3. **Orders the Commission of the EAEC to withdraw document No 123/8 from the applicant's personal file;**

4. **Suspends judgment on the application for the annulment of the decisions of 20 and 21 January 1965 and 13 May 1965 by the Commission of the EAEC regarding the continuance and the suspension of fresh disciplinary proceedings; orders the Commission to produce within three months all the items missing from the file, in particular all the documents and minutes referred to in the Ritter memorandum of 17 June 1964 (especially the documents establishing the nature of the 'inconclusive' investigations) and the 'complaint lodged by a Head of Division' referred to by the Commission in its decision of 30 September 1964 ordering an inquiry;**

5. **Refers the case back to the Commission for execution of this judgment;**

6. **Rejects the claim for compensation and the remainder of Mr Gutmann's subsidiary pleas;**

7. **Orders the Commission of the EAEC to pay all the costs so far incurred in the proceedings, including those in the application for the adoption of an interim measure; and reserves judgment on the remaining costs.**

Luxembourg, 5 May 1966

Delvaux Trabucchi Lecourt

A. Van Houtte L. Delvaux

Registrar President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 MARCH 1966[1]

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Mr President,
Members of the Court,

The applicant in the two cases with which my opinion is concerned today is on the staff of Euratom. He began work there on 1 July 1958, at first in the translation section of the Commission in Brussels. Later—in 1960—he was transferred at his own request to Ispra, where he was responsible in career bracket A 5–A 4 for the Press and Public Relations Department of the Nuclear Research Centre.

In May 1964 the Director of the Research Centre considered it necessary to investigate certain aspects of the applicants' conduct which appeared to be irregular. The investigation resulted in the issue on 3 July 1964 of a written reprimand under Article 86(2)(b) of the Staff Regulations, censuring specific instances of the applicant's behaviour. The applicant made no complaint against this minor disciplinary measure.

Some months later the Commission found reason to pursue or reinstate the inquiry relating to the conduct of the applicant in the service. Accordingly, he was interviewed on 25 September 1964 by the head of the Commission's security department (the department responsible for safeguards under Article 77 of the Treaty). On the same day the Director of the Research Centre informed him that in accordance with the first and second paragraphs of Article 88 of the Staff Regulations, he was being temporarily suspended on full pay. The Director also ordered that the applicant's office be sealed off and that he be forbidden access to the Research Centre.

During the applicant's temporary suspension from duty the Commission decided not to allow him to continue in his post as Head of Division at Ispra. In a decision of 9 December 1964 it ordered his transfer to Brussels and appointed him Principal Administrator in the library of the Information Services Directorate. This decision was communicated to the applicant on 22 December 1964; the date on which he was to commence his duties was to be notified to him later. This was done in a note from the Director-General for Administration on 11 January 1965, ordering the applicant to commence his duties in Brussels on 25 January 1965 at 9 a.m. The applicant, however, did not accept the measures. On 5 January 1965 in fact he made a complaint through official channels under Article 90 on the Staff Regulations to the President of the Commission, although he duly complied with the order transferring him and has

occupied his Brussels post since 25 January 1965. In his complaint through official channels to the President of the Commission he requested that a final decision be taken concerning his temporary suspension, and that the decision to transfer him be revoked. On 18 February 1965 he received in reply a letter from the Director-General for Administration dated 5 February 1965, informing him that at its meeting on 20 and 21 January 1965 the Commission had decided to reject the applicant's appeal against his transfer to Brussels, and to end his temporary suspension as from the day when he commenced work in Brussels. This decision enabled the applicant to make his first application to the Court—Case 18/65—on 30 March 1965.

Shortly before the application was made, on 24 March 1965, a written notice was posted in the Brussels premises to the effect that the applicant's post at Ispra as Principal Administrator in the Press and Information Service had become vacant. The applicant responded by making an application to the President of the Court of Justice to suspend the operation of this measure; the application was granted by an order of the President dated 8 April 1965 effective until 15 June 1965. The applicant also made a second main application—Case 35/65—challenging the advertising of his former post at Ispra. In addition, he learned from the statement of defence submitted in Case 18/65 of the decision adopted by the Commission on 20 and 21 January 1965 ordering the disciplinary inquiry into his conduct to be continued, and this decision too he included in the second application. Finally the latter case also covers a decision of the Commission of 13 May 1965 communicated to the applicant in a letter from the Director-General for Administration on 25 May 1965, suspending the disciplinary proceedings pending judgment in Case 18/65.

The two cases were joined by the Court by an order dated 8 July 1965, for the purpose of the proceedings and the final judgment. Thus the essential issues now before us are the following:

I — *In Case 18/65:*

1. The application for the annulment of the Commission's decision of 5 February 1965, that is, the decision given in response to the applicant's complaint through official channels of 5 January 1965 (this request was modified in the reply so as to seek the annulment of the Commission's decisions on the applicant's temporary suspension and his transfer to Brussels).

II — *In Case 35/65:*

1. The application for the annulment of the vacancy notice of 11 March 1965 advertising the post of Principal Administrator in the Press and Information Service at Ispra;
2. The application for the annulment of the Commission's decisions of 20 and 21 January and 13 May 1965.

I and II:

In both cases the applicant also seeks damages from the Commission, on the grounds of wrongful act or omission, for the non-material damage caused to the applicant by its conduct, at a sum to be determined by the Court.

Legal consideration

A — Admissibility

Before we consider in detail the view to be taken of these claims and the arguments adduced in their support, there is a question of admissibility to be seen to, which was raised by the Commission in Case 18/65. There it objected to the alteration of the application for annulment in its original form made by the applicant's second written statement, saying that it contravened Article 42 of the Rules of Procedure and the case-law of the Court on the subject.

Here I must recall from the facts of the case that the applicant did not complain directly against the Commission's decisions suspending him and transferring him to Brussels. Instead he first made a complaint through official channels, and only when this proved unsuccessful did he decide to bring legal proceedings. So his behaviour was in accordance with the guidelines which the Court has repeatedly said should be observed in the interests of the proper

administration of justice. The correct view on this point is that he would have been entitled, despite the expiry of the time-limits applicable for challenging the decisions made on 25 September 1964 and 9 December 1964, to seek the annulment of those decisions, which he feels were the main cause of the damage done him; were it otherwise, that is, if the claims were to be restricted to the annulment of the decision on the complaint through official channels, then those who observed the limits prescribed by the case-law would be forced to accept a limitation—at least technically—on the protection afforded them by the law. But if the applicant in the present case did not originally avail himself of this right of his when he drew up the application, confining himself to challenging the decision given in response to his complaint, he must, I think, be permitted to shift his ground in the proceedings, as he has done. *A fortiori* when the change of claim does not involve an alteration of the substantial issues in dispute, because the subject matter, even if the application is for the annulment of the Commission's decision on his complaint, is the legality or illegality of the decisions with which it was concerned.

Therefore I have, in principle, no doubt that the applicant's revised applications for annulment are admissible, subject only to the reservation that since the Commission has itself meanwhile postponed a decision on the temporary suspension the question cannot now be of its *annulment*, but that of *ascertaining its illegality*. With this reservation in mind, one which I do not think requires to be formally decided upon in the context of the examination as to admissibility, I shall move on to investigate the actual issues raised by the application.

In so doing, I must treat Case 18/65 and Case 35/65 separately, as well as the applications for annulment and the claims for damages contained in them.

B — The substance

I — *Case 18/65*

1. Is the decision of 25 September 1964 temporarily to suspend the applicant illegal?

(a) *Inadequate statement of reasons*

The applicant's first reason for saying that the decision of 25 September 1964 is illegal is that the statement of reasons given for it is inadequate.

As far as the law is concerned the reply must be that a decision ordering the temporary suspension of an official certainly requires a statement of reasons since it constitutes an act adversely affecting him within the meaning of Article 25 of the Staff Regulations, even when the official concerned retains his pay. In this case the statement of reasons should be determined essentially by the requirements imposed by Article 88 of the Staff Regulations as regards temporary suspension, that is, it must make clear that the official concerned is charged with serious misconduct, constituting either an act in conflict with his duties or an infringement of the law.

If this point is kept in view, then the statement of reasons given here seems scarcely adequate. Apart from a reference to Title VI of the Staff Regulations, all it contains is the information that the inquiries carried out have revealed that the applicant was guilty of improper official conduct in his dealings with subordinates and in the performance of his duties, and that this required investigation. In my opinion it should have been stated, besides these vague intimations which do little more than repeat the text of the Regulations, in what respect the applicant's conduct gave cause for complaint, that is, it should have substantiated to some extent at least its criticisms of him. That is the only way in which the statement of reasons can show that specific complaints have in fact been investigated and that they relate to a serious breach of conduct; only this will ensure that the administration does not attempt in the legal proceedings to vindicate a decision on grounds other than those which it put forward in the first instance.

On the other hand if the Commission finds that it was explained to the applicant in detail at the time he was interviewed what complaints were being brought against him, it cannot avoid the consequences merely because the official conducting the hearing, from the department responsible for ex-

ternal security, is not the same as the body making the decision. Now, from the hearing itself one cannot conclude what were the circumstances which were regarded as decisive by the *body making the decision*, that is to say, the Commission. Moreover, the information given to the applicant was also inadequate in that the statement of reasons for the decision—as has been repeatedly emphasized in past judgments —also serves to provide the Court with an explanation of the principal grounds on which a decision was based.

Lastly, one cannot overlook these inadequacies just because there was an urgent measure to be adopted, or because the administration might have been endeavouring to be as discreet as possible in order to protect the applicant's reputation. Even if the measures are urgent, the actual *statement* of the essential grounds on which the decision is based does not delay the adoption of the measures to any extent. But as far as the applicant's reputation goes, an explicit statement of the reasons for the decision gave no ground for concern because the measures adopted were not destined for publication and because any prejudicial statement that was unfounded could be set aside in subsequent proceedings. Thus one can only assume that the decision on the temporary suspension is illegal in view of its inadequate statement of reasons. Since formal complaints such as those just dealt with are not, by nature, particularly satisfactory, I shall not content myself with the conclusion just given but will go into the other substantive complaints made by the applicant.

(b) *Infringement of Article 88 of the Staff Regulations*

According to the applicant, the decision challenged is also illegal on the ground that the circumstances accompanying its adoption might lead to the conclusion that the Commission intended it to be a disciplinary measure against the applicant. This is borne out, in the applicant's opinion, by the additional security measures (sealing off his office, denying him access to the Centre), as also the publicity which the Commission, in various ways, gave to the measures.

However, I feel that the applicant's views cannot be endorsed here.

Sealing off an official's office and denying him entry to his place of work do not by any means unreasonably increase the severity of his suspension if done in order to facilitate the investigation of particular occurrences, and if there is reason to fear that the presence of the official concerned and his unrestricted access to his place of work and to official papers might frustrate the inquiry.

As regards the criticism of the publicity it must be said that in the assessment of the legality of the decision this may be disregarded because it came *after* the decision was adopted and therefore had no influence on the statement of reasons contained therein. In addition, the least that can be said as regards the posting in the Nuclear Research Centre of the suspension is that it was probably not intended to be defamatory, first, because no names were mentioned, and secondly because it was expressly indicated that, contrary to rumours circulating in the Research Centre, the steps being taken were not disciplinary measures. Lastly, as regards the article published in a Dutch newspaper on 13 October 1964, it does not, the Commission emphasizes, refer to the applicant by name. Nor has the applicant been able to bring evidence to prove that the Commission's staff supplied information for the article or issued statements on it after its publication. It therefore seems that the Commission cannot be accused of infringing Article 88 of the Staff Regulations in any of these respects when it issued its decision.

(c) *Violation of the principle* non bis in idem

On the other hand more serious doubts are raised by the complaint that in ordering the temporary suspension the Commission contravened a vital rule of the disciplinary code, that contained in Article 86(3) of the Staff Regulations which reads: 'A single offence shall not give rise to more than one disciplinary measure'. On this point, the applicant explains that all the events on which his views were heard on 25 September 1964 and which were the basis for his suspension had already been the subject of an interview and

investigation before the first disciplinary decision was issued on 3 July 1964 and were therefore covered by the first disciplinary proceedings. No new facts giving grounds for fresh disciplinary proceedings had been brought in evidence by the Commission.

As far as the law is concerned the first point to be made regarding this complaint is that the principle laid down in Article 86(3) of the Staff Regulations is not (as the Commission appears to assume) confined to instances where a second disciplinary sanction is *imposed* for one and the same act. The correct view is that it also precludes the *introduction* of a second series of disciplinary proceedings with regard to facts already dealt with, and this may well be the case here if the suspension from duty under Article 88 of the Staff Regulations is a preparatory measure.[1] In other words, then, someone who has already been implicated in disciplinary proceedings on the basis of a particular set of facts should, irrespective of the outcome, be immune from any further action in the disciplinary sphere, including preparatory inquiries, in respect of those facts.[2]

The complaint thus reduces itself to the question of fact, whether the subject-matter of the proceedings closed by the decision of 3 July 1964 and of those which brought about the suspension on 25 September 1964 was identical; this is not a question of which events were in fact taken into account as the basis for the disciplinary decision and which were merely discussed.

It is not difficult to answer this as regards the comparison between the hearing on 25 September 1964, the contents of which we know, and the first disciplinary decision, the text of which is likewise known to us. Confusion and contention arise only as to what, beyond the misconduct for which the reprimand of 3 July 1964 was given, was the subject-matter of the first inquiry. That there points *were* discussed and investigated is undeniable. There is sufficient evidence of this in the note from the Director of the Research Centre of 17 June 1964. Despite the great efforts made in the present proceedings we have not been able to clarify this point completely, because the Commission has failed to produce all the documents in the first disciplinary proceedings required to show that the proceedings in which they were drawn up were lawful. One thing I have in mind concerns the written complaints submitted by the applicant's subordinates or colleagues to the Director of Ispra, as well as detailed minutes of the interview with the applicant.

So we must ask ourselves what are the procedural consequences of this set of circumstances.

To do so, we must distinguish the two areas of inquiry on which the decision of suspension was based, namely:

— the allegedly strained relationship between the applicant and his colleagues;
— the applicant's alleged misuse of the department's facilities.

As regards first the applicant's behaviour towards his subordinates, it must be concluded that the main weight of the complaints made so far rests without doubt on the first disciplinary decision of 3 July 1964 (cf. the statements made by Messrs Deplanche, Zimmermann and Regis and Miss Cadario). These statements were known of at the time of the first disciplinary proceedings, as is shown by the note from the Director of the Centre of 17 June 1964; since the Commission has not brought evidence to the Court to show that it expressly excluded these complaints from the first disciplinary proceedings, its claim to impose the disciplinary sanction must be regarded as exhausted by a tacit admission that there is no case to answer. And nothing new has come to light which might permit the facts in question to be reconsidered in some way, for the statements by two secretaries in September 1964, the only relevant source, follow exactly the lines of the other statements given before 3 July 1964, in their summary, generalized and practically identical accusations. So in fact the applicant's behaviour towards his subordinates can no longer be used to justify his suspension in view of the principle *non bis in idem*.

1 — Cf. Plantey, Traité pratique de la fonction publique, 1963, No 881.
2 — Df. Maunz-Dürig, Kommentar zum Grundgesetz der Bundesrepublik Deutschland, Notes 122 to 129 on Article 103.

As for the applicant's alleged misuse of the department's facilities, there is some confirmation for his assertion that this, too, was covered by the first disciplinary proceedings in the note referred to above dated 17 June 1964, according to which certain inquiries made with regard to the misuse of the department's facilities and been without result. In fact this statement might have concealed the existence of inquiries such as those later carried out the second time (September 1964) with regard to an alleged misuse of the Ispra *garages* and *workshops*. But the points of obscurity which remain must, in view of the Commission's conduct in these proceedings, be laid at its door, so that here, too, we reach the conclusion that the right to take disciplinary measures had been exhausted.

No facts other than those mentioned above have been argued by the Commission to justify the suspension decision; so the general conclusion must be that this decision has no sound basis, and thus its illegality is assured on material grounds too.

(d) In view of this, I need not go into the other arguments advanced by the applicant for the same purpose of demonstrating the illegality of the suspension decision (as, for instance, his comment as to the inordinate duration of the suspension). Instead I shall turn my attention immediately to examining the second issue in Case 18/65, the decision of 9 December 1964 to transfer the applicant to Brussels.

2. The legality of the transfer decision of 9 December 1964

(a) *Inadequate statement of reasons*

Here again the first complaint to be investigated is that the challenged decision does not contain an adequate statement of reasons. It seems not to raise any difficulty in so far as the decision actually communicated to the applicant on 22 December 1964 contains no trace of a statement of reasons, but merely the assertion that on 9 December the Commission had decided in the interests of the service to transfer the applicant to Brussels.

Before we reach a definite conclusion against the Commission, however, the following questions should be considered:

— Does a transfer decision require a statement of reasons?
— Is an oral explanation of the relevant reasons sufficient?
— Is it enough for the official concerned to be given the reasons in a second decision given in response to his complaint through official channels?

As to the first question I myself, unlike the Commission, have no doubt that a transfer decision can be an act adversely affecting an official within the meaning of Article 25 of the Staff Regulations, especially when it changes his place of work, thereby encroaching heavily upon the official's private live, and when he is removed from his particular sphere of work only to find himself given a post without—according to the applicant in the present case—any real duties. For this reason there is special need for a transfer decision to state the reasons on which it is based, and the more so when the only real criterion—that it is in the interests of the service—allows the administration a considerable margin of discretion. Since the Staff Regulations are particularly insistent on the formal requirement of a statement of reasons, a purely oral explanation of the reason cannot be considered adequate, not least because it deprives the Court of any reliable means of reviewing the decision. That leaves only the question whether the order given as a result of the applicant's complaint through official channels can compensate for the defects of form inherent in the transfer decision.

The order states that the transfer proved necessary because it had already been considered in connexion with the investigation of the events which occasioned the reprimand on 3 July 1964, because the disciplinary measure pronounced had undermined the applicant's authority and because, lastly, the applicant's relationship with members of his department had created an intolerable atmosphere. The content of this statement of reasons could well be considered sufficient (even though it is not very specific); but it cannot enter into consideration because it did not accompany the decision here in question but merely the measure taken after the actual transfer decision had already been carried out.

As a result the applicant's complaint on

grounds of form would of itself suffice for the annulment of the transfer decision itself.

But here again I do not wish to content myself with an examination of this ground of complaint, in itself relatively unsatisfactory, but to bring into consideration the other, material arguments put forward by the applicant.

(b) *Other complaints of the applicant*

Here I can deal briefly with the complaints to the effect that when a temporary suspension is in force the official concerned cannot be transferred, that the transfer from on 'cadre' ('service') to another is only permissible if certain procedural rules are observed (competition), that the transfer can only be at the prior request of the official, and lastly the view that the vacancy notice for the post to which the applicant was transferred was inadequate both as to its content and as to the length of time for which it was posted up.

On preliminary examination not one of these seems well-founded. If my view is correct, the advertisement for the post to which the applicant was transferred fulfilled all the requirements to be met under the Staff Regulations, which do not include consulting the Staff Committee in accordance with Article 110 of the Staff Regulations or the observance of a certain minimum period of time before filling the advertised post. Nor, I think, do the Staff Regulations forbid a transfer whilst a temporary suspension is in force, provided only that it is justified in the interests of the service (on which point more will be said presently), nor can a transfer be made only at the request of the official concerned, any more than it can be so made under national laws relating to public servants. On the contrary, the general practice is to transfer officials by administrative action whenever the requirements of the service make it desirable.[1] Finally, as the Commission argues convincingly, in the present case there was no change of 'cadre' since before his transfer the applicant worked in the administration service and there he remains in the post he now occupies in Brussels.

I think no further comment on these complaints is necessary. Instead, we must turn our attention to the important question, whether in fact the transfer of the applicant was in the interests of the service.

(c) *Was the transfer made in the interests of the service?*

The reasons advanced by the Commission, based on the interests of the service, were mentioned when I dealt with the inadequacy of the statement of reasons. There are two main points:

— the undermining of the applicant's authority consequent upon the decision to discipline him on 3 July 1964;
— difficulties which arose in the applicant's relationship with his colleagues and which threatened to cripple the Press and Information service.

Of these, the first must, I think, be firmly rejected. The applicant is right to stress that the reprimand addressed to him on 3 July 1964 was a *minor* disciplinary measure which could be adopted without formal disciplinary procedures in accordance with Annex IX to the Staff Regulations. Of its nature it did not entail publicity and so could have been kept from the knowledge of a wider circle of officials had the authorities acted correctly. Even if, however, it is assumed that the reprimand would become known at least within the department in which the applicant worked, that alone would not appear to justify the view that his authority was thereby so gravely undermined that a transfer was imperative. If one adopt this line of thinking the minor sanction of a reprimand would, if it justified a transfer, result in the imposition of a far more serious disciplinary measure. The least requirement must therefore be a specific statement of the reasons, a clear indication of the facts which prove that, as a result of the sanction, the applicant's authority had been seriously undermined, and I find no such statement in the present case.

1 — Cf. Plantey, Traité pratique de la fonction publique, 1963, 747; para. 26, Bundesbeamtengesetz (German law relating to federal civil servants), edition of 1 October 1964.

As regards the second ground, it is certainly not disputed that where incompatibility of character creates tension in any sphere of work, it may justify transferring an official from that sphere, if this seems the only means of ensuring the efficiency of the service.[1]

But it is also true that resort to subjective grounds of transfer such as these, which set measures taken in the interests of the service almost on a par with disciplinary measures, require very careful attention to procedure, that is, a thorough investigation and consideration of the real cause of the trouble with due observance of the rights of defence of the person concerned, to avoid giving the impression that the transfer is a disguised disciplinary measure. In that respect I think this case is open to criticism. If my view is correct, the Commission took as justification for its measures a series of written statements from the applicant's former subordinates, concerning which the applicant's views were heard—he was not shown their text—only once (on 25 September 1964). He was not allowed to confront his accusers nor were the witnesses named by him heard. I consider it doubtful whether such a procedure can be considered proper, even if the Staff Regulations do not expressly say that an official who is to be transferred must be given an opportunity to defend himself. It may be pointed out for example that in the French law relating to public servants there is a requirement that, where a compulsory transfer is being made, involving a change in the place of work ('déplacement d'office'), the file shall be shown to the official concerned ('communication du dossier') and even that the views of the joint committee representing the official and staff sides shall be heard (cf. Plantey, Traité pratique de la fonction publique, 1963, Nos 744, 752 and 758).

If one ignores these procedural defects and considers the substance of these points (the accuracy of which the applicant vigorously denies) made by the Commission as grounds for its decision, the picture is no more satisfactory.

First, there is the applicant's behaviour towards his former subordinates Messrs Regis, Zimmermann and Deplanche. This could have been left out of account in considering the interests of the service in relation to the transfer, because these officials ceased to work in the applicant's department after the summer of 1964. But apart from this, the use of written evidence taken from them must be criticized partly because it does not contain any serious complaint and partly because the statements which it does contain are of a very general nature and would certainly have called for greater amplification. It is also obvious here that the applicant's complaint that he himself was being victimized (see his note of June 1964) was not investigated even though there are circumstances justifying it; there were, for example, the unusually favourable report on the applicant in April 1964, the conflicts which occurred in his department after one of the three abovementioned officials had started work there, the fact that all three reported sick on the same day—which appears *prima facie* to be the outcome of a plot to behave in such a way as to embarrass their superior; the applicant moreover has offered to prove his claims by witnesses. Accordingly, as the information then at the Commission's disposal stood, the statements of these three officials were of doubtful value.

To the statements made by the two other officials (Miss Cadario and Miss Pommée) the same general criticism applies, that they are barely substantiated. Moreover one of these women never worked under the applicant while the other had already left his service in January 1964, that is, at the time when it was stated in the applicant's official report that he carried out his duties with courtesy, conscientiousness and great tact. Lastly, as regards the written testimonies of the two secretaries (Miss Chiorzi, Miss Manara) said to have been given in September 1964, these could hardly have been in more brief and sweeping terms. They are contradicted, moreover, by the relatively detailed and unambiguously positive statements of another secretary (Miss Huch), given in January 1965 after she had left the service of the applicant, which, in view of its consequent impartiality, is of particular

1 — Cf. Plantey, Traité pratique de la fonction publique, 1963, No 748.

value.
On the other hand if one still has doubt whether in fact objective difficulties in the service, which were pointed out by the applicant as early as 1962, could have contributed to a certain unease and tension in his sphere of work, then the picture which emerges as a whole is one which scarcely offers any substantial ground based on the interests of the service for resorting to the particular device of transferring the applicant. There should in any case be food for thought in the fact that as early as 21 January 1965 the Commission considered that further disciplinary proceedings to investigate all the facts were desirable, and that seems to show that it did not then have an absolutely clear picture of the state of affairs in the Press and Information department at Ispra when it issued its transfer decision.
I am inclined towards the view that insufficient evidence has been brought to show that the applicant's transfer was in fact in the interests of the service, so adding a substantive ground to the formal ones already stated for annulling the challenged decision.

3. Summary

Finally, all that has been said confirms that in Case 18/65 the applicant's main conclusions, seeking to establish the illegality of the decision to suspend him and to annul the transfer decision are well-founded. I shall consider his subsidiary plea in this case and the claims he has made for damages at the end of my opinion.

II — *Case 35/65*

1. Vacancy Notice No V/IS/40/65

The first claim in Case 35/65 is for the annulment of the advertisement for the post occupied by the applicant at Ispra until his transfer. No specific independent arguments were brought to support this claim but the applicant pleads that the annulment of the decision to transfer him confirms that the decision which followed and was based on it—the actual advertisement to the effect that the applicant's former post had become vacant and was to be filled—was also illegal.
It is immediately obvious that this point is valid, for if the need to fill a post has arisen through an unlawful act, that is, because of a transfer in the absence of any indication that it is in the interests of the service, then the advertisement for the post which has become vacant by such means must likewise be unlawful. The first head of claim in Case 35/65 must accordingly be accepted.

2. The Commission's decision of 20 and 21 January 1965

The second claim is that the decision taken by the Commission on 20 and 21 January 1965 to continue the disciplinary inquiry into the applicant's conduct should be annulled. It is alleged to be unlawful because it contravenes the third paragraph of Article 88 of the Staff Regulations, no steps towards an inquiry having in fact been taken after it was issued, and because the principle *non bis in idem* had not been observed (to name only the most important of the complaints submitted).
The question which the Court might ask of its own motion with regard to his claim is the initial one whether it is admissible, that is, whether it concerns an act adversely affecting an official within the meaning of Article 91 of the Staff Regulations, or merely an internal matter giving the applicant no rights in law.
Any such objection must be rejected, however, because our case-law as a rule adopts a very generous attitude towards the recognition of acts as having adverse effects. In the present case it cannot be denied that the order to institute disciplinary proceedings is in itself capable of showing the official concerned in an unpleasant light because it assumes a strong suspicion of misconduct. Nor can it reasonably be said that grounds for an application to the Court exist only where the disciplinary proceedings have resulted in a measure having a adverse effect, since cases occur where no such measure is taken even after completion of the disciplinary inquiry. In spite of one or two doubts then, I would say that there is no objection to challenging the Commission's decision of 20 and 21 January 1965.
As regards the individual heads of claim in

this application the following observations arise:

— The Commission disputes the allegation that no proper measures of inquiry were taken after 21 January 1965, saying that measures of inquiry need not necessarily be set down in writing in the form of a minute but this question of fact can be left open for the present. The correct approach to determining the legality of a decision is not to inquire whether and how it was in fact executed, but simply whether in the light of the conditions prevailing at the time of its adoption its form or content are open to criticism.

— Equally misguided is the applicant's criticism based on the wording of Article 88 of the Staff Regulations. For the provision that 'a final decision shall be taken within four months from the date when the decision that an official be suspended came into force' is not meant to preclude measures of inquiry from being taken after the expiry of this period. The Commission has given convincing proof of this by quoting details from the disciplinary proceedings governed by Annex IX to the Staff Regulations with the time-limits imposed in various cases (Articles 6 and 7 of Annex IX).

The applicant's criticism might also perhaps be taken to mean that the Commission has failed to observe the principle that once breaches of conduct have been brought to light, the disciplinary proceedings to investigate them must be conducted as speedily as possible in the interest of the official concerned. However this criticism is irrelevant in our case in view of other considerations, to which I now come.

— In this context, too, the failure to observe the principle *non bis in idem* may be paramount. Admittedly, it was not invoked until the applicant made his reply, but I do not think this prejudicial since in staff cases the Court can make considerable use of its unlimited jurisdiction ('pleine juridiction') and can take material grounds for the application into account of its own motion, as is well demonstrated by the case-law.

As to the scope of this principle I have already explained that not only does it prohibit the *imposition* of two disciplinary sanctions for one and the same thing, but also the *institution* of further disciplinary proceedings in respect of something which has already been the subject of such proceedings.

Consequently it can also be contravened by the Commission's decision of 20 and 21 January 1965 which was purely preparatory to a disciplinary decision, provided that the former really does cover facts already investigated and does not claim the intrusion of new facts. But that is what seems to have occurred in the present case. The only point still at issue in January 1965, according to what we know, was the applicant's behaviour toward his colleagues and his alleged misuse of the department's facilities, that is, occurrences which were under investigation even before the first disciplinary sanction was administered. The applicant's interview of 22 December 1964 brought no new facts to light, nor did the written statements from two of the applicant's secretaries in January 1965, one of which was even eloquent in its praise of him.

So in the absence of sufficient evidence from the Commission to the contrary, we must also annul its decision of 21 January 1965 on the ground that it contravenes the principle *non bis in idem*.

3. The Commission's decision of 13 May 1965

Finally the third claim for annulment is made against the decision whereby on 13 May 1965 the Commission ordered that the disciplinary inquiry instituted against the applicant should be suspended pending the judgment of the Court in Case 18/65.

I may be brief on this point because the decision referred to is based on the decision of 21 January 1965 on the continuance of the disciplinary proceedings and ought therefore in the nature of things to share its fate in the judgment.

But apart from this even, and assuming that the Commission had properly started a second disciplinary inquiry with regard to the applicant, his criticism is not unjustified. In deciding to suspend the disciplinary inquiries in one instance, thus avoiding the continuance and completion of the disciplinary proceedings, the Commission does not in fact enjoy unlimited discretion. Its powers are restricted, in the sense that it

must balance the interest of the service in eliminating incidents which might disturb the functioning of the department against the personal interest of an established official in a senior post in seeing the proceedings brought to a proper conclusion because of his career prospects and security of tenure and out of consideration for the official himself and his family.

In this context it is important that the second disciplinary inquiry goes back to events which occurred in September 1964, or that in September 1964 the Commission was aware of the applicant's breaches of conduct. It was because of them that it suspended the applicant from duty temporarily and kept the measure in force from 25 September 1964 to 25 January 1965. In view of this it seems incomprehensible that by January 1965 still no definite view had been reached as to the extent and seriousness of the alleged breaches of conduct. At any rate the applicant rightly claims that he finds it unconscionable that he should have been kept in the dark, not just until January but on into May 1965 and even until now, as to the result of the inquiries set on foot and the conclusions drawn therefrom by the Commission. Possibly this should not be viewed strictly as a contravention of Article 88 of the Staff Regulations. But certainly such behaviour by the Commission is a serious breach of the duty of care and assistance owed by an administrative authority to its officials.

In contrast the Commission's self-justification, particularly its reference to the case pending in Application 18/65, does not seem valid. First the transfer decision of 9 December 1964 (one of the issues in dispute in Case 18/65) was not considered by the Commission to be a disciplinary measure and could not therefore affect the disciplinary proceedings; and second, even when the circumstances leading up to suspension are being considered for judgment by the Court, that is no justification for leaving in unreasonable suspense the definitive examination and assessment of those circumstances in the context of disciplinary measures. In any case I do not see any danger that continuance of the disciplinary proceedings might influence the proceedings in Court. But the motive argued by the Commission that it suspended the proceedings so that 'aucun grief d'animosité ou de ressentiment à l'égard de l'intéressé ne puisse lui être imputé' ('so that no charge of animosity or resentment with regard to the person concerned may be made against it') must be disregarded because the applicant himself demanded repeatedly and emphatically that the disciplinary proceedings should continue.

Whatever the view taken of the decision of 13 May 1965, it seems that it cannot but be annulled on those grounds.

III — *Claims for damages and subsidiary claims*

There remains only a word or two to be said concerning the applicant's subsidiary conclusions and his claim for financial compensation for the non-material damage he has suffered as a result of the Commission's behaviour.

1. Subsidiary conclusions

Among the applicant's numerous subsidiary conclusions, set out mainly in his reply in Case 18/65, I need not, in the light of the investigations already made, go further into those which ask the Court to institute an inquiry to take evidence. Likewise his various requests for a declaration, which are ultimately destined to support his main application for annulment, need no further reply.

The only point still unsettled is the request for the removal of a document (No 123/8) from the applicant's personal file, a request made with reference to Article 26 of the Staff Regulations and the fact that this document does not bear his signature. I think I am right in saying that the Commission has not commented on this; but the request seems to be justified. According to Article 26 of the Staff Regulations any documents which concern an official's administrative status and reports relating to his ability, efficiency and conduct may not be used or cited against an official 'unless they were communicated to him before they were filed'. Since this was not done, as the lack of signature shows, and the document in question is quite clearly prejudicial to the

applicant, it cannot remain in his personal file.

2. The application for damages

I shall deal more or less briefly with the applicant's claim for damages, which he makes in view of the illegality of the contested decisions and the defamatory circumstances accompanying their adoption. He says it is justified because the contested decisions exhibit defects sufficiently grave to justify a complaint of a wrongful act or omission against the Commission. I am thinking here of the serious measure of suspension and its long duration and of the fact that an examination by the security department preceded it, both circumstances which must have cast an extremely bad light on the applicant; I also have in mind the transfer to Brussels which was connected with these events and which has not been shown to be in the interests of the service, and the unconscionable delay in clearing up the allegations of breaches of conduct which, according to the evidence available, were already covered by earlier disciplinary proceedings. Since in Joined Cases 43, 45 and 48/59 (Rec. 1960, p. 956 et seq.) the Court has recognized the award of financial damages where a contract of employment is terminated without reference to the interests of the service, on the ground of the apprehension caused thereby, it cannot if it wishes to preserve the principle, recognize in any other way the objective effect of the various circumstances mentioned above in the present case, in particular their effect on the applicant's mental well-being. Like the applicant, I do not think that a sum need be fixed. The Court will determine the proper sum at its discretion.

C — Summary and conclusion

I can now put forward the following opinion.

In Case 18/65 it should be decided that the applicant's temporary suspension of 25 September 1964 was illegal; in addition, the Commission's transfer decision of 9 December 1964 should be annulled.

Similarly, in Case 35/65 the vacancy notice of 11 March 1965 and the Commission's decision of 20 and 21 January 1965 and that of 13 May 1965, based on the disciplinary inquiry into the applicant's conduct, should all be annulled.

The Court should also order that Document No 123/8 be withdrawn from the applicant's personal file.

Lastly, the Commission should be ordered to pay a sum to be fixed at the discretion of the Court as compensation for the non-material damage caused. Since the application is successful in its more important points, a decision on costs should be made in accordance with Article 69 (2) of the Rules of Procedure.