For this purpose, directs the parties

(a) to send to the Court, within two months from the date of delivery of the present judgment, the name of the expert whom they have agreed to appoint;

(b) failing such agreement, to send to the Court, within the same period, the names of the experts whom they propose, setting out their reasons for refusing the other party's proposal;

3. Reserves the costs.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 2 April 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 26 FEBRUARY 1981

My Lords,

The applicant in this case, Mr Adriano Pizziolo, is a Commission official, on the scientific staff, who, having had a year's unpaid leave on personal grounds which ended on 28 February 1971, has still not been reinstated.

Article 40 of the Staff Regulations provides, so far as material:

"1. An official may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds.

2. ... the duration of such leave shall not exceed one year.

Leave may be extended for two further periods of one year each.

3. ...

4. Leave on personal grounds shall be governed by the following rules:

(a) it shall be granted at the request of the official concerned by the appointing authority;

(b) application for extension shall be made two months before the leave expires;

(c) another person may be appointed to the post occupied by the official;

(d) on the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post. If he declines the post offered to him, he shall retain his right to reinstatement when the next vacancy corresponding to his grade occurs in his category or service, subject to the same proviso; if he declines a second time, he may be required to resign after the Joint Committee has been consulted. Until effectively reinstated he shall remain on unpaid leave on personal grounds."

The words "provided that he satisfies the requirements for the post" were added by Article 12 of Council Regulation No 1473/72, which came into force on 1 July 1972. As the Court, however, held in Case 58/75 *Sergy* v *Commission* [1976] 2 ECR 1139, those word merely confirm the law as it previously stood.

Mr Pizziolo was born on 4 August 1929. He is a graduate of the University of Pisa, where he obtained a "Laurea" in Chemistry. From 1956 to 1957 he worked as a laboratory technician at Montecatini's, where he was concerned with research on synthetic polymers. From 1957 to 1959 he was employed by Agip Nucleare on decontamination of radioactive water. In 1959 he entered the service of the then Euratom Commission as a member of the staff of the Joint Research Centre (the "JRC"). His first posting was to Geel, where he worked in the plutonium division. In 1963 he became an established scientific official in Grade A 7. He was promoted to Grade A 6 in 1964. In the same year, he was transferred to Karlsruhe where he worked in the European Institute for Transuranium Elements.

On 11 December 1969 he applied for one year's unpaid leave on personal grounds from 1 March 1970 to 28 February 1971, in order to enable him to widen his experience in the nuclear field by taking part in a programme of research conducted by Agip Nucleare in Milan. He stated in his application that he intended not to apply for any extension of that leave but to seek reinstatement under Article 40 (4) at the end of it. By a decision of the Commission reached by the "written procedure" on 20 February 1970, the formal act embodying which was dated 27 February 1970, his application was granted.

Mr Pizziolo did not apply for any extension of his leave, so that, as from 1 March 1971, he became entitled to reinstatement upon the first suitable post falling vacant. Having regard to Article 40 (4) (b), the Commission must be taken

to have known as from 1 January 1971 that that would be so.

On 24 March 1971 Mr Pizziolo wrote to the Commission expressly asking to be reinstated. We have not been told what, if anything, happened as a consequence of that letter.

Later Mr Pizziolo learned that the Commission had decided to authorize the transfer of officials from the scientific to the administrative staff without requiring them to undergo a competition. Accordingly by a note dated 15 December 1972 he informed the Commission of his availability for appointment to a post paid from the operational budget. The reaction of the Commission to this was to send him, on 23 February 1973, an application form to complete. This he did on 20 March 1973.

By a letter dated 20 September 1973 Mr Pizziolo asked to be made the subject of the "special and temporary measures for the termination of services of officials of the European Communities", authorized by Council Regulation No 1543/73 of 4 June 1973. He was informed that the Commission had decided that those measures were not applicable to officials on unpaid leave. (In Case 38/74 *Geerlings* v *Commission* [1975] 1 ECR 247 the Court held that, in so deciding, the Commission had correctly interpreted the Regulations.)

On 10 August 1976 Mr Pizziolo wrote to the Institute for Transuranium Elements asking for reinstatement there. He received a reply saying that there was no vacant post at the Institute for which he had the necessary qualifications, but offering to convey his request to the other establishments of the JRC. He accepted that offer.

On 5 October 1977 he completed another application form. We have not been told in what connexion.

In April 1978 the Individual Rights and Privileges Division of the Directorate-General for Personnel and Administration began to send to Mr Pizziolo copies of vacancy notices relating to posts for which he might wish to apply. This may have been due to the fact that, so we were told by Counsel for the Commission at the hearing, the Commission, following the decision of the Court in the *Sergy* case, decided, on the advice of its Legal Service, to make that Division centrally responsible for ensuring that the qualifications of officials entitled to reinstatement were systematically considered in relation to posts becoming vacant. Be that as it may, among the vacancy notices thus sent to Mr Pizziolo was Vacancy Notices Nos COM/364/78 to 371/78, which related to eight posts in the "Euratom Safeguards" Directorate (Directorate E) of the Directorate-General for Energy (DG XVII). That Directorate is, as Your Lordships know, based in Luxembourg, and I shall, for the sake of convenience, call those posts the "Luxembourg posts". The qualifications for the eight posts were the same and Mr Pizziolo asked to be considered for one of them. He was, as a result, interviewed in Luxembourg on 4 August 1978, but he was not appointed to any of the posts. It was considered that his knowledge and experience did not satisfy the requirements for them.

On 23 October 1978 Mr Pizziolo lodged at the Secretariat-General of the Commission a request under Article 90 (1) of the Staff Regulations asking that effect should be given as soon as possible to his right, under Article 40 (4) (d), to reinstatement and for compensation for the loss that he had sustained owing to the failure to reinstate him so far. I shall call this the "general request". In support of it Mr Pizziolo mentioned a number of posts that had become vacant since 28 February 1971 and for which, he said, he would have been qualified. They included the Luxembourg posts.

On the same day Mr Pizziolo lodged a complaint under Article 90 (2) specifically against the failure to appoint him to any of the Luxembourg posts. I shall call this the "specific complaint". It was expressed to be without prejudice to the general request.

The four-month periods prescribed by Articles 90 (1) and 90 (2) respectively expired on or about 23 February 1979, by which time the Commission had replied neither to the general request nor to the specific complaint. Both were therefore deemed impliedly rejected.

Against the implied rejection of the general request Mr Pizziolo lodged a complaint dated 29 March 1979, which was registered at the Secretariat-General of the Commission on 3 April 1979, i.e. well within the period of three months prescribed by Article 90 (2). I will call this the "general complaint".

In relation to the implied rejection of the specific complaint Mr Pizziolo took no further step. He could have appealed to this Court within three months, by virtue of Article 91, but he did not.

On 15 June 1979 the Member of the Commission responsible for personnel and administration, Mr Tugendhat, wrote to Mr Pizziolo expressly rejecting the specific complaint. The letter was of course out of time for that purpose. It was even too late to cause the three-month period for appealing to this Court against the rejecting of the specific complaint to run afresh under the proviso to Article 91 (3). It would have been in time to deal with the general complaint, but it conspicuously omitted to do so.

The Commission in fact never replied to the general complaint. The four-month period for doing so expired on or about 3 August 1979. This action, which is based on the implied rejection of the general complaint, was brought on 24 October 1979, i.e. within the requisite period of three months.

I have set out those facts in some detail, because the Commission gave a somewhat inaccurate and incomplete account of them in its pleadings and, on the basis of that account, raised (in the Rejoinder) the question of the admissibility of the action. It seems to me that the action is clearly admissible. The only question, to my mind, is whether, having omitted to appeal against the rejection of the specific complaint, Mr Pizziolo can now rely, for any purpose, on the fact that he was not appointed to one of the Luxembourg posts.

The Commission did not raise that question as such, and it left the question of admissibility generally to the wisdom of the Court. It is however established by a substantial body of authority that the time-limits prescribed by Articles 90 and 91 are mandatory ("d'ordre public") so that the Court must consider, if necessary of its own motion, whether they have been complied with — see Case 4/67 *Muller* v *Commission* [1967] ECR 365 (Rec. 1967, p. 469), Case 24/69 *Nebe* v *Commission* [1970] ECR 145, Case 33/72 *Gunnella* v *Commission* [1973] ECR 475 and Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769. In Case 34/80 *Authié* v *Commission* (in which Your Lordships have just delivered judgment) I had occasion to refer to the cases about appeals from selection boards. They illustrate the operation of the principle, in that there are among them cases where the Court expressly dealt with the question of admissibility although the Commission had not raised it at all or, whilst raising it, had not formally taken any point on it or had done so only at the hearing — see Case 44/71 the *second Marcato case* [1972] ECR 427, Case 37/72 the *third Marcato case* [1973] ECR 361, Case 31/75 *Costacurta* v *Commission* [1975] ECR 1563, Case 7/77 *von Wüllerstorff und Urbair* v *Commission* [1978] ECR 769, Cases 4, 19 and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403 and Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613. In Case 255/78 *Anselme* v *Commission* [1979] ECR 2323, however, the Court held that it need not consider the question of admissibility because the Commission, whilst raising it, had taken no formal point on it. That seems to be an isolated decision, out of line with the other authorities, including the more recent *Belfiore* case, and it ought not, in my opinion, to be followed.

To allow Mr Pizziolo to impugn in the present action the decision of the Commission not to appoint him to any of the Luxembourg posts would be to allow him to raise again the very issue that he raised by the specific complaint, against the implied rejection of which he chose not to appeal. That being so, to allow him to do that would, in my opinion, be contrary to Article 91 (3). My regret in coming to that conclusion is lessened by the fact that, as a result of the questions that were put by the Court to the Commission at the close of pleadings, evidence was placed before us showing that Mr Pizziolo's qualifications for those posts were carefully considered following his interview, and by the fact that, for reasons that I shall come to, I do not think that Mr Pizziolo needs to rely on the failure to appoint him to any of the Luxembourg posts in order to succeed in this action.

I turn to the substance of the case.

It is of course at first sight astonishing that Mr Pizziolo has still not been reinstated, ten years after the expiry of his period of leave. The Commission accepts that it was under an obligation to reinstate him as soon as a post for which he was qualified fell vacant. Its defence is essentially that no such post has in fact fallen vacant, largely because of the repeated reductions over the years, owing to the policy of the Council, in the numbers of the Community's scientific staff, and because of the very

specific nature of the tasks that such staff are needed for.

Mr Pizziolo challenges that in two ways. First he says that he could have been and should have been reinstated in his own old post when his leave came to an end. Alternatively he says that a number of other posts became vacant subsequently for which he was qualified.

Unfortunately the full facts about Mr Pizziolo's own old post only emerged as a result of the questions put by the Court to the Commission at the close of pleadings and of further questions put by Members of the Court at the hearing. In order to understand those facts it is necessary to know two things.

The first is that, in the administration of the JRC, a distinction is made between "budgetary posts" and actual jobs. The "budgetary posts" are those listed in the relevant section of the budget in accordance with Article 6 of the Staff Regulations. They constitute a sort of "pool" available for the whole of the JRC. When the appointing authority decides that a particular job needs to be done at a particular establishment, it draws on that pool so as to allocate a budgetary post to that job. If and when the appointing authority decides that that job no longer needs to be done, or at all events that another job for which no budgetary post would otherwise be available must take priority over it, the budgetary post is withdrawn from it so as to become available again in the pool.

The second thing is the significance of the formula "This post will be filled when funds become available" which, we were told, is used in all vacancy notices published by the Commission, and is certainly to be found in all the vacancy notices with which we are concerned in this case. The significance of that formula is, so it appears, that the publication of a vacancy notice by the Commission does not mean that the appointing authority has definitely decided to fill the post thereby advertised. It means only that the filling of such a post is envisaged. We were told that many more vacancy notices are published than there are budgetary posts available. Events supervening between the date of the publication of a vacancy notice and the time when the appointing authority has finally to decide whether to fill the post advertised, or a consideration of the priorities as they then stand, may cause the appointing authority in the end to decide not to fill the post and, accordingly, not to allocate a budgetary post to it.

Although that procedure does not at first sight accord with the wording of Article 4 of the Staff Regulations, I have come to the conclusion that it is lawful. To hold that the publication of a conditional vacancy notice was forbidden by the Staff Regulations would mean holding that, once a vacancy notice has been published, the appointing authority is inevitably committed to filling the post thereby advertised even in a case where that has in the meantime become, for some reason, unnecessary or undesirable. The publication of the notice in conditional form has at least the

advantage of warning candidates that no appointment may in the end be made.

The facts about Mr Pizziolo's own post are these.

A vacancy notice (COM/512/70) relating to it was published when he was about to go on leave. In that notice the closing date for the receipt of applications was stated to be 12 February 1970. Whoever caused that notice to be published jumped the gun. The decision of the Commission granting Mr Pizziolo's leave was not reached, Your Lordships remember, until 20 February 1970, and the papers submitted to the Members of the Commission recommending that decision included a note saying that, in the opinion of the Directorate-General for Personnel and Administration, "la publication du poste ne s'impose pas". Be that as it may, we were told that no suitable candidate responded to the notice and that, subsequently, following Mr Pizziolo's departure and a redistribution of the work within the service he had belonged to, the Ceramics and Metallurgy Service, the budgetary post that he had occupied went back to the pool.

Later in 1970 the JRC secured an order from the German Gesellschaft für Kernforschung for the manufacture of a certain quantity of nuclear fuel of a special kind. It fell to the Ceramics and Metallurgy Service to do the work necessary to meet that order. But it was work that would last only for a limited period. So a temporary servant, Mr Richard, was engaged to do it. His contract, after prolongation, lasted for three years, from 15 January 1971 to 15 January 1974. A budgetary post was released from the pool for that period, in order to enable him to be employed, after which it went back to the pool.

The Commission admits that Mr Pizziolo could have done Mr Richard's job. It says however, firstly, that the job would have meant for Mr Pizziolo a diminution in his status ("un amoindrissement dans sa position") in the service, since it involved only the manufacture of fuel, not research or development, and secondly that it would have been administratively irresponsible to have reinstated a permanent official in what was essentially a temporary job.

It is in my opinion a nice question whether the Commission was justified in not offering the job to Mr Pizziolo because it would have meant a diminution in his status. The view is tenable that it was for him to decide as to that. On the other hand one has to bear in mind that, under Article 40 (4) (d), an official has to be offered reinstatement only twice, so that it might not be difficult, in some cases, for an institution to get rid of an unwanted official who was on unpaid leave by the device of offering him on two successive occasions posts for which he was formally qualified but the acceptance of which would mean for him a diminution in status.

In my opinion, however, it is not necessary to decide that question in this case, because the Commission was, so it seems to me, manifestly right on the second point. There are in all Community institutions jobs that are

appropriate for established officials and jobs that are appropriate for temporary staff. The job that Mr Richard was employed to do was of the latter kind. If Article 40 (4) (d) were to be interpreted as meaning that an institution is bound to reinstate an official in such a job, it would mean that, at the end of the period for which that job needed to be done, the institution could be left with a "floating" official for whom no post was available. That cannot, in my opinion, have been intended by the authors of the Staff Regulations.

I conclude that Mr Pizziolo was not entitled to reinstatement in his own old post, which had in fact, and quite lawfully, ceased to exist.

I turn to Mr Pizziolo's alternative contention, that a number of posts became vacant after his leave ended that he was qualified to fill.

I think it right to consider the vacancy notices relating to those posts chronologically since it is clear, not only from Article 40 (4) (d) itself, but also from the relevant authorities in this Court on its interpretation — the *Sergy* case, which I have already referred to, and Cases 126/75, 34 and 92/76 *Giry* v *Commission* [1977] 2 ECR 1937 — that what the Court has to do in a case such as this is to ascertain the earliest date at which the defendant institution ought to have reinstated the official concerned, if of course it ought to have reinstated him at all.

The earliest vacancy notices relied upon by Mr Pizziolo are COM/503/71 and COM/510/71. They related to the same post in a service at Karlsruhe dealing with technology and high temperature metallography. The second notice was an amended version of the first. The closing date for the receipt of applications was 18 February 1971. The Commission states that, owing to the scarcity of budgetary posts for the JRC, it was decided in the end not to fill the post. Arrangements were made for the work in question to be done by the existing staff of the service. Mr Pizziolo contends that budgetary considerations ought not to have been allowed to prevail over the Commission's obligation to reinstate him. I do not think that that is right. An appointing authority cannot in my opinion be bound to reinstate an official in a post that has been the subject of a conditional vacancy notice and that it has decided for budgetary reasons not to fill. The Commission also states that, in any case, Mr Pizziolo's qualifications did not satisfy the requirements for the post. The reasons given are of a highly technical nature and I do not think that the Court could adjudicate upon them without the assistance of an expert's report. On the view I take, however, that is not necessary.

The next vacancy notice relied upon by Mr Pizziolo is COM/515/73. This related to a post at Winfrith, in the United Kingdom, coming under the Directorate-General for Industrial, Technological and Scientific Affairs. The closing date for the receipt of

applications was 24 April 1973. In the Reply (at p. 18) Mr Pizziolo tabulated the qualifications required for the post as stated in the vacancy notice and his own qualifications, to show that the latter matched the former. He adduced as evidence in support two reports of the Institute for Transuranium Elements in which the work in which he took part there is described. There was no attempt on the part of the Commission, at any stage of the case, to refute the claim thus made or to give any reason why Mr Pizziolo should not have been appointed to the post. This contrasted sharply with the fact that, in relation to other vacancy notices on which Mr Pizziolo relied, the Commission was able to explain why it considered that he did not have the requisite qualifications. Even at the hearing, where Counsel for Mr Pizziolo strongly stressed that the Commission had said nothing in answer to Mr Pizziolo's claim in relation to this vacancy notice, there was no response from those present on behalf of the Commission. In those circumstances, the conclusion is, in my opinion, clear that Mr Pizziolo is entitled to succeed on that claim. No expert's report is, in my opinion, necessary on the question whether Mr Pizziolo's qualifications matched those required for the post since the Commission has put forward no argument to the effect that they did not. In saying this I do not of course overlook the Commission's general allegation, which I have already mentioned, that in fact no post for which Mr Pizziolo was qualified has fallen vacant since the end of his leave. The point here is that the Commission has not sought to substantiate that allegation in any way in relation to this post.

Taking, as I do, that view, I can deal shortly with the other vacancy notices on which Mr Pizziolo relied. COM/531/74 and COM/507/75 share with COM/515/73 the characteristic that the Commission made no attempt to refute Mr Pizziolo's claim that he satisfied their requirements. As regards COM/1530/75 and COM/1513/76 the Commission disputes that Mr Pizziolo had the required qualifications. Here again the reasons given are technical and could not, in my opinion, be adjudicated upon without expert assistance. The same is true of COM/1531/76, which was however cancelled as a result of the entry into force of Council Regulation No 2615/76. COM/364/78 to 371/78 related, Your Lordships remember, to the Luxembourg posts. Lastly COM/R/514/78 and COM 1237/78 related to posts for which Mr Pizziolo was actually considered but found not to have the requisite qualifications.

I turn to the question what relief Mr Pizziolo is entitled to.

He claims firstly a declaration that he ought to have been reinstated on 1 March 1971. That is, in my opinion, for the reasons I have given, too early. The earliest post that he should have been offered was that advertised by vacancy notice COM/515/73, the closing date for applications for which was, as I have mentioned, 24 April 1973. Since the Commission's obligation to reinstate him prevailed over the power to fill the post

by promotion or transfer, and since there is no other obvious date that can be selected, I think that the declaration should be that he ought to have been reinstated at that date.

Secondly he claims a declaration that the Commission is bound to reinstate him in the first post corresponding to his grade which falls vacant in his category, with effect as regards his seniority in grade and step and as regards his pension rights from 1 March 1971. With the substitution of 24 April 1973 as the effective date, and with the proviso that he must satisfy the requirements for the post, that appears to me accurately to state his rights — see the judgments of the Court in the *Sergy* and *Giry* cases. But I do not think it necessary for Your Lordships formally so to declare. In the *Sergy* case the Court expressly left it to the Commission to work out the applicant's rights (see paragraphs 23 and 24 of the judgment and its operative part).

Thirdly Mr Pizziolo claims compensation for the loss of salary suffered by him from 1 March 1971 until his actual reinstatement or, at all events, until judgment, such compensation being equal to the net emoluments to which he would have been entitled during the period in question subject however to deduction of the net earned income received by him during that period from other employment. I would of course substitute 24 April 1973 as the starting date. Otherwise the compensation claimed corresponds to that awarded by the Court in the *Sergy* case, with two differences, first, that in that case the terminal date was known because the applicant had been reinstated and, second, that in that case the relevant figures had been placed before the Court, whereas here they have not been. The question thus arises whether Your Lordships should award Mr Pizziolo compensation up to the date of his reinstatement or only up to the date of judgment. The latter must, I think, be the correct answer since, in the absence of agreement between the parties, the Court will itself have to quantify the compensation and it cannot speculate as to the amounts of the future salaries of Community officials or as to the amounts of the future earnings of Mr Pizziolo.

Fourthly, Mr Pizziolo claims interest at 8% per annum on the compensation from the respective dates of the instalments of salary to which he would have been entitled. 8% was the rate awarded in the *Sergy* case and it seems to have become the rate normally awarded by the Court in comparable cases — see for instance Case 115/76 *Leonardini* v *Commission* [1978] ECR 735 and Case 40/79 *Mrs P.* v *Commission* (5 February 1981, not yet reported). It has not however been the practice of the Court to award interest from a date earlier than that of the relevant complaint under Article 90(2) — see the authorities that I discussed in Case 114/77 *Jacquemart* v *Commission* [1978] ECR at pp. 1718-1719. Here, however, the complaint was preceded by a request under Article 90(1) and it seems to me logical to make interest run from the date of that request, i.e. 23 October 1978, or of course from the date when the instalment of salary would have become due, if later.

Fifthly, Mr Pizziolo claims an order that the Commission should "reconstitute" his career since 1 March 1971 or, alternatively, should compensate him for the loss suffered by him in the development of his career, which loss he estimates at BFR 150 000. He claims interest on that sum too. I take the claim to be one for loss of the chance of promotion. If that be so it is of a kind that the Court held in the *Giry* case could not be sustained (see paragraphs 25 to 28 of the judgment).

Sixthly, Mr Pizziolo claims an order annulling the implied decisions rejecting his request of 23 October 1978 and his complaint of 29 March 1979. Such an order is in my opinion inappropriate — see Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677.

Lastly, Mr Pizziolo asks for costs. He is in my opinion entitled to them.