commission's decision of 19 December 1984 appointing Jürgen Mensching Head of the Division for Energy (other than Coal), Chemicals, Agricultural Products and Foodstuffs in the Directorate-General for Competition.

That appointment followed the publication on 26 October 1984 of Vacancy Notice COM/1421/84, to which 19 officials, including the applicant, replied.

The applications were examined by the Advisory Committee on Appointments in Grades A 2 and A 3 ('the Groupe Noël') which, in an opinion submitted on 17 December 1984, took the view that special consideration should be given to five candidates, who included Mr Mensching but did not include the applicant.

On 19 December the Commission examined the applications and decided to appoint Mr Mensching to the post of Head of Division.

The decision was taken at a time when, having resigned, the two French Members of the Commission, Mr Ortoli and Mr Pisani, no longer held office.

The Council had decided, at its meetings on 6 November and 11 December 1984, not to replace them because the new Commission was to take up its duties on 5 January 1985.

The complaint and appeal were lodged within the prescribed periods in accordance with Articles 90 and 91 of the Staff Regulations of Officials.

2. I shall now examine the various submissions put forward by the applicant in support of his application.

The first submission made by the applicant in his application is that the Commission was not, at the date of the contested decision, validly constituted in accordance with the fourth subparagraph of Article 10 (1) of the Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty of 8 April 1965).

That argument is untenable.

Article 12 of the Merger Treaty authorizes the Council to decide not to replace Members of the Commission who cease to hold office before the end of the term for which they were appointed. The Council took that decision in relation to Mr Ortoli and Mr Pisani because only a short period remained before the end of their term of office.

* Translated from the Portuguese.

Furthermore, as the Commission contends in its defence, the rule in Article 10 of the Merger Treaty could not by itself impede the functioning of the Commission, in view of the general principle that there should be continuity in the public service.

The same applies in other cases of *force majeure*, for example where a Member of the Commission dies and there is no other member of the same nationality.

Furthermore, since the applicant has not disputed the presence of the quorum required by Article 17 of the Merger Treaty for the Commission's meetings to be valid, it must be concluded that the decision to appoint Mr Mensching cannot be challenged on the ground that the Commission was not competent to adopt it.

That was the view expressed by the Commission and the Council in their replies to Written Questions Nos 1941/84 and 1942/84 from the European Parliament, in which they stated expressly and without reservation that, since its membership was at all times consistent with the rules in force, the Community was fully able to discharge its duties and the measures adopted by it during that period were entirely valid.

That applied to several other appointments and decisions of various kinds which, as was pointed out at the hearing, were adopted by the Commission during the two-month period in question and there does not appear to be any basis for the opinion put forward by the applicant that the Commission's powers to act were restricted to urgent matters in which any delay might prejudice the interests of the Community.

At the hearing, the applicant eventually conceded that the Commission was not improperly constituted and, consequently, had the power to take valid decisions.

Moreover, that submission appears to be less than self-sufficient in so far as the applicant, both in the written procedure and in unequivocal terms at the hearing, linked the argument concerning the improper constitution of the Commission with the allegation that the Commission acted precipitately or in haste, which in his view constituted a misuse of powers.

The first submission relied upon by the applicant thus merges into his fourth submission and I shall therefore examine the other aspects of it when I consider the fourth submission.

Furthermore, the applicant's other arguments lead on to the fourth submission, in so far as they all include the allegation that the Commission misused its powers.

However, I shall examine them separately to the extent to which they are specific and independent.

(i) According to the applicant, the Commission appointed to the post in question a candidate who, unlike the applicant, did not have the experience or qualifications required by the vacancy notice.

In his view, therefore, it infringed Article 7 (1) of the Staff Regulations, which provides that each official is to be assigned 'to a post in his category or service which corresponds to his grade', 'solely in the interest of the service and without regard to nationality'.

The applicant maintains that that is an independent ground for annulment, wholly unconnected with his next submission based on Article 45 (1) of the Staff Regulations, which applies to promotion.

It is difficult in the circumstances of the present case to regard the breach of Article 7 as an independent ground for annulment that is distinct from the alleged misuse of powers or from the argument based on Article 45 (1).

Assuming, however, that it is, let us see whether the applicant's argument is tenable.

The Commission accounts for its rejection of the applicant's argument by giving a description of Mr Mensching's career.

Between 1970 and 1975 Mr Mensching was a member of the private office of Mr Haferkamp, a Member of the Commission; he was the assistant to the Director-General for Competition between August 1975 and April 1981, and thereafter Deputy Head and then Head of Mr Haferkamp's private office. He had thus acquired, in addition to his university education, the knowledge and experience needed to satisfy all the requirements of the vacancy notice, as regards both the nature of the post to be filled and the prescribed qualifications.

Indeed, his duties as the assistant to the Director-General for Competition extended to all matters of policy and law relating to competition in the Communities and the duties which he performed in the private office of a Member of the Commission not only attested to his ability to manage staff but also obliged him to concern himself with and follow all aspects of Community affairs, not merely in a limited number of specific sectors but also regarding matters within the scope of the duties of the Members of the Commission and those arising from the collegiate nature of the Commission's responsibilities, which oblige officials working in their private offices to follow all the activities of the institution.

At the same time, as Deputy Head of Mr Haferkamp's private office Mr Mensching had for almost four years been in charge of competition policy (DG IV) and the Commission states that his periodic reports refer to his activities as an adviser in every area of competition policy between 1971 and 1981.

At the hearing the applicant asserted in particular that Mr Mensching's career could not have provided him with one of the qualifications required by the vacancy notice, namely 'knowledge of one or more of the sectors in question'.

That does not seem to me to be the case.

The vacancy notice did not require a *thorough* knowledge in this instance (as it did in the subsequent provisions laying down other requirements), but merely required a knowledge of one or more of the sectors covered by DG IV.

In those circumstances, it does not seem to me that the appointing authority committed an error — still less a manifest error — in concluding that, in view of the duties which he performed, Mr Mensching had acquired such knowledge. It would be surprising if it had not taken that view with regard to an official who even the applicant acknowledged to be 'extremely able'.

The Commission further states that throughout his period of service Mr Mensching's periodic reports have been extremely favourable, describing his abilities and qualities as those of an exceptional official.

It is true that, as the Commission concedes in its defence, Mr Bouteiller's career as an official in the Directorate-General for Competition since 1959 also enables him to fulfil the conditions set out in the vacancy notice.

However, the Commission also states that the applicant's periodic reports were unequivocally favourable only between 1959 and 1978.

Consequently, the appointing authority was entitled to use its discretion in assessing the candidates' ability to carry out new duties in the interests of the service.

It exercised its discretion taking account of the opinion of the Advisory Committee on Appointments, which chose from among all the applicants five candidates of different nationalities whom it considered to be most suitable to fill the post in question. Mr Mensching was one of the candidates chosen but Mr Bouteiller was not.

The Court of Justice has consistently held that the 'assessment of the ability of an official is a matter within the competence of the administration' [1] since, 'in order to evaluate the interests of the service and the merits to be taken into account in connection with a decision regarding promotion . . . the appointing authority has a wide discretion'. [2]

In that respect, the Court must 'restrict itself to consideration of the question whether, regard being had to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable limits and has not used its power in a manifestly incorrect way'.

'In particular, the Court cannot substitute its assessment of the merits and qualifications of the candidates for that of the appointing authority where there is nothing in the file to suggest that, in assessing the merits and qualifications of the applicants, the appointing authority has committed a manifest error'. [3]

No such error has been committed in the present case: no evidence has been adduced to show that, by promoting Mr Menching and not Mr Bouteiller or some other candidate, the appointing authority exceeded the limits of the wide discretion which the Court has recognized that it has or made a manifestly erroneous assessment of the qualifications of the candidates.

Moreover, the Court has held [4] that the appointing authority is not 'obliged to give reasons for promotion decisions in so far as they affect candidates who have not been promoted; a statement of those reasons might harm some if not all unsuccessful candidates'.

It is true that the Court has also held that there is an assumption that the appointing authority's exercise of the discretion involves 'careful examination of the files and meticulous regard to the requirements laid down in the notice of vacancy'. [5]

However, it is clear from all the foregoing considerations that the appointment of Mr Mensching was, in the light of the contents

1 — Judgment of 27 June 1973 in Case 35/72 *Kley* v *Commission* [1973] ECR 679, at p. 690, paragraph 29.

2 — See, for example, judgments of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099, at p. 1109, paragraph 26; of 3 December 1981 in Case 280/80 *Bakke-D'Aloya* v *Council* [1981] ECR 2887, especially at p. 2898, paragraph 10; of 21 April 1983 in Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, especially pp. 1256 and 1257, paragraphs 9 and 13; of 14 July 1983 in Case 176/82 *Nebe* v *Commission* [1983] ECR 2475, especially p. 2486, paragraph 18; of 23 October 1986 in Case 26/85 *Vaysse* v *Commission* [1986] ECR 3131, paragraphs 26 and 27.

3 — See judgment of 21 April 1983 in *Ragusa*, loc. cit., summary and paragraph 13.

4 — Judgment in *Grassi*, loc. cit., paragraph 12 at p. 1108.

5 — See judgment in *Grassi*, loc. cit.

of his personal file, fully in conformity with the conditions set out in the vacancy notice.

In my view that submission must therefore be rejected.

(ii) According to the applicant, the Commission did not consider the comparative merits of the candidates and the reports on them, and thus infringed Article 45 of the Staff Regulations.

The applications were not examined by the Commission itself, which merely relied on the examination undertaken by the Director-General for Personnel and Administration and the opinion of the Advisory Committee on Appointments in Grades A 2 and A 3.

However, it is clear from the minutes of the Commission's meeting of 19 December 1984 that:

(a) The applications of the persons concerned were published in Document PERS (84) 204;

(b) They were examined by the Director-General for Personnel, together with the supporting documents which were contained in the personal files of the persons concerned;

(c) The Advisory Committee on Appointments gave its opinion on 17 December 1984, and this was taken into account by the Commission. The opinion was given on the basis of an examination of the application and personal file of each official and took into account the opinion of the Director-General for Competition, who appeared before the committee;

(d) The Commission considered the comparative merits of the candidates, in the light of the nature of the post to be filled, and examined the reports on ability, efficiency and conduct in the service of each of the candidates.

There is no reason to suppose that that was not the course of events and in any case the applicant has adduced no proof to the contrary, that is to say evidence that the Commission did not in fact examine the comparative merits of the candidates.

Furthermore, as the Court decided in its judgment of 1 July 1976 in Case 62/75,[6] the appointing authority 'has power under the Staff Regulations when deciding on promotions to make a choice on the basis of a consideration carried out in the manner which it considers to be the most appropriate of the comparative merits of the candidates eligible for promotion and of the reports on them'. In that regard, there are various factors to be taken into account, including the degrees obtained by the candidates, their competence and efficiency in the service, and the general quality of the work which they have performed in carrying out their duties.[7]

The Court of Justice has also held that where, after the comparative merits have been considered, 'a candidate fulfils all the conditions in the vacancy notice, the appointing authority may appoint him rather than an equally well-qualified candidate for reasons relating to the interest of the service, without that appointment's constituting a misuse of powers'.[8]

In short, I am bound here again to stress that when deciding on promotions under Article 45 of the Staff Regulations the

6 — Judgment of 1 July 1976 in Case 62/75 *De Wind* v *Commission* [1976] ECR 1167, especially paragraph 17 at p. 1176.

7 — See, for example, judgments of 17 March 1983 in Case 280/81 *Hoffmann* v *Commission* [1983] ECR 889 *et seq.*, especially paragraph 9 at p. 901; of 24 March 1983 in Case 298/81 *Colussi* v *Parliament* [1983] ECR 1131 *et seq.*, especially paragraph 22 at p. 1142; of 14 July 1983 in Case 9/82 *Obrgaard and Delvaux* v *Commission*, [1983] ECR 2379 *set seq.*, especially paragraph 17 at p. 2390.

8 — See, for example, judgment of 17 December 1981 in Case 151/80 *De Hoe* v *Commission* [1981] ECR 3161, especially paragraph 16 at p. 3175.

institutions possess a wide discretion, as is confirmed by the judgments cited above in connection with the previous submission, and the Court cannot substitute its assessment of the qualifications and merits of the candidates for that of the appointing authority in the absence of manifest error. [9]

Thus as regards the consideration of the comparative merits of the candidates it must once again be concluded that there is no evidence showing that the appointing authority exceeded its powers or committed any error of assessment for which it should be censured.

In his reply the applicant also expresses doubt as to the legality of the composition and functioning of the Advisory Committee on Appointments, stating that it is impossible to determine whether the legal requirements were complied with and questioning whether or not the committee complied with Article 45 (1) of the Staff Regulations 'which confers power to decide on promotions on the appointing authority alone'.

In that connection it should be recalled that the Advisory Committee on Appointments was created by a Decision of 23 July 1980, which defined its composition, procedure and powers.

It is clear from that decision that the committee has consultative powers and is composed of members appointed in a personal capacity, its function being to assist the Commission in the discharge of its duties as appointing authority with regard to officials in Grade A 2 and A 3; it has no powers of decision.

As the Court has already held in its judgment in *Vaysse*, [10] 'Decisions on promotion and transfer are a matter for the appointing authority alone. If, therefore, on its own initiative and without being required to do so by the Staff Regulations, the appointing authority involves a consultative committee such as the "Groupe Noël" in the preparation of such decisions it may determine the composition and responsibilities of that committee as it sees fit'.

As regards the argument based by the applicant on the fact that the Commission stated in its defence that it had no knowledge of the note of 1 October 1984 by which he was appointed temporarily to perform the duties of the Head of Division, the Commission satisfactorily explained that that did not constitute a temporary posting pursuant to Article 7 (2) of the Staff Regulations — which would require a decision of the appointing authority, that would have to be placed in the personal file pursuant to Article 26 — but was merely the provisional replacement of the Head of Division by the senior official in the highest grade pending the appointment of the new holder of the post. It was therefore a measure concerning the internal organization of the services of DG IV, which automatically followed from Article 26 of the Internal Rules of the Commission and of which the Commission was not necessarily bound to be aware. In any event the fact that the applicant carried out such duties for just over two months could not compel the Commission to alter its view as to the merits of the candidates.

9 — See judgment in *Ragusa*, loc. cit.

10 — Loc. cit., at paragraph 15.

Finally, I also consider that the applicant cannot complain about the fact that the contested decision was adopted on 19 February 1985, at a time when the Commission did not have at its disposal the most recent periodic reports (the applicant's report for 1983 to 1985 was drawn up in February 1986).

The Commission has informed the Court that at the time of the appointment it had at its disposal the most recent reports concerning both the applicant and Mr Mensching, which were drawn up in 1984 for the period from 1981 to 1983. Besides, the report on the applicant from 1983 to 1985 proved merely to confirm his previous report.

For all those reasons, therefore, it must once again be concluded that this argument put forward by the applicant cannot succeed.

(iii) The applicant makes one final submission in support of his application and — as I have already pointed out — all the others are in some way integral parts of it. He claims that the Commission was guilty of misuse of power (and also or alternatively, misuse of procedure), in so far as it chose a person working for a Member of the Commission rather than an official who was pursuing a normal career.

Let me now examine those of the applicant's arguments which have not already been considered and shown to be unfounded.

The applicant attaches great importance to the extraordinary haste with which, in his view, the Commission adopted the decision appointing Mr Mensching. That allegation of haste, being one of a collection of presumptions sufficient to demonstrate a misuse of powers, is based on the applicant's view that Mr Mensching's appointment had been decided upon in advance.

However, the information before the Court does not seem to me to justify that conclusion.

At the hearing the Commission maintained, without being challenged by the applicant, that the period which normally elapses between the receipt of applications and the Commission's decision is two or three weeks. In the case at issue, almost a month elapsed, which means that the procedure followed a normal course and the allegation that the Commission acted in haste or precipitately is thus less credible.

Furthermore, the post in question was of recent creation and it is not surprising that efforts should be made to fill it promptly.

In his reply the applicant referred to an alleged desire to favour an official of German nationality as part of the Commission's policy of maintaining an internal balance. By way of proof he referred specifically to the fact that there was only one advisory committee for Grades A 2 and A 3.

The Commission explained that there was only one committee because the appointing authority — namely the Commission — was the same for both grades and, in any event, Germans were overrepresented in DG IV, which detracted from the argument regarding balance.

Furthermore, at the hearing the applicant sought to considerably reduce the scope of that argument and eventually stated Mr Mensching's nationality was not relevant to the basis of his application.

The applicant also recognized at the hearing that the nationality of those Members of the Commission who resigned was not ulti-

mately of decisive importance to his arguments and that the independence of the Members of the Commission was not at issue.

The allegation of discrimination on the ground of nationality must therefore be rejected.

In support of the argument based on the fact that Mr Mensching was the member of a private office, the applicant also refers to certain circumstances of a general nature: the alleged entry of 'parachutists' from the private offices of Members of the Commission, the position adopted by the unions and questions asked in that regard by a Member of the European Parliament.

Rejecting that argument, the Commission produced its reply to the aforesaid Member of the European Parliament, which indicated the exact proportion of all the promotions which took place during the second half of 1984 accounted for by promotions of officials from private offices.

Furthermore, the Commission maintained that the position adopted by the unions sought to prevent any abuse with regard to the reintegration of former members of the private offices, in particular with regard to members of the temporary staff and the organization of individual competitions; the circumstances are quite different in the case of Mr Mensching, who has been an established official in the Commission since 1 October 1973.

The applicant's arguments are thus based on general considerations relating to matters unconnected with this action, which do not in my view constitute a sufficient foundation for the allegation that the Commission misused its powers.

As the Court of Justice has held,[11] 'a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for purposes other than those stated'.

From all the foregoing considerations it follows that the applicant has not sufficiently established that the Commission misused its discretionary power by pursuing unlawful objectives or committing a manifest error.

Consequently, it also seems to me that the applicant's allegation that, by adopting the contested decision, the Commission misused its powers cannot be accepted.

Accordingly, since none of the arguments relied on by the applicant has been successful, I consider that his application must be dismissed, and the parties should pay their own costs in accordance with Article 70 of the Rules of Procedure.

11 — See, for example, judgment of 21 June 1984 in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447 *et seq.*, especially paragraph 30 at p. 2465.