OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 June 2000 *

I — Introduction

1. The Council has brought the present appeals to challenge the annulment by the Court of First Instance of certain decisions adopted by the Court of Justice in its capacity as appointing authority for Christiane Chvatal and Others and Antoinette Losch (the applicants at first instance; 'the applicants'). [1] By those decisions the Court of Justice rejected the applicants' requests that their names be entered on the list of persons having expressed an interest in their service being terminated (early), as made possible by Council Regulation (EC, Euratom, ECSC) No 2688/95 of 17 November 1995 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Austria, Finland and Sweden [2] ('the Regulation'). However, the Regulation authorises such measures to be adopted only in respect of officials of the European Parliament.

II — Legal background

2. The legal basis for the Regulation was Article 24(1) of the Treaty establishing a Single Council and a Single Commission of the European Communities ('the Merger Treaty'). Prior to amendments made by the Treaty of Amsterdam it provided as follows:

'The officials and other servants of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community shall, at the date of entry into force of this Treaty, become officials and other servants of the European Communities and form part of the single administration of those Communities.

The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of other servants of those Communities.'

* Original language: German.

1 — Judgments of the Court of First Instance of 30 September 1998 in Case T-154/96 *Chvatal and Others* v *Court of Justice* [1998] ECR-SC I-A-527 and II-1579 and Case T-13/97 *Losch* v *Court of Justice* [1998] ECR-SC I-A-543 and II-1633.

2 — OJ 1995 L 280, p. 1.

(This version was repealed by the Treaty of Amsterdam and replaced by identical provisions in Article 9(3) of the Treaty of Amsterdam (first subparagraph) and Article 283 EC (second subparagraph).)

3. The second sentence of the second paragraph of Article 10 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') states:

'The [Staff Regulations] Committee shall be consulted by the Commission on any proposal for the revision of the Staff Regulations ...'.

4. Article 90 of the Staff Regulations reads as follows:

'1. Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. ...

2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him ...'.

5. Article 184 of the EC Treaty (now Article 241 EC) states:

'Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 173, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 173 in order to invoke before the Court of Justice the inapplicability of that regulation' (Article 173 of the EC Treaty is now, following amendment, Article 230 EC).

III — Facts

6. The Commission, having on 21 June 1995 obtained a favourable opinion from the Staff Regulations Committee pursuant to the second paragraph of Article 10 of the Staff Regulations, presented a proposal on 7 July 1995 for a 'Council Regulation (EC) introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Austria, Finland and Sweden' [3] ('the initial proposal').

3 — COM(95) 327 final, OJ 1995 C 246, p. 23.

7. Under Article 1, the purpose of the initial proposal was to authorise — in the interests of the service and in order to take account of requirements resulting from the accession of Austria, Finland and Sweden to the European Communities — the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors and the Economic and Social Committee, until 30 June 2000, to adopt measures terminating the service of officials who had reached the age of 55, with the exception of those in Grades A 1 and A 2 (the 'release' of officials).

8. Article 3 of the initial proposal states that the officials affected by these measures for their release — also called a 'golden handshake' — are to be selected by the Community institution, in the interests of its service in connection with enlargement, after it has given staff the opportunity to express their interest and consulted the Joint Committee. In so doing, it must take into consideration the age, ability, efficiency, conduct in the service and family situation of the officials, as well as their seniority which must be a minimum of 10 years. Under no circumstances may measures for the release of officials be applied without the consent of the official concerned.

9. Under Article 4 of the initial proposal, a released official is entitled to a monthly allowance equal to 70% of the basic salary for the grade and step held at the time of departure. Entitlement to this allowance ceases no later than the last day of the month in which the former official attains the age of 65 and in any event as soon as he, before attaining that age, is eligible for the maximum retirement pension. In that case he automatically receives a retirement pension.

10. Under the initial proposal, the Court of Justice was authorised to adopt measures to release 25 officials.

11. The initial proposal was submitted to the Community institutions concerned for their opinion, pursuant to Article 24 of the Merger Treaty. [4] The Parliament, the Court of Justice and the Court of Auditors gave a favourable opinion on 25 September, 12 October and 26 October 1995 respectively.

12. During the legislative process the Commission declared that, in order to facilitate decision-making within the Council, it was willing to split the initial proposal and to accept that the Council would accord priority to dealing with measures for the release of Parliament officials only. [5]

4 — For the wording thereof, see point 2 above.

5 — Council document No 11098/95 of 31 October 1995, reproduced in Annex III(d) to the Council's statement in intervention at first instance.

13. On 17 November 1995 the Council accordingly adopted the Regulation,[6] authorising only the Parliament to release a total of 70 officials employed by it.

14. Between 6 February and 16 July 1996 the applicants submitted to the Court of Justice, in its capacity as appointing authority, requests that their names be included on the list of persons having expressed an interest in a measure for their release. The Registrar of the Court of Justice declined to react favourably to those requests since there were no rules which permitted the Court of Justice to adopt measures for the release of staff.

15. Thereupon the applicants submitted complaints pursuant to Article 90(2) of the Staff Regulations, but they were rejected.

16. On 8 October 1996 and 20 January 1997 respectively the applicants then brought actions before the Court of First Instance. The Council and the Netherlands intervened in the proceedings in support of the Court of Justice.

IV — Judgment of the Court of First Instance

17. By judgments of 30 September 1998[7] the Court of First Instance annulled the decisions of the Registrar of the Court of Justice. In support of its decision it relied, *inter alia*, on the following grounds:

1. *The admissibility of the action*

18. Article 90(1) of the Staff Regulations provides, without restriction, that any person to whom the Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The exercise of that right is not conditional on the existence of any legal basis permitting the administration to adopt the decision requested; nor it is hindered by the fact that the administration has no margin of discretion as regards its adoption.

19. A decision of the appointing authority rejecting a request for entry on the list of officials interested in being released, on the ground that the Regulation was not applicable in the institution concerned, directly and immediately affected the legal situation of the officials concerned. The decision prejudiced the applicants, inasmuch as they could no longer claim the benefit of the measures in question, whether by partici-

6 — Cited in point 1 above.

7 — Cited in footnote 1.

pating in another procedure or by any other means, and inasmuch as the institution concerned had not, after the decision rejecting the requests, taken any final decision which those officials could challenge.

20. Furthermore, although entry on the list in question constituted merely a preparatory act which did not mean that the measures requested would definitely be granted, a refusal on the aforementioned ground to take into consideration an expression by an official of interest in being released clearly and definitely operated, in the absence of adoption by the Council of the Commission's proposal for a similar regulation applicable to the official in question, to deprive him of the benefit of that measure, and therefore adversely affected him.

2. *Substance*

(a) The objection of illegality (admissibility)

21. The objection of illegality provided for in Article 184 of the EC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, with a view to obtaining the annulment of a decision addressed to him, the validity of the regulation forming the direct legal basis of that decision and, more broadly, the validity of any provision of a regulation which may in the circumstances be relevant to the adoption of that decision.

22. The contested decision was based on the fact that, unlike the initial proposal, the Regulation applied only to officials of the Parliament, and that, by necessary implication, it did not therefore cover officials of other Community institutions, including the Court of Justice. Consequently, the decision was based on the implicit exclusion by the Regulation of a specific class of persons. The illegality of a regulation may result from the fact that a specific class of persons is excluded from its scope. Accordingly, the objection of illegality raised against the Regulation fell within the scope of Article 184 of the EC Treaty.

23. The argument that this objection was premature was incorrect. At the time of the hearing before the Court of First Instance rules for institutions other than the Parliament had still not been adopted, while the applicants' rights were alleged to have been infringed since the adoption of the Regulation.

24. Finally, the argument that the appointing authority had no choice but to apply the Regulation and therefore to reject the requests could not be accepted. The fact that the appointing authority was legally bound to apply the Regulation did not

prevent the applicants from exercising their right under Article 184 of the EC Treaty to bring before the Community judicature a claim for a declaration that the Regulation was inapplicable.

(b) The objection of illegality (substance)

— Breach of the principle of equal treatment

25. The general principle of equal treatment requires that comparable situations should not be treated differently unless such differentiation is objectively justified. In a matter involving the exercise of discretion, that principle is disregarded where the institution makes a differentiation which is arbitrary or manifestly inappropriate in relation to the objective pursued.

26. By restricting the scope of the Regulation to the Parliament alone, despite the fact that other institutions had indicated their intention, like the institution to which the Regulation applied, to adopt measures for the release of officials and had undergone a comparable change in their complement of staff, the Council differentiated between the situations of those institutions in a manner which was arbitrary or, at the very least, manifestly inappropriate.

— Infringement of essential procedural requirements

27. Consultation of the Parliament under Article 24 of the Merger Treaty, which enables it in particular to participate effectively in the Community's legislative process, is an essential feature of the institutional balance which the Treaties seek to achieve. Due consultation with the Parliament pursuant to that provision therefore constitutes an essential procedural requirement non-compliance with which renders the act in question void.

28. The Parliament must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself. The amendment of a proposal does not concern the essence of the text, taken as a whole if, first, it forms part of the objective pursued by the text in question and, second, it does not affect the fundamental scheme of that text. The amendment made to the initial proposal went to its essence. Nor did it correspond to the wish expressed by the Parliament. That institution had approved the initial proposal in its opinion. It thus expressed the wish that all the institutions should be able to adopt measures to release

officials. Moreover, it expressly asked to be reconsulted in the event of any substantial amendment. Accordingly, the Parliament should have been consulted again before the Council adopted the amended version of the initial proposal.

29. In addition, the second sentence of the second paragraph of Article 10 of the Staff Regulations requires the Staff Regulations Committee to be consulted by the Commission on any proposal for revision of the Staff Regulations. That provision imposes on the Commission a consultation obligation which extends not only to formal proposals but also to the introduction by it of substantial amendments to proposals which have already been considered, unless, in the latter case, the amendments correspond, in essence, to those proposed by the Staff Regulations Committee. That way of proceeding is justified by the wide scope which the provision in question attaches to the obligation laid down by it. Furthermore, that interpretation is dictated by the role assumed by the Staff Regulations Committee which is called upon to express the interests of the Community civil service as a whole.

30. The Staff Regulations Committee issued an opinion in favour of the initial proposal on 21 June 1995. However, the amendment made to the initial proposal by the Commission in the course of the legislative procedure was substantial. Nor did it correspond to any amendment proposed by the Staff Regulations Committee. Accordingly, the Staff Regulations Committee should have been consulted again.

3. *Outcome*

31. The Court of First Instance therefore held as follows in the operative part of the judgment in *Chvatal and Others*:

'The Court hereby:

1. Annuls the decisions of the Court of Justice addressed:

   — on 28 February 1996 to Christiane Chvatal,

   — on 24 April 1996 to Jean-Yves Delaval,

   — on 28 February 1996 to Jean Demaeght,

   — on 28 February 1996 to Giovanna Dragoni,

   — on 28 February 1996 to John Hambly,

   — on 24 April 1996 to Marc Kemmerling-Laleure,

   — on 11 March 1996 to Kirsten Lammar,

   — on 28 February 1996 to Théo Lippert,

   — on 28 February 1996 to Angus Mackay,

— on 28 February 1996 to Kaj Østergaard,

— on 28 February 1996 to Maureen Russell,

— on 11 March 1996 to Ulrike Sinter,

— on 28 February 1996 to Aristides Vlachos,

— on 28 February 1996 to Hans Gerhard Weller,

rejecting their requests that their names be entered on the list of persons having manifested their interest in being the subject of a decision terminating their service, as provided for by Council Regulation (EC, Euratom, ECSC) No 2688/95 of 17 November 1995 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Austria, Finland and Sweden;

2. Orders the Court of Justice to bear its own costs and those of the applicants;

3. Orders the Kingdom of the Netherlands and the Council of the European Union to bear their own costs.'

32. The operative part of the judgment in *Losch* reads:

'The Court hereby:

1. Annuls the decision of the Court of Justice of 22 July 1996 rejecting the request made by Antoinette Losch on 16 July 1996 that her name be entered on the list of persons having manifested their interest in being the subject of a decision terminating their service, as provided for by Council Regulation (EC, Euratom, ECSC) No 2688/95 of 17 November 1995 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Austria, Finland and Sweden;

2. Orders the Court of Justice to bear its own costs and those of the applicant;

3. Orders the Kingdom of the Netherlands and the Council of the European Union to bear their own costs.'

V — Procedure and forms of order sought

33. The Council brought appeals against those judgments on 1 December 1998. It claims that the actions were inadmissible if only because a request within the meaning of the Staff Regulations requires a legal basis, which is absent in the present case. A mere finding of the absence of a legal basis cannot adversely affect an official. By nevertheless annulling the decision of the Registrar, the Court of First Instance failed to observe the institutional balance enshrined in Article 4 of the EC Treaty (now Article 7 EC). Moreover, the Court should not have upheld the objection under Article 184 of the EC Treaty that the Regulation is invalid, but should have referred the applicants to the possibility of a direct action. As regards the substance of the judgments, the Council pleads that the principle of equal treatment and the principles governing consultation of the Parliament and the Staff Regulations Committee were misapplied.

34. The Council accordingly claims that the Court should:

— set aside the judgment of the Court of First Instance of 30 September 1998 in Case T-154/96 between Christiane Chvatal and Others and the Court of Justice supported by the Council of the European Union and the Kingdom of the Netherlands;

— set aside the judgment of the Court of First Instance of 30 September 1998 in Case T-13/97 between Antoinette Losch and the Court of Justice supported by the Council of the European Union and the Kingdom of the Netherlands;

— in its discretion, make an appropriate order as to the costs of the proceedings before the Court of Justice.

35. In the view of the applicants, the appeal is inadmissible since the judgment of the Court of First Instance of 30 September 1998 in Case T-164/97, [8] pronounced in a parallel case on identical grounds, has become definitive and thus the illegality of the Regulation has been definitively established. In the alternative, the applicants contest the arguments which the Council puts forward in its appeal.

36. The applicants in *Chvatal* therefore contend that the Court should:

— declare inadmissible the appeal lodged by the Council against the judgment of the Court of First Instance (Fifth Chamber) of 30 September 1998 in

8 — *Busacca and Others* v *Court of Auditors* [1998] ECR-SC I-A-565 and II-1699.

Case T-154/96 between Christiane Chvatal and Others and the Court of Justice supported by the Council of the European Union and the Kingdom of the Netherlands;

— accordingly dismiss the appeal and order the Council to bear all the costs;

— in the alternative, declare the appeal unfounded and order the Council to bear all the costs.

37. The applicant in *Losch* contends that the Court should:

— declare inadmissible the appeal lodged by the Council against the judgment of the Court of First Instance (Fifth Chamber) of 30 September 1998 in Case T-13/97 between Antoinette Losch and the Court of Justice supported by the Council of the European Union and the Kingdom of the Netherlands;

— accordingly, dismiss the appeal and order the Council to bear all the costs;

— in the alternative, declare the appeal unfounded and order the Council to bear all the costs.

VI — Legal appraisal

1. *The admissibility of the appeal*

38. The applicants submit that the appeal is inadmissible. At least the appeal lodged by the Council against the judgment of the Court of First Instance in *Busacca*, [9] which was pronounced in a parallel case on identical grounds, is inadmissible under the third paragraph of Article 49 of the EC Statute of the Court of Justice because the Council did not intervene in that case. Thus, the illegality of the Regulation has been definitively established. The applicants conclude that there is accordingly no legitimate interest in bringing the present appeals.

39. In that respect it should be noted that the effect of a finding, on an indirect challenge, that a regulation is inapplicable on the grounds set out in the second

9 — Case T-164/97, cited in footnote 8; see the Opinion of today's date in Case C-434/98 P *Council* v *Busacca and Others*, pending before the Court.

paragraph of Article 173 of the EC Treaty is limited to the legal relationship between the parties concerned. [10] If the judgment of the Court of First Instance in *Busacca* were to become definitive in this regard, that could not therefore prevent the Court of Justice from reaching a different conclusion regarding the inapplicability of the Regulation in the present case. Accordingly, this plea put forward by the applicants must be rejected.

2. *The substance of the appeal*

(a) The admissibility of the original action

Submissions of the parties

40. The Council takes the view that the assessment of the Court of First Instance concerning the admissibility of the action is incorrect in law. Any persons to whom the Staff Regulations apply have an unrestricted right to submit requests falling within the scope of those regulations. However, the right to submit requests cannot in law be exercised on any account in the absence of a legal basis.

10 — Joined Cases 31/62 and 33/62 *Wöhrmann* v *Commission* [1962] ECR 501, at p. 507, and Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177, paragraphs 36, 37 and 38.

41. In the present case, there cannot have been an act adversely affecting the applicants because, in its response, the appointing authority merely stated that, under the legislation as it then stood, there was no legal basis enabling release to take place. Only if other legislation had been adopted could the applicants' legal position have been altered. In a Community based on the rule of law the appointing authority is bound by provisions of secondary legislation so long as they have not been held invalid. By now creating retrospectively a notional legal measure to extend the Regulation, which the Council was, however, not required to adopt, the Court of First Instance has failed to observe the institutional balance.

42. Furthermore, the Court of First Instance erred in declaring that the objection of illegality raised pursuant to Article 184 of the EC Treaty against the Council's regulation was admissible. In order for an objection of illegality to be admissible, the application for annulment must itself be founded on a substantial cause of action, the objection of illegality constituting one of the pleas put forward in support of that application. In the present case, the application was in reality aimed solely at contesting the Regulation.

43. The Kingdom of Spain concurs with the Council's view in all respects. Spain observes that in the present case there was no decision adversely affecting an official since the letters of rejection expressly contemplated regard being had to the applicants' requests should the Council adopt the relevant legislation. An objection of inapplicability pursuant to Article 184

of the EC Treaty can be raised only within the framework of an action and not in isolation. However, in the present case there is no such action. In particular, no action for failure to act pursuant to Article 175 of the EC Treaty (now Article 232 EC) can be brought, since the Council is not required by law to adopt a regulation on terminating the service of officials of the Court of Justice.

44. The applicants take the view that the requirements which the Council places on requests within the meaning of Article 90(1) of the Staff Regulations have no basis in that provision and the case-law of the Court. As regards the failure to observe the institutional balance alleged by the Council, they refer to Article 176 of the EC Treaty (now Article 233 EC) under which the institutions are required to take the necessary measures to comply with judgments.

Appraisal

45. As all the parties correctly observe, the European Community is a community based on the rule of law. According to settled case-law, it follows that neither the Member States nor the Community institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to permit the Court to review the legality of measures adopted by the institutions. [11] Accordingly, the Court must apply the Community system of legal remedies and procedures in such a way that effective legal protection is provided against any infringement of the law by the institutions.

46. Furthermore, the Court has already decided a case which, at least as regards admissibility, is comparable, namely *Razzouk*. [12] In that case Mr Razzouk applied for a widower's pension as the surviving spouse of a Community official. It was not disputed that under the provisions of the Staff Regulations applicable at that time the necessary conditions for such entitlement were not satisfied in his case. For that reason the Commission rejected his request and the subsequent complaint. At that time the Staff Regulations granted such a widower's pension only under conditions much less favourable than those applicable to a widow's pension. Mr Razzouk therefore based his action on a breach of the principle of equal treatment of men and women. The facts of that case are thus similar to those of the present case inasmuch as there is no doubt that, on the wording of the applicable secondary legislation, no legal basis existed for the request which was submitted. The action brought by Mr Razzouk also necessarily sought an amendment of existing secondary legislation and presupposed a finding that the existing regulation laying down the Staff Regulations was inapplicable with regard to the grant of widowers' pensions. None

11 — Judgments in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23, and in Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 16; order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraph 16; Opinion 1/91 [1991] ECR I-6079, paragraph 21; and judgment in Case C-314/91 *Weber* v *Parliament* [1993] ECR I-1093, paragraph 8.

12 — Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509.

of those points was raised in that case, but the Court upheld Mr Razzouk's view and found in his favour. Given the clear and definite language in that judgment, there would appear to be no possibility that Court would have accepted the objections of inadmissibility raised in the present case and dismissed the action.

47. If the judgment of the Court of First Instance and the Council's objections as to the admissibility of the action are viewed in this light, the grounds of appeal contesting the admissibility of the action must be rejected.

48. It is true that the right to submit requests under Article 90 of the Staff Regulations cannot be interpreted as permitting members of staff, unlike all other unprivileged applicants under the fourth paragraph of Article 173 of the EC Treaty, to bring about an abstract review of the legality of measures of general application. [13] Furthermore, the appointing authority could not grant the applicants' requests since, if only for reasons of budgetary law, it cannot take measures to terminate the service of officials under the conditions laid down by the Regulation in the absence of a relevant legal basis derived from secondary legislation. [14] However, it does not follow that the request has no legal basis and consequently merely seeks an abstract review of the Regulation's legality. Instead, the claim asserted by the request is based on the view that the restriction of the Regulation to Parliament officials infringes the general prohibition of discrimination and that this infringement is to be rectified by granting the applicants similar advantages in their capacity as officials of the Court of Justice. [15] Whether this view as to the effects of the prohibition of discrimination in the present case is correct is, however, not a question of admissibility and must be dealt with instead within the context of the substance of the case.

49. The rejection of the applicants' requests also adversely affects them for the purposes of Article 90(2) of the Staff Regulations since those requests are aimed at securing an entitlement. Nor can the reservation regarding a change in the legal position alter this finding. It is not possible to secure the entitlement at least until the relevant decisions have been adopted. Consequently, the action is in principle also admissible under Article 91 of the Staff Regulations.

13 — Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, paragraph 9.

14 — Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 22; however, see also the specific order to pay in *Razzouk*, cited in footnote 12, paragraph 19; with regard to the fact that the power to declare secondary legislation invalid is a judicial power, see Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paragraph 5.

15 — Besides, even where no authorisation to adopt a favourable decision exists under secondary legislation, the procedure provided for in Articles 90 and 91 of the Staff Regulations can fulfil its purpose if the appointing authority recognises, by means of such requests, that superior rules of law require the adoption of supplementary secondary legislation, submits appropriate suggestions to the Commission and, where appropriate, defers a decision on the requests submitted by members of staff.

50. Since, in accordance with the foregoing considerations, the prohibition of discrimination is to be regarded as a possible legal basis for the claim which has been asserted, the fact that, as found by the Court of First Instance, members of staff of other institutions are excluded from the benefit of the Regulation loses the meaning attributed to it by the Court of First Instance and the parties. The illegality of the Regulation should not be regarded as the basis for the action but merely as a consequence of a possible finding that officials of other institutions have been subject to unlawful discrimination, limited to the failure to include the applicants. Therefore, the validity of the Regulation and the admissibility of the objection that it is inapplicable within the meaning of Article 184 of the EC Treaty need not be considered.

(b) The substance of the original action

— The need to reconsult the Parliament

Submissions of the parties

51. As regards the allegation that the institutional balance — Article 4 of the EC Treaty — has not been observed, the need to adopt appropriate provisions follows under Article 176 of the EC Treaty from every judicial decision which, on the basis of the prohibition of discrimination, requires the extension of a benefit to persons excluded under secondary legislation. It appears to be argued by that plea that judicial decisions of this nature would be contrary to the institutional balance. However, within the very institutional balance of the Community — which is a community based on the rule of law — the judiciary has the primary duty of ensuring effective legal protection. This legal protection must also cover cases in which secondary legislation restricts access to a benefit in contravention of the prohibition of discrimination. Otherwise, it would not be possible to provide effective legal protection in cases of this kind. Accordingly, the Court holds that the prohibition of discrimination is infringed in such cases relating to the grant of an advantage. [16] The risks for the institutional balance which nevertheless exist in the case of decisions of this kind must be dealt with not at the level of admissibility, but when assessing whether there is unlawful discrimination. [17]

52. The Council considers that it is wrong to accept that the European Parliament should have been consulted again. All the parties to the legislative process — the European Parliament, the Council and the Commission — were aware that the reg-

16 — The Court does so expressly in *Razzouk*, cited in footnote 12, paragraph 19: 'Following upon that annulment, it is for the Community legislature to accept the consequences of the present judgment and to take the necessary measures to establish equality between the sexes as regards the Community pension scheme'. See also Case 156/78 *Newth* v *Commission* [1979] ECR 1941, paragraph 13, where the Court does so in the guise of an 'interpretation', and Case 20/71 *Sabbatini* v *Parliament* [1972] ECR 345.

17 — See point 59 et seq. below.

ulations concerning the release of staff applicable solely to the European Parliament met a pressing desire on the part of the latter. Therefore, flexibility in the Community legislative process, which is necessary in order to achieve a convergence between the views of the institutions, should apply in the present case as regards the form in which the European Parliament may communicate its opinion to the Council or its assent to an amendment of the proposal initially submitted by the Commission. In the present case, excessive adherence to formalities would impede the proper functioning of the legislative process, whilst not meeting any need.

53. The Kingdom of Spain takes the view that the Regulation does not diverge substantially from the proposal on which the Parliament was consulted or from the wishes of the Parliament. The differences between the proposal and the Regulation are justified, officials have no right to termination of their service and the number of Parliament officials affected did not change. Therefore, it was not necessary to reconsult the Parliament.

54. In the view of the applicants, the Council contradicts its own statements on the democratic importance of consulting the Parliament if it disputes the necessity of reconsulting the Parliament with regard to adoption of the Regulation.

Appraisal

55. Although a plea alleging failure to consult the Parliament relates to the safeguarding of its rights, the Court has consistently held that any person may rely on such failure in an otherwise admissible action in order to establish that a measure is unlawful. [18] In the present case, it may remain open whether this case-law must be followed. As has already been stated, the decisions at issue are not founded on the Regulation, but might be subject to annulment at most because they infringe the prohibition of non-discrimination. Furthermore, if the Regulation were inapplicable there would still be no right of access to early termination of service as provided for by the Regulation.

— The need to reconsult the Staff Regulations Committee

Submissions of the parties

56. The Council also criticises the finding of the Court of First Instance that it was necessary to reconsult the Staff Regulations Committee. The committee cannot be

18 — Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 32 et seq.; Case 139/79 *Maizena* v *Council* [1980] ECR 3393, paragraph 33 et seq.; and Joined Cases C-13/92 to C-16/92 *Driessen and Others* [1993] ECR I-4751, paragraph 23.

compared with the Parliament. Such an extension of the need for reconsultation would then also have to apply to many other consultative bodies. That would cause considerable disruption to the legislative process. Nor does the Regulation involve an amendment of the Staff Regulations, which is the only instance where consultation of the Staff Regulations Committee is required. The Kingdom of Spain concurs with those arguments and reiterates that the Regulation does not diverge substantially from the proposal.

57. The applicants observe that the Staff Regulations Committee also consists of democratically elected representatives, that is to say representatives of the staff. Since the Council recognises the rights of participation of democratic institutions, the refusal to reconsult the Staff Regulations Committee is contradictory.

Appraisal

58. As has already been established with regard to consultation of the Parliament, it may remain open whether it was necessary to reconsult the Staff Regulations Committee. In this regard too, any procedural errors would be irrelevant as regards the validity of the contested decisions of the Court of Justice. Consequently, there is no need to comment further on this matter.

— The prohibition of discrimination

Submissions of the parties

59. Finally, the Council argues that the principle of non-discrimination has been applied incorrectly. The Court of First Instance's conclusion that the Council drew a distinction which is arbitrary, or at least manifestly inappropriate in relation to the objective pursued, is incorrect in law. The distinction drawn between officials of the Parliament and officials of the Court of Justice is justified on at least three grounds:

1. the Parliament undertook not to increase its complement of staff for five years;

2. this undertaking is of particular importance because the Parliament employs a large number of staff — far more than the Court of Justice;

3. the Parliament called for the immediate submission of a proposal for a regulation with respect to its staff, as is also reflected in the preamble to the Reg-

ulation, whereas the Court of Justice simply announced that it intended to release a number of its officials.

60. The applicants, on the other hand, point out that, in accordance with Article 1 of the Staff Regulations, all Community officials enjoy the same rights, and are subject to the same obligations, stemming from the Staff Regulations, irrespective of their appointing authority. The Regulation is legislation of lower rank than the Staff Regulations and consequently cannot justify a derogation from the Staff Regulations in favour of officials of the Parliament.

Appraisal

61. The Court has consistently held that it is 'contrary to the general principle of equal treatment, which is one of the fundamental principles of Community law, for comparable situations to be treated differently unless the difference in treatment is objectively justified'. [19]

62. This principle applies in a particular way as between Community officials. At the level of primary law Article 24(1) of the Merger Treaty expressly provides that all officials form part of an integrated Community administration. The Staff Regulations give concrete expression to this principle of equal treatment laid down in the law governing officials in that they in principle apply uniformly to all Community officials and they contain, in individual provisions, specific requirements for equal treatment or prohibitions of discrimination. [20] Consequently, the situation of Community officials is in principle comparable even where they are employed by different institutions.

63. As regards release, the applicants are treated, as officials of the Court of Justice, differently from officials of the Parliament. Parliament officials may express an interest in a measure for their release. This possibility does not merely correspond to an expectation irrelevant in terms of Community law, but constitutes the first step for participating in a formal administrative procedure. Although those participating in the procedure have no mandatory entitlement to be released, they at least have an entitlement to adoption by the appointing authority of a decision on their release, after due exercise of its discretion, having regard to the age, ability, efficiency, con-

19 — Joined Cases 271/83, 15/84, 36/84, 113/84, 158/84, 203/84 and 13/85 *Ainsworth and Others* v *Commission and Council* [1987] ECR 167, paragraph 33; see also Joined Cases 152/81, 158/81, 162/81, 166/81, 170/81, 173/81, 175/81, 177/81, 178/81, 179/81, 182/81 and 186/81 *Ferrario and Others* v *Commission* [1983] ECR 2357, paragraph 7, Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraph 19, and, last, Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39.

20 — Article 5(3) in respect of recruitment and service career within the same category, Article 7(1) in respect of assignment to a post, and the second and third paragraphs of Articles 27 in respect of recruitment.

duct in the service, family situation and seniority of the official. The applicants have no such entitlement. Instead, their appointing authority had to deny them release without regard to any factors.

64. Nor is this unequal treatment removed by the fact that the applicants' appointing authority adopted its decisions in a uniform manner and granted no official the possibility of expressing an interest. It is true that officials cannot invoke the principle of equal treatment where, within existing margins of discretion, they are treated by their appointing authority in a manner which differs from that in which officials of other institutions are treated by theirs. [21] The principle of equal treatment does not require a public authority to act in the same way as other public authorities, but merely to treat similar situations equally when adopting its decisions. [22] However, in the present case the unequal treatment stems from the fact that the Community legislature, which is responsible for laying down the conditions of employment governing all Community officials, adopted legislation which benefits only officials of the Parliament.

65. It is thus necessary to consider whether the unequal treatment can be justified.

66. The Court of First Instance proceeds on the basis that the legislature had a broad margin of discretion as regards rules adjusting the structure of the Community civil service on the accession of Sweden, Finland and Austria and consequently there is no justification only where the distinction made is arbitrary or manifestly inappropriate in relation to the objective pursued. [23] According to the case-law, this concerns not so much an alternative as the definition of arbitrariness as a manifestly inappropriate measure. [24]

67. It is this very finding that forms the starting point for the concerns which the Council and Spain express in connection with the plea alleging a failure to observe the institutional balance. Where the Community is faced with a complex task — such as adjustments to the composition of the civil service on the accession of new Member States — the legislature is required to analyse the circumstances in the light of the task and to take the necessary measures on that basis. A court cannot replace this political decision-making with its own assessment.

68. The fact that the introduction of measures to release staff is not directed primarily at the individual legal status of officials

21 — Joined Cases 44/74, 46/74 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383, paragraph 26.

22 — Case 223/86 *Pesca Valentia* [1988] ECR 83, paragraph 18, and *Karlsson*, cited in footnote 19, paragraph 51.

23 — *Chvatal and Others*, paragraph 126.

24 — See Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 120, and Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, paragraph 19.

but at the organisation of the institutions concerned, also indicates that there is broad discretion. Whether an institution is granted the possibility of terminating the service of some of its officials for the benefit of applicants from new Member States is above all an organisational matter. Furthermore, the Regulation has considerable budgetary consequences since the Community dispenses with the service of officials in order to refill their posts but has to continue providing for those officials at great expense.

69. On the other hand, the Regulation does not affect any vested rights of officials who could potentially benefit from it. It merely provides an opportunity, safeguarded by procedural law, to obtain a benefit. Nor is the unequal treatment linked to a distinguishing criterion which is particularly significant as regards officials' individual rights — in particular their fundamental rights and freedoms — as would be the case in the event of a distinction on the basis of sex or nationality, for example.

70. Therefore, judicial review is necessarily restricted, including with regard to the justification of unequal treatment. Pursuant to the second sentence of Article 91(1) of the Staff Regulations unlimited judicial review takes place only in disputes with members of staff of a financial character. By contrast, specifically in the case of discretionary legislative decisions the review is directed first and foremost at manifest errors in establishing the underlying facts or in the assessment thereof.

71. The first criterion for this review is provided by the preamble to the Regulation. It states as follows:

'... following the accession of Austria, Finland and Sweden, the composition of the Community civil service needs to be adjusted;

... new posts have been granted to the institutions by the budgetary authority for this purpose;

... however, the European Parliament has made known that, as far as it is concerned, it intends to carry out this adjustment by resorting almost exclusively, as from 1996, to special measures to terminate service;

... it is therefore appropriate to adopt such special measures for officials of the European Parliament'.

72. The aim of integrating nationals of the new Member States into the Community civil service in sufficient numbers cannot be criticised. Moreover, the Regulation proceeds on the basis that this aim is to be attained in principle by creating new posts. It states, however, that the Parliament intended in the future — as from 1996 — to adjust the composition of its staff by resorting 'almost exclusively' to special measures to terminate service. The Regulation is intended solely to enable the Parliament to take such measures.

73. The Court of First Instance thereupon establishes that the Court of Justice, like the Parliament, received a single special allocation of new posts, in 1995 only. Although the Court of Justice had also displayed interest in the possibility of release, it was not granted such a possibility (*Chvatal and Others*, paragraph 130 et seq.). Therefore, the preamble to the Regulation did not justify the distinction which is made in it. This finding by the Court of First Instance is also correct.

74. Nevertheless, the Court of First Instance itself demands that the distinction must be manifestly inappropriate in relation to the objective pursued. However, it merely demonstrates that the preamble to the Regulation does not contain sufficient justification for the Parliament alone having been granted the possibility of releasing staff.

75. On the other hand, in the context of the objective of bringing about appropriate representation of nationals of the new Member States in the institutions' staff, the legislation adopted cannot be manifestly inappropriate. Prior to the measures to adjust the composition of the civil service, 3 249 officials were employed by the Parliament with an additional notional reserve of 74 posts for officials seconded to the political groups. [25] Therefore, the single allocation of 242 new posts corresponded to 7.3 to 7.4% of the staff in the case of the Parliament. In the case of the Court of Justice, the number of officials increased from 750 to 842. This corresponds to about 12.3% of the staff. Consequently, viewed as a whole the Court of Justice was allocated considerably more posts in relation to its complement of staff for the incorporation of officials from new Member States on the accession of those States. Even if the 70 posts covered by release are included, the rate in respect of the Parliament is still only 9.4 to 9.6%. The preferential treatment of the Parliament *vis-à-vis* the Court of Justice in respect of release is therefore offset by the one-off allocation of new posts. Consequently, from the point of view of an organisational measure to adjust the composition of the civil service, the criterion which is decisive in this case, it does not appear manifestly inappropriate to have considered the Parliament, but not the Court of Justice, when allocating posts for the release of staff in addition to the one-off allocation of new posts. Accordingly, the differences in the treatment of the members of staff of both institutions which

25 — OJ 1994 L 369, p. 154.

arise, of necessity, from this unequal treatment of those institutions also cannot infringe the principle of equality as long as the vested rights of the members of staff are not adversely affected.

76. It is to be noted merely in passing that these considerations, which apply only in respect of the accession of three new Member States, are completely unrelated to the general matter of the extent to which the two institutions require new posts to meet their respective workloads.

77. Thus, there is insufficient evidence of manifestly inappropriate unequal treatment. Consequently, no breach of the prohibition of discrimination can be established.

3. *The decision on the appeal*

78. In light of the foregoing, the appeal is well founded. Under the first sentence of the first paragraph of Article 51 of the EC Statute of the Court of Justice, the judgment of the Court of First Instance is to be set aside since none of the three points each supporting its substance can justify annulling the decisions of the Court of Justice in respect of the applicants. [26]

79. Under the second sentence of the first paragraph of Article 54 of the Statute, the Court may itself give final judgment in the matter, where the state of the proceedings so permits. In its judgment the Court of First Instance left undecided the pleas alleging an insufficient statement of reasons for the Regulation and misuse of powers when adopting it. However, it is not necessary to remit the case to the Court of First Instance for a decision on those matters.

80. On the view taken in this Opinion, a failure to state reasons for the Regulation is as incapable of leading to the success of the action as defects in carrying out the required consultations. [27] This matter too may be left open.

81. The same applies in principle to a misuse of powers in adoption of the Regulation. If the legislature misused its powers in adopting the Regulation — that is to say 'it appears, on the basis of objective, relevant and consistent [evidence], to have been taken for purposes

26 — See points 55, 58 and 61 et seq. above.
27 — See point 55 above.

other than those stated'[28] — it again does not follow that the applicants are entitled to participate in the procedure for deciding on release.

82. In so far as this plea alleges a misuse of powers in failing to extend release to the Court of Justice, it appears difficult to examine at all whether a certain measure was not taken in order to pursue purposes other than those stated since the grounds for an omission are not normally given. Therefore, the concept of a misuse of powers in cases of omission is applicable in practice only where a duty to act exists at least in principle. Applying the foregoing to the present case, consideration of misuse of powers is possible only in the context of an examination of discrimination since in principle there is a duty to treat similar situations equally. Regard may be had to the possibility of a misuse of powers only in this context. Such a misuse of powers would be tantamount to an arbitrary distinction within the meaning set out above. However, as has been stated, no such distinction can be discerned here.[29]

83. Therefore, the applicants' pleas are either incapable of leading to the success of their action or unfounded in the light of the considerations previously set out concerning the substance of the appeal.

28 — Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 30.

29 — See point 75 above.

VII — Costs

84. Under Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs.

85. Under Article 69(2) of the Rules of Procedure, the applicants must, as the unsuccessful parties, be ordered to pay the costs of the proceedings — at first instance and on appeal — if they have been applied for in the successful party's pleadings. However, no such application was made either at first instance or on appeal.

86. Furthermore, the other parties must themselves bear the costs which they have incurred. Under Article 70 of the Rules of Procedure, read in conjunction with the first indent of the second paragraph of Article 122, the Council is to bear its own costs in so far as they are connected with the appeal since the present proceedings are between the Community and servants of the Community and the Council brought the appeal. Under Article 70 of the Rules of Procedure, the Court of Justice must bear the costs which it incurred at first instance. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the institutions and Member States which intervened in the proceedings are to bear their own costs. This concerns Spain as regards the appeal and, at first instance, the Council and the Netherlands.

VIII — Conclusion

87. I therefore propose that the Court should:

(1) set aside the judgments of the Court of First Instance of 30 September 1998 in Case T-154/96 *Chvatal and Others* v *Court of Justice* and Case T-13/97 *Losch* v *Court of Justice*;

(2) dismiss the actions for annulment brought before the Court of First Instance by Christiane Chvatal and Others on 8 October 1996 and by Antoinette Losch on 20 January 1997;

(3) order the parties to bear their own costs.