Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the Staff Regulations of Officials of the European Communities, especially Article 91;
Having regard to Article 4 of Regulation No 259/68,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the Commission of 15 January 1969 appointing Mr Jacques Dousset Director in the Directorate for Harmonization, Coordination and Financial Control of Infrastructures;**
2. **Dismisses the application against the decision of 18 June 1969 as inadmissible;**
3. **Dismisses the application in so far as it relates to the decision of the Commission not to pay the applicant the fixed travel allowance;**
4. **Orders the defendant to pay one half of the costs of the applicant.**

Monaco Donner Mertens De Wilmars

Delivered in open court in Luxembourg on 13 May 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 MARCH 1970[1]

Mr President,
Members of the Court,

The proceedings which I am to discuss today are seen by the applicant as a continuation of an earlier case between the same parties (Case 17/68). I can therefore be brief in my summary of the facts.

As you know, the applicant was for a long time Head of the Transport Rates and Conditions Directorate of the Directorate General for Transport of the Commission of the EEC. On the merger of the executives of the three Communities the common Commission decided in the course of the restructuring of its departments to maintain

1 — Translated from the German.

only three of the four directorates concerned with transport. By a decision of 20 March 1968 three other officials were appointed heads of these three directorates. By a decision on the same date the Commission appointed the applicant to the post of Principal Adviser (in Grade A 2) in the Directorate General for Transport. Later, by a decision of 26 June 1968, the applicant's employment was terminated in accordance with Article 4 of Regulation No 259/68.

It was these two measures that the applicant contested in Case 17/68. His application met with success, for in the judgment of 6 May 1969 both the decision of 20 March 1968 on the appointment of the applicant to the post of Principal Adviser and the decision dismissing him from the service on 26 June were annulled.

The result of this was that the Commission was obliged to re-employ the applicant. According to the applicant this can only be done satisfactorily by appointing him to a director's post, preferably in the Directorate General for Transport. In fact on 1 October 1968 — as we already know from Case 17/68 — that Directorate General did lose a director who had reached retirement age so that a director's post became free. However, by a decision of the Commission of 15 January 1969 an A 3 official (a French national) was promoted to fill the post. When the applicant discovered this (according to him this happened in the oral proceedings for Case 17/68 on 25 February 1969), he protested by making a formal complaint to the Commission on 24 May 1969. In it he requested that the above-mentioned appointment to fill the post be annulled, naturally in the hope that he himself would be appointed to the post. However, the Commission found a different solution for the applicant after the judgment of 6 May 1969. By a decision of 18 June 1969 it declared that the applicant was reinstated as an official with effect from 1 October 1968. But the applicant was not employed in a post as director, but again as a Principal Adviser in Grade A 2 in the Directorate General for Transport. Of this he was informed by a letter from the President of the Commission of 22 July 1969 received by him on 25 July 1969. At the same time he was informed that his complaint of 24 May 1969, requesting the annulment of the appointment of another official to the post of Director in the Directorate General for Transport, had, in the opinion of the Commission, lost its purpose.

It remains to be noted as to the facts of the case that the applicant on being reinstated claimed the fixed reimbursement of travel expenses within Brussels under Article 15 of Annex VII to the Staff Regulations for the period from 1 October 1968 to 30 July 1969, 10 months in all. Following the refusal of the financial controller to approve this on 19 June 1969, however, the Commission decided in the course of its meeting of 9 and 10 July 1969 not to accord this allowance.

The result of the foregoing incidents was that Mr Reinarz brought an application before the Court of Justice on 26 September 1969, submitting to us the following claims:

1. That the decision of the Commission of 18 June 1969 appointing the applicant as a Principal Adviser should be annulled;
2. That the decision of 15 January 1969 appointing another official director in the Directorate General for Transport should de annulled;
3. That the decision of the Commission refusing payment of the fixed reimbursement of travel expenses under Article 15 of Annex VII to the Staff Regulations should be annulled;
4. That the Commission should be ordered to pay, in accordance with Article 15 of Annex VII to the Staff Regulations, the sum of 30 000 Bfrs for the period from 1 October 1968 to 30 July 1969.

A further claim that the Commission should be ordered to pay damages to the extent of one million Bfrs was dropped by the applicant in the course of the oral proceedings.

Let us proceed to examine these claims, all considered unfounded by the Commission, to see how they must be decided.

Legal Consideration

1. As I have already indicated, no objection was taken as to the admissibility of the

application. Nor are there any indications that the Court should object of its own motion. This applies as regards observance of the time-limits fixed, as will be seen from a simple comparison of the dates: in this respect the important times are, of course, the dates on which the relevant documents came to the notice of the applicant or he was notified of them and the date on which the appeal through official channels was introduced. So far as doubts were raised as to the admissibility of certain *submissions*, I shall consider this in connexion with the examination of the relevant complaints. Now I can proceed directly, without further preliminary remarks, to examine the substance of the case.

2. First comes the claim for the annulment of the decision of 18 June 1969 appointing the applicant a Principal Adviser in the Directorate General for Transport. Two grounds were given for this in the application. The applicant claims that the issue of the contested decision did not correctly comply with the judgment of the Court of Justice of 6 May 1969. In addition to that the duties of a Principal Adviser are not equivalent to those of a director and therefore the applicant should not be appointed a Principal Adviser when earlier he had fulfilled the duties of a director.

In considering this argument the first thing to bring to mind is the reasons given in the judgment in Case 17/68 for annulling the appointment of the applicant as a Principal Adviser in the Directorate General for Transport. In my opinion a reading of the judgment leaves no doubt on this point. The fact is that the decision of 20 March 1968 which was then contested was only criticized and annulled because the *initial selection* of A 2 officials whose employment was to be terminated was made on that day, in other words because the appointment as a Principal Adviser was intended to *prepare* the way for the decision terminating his employment taken later and because this was done under the mistaken assumption that the applicant intended to leave the service voluntarily, so that his performance and capabilities need not be taken into account in selecting the officials who were to remain in the service. This emerges clearly from the finding in the judgment that the Commission intended at its meeting of 20 March 1968 'to draw up a provisional list of officials of Grades A 1 and A 2 likely to be affected during the following weeks by a measure terminating the service of officials' (Rec. 1969 p. 70), and in the sentence 'As a result the Commission removed the applicant from his post of director and transferred him to a post as Principal Adviser but made it clear that the decision was provisional until such time as a final measure could be taken' (Rec. 1969, p. 71). There is, on the other hand, no indication in the judgment to the effect that the duties of a Principal Adviser were not *equivalent* to those of a director, making it contrary to the Staff Regulations to appoint an A 2 official as Principal Adviser. There can therefore be no question of the judgment in Case 17/68 providing grounds for the annulment of the decision in dispute which on this occasion was not a measure preparatory to later dismissal, and therefore served a purpose completely different from that of the decision of 20 March 1968.

Let us therefore ask, independently of the abovementioned judgment, what results from the argument based on the lack of equivalence of duties (between a Principal Adviser on the one hand and a director on the other) for the purpose of evaluating the applicant's claim.

On this point it must doubtless be admitted that there are certain differences as regards the opportunities to act and to obtain information, the number of collaborators and even the prestige attached to both positions in the eyes of the staff. However, I would be inclined to agree with the Commission that such factors, whilst they may also play a rôle in assessing directors' posts, are not decisive for the purpose of the examination in this case. The real deciding point is that according to the binding definition of posts in the service, the so-called 'job description', the duties of Principal Adviser and of director are assumed to be equivalent in the law governing the staff of the Communities. This the Commission also observes, rightly, in another connexion (one only has to think of the organization of its legal department). On the basis of this fact, the existence of

different opportunities for promotion and career prospects cannot be accepted as proved. Nor is it right to assume any difference in principle regarding the stability of the service relationship, even though it must be admitted that the duties of a Principal Adviser in the field of research may not be as constant as the duties of a director. The decisive factor is that Article 41 of the Staff Regulations contains provisions for reducing the number of posts, which in such a case are designed to ensure the objectivity of the selection procedure and thus prevent those holding posts as Principal Advisers (such as we are now concerned with) from being placed in particular jeopardy.

Since this also invalidates the argument that the duties of a Principal Adviser are less important and since in the case-law of the Court no official can claim any particular post in the service, but only at most to be given duties of a particular level, we are left with the conclusion that the applicant cannot hope for any success in his first claim on the basis of the arguments set out in the application.

However the applicant has now raised a further complaint in his reply, which could lead to a different evaluation of the first claim were it not excluded from consideration by our rules of procedure. What the applicant claimed in his second pleading was that in fact his appointment as a Principal Adviser was not made in the interests of the service. It should be seen as an emergency solution, because the director's post which became vacant in October 1968 in the Directorate General for Transport had been filled otherwise, by way of promotion, and so could no longer be considered as a possible post for the applicant. This interpretation of the facts is said to be borne out in particular by the fact that duties relating to research of the kind entrusted to the applicant are assumed (by a total of five high-ranking officials) in several different administrative units.

In fact we must follow the Commission in saying that this argument cannot be taken into account in view of Article 42 of our Rules of Procedure and the fact that they are in no way implied in the grounds given in the application. Whilst other cases may give rise to doubt whether or not Article 42 of the Rules of Procedure is rightly applied, the present proceedings do not appear to me to leave the slightest doubt on this point. What immediately strikes one in this case is that in an extremely concise application, which takes a mere 40 lines or so to set out the facts and grounds for four claims, a handful of grounds of application are merely indicated and that important arguments independent of these were only presented at a later stage in the proceedings. I think it must be made clear once again in the judgment that this method of proceeding cannot be tolerated.

However, leaving aside the objections on the procedural aspects even the actual *content* of the complaint which was belatedly raised proves in the end to be of no avail to the applicant's case. This is certainly true of the argument that duties in connexion with research such as those entrusted to the applicant were undertaken in several different administrative units of the Commission. Apart from the fact that the Commission has in part contested the accuracy of the applicant's assertions, such overlapping of areas of duty in administrative structures, which indicate the size of the Commission's departments, is frequently unavoidable, and this settles the point. But it has not been proved that in this particular case giving such functions to certain officials is not in the interests of the service.

Moreover, one cannot agree with the claim that the appointment of the applicant as a Principal Adviser was an emergency solution on the part of the Commission. In my opinion the Commission can be believed when it declares that if it had been necessary in order to comply with the judgment in Case 17/68 it would have been prepared to transfer the applicant to a post of director, particularly since it had managed to keep such a post available in its budget. Since this was not required of the Commission, however, the way in which it organizes its administrative departments must in principle be left to its own discretion.

This leaves us with the conclusion that the first claim in the application must be rejected as unfounded even if, contrary to the principle in Article 42 of the Rules of

Procedure, the arguments which were introduced by the applicant late in the proceedings were to be included in our examination.

3. In this second claim the applicant seeks the annulment of the decision of the Commission of 15 January 1969 appointing another official, by way of promotion, to one of the three posts of director in the Directorate General for Transport.

On this point he argues in the written procedure that the Commission placed itself in a difficult position from a budgetary point of view so far as concerns the opportunity of giving the applicant a post corresponding to his former duties. In addition to this the appointment of this other official must, according to the applicant, be considered to be a consequence of the applicant's dismissal which the Court of Justice has declared to be unlawful.

I am in agreement with the Commission's view that no great significance can be attached to these remarks. We have in fact seen that the Commission was accorded an A 2 post for the purpose of complying with the judgment in Case 17/68. There was therefore no real budgetary difficulty in employing the applicant in a suitable manner, that is to say, at a level corresponding to his position in the table of salaries. As to the applicant's suggestion that the appointment of 15 January 1969 was the result of his dismissal, one must consider what the Commission has said concerning the distribution of powers within the Directorate General for Transport. According to it the four directorates existing immediately after the merger of the executives were altered to make only three, and that was done in such a way — as far as it is relevant to the present case — that the applicant's former field of duties was with that dealing with transport questions in the coal and steel sector. It should also be noted that the appointment of 15 January 1969 did not concern this field, but another area of duty. It thus becomes clear that the applicant has no ground for claiming that had the post just filled in January 1969 still been free at the time judgment was given in Case 17/68 he would have had particularly good prospects of being appointed to it. But in fact the Commission enjoyed here, as it does in general with regard to the organization of its departments, a clear discretionary power and it would therefore have been necessary for the applicant to show that the Commission had exercised its discretion arbitrarily. But there is nothing to that effect to be found in his written arguments and therefore he is no further forward with his claim.

Not until the oral proceedings did the applicant claim that a misuse of powers had occurred in connexion with the decision of 15 January 1969. He claimed that the relevant official was of the same nationality as his predecessor so that the appointment was decided by his nationality, thereby infringing principles which the Court of Justice declared in Case 17/68 and in other cases to be essential to the law relating to European officials. Here too, the Commission emphasizes the principle in Article 42 of our Rules of Procedure, and here too, it is undoubtedly right. The arguments now produced by the applicant must be disregarded because they were introduced late and because with the best will in the world one cannot find any indication of them in the written application. One is in any case forced to that conclusion in view of the fact that the Commission was given no opportunity in the oral proceedings to deal with the complaint in detail. It should also be remarked that the reference to the nationality of the official appointed is not in itself significant. It would have been necessary for more details of the appointment procedure to have been indicated and established, for instance a description of the other candidates, their nationality and their proven capabilities. Only in this way could judgment be reached as to the rôle played by nationality in making the decision of 15 January 1969, and only thus might the complaint that it had been given too much priority be confirmed, a complaint which, let it not be forgotten, only succeeded in Case 17/68 because a member of the Commission had supplied a corroborating statement.

Accordingly, the second claim must also fail, in the first place because the written arguments supporting it are insufficient, and in the second place because the criticisms

put forward in the oral proceedings must be disregarded in view of Article 42 of the Rules of Procedure.

4. Finally the last claim concerns the applicant's entitlement to the fixed reimbursement of the expenses of travel within Brussels, to which he thinks he is entitled under Article 15 of Annex VII to the Staff Regulations for the ten months during which he was not in the service of the Commission. The applicant justifies his claim with the argument that the abovementioned provision is designed not merely to cover travel expenses actually incurred but rather to compensate for depreciation in the value of a private vehicle and to a certain extent to cover representation costs. Yet again, however, we must support the Commission's view against that of the applicant. Quite apart from certain technical differences to be found between the French text of the provision and the German version and on which the applicant lays great emphasis, I have not the slightest doubt that Article 15 of Annex VII to the Staff Regulations is concerned exclusively with reimbursement of expenses incurred, as is shown in any case by the heading under which it comes. If this is so the answer to the present question is quite simple. Once it can be shown that an official — like the applicant — has not been employed on active service for a considerable length of time, there can be as little question of giving him financial compensation, which amounts to nothing other than an allowance to cover the absence of a service vehicle, as of placing at his disposal a service car with retroactive effect. Nor can this be contradicted by the generous administrative practice of the Commission, according to which compensation under Article 15 is paid in the event of an absence from Brussels of several months' duration (for instance in the event of a holiday abroad or sickness leave). That is justified in view of the possibility in such cases that the relevant official could be called back to his place of employment for special reasons, thus involving journeys 'within the boundaries of the town where (the officials) are employed', as mentioned in Article 15. Such eventualities could not, however, arise in the case of an official whose active service had been *terminated*, not even retroactively after his resumption of service. This essential difference of fact must prevent the applicant from being able to rely on the administrative practice he refers to to support his claim.
Accordingly the third claim must also fail without its being necessary to attempt any further interpretation.

5. Summary

My opinion on the claims still pursued is thus as follows:

Whilst the application is undoubtedly admissible it must be dismissed in its entirety as unfounded. This brings with it the consequence that the applicant himself must pay the costs of the proceedings.