JUDGMENT OF THE COURT (FIRST CHAMBER)
15 DECEMBER 1966[1]

# Fulvio Fonzi
# v Commission of the European Atomic Energy Community

**Case 28/65**

Summary

1. *Procedure — Extension of time-limits on account of distance — Applicant's place of residence to be taken into account*
   *(Rules of Procedure, Annex II, Article 1)*

2. *Officials — Disputes with the administration — Appeal through official channels made within the time-limit for appeal to the Court — Time-limit for appeal to the Court preserved*
   *(Staff Regulations of Officials of the EAEC, Articles 90, 91)*

3. *Procedure — Principal claim — Inadmissibility entailing that of ancillary claim*

4. *Procedure — Pleadings — Documents prejudicial to third parties to be removed from the file of the case — Conditions*
   *(Rules of Procedure, Article 37)*

1. The extension of time-limits on account of distance is dependent solely on the facts, that is to say, on where the applicant is habitually resident. The place of residence of the applicant's lawyer cannot be taken into consideration.
2. Cf. para. 1, summary, Judgment in Joined Cases 27 and 30/64, Rec. 1965, p. 616.
3. The inadmissibility of a principal claim entails that of any ancillary claim based on it.
4. Documents capable of prejudicing third parties not involved in the proceedings and unable to defend themselves must be removed from the file of the case.

In Case 28/65

FULVIO FONZI, a Scientific Officer at the EAEC Commission, assisted by Mario Giuliano, Advocate at the Corte di Cassazione, Italy, and Professor in the Faculty of Law of the Università degli Studi, Milan, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY, represented by its

1 — Language of the case: Italian.

Legal Adviser, Antonio Marchini-Camia, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application:

(a) For the annulment of the decision of 7 October 1964, notified by letter on 12 October 1964, allocating the applicant to the Directorate-General for Personnel and Administration in Brussels;

(b) For the annulment of the decision of 3 February 1965, notified by letter of 5 February 1965, rejecting the appeal through official channels made on 10 December 1964 against the abovementioned allocation;

(c) For payment of the daily subsistence allowance for officials on mission provided for in Article 13 of Annex VII to the Staff Regulations;

(d) For payment of damages;

THE COURT (First Chamber)

composed of: A. Trabucchi, President of Chamber, L. Delvaux (Rapporteur) and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: H. J. Eversen, Deputy Registrar

gives the following

## JUDGMENT

## Issues of fact and of law

### I — Facts

The facts of the case may be summarized as follows.

In a previous application (30/64) the applicant requested the Court to annul a decision of transfer or secondment made on 24 June 1965. The judgment given by the Court (First Chamber) on 8 July 1964 dismissed the application as inadmissible on the ground that the contested measure was an internal departmental matter falling within the powers of the EAEC Commission and could not, therefore, constitute an act adversely affecting the applicant within the meaning of Article 91 of the Staff Regulations (Rec. 1965, p. 637).

In a letter dated 12 October 1964 the defendant notified the applicant of a decision taken on 7 October 1964 appointing him to

the Directorate-General for Personnel and Administration in Brussels.

As early as 19 October 1964 the applicant wrote to the Director-General for Personnel and Administration to say that while he would comply with the abovementioned decision he intended to exercise the rights of appeal accorded him by the Staff Regulations.

Accordingly he made an appeal through the official channels on 10 December 1964, which was rejected by a decision of the EAEC Commission taken on 3 February 1965, and notified in a letter dated 5 February 1965.

This present application, against both the decision allocating him to Brussels and the decision rejecting his appeal through official channels, was lodged at the Court Registry on 12 May 1965.

## II — Conclusions of the parties

Whilst reserving the right to amplify his submissions and arguments at a later stage, to introduce new submissions and arguments if necessary, and to produce new documents and to call for measures of inquiry should the need arise,

A — the *applicant* claims in his *application* that the Court should:

'1. Declare the present application admissible and well-founded and, consequently:
2. Annul the decision regarding the applicant taken by the Commission on 7 October 1964;
3. Annul the decision of 3 February 1965 rejecting the applicant's appeal through official channels against the decision referred to at 2 above;
4. Order the defendant to pay the applicant the subsistence allowance for an official on mission for the whole period during which, consequent upon the above decision, he worked at Brussels;
5. Order the defendant to pay the costs of the application.'

B — The *defendant* contends in an *objection of inadmissibility* that the Court of Justice should:

'1. Rule on the objection of inadmissibility without going into the substance of the case;
2. Rule as to costs in accordance with the requirements of Article 70 of the Rules of Procedure.'

C — In his *observations on the objection of inadmissibility the applicant* claims that the Court should:

'1. Reject the defendant's preliminary objection or reserve its decision for the final judgment;
2. Order the defendant to pay the costs of the preliminary objection.'

D — In its *statement of defence* the *defendant* contends that the Court should:

'1. If it does not rule in favour of the defendant's request that a preliminary decision be given as to the admissibility of the application, declare that Mr Fonzi's application is inadmissible;
2. In any case, declare it unfounded;
3. Order the applicant to pay the costs in accordance with the requirements of Article 70 of the Rules of Procedure.'

E — In his *reply* the *applicant*:

'On all those grounds and subject to all reservations, including any measures of inquiry which the Court may call for after the Commission's rejoinder, repeats the conclusions he has submitted in the application but *modifies head 4 thereof, by substituting for it the following*:

'4. Order the defendant to pay the applicant the subsistence allowance for an official on mission for the whole period of his stay in Brussels, in accordance with the decision mentioned in 2. above with interest at 5% on the sums due calculated from the day on which they should have been paid; also order the defendant to pay the sum of 600 000 francs in damages for the non-material and material injury which has been and is yet to be caused as a result of the false statements made concerning the content of the minutes of the Commission's 249th meeting on 24 June 1964,' *and adds the following conclusions as regards measures of inquiry*:

'4. (a) Summon the following witnesses to be heard:

B. J. Asbeck-Brusse, Paule Marc van Laethem, Jacques Renaudie, so that their evidence may be heard on the various circumstances set out in the preceding pages of this reply and on the

grounds therein stated; likewise Mr Chatenet, the President, Mr Medi, the Vice-President, Messrs de Groote, Sassen and von Moltke, Members of the Commission, and Mr Vernaeve, the Secretary, to confirm if need be the authenticity of the text of the resolution regarding the applicant adopted at the Commission's 249th meeting held in Brussels on 24 June 1964;' *and explains further, as regards head 5*, that the order for the defendant to pay the costs of this action should be extended to cover the costs of Application No 28/65 R for the adoption of an interim measure and the proceedings which resulted from the preliminary objection made by the defendant.'

F — In its *application on a procedural issue of 15 January 1966* the *defendant* claims that the Court should:

'1. Exclude from the proceedings the draft of the minutes of the Commission's 249th meeting, annexed by the applicant to his reply (Schedule No 23 to the reply);

2. Take note that the defendant offers to produce extracts—that is, those which concern Fonzi—from the minutes of the Commission's 249th meeting if the Court so desires, or in any case, if it should become relevant, that is, if Mr Fonzi makes an application for Case 30/64 to be revised;

3. In addition, exclude from the proceedings the following documents, annexed by the applicant to his reply:

— a copy of a report by a private detective agency on the activities of Mr Gazzano prior to his entering employment with Euratom (Schedule 22 to the reply);

— a telex message from Mr Barthélemy to Mr Funck of 16 October 1964 (Schedule 34 to the reply);

4. Declare inadmissible the following new requests made by the applicant in his reply:

(a) The request presented in the latter part of the new head 4, introduced by his reply, in which the applicant requests that the defendant be ordered to pay damages of 600 000 francs as compensation for the non-material and material injury which has been and will continue to be caused as a result of the false statements made concerning the content of the minutes of the Commission's 249th meeting of 24 June 1964;

(b) The request made in the second part of the new head 4 (a) which appears for the first time in the reply, in which the applicant requests that the Court hear as witnesses Mr P. Chatenet, the President, Mr Medi, the Vice-President, Messrs de Groote, Sassen and von Moltke, Members of the Commission, and Mr Vernaeve, the Secretary, to confirm if need be the authenticity of the text of the resolution regarding the applicant adopted at the Commission's 249th meeting held in Brussels on 24 June 1964;

5. Take note that the defendant leaves to the discretion of the Court the question of the admissibility of the new request made by the applicant in his reply concerning the increase by 5%, by way of interest, of the sum originally sought;

6. Order the applicant to pay the costs subject to the requirements of Article 70 of the Rules of Procedure.'

G — In his *observations on the preliminary objection* the *applicant* claims that the Court should:

'Dismiss the preliminary objection without going into the substance of the case, keep the time-limit lodging the defendant's rejoinder to the date already fixed and order the defendant to pay the entire costs.'

H — In its *rejoinder* the *defendant* contends that the Court should:

'1. Declare the application inadmissible; failing that, declare inadmissible the new conclusions introduced by the applicant's reply and exclude from the file of the case the documents annexed to the reply which have no bearing on the present issue;

2. Alternatively, dismiss the application as unfounded;

3. Order the applicant to pay the costs, subjects to the requirements of Article 70 of the Rules of Procedure.'

## III — Submissions and arguments of the parties

### A — *Admissibility*

The *defendant* alleges that the application was lodged out of time on 12 May 1965, after expiry of the period prescribed by Article 91 of the Staff Regulations of Officials, including the extension on account of distance accorded by Article 1 of Annex II to the Rules of Procedure.

There are three possibilities, according to the defendant: first, the lodging of an appeal through official channels does not affect the time-limit for introducing an appeal to the Court; second, the appeal through official channels suspends the operation of the time-limit; and third, the appeal through official channels interrupts it.

In the case of the first possibility, it says, the period for lodging an appeal to the Court expired on 26 January 1965, and in the second on 26 March 1965.

In the third case, the defendant calculates the period as follows: on 7 February 1965, the day on which he was notified of the decision dismissing his appeal through official channels, the applicant's habitual residence was in Belgium, which means that the extension of the period on account of distance amounts to two days. Accordingly, the period of three months and two days starting the day after notification expired on 10 May 1965. The appeal to the Court lodged on 12 May 1965 is thus inadmissible because it was made two days after the period expired.

The *applicant* replies that his application was lodged within the prescribed period.

1. In calculating the extension of the time-limits on account of distance which must be taken into account is not, he says, the country in which the applicant happens to be but the country where the advocate assisting him is resident and carries on his business. This is proved by the compulsory requirement that an official be assisted by an advocate before the Court (Rules of Procedure, Article 58), the fact that the pleadings are signed by the advocate (ibid, Article 37) and the right of the parties to be assisted by an advocate resident in a country other than that in which they habitually reside.

2. Moreover, in view of the fact that the applicant was kept in the post under the Staff Regulations to which he had been appointed, he must be considered as still resident at Ispra and merely on temporary mission to Brussels. In support of this the applicant produces three of the administration's decisions, dated respectively 30 October 1964, 12 November 1964 and 10 March 1965 (Schedules 1, 2 and 3 of the reply).

The *defendant* replies that the applicant could not seriously have believed that he was only sent to Brussels on mission. It points out that the decision of 3 February 1965 dismissing the appeal through official channels refused on this ground to grant the request for a mission order which it contained. Thus the applicant could no longer believe, after the rejection of this appeal, from which the period for lodging an appeal to the Court began to run, that he was in Brussels on mission. Consequently the period for lodging the appeal expired three months and two days after 7 February 1965, that is to say, on 10 May 1965, and the application was only lodged on 12 May 1965, that is to say, two days late.

Lastly the defendant recalls, as a further point, that in its preliminary objection, the decision on which the Court has reserved for the final judgment, it asked that some of the conclusions formulated for the first time in the reply be declared inadmissible, and that certain documents annexed to the reply and totally irrelevant to the issues in the present dispute be removed from the file of the case.

### B — *The substance of the case*

The arguments invoked by the applicant against the legality of the decision of 7 October 1964 assigning him to Brussels and the decision of 3 February 1965 rejecting his appeal through official channels against the first-mentioned decision, are those of lack of competence, infringement of an essential procedural requirement (failure to state reasons), infringement of the Treaty and of the Staff Regulations of officials, and misuse of powers.

He also claims payment of the daily sub-

sistence allowance for officials on mission, and finally damages to compensate for the injury caused to him 'as a consequence of the false particulars supplied by the defendant concerning the minutes of the Commission's 249th session on 24 June 1964'.

1. Lack of competence, failure to state reasons, infringement of the Treaty and of the Staff Regulations of officials

The *applicant* states that the decision of 7 October 1964 assigning him to a place of work should, since it concerns the applicant and was contrary to his wishes, have stated the reasons for it in accordance with Article 24 (1) of the Staff Regulations.
Secondly, the same decision, in so far as it assigns the applicant to a new place while preserving his status under the Staff Regulations, in other words the post he occupied at Ispra, infringes Article 1, 3, 4, 5, 7, 11, 27, 35, 36, 37, 92 and 102 of the Staff Regulations. On this point, the applicant refers to the arguments set out in his appeal through official channels of 10 December 1964 (Schedule 5 to the application).
The contested decision which seeks to sever the link established by the Staff Regulations between posts on the one hand and duties on the other and either constitutes a concealed disciplinary measure or amounts to an improper diversion of funds assigned to the Commission for its research budget to the administration budget which covers the applicant's current activities. This amounts to an infringement of the Treaty and other provisions of Community law and of essential procedural requirements, and to a misuse of powers.
The *defendant* replies, first as regards the complaint about the failure to state the reasons for the decision, that according to Article 25 of the Staff Regulations only decisions adversely affecting an official have to state the reasons on which they are based. The case-law of the Court shows that any 'decision adversely affecting an official' should be taken to mean any acts capable of directly affecting a given legal situation (Judgment of 1 July 1964 in *Huber* v *EEC Commission* [1964] E.C.R. 375). The defendant claims that in the present case the applicant's legal situation has in no way been altered. In fact the applicant retained before and after the contested decision the post given him originally and corresponding to his particular scientific qualifications, as taken into consideration when he was originally appointed.
The defendant then moves on to answer the applicant's arguments in support of his claim that the Staff Regulations were infringed.
Replying to the arguments presented by the applicant in the course of his appeal through official channels of 10 December 1964 (Schedule 5 to the application) the defendant explains that it never intended to separate the permanent post from the duties attributed to it, that it did not confuse the said post with the basic post and that it did not, finally, identify it with a mere post under the budget scheme.
The defendant says that assigning the applicant's post to the purchasing department in the central administration in no way implies the separation of the basic post from its duties, because the applicant continues to exercise functions fully consistent with his particular scientific qualifications. The assignment was, the defendant claims, purely a matter for the internal organization of the departments, for which the Commission is responsible. Article 7 of the Staff Regulations, which states that the appointing authority shall assign an official to a post in no way implies that the permanent post must remain necessarily and indefinitely attached to one particular department in the Commission or to a single geographical location.
To the alleged infringement of Article 35 of the Staff Regulations on the ground that this provision does not expressly mention, in its list of situations, assignment in the same post to a different place of work, the defendant replies that such an assignment is not a particular situation under the Staff Regulations; that is, changing the place of work does not in itself constitute an alteration of the official's situation. In the present case the applicant, while assigned to a new place of work, is employed in the same category of work as that previously done by him.
To the alleged infringement of Article 5 of the Staff Regulations on the ground that by

the contested decision the Commission broke the link which must be retained between post and duties, the defendant replies that the wording of the transfer decision of 7 October 1964 (Schedule 3 to the application) and of the definition of the applicant's duties which it contains reveals that those duties are at the same level and of the same nature as those he performed at Ispra and that they are in accordance with the applicant's general standard, scientific qualifications and experience.

It adds that if any adjustment at all of the manner in which duties are performed so as to correspond to developments in the departments were to be prohibited, the institution's activities would be made ridiculously inflexible.

To the alleged infringement of the budgetary regulations on the ground that the applicant continues to be paid under the research budget instead of under the administration budget, the defendant replies that the Commission would be responsible to the Council of Ministers for any infringement of budgetary regulations committed by it, but such an infringement would not be an act adversely affecting the applicant and could not, therefore, be the subject of an application to the Court by him (Article 91 (1) of the Regulations). It adds that the details of the distribution of resources between the two budgets is dictated by the interests of the service which the Commission is bound to follow.

Lastly the defendant remarks, as to the complaint that the decision of 3 February 1965 rejecting the applicant's appeal through official channels lacked a statement of reasons, that this decision (Schedule 6 to the application) states clearly the grounds on which it was given.

The *applicant* replies as follows.

(a) The applicant makes an analysis of the powers and duties attached to his official post at Ispra on the one hand, and of the duties assigned to him in the purchasing department by the disputed decision on the other hand. He concludes that the duties assigned to him in Brussels by the disputed decision are fundamentally different from those of the official post in which the defendant claims he was kept. He adds that the definition of duties for a scientific officer in Grade A 5, as set out in Circular 9/63 (Schedule 4 to the reply) is 'Head of a specialized section or of a (scientific) group' or 'Assistant to a scientific officer or principal technician or to a head of (scientific) division'. An examination of internal memorandum No 15 of 17 April 1964 on the organization of the purchasing department in the Directorate-General of Personnel and Administration (Schedule 5 to the reply) shows, according to the applicant, that the duties assigned by the disputed decision bear no resemblance to those of the basic post to which his official position corresponds.

(b) The applicant criticizes the defendant's argument that the duties carried out by the applicant in Brussels correspond to his rank, qualifications and training. This argument, he says, confuses the duties attaching to each permanent post with actual possession of the qualifications required to perform those duties. Paragraphs (1) and (4) of Article 5 of the Staff Regulations mean that it is unlawful to assign the applicant, that is, to impose on him whilst keeping him in the same permanent post, duties which are new and different from those normally attached to his permanent post. In this respect he refers to the judgment of the Court of 17 December 1964 in *Boursin* v *High Authority* (para. 4, summary, [1964] E.C.R. 691 & 692).

(c) The applicant remarks that the defendant claims, while maintaining that it is only a question of different ways of performing the same duties, that it has the power to alter at will the powers and duties attaching to a permanent post.

According to the applicant, when Article 5 (4) of the Staff Regulations makes a definition of powers and duties attaching to each post subject to consultation with the Staff Regulations Committee referred to in Article 10, it means that the Committee should also be consulted before any alteration is made in the duties previously defined for any particular post.

Since such consultation was not first held, the contested decision is defective not only because it infringes the Regulations but also because the Commission lacks the requisite powers.

The applicant points out that the contested

decision was criticized by the Audit Board in its accounting report for the financial year 1964 (Schedule 6 to the reply) for infringing the Staff and Budgetary Regulations.

As regards the admissibility of the submission of lack of competence, not raised in the original application, the applicant submits, first, that this should be considered as having been put forward by implication in the allegation of infringement of Article 5 (4) of the Regulations and, consequently, that this submission is based on the defendant's claim, in its statement of defence, that it considered itself free to modify the duties attaching to posts under the Staff Regulations as defined by the second paragraph of Article 5 (4) of the Regulations.

(d) The applicant explains that according to Article 7 (1) of the Regulations, 'the appointing authority shall ... assign each official by appointment or transfer to a post in his category or service which corresponds to his grade'.

It follows that, except in the case of an interim appointment or secondment, the assignment may only be made by appointment or transfer. And since, under the first paragraph of Article 4 and Article 29 of the Regulations no appointments, promotions and transfers can be made for any purpose other than that of filling a vacant post, it follows that an assignment automatically presupposes that the post to which the official is to be assigned is a vacant one.

The applicant observes that if the contested decision is to be considered as implying his assignment to a new post, many requirements imposed by the Staff Regulations are not met by it. In the first place, there is no vacant post. Secondly, no vacancy was notified to the staff together with the definition of the duties and powers attaching to the post and the qualifications required of candidates for the post, the description of the manner in which the post was to be filled, and the indication of the time-limit for submitting applications. Similarly no application was made for the vacant post by the applicant, nor was he formally transferred in the interests of the service with due statement of the reasons for this.

According to the applicant, the justification for his application is expressly acknowledged in an internal memorandum from the administration dated 2 June 1965 containing proposed amendments to the Staff Regulations envisaging the possibility of adopting decisions to assign officials the legality of which, according to the Regulations then in force, could only be assured by transferring the official or by sending him on mission (Schedule 7 to the reply).

The applicant then criticizes the defendant's allegation that the applicant's assignment to Brussels should be viewed as a simple 'alteration of service or place of work' for the permanent post occupied by the applicant till the present day.

If this is so, how, asks the applicant, can he be considered to be on the staff at Ispra, as is shown by Schedules 1, 2 and 3 to the reply? And why are official communications still addressed to him at the Joint Research Centre at Ispra, Department CETIS? (Schedules 8, 9 and 32 to the reply). Why were the travelling expenses refunded to the applicant for his annual holiday in 1965 calculated with Ispra as the departure point? (Schedule 9 to the reply). Why, lastly, was notice of the applicant's assignment to Brussels not published in the Community's Monthly Staff Bulletin as required by the second paragraph of Article 25 of the Regulations?

The applicant claims that all these facts show that he was in Brussels on mission, with all the financial and legal consequences which that entails.

(e) The applicant alleges that the duties assigned to him in Brussels do not correspond to his rank, scientific ability or experience. The contested decision, by assigning an official from the scientific and technical services to purely administrative duties, while continuing to draw on the research and investment budget for his post, violated Title VIII and Annex I to the Regulations. The applicant recalls that the assignment was criticized by the Audit Board (See above, paragraph (c) and Schedule 6 to the reply).

Contrary to the defendant's allegations, the duties carried out by the applicant in Brussels are of an inferior type to those of his category A.

Thus the contested decision violates the general principle, acknowledged in all the

legal systems of Member States and the Community, that the new duties given to an employee by his employer should not materially alter his previous situation.

The applicant says that if the definition of duties given by the contested decision is compared with Internal Memorandum No 15 of 17 April 1964 it will be seen that the duties assigned to the applicant were previously carried out by an official in Grade B 3 (Schedule 5 to the reply). The applicant claims that the survey carried out on the purchasing department was done before he came, that the Commission made a contract with the Interburo Company to conduct the survey, and that it confined itself to giving advice to the company (Schedules 11, 12, 13 and 14 to the reply). Also, says the applicant, a survey causing all the institution's purchases, referred to by the contested decision, is not possible because the purchasing department based in Brussels has no authority over the purchasing departments of the research centres, and the latter, being financed by the research budget, are subject to the control of the Director-General for Research, who is a scientific officer, not an administrative official.

(f) The applicant claims that no reasons are given for the contested decision which therefore infringes the first paragraph of Article 25 of the Staff Regulations. He says that the judgment of the Court in the case of *Huber* of 1 July 1964, referred to by the defendant, is not relevant to this case.

According to the applicant the contested decision altered his legal position by changing the nature and level of the duties attaching to his post under the Regulations, changing the location of his place of work against his wishes and not in the context of secondment or transfer, disrupting the previous legal situation without substituting a fresh one, as required by the Regulations, and creating uncertainty in the applicant's job without granting him the daily subsistence allowance for being on mission.

(g) The applicant claims that he was assigned to new duties in Brussels as from 28 January 1965 purely by a note from the Director-General for Administration and Personnel, and without the least mention of a Commission decision (Schedule 16 to the reply).

(h) After summarizing his arguments ((a) to (g)) the applicant points out that the arguments put forward against the transfer decision of 7 October 1964 apply equally to the decision of 3 February 1965 rejecting the appeal through official channels against the abovementioned decision.

The defendant replies as follows.

First, it contends that the contested decision is a measure of administrative organization taken by the departments for which the superior authority alone is responsible and which it must have the power to determine and to modify so as to meet changing situations and requirements (Opinion of Mr Advocate-General Gand in Case 15/65, *Klaer* v *High Authority*, Rec. 1965, p. 1313). In deciding whether this measure injures the rights conferred on the applicant by the Regulations, one must, says the defendant, decide what is the content of the right to the post and to the duties attached to it. Article 1, Annex I, the second paragraph of Article 5 (4) of the Regulations, and also Circular 9/63, setting out the definition of powers and duties for each basic post, show that the Staff Regulations do not recognize any right of an official to be kept in the service and at the place of work originally his, nor does it indicate to what extent the duties which an official is entitled to perform must be specified. Thus what the official is guaranteed as being the substance of his right to a post is that his duties must by their nature and level always correspond to the qualifications and professional training which were the determining factors in his appointment. And Annex VII to the Regulations, in Article 5, 7, 9 and 10, affords ample compensation for any practical disadvantages which may result for an official from changing his place of work.

After comparing the applicant's professional situation before the contested decision and now, the defendant concludes that no difference exists between the two such as could mean that the contested decision had infringed an essential procedural requirement, provisions of Community law or that it was defective for lack of competence, as claimed by the applicant.

In fact, says the defendant, the applicant, a

Scientific Officer, was not engaged directly in research at Ispra. His work for CETIS (Centre Européen de Traitement de l'Information Scientifique) (European Centre for the Processing of Scientific Information) consisted of organization and management tasks, requiring scientific abilities. The same is true of his current duties in Brussels. In fact the contested decision of 7 October 1964 (Schedule 3 to the application), the note from the Director-General for Administration and Personnel of 28 January 1965 (Schedule 16 to the reply) and the decision of 30 October 1965 containing the agreement on the use of data-processing equipment (Schedule 1 to the rejoinder) are evidence that the duties performed by the applicant in Brussels are those of study and planning in the sphere of data-processing, which require scientific training such as the applicant's and correspond to the duties attaching to the basic post of scientific officer in Grade A 5.

The defendant concludes that it decided to assign the applicant to Brussels in the interests of the service while maintaining him in his post.

It therefore interpreted the Staff Regulations of officials, which do not appear to deal expressly with the matter, to mean that the official's right is not violated if there is a continuing correspondence between the nature and level of his duties on the one hand and the qualifications and vocational training on the basis of which he was appointed on the other hand, bearing in mind that such correspondence was assured in the present case and that there were no vacant posts.

The defendant considers that the solution of abolishing the applicant's post at Ispra, immediately creating a new one in Brussels, and assigning the official concerned by means of a transfer carried out under Article 7 of the Regulations, would have been a mere procedural fiction with no meaning other than a pointless obeisance to procedure for its own sake.

The defendant then proceeds to refute point by point the claims made by the applicant in his reply.

*As to (a).* The defendant refers to its observations above, which show that the contested decision altered neither the level nor the nature of the duties guaranteed to the applicant under the Regulations.

*As to (b).* The defendant replies that the statement of defence does not confuse but explains. It is obvious, it says, that the duties performed by the applicant in Brussels could not be of the same kind as those carried out at Ispra if they did not correspond to the qualifications of the employee in the post on the basis of which he was recruited.

*As to (c).* The defendant replies, first, that because neither the duties corresponding to the post assured by the Regulations, nor the duties corresponding to the basic post were modified, the Staff Regulations Committee was not consulted, and so the Commission did not exceed its powers.

To the applicant' complaint that the contested decision was criticized by the Audit Board, the defendant replies that the Commission is still bound to observe the fundamental criterion of the interests of the service and that if the budgets are misused the applicant is not thereby prejudiced and he cannot challenge it before the Court under Article 91 of the Regulations. As to whether an irregularity exists within the meaning of the Regulations, it is for the Court and not the Audit Board to settle the matter.

*As to (d).* The defendant replies that the applicant's reasoning relies on the supposed modification of the duties which the applicant was entitled to perform by virtue of his position. But, says the defendant, first the contested decision did not modify those duties, and secondly it did not assign the applicant to a new post.

Concerning the internal memorandum of 2 June 1965 referred to by the applicant, the defendant remarks that this memorandum proves that the contested decision was indeed taken in the interests of the service.

As for the other administrative documents referred to by the applicant, the defendant asserts that they either contain information relevant solely to budgetary matters, or represent factual errors such as inevitably arise in any large organization.

*As to (e).* The defendant replies that it has shown that the duties being performed by the applicant in Brussels have always corresponded in nature and level with those

which he is entitled to perform under the Regulations.

*As to (f).* The defendant replies that since the contested decision does not affect the applicant's legal situation it should not be counted among those for which Article 25 of the Regulations requires reasons to be stated. It adds that the file on Joined Cases 27 and 30/64 shows that the applicant was perfectly aware of the reasons for his transfer.

*As to (g).* The defendant replies that while the applicant's work in Brussels has undergone some development, his duties have always corresponded in nature and level with those assured him under the Regulations.

2. Misuse of powers

The *applicant* claims that the contested decision is in fact a disciplinary measure in disguised form.

The *defendant* replies that the applicant is seeking to make a ground for annulment out of what is mere suspicion on his part, wholly without foundation, and observes that the burden of proof is on the applicant.

The defendant states that the applicant's removal from CETIS was necessary in the interests of the service both as a result of the development of that institution's activities and because of the applicant's conduct, which had irreparably prejudiced the confidence indispensable for any cooperation.

The defendant also alleges that the applicant sought of his own accord his removal from Ispra, and that the Commission had considered the possibility of transferring him to Garching and Jülich laboratories. It further alleges that the introduction of data-processing methods in the purchasing department at Brussels required the services of an administrative official with the applicant's qualifications.

The defendant concludes that the decision of 7 October 1964 is not a concealed sanction and that, in any case, the Commission had no hesitation in reprimanding Mr Fonzi when this proved necessary (See Case 30/64).

The *applicant* replies as follows:

(a) He claims that the two grounds for the contested decision given by the defendant in its statement of defence are not sufficient to justify the measure to which he objects.

Concerning the argument based on the developments in the activities of CETIS, the applicant observes that even if the interests of the service can be relied upon in order to have him removed from CETIS, they cannot justify his removal from Ispra, where some 3 000 officials are employed, in order to send him to Brussels to perform duties suited to an official in Grade B 3. Consequently the transfer complained of is motivated solely by the intention to humiliate him and to deprive the staff committee at Ispra of a hard working and dynamic member.

As regards the reason based on the applicant's conduct towards his colleagues at CETIS, he says that this behaviour was censured once and for all by the decision reprimanding him taken on 24 April 1964, as shown by the judgment of 8 July 1965 in Cases 27 and 30/64, which declared that the reprimand was given in the interests of the service. In consequence the facts already censured in that judgment could not be used to justify the present transfer decision, which therefore violates the fundamental principle *non bis in idem.*

(b) The applicant observes that developments in the activities of CETIS are not sufficient ground for his removal from Ispra. He points put, in particular, that two scientific posts were declared vacant at the time at Ispra and that he possessed the required qualifications for them (Schedules 17 and 18 to the reply).

(c) The applicant claims that after his assignment under the contested decision to the purchasing department at Brussels to do work performed by an official in Grade B 3, he was then appointed, though without any formal measure, to replace Mr Viellard, an official in Grade A 5, deputy to the head of the purchasing department Mr Asbeck-Brusse, so that Mr Viellard could be made (without the issue of any vacancy notice or the holding of a competition) secretary to Euratom's advisory committee for purchasing and contracts. In support of this claim he quotes the evidence of the said Mr Asbeck-Brusse, and the documents produced in Schedules 5, 16, 20 and 21 to the reply.

(d) The applicant replies to the defendant's allegation that he had himself asked to leave Ispra. He says that this refers to the application which he made for one of the posts advertised in Vacancy Notice 69/64 and that this entailed scientific work in the nuclear sector at Frascatti. He explains that his wish to leave Ispra was due to the disagreement with Mr Gazzano and other officials at Ispra which was the subject of Joined Cases 27 and 30/64.

(e) The applicant replies to the allegations of 'deliberate distortion' and 'bad faith' made against him in the defendant's observations with regard to the application on a procedural issue in Case 28/65 R, by producing (Schedule 23 to the reply) a photocopy of the draft minutes for the 249th session of the Commission held in Brussels on 24 June 1964, which he states he obtained through normal departmental channels.

He remarks that the text on page 7 of the document is not the same as that produced by the defendant in the schedule to its statement of defence to application 30/64 R on a procedural issue, and which the Court took into account in its judgment of 8 July 1965 (Rec. 1965, p. 637) when it declared inadmissible the application for the annulment of the transfer and secondment decision taken with regard to the defendant on 24 June 1964.

The authentic text, he says, establishes that the applicant was not merely sent to Brussels on mission, but that he was transferred there.

It is for the Court to decide, he concludes, to which of the parties to the case the epithets used by the defendant should be applied.

The applicant then asks the Court to order the hearing as witnesses of those present at the Commission's 249th meeting.

He formally reserves the right to take any further action, in particular the procedure for revision under Articles 98 et seq. of the Rules of Procedure.

(f) The applicant concludes by saying that the true motives for the contested decision are the following:

— to humiliate him;
— to impose a new concealed disciplinary sanction based on facts already covered by the reprimand;
— to prevent him from carrying out his duties as a member of the Staff Committee at Ispra;
— to make his administrative and legal situation chaotic and deprive him of any future prospects.

He points out that the effect of his present situation is to deprive him of the periodical bonus which his excellent reports would have justified (Schedules 10 and 25 to the reply) and to cut him off from promotion by reason of the uncertainty as to which Director General would be competent to propose it. He asks the Court to hear as witnesses on this point Mr Jacques Renaudie, representative of the Staff Committee on the Central Committee for the promotion of the research budget.

Lastly, he relies on the case-law of the Court (Judgment of 8 July 1965 *Willame* v *EAEC Commission*, Rec. 1965, p. 821) which recognizes the duty of institutions to extend the fullest assistance to staff representatives. However, claims the applicant, the defendant first endeavoured to prevent him from fulfilling his duties as a member of the Ispra Staff Committee, as was shown in the proceedings in Case 30/64, and then succeeded, thanks to the transfer decision, in preventing him from continuing to exercise those duties.

The *defendant* replies as follows to the applicant's allegations in the reply.

*As to (a)*. The defendant observes that it was in the interests of the service not only to recall the applicant from CETIS but also to assign him to the purchasing department.

To the argument based on the principle *non bis in idem* the defendant replies that under Italian law it is lawful for the administration, when it has disciplined one of its employees, to send him to another place of work, in particular when the employee's conduct has undermined his standing in a particular place of employment.

*As to (b)*. The defendant replies that the first vacant post went to Mr Farese, an official granted leave on personal grounds and thus to be given priority according to the Regulations, and that the second post went to Mr Debroux on 9 September 1963, that is, before the date of the applicant's departure from Ispra.

*As to (c)*. The defendant replies that the need to appoint to the purchasing depart-

ment an official of the same standing and with the same training as that of the applicant became apparent, even before the contested decision was adopted, as a result of the survey conducted by Interburo.
It remarks, next, that the applicant's duties were not the same as those of Mr Viellard. Only later were certain of the latter's duties, together with other new duties, given to the applicant in addition to those originally assigned to him.
*As to (d)*. The defendant recalls that the applicant's accusation that Mr Gazzano and Miss Pozzi gave false information in their applications for the post was rejected by the Court in its judgment of 8 July 1965 (Rec. 1965, p. 639). It adds that it places the applications in question at the disposal of the Court.
As to the report from a private detective agency, the defendant recalls that in its preliminary objection, the decision on which the Court has reserved for the final judgment, it requested that this document be removed from the file as being irrelevant to the case in hand.
*As to (e)*. The defendant observes that the text in question does not refer to the contested decision but to other, earlier decisions. It recalls that on 22 March 1966 it submitted to the Judge-Rapporteur the record of the Commission's resolutions and that this showed that the document produced by it earlier corresponded to the official text of the minutes of the Commission's meeting of 24 June 1964.
*As to (f)*. The defendant observes:
— that bonuses for outstanding service are given only in very exceptional cases, and not to all who have had good personal reports;
— the promotion procedure followed by the EAEC Commission does not include proposals for promotion by Directors-General, but a comparative examination of the merits of all officials enjoying the requisite seniority;
— the applicant had asked to be transferred from Ispra to Frascati; in view of this it cannot see how the contested decision could have prevented him from carrying out duties on the Staff Committee at Ispra which he had already agreed to relinquish.

3. The request for payment of the daily subsistence allowance for officials on mission, and the application for damages

The *applicant* says that according to the Regulations there are only two ways of validly moving an official to a different location for duties other than those attaching to his post under the Regulations: mission and transfer. Since the defendant states that the applicant was kept in his official post under the Regulations and was not transferred to Brussels, his assignment to Brussels could only be on mission, together with its consequences including payment of the daily subsistence allowance for officials on mission.
Accordingly the applicant asks the Court to order the defendant to pay him the mission allowance for the entire period of his stay in Brussels, with interest at 5% from the day on which payment fell due.
The applicant mentions a number of officials who are given this allowance (Schedule 29 to the reply). He refers to the effect of the contested decision on his wife's health (Schedule 26 to the reply) and the fact that he only accepted the money paid him on various grounds subject to reservations (Schedule 5 to Application 28/65 R on a procedural issue and Schedules 27 and 28 to the reply). He observes that if the Court did not consider itself competent to award him the sum requested as mission allowance, it could do so as compensation for the material damage caused him by putting the contested decision into effect.
He also seeks payment of the sum of 600 000 francs in damages to compensate for the non-material and material injury caused to him by the defendant's statements concerning the contents of the minutes of the 249th meeting of the Commission of 24 June 1964.
The *defendant* replies that even if an annulment is granted, the applicant should not automatically be held to be in Brussels on mission. In fact, it says, for such a situation to arise a measure would have had to be expressly adopted by the appointing authority and in consequence, the Court could only fix the amount of any material damage. The defendant also claims that the applicant's material situation has not been injured, since he received or ought to receive under

the Regulations expenses and allowances no different from those provided for by the Regulations for all kinds of permanent change in the place of employment, service or duties which do not amount to a change of basic post, which is the case here. Moreover, the material damage cannot be calculated on the basis of mission allowances because the applicant could not have been unaware that his situation was intended to be permanent.

As to the non-material damage resulting from the false statements alleged to have been made by the defendant, the Court was able during the hearing on 22 March 1966 to reassure itself that the extract from the minutes produced by the Commission in Case 30/64 R corresponded exactly with the official record.

IV — Procedure

The parties lodged their pleadings in due time and procedure followed the normal course.

A request for suspension of operation was lodged on 9 June 1965 and rejected by an order of the President of the First Chamber of 7 July 1965. An application on a procedural issue was submitted on 15 June 1965 by the defendant asking that the main application be declared inadmissible because it was out of time; the decision on this request was reserved for the final judgment by an order of the First Chamber of 8 July 1965.

On 15 January 1966 the defendant submitted a second application on a procedural issue, asking that certain documents annexed by the applicant to his reply be removed from the file and that part of the conclusions contained in the reply be declared inadmissible. By order of the First Chamber on 10 March 1966 the document annexed to the reply under item No 23 was removed from the file of the case, measures of inquiry were ordered, and for the rest the decision on the matter was reserved for the final judgment.

Pursuant to the abovementioned order the parties appeared before the Judge-Rapporteur on 22 March 1966. The defendant submitted to the Judge-Rapporteur the official record of the proceedings of the EAEC Commission containing the authentic text of the minutes of its meeting on 24 June 1964, approved on 14 July 1964; this showed that it corresponded exactly with the copy produced to the Court by the defendant on 25 July 1964 in the Schedule to its observations on Application 30/64 R on a procedural issue. After hearing the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General the Court (First Chamber) decided at its session on 22 June 1966 to open the oral proceedings without any preparatory inquiry. The oral arguments of the parties were heard on 6 October 1966.

The applicant alleged in the course of the oral proceedings that the damages sought were justified on the ground that the judgment of 8 July 1964 had ordered him to pay three quarters of the costs which he had incurred in Case 30/64 and because the defendant had deprived him of his scientific career.

Mr Advocate-General Roemer delivered his opinion to the Court at the hearing on 19 October 1966.

## Grounds of judgment

I — Admissibility

A — *Applications for annulment*

The defendant alleges that the applications for annulment of the decision to allocate the applicant to Brussels, notified on 15 October 1964, and the decision rejecting the appeal through official channels, notified on 7 February 1965, are inadmissible because they are out of time. Application 28/65 was not, in fact,

lodged until 12 May 1965, whereas the period of three months for lodging an appeal prescribed by Article 91 of the Staff Regulations of Officials, extended by two days on account of distance, expired on 9 May 1965.

The applicant replies that the extension on account of distance applicable in this case was ten days, not two, so that the period for lodging an appeal did not expire till 17 May 1965. In support of this interpretation he first claims that, because he was being kept on in the post to which he was appointed under the Staff Regulations, he should be considered as resident at Ispra and as merely on temporary mission to Brussels. He goes on to say, basing his argument on Articles 37 and 58 of the Rules of Procedure, that in calculating the extension of time on account of distance the country to be referred to is not the one where the applicant happens to be, but the country where the lawyer assisting him is resident and practising.

It is not disputed that on 7 February 1965, the date from which the period allowed for lodging an appeal begins to run, and for the whole of that time, the applicant was in fact working in Brussels and not at Ispra. Consequently, according to the wording of the decision on extension of time-limits on account of distance comprising Annex II to the Rules of Procedure, the applicant was habitually resident in Belgium both on 7 February 1965 and during the subsequent months and could not, therefore, enjoy more than two days' extension on account of distance. Moreover, the result of the express wording in the said Annex II: 'parties ... habitually resident' is that what is to be considered is the habitual place of residence of the parties, not of their lawyers.

The appeal through official channels, lodged within the period prescribed for an appeal to the Court, has preserved the time-limit under the Staff Regulations for making an appeal to the Court. The extension on account of distance is dependent solely on the facts, that is to say, on where the applicant has his place of residence. Accordingly the applicant, being habitually resident in Belgium, had three months and two days within which to bring an appeal to the Court. Since this period expired on 9 May 1965, the applications for annulment lodged on 12 May 1965 are inadmissible because they are out of time.

B — *Application for payment of the daily subsistence allowance for officials on mission*

In the conclusions in his application, the applicant asks that the defendant be ordered to pay him the mission allowance for the entire period of his service in Brussels following the abovementioned decision to transfer him.

This claim is obviously dependent on the applications for annulment and since it is ancillary to the main application it shares its fate and must be declared inadmissible.

The applicant also asks in his reply that, should the Court, whilst annulling the contested decisions, not consider it possible to award him the daily subsistence allowance for an official on mission, he should nonetheless be awarded a corresponding sum as compensation for the material damage which he suffered when the said decisions were put into effect.

It follows from the very form in which this claim is cast, which amounts in any case to a fresh application, that if the applications for annulment are inadmissible so too must be a claim which is ancillary to the annulment of the contested decisions. Accordingly this request must be rejected as inadmissible.

C — Claims that the defendant be ordered to pay 600 000 francs by way of damages

In the conclusions in his reply the applicant asks the Court to award him 600 000 francs by way of damages for the material and non-material injury which he has suffered and is yet to suffer as a result of the false statements made by the defendant concerning the content of the minutes of the 249th meeting of the EAEC Commission on 24 June 1964. In the course of the oral proceedings on 6 October 1966 the applicant alleged that his application for damages was also justified by the fact that he was ordered by the judgment of 8 July 1965 to pay three quarters of the costs which he had incurred in Case 30/64. The applicant further maintained during the same proceedings that he was also claiming the damages on the ground that the defendant had deprived him of his scientific career.

The first two requests relate back to Joined Cases 27 and 30/64 which were disposed of by the judgment of the Court (First Chamber) of 8 July 1965. As a result they can only be examined in the context of proceedings for a revision of that judgment.

As for the third request, it is a fresh issue not set out in the original application and cannot therefore be entertained.

All three requests must accordingly be declared inadmissible.

## II — The application on a procedural issue of 15 January 1966

By an order of the Court (First Chamber) of 10 March 1966 there was excluded from the proceedings, as requested by the defendant, the document annexed to the reply as item No 23, and it was ordered that, for the rest, the decision on the procedural issue should be reserved for the final judgment. It therefore remains to examine the defendant's conclusions to the effect that the documents constituting Schedules 22 and 34 to the reply should be excluded from the proceedings.

The inquiry by a private detective agency into the activities of EAEC officials prior to taking up their duties (Schedule 22 to the reply) is capable of prejudicing third parties not involved in the present proceedings and unable to defend themselves. On that ground therefore it must be removed from the file.

On the other hand, the telex message from the President of the Staff Committee at Ispra to the Director-General for Administration (Schedule 34 to the reply) is relevant to the present proceedings and is manifestly incapable of prejudicing the rights of third parties. As regards this document therefore the defendant's request should be rejected.

III — Costs

The applicant has failed in his main application and in Application 28/65 R on a procedural issue.

The defendant has been successful in its objection of inadmissibility of 15 June 1965 and in the essential conclusions of its application of 15 January 1966 on a procedural issue.

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

However, Article 70 of the Rules of Procedure provides that in actions brought by Community officials costs incurred by institutions shall be borne by the latter.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Article 152 of the Treaty establishing the EAEC;
Having regard to the Protocol on the Statute of the Court of Justice of the EAEC;
Having regard to the Staff Regulations of Officials of the EAEC and, in particular, Articles 90 and 91 thereof;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

**1. Dismisses Application 28/65 as inadmissible;**

**2. Orders the removal from the file of the case of the document appearing as Schedule 22 to the reply;**

**3. Orders each party to pay its own costs, both in the main action and in the interlocutory proceedings.**

Trabucchi Delvaux Lecourt

Delivered in open court in Luxembourg on 15 December 1966.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

## OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 OCTOBER 1966[1]

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1 — Translated from the German.