REPORT FOR THE HEARING
delivered in Case 307/85 *

I — Facts and procedure

1. The applicant has been a reviser at the Economic and Social Committee since 1 February 1982, having been successful in Open Competition ESC/LA/19/79.

2. In October 1982 he took part in Open Competition ESC/LA/45/81 for the post of Head of Division in the Directorate-General for Translation — Greek Language Division, in Grade LA 3. The minimum age-limit was set at 40. No one was placed on the list of suitable candidates.

3. In May 1983 a second notice of competition, ESC/LA/57/83, was published for the same post. The conditions required were the same, with two exceptions: the age-limit was reduced to 35 and a supplementary written test was added. The name of Mr Ts. was at the head of the list of suitable candidates, and the applicant's was second.

4. On 17 October 1984 the Bureau of the ESC proposed to the Council that Mr Ts. should be appointed Head of the Greek Language Division, and that decision was communicated to the Council on 7 November 1984. On the same day Mr Ts. was assigned to 'carry out the duties associated with that post on an interim basis' from 1 November 1984 until the post should be filled. Mr Ts. was appointed to the post by a decision of the Council of 29 January 1985, with effect from 1 February 1985. That decision was notified by the Council to the Secretary-General of the Economic and Social Committee by a letter of 4 February 1985.

5. On 31 March 1985 the applicant submitted a complaint 'to the appointing authority of the Economic and Social Committee through official channels' in which he argued that in the course of Competition LA/57/83 there had been a breach of the principle of equal treatment and a misuse of powers. He submitted that the appointment should be revoked, the competition annulled and a new competition organized.

6. On 26 July 1985 the Chairman of the Economic and Social Committee rejected the requests for the annulment of the competition and the organization of a further one and informed the applicant that his request for the revocation of the disputed Council decision was not within the power of the Economic and Social Committee; he suggested that the applicant submit his complaint to the Council 'if, notwithstanding the explanations given, that is your desire'.

7. On 11 October 1985 the applicant brought proceedings before the Court, on the basis that the President of the Council had tacitly rejected his complaint of 31 July 1985.

8. The written procedure took the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Fourth Chamber) decided to open the oral procedure without ordering any preparatory inquiries. However, it asked the defendant to submit the report of the selection board in Competition LA/57/83 and the minutes of the meeting of 17 October 1984 of the

* Language of the Case: French.

Bureau of the Economic and Social Committee.

II — Conclusions of the parties

1. The *applicant* claims that the Court should:

'(a) declare the action admissible;

(b) declare it well-founded;

(c) declare that the organization of the competition was not within the power of the Economic and Social Committee, and therefore declare it void;

(d) declare that inasmuch as the competition itself must be annulled, the appointment of Mr Ts. has no foundation; in the alternative, declare that the selection criteria were illegal, on the ground that they were discriminatory, tailored for a particular candidate and amounted to a misuse of powers, and therefore declare void the resulting appointment;

(e) take note that the applicant offers to call witnesses to give evidence of the facts set out in the application;

(f) order the Economic and Social Committee to provide to the Court the notes of the selection board concerning the candidate proposed for appointment and the applicant;

(g) take note that the applicant reserves the right to claim compensation for non-material loss;

(h) in any event, order the Economic and Social Committee to pay all the costs.'

In his *reply* he further requests that the Court:

'(a) order that the report of the selection board, together with all annexes, be submitted to the Court before any further step in the proceedings;

(b) take note that the applicant offers to call P. Dracos, a member of the Bureau of the Economic and Social Committee, to give evidence to the effect that there was no discussion of the merits of the candidates who were successful in the competition but merely a proposal for the appointment of the top-ranked candidate, without any further remarks; and hold that this offer of evidence is relevant.'

2. The *Economic and Social Committee* submits that the Court should:

'(a) declare the action inadmissible;

(b) declare that the applicant's offer to call evidence is unfounded in particular in so far as it affects the secrecy of discussions; in the alternative, authorize the defendant to call evidence to refute the facts alleged by the applicant by all permissible means, including the calling of witnesses;

(c) declare that the claims for annulment and the applicant's reservation of the right to claim compensation are unfounded;

(d) consequently, dismiss the action and make an order for costs in accordance with the law.'

In its *rejoinder*, the Economic and Social Committee maintains its conclusions and 'leaves the matter of the production of the report of the selection board, as requested by the applicant, to the judgment of the Court'.

3. The *Council* claims that the Court should:

'(a) declare the action against the Council inadmissible on the ground that no complaint was submitted to the Council;

(b) declare that the claims for annulment and the reservation of the right to claim compensation are unfounded;

(c) consequently, dismiss the action and make an order for costs in accordance with the law.'

III — Submissions and arguments of the parties

Admissibility

I — The claim for the annulment of the appointment

A — *Whether an action lies against the Council*

1. Raising what it prefers to call not an objection of inadmissibility but rather a 'request for clarification', the *Economic and Social Committee* argues that the appointment decision at issue must be imputed to the Economic and Social Committee, which is thus the proper defendant, and not to the Council. The decision was taken by the Council in accordance with the third indent of Article 57, first paragraph, of the Rules of Procedure of the Economic and Social Committee. If the applicant wishes also to proceed against the Council, in his application he should have named not only the Economic and Social Committee and the Council but also the Commission, since the three institutions shared the power of appointment in this case.

2. The *Council* expressly submits that no action lies against it, on the same grounds. It considers that the contested decision should be imputed to the Economic and Social Committee. In this case the Council acted as the authority holding part of the power of appointment of LA 3 officials at the Economic and Social Committee, that power having been delegated to it by an act of the Economic and Social Committee.

3. The *applicant* considers that it is indeed the Council that is the appointing authority in this case, pursuant to Article 57 of the Rules of Procedure of the Economic and Social Committee. The fact that in respect of certain grades the agreement of the Commission must be obtained does not concern the candidates. The Council is therefore liable.

B — *Absence of a preliminary complaint*

1. The *Economic and Social Committee and the Council* submit that the application is inadmissible in so far as it is directed against the appointment, because the applicant failed to submit a complaint beforehand to the Council and, in particular, failed to pursue the Economic and Social Committee's proposal that he should forward his complaint to the Council.

2. The *Economic and Social Committee* adds that under the principle of parallelism in forms and procedures the applicant was obliged to submit a complaint to all the institutions which share the power of appointment of LA 3 officials at the Economic and Social Committee. Since that procedure was not followed, the Council decision appointing Mr Ts. can no longer be challenged.

3. The *applicant* contends that there was a complaint as referred to in Articles 90 and 91 of the Staff Regulations — his complaint of 31 March 1985 addressed through official channels to the appointing authority and thus, inasmuch as it concerned an LA 3 post, to the Council. There could be no doubt as to the person to whom the complaint was finally addressed: it could be none other than the President of the Council. Both in the heading and in the body of his complaint, the applicant referred to the decision of 29 January 1985 of the President of the Council. In any event, it is for the Council to explain the improper failure of the Economic and Social Committee to forward his complaint, the latter institution having in effect diverted a document intended for the Council. The Economic and Social Committee's proposal that the applicant should submit his complaint to the Council was thus meaningless. The applicant asks whether, in those circumstances, the Economic and Social Committee is not guilty of a lack of diligence or of some confusion.

II — *With regard to Competition ESC/LA/57/83*

1. The *Economic and Social Committee* considers that the applicant's claim for the annulment of Mr Ts.'s appointment on the ground of the unlawful conduct of the competition is inadmissible for the following reasons: (a) in his application the applicant failed to raise a claim for the annulment of that appointment, but simply asked the Court to declare that the appointment 'had no foundation'; there is therefore no point in seeking the annulment of the competition; (b) the applicant did not dispute the decision of the selection board within the appropriate period; (c) the applicant must be considered to have consented and to have waived his right to seek the annulment of the competition, since he did not protest against the organization of the competition or against its results.

2. The *applicant* points out that, as the Court has held, he could not challenge a preparatory measure, such as the organization of a competition, but only the final decision, that is to say the appointment of a candidate, which is the act adversely affecting him. Furthermore, initially the applicant had no interest in contesting the organization of Competition LA/57/83. That does not, however, prevent him from now claiming that the competition is void on the ground that it was not the Council that decided to hold it and conducted it, in accordance with Article 57 of the Rules of Procedure of the Economic and Social Committee. The illegality of the competition thus entails both its annulment and the annulment of the decision to appoint Mr Ts., the competition being one of the legal bases for the latter decision.

Substance

Annulment

A — *Illegality of the organization of the competition*

1. In his first submission the *applicant* asserts that the Secretariat of the Economic and Social Committee had *no power* to organize the competition. He argues that since Competition LA/57/83 concerned an LA 3 post only the Council could decide to hold it and conduct it, under Article 57 of the Rules of Procedure of the Economic and Social Committee. The competition is thus absolutely void and cannot be ratified.

2. The *Economic and Social Committee* and the *Council* consider that this submission raises the question of the interpretation of Article 57 of the Rules of Procedure of the Economic and Social Committee in conjunction with Articles 2, 29 and 30 of the Staff Regulations of Officials. In their view the only interpretation that is justified from both the legal and practical points of view is one which involves the three appointing authorities in the following manner: the Economic and Social Committee decides to hold and conducts a competition, then its Bureau examines the qualifications and merits of the candidates according to the results of the competition and makes a proposal to the Council; the Council refers that proposal to the Commission for its agreement; finally, on the basis of the proposal by the Bureau of the Economic and Social Committee and with the agreement of the Commission the Council takes its decision which, from a formal point of view, must be regarded as *the* appointment decision. The three institutions have acted in accordance with that realistic interpretation for some considerable time, so that it now constitutes customary law. Some 20 procedures have been organized in that manner without giving rise to protests. Furthermore, that interpretation preserves the power of the Council and the Commission to oppose an appointment of which they do not approve. They consider that the interpretation put forward by the applicant is neither well-founded from a legal point of view nor

realistic, in the light of the increase in the Economic and Social Committee's staff.

3. In his *reply* the applicant argues that Article 57 cannot be interpreted or reinterpreted according to the increase in the Economic and Social Committee's staff: the appointing authority remains the Council. Moreover, the argument that some 20 appointments made in the same manner did not give rise to protests is irrelevant: *injuria non facit jus.* Finally, customary law has no place in administrative law.

4. The *rejoinder* of the Economic and Social Committee in particular once again concentrates on the interpretation of Article 57 of the Rules of Procedure: according to its interpretation, under the *second sentence* of the third indent of Article 57, first paragraph, the Chairman of the Economic and Social Committee has the residual power to declare an LA 3 post vacant. Consequently, the Chairman of the Economic and Social Committee acted in accordance with the provisions of the Staff Regulations, in particular Article 4 concerning the declaration that a post is vacant. Article 4 is not one of the articles of the Staff Regulations listed in the *first sentence* of that provision, under which the powers of the appointing authority are to be exercised 'by the Council, acting on a proposal from the Bureau and with the agreement of the Commission'.

5. In his second submission, the *applicant* asserts that the lowering of the *age-limit* to 35 was *illegal* inasmuch as it was intended to favour his fellow-candidate Mr Ts.

6. The Economic and Social Committee argues that the submission is inadmissible since the applicant has no legitimate interest in seeking the annulment of the competition on the ground that the age-limit was lowered. Furthermore, the applicant made no protest at the time of the competition.

7. On the substance of the issue, the *Economic and Social Committee* argues that the age-limit was lowered in the interest of the service in order to allow a greater number of candidates to apply, since in the first competition there was only a limited number of candidates and none of them was successful; that age-limit is now the usual one in competitions of this kind.

8. The *Council* considers that this submission concerns only the Economic and Social Committee. In the alternative, it relies on the objections and arguments put forward by the Economic and Social Committee.

B — *Illegality in the conduct of the competition*

1. The *applicant* argues first of all that the competition was conducted in a *manner which discriminated* against him. He points in particular to the following circumstances: (a) whereas during the first competition he was asked to refrain from carrying out the duties of Head of Division, during the disputed competition Mr Ts. was allowed to carry out those duties; (b) from March 1983 onwards, the Director-General of the Economic and Social Committee, who was also chairman of the selection board, passed over the applicant but worked with Mr Ts. for the needs of the service and went for coffee with him, even during the competition.

2. The *Economic and Social Committee* replies that it was the applicant himself who, on various pretexts, refused to take on the responsibilities of Head of Division. As late as 1984, however, the Director-General required the Head of the Translation Service to look after the direction of the Greek Division in cooperation with the applicant and Mr Ts.: the division was run

in that manner because of the problems created by the recent accession of Greece. Furthermore, on several occasions, the applicant was consulted concerning the establishment of probationary officials in the Greek Division.

3. Secondly, the *applicant* submits that the selection board considered and made comments on the personality of the candidates. In so doing, the *selection board went* significantly *beyond its powers.*

4. The *Economic and Social Committee* argues that the consideration of such issues is part of the discretionary power of assessment of the appointing authority and of the selection board, and the selection board did not exceed its powers of assessment in this case, especially since suitability for the post of Head of Division was one of the conditions required by the vacancy notice.

5. Thirdly, the *applicant* submits that the selection was made in advance and that there was a *misuse of powers.* With regard to the selection board he makes the following allegations:

(a) the selection board waited for the Director-General of the Economic and Social Committee to return from holiday before considering the personality of the candidates;

(b) before the selection board had drawn up its final report, the applicant was informed that Mr Ts. had moved into the office of the Head of Division.

6. The *Economic and Social Committee* denies that this submission is well-founded, and points out that:

(a) consideration of the personality of the candidates forms part of the discretionary powers of the appointing authority and the selection board;

(b) the fact that Mr Ts. moved into the office of the Head of the Greek Division was an entirely fortuitous internal arrangement in the Greek Division which was necessary for practical reasons; there was no decision on the part of the administration, and in any event such a factual situation would not in itself influence the appointing authority in any way.

7. The *Council* considers that these submissions concern only the Economic and Social Committee. In the alternative, it relies on the objections and arguments put forward by the Economic and Social Committee.

C — *Illegality of the proposed appointment*

Illegality of the Bureau's proposal

1. According to the *applicant,* the proposal for the appointment of Mr Ts. made on 17 October 1984 by the Bureau of the Economic and Social Committee was *illegal* since there was no discussion of the comparative merits of the candidates but the simple adoption of a proposal drawn up in advance by the Secretary-General. The applicant states that he has requested the minutes of that meeting but his request has not been met.

He states that he is virtually certain that the two candidates received practically the same marks, and in such circumstances it is generally accepted that the older candidate should be selected. Furthermore, the applicant has seven years' more professional experience than Mr Ts., the two of them carried out the duties of Head of Division on an alternating basis, and no adverse comment was made on the applicant's handling of those duties, and, finally, the applicant's knowledge of languages is far greater than that of Mr Ts.'s.

2. The *Economic and Social Committee* submits that there was a careful examination of the comparative qualifications and merits of the candidates. If there was no actual discussion, that is because there was general consensus and thus no need for any discussion. Each member of the Bureau had

a copy of the list of suitable candidates and it was for the members to indicate their disagreement with the proposal of the Secretary-General if they did not share his view.

The Economic and Social Committee also submits that the applicant's capability was not more decisive than that of Mr Ts., the two candidates did not in fact carry out the duties of Head of Division in alternation because the applicant avoided it, and the simple seniority of an official is not a decisive element in the assessment of his merits.

3. The *Council* does not consider itself concerned by this submission and, in the alternative, relies on the objections and arguments put forward by the Economic and Social Committee.

4. In his *reply*, the applicant submits a statement by one of the Greek members of the Bureau to the effect that there was no examination of the other persons on the list of suitable candidates. He also proposes to call another Greek member of the Bureau to give evidence on what took place at that meeting.

5. In its *rejoinder*, the Economic and Social Committee states that at its meeting of 20 November 1984 the Bureau approved the minutes of its meeting of 17 October 1984 without any comment on the part of any of its members, in particular with regard to the statement that it had 'carefully examined all the applications . . . '. Minutes of a meeting drawn up *in tempore non suspecto* have more evidentiary weight than a statement made more than a year later for the purposes of legal proceedings.

Misuse of powers

1. The *applicant* submits that even at the stage of the proposal the misuse of powers which tainted the entire procedure continued. He makes the following allegations:

(a) even during the first competition, the applicant was treated in an unequal manner: none of the members of the selection board knew the Greek language; it is true that he can no longer challenge that competition, but the fact remains that there were astonishing circumstances associated with that competition which presaged the results of the second one;

(b) the age-limit in Competition LA/57/83 was lower than the limit in Competition LA/45/81 in order to allow Mr Ts. to take part;

(c) from April 1984 onwards the applicant was no longer even consulted by his superior;

(d) on 19 July 1984 the Director-General informed Mr Ts. that he was to be appointed to the post of Head of Division; he did so in advance of the decisions of the Bureau, the Commission and the Council;

(e) from that same day, 19 July 1984, Mr Ts. openly took over the duties of Head of Division;

(f) on the same day Mr Ts. held a party for his friends and colleagues to celebrate the happy event.

2. The *Economic and Social Committee* categorically denies that this submission has any foundation in fact or in law. It replies to these allegations as follows:

(a) since he made no protest at the appropriate time, the applicant cannot now make reference to irregularities in the first competition;

(b) since the applicant made no protest at the time of the competition, this submission is inadmissible; with regard to the substance of the complaint, the age-limit was lowered in the interest of the service in order to allow a greater number of persons to take part, since in the first competition there were only a small number of candidates and none of them was successful; that age-limit is now normal in competitions of this kind;

(c) The Director-General of the Economic and Social Committee (and chairman of the selection board) called both the applicant and Mr Ts. to his office on 19 July 1984 in order to inform them that they had been successful in the competition and that the list of suitable candidates was to be forwarded to the Bureau of the Economic and Social Committee for a decision on the appointment. That cannot be regarded in any way as having anticipated the appointment of Mr Ts.;

(d) the applicant's assertion that he was not consulted by his superior is incorrect;

(e) the applicant's interpretation of 'Mr Ts. 's party' is entirely personal and tendentious; it is not backed by any evidence and is not even mentioned in his note of 19 September 1984.

3. The *Council* relies on the arguments of the Economic and Social Committee, in the alternative.

4. In his conclusions the *applicant* reserved the right to claim compensation for non-material damage. No further claim of that kind was made.

The preparatory inquiries proposed by the applicant

The *applicant* also proposes certain preparatory inquiries in support of his allegations. In particular, he requests:

A — *Submission of documents*

(a) submission of the minutes of the meetings of the selection board, the reports of the selection board, the candidates' marks and all annexes;

(b) submission of the minutes of the meeting of 17 October 1984 of the Bureau of the Economic and Social Committee.

B — *Calling of witnesses*

(a) Mr Feilberg, Head of the Danish Translation Division, to give evidence on the examination by the selection board of the candidates' personalities;

(b) Mr Dracos, a member of the Bureau of the Economic and Social Committee, to give evidence on what took place at the meeting of the Bureau on 17 October 1984;

(c) finally, in the conclusions of his application the applicant asks the Court to 'take note that the applicant proposes to call witnesses to give evidence on the circumstances set out in the application'.

C. Kakouris
Judge-Rapporteur