On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application.**

2. **Orders the Commission to pay the costs, including those of the applicant.**

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 14 July 1983.

J. A. Pompe
Deputy Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 19 MAY 1983 [1]

Mr President,
Members of the Court,

Théo Nebe, an official in Grade A 4, has brought an action before the Court against the Commission of the European Communities concerning its decision of 24 November 1981 to reassign him from Division VI/D/1 (Milk Products) to Division VI/G/4 (Clearance of Accounts, Irregularities and Frauds) within the Directorate-General of Agriculture.

I — The facts are as follows:

Théo Nebe was engaged by the Commission as a probationary official by

1 — Translated from the French.

virtue of Article 29 (2) of the Staff Regulations of Officials After he had been established he was promoted on several occasions and finally on 13 July 1973 to Grade A 4 with effect from 1 January 1973. For more than 19 years he performed his duties in the Milk Products Division of the Directorate-General for Agriculture (the title of which has been changed on several occasions).

On 12 March 1981 Mr Villain, the Director-General for Agriculture, circulated a memorandum for the attention of the staff of that Directorate-General which defined his policy regarding the mobility of the officials under his authority. I would refer to three elements thereof:

The reference to the mobility policy laid down in stages by the Commission itself on 23 July and 27 October 1980;

The application of the mobility policy to officials between the ages of 30 and 55 in career brackets A 5 - A 4, B 3 - B 2 and B 1 who have performed the same duties for at least five years and in career brackets A 7 - A 6 and B 5 - B 4 who have performed the same duties for at least three years;

The application of the policy, in principle, on a voluntary basis but whithout prejudice to the possibility of compulsory reassignment should the need arise.

On 13 October 1981 Mr Villain suggested to Théo Nebe that he should be reassigned to a post in the Clearance of Accounts, Irregularities and Fraud Division of the directorate for the European Agricultural Guidance and Guarantee Fund.

After discussions with leading officials of the European Agricultural Guidance and Guarantee Fund in the course of which his duties were explained Théo Nebe sent a memorandum to Mr Villain declining his suggestion and giving reasons for his refusal.

On 29 October Mr Villain repeated his oral proposal in writing. After replying to the applicant's objections he asked him to commence his new duties on 1 December 1981.

On 4 November Mr Villain sent to the Director-General for Personnel and Administration a list of reassignments to be decided upon by the appointing authority and the name of Théo Nebe appeared on that list.

On 24 November the formal decision reassigning him was taken. The post occupied by him was transferred from Division VI/D/1 (Milk Products) to Division VI/G/4 (Clearance of Accounts, Irregularities and Fraud) with effect from the following 1 December. That measure is the subject of this application.

Representations made by the German Minister of Agriculture and the Luxembourg Minister for Foreign Affairs that Mr Nebe should remain in his former post were unsuccessful.

On 30 November Théo Nebe informed the Director-General for Personnel and Administration of his intention to lodge a complaint against the decision concerning him and of which he actually received notice on 18 December 1981.

On 18 December 1981 he lodged a complaint pursuant to Article 90 (2) of the Staff Regulations. He contended that the decision of 24 November 1981 was illegal for three reasons:

The decision was contrary to the general interests of the Commission because his specialist knowledge was the reason for his recruitment under Article 29 (2) of the Staff Regulations.

The decision was not in accordance with the principles applied by the Commission in relation to staff mobility.

The decision was contrary to the interests of the service and infringed Article 7 (1) of the Staff Regulations.

Since the Commission remained silent for four months the objection was deemed to have been impliedly rejected on 18 April 1982. Subsequently it was explicitly rejected on 1 October 1982, which may be regarded as a very slow response.

In the meantime Théo Nebe brought the present action which was lodged at the Court Registry on 12 July 1982. The Commission's statement of defence was lodged on 20 September.

II — Before considering the arguments submitted by the applicant it is necessary to decide whether or not the contested decision was adopted pursuant to what is known as the "mobility" procedure. Guidelines for that procedure were laid down by the Commission at a meeting on 23 July 1980 and the details of its implementation were fixed by the Commission on the following 29 October. According to those rules measures taken to reassign an official must comply with certain requirements as to procedure and substance. Moreover, the Commission emphasizes that the new procedure is not intended to replace the system of transfer and reassignment with the officials's post currently in force. As the Court is aware decisions of the latter type need only comply with the two requirements referred to in Article 7 (1) of the Staff Regulations: the interests of the service must be respected and the post must correspond to the official's grade. [1]

It is essential to consider that question frist: if the decision concerning Théo Nebe's assignment was not taken pursuant to the decision of 29 October 1980 relating to mobility but was merely a decision reassigning him with his post, there is no need to consider either his second submission, that there has been an infringement of that decision, or the arguments flowing from it to be found in all the other submissions.

The Commission maintained that the latter alternative applied in the present case and the Court requested, in order to enable it to determine the accuracy of that assertion, the production of:

On the one hand a copy of the decision relating to mobility within DG VI adopted at the same time as the contested decision, that is to say in November 1981;

On the other hand the final list drawn up by the appointing authority pursuant to Article 5 of the Commission's decision on mobility in relation to DG VI and in respect of 1981.

An examination of those documents shows, without doubt, that the decision adopted with regard to Théo Nebe dated 24 November 1981 could not have been adopted in the context of the mobility procedure laid down by the Commission on 29 October 1980. In fact the first stage of the procedure, that is to say the publication of preliminary lists of all the officials who had not had a significant change of assignment for a given period

1 — Judgment of 24. 2. 1981 in Joined Cases 161 and 162/80 *Carbognani and Zabetta* [1981] ECR 543, paragraph 21 at p. 562.

(three years or more for officials in Grades A 6 and A 7, for example; more than five years for officials in Grades A 4 and A 5), did not take place until 15 February 1982. [1] With regard to category A, it related only to officials in Grades A 7 and A 6. Furthermore, that procedure applies to all the departments of the Commission with the exception of scientific and technical personnel. It is not therefore applied separately in each Directorate-General.

It follows that the decision adopted with regard to Théo Nebe falls within the provisions of Article 7 (1) of the Staff Regulations.

Nevertheless, the decision does have some special characteristics since it is clear from the evidence submitted that it was adopted pursuant to the mobility policy outlined by the Director-General for Agriculture in his memorandum of 12 March 1981 and implemented solely within that Directorate-General.

Thus there is now no purpose in examining the applicant's submission, and the arguments supporting it, in respect of the failure to observe the Commission's decision of 29 October 1980.

III — As the application is indubitably admissible, I will examine the substance of the dispute.

Théo Nebe makes four submissions:

Infringement of Article 7 of the Staff Regulations;

Infringement of the Commission's decision of 29 October 1980;

Inadequate statement of the grounds on which the decision was based;

Misuse of powers.

First submission

A — The applicant relies in the first place on Article 7 (1) of the Staff Regulations which lays down two requirements: the interests of the service and ensuring that the post corresponds to the official's grade. To be precise the provision states that:

"The appointing authority shall, acting solely in the interest of the service ... assign each official by ... transfer to a post in his category ... which corresponds to his grade".

In the present case the decision does not amount to a transfer, which presupposes the existence of a vacant post, but is a reassignment with the official's post.

Théo Nebe does not contend, moreover, that his new post does not correspond to his grade, nor in particular that it is at a level below his grade, but questions whether his reassignment was decided solely in the interests of the service.

The Court's case-law has already defined the concept of "solely in the interest of the service". The Court has recognized that the Community institutions have a wide discretion in the organization of their departments in accordance with the tasks entrusted to them and in the assignment, with those tasks in view, of the staff placed at their disposal. [2]

In addition the Court has placed upon officials the burden of proving that the decision taken with regard to them is not in the interests of the service or, to use

1 — Staff Courrier No 353.

2 — Judgment of 21. 5. 1981 in Case 60/80 *Kindermann* v *Commission* [1981] ECR 1329, paragraph 17 at pp. 1341 and 1342; see also, for the specific case of the reorganization of the medical branch: judgment of 9. 7. 1981 in Joined Cases 59 and 129/80 *Turner* v *Commission* [1981] ECR 1883, paragraphs 44 and 45 at p. 1914.

the wording adopted by the Court in the *Kindermann* case, that "in taking the decision in question, the Commission has exceeded [its discretionary] power." [1]

B — In support of his submission Théo Nebe relies essentially on four arguments which must be considered individually:

That he was recruited initially under Article 29 (2) of the Staff Regulations;

That his reassignment disrupted his former division and did not improve the situation in his new division;

That his compulsory reassignment was absolutely contrary to his personal interest;

That outside the Commission there were unfavourable reactions to his reassignment.

First argument: recruitment under Article 29 (2) of the Staff Regulations

In both his complaint and his application Théo Nebe maintained that his re-assignment to duties other than those for which he was recruited direct and by a procedure other than that which is normally adopted was incompatible with the legal basis of his recruitment and the interests of the service. He has now withdrawn that argument, which certainly went too far, and argues instead that:

In the first place, a decision is not automatically well founded in law simply because it contains a reference to the interests of the service; and

In the second place, a decision to transfer or reassign an official recruited on the basis of certain special qualifications relevant to a post must be particularly well supported by reasons with regard to the requirement of the interests of the service.

It is true that "it is not sufficient for the administration to invoke in the abstract the interests of the service for an alteration in the employment of its officials to be *ipso facto* lawful. The concept of the interests of the service is an imprecise and vague one. Its mere mention, which can take on the character of a commonplace and correspond to nothing precise, is not sufficient for even a limited judicial review to be possible". [2] It is therefore necessary "for the administration to be in a position to state the specific nature of such interest". [2]

As regards the second point it appears that in the case of an official who is recruited under Article 29 (2) it is essential to consider with particular care whether the decision relieving him of the duties which required special qualifications on the part of the person recruited to perform them really is in the interests of the service. In fact the level of expertise implied by that method of recruitment leads to a presumption that the official in question is more useful performing those duties than others. The administration's discretion must be more limited in such a case than it is generally. However, once the expert has left his initial post it seems to me that the Court's ordinary case-law may be applied.

1 — Paragraph 17, ibid., *in fine*.

2 — Opinion of Advocate General Reischl in the *Kindermann* case, cited above, at p. 1351.

Second argument: prejudice caused to his former division without a benefit for his new division

It is maintained that the departure of Théo Nebe disrupted the organization of the Milk Products Division without any benefit to the division to which he was reassigned. The interests of the service therefore require that he should be retained in the duties performed by him in the former division.

The applicant contends that:

1. The disruption of the Milk Products Division is shown in particular by the fact, related in a memorandum of July 1982, that the file concerning an alleged infringement by a Member State could not be fully investigated. The Commission replies that that file did not fall within Théo Nebe's sphere of authority in that division.

2. His arrival in the division concerned with the clearance of accounts did not improve the situation there.

(a) The delays in clearing accounts were attributable in fact, he maintains, not to a lack of staff but to the complexity and slowness of the procedures used. That assertion is disputed by the Commission, which submits figures which clearly show the effort it has made to strengthen Division VI/G/4. Nevertheless such general considerations do not appear to me relevant in dealing with the question at issue. Even if it was necessary to strengthen the division in question it does not automatically follow that Théo Nebe should be chosen to direct the team concerned with the clearance of accounts. Whilst keeping within the limits of judicial review, it is necessary to ascertain whether that particular choice was in the interests of the service.

(b) The applicant has put forward several considerations militating against that choice.

He notes that there is a relatively high number of officials in Directorate-General VI, even in the same grade, and that there were more candidates for movement than were actually transferred. It may be added that amongst the latter there were probably some persons who had not been recruited under Article 29 (2) and who could not therefore be considered as experts in one product or field.

Yet by virtue of his training and his experience he considers himself to be a specialist in milk products. That expertise is of no use in the performance of his new duties. It would have been of greater benefit to the interests of the service to have chosen another person.

(c) Quite a few arguments point in favour of the choice of the applicant.

1. Théo Nebe is certainly an official of great merit, as is shown by the letter sent by the Luxembourg Minister of Foreign Affairs, who has worked with him, and especially by his periodic reports.

2. In addition an examination of his career shows a continuous increase in his responsibilities corresponding to the increasing complexity and difficulty of problems in the milk sector. Moreover, he was given two further duties, namely to coordinate the administration of food aid and to deal with the applications for

membership of Greece, Spain and Portugal with regard to that sector.

3. Although acknowledged to be an expert in milk matters Théo Nebe did not cease to improve and extend his knowledge. He also became an agricultural economist. Before joining the Commission he had, in fact, attended various courses in economics at the Leibniz Akademie (Verwaltungs- und Wirtschaftsakademie) [college of business management and economics] in Hannover and at the Mittelrheinische Verwaltungs- und Wirtschaftsakademie in Bonn.

4. Furthermore he possesses some knowledge of law, acquired during his studies at Hannover and Bonn, which he put into practice by taking part in the drafting of Community regulations concerning milk and milk products. He is the joint author of a work entitled "Das Recht der Milchwirtschaft" [The law relating to the milk economy]. It should also be noted that his final duty in the Milk Products Division was to consolidate the food aids in the milk products sector.

5. Finally, it would appear that his new duties give him "specific responsibility to check expenditure in the milk products sector".

It follows from all those considerations that Théo Nebe's reassignment was in the interests of the service.

Third argument: failure to take into account his personal interest

In the view both of the Commission and of the applicant it is necessary, on the reassignment of an official, to reconcile the interests of the service with the personal interest of the official as far as possible. Théo Nebe concedes that in the case of conflict the interests of the service must prevail over the personal interest of the official.

But the parties differ as to the application of those principles to the present case. In the applicant's opinion the administration has clearly infringed its duty to have regard for his welfare [Fürsorgepflicht]. By forcing him to perform duties which do not correspond to his particular expertise it has failed to take into account his personal interest.

(a) The duty to have regard for the welfare of its officials "reflects, according to the case-law of the Court, the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants". [1] "A particular consequence of this balance is that when the official authority takes a decision . . ., it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the individual concerned." [2] Nevertheless "this consideration cannot prevent the authority from undertaking a rationalization of departments if it believes that this is necessary." [3]

(b) Has the Commission taken sufficient account of all the relevant factors, including those relating to Théo

1 — Judgment of 9. 12. 1982 in Case 191/81 *Plug*, [1982] ECR 4229 at p. 4247, paragraph 21.

2 — Judgment of 28. 5. 1980 in Joined Cases 33 and 75/79 *Kuhner*, [1980] ECR 1677, paragraph 22 at p. 1697.

3 — Judgment of 29. 10. 1981 in Case 125/80 *Arning* [1981] ECR 2539, paragraph 19 at p. 2555.

Nebe's personal interest, in order to be able to reassign him to the division concerned with the clearance of accounts?

Théo Nebe contends that two matters must be considered:

On the one hand, for family reasons he must refuse to undertake the regular missions of long duration in the Member States necessary to carry out the checks required as part of the clearance of accounts of the Agricultural Guidance and Guarantee Fund.

On the other hand, he is bound by contract to continue to collaborate in updating "Das Recht der Milchwirtschaft", a loose-leaf collection of legislation with commentaries and an analytical table of contents.

In fact, Mr Villain was aware of those matters but they do not appear to have been decisive "in view of the imperative requirements of the service".

It seems to me that that argument is well founded. In any case Théo Nebe ceased to rely on family reasons both in his complaint prior to the commencement of proceedings and during those proceedings. With regard to the difficulty of continuing to collaborate in the publication of "Das Recht der Milchwirtschaft" that should not, in the opinion of the Commission, be overestimated.

In addition it is my opinion that the concept of the personal interest of the official may include not only factors of a private nature, even if they are closely linked to his work, but also factors related to his employment. It is certain that Théo Nebe's reassignment resulted in an increase in his responsibilities. A comparison of the description of his duties in the Milk Products Division (periodic report for 1977-79) with that of his new duties confirms the truth of that assertion. The Commission went on to state that Théo Nebe's new duties were in an area which the relevant authorities considered to be a priority area and he was now in charge of a team of some 20 persons. It therefore concludes that "if his reassignment is not a guarantee of promotion it can certainly only help in that direction".

All the above considerations enable me to conclude that the relevant authorities within the Commission did take into account the applicant's personal interest to the extent required by the Court's case-law and in compliance with the duty to have regard to his welfare.

Fourth argument: unfavourable reactions outside the Commission

Finally, the interests of the service must be assessed not only from the point of view of internal administrative management, in the opinion of Théo Nebe, but also with regard to the relationship between the service and persons outside it. That is particularly important where the officials who are transferred are required to maintain close contacts with all those (from the national authorities to commercial operators) who are involved in the operation of the common market organizations, as is the case with officials of the Milk Products Division.

In fact the letter of 24 November 1981 from the German Minister for Agriculture to the Commissioner responsible for agricultural questions and an article

which appeared in the German magazine "Welt der Milch, Fachzeitschrift für die europäische Milch- und Nahrungsmittelindustrie" [The World of Milk, a specialist publication of the European milk and foodstuffs industry] dated 26 February 1982 demonstrate that Théo Nebe's removal was the subject of criticism in the relevant circles.

Without entering into the specific problem of substance the Commission replies, in a convincing manner, that the argument based on the unfavourable reactions of a specialist publication or of a national politician may be taken into account only with the greatest caution. It states, quite rightly, that such articles in the press and, one might add, intervention by persons in public office, are frequently inspired by extraneous considerations. It emphasizes, furthermore, that Théo Nebe continues to maintain close contacts with relevant authorities of the Member States in his new duties.

Thus when it reassigned Théo Nebe compulsorily from the Milk Products Division to the division concerned with the clearance of accounts of the European Agricultural Guidance and Guarantee Fund within the Directorate-General for Agriculture, the Commission did not exceed the limits of its discretion in taking the view that such a step was in the interests of the service, even taking into account the fact that the person concerned was an expert.

Second submission

Since the contested decision was not adopted pursuant to the Commission's decision of 29 October 1980 concerning mobility, there is no need to consider Théo Nebe's second submission, based on an infringement of that decision.

Third submission

His third submission is based on the second sentence of the second paragraph of Article 25 of the Staff Regulations according to which any decision adversely affecting an official must state the grounds on which it is based.

Let us recall first the Court's case-law with regard to the scope of that duty in relation to transfers and reassignments with the official's post.

There is a twofold purpose to the duty to give reasons: on the one hand it allows "the official concerned to determine whether the decision is defective, making it possible for its legality to be challenged" and on the other hand it "enable[s] it to be reviewed by the Court", [1] and the Court has stated that the dual obligation is fulfilled if "the circumstances in which the disputed measure was adopted and notified to those concerned and the staff memoranda and other communications accompanying it make it possible to recognize the essential factors which guided the administration in its decision". [2]

Moreover, the Court has stated that:

"the duty to give a statement of the grounds on which a measure concerning organization of the department is based must be related to the discretionary power which the appointing authority exercises in this connection and also to the marginal nature of the disadvantages which result for the official concerned from a re-posting which does not affect his grade or his material situation". [3]

1 — Judgment of 28. 5. 1980, *Kuhner*, cited above, paragraph 15 at p. 1695.

2 — Judgment of 17. 12. 1981 in case 791/79 *Demont* v *Commission* [1981] ECR 3105, paragraph 12 at p. 3116.

3 — Judgment in the *Arning* case, cited above, paragraph 12 at p. 2553.

Finally, the Court has held that:

"the extent of this obligation must be determined on the basis of the particular facts of each case". [1]

I have been able to find only one judgment amongst the Court's recent decisions where it has annulled a decision to transfer an official on the ground that the reasons upon which it was based were mistaken. [2]

In that case, which concerned the compulsory transfer of a medical practitioner from the Commission's medical branch to DG XII on the sole ground that she had not "adapted herself" to the new duties assigned to her in the medical branch which were particularly "insubstantial", the Court considered that such a statement of reasons amounted to an unjustified slur on the applicant "so that the decision to transfer her is in any event lacking in a correct statement of the grounds on which it is based, contrary to the requirements of the second sentence of the second paragraph of Article 25 of the Staff Regulations" (paragraph 63).

In the present case it may be seen that the decision of 24 November 1981 refers solely to the interests of the service as the ground on which it was based. The statement of reasons therefore does not contain any specific, negative reason of the kind which formed the basis of the decision referred to above which was adopted in relation to Mrs Turner.

It is therefore necessary to refer to the steps preceding the contested decision: the conversation between Mr Villain and Mr Nebe on the previous 13 October and the memoranda exchanged between them.

In the opinion of Théo Nebe they show that the statement of reasons was contradictory and insufficient.

1. The applicant notes first the inconsistency between the characteristics of the mobility policy as laid down in the memorandum of Mr Villain and the manner in which the policy was applied to himself.

(a) However, there is certainly no inconsistency between the mobility policy described in the memorandum and the compulsory reassignment of the applicant against his will. In fact the terms of the circular indicate that Mr Villain did not exclude the possibility of such a reassignment. He states in fact: "I hope to receive many requests which will permit this policy to be applied on a voluntary basis. Nevertheless, it is clear that in order to satisfy those who wish to benefit from mobility it will be necessary in certain cases to transfer officials who have not requested a move despite having performed the same duties for a very long time. That is the price to be paid for the balance of the departments and the satisfaction of those who wish to move."

(b) Théo Nebe goes on to note that the requests of certain officials in DG VI who wished to be reassigned were rejected contrary to the declared voluntary nature of the policy. But he does not refute the Commission's reply according to which if a small minority of requests for reassignment could not be satisfied "that was because on the one hand some departments could not be disrupted, for that would have been the precise opposite of the objective pursued,

1 — Judgment in the *Kuhner* case, cited above, paragraph 15 at p. 1695.

2 — Judgment of 9. 7. 1981 in Joined Cases 59 and 129/80 *Turner* v *Commission*, paragraphs 62 to 65, in particular paragraph 63, at pp. 1918 and 1919.

that is to say, restoring balance to the services and using the available staff better, and on the other hand a choice had to be made in certain cases between officials who had expressed the same preferences".

(c) Finally, Théo Nebe alleges that his Director-General failed to undertake the "comprehensive consultation with the representatives of the staff" which, according to his memorandum, was to accompany the implementation of the mobility policy.

However, is such consultation to concern the mobility policy itself, or is it to concern individual cases?

In my view it must be the former; there is nothing in the general wording of the memorandum from which it may be inferred that consultation should have taken place 39 times in respect of the 39 officials in category A who were the subject of the exercise.

Moreover, it is evident that the legality of a compulsory reassignment cannot depend on the agreement of the representatives of the staff; the person responsible discharges his duty if he simply consults them. In fact a meeting took place on 7 October 1981 between the representatives of the staff as a consultative committee and Mr Pizutti, a deputy Director-General, representing Mr Villain. At that meeting the representatives of the staff requested an explanation as to the manner in which it was intended to implement the mobility policy within the Directorate-General for Agriculture.

2. Is the statement of reasons given in respect of the contested decision insufficient, inappropriate or even incorrect?

(a) Théo Nebe considers that to take account of mobility as a positive factor in proposals for promotion is valid in respect of officials who have recently been appointed but not in respect of officials who, like him, have already completed 20 years service with the Commission.

There is nothing to support that contention. The Commission clearly encourages mobility as an advantage for all officials and I have already noted that the applicant's career has been marked by a continuous increase in his responsibilities during recent times.

(b) Théo Nebe states that on account of the number of volunteers some person other than himself could have been chosen to direct the team concerned with the clearance of accounts of the European Agricultural Guidance and Guarantee Fund expecially since, given his training and experience, he was of greater benefit to the proper functioning of the service in his former post than in his present post. Thus it was incorrect to give the interests of the service as the reason for the decision to move him.

I have already replied to that contention in the negative when considering the substance of the claim. The same applies in relation to the more narrow question of the duty to provide reasons for a decision. With regard to the arguments submitted by Théo Nebe in relation to specialization Mr Villain replied explicitly that "such specialization and your knowledge of the regulations and other provisions and your experience in the area are precisely the reasons which have led me to consider your transfer." [1]

1 — Memorandum of 29 October 1981.

Théo Nebe was aware of the basis of the decision of 24 November from the time he was notified of it. In that respect, therefore, it contained a sufficient statement of reasons.

(c) Finally, the applicant observes that his name was on the list drawn up on 25 September "of decisions for the transfer of officials to DG VI to be adopted by the appointing authority." From that he concludes that the interview he had with Mr Villain on 13 October was a pure formality: no argument, however valid, would have been capable, in his view, of changing the opinion of the other party to the conversation with regard to his reassignment.

Nevertheless a careful reading of the document to which Théo Nebe refers shows that the list of 25 September was a provisional list and was therefore capable of amendment. In fact the list was not submitted to the Director-General for Personnel until 4 November 1981. In those circumstances there is nothing to justify the view that his name would have remained on that list if the objections he raised against it were well founded.

In my opinion the various requirements of the Court's case-law have been complied with: when the decision to reassign him with his post was adopted on 24 November 1981 Théo Nebe was already aware of the main elements justifying it with regard to the interests of the service. Moreover, he had had an opportunity to put forward his objections, which were examined and considered.

Fourth submission

Théo Nebe submits fourthly that the decision to reassign him is invalid for misuse of powers.

1. However, that submission is relevant only if, contrary to the opinion I have expressed, the Court considers the second submission to be well founded. It is therefore of a secondary nature and presupposes that the contested decision was not adopted in the interests of the service. If, on the other hand, that decision may be justified as being in the interests of the service, as I believe, and since that is the purpose for which the power to adopt the decision was given to the appointing authority, [1] then *ipso facto* it was not adopted for "an objective other than the legal one." [2]

2. Even if the Court does not agree with my analysis of the second submission, is Théo Nebe able to "prove", [3] "à sufisance de droit", [4] "on the basis of the objective, relevant and consistent facts", [5] that the appointing authority has only *appeared* to consider the legal purposes for which the powers were conferred?

He relies on the following factors:

1 — Opinion of Advocate General Reischl of 10. 3.1983 in Case 85/82 *Schloh* v *Council* [1983] ECR.

2 — Judgment of 25. 11. 1976 in Case 123/75 *Küster* v *European Parliament* [1976] ECR 1701, paragraph 15 at p. 1710; see also the judgment of 5. 5 1966 in Joined Cases 18 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103.

3 — Opinion of Advocate General Reischl in the *Schloh* case, cited above.

4 — Jugdment in the *Küster* case, 1976 Receuil 1701, paragraph 15 at p. 1710.

5 — Judgment in the *Gutmann* case, cited above, at p. 117.

The attempt to include in his new duties aspects relating to the exercise of his former specialization;

The marked desire to reassign him compulsorily in spite of the objections he made to the Director-General of DG VI in relation in particular to his specialization and the unusual manner of his recruitment;

The purely speculative, and unproved, contention that he was more useful to the Commission in his new post, in his capacity as an expert, than in his former post.

Inasmuch as those factors are not identical with the arguments developed in support of the second submission, they appear to me to be clearly insufficient to demonstrate that the contested decision was adopted for purposes other than those for which the Commission has the power to reassign officials.

Thus the final submission must also be dismissed.

IV — It remains for me to give my opinion on the question of costs.

As I emphasized by way of a preliminary consideration, the course of this action, and probably its conclusion, would have been different had Théo Nebe been reassigned pursuant to the mobility procedure laid down by the Commission in its decision of 29 October 1980. In fact, as I am about to demonstrate, there was confusion with regard to the legal basis of that decision until an advanced stage of the contentious proceedings. In those circumstances it would appear to be quite understandable that the applicant should have believed for a long time that the decision to reassign him was adopted in direct application of the Commission's decision and not, as has been shown to be the case, pursuant to an internal procedure within the Directorate-General for Agriculture which, whilst it draws on "the principles laid down in the mobility guidelines adopted by the Commission on 23 July 1980", [1] need only satisfy the conditions laid down in the memorandum providing for it and those laid down by Article 7 (1) of the Staff Regulations.

In my opinion the resulting ambiguity should have been removed sooner. The Commission should have eliminated it as soon as the memorandum of 30 November 1981 from Théo Nebe to the Director-General for Personnel and Administration was received, which states: "it [the manner in which Mr Villain had acted] was contrary to the Commission's decision concerning mobility which provides that those measures may only be adopted with the agreement of the official in question."

More serious still is the fact that the statement of defence of 27 September, which was lodged at the Court Registry on 30 September, is still equivocal. In its reply to the third submission relating to the statement of reasons, that is to say in reply to the applicant's argument that the decision fails to take into account the fact that he is an expert in the milk

1 — Observations submitted by the Commission on 12 April 1983 as a result of the Court's request to produce to it certain documents.

products sector, the Commission states that that factor may not be usefully relied upon unless that specialization was such that "there was no other post in the Commission where he could pursue a career which was sufficiently interesting for him or which was sufficiently useful to the Commission." It was thereby reproducing the wording of point 3 (b) of its decision of 29 October 1980 concerning mobility. That was why the matter was still the subject of debate in the applicant's reply.

Finally the explicit rejection of Théo Nebe's complaint on 1 December 1982 contains the following passage: "you may have been led to consider the decision adopted in relation to you as a measure adopted in the context of a mobility arrangement because it was adopted concurrently with a reorganization of the departments of DG VI pursuant to the general guidelines issued by the Commission on 29 October 1980 which does not affect, at the initial stage, officials in Grades A 5 and A 4." That passage is clearly incorrect since the first stage in implementing the decisions taken by virtue of the mobility policy of 29 October 1980 was not carried out, as I have already said, until 15 February 1982 and did not relate solely to DG VI but to all the departments of the Commission. [1]

It is for that reason that I suggest that an order be made under the second subparagraph of Article 69 (3) of the Rules of Procedure which gives the Court the power to order one party, even a successful party, to pay the costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.

Consequently my conclusions are:

1. That the application should be dismissed;

2. That the Commission should be ordered to pay all the costs, including those of the applicant.

1 — Reply of the Commission of 15. 4. 1983 to the Court.