1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 12 July 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 28 JUNE 1979 [1]

Mr President,
Members of the Court,

The applicant in the proceedings in which I am delivering my opinion today has been in the service of the European Communities since 1961. After working for the Parliament and the Council of Ministers, in 1965 he moved to the Language Department of the Commission. In 1967 he was placed in Grade L/A 5 and in 1973 he was promoted to Grade L/A 4. Since 1974 he has belonged to the translation department of the Administrative Commission on Social Security for Migrant Workers, (hereinafter referred to as the "Administrative Commission"). The translators in question work in various languages and for administrative purposes form part of Directorate General IX but are in fact placed at the disposal of Directorate General V. They belong to Division IX/D/3 (Translation: General Matters), which itself comes under Directorate IX/D (Translation, Documentation, Reproduction and Library). In a group under a head of department the applicant worked as a translator and reviser for texts to be translated into German. From 1975 he was responsible in addition for co-ordinating the work of the five German translators in Grade L/A 5 belonging to the group and he also replaced the head of department when she was absent.

Tension and problems arose on a number of occasions between the applicant and the other translators and as a result the five German members informed the Head of Division, Mr Pignot, in writing that they rejected the applicant in all respects as a colleague

1 — Translated from the German.

and administrator, for example in connexion with the allocation of work. The Head of Division thereupon interviewed the persons concerned and the applicant about the matter and sought to arrange a joint meeting. The meeting did not take place however, as at the last moment the applicant stated that he was not prepared to have a confrontation with the "conspirators" and that he intended to submit a complaint to the President of the Commission. In a "note for the record" of 20 June 1977 Mr Pignot stated that his attempts at effecting a reconciliation had been unsuccessful and that he had requested Miss Peppinck, the Head of the translation department of the Administrative Commission herself to distribute translations into German within her department. He had the note countersigned by all the persons concerned. In a further note on the same day the Head of Division informed the applicant in writing at the latter's own request that he had asked Miss Peppinck thereafter to distribute work between the German translators of the Administrative Commission. In the note he expressly emphasized that the step was by no means a disciplinary measure but had been taken on a provisional basis in the interest of the service solely to ensure continuity of the work.

Subsequently on 21 June 1977 the applicant sent a letter to the President of the Commission in which he requested that the Commission should immediately "take steps against officials who have formed a conspiracy against me, annul the measures taken against me by Mr Pignot (Head of Division IX/D/3) in order to comply with the demands of the conspirators and, finally, adopt appropriate measures to re-establish a healthy working atmosphere free from fear and tension amongst the translators of the Administrative Commission".

On 1 July 1977 Mr Pignot informed the applicant orally that he was not to replace the head of department who was temporarily absent.

The applicant thereupon sent a further letter to the President of the Commission, supplementing, the above-mentioned letter of 4 July 1977, requesting the annulment of the measure which in his opinion, in the absence of an appropriate decision by the Commission, constituted an infringement of Article 26 of the Internal Rules of Procedure of the Commission.

By a letter of 1 July 1977 the applicant rejected an assignment to the Task Force for Negotiations with Portugal proposed to him by Mr Ciancio, the Director, on 28 June 1977. The Director asked him in writing to reconsider the proposal, but by letter of 25 July 1977, the applicant sent a second supplementary letter to the President of the Commission asking that further consideration of his request of 21 June 1977 should be entrustred not to Mr Ciancio, the Director, and Mr Pignot, the Head of Division, but to an independent body.

By letter of 27 July 1977 Mr Baichère, the Director General, placed the applicant at the disposal of the Task Force for Negotiations with Portugal with effect from 1 September 1977. At the same time he emphasized that the "request" of the applicant of 21 June 1977 and the supplementary communication of 4 July 1977 would be examined subsequently.

Subsequently it became evident that in the Task Force for Negotiations with Portugal the applicant's duties were, for the most part, to translate from

Portuguese into French and the applicant by letter of 24 October 1977 submitted a complaint to the President of the Commission "against all the appointing authority's acts or omissions operating to my detriment in this case".

By letter of 27 October 1977, that is after the complaint had been lodged, Mr Baichère, the Director General, informed the applicant that he wished to reconsider the matter in order to find a new assignment for the applicant as soon as possible so as to take account of his merits and the interests of the appointing authority in the best possible way. In the meantime he asked the applicant to carry out the special duties given him by Mr Ciancio.

By letter of 8 February 1978, received by the applicant on 1 March 1978, Mr Commissioner Tugendhat informed the applicant that the Commission could not uphold his complaint of 24 October 1977 as examination of his request of June 1977 had revealed no evidence of the existence of any conspiracy, the decision of the Director General to assign the applicant to the Task Force for Negotiations with Portugal was based on the requirements of that Task Force and the qualifications of the applicant and finally the special duties assigned to the applicant had been allotted to him in the interests of the service and taking account of his abilities.

On 29 May 1978 the applicant lodged an application with the Court of Justice in which he claims that the Court should:

1. Declare the decision of Mr Pignot, referred to in the note of 20 June 1977, to discharge the applicant from his duties as co-ordinator of the German section of the Administrative Committee team to be null and void;

2. Declare the decision of Mr Pignot that in case of absence of his superiors the applicant should not replace them or receive a temporary posting to be null and void;

3. Declare the decision of Mr Baichère, the Director General, of 27 July 1977 moving the applicant from his post as reviser/co-ordinator in the Administrative Commission to the Task Force Portugal to be null and void;

4. So far as necessary declare the decision of Mr Baichère of 27 October 1977 putting the applicant at the disposal of Mr Ciancio, the Director, to be null and void;

5. Declare the opposite party's refusal of the applicant's request of 21 June 1977 for protection against the machinations of a number of his colleagues to be null and void;

6. Order the opposite party to pay the costs.

The defendant, the Commission, on the other hand, takes the view that the applicant has no cause of action in respect of the larger part of his claims. Accordingly it contends that the application should be dismissed as being inadmissible and, in any event, without foundation and that the applicant should be ordered to pay the costs.

My legal appraisal of this factual situation and the claims made is as follows:

I — Admissibility

I shall first examine the individual heads of claim as regards their admissibility.

1. The applicant's first head of claim is directed against the decision of the Head of Division of 20 June 1977 giving the Head of the translation department responsibility for distributing work amongst the German translators — which had previously been carried out by the applicant.

The Commission takes the view that that claim is inadmissible for failure to comply with the period for initiating proceedings. It contends that by his letter of 21 June (received on 22 June) the applicant submitted a complaint to the Commission as the appointing authority within the meaning of Article 90 (2) of the Staff Regulations. As no answer was given within the period of four months laid down by Article 90 (2) that complaint must be deemed to have been rejected by implication on 22 October. Accordingly pursuant to Article 91 (3) of the Staff Regulations the application should have been lodged on 22 January 1978 at the latest.

In addition the defendant challenges the admissibility of the claim having regard to the legal nature of the contested measure. In its view the measure of 20 June 1977 constitutes merely an internal administrative measure which leaves unaffected the applicant's position under the Staff Regulations and does not constitute a measure that can be challenged under Article 91 of the Staff Regulations.

The applicant on the other hand argues that the letter of 21 June does not constitute a complaint within the meaning of Article 90 (2) of the Staff Regulations but merely a request within the meaning of Article 90 (1). This, he states, is clear from the wording "I request" and is moreover confirmed by the letter of Mr Baichère of 27 July which similarly refers to the applicant's "request of 21 June 1977". Furthermore for one who is not a lawyer it is not always easy to distinguish between a request and a complaint and their respective consequences. In the applicant's view the Commission should therefore have drawn his attention to the fact that the letter was to be regarded as a complaint and that any application to the Court of Justice would have to be lodged within a certain period.

Moreover the measure in question, which contrary to the wording used in the note was not provisional, in fact detrimentally affects his position in the service, *inter alia* by harming his career. Even though he was not given a higher rank than his colleagues the fact cannot be denied that as co-ordinator he carried out managerial functions as against the other revisers and this certainly influenced his administrative status. The duties of a co-ordinator are given particular emphasis both in his staff report and in the "Translator's Practical Guide".

With regard to the classification of the applicant's letter of 21 June 1977 to the President of the Commission, I would say that according to the consistent case-law of the Court of Justice, in determining the nature of a legal instrument, reference should be made not to the formal criterion of the external appearance or the description of the measure by the author or a third party but solely to the objective content and the true significance of the instrument. For that reason alone the words with which the applicant headed the letter or Mr Baichère's description of it is irrelevant.

The decisive factor is rather that in that letter amongst other claims the applicant requested that the Commission should without delay "withdraw the measures taken by Mr Pignot (Head of Division IX/D/3) against me". In my opinion that wording clearly shows that the

applicant did not intend to submit a request for a decision relating to him within the meaning of Article 90 (1) of the Staff Regulations but rather sought the annulment of the measures taken against him by the appointing authority and was thus submitting a complaint within the meaning of Article 90 (2) of the Staff Regulations.

Accordingly from the date of receipt of that complaint, 22 June 1977, the periods laid down in Articles 90 and 91 of the Staff Regulations began to run. On 22 October 1977 at the latest the complaint was to be regarded as having been rejected by implication and pursuant to Article 91 (3) of the Staff Regulations the applicant should have lodged an appeal against that decision by 22 January 1978 at the latest.

The aforesaid periods are exclusive periods which the Court must apply of its own motion and which allow no scope for considerations of what is reasonable. There is no reason to emphasize particularly that the rejection of the request by the Commission of 8 February 1978 after the expiry of the periods could not set them running again.

As the letter of 21 June further shows the applicant's clear and unambiguous intention to lodge a complaint there was no reason for the Commission under the principle of good faith to call the applicant's attention to the fact that the period for lodging an application to the Court had started to run.

Furthermore I agree with the Commission that in this particular case the withdrawal of responsibility for distributing work constitutes a measure which relates solely to internal administration and does not constitute a measure which may be challenged under Article 91 of the Staff Regulations.

In the judgment in the case of *Hébrant (née Macevicius)* (Judgment of 20 May 1976, Case 66/75 [1976] 1 ECR 593) the Court held that a measure coming within the power of internal organization of an institution can be actionable under Article 91 of the Staff Regulations only if it adversely affects the rights which the person concerned has under Articles 5 and 7 of those regulations, especially by requiring him to carry out duties which do not correspond to his post and grade. For such to be the case, it is not sufficient that the said measures should bring about a change or even any reduction in the responsibilities of the person concerned, but it is necessary that, taken together, his remaining responsibilities should fall clearly short of those corresponding to his grade and post, taking account of *their character, their importance and their scope* (see also in this respect Case 16/67 *Labeyrie* v *Commission* [1968] ECR 293; and Case 129/75 *Hirschberg (née Nemirovsky* v *Commission* [1976] 2 ECR 1259).

It is clear from the facts that in the course of 1975 the applicant, a reviser in Grade L/A 4, was orally entrusted with the co-ordination of work of the other five German translators in the Administrative Commission. In this respect it should first be observed that the post of co-ordinator as such is not mentioned in the list of basic posts and corresponding career brackets in Annex I A to the Staff Regulations. On the other hand in the Translator's Practical Guide of October 1975 issued by the Directorate General for Personnel and Administration it is emphasized that the activities of a co-ordinator concern purely technical matters. It is there

expressly stated that authority is wholly in the hands of the Head of Division who also bears sole responsibility for distributing work. The position of co-ordinator is thus not linked to the post and the rights of an official under the Staff Regulations. The withdrawal of such activities led, it is true, to a reduction in the scope of the applicant's duties but it did not detrimentally affect his legal position under the Staff Regulations. Withdrawal of responsibility for co-ordination therefore related exclusively to internal matters and the running of the administration which the applicant's superiors are empowered to lay down and alter in accordance with the requirements of the service. In this respect the provisional or final nature of the measure is not relevant.

The applicant is, it is true, right in saying that the mention of the functions of a co-ordinator in the staff report may affect an official's career and his promotion prospects. That fact alone however does not entitle an official to continue to carry out such duties which were assigned for reasons internal to the service and which are not related to his post.

To summarize therefore I conclude that the first claim must be rejected as inadmissible both because the application was lodged out of time and because the applicant has no legal interest.

2. Under the second head of claim the applicant seeks the annulment of the oral decision of Mr Pignot of 1 July 1977 by virtue of which, in the absence of his superiors, the applicant was not to replace them.

The Commission takes the view that this claim is also inadmissible because it was lodged out of time. It further points out that the decision in question was not intended to have general effect but related exclusively to the replacement of the head of the department, Miss Peppinck, during her annual leave in 1977. For that reason that decision as well, the Commission claims, cannot be regarded as an act adversely affecting the applicant within the meaning of Article 90 (2) of the Staff Regulations.

The applicant on the other hand once again wishes the letter of 4 July 1977 to be regarded as a mere request and not a complaint and regards the refusal to allow him to replace his superior as a measure with lasting effects.

It is clear from the applicant's letter of 4 July 1977 to the President of the Commission that, irrespective of the description given, the applicant wished to lodge a complaint against a measure adversely affecting him when he wrote: I request the withdrawal of the measure taken against me ...". In this respect I refer to my observations regarding the first head of claim. As the Commission gave no answer to that complaint by 4 November it is to be regarded as having been rejected by implication as from that date and the applicant should have made an application to the Court against that implied decision by 4 February 1978 at the latest. The application lodged on 29 May 1978 is therefore also inadmissible in this respect.

The Commission's statement that the measure in question related only to the special cast of the absence of the head of department of leave in 1977 must also be accepted. That is also supported by the fact that in the letter of 4 July 1977 the applicant himself states that Mr Pignot had informed him that "he had decided that I (the applicant) would not replace the head of the department, who was temporarily absent". In view of that

there can be no doubt that this measure, which was of very limited duration, did not affect the applicant's administrative position but is merely to be regarded as a measure relating to administrative matters which cannot be challenged under Article 91 of the Staff Regulations.

Against that it is also not possible to rely on the argument that the applicant was not subsequently asked to replace the head of department. As the Commission also points out that is the consequence not of the contested oral decision but of the fact that pursuant to further decisions to which I shall refer subsequently the applicant no longer worked in the Administrative Commission's translation department.

3. Finally the applicant's third claim is directed against the decision of Mr Baichère, the Director General, of 27 July 1977 by virtue of which the applicant was placed at the disposal of the Task Force for Negotiations with Portugal with effect from 1 September 1977.

The defendant contends that that claim too is inadmissible. On the one hand it submits that the claim lost its object before the application was lodged as the decision in question had been cancelled by then and, on the other, it takes the view that like the other measures it is merely an internal administrative measure adopted in the interests of the service.

The applicant raises the objection that cancellation did not take place because the unlawfulness of the decision had been recognized. The fact that by that measure he had been deprived of his former duties in itself constitutes ground for complaint. Although the decision was cancelled it had produced material and non-material effects; for that reason annulment of the measure would constitute reparation for him.

In fact the decision was cancelled by the decision of Mr Baichère, of 27 October 1977, that is, after the submission of the applicant's complaint through official channels on 24 October and before his application was filed. The appeal has therefore in principle lost its object (see Joined Cases 126/75, 34 and 92/76 *Giry* v *Commission*, judgment of 27 October 1977, [1977] 2 ECR 1937). In order none the less to show that he has a need for legal protection the applicant must produce additional substantiated and objectively conclusive evidence of an interest requiring protection in the subsequent annulment of a measure which no longer has any effect. Such a situation might be assumed to exist if the "transfer" had been formally or substantially defective of if it had been a disciplinary measure.

It is clear from the wording of the decision itself that the applicant was not transferred to the Task Force — only the appointing authority would have had power to do that pursuant to Article 7 of the Staff Regulations — but was merely placed at the disposal of that group with the result that his administrative position and his rights under the Staff Regulations were not affected. In the decision it is further expressly emphasized that the applicant was assigned to that group only on account of the needs of the service and the applicant's recognized qualifications as a reviser. Such wholly positive reasons cannot in themselves detrimentally affect the applicant's career and promotion prospects. In addition we have heard that the Task Force in fact

required translators with a knowledge of Portuguese.

Finally Mr Baichère's decision is not unlawful, either, because the applicant thereby lost his duties as co-ordinator and the possibility of replacing the head of the department in the Administrative Commission. As I have already stated, responsibilities exercised within the framework of the internal administration of an authority may at any time be revoked by an administrative measure. The question of acting in place of Miss Peppinck no longer arose after the applicant was placed at the disposal of the Task Force.

Taking all those circumstances into account I conclude that the applicant has no special interest in the annulment of the decision which is no longer effective. For that reason I propose that the third claim should be dismissed for lack of an interest requiring legal protection.

4. The fourth claim finally seeks the annulment of the decision of the Director General of 27 October 1977 whereby the applicant was placed at the disposal of Mr Ciancio to carry out special duties.

As that decision was taken only three days after the applicant's complaint of 24 October 1977 it did not form the subject of a complaint through official channels of the kind referred to in Article 90 (2) of the Staff Regulations. The claim must therefore be dismissed as inadmissible for lack of a prior complaint through official channels.

II — Substance

As the first four claims have proved to be inadmissible it is no longer necessary for me to examine the question whether they are well-founded. Furthermore it is clear from my observations regarding admissibility that if the claims were held to be admissible I should take the view that they were without foundation as all the contested measures are internal administrative measures to remove obstacles to the smooth functioning of the service, which did not stand in the way of the applicant's assignment to a post corresponding to his grade. That is in particular also true of Mr Baichère's last decision whereby the measure moving the applicant to the Task Force was cancelled. As we have heard, he has been given responsibility within that same directorate for carrying out difficult translations and revising translations. The scope of those duties is no less having regard to their type, importance and extent than those corresponding to Grade L/A 4 and the applicant's post.

I therefore now have to examine only the applicant's last claim directed against the rejection of his request for protection against the machinations of his colleagues, the admissibility of which is not open to doubt.

The applicant relies on the first paragraph of Article 24 of the Staff Regulations under which: "The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances ... to which he ... is subjected by reason of his position or duties". He regards the letter from his colleagues of 15 June 1977 notifying the Head of Division of their refusal to collaborate with the applicant as a conspiracy defaming him. In addition he alleges that the Head of Division, Mr Pignot, was not competent to satisfy the duty to provide assistance set out in Article 24 of the Staff Regu-

lations as for officials in Grade L/A 4 the duty is incumbent upon the Commission which has not delegated its powers in that respect.

The defendant on the other hand refers to the judgment in Case 128/75 *(Mr N.* v *Commission,* judgment of 18 October 1976, [1976] 2 ECR 1567) and states that pursuant to Article 24 of the Staff Regulations the administration must act and take all necessary steps only when there are serious accusations as to the integrity of an employee in his official capacity. The said letter refusing to work with the applicant however does not constitute such serious defamation and Mr Pignot did everything to resolve the problem.

If we first examine the facts, the notes which had already been exchanged before 15 June 1977 show that tension and problems existed in the applicant's department — I shall give no opinion as to the question of blame — which hindered the smooth functioning of the service. In my opinion it is not necessary here to answer the question whether, taking those circumstances into account, the letter in question already constituted a serious unlawful attack on the integrity of the applicant in his official capacity. In any event the Head of Division after hearing the two sides took appropriate steps by asking the opposing parties to sit down at a table to settle their differences. As the applicant did not accept that invitation he must bear responsibility for the failure of the attempt at reconciliation. There can also be no doubt that, as the official's superior, the Head of Division was competent for that purpose as Article 24 states only that where certain unlawful situations exist the Communities must provide assistance.

In the light of such a situation the administration was certainly entitled to seek to remove the source of friction by severing the official relationship so as to ensure the smooth functioning of the service. Similarly the applicant has not produced sufficient evidence to show that those measures are to be regarded as a "conspiracy". From the letter of the Commission of 8 February 1978 it is clear that even after that the whole situation was reviewed.

I therefore conclude that the fifth claim must be dismissed as being without foundation.

In view of the foregoing I propose that the application should be dismissed and that under Articles 69 and 70 of the Rules of Procedure each party should bear its own costs.