On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders each party to bear its own costs.**

Donner O'Keeffe Bosco

Delivered in open court in Luxembourg on 25 November 1976.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The case on which I have to give my opinion today is concerned with a report made on the applicant under Article 43 of the Staff Regulations.

This report on 'ability, efficiency and conduct in the service' relates to the years 1973 and 1974. As provided in Article 43 of the Staff Regulations, it was communicated to the applicant. Since the applicant did not agree with its contents he made observations thereon on 5 March 1975. In them the applicant expresses his astonishment at the fact that he received only 'Very good' for 'Ability' and 'Efficiency' whereas in two previous reports he had received 'Excellent' for these.

Further, in the general observations the applicant notes that there is no mention of his suitability for promotion as was the case in the two previous reports. In his view this is all the more astonishing since for some eight months during the period covered by the report he acted as temporary Head of Division.

The Director-General to whom the applicant was responsible made

1 — Translated from the German.

observations on this in a note dated 12 March 1975.

He referred in particular to the fact that in the interests of harmonizing assessments the Directorate-General had agreed that the 'Excellent' should be used only for exceptional efficiency. He therefore saw no ground for altering the entry. In a letter dated 21 March 1975 the applicant was invited to submit his observations on the matter. In his letter dated 16 April 1975 the applicant pointed out that there was no mention in the report of the fact that between 1 September 1973 and 20 May 1974 he had acted as Head of Division of the Secretariat of the Committee on Public Health and the Environment. In addition he pointed out that there was no longer any mention, in contrast to previous reports, of his suitability for promotion. If this meant that the applicant was no longer regarded as suitable for promotion, then, in his view, reasons ought to be given in accordance with the directive of the President of the European Parliament of 21 December 1966.

Since the applicant's request for an amendment of his assessment in accordance with his observations was not complied with, he lodged on 17 June 1975 a formal complaint to the appointing authority. He requested that for his ability and efficiency he should be given the remark 'Excellent' and that in the general assessment his suitability for promotion should be mentioned. Further he requested that it should be mentioned that during the said period he had acted as Head of Division. Finally he stated that he was anxious that the reference to the principles in Joined Cases 35/62 and 16/63 *André Leroy* v *High Authority of the ECSC* [1963] ECR 197 should be removed from his report since it could be assumed that their mention, in particular the emphasis that the Court could not review the reasonableness of an assessment made by the administration of the vocational skill down by an official, was only intended to intimidate the applicant.

In his decision dated 21 October 1975 the President of the European Parliament stressed first of all that the complaint was inadmissible as being out of time since the report had been notified to the applicant at the latest on 5 March 1975. Further the complaint had partly been met in so far as the reference to the abovementioned principles had been removed from the report and a note had subsequently been added that the applicant had temporarily acted as Head of Division. Moreover the complaint was stated to be unfounded because the assessments contained in the report were not objectionable and there was no right to claim observations on suitability for promotion.

Thereupon the applicant brought an action before the Court on 16 December 1975 claiming that the Court should:

- Declare the decision rejecting the complaint to be null and void;
- Annul the periodic report for 1974-1974 and rule that it must be withdrawn from the applicant's personal file;
- Order the Parliament to pay the applicant one franc by way of damages.

I – In judging this case it is first necessary to consider certain objections which the defendant Parliament has made on the admissibility of the action.

1. First the Parliament takes the view that reports under Article 43 of the Staff Regulations are not measures which may be contested. On this it refers to Article 90 (2) of the Staff Regulations and concludes that apart from failure to adopt a measure only decisions can be regarded as acts adversely affecting an official. It refers further to the case-law in Joined Cases 177/73 and 5/74 *Andreas Reinarz* v *Commission of the European Communities* [1947] ECR 819, according to which only acts 'capable of directly

affecting a precise legal position can be regarded as adversely affecting an official' *(ibid.* at p. 828). Moreover the Parliament stresses that it is expressly provided in the Staff Regulations that officials are entitled to make comments on the reports concerning them; properly construed this exhausts their remedies. Finally it must be considered that an action can result only in a review of legality, that is, an assessment cannot be replaced by one made by the Court. If the matter is referred back to the administration, the latter remains free to assess the efficiency of an official.

In my view it should first of all be borne in mind that reports under Article 43 of the Staff Regulations are of considerable importance for the career of officials. This appears from Article 45 according to which promotions are made after consideration of the reports. In addition such reports, as we have repeatedly noticed, have great importance in the carrying out of selection competitions. It must therefore be acknowledged that defective reports may affect the legal position of officials and therefore they have an interest in having them reviewed by the Court. This is not affected by the opportunity provided by Article 43 of the Staff Regulations to make comments on the reports since they do not in every case remove a wrong assessment and, as such comments originate from the person concerned, they often do not have much weight.

In addition it seems significant to me — though I have not attempted an exhaustive study of comparative law — that under legal concepts prevailing in certain Member States such assessments are included as legal acts which may be contested before the courts. This is the case with regard to German law as appears from the Kommentar zum Bundesbeamtengesetz (Commentary on the Federal Civil Service law) by Plog-Wiedow and the decisions of the Bundesverwaltungsgericht (Federal Administrative Court) cited there in Note 17 to Article 172. The same applies now in French law too (originally the case-law was negative). In this respect I refer to Plantey, Traité pratique de la fonction publique, 3rd Edition, Vol. 2, Nos. 2311 and 2312 and the case-law of the Conseil d'État cited there. This naturally does not mean undertaking a comprehensive examination and replacing the assessment made by the administration. Certain errors can be pointed out however in legal proceedings — such as procedural errors, wrong statements of fact and obvious omissions or contradictions — resulting in the annulment of the assessment, which the administration must accordingly undertake afresh without the errors which have been pointed out.

For these reasons I take the view that the concept of 'decision' in Article 90 (2) of the Staff Regulations is not to be understood in a narrow technical sense and that in the interests of proper legal protection of officials of the Communities, which is not to be taken as lower than the national standard, reports under Article 43 of the Staff Regulations are also to be regarded as measures which may be contested before the Court. Otherwise in fact the only opportunity of referring to any errors would be in proceedings against measures in which the reports have played a part. This might well impede the taking of important staff decisions and such a procedure is certainly not in the interests of efficient administration.

The first objection to admissibility should therefore be rejected as invalid.

2. A second objection is that the applicant has not brought his complaint through official channels, for which Article 90 of the Staff Regulations provides a period of three months, in time. The criterion is alleged to be the notification of the report to the person concerned, which was done at the latest on 5 March 1975 as the signature of the applicant shows, and it is irrelevant that

the report was not finally signed by the Secretary-General of the Parliament until 17 April 1975.

In this connexion it is significant in my view that Article 43 of the Staff Regulations expressly provides that the official is entitled to add to the assessment any comments which he considers appropriate. The applicant made use of this and his Director-General replied as we have seen on 12 March 1975. Further a letter dated 21 March 1975 expressly invited the applicant to submit his comments, which he did in a letter dated 16 April 1975. In these circumstances it can certainly be said that the assessment procedure was not terminated by the communication of the report to the applicant and therefore the applicant, who had started the discussion for which there was provision, had no cause to take formal steps immediately after communication of the report to bring the matter before the Court. It is also significant that a 'Note de service' No 66/19 of 21 December 1966 expressly states that assessments made by the Directors-General become final only 'après visa du Secrétaire général'. Accordingly the applicant could rightly assume that this act was necessary to complete the procedure.

Since in view of the fact that the Secretary-General signed on 17 April 1975 the complaint which was made on 17 June 1975 appears in time, it only remains to observe that the second objection to admissibility is also invalid.

3. Finally the complaint is also alleged to be inadmissible because in view of the first-class assessment which the report contains of the applicant it can in no way be said adversely to affect him.

My view of this objection is that when considering admissibility the only criterion is whether the contested act adversely affects the applicant according to his own arguments. This may indeed be said, as the applicant points out that compared with previous reports the contested report contains worse assessments which are factually unjustified. Whether there is in fact a ground for complaint and whether the position is contrary to the Staff Regulations is a matter not of admissibility but to be gone into only on considering the substance of the action.

There is therefore no ground for rejecting the application as inadmissible.

II — Substance

In considering the substance of the action, to which I now turn my attention, it should first of all be recalled that the Parliament in part took the applicant's complaint into consideration, namely in relation to the mention of the fact that the applicant had temporarily performed the duties of a Head of Division and also in relation to the removal from the report of the extracts of the judgment to which the applicant objected. We are thus now concerned only with two grounds of complaint: first that the applicant received in his report for the years 1973 and 1974 the entry 'Very good' for ability and efficiency and secondly that in the final general observation there was no longer any mention of his suitability for promotion.

1. The applicant objects in the first place that no reasons were given for departing from earlier reports and he claims principally that this infringes the second paragraph of Article 25 of the Staff Regulations which provides that 'any decision adversely affecting an official shall state the reasons on which it is based'.

With regard to this objection it may rightly be queried in my view whether Article 25 of the Staff Regulations applies at all to reports under Article 43. The view may be held that here it is a question only of special provisions which every institution has adopted for the

making of reports and according to which, in so far as the Parliament is concerned, reasons have to be given only for exceptional entries and not for departures from previous reports as the wording of Article 5 of the said 'Note de service' No 66/19 makes quite clear. Ultimately however this question can be left open, for even assuming that Article 25 applies it is at most authority for a duty to give reasons for assessments containing a negative element. However in the applicant's case there can be no question of a negative assessment since none of the entries given with regard to the applicant is below 'Very good'; moreover the general assessment is entirely positive and the equivalent of those in earlier reports, apart from the omission of the mention of suitability for promotion. The complaint that the duty to give reasons has not been complied with is therefore certainly not valid.

2. Further with regard to the justification of the entries 'Very good' in place of 'Excellent' it must be observed that the Court has never declared an assessment to be obviously wrong — as is known, the Court is extremely cautious in this sphere (Joined Cases 27 and 30/64 *Fulvio Fonzi* v *Commission of the European Atomic Energy Community* [1965] ECR 481). It is true that it should be observed that the defendant Parliament in the Autumn of 1973 in other legal proceedings recognized the suitability of the applicant for promotion. It is also true that the applicant temporarily carried out the duties of a Head of Division and that the general assessment in the contested report is very favourable to him. It may also be accepted, as the applicant has claimed, that the Chairmen and Deputy-Chairmen of Committees have praised him. All this does not in my view add up to a compelling reason for saying that all that is appropriate for him is the entry 'Excellent' instead of 'Very good'.

In this respect it was explained to us that the Directors-General and the Secretary-General of the Parliament had agreed that 'Excellent' should be used only with great reservation and in very exceptional circumstances. Contrary to the applicant's view, it is quite possible to have such harmonization of assessment practice and since they are purely internal measures within the meaning of the judgment in Case 16/64 *Gertrud Rauch* v *Commission of the European Economic Community* [1965] ECR 135 it is not necessary to have implementation measures under Article 110 of the Staff Regulations. As the Parliament has produced figures to show, this harmonization has obviously led to the use of the entry 'Excellent', which was frequently applied in previous years, being limited to a reasonable proportion. In view of this it is reasonable to accept thus that the applicant should be similarly treated and that it is not at all the case that he has been singled out for a worse report without justifiable grounds.

The applicant's objection to the entry 'Very good' applied to him cannot therefore be regarded as justified.

3. Finally with regard to the fact objected to by the applicant that in the general assessment in the contested report there is no longer mention of his suitability for promotion as there was in previous reports, the following should be said:

First in this respect the report for 1969-1970 must be disregarded, for the observations contained in it obviously relate to promotion to Grade A 4 which did in fact take place. Further it is important in my view that nowhere is such an observation provided for; naturally the fact that the observation was once made in relation to the applicant does not mean that it must continue to be so made. Finally failure to mention suitability for promotion, as the Parliament stated, does not mean that the applicant does not deserve promotion. In

fact the opposite may be gathered from other documents, as is shown by earlier court cases, to which the applicant has referred.

The omission therefore of the relevant proposal in the report for 1973-1974 cannot be regarded as a ground for its annulment.

III — In view of all this it is clear to me that the action is completely unfounded, including the claim for payment of compensation. The Court should find accordingly and make an order for costs in accordance with Article 70 of the Rules of Procedure.