Case 119/83

Edmund Appelbaum
v
Commission of the European Communities

Summary

Officials — Recruitment — Equal treatment (Staff Regulations of Officials, Article 5 (3))

There is a breach of the principle of equal treatment laid down in Article 5 (3) of the Staff Regulations of Officials when two categories of persons whose factual and legal positions are essentially the same are treated differently at the time of their recruitment.

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMAAT
delivered on 6 June 1985 *

Mr President,
Members of the Court,

I. Introduction

This Opinion is concerned with actions brought by former members of the staff of the European Association for Cooperation (hereinafter referred to as 'the Association'), all of whom, with the exception of Mr Salerno (for health reasons), have since become officials of the Commission. Although there are fourteen of these cases, requiring — since some have been joined —

* Translated from the Dutch

a total of five judgments, I propose to deal with all the cases in a single opinion, although it will be subdivided into three parts in order to deal with the three main issues raised by the applicants.

I consider that those issues may be reduced to the following:

(1) The question whether the Association is merely a fiction in so far as it is in reality an administrative unit of the Commission, which would mean that the applicants were in fact Commission officials even though they had been employed by the Association. Although that question is of particular relevance to Cases 87 and 130/77, it appears in all the cases.

(2) Following the establishment of the European Agency for Cooperation (hereinafter referred to as 'the Agency') to replace the Association by Council Regulation (EEC) No 3245/81 of 26 October 1981 (Official Journal, L 328, p. 1), the Council adopted special transitional measures with regard to the 56 members of the Association's headquarters staff by means of Council Regulation (EEC) No 3332/82 of 3 December 1982 (Official Journal, L 352, p. 5) with a view to their recruitment as officials of the Commission. The applicants contend that the Court should annul that regulation not only on the aforesaid grounds but also because it does not confer the status of official on them retroactively with effect from their appointment to the staff of the Association, despite a number of undertakings given by the Council. That argument is used in particular in Case 22/83 together with Cases 9 and 10/84.

(3) Lastly, there are the problems connected with the recruitment as Commission officials of staff members employed by the Association under special contract; those problems relate to their grading. In particular there is the question whether the difference in the treatment of headquarters staff and staff under special contract on their recruitment as Commission officials conflicts with the principle of equal treatment, and the question whether the Commission correctly applied its decision with regard to the criteria applicable to classification upon recruitment (Document No 61/IX/81). The cases in which those arguments are raised are Cases 66 to 68/83 and 136 to 140/83 and Case 119/83.

I propose to consider those three arguments after reviewing the relevant facts in so far as they have not already been described. In considering the arguments I shall also discuss questions concerning admissibility.

II. The question whether the Association is a legal fiction and the resulting question whether the applicants, although staff members of the Association, are in fact not Commission officials (in particular, Cases 87 and 130/77, *Salerno, Ane and Others)*

II. 1. *The facts*

All the applicants were members of the headquarters staff of the European Association for Cooperation, an international non-profitmaking association set up in accordance with the Belgian Law of 25 October 1919, as amended by the Law of 6 December 1954. The Association was accorded legal personality by Royal Decree of 15 December 1964.

Following the framing of the policy on cooperation between the European Communities and numerous developing countries in connection with the Conventions of Yaoundé and Lomé, a European Development Fund, funded by

the Member States and administered by the Commission, was set up. Cooperation developed very rapidly — especially in the field of training programmes and the secondment of experts — and so, in 1964, the Commission decided to constitute a non-profitmaking association in order to ensure that staff engaged in those areas could be managed with the requisite flexibility and efficiency. The activities of the Association were defined in Article 3 of its Statute:

'... the Association shall be responsible under its Statute and the various conventions concluded with the Commission of the European Communities for the recruitment, placement and administration of persons appointed to carry out tasks in the field of cooperation, scientific and technical supervision and the administration of scholarships granted by the Community'.

The conventions referred to therein were concluded on 13 July 1965 and 4 June 1974.

Under the first convention the Commission entrusted the above-mentioned tasks to the Association (Article 1). On the basis of data provided by the Commission, the Association has the task of selecting personnel to work in the field of cooperation and the task of laying down the conditions under which such personnel is appointed (Article 3). The Association is expressly designated the employer of those concerned (Article 7). It is authorized to appoint the officials needed to administer it at its headquarters (Article 2). The articles in question read as follows:

Article 1

'The Commission shall, in accordance with the terms set out below, entrust the Association with the task of recruiting and administering Commission delegates and officials to be placed under contract for the purpose of undertaking technical supervision, control and assistance, in order to carry out projects financed by the European Development Fund or the Commission Budget.'

Article 2

'The Association shall be authorized, subject to its requirements, to appoint at the place where it has its seat the officials needed to administer it.'

Article 3

'The Association shall, on the basis of data supplied by the relevant Commission departments, select the personnel referred to in Article 1 above, and lay down the conditions under which such personnel is appointed.'

...

Article 7

'The Association shall assume towards agents all the obligations of an employer in matters connected with administration and finance.'

...

From the information produced during the proceedings it appears that the Association employs the following categories of staff:

(a) Headquarters staff, whose principal task is the management of staff responsible for providing technical assistance;

(b) Staff recruited under special contract and seconded to Directorate General VIII of the Commission or special staff recruited by the Association on the basis of operational appropriations of the European Development Fund;

(c) Staff responsible for providing technical assistance who are employed overseas in connection with cooperative projects and activities, and staff of Commission delegations in the African, Caribbean and Pacific (ACP) countries.

These actions are concerned with the first two categories of staff. However, as regards the first question which I propose to examine in this Opinion, concerning the alleged fictitious nature of the Association, the applicants have put forward their arguments solely in the context of the first cases, Cases 87 and 130/77. Those cases are concerned particularly with the headquarters staff and therefore, as far as possible, I shall confine my examination accordingly.

On 4 November 1976 the Administrative Board adopted a resolution putting the remuneration of Association staff on an equal footing with that of Commission officials and staff, except as regards the household allowance which was not granted to Association staff.

On 3 December 1982 the Council adopted Regulation (EEC) No 3332/82, as a result of which the 56 members of the Association's headquarters staff could be appointed as probationary officials of the Commission by way of derogation from the second and third paragraphs of Article 4, Article 28 (d) and Article 29 of the Staff Regulations of Officials of the European Communities. Their appointment was to be to the appropriate grade and step indicated in the table of equivalence annexed to the regulation.

II.2. *Object of the applications*

On 3 February 1977 28 members of the Association's staff lodged a complaint with the Commission in which they sought the annulment of the above-mentioned decision of 4 November 1976 and requested the Commission to recognize them as members of the temporary staff with effect from their engagement by the Association. On 28 July 1977 the Commission rejected that complaint. Salerno, the applicant in Case 87/77, and the 28 applicants in Case 130/77 brought actions against that decision rejecting the complaint, the application in Salerno's case being received at the Court Registry on 7 July 1977 and the application in Case 130/77 on 27 October 1977.

The aim of the applications may be summarized as follows: a declaration that the applicants, who were staff of the Association, were officials or, in the alternative, temporary staff of the Commission with effect from their engagement by the Association.

As has already been pointed out, the applicants in Cases 87 and 130/77 also challenge the decision of 4 November 1976 adopted by the Administrative Board of the Association. In Cases 66 to 68 and 136 to 140/83 and Case 119/83 the staff under special contract have brought actions against the individual decisions appointing them as Commission officials on the basis of, *inter alia*, the same argument.

II.3. *Problems concerning admissibility*

In Cases 87 and 130/77 the Commission lodged four objections of inadmissibility. The Court has decided to reserve its decision thereon for the final judgment.

The *first* objection is that the Commission could not annul the decisions of the Association's Administrative Board since it is autonomous; consequently, the application for the annulment of the Administrative Board's decision and of the decision rejecting the complaint are inadmissible. Against that, the applicants correctly

contend that the question of admissibility coincides with the substantive issue, and that, as persons laying claim to the status of officials, they have the right to bring an action before the Court, as the Court decided in Case 65/74, *Porrini*, [1975] ECR 319.

Secondly, the Commission argues that in so far as the contested decison does not apply the Staff Regulations to Association staff, it constitutes merely the confirmation of an earlier decision and, as such, cannot adversely affect the applicants. I agree with the applicants' view that the decision of the Administrative Board constitutes a fresh decision inasmuch as it states that its object is more closely to align the remuneration systems of the two staff groups, it lays down new financial rules and constitutes a further step towards the assimilation of their remuneration (with the exception of the household allowance) to that of officials.

The Commission's *third* objection is that it cannot comply with the applicants' request to be appointed as officials because, as is clear from the judgment in Case 18/69, *Fournier*, [1970] ECR 249, the Commission has no power to effect such appointments outside the requirements and procedures laid down in the Staff Regulations, and those requirements were not met in this instance, in particular the requirement that applicants must pass a competitive examination. In my opinion, however, what the applicants are seeking is a declaration regarding their status which, if granted, would lead the Commission to take the necessary measures.

The Commission's *fourth* objection is that the Court may not compel the administration to appoint the applicants as officials. As far as it goes the objection is correct, but it does not prevent the administration from having to take the necessary measures in order to implement the Court's judgment.

In conclusion, I propose that the Court should dismiss the objections of inadmissibility lodged by the Commission and consider the substance of the cases.

II.4. *The substance*

The applicants consider that the Association is no more than an administrative unit of the Commission; consequently, it is merely a fiction that the Association is the employer and therefore the applicants are in fact employed by the Commission. In that connection they point to a number of facts, including the following:

(a) The Association is included in the Commission's establishment plan;

(b) The Association posesses no assets of its own;

(c) Commission officials sit on the Administrative Board of the Association;

(d) Conditions of employment and financial and fiscal arrangements (with the exception of the household allowance) are virtually the same as those applying to officials;

(e) The staff of the Association were engaged in the name of and on behalf of the Commission;

(f) Statements were made by officials of the Commission that Association staff formed part of the Directorate General for Development.

The applicants' line of argument is based, not so much on legal reasoning, but above all on situations of fact which, in their opinion, entail legal consequences. Their only legal arguments are based on the principle that there must be equal treatment between the staff of the Association and Commission officials. Since that argument can prevail only if the two groups are in similar circumstances, it is bound up with the aforesaid situations of fact. Consequently I shall discuss that aspect first.

I would observe, once again, that the Association was set up under Belgian law and was accorded legal personality by Royal Decree of 15 December 1964.

The question raised by the applicants as to the validity of that legal personality can be answered only in the light of national law by the Belgian courts. The Court of Justice may not make a definitive pronouncement on the matter. I doubt very much whether the evidence adduced by the applicants, which, in their view, should be considered not separately but as a whole, is capable of setting aside the legal personality conferred on the Association. The applicants seem to have been the victim of a division of tasks between the Association and the Commission which was perhaps not entirely clear as far as they were concerned. The very close intermeshing of the Commission and the Association is apparent in particular from the Convention concluded between them in 1965. Moreover, it appears that the Commission, too, soon began to have doubts about the desirability of the private-law structure of the Association. The decisions aligning the terms of employment of Association staff with those enjoyed by Commission officials should also be seen in that light. A further reflection of that attitude was the proposal submitted by the Commission to the Council in 1977 for the establishment of an agency under Community law with the same tasks as the Association. In the course of these proceedings the Commission has argued — cogently, in my view — that the development should be seen in historical terms in the context of the Community's steadily growing rôle in the area of development policy. In view of the uncertainty which prevailed, especially in the early days, as to the extent, character and duration of the associated work and as to the potential for employing outside organizations, I consider that the organizational policy adopted by the Commission is in itself perfectly defensible. Initially the Commission utilized engineering consultants. However, in 1964 when more attention was paid to development policy it was thought appropriate to set up the Association. Following the conclusion of the Lomé Convention and the Convention with the Mediterranean Countries, the Commission decided to introduce a proposal for an agency governed by Community law.

In general the applicants do not base their arguments on the legal rules of the Association. As has already been mentioned, the Association has the rôle of supplying the Commission, on its request, with persons to carry out tasks in the field of scientific and technical cooperation and of administering such staff (Convention, Articles 1 and 3). Such staff are bound by contract to the Association (Convention, Article 7; Administrative Protocol of the Association, Article 36). Instructions from the Commission setting out staff members' specific duties form part of their contracts of employment with the Association (Convention, Article 6). Headquarters staff are also under contract to the Association (Convention, Article 2; Administrative Protocol, Article 20). Those contracts are governed, according to the Administrative and Financial Regulation, by, *inter alia*, Belgian law, the Association's Statute and the provisions of each individual contract.

The facts adduced by the applicants are incapable of overturning the legal rules governing the Association and the employment contracts between the Association and its staff. Neither can they replace the recruitment requirements laid down in the Staff Regulations, as the Commission has rightly pointed out. I would refer in that connection to Article 1 of the Staff Regulations.

In addition, the Commission has cogently countered the argument that the Association possesses no assets of its own by pointing out that the European Development Fund subsidizes 95% of its expenditure and the Commission 5%. Its expenditure comprises in particular the salaries of members of staff. In order to cast further light on that aspect I would refer simply to Articles 28 to 30 of the Association's Statute, to Articles 12 to 29 of the Convention between the Association and the Commission and to the Association's Financial Protocol. Furthermore, it appears that the Association owns the moveables (furniture, for example) constituting its assets (Financial Protocol, Article 31). Obviously the inclusion of the Association in the Commission's establishment plan can in no way affect the Association's legal personality; indeed it seems to follow from the close link with the activities of the Commission. Moreover what is included in the establishment plan is the liaison office between the Association and the Commission (Article 11 of the Convention; Article 10 of the Administrative Protocol). The fact that employment policy with respect to Association staff has been gradually brought more or less into line with that applied to Commission officials does not support the applicants' conclusion, but constitutes simply the expression of the authorities' desire steadily to harmonize the two policies. Finally, statements made by Commission officials lacking the authority to commit the Commission in that regard are also incapable of leading to the applicants' conclusion.

Since it has been established that the applicants were in a different factual and legal position from that of Commission officials, the arguments based on the principle of equal treatment should be dismissed.

In conclusion I propose that the Court should dismiss the applicants' arguments to the effect that the Association's status as an employer is a fiction and that the applicants are in fact officials of the Commission.

III.1. I shall now consider the *second question raised by the applicants (in particular in Case 22/83).*

The applicants seek the annulment of Council Regulation (EEC) No 3332/82 laying down special transitional measures for the recruitment as officials of the Commission of 56 members of the staff of the headquarters of the European Association for Cooperation, in so far as that status was not conferred on them as from their engagement by the Association. To that end the applicants put forward the argument — which I have already rejected — that the Association's status as an employer is a fiction; in addition, they refer to a number of provisions.

The proceedings have been brought against the Council pursuant to the second paragraph of Article 173 of the Treaty. The Council has lodged an objection of inadmissibility, contending that the regulation at issue is legislative in character and hence that the requirements of the second paragraph of Article 173 are not fulfilled.

III.2. *The relevant facts and the arguments put forward by the applicants*

As has already been stated, in 1977 the Commission submitted to the Council a proposal for the establishment of a European Agency for Cooperation to replace the Association. The Council adopted that proposal by Regulation No 3245/81 of 26 October 1981 (Official Journal 1981, L 328, p. 1).

Subsequently, on 3 December 1982, the Council adopted Regulation No 3332/82 laying down special transitional measures for the recruitment of officials of the Commission of 56 members of the staff of the headquarters of the Association. Article 1 thereof provides that the staff concerned may be appointed as probationary officials and assigned to one of the posts indicated for that purpose in the Commission

establishment plan for the 1982 financial year. Article 3 provides that, by way of derogation from Articles 31 and 32 of the Staff Regulations, the persons concerned are to be appointed to the appropriate grade and step indicated in the table of equivalence annexed to the regulation. The second and third paragraphs of Article 3 stipulate that seniority in grade is to be reckoned from the date of appointment as a probationary official and that seniority in step is to be that acquired by the person concerned in the service of the Association.

I understand the applicants' arguments, which are not always easy to follows, to be as follows: in breach of the principle of legitimate expectations or in breach of its obligations under previous decisions taken by it, and hence in breach of the principle *patere legem quam ipse fecisti*, the Council omitted in Regulation No 3332/82 to make the applicants' entry into service as officials effective as from the date of their engagement by the Association. That is important especially from the point of view of the applicants' pension rights. The applicants base their arguments on Article 14 of Regulation No 3245/81 setting up the European Agency for Cooperation, which provides that the Commission is to determine the general terms of recruitment and of employment and the general system of remuneration, allowances and additional payments. They take the view that the said Article 14 enabled the Commission simply to appoint them in accordance with their wishes, since the relevant posts were provided for in the 1982 Budget. As a result of the special transitional measures set out in Regulation No 3332/82 the Council departed from that provision. The applicants further base their contentions on an explanatory note to the budgetary item which makes the posts concerned available.

I shall not consider those arguments until I have discussed the objection of inadmissibility lodged by the Council.

III.3. *Admissibility*

The Council contends that the application is inadmissible on account of the legislative character of Regulation No 3332/82, as a result of which the requirements of the second paragaraph of Article 173 of the EEC Treaty are not fulfilled. Proceedings against a regulation are admissible only if the regulation is of direct and individual concern to the applicant.

Consequently, according to the established case-law of the Court (in particular Case 64/80, *Giuffrida and Campogrande* v *Council*, [1981] ECR 693), the nature and scope of the measure must be determined.

According to its title, the object of the regulation is to lay down 'special transitional measures for the recruitment as officials of the European Communities of 56 members of the staff of the headquarters of the European Association for Cooperation'. Article 1, in particular, is relevant to the question of admissibility:

(a) Article 1 identifies the group which is eligible for appointment as probationary officials, that is to say staff occupying posts at the headquarters of the Association on 1 January 1982 and still occupying posts there at the date of the entry into force of the regulation;

(b) Article 2 governs the procedure to be followed for appointments, which expressly derogates from a number of articles of the Staff Regulations.

(c) Article 3 lays down special rules concerning grading, which again derogate from the Staff Regulations.

The Court has held on numerous occasions that the relevant test is whether or not the measure in question has general application (Case 64/80, *Giuffrida and Campogrande*). If a measure is to constitute a decision and hence be of individual concern to the applicant, it must be addressed to a

restricted circle of natural or legal persons, defined or identifiable, which may not be extended at the time when the measure is adopted (in particular, Cases 16 and 17/62, *Confédération Nationale des Producteurs de Fruits et Légumes* v *Council*, [1962] ECR 471, and Cases 41 to 44/70, *International Fruit Company* v *Commission*, [1971] ECR 411). In fact the legal position of each person must be decided upon individually.

I consider that the applicants are correct in their contention that the regulation is of individual concern to them. The regulation is expressed as being restricted to *56* members of the staff of the Association in its title and in the third and fourth recitals in the preamble. Moreover, it appears from Article 1, which has already been quoted, that a fixed group which may not be extended is involved. Furthermore, the third recital states that the object of the regulation is to resolve the problems of the 56 members of the staff. That is also consistent with the aim of taking action with regard to a limited number of persons and hence of deciding on their legal position individually. The regulation may be viewed as a conglomeration of individual decisions in line with the Court's decision in the *International Fruit Company* case, referred to above. I further consider that the provisions of the regulation are of direct concern to the applicants. The Court has interpreted that criterion as meaning that the authorities responsible for implementing the regulation may enjoy no discretion (see, in particular, the *International Fruit Company* case, cited above). In this case the Commission, as the appointing authority, did no more than apply the provisions of the regulation to the applicants, in particular by appointing those concerned as probationary officials and classifying them in the appropriate grade and step as indicated in the table of equivalence in accordance with Article 3.

In conclusion, I take the view that, having regard to the Court's previous decisions, Regulation No 3332/82 is of direct and individual concern to the applicants. I therefore consider the application in Case 22/83 to be admissible.

III.4 *Substance*

The applicants consider that, by adopting Regulation No 3332/82 in which the Council failed to appoint them as Commission officials with effect from their engagement by the Association, the Council acted in breach of the principle of legitimate expectations and failed to comply with obligations which it itself imposed.

They rely in the first place on Article 14 of Regulation No 3245/81, setting up a European Agency for Cooperation, which reads as follows:

'The general terms of recruitment and of employment and the general system of remuneration, allowances and additional payaments for the staff referred to in Article 3 (1) and for the staff of the Agency's headquarters shall be determined by specific provisions adopted by the Commission after the Committee referred to in the second subparagraph of Article 12 (2) has delivered its opinion.'

Secondly they point out that the 1982 Budget earmarked 56 posts for the Association's headquarters staff. Consequently they consider that the Council was not entitled to adopt the special transitional measures relating to the 56 members of the headquarters staff which were set out in Regulation No 3332/82. In their view, the Commission could simply have appointed the staff concerned to the available posts pursuant to Article 14 and could have done so retroactively with effect from the date of their engagement by the Association.

They consider that the Council infringed that article by laying down special transitional measures in Regulation No 3332/82.

I must admit that the relationship between the arrangements which the Commission is to make pursuant to Article 14 and Council Regulation No 3332/82 is none too clear. However, the Council and the Commission provided a convincing explanation in the course of the proceedings. They stated that the arrangements provided for in Article 14, which have not yet been implemented, would apply to the future staff of the Agency. In contrast, it was thought expedient to appoint the existing staff of the headquarters of the Association (and the staff under special contract) as established officials of the Commission. The Commission could not, in appointing those staff members to the posts provided for in the budget, derogate from the provisions of the Staff Regulations except on the basis of Article 29 (2) of those regulations; the Commission did not apply that provision and, what is more, was not obliged to do so. On the other hand, the Council adopted Regulation No 3332/82 laying down special transitional rules derogating from the provisions of the Staff Regulations in a manner favourable to the applicants. There is nothing to suggest that, by doing so, the Council infringed Article 14 of Regulation No 3245/81. The first of the applicants' arguments should therefore be dismissed.

The applicants' second argument is that the Council committed itself to appointing them as established officials with effect from their engagement by the Association. They cite in support of that argument a note to Budget Item No 1100, which made available 56 established posts (Official Journal 1982, L 31, p. 251). That note reads as follows: 'The posts for the European Association for Cooperation (headquarters) are incorporated in the Commission's establishment plan in accordance with the conditions set out in the resolution adopted by the European Parliament on 11 May 1979 (Official Journal, C 140, 5 June 1979, p. 142).'

Against that argument the Council correctly contends that a distinction must be made between the Council in its capacity as part of the budgetary authority and the Council in its legislative capacity. The budget is produced by the budgetary authority. An item of the budget is to be seen as conferring authority to incur the relevant expenditure, but not as imposing an obligation to do so. That argument applies with all the more force to a note to the budget, which is merely indicative in nature (see the Court's judgments of 26 September 1984 in Cases 216/83 and 295 to 297/83, *Parti Ecologiste 'Les Verts'* v *Commission*, [1984] ECR 3325).

Consequently, by adopting Regulation No 3332/82 the Council did not infringe a self-imposed legal obligation. As a result, that argument should also be dismissed.

In sum I propose that the Court should declare the application in Case 22/83 to be admissible, but dismiss it as unfounded.

IV. Cases 9 and 10/84

IV.1. *The facts*

The applicants have brought the proceedings in Cases 9 and 10/84 in case the Court should declare their application in Case 22/83 to be inadmissible. Only in that event need the Court pronounce in Cases 9 and 10/84.

It appears that proceedings were instituted in Case 9/84 following the Commission's apppointment of the applicants as officials on 10 March 1983 with effect from 1 January 1983 pursuant to Council Regulation No 3332/82. On 8 June 1983 they lodged a complaint against their appointment with the Commission pursuant to Article 90 of the Staff Regulations in which

they contended that Regulation No 3332/82 was inapplicable on account of the failure to appoint them retroactively from the date of their engagement by the Association. That complaint was expressed as being based on Article 184 of the EEC Treaty. The arguments adduced are similar to those put forward in Case 22/83. Case 10/84 differs somewhat. The applicant in that case, Mr Salerno, was not appointed as a probationary official at the Commission since he did not fulfil the medical requirements laid down in Article 28 (e) of the Staff Regulations. In the application it is wrongly assumed that there was an appointment decision. With the exception of one point, the claims submitted by the applicant to the Court are similar to those made in Cases 22/83 and 9/84. The only different claim concerns the medical examination, the object being a declaration that the applicant had already been appointed as an official of the Commission from the date of his engagement by the Association and should therefore not have had to undergo a medical examination pursuant to Regulation No 3332/82.

IV.2. *Admissibility*

The Commission has lodged an objection of inadmissibility in both cases. It argues that the applications seek primarily to establish the inapplicability of Council Regulation No 3332/82. It maintains, however, that under Article 184 of the EEC Treaty a regulation may only be challenged indirectly in the course of proceedings brought pursuant to another article of the Treaty. The Commission correctly refers to the Court's previous decisions on the matter. Thus in Case 33/80, *Albini*, [1981] ECR 2141, the Court stated that: 'The possibility provided by Article 184 of the Treaty of invoking the inapplicability of a regulation does not constitute an independent right of action and may only be sought incidentally. In the absence of such an independent right of action the applicants cannot invoke Article 184' (paragraph 17 on page 2157).

Although I have to admit that the applicants' claims with regard to that point are none too clearly formulated, I propose that the Court should not allow the objection of inadmissibility lodged by the Commission, bearing in mind that the Court will have to consider these cases only in the event that it holds Case 22/83 to be inadmissible.

In my view, the relationship between the applications in Case 22/83 and Cases 9 and 10/84 is significant in that regard. In Case 22/83 the application is expressed to be directed solely against Regulation No 3332/82 itself. In contrast, the later actions were lodged when the individual appointment decisions had been taken by the Commission (Case 9/84) or the appointment had been refused (Case 10/84). It was the appointments made by the appointing authority or its refusal to appoint which led to the complaints under Article 90 of the Staff Regulations. In addition, in their reply (p. 8) the applicants made it sufficiently clear that they were contesting the appointment decisions in so far as they had not been appointed as officials with effect from the date on which they were engaged by the Association.

If the Court accepts my view that the applications are admissible, it must pronounce on the substance.

IV.3. *Substance*

As far as the substance is concerned, the applicants refer to their arguments in Case 22/83.

Suffice it to say that I concluded in that case that the applicants' claims should be dismissed. However, in addition, the applicants claim in the alternative that they should have been appointed as probationary officials with effect from 1 January 1982 and not from 1 January 1983. They argue that Regulation No 3332/82 contains no provision in that regard. Furthermore, they

contend that the former date is more consonant with Article 1 of the regulation, which restricts its scope to staff members who 'occupy a post at the headquarters of the Association on 1 January 1982 and who may still occupy a post there at the date of entry into force of this regulation'.

The Commission rejects that argument, pointing out, correctly, that Article 4 of the regulation provided that it was to enter into force on 15 December 1982. Nowhere in the regulation is there a provision making the appointments retroactive. I would add that the second part of the above quotation from Article 1 ('. . . and who may still occupy a post there at the date of entry into force of this regulation . . .') manifestly points to the opposite conclusion to that reached by the applicants.

The claim made in Case 10/84 that the applicant's appointment was not dependent on passing a medical examination should also be dismissed. In the absence of such a provision in Regulation No 3332/82, Articles 28 (e) and 33 of the Staff Regulations apply.

IV.4. *Conclusions with regard to Cases 9 and 10/84*

In conclusion I propose that the Court should hold that the applications in Cases 9 and 10/84 are admissible but dismiss them as unfounded.

V. Recruitment of Association staff members under special contract as officials of the Commission (Joined Cases 66 to 68/83 and 136 to 140/83 and Case 119/83), referred to above as the third question.

V.1. *Introduction*

Finally I intend to consider Joined Cases 66 to 68/83 and 136 to 140/83 and Case 119/83. These cases all concern the grading of former Association staff employed under special contract upon their appointment as Commission officials. In contrast to the preceding cases dealing with staff employed at the headquarters of the Association (Cases 22/83 and 9 and 10/84), no special transitional arrangements of the sort embodied in Council Regulation No 3332/82 were adopted for the staff concerned. As a result, appointments were made on the basis of the provisions of the Staff Regulations. The arguments put forward in all the cases are virtually identical to each other and so I shall consider them in the abstract unless it is necessary to dwell on the specific case. The arguments can be reduced to three questions:

(a) arguments connected with the alleged fictitious character of the Association;

(b) breach of the principle of equal treatment on account of the difference in the arrangements made for the recruitment as Commission officials of members of the Association's headquarters staff and those made for the recruitment of Association staff members under special contract;

(c) improper application of the Commission decision on grading criteria.

Before I take up those questions I shall first set out the facts and consider the objections of inadmissibility lodged by the Commission.

V.2.(a) *The facts*

As I have already mentioned, all the applicants were formerly employed by the Association under special contract. This means that they were seconded by the

Association to Directorate General VIII of the Commission. There they carried out duties equivalent to those performed by their colleagues, who were Commission officials. Their terms of employment were governed by two instruments, namely the 'General terms of the S.C./II contract' and the 'Specific terms of the S.C./II contract', in addition to their individual contracts. In principle the contracts were concluded for a limited period in accordance with the specific terms but in practice were always renewed. It appears from the letters terminating the contracts sent at the time when the applicants were recruited by the Commission that under Belgian law the renewable annual contracts were to be regarded as contracts concluded for an indefinite period.

The budgetary authorities assigned 32 permanent posts to the Commission for 1981 to cover the appointment as established officials of the 32 staff recruited by the Association under special contract. The European Parliament stated that the posts were for staff who had been seconded to Directorate General VIII at the Commission for more than six years and performed the same tasks as their colleagues to whom the Staff Regulations were applicable.

Accordingly, on 4 February 1981 the Commission decided to assign the 32 permanent posts to Directorate General VIII so as to be able to establish the staff concerned. The appointments were subject to the ordinary law applicable to European public servants. According to the Commission, matters proceeded as follows after that decision:

(a) In April 1981 a list of 37 staff members was drawn up, comprising the 32 staff mentioned above together with five others — none of whom, according to the Commission, were in Category A — who had been recruited on the basis of operational appropriations of the European Development Fund and warranted the same treatment as the other 32 members of staff.

(b) The Grading Committee proceeded to classify all the staff eligible for establishment in the appropriate grade and step.

(c) All those staff members were offered (in around mid-June 1981) temporary contracts, which they accepted. At the same time they all received letters of dismissal from the Association.

(d) Subsequently a vacancy notice was published on 16 July 1981 for 32 new permanent posts at the Commission.

(e) Internal competitions were organized; most of the candidates were successful; according to the Commission, only in a few exceptional cases were appointments made on the basis of Article 29 (2) of the Staff Regulations.

(f) Finally the staff concerned served probationary periods starting on 1 July 1982, after which they were appointed as established officials with effect from 1 April 1983. They continued to perform the same duties as they had performed prior to their appointment.

The applicants were all appointed at a lower grade or a lower step than that attained at the Association, on the basis of the table of equivalence annexed to Regulation No 3332/82. The applicants also contend that they are entitled to a more favourable classification on the basis of the Commission's decision on grade and step classification (Document No 61/IX/81) in view, in particular, of their extensive experience.

V.2 (b) *Position of each applicant individually*

Mr Hattet, the applicant in Case 66/83, was engaged by the Association on 21 December 1970 in Grade 15, Step 4, corresponding to Grade A 5, Step 4, and was seconded to Directorate General VIII. On 1 January 1979 he had attained Step 8 in that grade. By decision of 30 June 1982 he was appointed a probationary official in Grade B 1, Step 3, with effect from 1 July 1982. Mr Hattet was appointed as an established official at the end of the probationary period. He states that on 1 July 1982 he had 27 years' experience, including 12 years with the European Communities, and had been performing the duties of a member of staff in Category A for 12 years. In view of his duties the Commission should, in his view, have classified him in Grade A 4, Step 4, a claim which his superiors fully approved.

Mrs Matt, the applicant in Case 67/83, was appointed to the staff of the Association on 7 January 1974 in Grade 32, Step 6, corresponding to Grade C 2, Step 6, to carry out secretarial duties. She ultimately reached Grade 31, Step 5. By decision of 30 June 1982 she was appointed as a probationary official in Grade C 4, Step 3, with effect from 1 July 1982. On termination of the probationary period she was appointed as an established official. The applicant claims that on 1 July 1982 she had 14 years' experience, including eight with the European Communities. In view of her education, abilities and knowledge of languages and the important duties assigned to her she considers that the Commission should have classified her in Grade C 1 in accordance with the principles set out in Commission Document No 61/IX/81.

Mr de Szy-Tarrisse, the applicant in Case 68/83, joined the Association in late 1974 and was seconded to Directorate General VIII on 18 February 1975, where he was classified in Grade 15, Step 4, which corresponds to Grade A 5, Step 4. Ultimately he reached Step 7 in that grade. By decision of 30 June 1982 he was appointed as a probationary official in Grade A 5, Step 3, with effect from 1 August 1982. On termination of the probationary period he was appointed as an established official. He therefore claims that on 1 August 1982 he had had 15 years' experience, including eight years with the European Communities. In his opinion, in view of his duties, the Commission should have classified him in Grade A 4, Step 4, a claim which his superiors fully approved.

Mr Donà, the applicant in Case 136/83, joined the Association on 1 April 1971 and was seconded to Directorate-General VIII in Grade 22, Step 3, corresponding to Grade B 2, Step 3, at the Commission. On 1 April 1981 he reached Grade 16, Step 5, corresponding to Grade A 6, Step 5. In connection with the transfer of the Association staff to the Commission he was appointed as a probationary official on 1 July 1981 and subsequently, by decision of 14 July 1982, notified to the applicant on 17 September 1982, was made an established

official with effect from 1 July 1982 in Grade A 6, Step 3. The applicant claims that on 1 July 1982 he had had 17 years' experience, including 11 years with the European Communities. In view of his experience and duties he considers that the Commission should have classified him in Grade A 5.

Mrs Becquart, the applicant in Case 137/83, joined the Association on 13 July 1975 and was seconded to Directorate General VIII in Grade 32, Step 3, corresponding to Grade C 2, Step 3, at the Commission. On 30 June 1981 she had attained Grade 32, Step 6, corresponding to Grade C 2, Step 6. By decision of 8 July 1982, notified to the applicant on 17 September 1982, she was appointed as a probationary official with effect from 1 July 1982 in Grade C 4, Step 3, the grade in which she was established at the end of the probationary period. The applicant claims that on 1 July 1982 she had had 10 years' experience, including seven with the European Communities. In view of her experience, seniority and the level of her duties she considers that the Commission should have classified her in Grade C 3 in accordance with the principles set out in Commission Document No. 61/IX/81.

Mrs Schmitz, the applicant in Case 138/83, joined the Association on 1 April 1972 and was seconded to Directorate General VIII in Grade 33, Step 2, corresponding to Grade C 3, Step 3, at the Commision. On 30 June 1981 she had reached Grade 33, Step 6, corresponding to C 3, Step 6. By decision of 8 July 1982, received by the applicant on 14 September 1982, she was appointed as a probationary official with effect from 1 July 1982 in Grade C 4, Step 3, the grade in which she was established at the end of the probationary period. The applicant claims that on 1 July 1982 she had had experience exceeding the ten years she had spent with the European Communities. In view of her career and seniority and the level of her duties she considers that the Commission should have classified her in Grade C 3 in accordance with the principles set out in Commission Document No 61/IX/81.

Mrs Le Maitre, the applicant in Case 139/83, joined the Association on 1 October 1974 and was seconded to Directorate General VIII in Grade 32, Step 3, corresponding to Grade C 2, Step 3, at the Commission. On 30 June 1981 she had reached Grade 32, Step 6, corresponding to Grade C 2, Step 6. By decision of 8 July 1982, received by the applicant on 17 September 1982, she was appointed as a probationary official with effect from 1 July 1982 in Grade C 4, Step 3, the grade in which she was established at the end of the probationary period. She claims that on 1 July 1982 she had had more than 10 years'

experience, including eight years with the European Communities. In view of her education and knowledge of languages she considers that the Commission should have classified her in Grade C 3 in accordance with the principles set out in Commission Document No 61/IX/81.

Mrs De Waegeneer, the applicant in Case 140/83, joined the Association on 12 November 1972 and was seconded to Directorate General VIII in Grade 33, Step 3, corresponding to Grade C 3, Step 3, at the Commission. On 30 June 1981 she had reached Grade 33, Step 8, corresponding to Grade C 3, Step 8. By decision of 8 July 1982, which was notified to the applicant, she was appointed as a probationary official with effect from 1 July 1982 in Grade C 4, Step 3, the grade in which she was established at the end of the probationary period. The applicant claims that on 1 July 1982 she had had more than 10 years' experience, including eight years with the European Communities. In view of the excellent report which was issued on 22 November 1982 at the end of her probationary period and her career, education and knowledge of languages, the applicant considers that the Commission should have classified her in Grade C 3 in accordance with the principles set out in Commission Document No 61/IX/81.

Mr Appelbaum, the applicant in Case 119/83, joined the Association in 1964 and was employed until August 1977 first in Burundi and subsequently in Cameroon. On 1 September 1977 he was transferred to Brussels and seconded to Directorate General VIII, where he was responsible for the sector concerned with the technical administration of all land transport projects funded by the Community.

On 25 June 1981 he was offered a contract for one year as a member of the temporary staff with effect from 1 July 1981. The post involved him in carrying out the same duties as he had been performing since 1 September 1977. His grade in the temporary post was IV/8, corresponding to Grade B 1, Step 4, at the Commission.

By decision of 30 June 1982 he was appointed as a probationary official with effect from 1 July 1982 in Grade B 2, Step 3. By decision of 16 May 1983 he was appointed as an established official in the same grade with effect from 1 April 1983.

The applicant claims that on 1 July 1982 he had had 21 years' experience as an engineer, including 18 years with the European Communities. According to the applicant he performed the duties of an official in Category A for 10 years and is a university graduate, a qualification not required for appointment to posts in Category B. His ultimate classification at the Association was B 1, Step 4. He therefore claims that the Commission should have appointed him in Grade B 1, Step 5, or at least in Grade B 1, Step 4.

In the interests of clarity I have set out the applicants' positions once again in tabular form.

Case	Date of engagement by the Association	Classification	Equivalent grade according to Regulation No 3332/82	Ultimate grade at Association (30-6-81)	Equivalent grade according to Regulation No 3332/82	Grade on appointement as probationary official (1-7-82)	Grade on the basis of Commission Decision 61/IX/81
66/83	21-12-70	15/4	A 5/4	15/8	A 5/8	B 1/3	A 4/4
67/83	7-1-74	32/6	C 2/6	31/5	C 1/5	C 4/3	C 1
68/83	(end of 1974) 18-2-75 seconded to DG VIII	15/4	A 5/4	15/7	A 5/7	A 5/3	A 4/4
136/83	1-4-71	22/3	B 2/3	16/5	A 6/6	A 6/3	A 5
137/83	13-7-75	32/3	C 2/3	32/6	C 2/6	C 4/3	C 3
138/83	1-4-72	33/2	C 3/6	33/6	C 3/6	C 4/3	C 3
139/83	10-10-74	32/3	C 2/3	32/6	C 2/6	C 4/3	C 3
140/83	12-11-72	33/3	C 3/3	33/8	C 3/8	C 4/3	C 3
119/83	(1964—'overseas') 1-9-77 seconded to DG VIII	IV/8	B 1/4	IV/8	B 1/4	B 2/3	B 1/5 or B 1/4

V.3. *The parties' claims*

In Cases 66 to 68/83 and 136 to 140/83 the applicants claim that the Court should:

(1) Declare that the applicant must be deemed to have been employed by the Commission since the date of his contract with the Association, namely,

in Case 66/83, *Hattet*, 21 December 1970,

in Case 67/83, *Matt*, 7 January 1974,

in Case 68/83, *de Szy-Tarrisse*, 18 February 1975,

in Case 136/83, *Donà*, 1 April 1971,

in Case 137/83, *Becquart*, 13 July 1975,

in Case 138/83, *Schmitz*, 1 April 1972,

in Case 139/83, *Le Maitre*, 1 October 1974,

in Case 140/83, *De Waegeneer*, 12 November 1972;

(2) Declare void each and every procedural measure which preceded the applicant's appointment as a probationary official, as well as the appointment itself, but only in so far as it includes classification in a lower grade or step or both;

(3) Order the defendant to re-grade the applicant in accordance with the principles determined by the defendant itself in Document 61/IX/81, that is to say,

in Case 66/83, *Hattet*, in Grade A 4, Step 4,

in Case 67/83, *Malt*, in Grade C 1,
in Case 68/83, *de Szy-Tarrisse*, in Grade A 4, Step 4,
in Case 136/83, *Donà*, in Grade A 5,
in Case 137/83, *Becquart*, in Grade C 3,
in Case 137/83, *Schmitz*, in Grade C 3,
in Case 138/83, *Le Maitre*, in Grade C 3,
in Case 140/83, *De Waegeneer*, in Grade C 3;

(4) In the event that the Court grants partial annulment in accordance with head (2) above, declare in so far as is necessary that the annulment is retroactive to the date of the applicant's engagement by the European Association for Cooperation;

(5) In the exercise of the Court's unlimited jurisdiction, declare that the defendant must pay the applicant the difference between the salary and benefits which he should have received and that which he actually received either since his engagement by the European Association for Co-operation or since his dismissal by that body, or, subject to amendment in the course of the proceedings, one Belgian franc;

6. to 11.

In the alternative, order the defendant to produce various documents.

In Case 119/83, the applicant, Mr Applebaum, claims that the Court should:

(1) Annul the applicant's classification in Grade B 2, Step 3, contained in the measure adopted on 30 June 1982 appointing him as a probationary official and also in the measure adopted on 16 May 1983 appointing him as an established official;

(2) Declare that the applicant should be classified in Grade B 1, Step 5, or at the very least Step 4, his seniority in step being back-dated to 1 March 1980.

V.4. *The admissibility of the applications*

In Cases 66 to 68/83 and 136 to 140/83 the Commission has lodged three objections of inadmissibility, one of which it has subsequently withdrawn.

First it argues that the contested measures are not acts adversely affecting the applicants in so far as the latter entered into them voluntarily. I consider that the Court should reject that part of the Commission's argument. The Court has consistently interpreted the expression 'act adversely affecting him' within the meaning of Article 90 of the Staff Regulations as signifying those acts capable of directly affecting an official's legal position (see, for instance, Joined Cases 177/73 and 5/74, *Reinarz* v *Commission*, [1974] ECR 819). Appointment as a probationary official certainly satisfies that test. The criterion of voluntariness, in so far as it arises in these cases, is therefore irrelevant.

Secondly the Commission argues in its defence that the classification cannot be contested separately from the appointment. In its rejoinder the Commission changed its view, considering that such an application is possible. That line of argument may therefore be viewed as having been withdrawn.

Thirdly the Commission considers that the applications were brought out of time. In its view the appointment of the applicants as probationary officials and subsequently as established officials merely confirmed their appointment as temporary staff; consequently, their actions should have been directed against those appointments.

The Commission also put forward that objection in its defence in Case 119/83, *Appelbaum*. In its rejoinder it abandoned that argument on the ground that the notice informing its staff of the grading criteria exceptionally allowed proceedings to be instituted in connexion with classifications effected on the basis of those criteria until 21 October 1983. In my view the Commission should have abandoned that objection in Cases 66 to 68/83 and 136 to 140/83 for the same reason. Furthermore, appointment as a probationary official, albeit with the same classification as that received when the official was appointed as a temporary official, constitutes an independent decision for the purposes of Article 90 of the Staff Regulations, such appointments being made in most cases as a result of a competition. Consequently, proceedings may be brought against such appointments. The Commission itself admits that some temporary staff members were not appointed as probationary officials.

I therefore consider that the Commission's request that the applications in question should be declared inadmissible should be dismissed.

V.5. *Substance*

V.5.1. *Introduction*

The applicants' submissions in Joined Cases 66 to 68/83 and 136 to 140/83 and in Case 119/83 can be reduced to the same three principal arguments already indicated. I therefore intend to deal with them principally in the same way except where individual treatment is required.

The three arguments are as follows:

(1) The Association is a fiction and its staff were already officials of the Commission.

(2) Breach of the principle of equal treatment in so far as the staff under special contract were treated differently from the headquarters staff upon their recruitment by the Commission.

(3) Failure to observe the Commission decision on grade classification (Document No 61/IX/81).

V.5.2.1. *The first argument*

The first argument is that the applicants were engaged by the Commission under the cloak of the Association whereas the Association was merely a legal fiction. The applicants maintain that, as a result, both their engagement by the Association and the conclusion of contracts engaging them as members of the temporary staff were fictitious, and that consequently the applicants must be considered to have been in reality *sui generis* officials or servants of the Commission from the date of their engagement by the Association. They therefore argue that the grades and steps allocated to them by the Association constituted vested rights. The applicants also refer to the arguments submitted in that connection in Joined Cases 87 and 130/77 and 22/83.

In order to reject that argument I would refer to my earlier remarks on this question.

However, at the same time I shall also deal with certain other closely related contentions. The applicants contend that the Commission has infringed Articles 102 and 25 of the Staff Regulations together with Annex IX (disciplinary proceedings) by appointing them to a lower grade than they had at the Association.

I would observe first of all that the alleged infringements could have taken place only if the applicants had also been subject to the

Staff Regulations before they were appointed as officials, a contention which I have just rejected. In transferring to the Commission the applicants moved from a contractual relationship with the Association to a relationship governed by the Staff Regulations. Consequently, those contentions must be dismissed. As regards Article 102 of the Staff Regulations I would further observe that that article could not apply to the applicants' recruitment as Commission officials, since it covers 'a servant of the Communities who is occupying a permanent post in one of the institutions of the Communities when these Staff Regulations enter into force . . .'. Article 102 concerned the entry into force of the Staff Regulations and applied to staff occupying a permanent post in one of the institutions. The applicants do not fulfil those requirements since they were contractual staff of the Association.

The applicants also submit in very general terms that the provisions of the Staff Regulations concerning competitions were infringed. However, the submission is developed no further and it is therefore not possible for the Court to pronounce upon it. Consequently I consider that it should be dismissed.

V.5.2.2. *The second argument*

The applicants consider that the principle of equal treatment has been breached in two ways.

First they consider themselves to have suffered discrimination vis-à-vis colleagues classified in a higher grade or step, there being no objective justification for the difference in treatment. Since that part of the argument has not been sufficiently developed it cannot be considered more closely. In addition, according to the Commission the classification was based on rules that it itself laid down for each individual case. In my view that part of the argument must therefore be rejected.

Secondly the applicants consider that they suffered discrimination vis-à-vis headquarters staff in connection with their recruitment. In the case of the headquarters staff, the Council adopted Regulation No 3332/82 laying down special transitional measures for their recruitment. According to Article 3 of that regulation appointment of the staff in question is to be based on a table of equivalence annexed thereto. What is more, seniority in step is to be that acquired by the person concerned in the service of the Association. It is undeniable that the applicants were classified lower than they would have been on the basis of the table of equivalence in Regulation No 3332/82. The Commission has expressly admitted that the headquarters staff were treated more favourably than the applicants. It considers, however, that to do so was not unlawful, since the headquarters staff and the applicants are in different positions.

The applicants, on the other hand, argue that their position is the same as that of the headquarters staff. Both types of staff were engaged by the Association under contracts of employment. The headquarters staff worked at the Association's headquarters, that is to say on the Commission's premises; the applicants were seconded to Directorate General VIII and performed the same work as the officials of that directorate general. The applicants maintain that, although Council Regulation No 3332/82 does not apply to them, that formal difference does not relieve the Commission of the obligation to accord them the same treatment, as had been requested by the budgetary authorities.

The Commission contends that the difference in treatment is not unlawful, since the two groups of staff were in different legal positions. Although the two groups were recruited by special agreement the headquarters staff were recruited for an indefinite period and were required to serve

a probationary period, whilst the applicants were recruited for a limited period. Moreover, the terms of employment of the two categories of staff were laid down in two totally different documents: the Administrative and Financial Regulations in the case of headquarters staff, the specific and general terms of the special contracts in the case of staff under special contract. Furthermore, the duties of the two categories of staff differed: the headquarters staff were occupied with the management of the other staff members (in particular, staff employed overseas), whilst the staff under special contract performed technical and supervisory activities in Directorate General VIII.

As regards the contention that the Commission was under a duty to establish the applicants in the grades and steps which they occupied at the Association even in the absence of a regulation equivalent to Regulation No 3332/82, the Commission argues, first of all, that the budgetary authorities were not empowered to depart from the rules laid down in the Staff Regulations. In the absence of a Council regulation laying down measures in respect of the applicants similar to those laid down for the staff of the headquarters of the Association, the Commission was unable to adopt measures which derogated from the Staff Regulations. Although I consider that conclusion to be correct as far as the method of recruitment is concerned, it still leaves open the question whether to accord the applicants equal treatment in the matter of grading would conflict with the Staff Regulations.

In order to answer that question, I would observe that the Commission has indicated — correctly as far as it goes — a number of formal differences between the positions of the two categories of staff, for instance as regards the documents laying down their conditions of employment and as regards their duties. However, as far as the substance of the contracts of employment is concerned, the difference is not as clear: Article 5 of the general terms also makes provision for a probationary period (of three months). Furthermore, not only were the applicants deemed, on the basis of national law, to be recruited for an indefinite period, but they were also all seconded for more than six years to Directorate General VIII. Do the differences referred to by the Commission justify the difference in the methods of recruitment employed by the Commission? In my view they do not. The differences described by the Commission are from a *formal* viewpoint correct. However, they do not in *substance* provide any explanation for the difference in the method of classification. Why is the grade attained at the Association taken as the basis for grading of headquarters staff under the Staff Regulations in accordance with the table of equivalence, whilst the applicants are subject to the usual rules?

According to the third recital in the preamble to Council Regulation No 3332/82 'the 1982 Budget of the Communities granted 56 established posts, broken down by grade, to the Commission to enable it to recruit those staff members'. The same situation arose with regard to staff under special contract, for whom 32 established posts, broken down according to grade, were assigned to the Commission in the 1981 Budget. The Commission has in no way shown or endeavoured to show that the difference in treatment is justified by a substantive difference in the positions at the Association of the applicants and the headquarters staff. Rather, in response to questions put by the Court at the hearing,

the Commission simply explained the difference in historical terms. The Commission considered the recruitment of the staff under special contract to be desirable at an early stage in view of their position and activities amidst the officials of Directorate General VIII. When in 1981 the budgetary authority made available to the Commission 32 established posts for that purpose, the Commission proceeded to recruit the staff in question on the aforesaid basis. The Commission considered — in my view rightly, as I have already stated — that it was not empowered to depart from the provisions of the Staff Regulations concerning recruitment. However, the grading of the staff concerned appeared to raise more difficulties than expected. Some members of the staff were graded more favourably, others, including the applicants, less favourably, than they had been at the Association. The Commission has expressly stated that, in order to prevent a repetition of such difficulties, it decided, following the setting up of the European Agency for Cooperation by Regulation No 3245/81 of 26 October 1981, to submit to the Council a proposal for a transitional regulation derogating from the Staff Regulations for the transfer of the headquarters staff which would be based on the grade obtained at the Association. The result is set out, in particular, in Article 3 of Regulation No 3332/82 and the associated table of equivalence.

In view of that explanation and the Commission's statement that the two transitional arrangements had the same aim — namely to ensure that as far as possible the staff retained the grades which they had reached — I consider that the difference in treatment is not justified. According to previous decisions of the Court, the principle of equal treatment as between officials expressed in Article 5 (3) of the Staff Regulations is of fundamental importance in Community staff law (see Case 9/81, *Williams* v *Court of Auditors*, [1982] ECR 3301).

On the basis of the foregoing I consider that the applicants' appointments conflicted with the principle of equal treatment and hence should be annulled.

In case the Court does not follow me in this and takes the view that there was no breach of the principle of equal treatment in this case, I shall now consider the third submission, to the effect that the Commission's decision on grade classification, Document No 61/IX/81, was incorrectly applied.

V.5.2.3. *The third submission* (failure to observe the rules contained in Commission Document No 61/IX/82 — Decision on the criteria applicable to grade and step classification upon recruitment)

I take the view that it is unnecessary to set out the individual positions of the applicants, since the submission — and the Commission's defence — may be reduced to a general proposition.

The applicants consider that they were entitled to the same grade upon recruitment by the Commission as they had at the Association. Some of the applicants even consider, in view of their experience, that a higher classification was justified on the basis of the aforesaid Commission decision.

The Commission repeats yet again that in classifying the applicants it was bound by the provisions of the Staff Regulations and its own rules on classification given that there were no special transitional

arrangements. It denies — in my view correctly — that it failed to comply with its own decision on grade classification. All the applicants are occupying posts corresponding to their grades. The level of the posts appears in the vacancy notices. Consequently the applicants cannot claim grades higher than those corresponding to their posts.

Under Article 2 of the classification decision, candidates are appointed to the starting grades of the relevant career brackets provided that they have had a specified amount of experience, depending on the grade in question. However, according to Article 3 of the decision, appointment to the upper grade in a career bracket is a matter for the discretion of the appointing authority; such appointments are made in exceptional circumstances and on condition that the candidate gives evidence of a specified amount of experience. In view of the discretionary power vested in the administration the applicants have no entitlement to such a classification. In my opinion, it follows from a recent decision of the Court that the Commission was *empowered*, within the limits laid down by Article 31 (2) of the Staff Regulations, to place such an interpretation on the classification decision for the benefit of former Association staff. I refer to the Court's judgment of 13 December 1984 in Joined Cases 129 and 274/82, (*Lux* v *Court of Auditors*, [1984] ECR 4127). However, since the Commission did not exercise that power, the applicants cannot derive rights from the decision itself.

In sum, I consider that this submission should be dismissed as unfounded.

VI. Conclusion

In view of the foregoing I consider that the court should decide as follows in the five judgments which it is to deliver:

(1) In Joined Cases 87 and 130/77, *Salerno, Ane and Others*:

The Court should declare that the principal claim is admissible but dismiss it as unfounded.

(2) In Case 22/83, *Boissin and Others*, which is joined with the above-mentioned cases:

The Court should declare the application to be admissible but dismiss it as unfounded.

(3) In Case 9/84 (*Boissin*) and Case 10/84 (*Salerno*):

The Court should declare that the applications are admissible in the event of its deciding that the application in Case 22/83 is inadmissible, but dismiss them as unfounded.

(4) In Joined Cases 66 to 68/83 and 136 to 140/83, *Hattet and Others*, and Case 119/83, *Appelbaum*, the Court should:

(a) Declare the applications to be admissible;

(b) Annul the decisions appointing the applicants as probationary officials and those appointing them as established officials in so far as they determine the applicants' grade or step on the ground that they infringed the principle of equal treatment in view of the special transitional arrangements made for the Association's headquarters staff;

(c) For the rest, dismiss the applications as unfounded.

As far as the costs are concerned, I propose that in the cases listed in paragraphs 1 to 3 of this section the Court should order the applicants to pay the costs in accordance with Article 70 of the Rules of Procedure.

As regards the cases mentioned in paragraph 4 above, I propose that the Commission should be ordered to pay the costs.