patent factual errors, are subject to review by the Court only from the aspect of any misuse of their discretion by the persons called upon to participate in drawing up those documents.

In Joined Cases 6 and 97/79

DANIELE GRASSI, an official at the Secretariat General of the Council of the European Communities, of Tervueren, Belgium, represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at the Chambres of Tony Biever, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Antonio Sacchettini, Adviser in the Legal Department of the General Secretariat of the Council, acting as Agent, assisted by John Carbery, also an Adviser in the said department, with an address for service in Luxembourg at the office of Mr Van den Houten, Director of the Legal Department of the European Investment Bank, 2 Place de Metz,

defendant,

APPLICATION for the annulment of various periodic reports on the applicant,

THE COURT (Second Chamber)

composed of: A. Touffait, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts, the course of procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts

On 1 July 1963 Daniele Grassi was appointed reviser in Grade L/A 4 in the Italian Division of the language department of the General Secretariat of the Council.

Pursuant to Article 43 of the Staff Regulations and the Council Decision of 18 October 1977 laying down the general provisions for implementing that article, the report on the ability, efficiency and conduct in the service of Mr Grassi was drawn up for the period from 1 November 1975 to 31 October 1977 by the first reporting officer on 16 February 1978 and forwarded to Mr Grassi on 17 February.

On 21 February 1978 Mr Grassi, in accordance with Article 7 (1) of the Council Decision of 18 October 1977, made observations on that report and asked for it to be revised.

The first reporting officer adhered to his report and Mr Grassi then asked on 2 March 1978 for its revision by a second reporting officer in accordance with Article 8 (2) of the decision of 18 October 1977.

The report by the second reporting officer was made on 15 March 1978. Mr Grassi signed it on 21 March, observing in accordance with Article 8 (5) of the Decision of 18 October 1977 that he intended to make a complaint under Article 90 of the Staff Regulations.

That complaint was made by a document dated 6 June 1978 and recorded at the General Secretariat of the Council on 9 June. The complaint sought the partial annulment of the periodic report by the second reporting officer of 15 March 1978 and in so far as was necessary the partial annulment of the periodic report by the first reporting officer of 16 February 1977 and asked that a fresh periodic report should be drawn up. At issue were the description of the duties, the detailed assessment of the ability and efficiency in the service and the general assessment.

On 14 June 1978 the Secretary General of the Council submitted Mr Grassi's complaint to the Select Committee of the Reports Committee pursuant to Articles 9 (b) and 11 of the Decision of 18 October 1977. On 13 July 1978 the Select Committee gave its opinion and Mr Grassi was informed of it on 17 July. According to that opinion the report on Mr Grassi could not be regarded "as being drawn up in an entirely satisfactory manner".

On 28 July 1978 the second reporting officer made an amended report taking account of the observations of the Select Committee of the Reports Committee.

On 5 September 1978 the Secretary General of the Council forwarded that report to Mr Grassi pointing out that if he could not accept it it was open to him to make a fresh complaint.

On 18 September 1978 Mr Grassi informed the Secretary General that he could neither accept the amended report of the second reporting officer nor make a fresh complaint. Article 11 (4) of the Decision of 18 October 1977 should be applied. That provided as follows:

Depending on the opinion given by the Select Committee the Appointing Authority shall decide:

(a) either to refer the matter to the Reports Committee, in which case the procedure shall continue in accordance with Article 10 (2) to (6);

(b) or not to refer the matter to the Reports Committee, which decision shall be communicated to the official who is the subject of the report and the report drawn up by the second reporting officer in accordance with Article 8 (4) shall be transmitted to the official who is the subject of the report and shall become final, thus bringing to an end the complaints procedure.

On 24 October 1978 the Secretary General in answer to Mr Grassi said that while he did not share Mr Grassi's opinion that the report made by the second reporting officer could be amended only after the the Reports Committee had been consulted and had delivered its opinion, he had decided to put Mr Grassi's complaint to that committee on the basis of the first periodic report which had not been amended.

On 28 November 1978 the Select Committee of the Reports Committee gave its opinion that Mr Grassi's case should be submitted to the Reports Committee. As a result when the Secretary General forwarded to Mr Grassi on 4 December 1978 a copy of the Select Committee's opinion he informed him that he had decided to put the complaint to the Reports Committee.

Since Mr Grassi considered that the periodic report as amended by the second reporting officer had been withdrawn and that at the expiry of four months from the making of the complaint the latter had by implication been rejected, he brought an action registered as Case 6/79 before the Court on 5 January 1979.

The Reports Committee, to which Mr Grassi's complaint of 6 June 1978 was submitted, gave its opinion on 15 February 1979. It found that the description of the duties in the contested periodic reports could not seriously be regarded as adversely affecting Mr Grassi, but that as regards his ability, conduct in the service and general assessment certain amendments appeared necessary.

The second reporting officer amended his report on 2 March 1979 and proceeded in accordance with Article 10 (4) of the Council Decision of 18 October 1977 to make the final report "following the opinion of the Reports Committee in so far as he shared it". The report was confirmed by the Secretary General of the Council as Appointing Authority and forwarded to Mr Grassi on 20 March 1979.

Mr Grassi countersigned the report on 29 March 1979 with reservations. On 20 June 1979 he brought a fresh action, Case 97/79, against that report.

II — Written procedure

In Case 6/79, which was brought before the Court by application dated 5 January 1979, the written procedure followed the normal course subject to an extension of time for the lodging of certain pleadings.

In Case 97/79, commenced by application dated 20 June 1979, the defendant Council pursuant to Article 91 (1) of the Rules of Procedure applied to the Court in a separate document lodged on 23 July 1979 for a preliminary decision on the admissibility of the action and to declare it inadmissible. In a document lodged on 19 September 1979 the applicant in the main action made his observations on the objection raised by the Council. By order dated 16 October 1979 the Court (Second Chamber) decided to reserve its decision for the final judgment and to reserve the costs.

In accordance with the application made by the applicant and in spite of an objection by the Council which maintained there was no connexion between the two cases, the Court (Second Chamber), by order dated 16 November 1979, decided pursuant to Article 43 of the Rules of Procedure to join Cases 6/79 and 97/79 for the purposes of the oral procedure and judgment and to reserve the costs.

Subsequently the written procedure in Case 97/79 followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. Nevertheless it asked the applicant to bring his conclusions up to date and to state more precisely the matters in the disputed periodic report which he was seeking to have annulled. Further it asked the Council to supply more specific particulars of the constitution and powers of the Reports Committee and to lodge the complete text of the Guide to Staff Reports. The parties complied with the Court's requirements within the periods specified.

III — Conclusions of the parties

The *applicant* in the final version of his conclusions, brought up to date at the request of the Court, claims that the Court should:

(a) Declare the applications admissible;

(b) Declare that the periodic report of the second reporting officer dated 2 March 1979 relating to the period from 1 November 1975 to 31 October 1977 with which Case 97/79 is concerned implies the withdrawal of the periodic report by the second reporting officer dated 15 March 1978 relating to the same period, with which Case 6/79 is concerned;

(c) Consequently find that pending the proceedings Case 6/79 has lost its purpose and order the defendant to pay the costs of that action;

(d) Annul certain references or assessments relating to the description of the main duties and the applicant's conduct in the service together with certain concluding observations in the periodic report of 2 March 1979 by the second reporting officer;

(e) Annul in so far as in necessary certain references or assessments in the periodic report of 16 February 1978 by the first reporting officer;

(f) Find that those annulments necessarily involve the annulment of the decision taken on the applicant's complaint dated 6 June 1978;

(g) Order the defendant to pay the costs of Case 97/79.

The *Council* claims that the Court should:

In Case 6/79

(a) Dismiss the action as inadmissible;

(b) Alternatively decide that it is unnecessary to give a ruling;

(c) In either event order the applicant to pay the costs.

In Case 97/79

(a) Give a decision first on the admissibility of the action;

(b) In the event of the action's being found admissible, dismiss the applicant's main and alternative claims as unfounded;

(c) Order the applicant to pay the costs in so far as they are not to be borne by the defendant under the provisions of Articles 70 and 95 (2) of the Rules of Procedure.

IV — Submissions and arguments of the parties during the written procedure

A — Admissibility

Case 6/79

The *Council* considers that although the action satisfies the conditions laid down by the Staff Regulations regarding time-limits for bringing it, on the other hand it is not admissible in view of the conditions provided for in Article 9 *et seq.* of the Council Decision of 18 October 1977.

(a) According to Article 12 of that decision only the final periodic report may be the subject of an application to the Court of Justice. The report of 15 March 1978 by the second reporting officer was the subject of a complaint by the applicant under Article 90 of the Staff Regulations on 6 June 1978 and that complaint was submitted to the Reports Committee under Article 9 (b) and Article 11 of the Decision of 18 October 1977. The opinion of the Reports Committee was given after the action was brought. At that time there had not yet been a final report on the applicant.

(b) The procedure provided for by the Decision of 18 October 1977 is obviously intended to regulate within the institution disputes which may arise when the periodic reports are made. The necessity of exhausting it first is therefore justified both by the requirement to obviate recourse to legal proceedings and by considerations based on the actual concept of the duty of officials to show loyalty to their administration.

(c) It is beyond dispute that the matter was still being dealt with through official channels prior to the commencement of proceedings when the applicant brought his action. Such internal procedure is included among the steps which according to the case-law of the Court are intended to allow the administration to deal with requests internally and thus perhaps avoid legal proceedings. If it had

to be accepted that an action might properly be brought before such prior steps had been exhausted, the consequence would be that two authorities, one judicial and one administrative, would be dealing with the case at the same time. It is precisely such simultaneous procedures that the case-law of the Court seeks to avoid.

(d) The procedure provided for in the Decision of 18 October 1977 was correctly applied. It was particularly in an attempt first to exhaust, before the case was put to the Court, all the remedies which the Reports Committee procedure gave, that the Appointing Authority decided to put the matter to that Committee after the period of four months laid down in Article 90 of the Staff Regulations.

(e) The legal position in which the internal complaints procedure is not exhausted casts doubt on the very existence on the part of the applicant of an interest in an immediate finding by the Court that he has not been properly dealt with. The applicant has no lawful interest in bringing proceedings in the procedural circumstances of this case: when the applicant brought his action he had no really genuine lawful interest then existing in having the disagreement between him and the Appointing Authority of his institution dealt with by the Court.

(f) As for the "fresh matter" constituted by the forwarding to the applicant on 20 March 1979 of the periodic report amended by the second reporting officer on 2 March, it should be observed that the new report is not a document confirming the first and that by implication it necessarily involves the withdrawal of the first periodic report by the second reporting officer of 15 March 1978.

The conclusions which the applicant reaches from that observation regarding the decision on costs however cannot be accepted: the implied withdrawal of the first report occurred not because of the action brought by the applicant against the document thereafter withdrawn but because the Appointing Authority took a new decision with a different content but relating to the same subject-matter.

The present position is that of a case which cannot proceed to judgment. In such a case Article 69 (5) of the Rules of Procedure provides that the costs shall be in the discretion of the Court. The applicant's recognition that his action had lost its purpose ought logically to have involved his withdrawing. In those circumstances the applicant ought to be ordered to pay the costs.

The *applicant* considers the objection of inadmissibility raised by the Council as obviously unfounded.

(a) The Council Decision of 18 October 1977 laying down the general provisions for the application of Article 43 of the Staff Regulations, adopted pursuant to Article 110 of the latter, is a decision implementing a regulation, from which it cannot derogate without being unlawful.

The conditions under which proceedings may be brought before the Court by an official are laid down by Articles 90 and 91 of the Staff Regulations and no others. Since those conditions have been observed in the present case, which is not denied by the Council, the action is admissible.

(b) Alternatively it must be found that the procedure established by the Decision of 18 October 1977 has not been correctly applied: by forwarding to the applicant on 5 September 1978 the second reporting officer's amended report without putting the matter to the Reports Committee, the Appointing Authority of the Council accepted, pursuant to Article 11 (4) (b) of the Decision of 18 October 1977 that the periodic report had become final.

(c) The arguments put forward by the Council to challenge the applicant's interest in bringing proceedings amount to taking the view, contrary to the well-established case-law of the Court, that the time-limits for bringing actions are not mandatory and that the parties may extend them at their convenience.

(d) The report by the second reporting officer of 2 March 1979 amends in certain respects the periodic report of 15 March 1978. It is neither in its substance nor form a confirmatory document.

The most correct analysis of the legal position created by this new fact is to regard the new periodic report by the second reporting officer as involving by implication, but necessarily, the withdrawal of the first report by the second reporting officer.

The action which was admissible when it was brought has lost its purpose during the course of the proceedings as a result of what the defendant has done and therefore the latter ought to be ordered to pay the costs.

Case 97/79

The *Council* considers the action inadmissible both according to the terms of Article 91 of the Staff Regulations and as regards its Decision of 18 October 1977.

(a) No complaint was made by the applicant against the final periodic report of 2 March 1979. Article 91 (2) of the Staff Regulations provides that an appeal to the Court shall lie only if the Appointing Authority has previously had a complaint submitted to it pursuant to Article 90 (2) against the act adversely affecting the official which is the subject of the appeal.

(b) The only complaint made by the applicant is that of 6 June 1978. The existence of that complaint cannot justify the admissibility of the present action.

First of all the latter is obviously out of time since it was brought well after the period of three months from the expiry of the period for answer as laid down in Article 91 (3) of the Staff Regulations had elapsed.

Moreover the stipulation that a complaint must previously be made has no meaning if the action may be directed against an act adversely affecting the official which is different from that to which the complaint relates. In the present case the complaint was directed against the periodic report of 15 March 1978 and was by implication rejected on 9 October 1978. On the other hand the action basically relates to the final staff report of 2 March 1979.

In any event the action must be preceded by a complaint against an act adversely affecting the applicant, but the applicant himself considers the periodic report of 15 March 1978 as withdrawn.

In those circumstances the action can be regarded as admissible only if there is a fresh complaint followed by its express or implied rejection.

Far from being a "complaint upon complaint" the making of a complaint in

the special circumstances of the case is a formal condition to be satisfied before the matter may be brought to the Court.

(c) The phrase "thus bringing to an end the complaints procedure", used by the Secretary General of the Council in his letter of 20 March 1979 simply adopts the wording of Article 11 (4) of the Council Decision of 18 October 1977. It was for the addressee of that letter to check whether the substantive and formal conditions laid down by the Staff Regulations for bringing an action were fulfilled.

At issue in the present case is the failure to make a complaint prior to bringing an action as required by the Staff Regulations.

(d) The second periodic report by the second reporting officer of 2 March 1979 does not simply confirm the first but is a fresh report.

The effect of that fresh report was not expressly to reject in part the applicant's complaint and thus to start the time for bringing an action running afresh. According to the last indent of Article 91 (3) of the Staff Regulations it is possible to start the time for bringing an action running afresh only where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an application has expired.

The periodic report of 2 March 1979 is therefore an act adversely affecting the applicant within the meaning of Article 90 (2) of the Staff Regulations and therefore ought to have been the subject of a prior complaint before being challenged before the Court.

(e) The order of the Court (Second Chamber) of 16 November 1979 joining the two actions cannot be cited outside its proper context to draw conclusions on matters which the Court itself has reserved for the final judgment.

(f) There is no contradiction in the arguments put forward by the Council on the question of admissibility in the two cases. The matters which occurred after the second action was brought fully justified the validity of the Council's case.

The second action was, like the first, premature because it was brought without waiting for the prior conclusion of the steps being taken through official channels. The objection that it was out of time was put forward only to show the impossibility of regarding the complaint of 6 June 1978 to be the relevant prior complaint to the Appointing Authority.

(g) It is true that the complaints procedure under the combined provisions of the Staff Regulations and the Council Decision of 18 October 1977 is complex. The only reasonable interpretation of the provisions in the Decision of 18 October 1977 is that the rules of the Staff Regulations must have precedence. Therefore the applicant's fears of the procedure's being prolonged are unfounded.

It seems pointless in this case to cite case-law which concerns different situations and the reasoning in which cannot be transposed to this case.

Reasons based on equity afford no ground for the applicant's failure to observe the provisions of the Staff Regulations on applications to the Court.

(h) The action is also inadmissible in so far as it seeks, if necessary, the annulment of the periodic report by the first reporting officer of 16 February 1978 and the decision taken on the complaint of 6 June 1978.

The *applicant* considers the Council's objections of inadmissibility to be unfounded.

(a) In his letter of 20 March 1979 the Secretary General of the Council told the applicant that he was confirming the periodic report of 2 March which he was forwarding to him "thus bringing to an end the complaints procedure". The applicant therefore no longer had to make a complaint but to bring an action. In any event it would be contrary to natural justice and the principles of legal certainty and the protection of legitimate expectation to censure the applicant for having followed the procedure which was required — immediate application to the Court without a new complaint — since the Appointing Authority itself regarded the contested measure as bringing the complaints procedure to an end.

(b) It follows from Articles 10, 11 and 12 of the Council Decision of 18 October 1977 that the final periodic report in respect of which proceedings may be brought is the report which brings the complaints procedure to an end. Therefore the action can and must be brought without a fresh complaint since by definition the condition provided for in the first indent of Article 91 (2) of the Staff Regulations is satisfied. A complaint upon a complaint has obviously no sense.

(c) Carried to the extreme the Council's case would mean that an action could never be brought against a periodic report or could be brought only after several years of steps taken through official channels and repeatedly re-commenced. It is apparent from the case-law of the Court that the rationale of both the administrative procedure and the legal procedure is against an interpretation of Article 91 (2) of the Staff Regulations which, if taken literally, would simply lead to prolonging the procedure to no useful purpose.

(d) Against the argument that the applicant's complaint of 6 June 1978 was directed against a different measure from that with which the action is concerned it must be said that the measures relate to the same subject-matter, namely the report on the applicant for the period from 1 November 1975 to 31 October 1977 and that the second periodic report by the second reporting officer is put forward to the Council itself as concluding the complaints procedure.

(e) In its order of 6 November 1979 the Court (Second Chamber) gave the following reason for joining Cases 6/79 and 97/79:

The two actions relate to the same periodic report on the same official for the same period and by the same reporting officers. The amendments made to certain expressions used in the first version of the report are not of such an extent as to affect its identity.

That finding is confirmation that the action did not have to be preceded by a fresh complaint since the two periodic reports of 15 March 1978 and 2 March 1979 in reality constitute two versions of the same report.

(f) The periodic report of 2 March 1979 is not actually a document confirming the periodic report of 15 March 1978. That observation however does not mean that there has to be a fresh complaint. To decide otherwise would mean in fact maintaining that if a complaint is rejected only in part, in which case the answer is not a document confirming that referred to in the complaint, an application to the Court can be made only after a fresh complaint. That conclusion is obviously contrary to both the wording and spirit of the second indent of Article 91 (2) of the Staff Regulations.

(g) The objection that the complaint of 6 June 1978 is out of time cannot be accepted.

Since it is recognized that there were no grounds for a fresh complaint it must be found, pursuant to Article 91 (3) of the Staff Regulations, that the actions was brought within three months of notification of the measure which the Council puts forward itself as concluding the complaints procedure and constituting, in other words, the answer to the complaint of 6 June 1978.

(h) The arguments of the Council are not only inaccurate in themselves but self-contradictory. In particular there is a contradiction between the arguments put forward against the admissibility of Case 6/79 as being premature and those put forward against the admissibility of Case 97/79 as being out of time.

(i) Very much as a secondary point, in the unlikely event of the Court's taking the view that in principle a complaint ought to have been made, the action should nevertheless be held admissible because of the terms of the letter from the Secretary General of the Council of 20 March 1979 and the applicant's difficulty in determining the pocedure to be followed having regard to the complexity of this case and the conflict between Articles 90 and 91 of the Staff Regulations and the Council Decision of 18 October 1977.

B — Substance

The *applicant* challenges the description of the main duties he has performed, the assessment of his conduct in the service and certain concluding remarks both in the periodic report by the second reporting officer of 2 March 1979 and in the periodic report by the first reporting officer of 16 February 1978. He alleges that those matters in the two reports infringe Article 43 of the Staff Regulations and the rule to the effect that special praise or criticism must be supported as far as possible by specific facts; further there is an infringement of the rules and principles to the effect that every administrative measure must state the grounds on which it is based and that the latter may not be vitiated by error of law or fact; and finally there is a breach of the principle of equality together with *ultra vires* acts and wrongful exercise of discretion by the administration.

The *Council* observes that according to the well-established case-law of the Court of Justice the assessment of an official's capacity in his work is for the administration and it is not for the Court to judge whether it is well founded. Review by the Court of matters of assessment in a periodic report is very

restricted and confined solely to formal defect, grounds patently wrong in law or based on wrong facts and misuse of powers.

Description of the duties

The *applicant* complains that the periodic report of 2 March 1979 states that he has done a limited number of unrevised translations and that the report of 16 February 1978 mentions that he has done difficult translations when necessary. Those remarks are to be regarded in the more general context as an attempt to belittle his duties as a reviser.

The fact that during a single mission lasting three days he did certain translations is hardly significant in the context of a periodic report covering a period of two years. There was no mention previously of such occasional tasks. Although they mentioned such an insignificant matter, the reporting officers had on the other hand not found it necessary to state that the applicant had on the same occasion directed the whole language group and that for a year and a half together with a younger reviser he had directed the ACP Section of the Italian Division.

The *Council* considers that the fact of mentioning that the applicant had also done certain translations on mission cannot be interpreted as belittling him. It was simply included for the sake of completeness.

The other revisers also did translations and the new reports relating to the years 1977/78 mention the fact, where appropriate.

It is not possible to complain that the reporting officers did not mention the duties of the person responsible for the translation team on a mission since such duties naturally fall to the most senior reviser. As regards the duties assumed in the ACP Section of the Italian Division, a caveat should be entered regarding the applicant's use of the word "directed".

No substantial inaccuracy can therefore be found in the description of the duties and there is no evidence of other irregularity.

Conduct in the service

The *applicant* observes that the two periodic reports in question have "acceptable" ("sufficiente") for his relations with his superiors and colleagues. That description is particularly unfavourable since all the other revisers of the Italian Division were maked "very good". Accordingly reasons sufficient in law should have been given for the comment on the applicant and that was in no way done here.

The *Council* considers that the entry "acceptable" is not particularly unfavourable either in itself or in comparison with previous observations and consequently does not require any supporting evidence contrary to the assessment "has shortcomings" which follows it in the Council's Guide to Staff Reports.

The nature of a report is to be evaluated on its own, not in relation to the reports on other officials. In any event the

applicant's observation in this respect is incorrect.

General assessment

The *applicant* complains that the two contested periodic reports refer to rigidity, intransigence and intolerance in his attitude and as regards the opinions of others, which has led to a certain number of incidents with his superiors and colleagues and has had a negative effect upon the atmosphere in the Italian Division of the language department.

(a) Those assessments, which are particularly unfavourable, have not been sufficiently supported in law, which is equivalent to there being no grounds stated for them: no answer has been given to the observations made in respect of them by the applicant nor has any explanation been furnished as to why the incidents to which reference is made were the consequence and the sole consequence of his behaviour.

The applicant was justified in asking what attitudes were in question and in respect of what matters or opinions. It was essential for an answer to be given if there was to be a statement of reasons. Moreover intransigence in a person's attitude can be objected to only if it reveals itself in respect of acts or opinions which do not provide a justification for it.

Regarding the incidents cited against the applicant a number of established facts should have been stated and then it would undoubtedly have been necessary at the very least to say why the applicant was held solely responsible for them. In this way it would be established that facts having nothing to do with the applicant's personality were at the origin of the incidents. A statement of reasons which does not even say why the applicant's alleged rigid personality was responsible for the incidents is obviously inadequate. The council "sticks" a label on the applicant and then without explanation, as if by an automatic fatalism, appends to it the responsibility for certain incidents and more generally for the climate obtaining in the Italian Division. It is not possible to justify a conclusion by reference to a premise without justifying that premise and the relationship between it and the conclusion.

(b) The fact that the applicant remains unaware of the reasons for the negative assessment on him cannot be justified by observing that the Court cannot substitute its assessment for that of the administrative authority. To adopt that view would mean surrendering all review of legality whether it be confined to procedural irregularities, manifest error of fact or law in the statement of reasons, including their relevance, and misuse of powers. The Court does not know why the applicant's superiors consider that he alone is responsible for the incidents put to his charge. It is therefore unable to carry out its review of legality. It must be inferred that no lawfully admissible reasons are stated for the measures in dispute.

(c) The Appointing Authority was expressly asked by the applicant's superiors to rule on the incidents alleged

against the applicant and it did not do so. In those circumstances it is no longer legally possible in a periodic report to hold the applicant responsible for them.

The fact that two reporting officers are of the same opinion is irrelevant in this respect since the reasons for their opinions are unknown. So too are the reasons for the assessments by an earlier reporting officer in 1973.

(d) The incidents alleged against the applicant are wrongly attributed to his alleged rigid attitude: he was not at the origin of those incidents and it would be obviously wrong to hold him solely responsible for them.

(e) The unfavourable assessments on the applicant are to be attributed to animosity displayed in various ways since he brought a previous action before the Court of Justice (Case 188/73 *Grassi* v *Council* [1974] ECR 1099).

The *Council* considers the objections put forward by the applicant to be unfounded.

(a) Both according to the case-law of the Court and the Council Decision of 18 October 1977 there is no obligation to state reasons in periodic reports save in extreme cases. Moreover it must be observed that a reporting officer has not only the right but also the duty to mention in the periodic report general attitudes of an official when they find specific expression and have negative repercussions on official relationships.

The fact that the Appointing Authority does not make a ruling upon incidents for which an official is regarded as being responsible in no way means that it is not possible to make mention of them in the periodic report relating to that official: any assertion to the contrary results from a confusion between disciplinary procedure and the procedure for periodic reports and calls in question the independent judgment of the reporting officer.

(b) In fact the Appointing Authority was required to give a ruling only on the second of the matters in question.

In carrying out their task the reporting officers have to make assessments, with knowledge of the facts, on the ability and conduct in the service of the official upon whom report is made. The fact that the report contains assessments by two reporting officers is a guarantee for the official. Moreover the assessment made by the two reporting officers in the 1975/77 report regarding the applicant's conduct in the service is not far removed in substance from the assessments made by his superiors in previous reports.

(c) The applicant does not challenge the substantial correctness of the facts alleged against him. He attempts to deny the correctness of the deductions made therefrom in the assessment contained in the periodic reports and in particular as regards the ascribing of those facts to his "rigid personality".

The general assessment objected to by the applicant does not say that his rigidity of attitude always leads in itself to regrettable incidents. It means that in certain circumstances his reaction to the problems which he encounters with his colleagues and superiors may be violent

and therefore lead to regrettable incidents.

(d) The applicant's responsibility for those incidents is clearly established by their detailed description.

(e) The facts put forward by the applicant as evidence of the alleged animosity against him are nothing other than unfounded assertions.

V — Oral procedure

The applicant represented by Mr Lebrun and the Council represented by Mr Sacchettini presented oral argument and answered questions put by the Court at the sitting held on 29 May 1980.

The Advocate General delivered his opinion on 26 June 1980.

Decision

1 The applicant, an official in Grade L/A 4 and a reviser in the Italian Division of the language department of the Council, brought two actions in succession on 5 January and 20 June 1979 for the partial annulment of the periodic report on him for the period from 1 November 1975 to 31 October 1977.

The events prior to the action

2 The report by the first reporting officer, the Head of the first division of the language department, was drawn up on 16 February 1978 and forwarded to the applicant who on 21 February made a number of observations and requested its amendment.

3 The report by the second reporting officer, Director of Operations and Translation, was drawn up on 15 March 1978 and forwarded to the applicant who on 21 March again made objections to the assessments by the second reporting officer and gave notice of his intention to make a complaint under Article 90 of the Staff Regulations. That complaint was submitted on 9 June 1978 to the Secretary General of the Council.

4 In view of that complaint and pursuant to the Council Decision of 18 October 1977 laying down the General Provisions for the application of Article 43 of the Staff Regulations the Secretary General put the matter to the Reports Committee whose intervention is provided for by that decision where an official does not accept a periodic report on him. On 13 July 1978 the Select Committee of that committee gave an opinion which was forwarded to the applicant.

5 Following that opinion the second reporting officer on 28 July 1978 amended the wording of his assessment, in particular upon an issue which had provoked particularly sharp criticism from the applicant. The report so amended was forwarded to the applicant on 5 September 1978 by the Secretary General. The applicant refused to accept the amended report and the Secretary General then decided on 24 October 1978 to submit the matter to the full Reports Committee.

6 Without awaiting that opinion the applicant brought the first action registered as Case 6/79 on 5 January 1979.

7 The Reports Committee gave its opinion on 15 February 1979. The committee was of the opinion that subject to certain amendments the assessment in the amended report "might constitute an appropriate basis". Following those observations the second reporting officer drew up on 2 March 1979 a final wording of the periodic report taking into account the observations of the Reports Committee.

In a note dated 20 March 1979 the Secretary General informed the applicant as follows: "I confirm the report, which I enclose, thus bringing to an end the complaints procedure".

8 On 29 March 1979 the applicant countersigned the final report but reserved his rights regarding pursuit of his legal action. On 20 June 1979 he brought his second action registered as Case 97/79 concerned with the final version of the periodic report and asked that that action be joined to the previous action.

9 By application dated 23 July 1979 under Article 91 (1) of the Rules of Procedure the Council asked the Court for a preliminary decision on the admissibility of the second action. By order dated 16 October 1979 the Court decided to reserve its decision for the final judgment.

10 By order dated 16 November 1979 the Court ordered that the two actions be joined.

11 It must be observed that the parties agree in treating the joined actions as concerning the final periodic report after the amendments made by the second reporting officer to his assessment on 2 March 1979 following the observations of the Reports Committee. It is therefore unnecessary to give a decision on the complaints made by the applicant in respect of the first version of the periodic report in so far as it does not coincide with the final report.

Admissibility

12 The Council challenges the admissibility of both the first and second actions. The submission of inadmissibility against the first action is mainly based on the fact that it was premature since the application brought it before the internal procedure provided for by the Council Decision of 18 October 1977 was exhausted. The Council's objections with regard to the second action are mainly based on the fact that there was no prior complaint to the Appointing Authority in accordance with Article 90 (2) of the Staff Regulations.

13 Having regard to the fact that the actions concern the final version of the periodic report it is necessary first to consider the admissibility of Case 97/79.

14 It is apparent from the application lodged on 20 June 1979 that the applicant intended to challenge the periodic report which became final as a result of the note from the Secretary General on 20 March 1979.

15 In the circumstances that note may be regarded as having marked the commencement of the period for bringing an action under Article 91 of the Staff Regulations without its being possible to require in addition the prior formality of a formal complaint under Article 90. In view of the nature of the periodic report which expresses the opinion freely drawn up of the reporting officers and not the assessment by the Appointing Authority, the making of a formal complaint under Article 90 does not appear to be a necessary pre-condition to bringing an action. It is therefore necessary to hold for reasons similar to those expressed by the Court regarding the decisions of selection

boards in competitions (cf. the judgment of the First Chamber of the Court of 16 March 1978 in Case 7/77 *Wüllerstorff und Urbair* v *Commission* [1978] ECR 769) that action against the periodic report lies as from the date on which that report may be regarded as final and that it is not possible to require in addition the prior formality of a complaint under Article 90. In the present case the periodic report must be regarded as being final from the time at which the letter from the Secretary General of 20 March 1979 was sent to the applicant.

16 The submission of inadmissibility made by the Council against Case 97/79 must therefore be rejected. Since that action was concerned with the whole periodic report in question in its final form it is no longer necessary to reach a decision on the submission of inadmissibility against Case 6/79.

Substance

17 After elimination of the criticism directed specifically against certain aspects of the first version of the periodic report the applicant persists as regards the final periodic report with three complaints regarding the description of his duties, the assessment of his conduct in the service and certain observations coming under the heading "General Assessment".

18 Before considering those complaints it is well to specify the nature of periodic reports and the scope of the review by the Court to which they may be submitted.

19 Article 43 of the Staff Regulations provides that "the ability, efficiency and conduct in the service of each official ... shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110. The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant."

20 As an internal document whose primary function is to provide the administration with periodic information on the performance of their duties by officials the periodic report is not included among the documents which

directly determine the position of officials under the Staff Regulations and must as such be fully subject to a review of their legality as provided for by the Treaty and the Staff Regulations. As the Court has had occasion to stress in other cases (judgment of the Second Chamber of 17 March 1971 in Case 29/70 *Marcato* [1971] ECR 243 and judgment of the First Chamber of 25 November 1976 in Case 122/75 *Küster* [1976] ECR 1685) periodic reports comprise assessments which, apart from formal irregularities or patent factual errors, are subject to review by the Court only from the aspect of any misuse of their discretion by the persons called upon to participate in drawing up those documents. Normally the exercise of the right given by Article 43 of the Staff Regulations to officials to append their observations to the periodic reports together with the internal procedures for complaints as provided by the Council Decision of 18 October 1977 are a sufficient safeguard. It is in the light of those considerations that the applicant's complaints must be considered.

Complaint relating to the description of duties

21 In the first place the applicant complains that the authors of the periodic report stated that he had done certain unrevised translations outside his work of revision. In fact as a reviser and apart from certain exceptions he had not himself done translations during the period in question. He therefore considers that description of his duties as an attempt to belittle his work as a reviser.

22 That complaint represents a misconception by the applicant of his duties inasmuch as the work of a reviser cannot be dissociated from the work of translation in a wide sense since every reviser must be able if necessary to do translations not subject to subsequent revision, especially where the translations are very difficult. Moreover in the context it is obvious that the passage in question reveals recognition by the reporting officers of the exceptional quality of the translations made by the applicant. As the Reports Committee has already observed in its report of 15 February 1979, it is therefore not possible to consider that the description of the duties contained in the periodic report can adversely affect the applicant.

Conduct in the service

23 In the second place the applicant complains that in the scale of assessment of ability, efficiency and conduct in the service containing classifications "outstanding", "very good", "good", "acceptable" and "has shortcomings", his relations with his superiors and colleagues are described as "acceptable" in contrast to the reports on other officials of the same division and on himself in previous reports. In addition no reasons are given for such assessments.

24 The Court considers that, by their nature, the statements under this heading, constituting, as they do, a composite assessment by their superior officers of the ability, efficiency and conduct of officials, requires that they must be capable of being given without restriction even if they express more or less adverse assessments. It is normal for assessments under this heading to emphasize differences between different officials and with regard to the same official as regards successive reporting periods. There is a place under the heading "General Assessment" for the statement of any reasons where the assessments are unusual in one way or another. It must be pointed out that the two reporting officers have given reasons under that heading for their critical assessment of the conduct of the applicant with regard to his superiors and colleagues.

25 That complaint must therefore be rejected as unfounded.

General assessment

26 The applicant's main complaint concerns the assessments on him by the first and second reporting officers regarding his intransigence in his relations in the department which is at the origin of a number of incidents with his superiors and colleagues causing the working atmosphere in the Italian Division to deteriorate. Without denying that the incidents between himself and the administrative authority did occur the applicant complains that the administration attributed to him personal responsibility for incidents which were caused by the general climate obtaining within the section to which he was assigned. He says that the remarks in the periodic report are insufficient

to reveal what really occurred and that the assessments made reflect personal animosity towards him.

27 It is apparent from the information revealed during the proceedings and from the documents in the file, especially those produced by the applicant himself, that during the reporting period in question the applicant's relations with the administration were marked by incidents in which the applicant took an active, if not decisive, part. By way of examples the second reviser refers to an argument between the applicant and a group of revisers in December 1975 and another dispute relating to the appointment of translators instructed to accompany certain Community delegations to non-member countries and in particular a mission to the Fiji Islands.

28 Having regard to the number of incidents and the heated nature of the applicant's utterances, the assessments made of him by the reporting officers, far from exceeding the discretion which superior officers have in the matter, may be regarded as a particularly moderate reaction to incidents obviously incompatible with the well-being of the department. The objectivity of the reporting officers with regard to the applicant appears from the fact that they gave in the same report particularly eulogistic recognition to the quality of the linguistic work performed by the applicant.

29 It follows from the foregoing that the applicant's complaint in relation to the general assessments in the periodic report must also be rejected.

30 It is therefore apparent that the action must be rejected as a whole.

Costs

31 Article 70 of the Rules of Procedure provides that without prejudice to the second subparagraph of Article 69 (3) in relation to costs which the Court considers to have been unreasonably or vexatiously caused, institutions shall bear their own costs.

32 The Court considers that the applicant should not have the benefit of the provisions of Article 70. It is apparent from the foregoing that as a result of his complaints and by means of the internal review procedure within the Council administration he could have had the assessments on him revised and reasons given therefor in a way which ought to have satisfied him. In those circumstances the bringing of and persistence in a legal action must be regarded as vexatious. It is therefore right to order the applicant to pay the whole of the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the whole of the costs.

Touffait Pescatore Due

Delivered in open court in Luxembourg on 3 July 1980.

For the Registrar

J. A. Pompe
Deputy Registrar

A. Touffait
President of the Second Chamber