*8. Officials — Integration — Unfavourable opinion of the Board — Right of official concerned to submit comments*
*(Staff Regulations of officials of the EEC, Article 102)*

*9. Officials — Integration — Powers of the administration — Review by the Court — Limits*
*(Staff Regulations of officials of the EEC Article 102)*

*10. Officials — Integration — Opinion of the Establishment Board — Statement of reasons*
*(Staff Regulations of officials of the EEC, Article 102)*

1. Cf. para. 1 of summary in Joined Cases 79/63 and 82/63.
2. Cf. para. 1 of summary in Case 18/63.
3. Cf. para. 3 of summary in Case 26/63.
4. Cf. para. 4 of summary in Case 26/63.
5. Cf. para. 5 of summary in Case 26/63.
6. The implementing provisions for which provision is made by Article 110 of the Staff Regulations are of a 'general' nature.
Therefore the adoption of these measures is only necessary for the application of those provisions of the Staff Regulations which are not sufficiently clear and which are intended to remain in force. Cf. para. 6 of summary in Case 26/63.
7. Cf. para. 7 of summary in Case 26/63.
8. Before giving an unfavourable opinion the Establishment Board must afford the person concerned the opportunity to submit his comments on the factors which may influence his integration. This obligation is complied with if the Board has heard the views of the person concerned on the facts contained in the report, for which provision is made in the last paragraph of Article 102 (1) of the Staff Regulations and whose conclusions it has adopted, or on the factors which it considers likely to lead it to conclusions different from those in the report and to have an influence on the integration of the servant. Cf. para. 8 of summary in Case 26/63.
9. Cf. para. 9 of summary in Case 26/63.
10. Cf. para. 10 of summary in Case 26/63.

In Case 80/63

ROBERT DEGREEF of Schaerbeek, 29 rue Joseph-Wauters, represented and assisted by Marcel Slusny, Advocate at the Cour d'Appel, Brussels, assistant lecturer at the University of Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

THE EUROPEAN ECONOMIC COMMUNITY OR ALTERNATIVELY THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Adviser Paul Leleux, acting as Agent, and assisted by Jean Coutard, Advocate at the

Conseil d'Etat and at the Cour de Cassation of France, with an address for service in Luxembourg at the office of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application for the annulment of

1. The integration procedure applied to the applicant,
   the opinion of the Establishment Board communicated to the applicant by letter of 28 June 1963,
   the decision to terminate the applicant's contract of employment, notified to him by letter of 28 June 1963;
2. Payment of damages.

THE COURT (Second Chamber)

composed of: Ch. L. Hammes, President, R. Rossi (Rapporteur) and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Issues of fact and of law

### I — Facts

The facts may be summarized as follows:
On 25 September 1959 the applicant was engaged by the Commission as a messenger in Grade C 13. He kept this grade until 1962.
Following an unfavourable opinion of the Establishment Board 'on the suitability of Mr Degreef for the duties of his post' the Director-General of Administration of the EEC in exercise of the power conferred on the appointing authority with reference to the establishment of servants in grades C and D, notified the applicant by letter of 28 June 1963 that his contract of employment had been terminated and gave him one month's notice of such termination.

### II — Conclusions of the parties

The *applicant* claims that the Court should:

'1. annul the integration procedure applied to the applicant as well as the opinion of the Establishment Board notified to the applicant by a letter from Mr Van Gronsveld of 28 June 1963;
2. annul the termination of the applicant's contract of employment notified to him by letter of 28 June 1963;
3. declare that the Commission must arrange that the integration procedure be re-applied to the applicant after completion of the formalities laid down in the last

sentence of Article 5 and in Article 110 of the Staff Regulations;

4. order the Community or alternatively the Commission to pay to the applicant by way of damages and interest thereon the sum of five million Belgian francs for material damage and five million Belgian francs for non-material damage, the applicant reserving the right to amend these figures in the course of the proceedings;
5. declare that the European Economic Community or alternatively the Commission must bear the entire costs of the proceedings (including all disbursements and fees).'

During the course of the oral procedure the applicant made the following amendment to his conclusions under head 4 namely that, if the decision terminating his contract be annulled, the defendant must pay to him the arrears of his monthly salary. In addition, he submits that, so far as the procedure is concerned, the Court should:

'declare that documents G 4 to 11 annexed to the statement of defence do not comply with the provisions of the second paragraph of Article 26 of the Staff Regulations;

consequently rule that they can be used neither as evidence against the applicant nor as the basis of allegations against him and that they must be excluded from the proceedings.'

The applicant claims, in addition, in his reply that the Court should:

'Alternatively

1. order the defendant to produce
   (a) the minutes of the meetings of the Council of Ministers relating to that part of the Staff Regulations which deals with the integration procedure and the application of Article 110;
   (b) all communications between the defendant and the provisional Staff Committee concerning the integration of officials as well as all minutes of the provisional Staff Committee relating to the said integration procedure;
   (c) the "white book" distributed by the provisional Staff Committee in June 1963 (document 1014 Pers. F. 63) and in particular a memorandum to the Commission (p. 17) and a statement made to the Commission (p. 95).
2. Order that the evidence of Mr Smulders, Director-General of Administration, on the integration procedure in general be heard.'

The *defendant* contends that the Court should:

'dismiss as being both inadmissible and unfounded the application of Mr Degreef brought against the integration procedure, against the opinion of the Establishment Board communicated to him by letter of Mr Van Gronsveld of 28 June 1963 and against the termination of his contract of employment notified to him on 28 June 1963 and his request that the said procedure be re-applied to him after completion of the formalities laid down in the last sentence of Article 5 and in Article 110 of the Staff Regulations and that the European Economic Community or alternatively the Commission be ordered to pay damages and interest thereon with all legal consequences and in particular those relating to the payment of costs.'

## III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

*Admissibility*

1. The *applicant* states in his reply that the reason for his application against the Community itself is explained by Article 91 of the Staff Regulations of Officials, which refers to disputes 'between one

of the Communities and any person . . .' and by the necessity to avoid any objection of inadmissibility under this head. He emphasizes that his naming of the Community as a party could be to his advantage if the Court considers that it is necessary to order production of the preparatory studies for Regulations Nos 31 and 11 of the Council.

The *defendant* calls attention to the fact that the institutions do not have a legal personality separate from the Community.

2. The *defendant* in addition puts forward the following submissions:

— First, the claim that the Commission must arrange for the integration procedure to be re-applied to the applicant 'after completion of the formal requirements laid down in the last sentence of Article 5 and in Article 110 of the Staff Regulations' is inadmissible because this case is an application for annulment and in such proceedings the Court has no power to order such a step to be taken.

— Secondly, the claim for the annulment of the integration procedure and of the opinion of the Establishment Board is inadmissible, because it is not directed against a measure in the nature of a decision. A procedure is not a decision and the opinion of the said Board is only a measure preparing the ground for a subsequent decision which alone can be the subject matter of an action. It is in fact an opinion which, on the one hand, does not bind the appointing authority if it is favourable to the servant to be integrated, and, which, on the other hand, gives the said authority the opportunity of integrating the servant in another grade and step if it is unfavourable.

— In these circumstances the application is only admissible to the extent to which it is directed against the decision to terminate the applicant's contract of employment notified to him by letter of 28 June 1963.

The *applicant* objects however that, on the one hand, the Court has concurrently jurisdiction to annul and also unlimited jurisdiction on that, on the other hand, the annulment of the integration procedure and the termination of the contract of employment which followed must, in accordance with the case-law of the French and Belgian Conseils d'Etat lead to:

— the re-appearance of the applicant before the Establishment Board after it has been reconstituted and in accordance with Article 110 of the Staff Regulations,

— the provisional restoration of the applicant to his position before the said termination, with all the benefits arising out of his former contract.

3. The *defendant* in addition points out that the applicant pleads in a general way all the grounds for annulment laid down by the Treaty without stating to which particular ground for annulment the various complaints set out subsequently in the application relate.

The *applicant's* answer on this point is that it emerges clearly from a consideration of the facts and law upon which the application is based which of the grounds mentioned in Article 173 of the Treaty has been pleaded in this case.

*The substance of the case*

A — The request for annulment

The *applicant* suggests to begin with that the Court, should make an order for the production of certain documents, which will enable it to know the serious objections to the way in which the integration procedure was conducted by the Commission of the EEC, and to hear the evidence on this issue of Mr Smulders, the Director-General of Administration. In addition he disputes the defendant's interpretation of Article 102 of the Staff Regulations and is of the opinion that production of the minutes of the Council might make it easier to

understand the intention of the legislature.

Then, after putting forward all the grounds laid down in Article 173 of the Treaty, he classifies his complaints under the following heads:

1. *Infringement of Article 110 of the Staff Regulations*

The *applicant* submits that the disputed integration procedure took place before the general provisions of the Staff Regulations referred to in Article 110 as well as those relating to establishment laid down in Article 102 were adopted or at any rate before they were adopted in accordance with the procedure set out in Article 110. He argues, in addition, that the said general provisions for giving effect to the Staff Regulations have not been brought to the notice of the Staff.

The *defendant* objects that the integration procedure referred to in Article 102 is a preparatory step leading to the application of the Staff Regulations and is therefore part of the transitional provisions. In these circumstances it is difficult to understand why the said Article 102 requires general provisions for giving effect to it similar to those laid down in Article 110 which according to their nature have permanent effect. In addition Article 102 is sufficiently explicit to enable it to be directly and immediately applied.

The *applicant's* reply is as follows:

— The fact that the authors of the Regulations have placed Articles 110 after the transitional provisions indicates that this Article must be applied in its entirety to all the said provisions including Article 102.

— The purpose of Article 110 is to ensure the cooperation of the staff in the working-out of the general provisions for giving effect to the Staff Regulations which are of great importance for them and to ensure that the Staff Regulations are applied consistently in the various institutions. Article 110 is therefore applicable without any qualification to the integration procedure, which affects the future of each servant.

— The Commission of the EEC itself acknowledged by implication that effect must be given to the integration procedure by some general provision, since it issued on 13 December 1961 an implementing regulation for this purpose, which was amended on 9 March 1962 and sent *a posteriori* for examination to the Staff Committee, whereas this should have been done before the implementation procedure was adopted.

— The wording of Article 102 is not explicit, because it says nothing about the composition of the Establishment Board nor about the procedure to be followed. The issue by the Commission of the EEC of an implementing regulation on this point is sufficient proof of this fact.

The applicant adds that his criticisms are also directed against the preparation of the reports referred to in the last paragraph of Article 102 (1), as they were not prepared in accordance with Article 110.

The *defendant* retorts:

— that it was normal procedure for the Commission to issue a regulation for the implementation of the integration procedure but this provisional measure is not a permanent implementing regulation;

— that the regulation issued for this purpose was communicated to the provisional Staff Committee as a matter of courtesy, such notification not being *legally* obligatory, and therefore it is of no importance whether the regulation was issued before or after the adoption of the integration procedure.

2. *Infringement of the last sentence of Article 5 of the Staff Regulations*

The *applicant* submits that the integration procedure is defective because it

took place before the definition of the duties and powers referred to in the last sentence of Article 5 of the Staff Regulations had been carried out in accordance with Article 110. This means that the opinions expressed by the applicant's superiors in the report on his ability *et cetera*, the opinions of the Establishment Board and the resulting decision of the Commission of the EEC are void and of no effect.

The *defendant* replies that the opinion of the Establishment Board refers to the conduct of the official in the post which he held before the Staff Regulations entered into force, and not to the future conduct of the servant in the new post to which he may be assigned. In these circumstances the definition of the duties and powers laid down by the said Article 5 has nothing to do with the integration procedure.

3. *Infringement of the rights of the defence and of general principles of law*

The *applicant* argues to begin with that the Establishment Board is an administrative tribunal. He puts forward in support of this view the following arguments:

— That the opinions of the Board bind the appointing authority. If the opinion is unfavourable to the servant, he cannot in any circumstances be established in his previous grade and at his previous step. If, on the other hand, the opinion is favourable to the servant, the appointing authority must establish him, subject only to confirmation that the other conditions laid down in Article 102 (1) (a) and (b) and in Article 28 (a) (b) (c) (e) and (f) have been fulfilled.

— That while conceding that it is not necessary to comply meticulously with the rules of the codes of civil and criminal procedure in the proceedings before the Establishment Board, nevertheless the rights of the defence must be upheld as the defendant itself admits.

— The Commission has for this purpose issued a regulation containing a certain number of rules which are very similar to the rules of procedure of administrative tribunals.

The applicant adds that the doubts expressed by the defendant on the question whether new administrative tribunals can be set up under the Staff Regulations are misplaced. Whether or not the Councils were right or wrong to create an Establishment Board and to confer upon it judicial or quasi-judicial powers is unimportant, because the creation of this body having the abovementioned powers is provided for by the Staff Regulations.

Having put forward this argument the applicant submits that in this case the procedure adopted by the Establishment Board did not observe the rights of the defence. This procedure, in order to ensure that these rights are not disregarded, should at least comply with the following requirements:

— prior production of the complete file;

— compliance with a properly ordered legal procedure, which implies the right of the official to call witnesses and to be present when they are heard by the Board, as well as the right to the last word;

— the reasons upon which the resulting decisions are based must be stated.

The applicant, in this connexion, substantiates certain complaints already made in his application:

— The report on the ability, efficiency and conduct of the applicant prepared by his superiors only contains subjective assessments which cannot be disputed, whereas it should contain facts which can be challenged by evidence to the contrary, as it is ultimately the task of the Establishment Board to form its own opinion on the general suitability of the servant on the basis of these facts.

The reports on the applicant are closely connected with the subjective assessment of the person making the report, whereas the Board should have had at its disposal more precise and objective material for its assessment which would have allowed the applicant to develop his defence effectively. On the other hand there is no confirmation whatsoever that the Board was informed of the method of reporting adopted by the applicant's superiors.

— The report of the applicant's immediate superior is based on that of Mr Gottmann whose animosity towards the applicant is shown by the circumstances mentioned in the statement of facts in the application. (The applicant maintains, *inter alia*, that he asked unsuccessfully for the installation of a control clock and to be moved into another room.) The view of Mr Hoffman, the applicant's new superior, is therefore of little importance. Apart from the question whether such a document produced after the integration procedure is admissible, Mr Hoffman must be asked to give evidence that his oral opinions in no way correspond to his written report.

However this problem does not in fact appear to be of great importance once it is realized that the report on the applicant by Mr Maudet is on the whole favourable and regards the applicant as being 'capable of carrying out the duties of his post'.

— The witnesses were heard in the absence of the applicant and it has not been shown that he was given the last word. The evidence of the witnesses heard by the Board was not recorded and was not brought to the notice of the applicant.

— The reasons upon which the opinion of the Establishment Board was based were not mentioned. (The arguments put forward on this point are the subject of a separate submission.)

As a result of the production of the minutes of the Establishment Board, of which he alleges he had no knowledge when the application was lodged, the applicant asserts in his reply that he is now able:

(a) to substitute, for the complaint that it is impossible, in the absence of these documents, to check the composition of the Establishment Board or to know who were the members who took part in the inquiry and deliberations, a request for a declaration that the deliberations of the Board are null and void: it appears in fact from the said minutes that Mr van Goeler, who was not a member of the Board, took part in some of its meetings;

(b) to claim in addition
   — the the same persons did not always take part in the inquiry and deliberations;
   — that the applicant was not able to be assisted by a colleague or, *a fortiori*, by a legal adviser.

The *defendant* to begin with challenges the view that the Establishment Board can be regarded as a judicial body. For this purpose it recalls the object of the integration procedure, its origin, its various stages and the legal consequences of the opinion given by the Establishment Board. After calling attention to the fact:

— that the opinion of the Board contains a value-judgment on a man and not on the legality of a measure or of certain conduct;

— that the opinion of the Board does not bind the appointing authority when it decides whether to integrate the servant or not, in a grade or step other than those which the servant has already attained expressly or by implication and, in addition,

— that it is doubtful whether the institutions can create any 'courts or tribunals' not provided for by the Treaty,

the defendant maintains that the pro-

ceedings of the Establishment Board are of an administrative and consultative but not of a judicial nature. It refers on this point to the opinion of the Advocate-General and to the judgment of the Court in Joined Cases 35/62 and 16/63. The defendant then goes on to submit that the integration of staff is equivalent, in law, to an *appointment* of various servants, and, from the point of view of policy, to a measure 'preparatory' to the application of the Staff Regulations. On the one hand refusal to integrate a servant is only a 'non-appointment' and is not therefore a disciplinary measure; on the other hand, as the integration procedure is a preliminary step leading to the application of the Staff Regulations it is only subject to them to the extent that the Staff Regulations themselves so provide. Finally the integration procedure limits the discretionary power of the competent authorities, but leaves a sufficiently large field for the exercise of this power which is inherent in any appointment.

Whilst taking the view that, having regard to the nature of the Establishment Board, as an administrative body and not a tribunal, it is unnecessary to examine certain complaints put forward by the applicant, the defendant makes the following additional comments:

— The report on the ability, efficiency and conduct of the applicant in the service made by the latter's superiors is based on the reports of the immediate superiors of Mr R. Degreef, among them, Mr Gottmann. This report was not unfavourable and was for the most part satisfactory except as far as the 'sense of responsibility' and 'punctuality' of the applicant are concerned, which are without any doubt serious deficiencies for a messenger.

— The report of Mr Hoffman, which is very unfavourable to Mr R. Degreef, was requested later by the administration as the result of the applicant's attacks against his former superior.

— The reasons upon which the assessments of the applicant are based are set out as objectively as possible and it must not be forgotten that the Establishment Board was informed of the method used in making the reports.

— There is no obligation at all to hear the witnesses in the presence of a servant whose case is being examined under the integration procedure, which is not a disciplinary procedure.

— There is no obligation that the applicant should be heard last.

— Mr von Goeler had to take part in the meetings of the Board by virtue of Article 1 of its general regulations and the absence of certain members at certain meetings had no significance.

— As the integration procedure is not a judicial proceeding the applicant's complaint that he was not assisted by a colleague or by a legal adviser is inadmissible. Moreover the applicant never asked for such assistance.

— It is only necessary to read the letter of Mr van Gronsveld, referred to by the applicant in his application, to confirm that the reasons upon which the opinion of the Establishment Board are based are adequate.

4. *Infringement of Article 102 of the Staff Regulations*

The *applicant* maintains that one of the members of the Establishment Board, Mr de la Fontaine, was not employed in a supervisory capacity and that the composition of the Board was therefore unlawful having regard to the penultimate paragraph of Article 102 (1) of the Staff Regulations. He states on this point that the Court can, by consulting if necessary the detailed list of posts of the Commission of the EEC, ascertain that there are no grades in the Legal Department, of which Mr de la Fontaine is a member.

The *defendant* contends that as Mr de la

Fontaine is in Grade A 2 he is employed in a supervisory capacity within the meaning of Annex I to the Staff Regulations.

5. *Infringement of the first paragraph of Article 25 of the Staff Regulations in that the reasons upon which the opinion of the Establishment Board was based are not stated*

The *applicant* analyses the wording of this opinion and concludes that the reasons upon which it is based are not stated and that it is unfounded.
The *defendant* refers to the points already argued above in relation to the third complaint and also to the judgment of the Court in Joined Cases 35/62 and 16/63.

6. *Infringement of the principle of equality of treatment between servants*

The *applicant* states that the reports, in the absence of criteria for their preparation settled beforehand and in a uniform manner, are bound to be subjective and can only lead to different conclusions concerning the servants to whom the integration procedure is applied and who perform duties at the same level. This would have been avoided if the Commission had acted in accordance with Article 110 of the Staff Regulations.
The applicant submits that the integration procedure, including the procedure for making up reports and the report referred to in Article 102 of the Staff Regulations, is null and void.
The *defendant* contends that the compilation of any report is of necessity subjective and recalls, on the one hand, that the Establishment Board was informed of the method of making up reports and, on the other hand, that the applicant himself studied the report on him and had an opportunity to answer it.
Finally, with regard to the breach of the principle of equality of treatment between servants, it appears that the applicant is confusing integration, on the one hand, with examinations for entry into the service or promotion, on the other hand, since in the former case there is no question at all of comparing the respective merits of the various servants but only of checking whether the servant concerned is suitable for his post.

7. *The inaccuracy or the incorrect evaluation of the facts upon which the Establishment Board relied*

In his reply the *applicant*, after studying the contents of the minutes of the meetings of the Establishment Board, states that he is in a position to substantiate this complaint by enumerating a certain number of facts which were inaccurately stated or incorrectly evaluated by the Board.
The arguments developed by the applicant cover:
— the report on the ability, efficiency and conduct in the service of the applicant,
— all the necessary information,
— the hearing of the servant himself,
which served as the basis upon which the Establishment Board gave an unfavourable opinion.
The applicant relies in addition on production of his file kept by the administration to prove, *inter alia*, that it does not support the conclusions in the opinion of the Establishment Board on his aptitude in the performance of his duties.
The *defendant's* reply is the brief observation that by putting forward this submission the applicant is in fact asking the Court to take the place of the competent administrative authority when it determines a servant's aptitude in the performance of his duties, although such a possibility has been expressly precluded by the Court in its judgment in Joined Cases 35/62 and 16/63.
It adds that the reasons upon which the

opinion of the Establishment Board is based are in accordance with the facts which emerge from the report on the candidate's ability, efficiency and conduct in the service.

The *applicant* requests finally that the new documents produced by the defendant, and which are attached to his personal file under letter G, be treated as inadmissible, because they are documents which are purely one-sided, on which he was never able to express an opinion and which do not comply with the provisions of the second paragraph of Article 26 and of Article 43 of the Staff Regulations. He disputes their content and submits that document G 8 contains a *petitio principii* and a manifest error of reasoning. The applicant emphasizes finally that all these documents, except those numbered from G 1 to G 3, came into being after the integration procedure and are therefore of no relevance in this dispute.

The *defendant* contends that the appointing authority cannot be denied the right to obtain, even after the opinion of the Establishment Board, other reports in order to decide whether the applicant can be integrated in a lower grade than the one accorded to him previously.

In this connexion it calls attention to the fact that the application is only admissible to the extent to which it is directed against the decision to terminate the applicant's contract of employment and that the procedure culminating in this decision includes the opinion of the Establishment Board and the reports obtained later by the Commission.

B — The claim for damages

The *applicant* submits in his application that the Court should award five million Belgian francs as damages for material damage, and five million Belgian francs as damages for non-material damage, caused by the decision to terminate his employment, if it comes to the conclusion that the invalidity of the report of the Establishment Board does not invalidate the said decision.

In his reply he explains that in calculating material damage the Court should take into account:

— his remuneration,
— his age,
— the fact that he is unlikely to find a post offering conditions as advantageous as those which are offered to him by his post with the Commission, both as regards the level of his remuneration and security of employment.

The applicant therefore requests the Court to determine '*ex aequo et bono*' the amount of the said damages.

The *defendant* replies that the fact that the Commission terminated the applicant's contract of employment and paid him all sums due under the said contract is not a wrongful act or omission on its part. In support of this view it refers to its arguments in relation to the application for annulment and also to the judgments of the Court in Case 25/62 and in Joined Cases 35/62 and 16/63.

IV — Procedure

The procedure followed the normal course.

The application was lodged on 29 July 1963.

By an order of the Second Chamber of the Court of 20 November 1963 the applicant was granted free legal aid.

Upon hearing the report of the Judge-Rapporteur and after hearing the Advocate-General the Second Chamber of the Court decided that no preparatory measures of inquiry were necessary in this case and fixed the date for the commencement of the oral procedure at 13 May 1964.

## Grounds of judgment

A—The naming of the defendants as parties

The application is brought against the European Economic Community or, alternatively, against the Commission of that Community.

The defendant submits that the institutions do not have a legal personality separate from that of the Community and that, therefore, the Commission alone should be made a party to the proceedings.

Under Article 179 of the EEC Treaty, 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.' The expression 'the conditions laid down in the Staff Regulations' necessarily implies that there is conferred upon the institution itself, as the appointing authority, the right to be a party to legal proceedings relating to disputes with its servants and officials. In fact Article 90 of the Staff Regulations of officials of the EEC, — hereinafter called the Staff Regulations — governing complaints by officials through official channels prior to an appeal to the Court, provides that any official may submit a request or complaint to the appointing authority of his institution. The appeal to the Court referred to in Article 91 of the Staff Regulations must follow similar rules and be made against the same institution. The present application must therefore be regarded as being brought against the Commission of the EEC, which in this case is the institution to which the appointing authority responsible for the contested measure belongs.

B—The application for annulment

Admissibility

1. The applicant claims in the first instance that both the integration procedure and the opinion of the Establishment Board notified to the applicant by letter of 28 June 1963 should be annulled. The defendant maintains that this head of the conclusions is not admissible, in that it does not relate to the annulment of a measure having the nature of a decision.

It emerges from Article 91 (1) of the Staff Regulations that disputes between the Community and any person to whom the Staff Regulations apply refer to the legality of an act 'adversely affecting such a person' ('un acte faisant grief à cette personne'). Only acts which are capable of directly affecting the legal position of servants can be considered as adversely affecting a person.

In this case the integration procedure is not an act adversely affecting a person but consists of a series of legal acts and measures preparatory to the contested decision to terminate the contract.

As far as the opinion of the Establishment Board is concerned it should be noted that, even when it is favourable to the integration of the servant, his legal position is not affected until the appointing authority takes the decision affecting him. Although under Article 102 (1) of the Staff Regulations, this opinion constitutes an essential factor on the basis of which the decision of the said authority is taken and which binds it, it is addressed only to the appointing authority, whereas under the first paragraph of Article 25 of the Staff Regulations any decision relating to a specific individual shall at once be communicated in writing to the official concerned. It must therefore be concluded that, for the purposes of the appeal provided for by Article 91 of the Staff Regulations, the opinion of the Establishment Board is not a measure which can be separated from the decision taken by the appointing authority.

For all these reasons this head of the conclusions is inadmissible to the extent to which it seeks the annulment of the integration procedure and of the disputed opinion, considered independently of the contested decision to dismiss the applicant. The arguments put forward in support of these conclusions can however be invoked against the said decision.

2. The applicant claims that the decision to terminate his contract of employment communicated to him by letter of 28 June 1963, should be annulled. The admissibility of this claim is not challenged by the defendant and no grounds exist for the Court to raise the matter of its own motion.

The applicant also claims that the Commission should be obliged to re-apply the integration procedure to him after complying with the formal requirements laid down in the last sentence of Article 5 and in Article 110 of the Staff Regulations. The defendant pleads that this claim is inadmissible, arguing that this action is an application for annulment and in such proceedings the Court has no jurisdiction to order such a measure.

Under Article 91 (1) of the Staff Regulations the Court of Justice has unlimited jurisdiction in any of the disputes mentioned in the said Regulations and in disputes of a financial character between the Community and any member of its staff. Although the Court, even in the context of such an application, is unable to order the administration to carry out a specific act, the re-opening of the integration procedure must however be considered as

one of the consequences flowing from the execution of the judgment if the application is granted.

The substance of the case

*Infringement of Article 110 of the Staff Regulations*

The applicant argues that the disputed integration procedure, laid down in Article 102 of the Staff Regulations, took place before the general provisions for giving effect to this procedure had been adopted in accordance with the first paragraph of Article 110. He draws from this fact the conclusion that the disputed decision made as a consequence of this procedure is for this reason unlawful.

The implementing provisions for which provision is made by the said Article 110 are of a 'general' nature. Therefore the adoption of these measures is only necessary for the application of those provisions of the Staff Regulations which are not sufficiently clear and which are intended to remain in force. Independently of the question whether Article 102 of the Staff Regulations is sufficiently clear to be immediately applicable, there is no doubt that it is only intended to regulate a certain number of situations within a limited period of time. As it is plainly only a transitional provision, the measures adopted for its application cannot be general in character.

In these circumstances the regulations adopted by the Commission of the EEC on 13 December 1961 and on 9 March 1962 for the implementation of the provisions of Article 102 of the Staff Regulations consist of a collection of special implementing measures which are not to be confused with the general implementing measures referred to in Article 110 and for this reason, do not have to be adopted in accordance with the procedure laid down by this Article and brought to the attention of the staff.

This submission is therefore unfounded.

*Infringement of the last sentence of Article 5 of the Staff Regulations*

The applicant submits that the disputed integration procedure took place before the definition of the duties and powers, referred to in the last sentence of Article 5 of the Staff Regulations, had been carried out in accordance with Article 110 and that such a defect makes the contested decision to terminate his contract of employment invalid.

The object of the definition of duties is to permit and facilitate the classifica-

tion of the servant on the basis of Annex I to the Staff Regulations. It cannot therefore be regarded as a legal measure which is an essential preliminary to the application of Article 102 of the Staff Regulations. Moreover bearing in mind the complexity of the task of defining the various posts and the amount of time involved, and having regard to the need for each institution to integrate its servants as soon as possible under the new Staff Regulations, there are no grounds for finding any irregularity in the disputed decision.

*Infringement of Article 102 of the Staff Regulations*

1. The applicant maintains that the Establishment Board gave the appointing authority a defective opinion in that it was not drawn up in accordance with Article 102 (1), as one of its members, Mr de la Fontaine, was at that time a legal adviser and was not employed in a supervisory capacity.

Mr de la Fontaine was classified in Grade A 2. According to Annex I to the Staff Regulations the basic post in this grade is that of Director. According to the definition of duties and powers prepared by the Commission and approved by the provisional Staff Regulations Committee the powers and duties of a legal adviser classified in Grade A 2 correspond to those of Director. As a result, Mr de la Fontaine's participation in the proceedings of the Establishment Board complied with Article 102 (1) of the Staff Regulations and this submission is therefore unfounded.

2. The applicant puts forward in addition the argument that when the Establishment Board gave its disputed opinion it relied on reports and assessments which, since no uniform criteria for the preparation of reports were determined beforehand, contain subjective assessments and do not relate to facts which can be challenged by production of evidence to the contrary.

The last paragraph of Article 102 (1) of the Staff Regulations lays down that the Establishment Board shall give its opinion 'on the basis of a report on the official's ability, efficiency and conduct in the service prepared by his superiors'. As the purpose of such a report is to give a value-judgment on a servant's aptitude in the performance of his duties, it must of necessity contain subjective assessments by the persons called upon to prepare it. Even if the criteria for making this report had been determined beforehand in a uniform manner, they would only create the formal context within which the factors taken into account by every person making a report would be evaluated subjectively. Moreover, although the Establishment Board advises on the basis of this report, it cannot disregard the specific facts before

giving its opinion. This submission therefore does not appear to be well founded.

*Infringement of the last paragraph of Article 25 of the Staff Regulations*

The applicant argues that the opinion of the Establishment Board is defective because the reasons upon which it is based are inadequate in law.

As has already been found, the submissions that this opinion is defective are only admissible to the extent to which they refer to the legality of the disputed decision arising out of it. In these circumstances the merits of this submission must be examined by the Court with reference to the said decision.

The Establishment Board states in its report No 11 of 13 July 1962 that its unfavourable opinion on the integration of the applicant was given 'after taking note of the report on the ability, efficiency and conduct in the service of Mr Degreef . . ., after obtaining all the necessary facts and after hearing the servant himself.' In addition it states in his report the reasons for its unfavourable opinion, that is to say, that in the applicant's case 'a sufficiently conscientious approach to his work' and 'the requisite punctuality for his work as a messenger' are both lacking. In these circumstances it must be found that the reasons upon which the opinion of the Establishment Board is based are adequate having regard to the references which it makes both to the information used by the Board and to the basic facts which the Board accepted to justify its opinion.

The wording of the opinion was notified to the applicant by letter of 28 June 1963 together with the disputed decision taken by the appointing authority to terminate his contract of employment. It must therefore be concluded that sufficient reasons for the said decisions have been given.

*Infringement of the rights of the defence and of general legal principles*

The applicant then argues that as the report on his ability, efficiency and conduct in the service was on the whole favourable, it ought normally to have led to his integration. He infers from this fact that the decision to terminate his contract of employment is all the more defective because the Establishment Board, before giving an unfavourable opinion, should, with due regard to the rights of the defence and to general legal principles, have brought to his notice all the facts capable of justifying this opinion and made it possible for him to challenge its substance if necessary.

According to the last paragraph of Article 102 (1) of the Staff Regulations

the Board gives its opinion to the appointing authority 'on the basis of a report on the official's ability, efficiency and conduct in the service, prepared by his superiors . . .'.

The report on the applicant's aptitude in the performance of the duties of his post, issued by his superiors and submitted to the Establishment Board, defines his aptitude as being that of an average servant. While considering some of his attributes as 'inadequate and requiring improvement', it concludes that the applicant is nevertheless 'capable of performing the duties of his post'. In spite of this report the Establishment Board gave an unfavourable opinion as to the suitability of the applicant for these duties.

Under Article 102 (1) (b) of the Staff Regulations of the EEC an unfavourable opinion of the Establishment Board binds the appointing authority. Before drawing up its opinion, the said Board must therefore afford the person concerned the opportunity to submit his comments on the factors which may influence his integration. This obligation is complied with if the Board has heard the views of the person concerned on the facts contained in the report, for which provision is made in the last paragraph of Article 102 (1) of the Staff Regulations and whose conclusions it has adopted, or on the factors which it considers likely to lead it to conclusions different from those in the report and to have an influence on the integration of the servant.

The report on the applicant's aptitudes in the performance of his duties submitted to the Establishment Board was in favour of his integration. It emerged from the oral procedure that the applicant was heard by the Establishment Board after his superiors had been heard but that he was not invited to submit his further comments on the facts for evaluation which the said Board obtained later, in particular at its fourth meeting when it drew up its unfavourable opinion. This omission must in itself lead to the nullity of the disputed opinion as well as of the contested decision.

## C — The claim for damages

During the oral procedure the applicant amended his claim for payment of damages and interest thereon and asked for payment of damages limited to his 'salary up to the date of judgment'.

The conclusions comprising the claims for damages contained in the pleadings were alternative claims to the applications for the annulment of the contested decision. In fact they were pleaded in case the Court were to hold that the invalidity of the opinion of the Establishment Board does not

invalidate the termination of the contract of employment. On the other hand the claims made during the oral procedure were put forward in case the Court were to hold that the contested decision is null and void. The applicant has therefore by implication withdrawn the conclusions formulated in his application.

Under Article 19 of the Protocol on the Statute of the Court, annexed to the EEC Treaty, and Article 38 (1) (d) of the Rules of Procedure of the Court, the submissions of the applicant must be contained in his application. In this case the claim for reimbursement of arrears of salary is one of the consequences of the judgment of the Court that the contested decision is null and void. In fact if the contested decision to dismiss the applicant is annulled, he must be considered to be still in the service of the Commission and is entitled to continue to receive his monthly salary unless and until a new decision to dismiss him is lawfully taken. In these circumstances he is entitled to be paid the arrears of his monthly salary and accompanying allowances until his reinstatement in the service, the amount of these payments to be fixed by the Commission, account being taken of any sums which the applicant may have received from alternative employment.

Therefore as the said submissions are by implication contained in those seeking the annulment of the disputed decision to dismiss the applicant, the provisions of Articles 19 of the Protocol on the Statute of the Court and Article 38 (1) (d) of the Rules of Procedure of the Court do not preclude their admissibility. As the Court holds that the disputed decision to dismiss the applicant is null and void these submissions are in addition well founded.

## Costs

The applicant has succeeded in the essential point of his application. Under Article 69 (2) of the Rules of Procedure the defendant shall be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon reading the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 179;
Having regard to the Protocol on the Statute of the Court of Justice annexed

to the Treaty establishing the European Economic Community, especially Article 19;
Having regard to the Staff Regulations of officials of the European Community, especially Articles 5, 25, 90, 91, 102 and 110;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 38 and 69;

THE COURT (Second Chamber)

hereby:

1. **annuls the decision to terminate the contract of employment of Mr R. Degreef, notified to him by letter of 28 June 1963;**

2. **orders the Commission of the EEC to pay Mr Degreef the arrears of his monthly salary and the accompanying allowances from the date of his dismissal, taking into account any sums he may have received from alternative employment during this period;**

3. **orders the Commission of the European Economic Community to pay the costs.**

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 1 July 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

## OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 JUNE 1964[1]

*Mr President,*
*Members of the Court,*

The case of Degreef against the Commission of the European Economic Community originates in the unfavourable outcome of the integration procedure under Article 102 of the Staff Regulations as regards the applicant, who since 25 September 1959 had been a messenger in the service of the Commission, and this led to his dismissal by the Director-General of Administration (notification to the applicant by letter

1—Translated from the German.