OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 29 JANUARY 1969[1]

Mr President,
Members of the Court,

The applicant in the proceedings with which we are concerned today was formerly an official with the High Authority of the European Coal and Steel Community and since the entry into force of the Merger Treaty has been an official with the Commission of the European Communities. Until 24 June 1968 he was Principal Administrative Assistant in Grade B 1 in the Directorate for Budgets. As a result of an administrative re-organization he has been working since 25 June 1968 in the Directorate-General for Financial Control.

In accordance with the provisions of Article 43 of the Staff Regulations of Officials of the European Coal and Steel Community, which still applied to him at that time, a report on his 'ability, efficiency and conduct in the service', was made, which covered the period from 1 July 1965 to 30 June 1967. As he was entitled to do under the second paragraph of Article 43, the applicant made a series of critical comments relating to alleged contradictions in the report and asked that it should be rectified so as to take account of them. As this was not done he lodged a formal complaint through his immediate superior with the President of the Commission on 27 March 1968 under Article 90 of the Staff Regulations, in which he repeated his request for rectification of the report. Finally on 25 July he filed an appeal with the Court. In his application he asked the Court to annul the report made on 15 January 1968 and to order that it be rectified.

The Commission's reply was that in fact his superior drew up a new report substantially modified on the basis of the applicant's comments of 22 May. This report was communicated to the applicant by his superiors; the applicant however refused to comply with their request that he should submit his comments and sign it. The report was therefore sent to the Directorate-General of Administration which was informed of what had happened. One of the heads of division of the Directorate-General thereupon asked the applicant on 31 May 1968 to see him and again brought the report to his notice. As the applicant still refused to sign the report and also refused to sign a document confirming this refusal, the said head of division drew up a note relating to what had occurred and had it placed with the new report on the applicant's personal file.

The Commission takes the view that all these facts show that the report of 22 May 1968 has effectively replaced the report of 15 January 1968 and that the application for annulment and rectification of the report of 15 January 1968 consequently has no purpose. It therefore submits that in accordance with Article 91 of the Rules of Procedure the Court should, without going into the merits of the application, dismiss it as inadmissible.

The Commission also submits in the alternative that the application cannot in any circumstances be regarded as admissible in its entirety, because it challenges points in the report of 15 January 1968 which are not mentioned in the applicant's complaint through official channels. The Court must hold that the appeal was to this extent filed out of time.

My opinion on these disputed matters, which were supplemented by the ap-

1 — Translated from the German.

plicant's observations on the Commission's statement and by submissions during the oral procedure, is as follows.

1. The admissibility of the application depends in the first place on the question whether it relates to a *measure which can be challenged* or whether the dispute—as is stated in Article 91 of the Staff Regulations—is concerned with an 'act adversely affecting an official' or whether its subject-matter, the report of 15 January 1968, is only to be regarded as an internal administrative measure.

There is no need to devote much time to this question. The applicant has shown in a convincing manner that reports under Article 43 of the Staff Regulations can have a direct effect on an official's career and his legal position from more than one point of view. They play an important part in promotion, which according to Article 45 of the Staff Regulations shall be decided 'after consideration of the comparative merits' of the officials eligible for promotion (however in the case of the applicant, since he is in Grade B 1, this procedure could only be adopted after his transfer to another category as a result of a competition). They can have repercussions in connexion with the re-organization of the administration of the Commission (as a result of which the applicant was assigned to a new post with effect from 25 June 1968). Finally they are of some importance when officials are transferred and seconded, when posts are abolished and when officials are dismissed for inadequate performance of their duties. It does not in fact appear to me to be a very sensible policy for officials to wait for such measures to be taken and only to plead the defectiveness of annual reports, that is to say, of the essential factors of the decision, during the prosecution of legal proceedings. In the interests of the administration, too, it is preferable to have an immediate clarification of the question whether or not a report made under Article 43 discloses any defects. With regard to the legal effects of such reports I consider that it is right to classify them in the category of acts adversely affecting officials under Article 91 of the Staff Regulations and to admit appeals against them.

On this issue moreover I find that I am supported by the national case-law relating to similar questions. In French law I refer to a judgment of the Conseil d'État of 23 November 1962 (quoted in his 'Traité élémentaire de droit administratif' by André Laubadin, 3rd edition, Vol. 2 page 63). In German law I would mention Note 51 to paragraph 42 of the 4th edition of the 'Kommentar zur Verwaltungsgerichtsordnung' by Eyermann-Fröhler.

2. The admissibility of the application depends in the second place upon compliance with the *time limits* prescribed by Article 91 of the Staff Regulations. According to this Article an appeal must be filed against an individual measure within three months of the notification of the decision.

Now it is, of course, in accordance with a well-established principle of our case-law, sufficient, indeed desirable, that a complaint through official channels should first be lodged within this period under Article 90 of the Staff Regulations which is intended to provide an opportunity to carry out an administrative examination of a measure which has been criticized. The applicant also satisfied this requirement by lodging on 27 March 1968 a complaint through official channels against the periodic report of 15 January 1968 which was communicated to him on 17 January 1968.

If he did not receive a reply to his complaint, it would have been open to him until 27 July 1968 to appeal under Article 91(2) of the Staff Regulations against this failure to reply, which on the expiration of two months from the date when he lodged his complaint

would have been deemed to be an implied decision rejecting it. In fact he filed his appeal at the Court of Justice on 25 July 1968 so that his *compliance with the time limit* cannot be called in question. However it appears that objection can be taken to the fact that the application is not directed to the annulment of the implied decision of rejection but of the periodic report of 15 January 1968. In fact this would not appear to be possible having regard to the view which the Court took, contrary to my opinion, in Joined Cases 18 and 35/65 (I refer to [1966] E.C.R., 122). On the other hand a further objection is the applicant's assumption that the Commission did not deal with his complaint through official channels in a way which was legally appropriate and the conclusion arising out of this assumption that the report of 15 January 1968, the subject of his complaint, continues to be valid. The main objection of the Commission is directed against this assumption.

3. As I stated at the beginning of my opinion the Commission stresses that it did not in fact fail to take any administrative action. On the contrary it accepted part of the applicant's complaint and replaced the report which he criticized with a second report of 22 May 1968. In the absence of any interest which can be legally protected it follows that the applicant cannot now ask for a judicial review of the first report which has been withdrawn but can at most ask for a review of the second report by means of an application to the Court.

I will now examine this aspect of the dispute in greater detail.

In the first place it cannot be denied that the applicant's superiors, who prepared the report of 15 January 1968 for the period from 1 July 1965 to 30 June 1967, produced a second report on the applicant for the same period dated 22 May 1968. This report differs in important respects from the first. It contains no additional observations of the applicant's illnesses and his short periods of leave; moreover the note on his capacity to carry out his duties with despatch is more satisfactory. The second report is not therefore simply a repetition of the first report but a new and improved document more favourable to the applicant. Whether it was expressly pointed out to the applicant—which he denies—that the second report was intended to replace the first does not seem to me to be conclusive. Two reports covering exactly the same period which differ from each other obviously cannot exist simultaneously. In a case such as this it is therefore self-evident that only the report which was made later and was moreover more favourable to the applicant should have effect. This view is not altered by the fact that in the list of documents in the applicant's personal file the reference to the first report withdrawn from the file was not erased, because the view can be taken that the designation in the same list of the second report ('Rapport de notation, *rectificative*') ('Amended periodic report') is sufficient to clarify the position, a fact which appears to make unnecessary a declaration sought by the applicant that the report of 15 January 1968 is no longer on his personal file.

It is none the less doubtful whether the second report was at all effective in law and could therefore replace the first report. The applicant resolutely disputes this view. He bases his argument on Article 43 of the Staff Regulations which provides that the periodic report shall be communicated to the official for whom it is intended. He refers to rules issued by the Commission of the EEC relating to Article 43 which provide that the periodic report must be signed by the official concerned. Finally he invokes Article 26 of the Staff Regulations which contains provisions on the keeping of the personal files of officials. These pro-

visions show that periodic reports cannot be used or cited against an official by a Community institution 'unless they were communicated to him before they were filed'. In addition the third paragraph of Article 26 provides that 'The communication of any document to an official shall be evidenced by his signing it, or, failing that, shall be effected by registered letter'.

The applicant takes the view that these provisions contain essential procedural requirements which must be observed. As, however, he never signed the second report and as his refusal to sign was not followed by the communication of it to him by registered letter, it must be regarded as having no legal effect and indeed as having *no existence* in law. It could not therefore have overridden and replaced the first report.

Let us examine whether these inferences hold good.

In our examination Article 43 of the Staff Regulations can be disregarded, because it only provides that the periodic report shall be communicated to the official and does not prescribe any formalities at all for this purpose. The second report was communicated to the applicant at any event on the day it was made (22 May 1968) by his superiors and on 31 May 1968 by an official of the Directorate-General of Administration. This emerged clearly from the oral procedure during which the applicant stated that he refused to sign the report, because he wanted to examine certain statements in it and submit his comments. This however raises the presumption that he had succeeded in ascertaining *the content* of the report. Similarly the rules issued by the Commission of the EEC relating to Article 43 of the Staff Regulations of Officials of the EEC do not help our case at all, because it cannot simply be assumed that they apply after the entry into force of the new *common* Staff Regulations (of 4/3/1968) of the *single* Commission and of all officials of the European Communities, including former ECSC officials. However, this question and the question whether there are similar rules of the former High Authority need not in the final analysis be answered, since Article 26 of the Staff Regulations contains corresponding if not more far-reaching rules.

Article 26 of the Staff Regulations is in fact crucial for the solution of our problem. Indeed a careful examination of this provision immediately raises doubts whether it supports the interpretation placed upon it by the applicant.

It is important first of all to note the categorical statement that a document may not be used against an official unless it was *communicated* to him before it was filed. The communication of a document (or its notification) is therefore the condition precedent to its validity in accordance with the general principle of administrative law that a document only has legal effect when it is published. The relevant sentence of Article 26 however says nothing about the procedure to be adopted for the communication of documents.

The same deficiency is also found in the *third paragraph* of Article 26—if it is properly interpreted. This paragraph, at least in its first part, only mentions the way in which a communication shall be *evidenced*. In any case the relevant commentaries nowhere put forward the view that, unless the formalities of the third paragraph are complied with, a document made under the Staff Regulations must be denied any existence in law. Nor is this the opinion of Euler, who in fact states in Volume 2, page 343, of his Commentary on the European Staff Regulations of Officials, that a periodic report on an official must be regarded as not being in existence unless it has been *communicated* to the official. In fact the view that a document communicated to an official must be regarded as not being in existence unless

it has been evidenced in accordance with the third paragraph of Article 26 seems to be a very unusual doctrine. This is shown to be the case if it is borne in mind that the Court (departing from the view which it held in an earlier case) in Joined Cases 8 to 11/66 laid down the general principle that the proper form of the *service* of a decision has no effect on its legal nature (one could also say: on its legal existence) (Rec. 1967, p. 117). The applicant's argument also seems to be far-fetched in the light of national law. In German law I can refer to paragraph 175 of the Bundesbeamtengesetz (German Law of Federal Civil Servants) and to the commentaries which have appeared on this subject. According to this section the requirement of formal service only applies to decisions concerning officials which are of great importance. In general a *narrow* interpretation of this provision is advocated and, if service is defective, any form of evidence can be adduced as proof that an administrative document has been communicated (cf. Plog-Wiedow, Kommentar zum Bundesbeamtengesetz, note 12 to paragraph 175).

I would therefore submit that, in order to establish also under the provisions of the Staff Regulations that a document is legally in existence, there is no reason to require under the law applicable to officials of the communities more than its communication to the official concerned. It should therefore be accepted that proof of communication can be safely adduced in a form other than that provided by the third paragraph of Article 26. I endorse the Commission's argument on this point that a communication by registered letter is primarily intended for officials who cannot be found at their normal place of work. In other cases the direct communication of a document to the official concerned is the appropriate method and, if he refuses to give an acknowledgement of service, this refusal is replaced by an official declaration of a superior. If any other procedure were adopted and if the interpretation of Article 26 advocated by the applicant were accepted, the administration would have to carry the burden of complicated and expensive formal requirements without in any way increasing the protection of the legal interests of the official.

As, however, in our case the report of 22 May 1968 was in fact brought to the notice of the applicant, and since his refusal to confirm that he had notice of it—as we have been told—is in fact explained by his wish to be able to submit his comments on the report and, as finally an official note of this refusal was made by one of the officials of the Directorate-General for Administration there can be no objection to holding the view that the requirements of Article 26 have been observed. This means at the same time that the report of 22 May 1968 has at least acquired a legal existence and has replaced the original report. The final inference to draw from all this is that the application is inadmissible, since the applicant did not show that he had any interest in a declaration that the first report was defective (for example he could have an interest if there was the danger that the defect would be repeated or if he intended to base certain claims on the original report).

4. Having regard to this result, which is in my opinion conclusive, it is unnecessary to examine the Commission's alternative objection that the application is at least *in part* inadmissible. I will merely state in this connexion that the Commission's view appears to me to be convincing. In fact the scope of an administrative complaint and an appeal to the Court must be the same. If an administrative complaint—as has happened in this case—only includes certain criticisms of an official report which are capable of being objectively defined, then, if an appeal to the Court is filed

later, it is only in relation to those points which have been criticized that the time limit of three months for appealing under Article 91 of the Staff Regulations can be regarded as having been observed. On the other hand after the expiry of the time limit it is no longer possible to complain of any other mistakes in a report. This is obviously in no way connected with the questions dealt with by Article 42 of the Rules of Procedure. There are then in my opinion no grounds for an application based on Article 42.

5. With regard to the *costs* of the proceedings, although the application is inadmissible, the Court could consider, pursuant to Article 69(3) of the Rules of Procedure, ordering the Commission to bear at least part of the costs. I make this submission with reference to the fact that the interpretation of Article 26 of the Staff Regulations raises certain difficulties, to the fact that in the list of documents appearing in the applicant's personal file the report of 15 January 1968 was not deleted or that there was no note concerning its removal (which Euler, op. cit, Vol. 1, p. 236 and Holtz, Handbuch des Europäischen Dienstrechtes, p. 201, consider appropriate), the fact that the appointing authority did not reply to his administrative complaint and finally to the fact that when he requested that he should be permitted to submit his comments on the second report he could have made a mistake through no fault of his own as to the legal effect of this report. I consider that such an apportionment of the costs is justifiable but leave it to the discretion of the Court to determine the proportion of the costs which the Commission may have to bear.

6. For the foregoing reasons my opinion is as follows:

The objection raised by the Commission is well founded. The application must be dismissed as inadmissible, because it had no purpose before it was lodged at the Court and because the applicant has not proved that he has an interest in a declaration that the first periodic report was defective.

In accordance with Article 70 of the Rules of Procedure the Commission must bear its own costs and in accordance with Article 69(3) such a proportion of the applicant's costs as the Court may in its discretion determine.