OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 25 JUNE 1970[1]

Mr President,
Members of the Court,

The three applications submitted to you under the numbers 60, 61 and 62/69 by Mr Chuffart, Mr Jaeger and Mr Janssen respectively, and which were joined by your Order of 19 March 1970, concern the internal reorganization arising out of the Merger Treaty of 8 April 1965.

I

The applicants, who are Belgian nationals, took up employment with the High Authority in 1953 and 1954 and were in the service of that institution in Luxembourg. When the ECSC Staff Regulations of 1956 (former Staff Regulations) were applied to them, they received the separation allowance provided for both by that text and by the General Regulations in favour of servants who, before their recruitment, were resident in an area situated at least 25 km from the seat of the institution. On the entry into force of the Staff Regulations of Officials of the ECSC (new Staff Regulations) on 1 January 1962, they received the expatriation allowance which replaced the earlier allowance and presupposed the fulfilment of different conditions from those required for the separation allowance: the 'geographical' or distance criterion is replaced therein by the 'nationality' criterion. Under Article 4 of Annex VII the expatriation allowance shall be paid to officials who are not and never have been nationals of the State in whose European territory the place where they are employed is situated and who for a certain period before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. Let me add for the sake of completeness that by virtue of Regulation No 259/68 of the Council of 29 February 1968, in force as from 5 March 1968, the applicants came under the scheme laid down in the Staff Regulations of Officials of the European Communities, which, apart from certain amendments, is identical to the EEC Staff Regulations of Officials of 1962. However, under the terms of the last paragraph of Article 2 of that Regulation, they remain subject to the provisions of Articles 93 to 105 of the EAEC Staff Regulations of 1962, among which appears Article 97 which gave rise to the present action.

At the same time that the new Staff Regulations came into force the Commission began to take certain measures arising out of the merger. By means of the Staff Courier it made known to officials which departments were to be established in Brussels and which in Luxembourg. In addition, it informed them that under Article 4 of Annex VII to the Staff Regulations (whose wording is the same in the new ECSC Staff Regulations and in the EEC Staff Regulations of 1962 which later became the combined Staff Regulations), Belgian officials transferred from Luxembourg to Brussels or Luxembourg officials transferred to Luxembourg would lose the right to the expatriation allowance. However, any such officials who were already in the service of the Communities before the entry into force of the Staff Regulations of 1962 could benefit from the transitional provisions provided for in Article 106 of the EEC Staff Regulations or Article 97 of the ECSC Staff Regulations, if they still qualified for the former separation allowance.

The applicants were among officials affected by the reorganization of the departments. They were informed in turn that their earlier postings had been terminated and that their place of employment would in future be Brussels, which, under the provisions of the fourth paragraph of Article 97 of the ECSC Staff Regulations, would result in loss of the right to the expatriation allowance. The allowance was in fact discontinued with effect from 1 August 1968 in the case of Mr Chuffart and Mr Jaeger and from 1 November in the case of Mr Janssen.

1 — Translated from the French.

Mr Janssen and Mr Jaeger unsuccessfully contested with the Director-General for Personnel the administration's interpretation of the fourth paragraph of Article 97. Subsequently, in a joint letter of 17 June 1969 addressed to the President of the Commission, the three applicants maintained that, in their opinion, the discontinuance of their allowance constituted a mistaken application of the Staff Regulations and, on the basis of Article 106 of the Staff Regulations of Officials 'at present in force' they asked to be awarded the separation allowance which they were receiving on 1 January 1962.

As they did not receive any reply to this letter they instituted proceedings before you by means of three identical applications, registered on 16 October 1969. They refer to the same articles of the various Staff Regulations and request you to annul the implied decision resulting from the failure to answer their complaint, to state that they are entitled to receive the amount which they would have received by way of separation allowance and to award them damages of an amount which they request you to fix, by reason of the attitude of the Commission.

You will be required to give a ruling on three points which I shall examine in succession: the admissibility of the applications—the justification for the conclusions concerning the amount in compensation for the separation allowance—the claims for damages in respect of the wrongful act imputed to the Commission.

II

The Commission, while referring the question to the wisdom of the Court, asks whether the applications are not time-barred. They were, in fact, submitted within the period laid down by Article 91 (2) of the Staff Regulations for bringing proceedings against failure by an authority to whom a complaint has been submitted to take a decision; however, according to your case-law, a complaint cannot extent the period for lodging an appeal before the Court unless it is itself submitted within the period laid down for that purpose—and it is this latter point which is causing difficulty.

In the opinion of the defendant the officials concerned, having been notified, first, by communications which appeared in the Staff Courier and then by individual notifications sent on 11 June and 5 July 1968, should have submitted their complaint at the latest by the end of the third month following the payment of their reduced remuneration, in particular as this reduction was clearly shown in the monthly salary advice slip, which no longer contained any figure corresponding to the special heading entitled 'Expatriation allowance or allowance—Article 97'.

It is therefore alleged that the period for lodging the application ran from the time of payment of the salary, the amount of which was stated in the monthly advice slip. I consider this solution to be very doubtful. The payment of remuneration does not in itself constitute a decision or a legal measure, and a salary advice slip is only for information. In the present case, as the advice slip no longer mentions any expatriation allowance it may give rise to the assumption that the latter has been discontinued, but this is a mere indication without legal significance and may be misleading. Let us imagine a case in which a monthly advice slip wrongly showed the figures for the preceding month, although the basic salary or an allowance should properly have been increased. Would the servant who had relied on this incorrect figure be informed that the period for bringing an application ran from the time of payment of the salary? In these material transactions which are more and more frequently entrusted to machines there are too many hazards for such a strict interpretation to be applied without injustice.

On the other hand, it might be asked whether the individual notification of 11 June or 5 July 1968 informing the applicants that the change in their posting would involve the discontinuance of the expatriation allowance as from a given date, was not in fact the measure against which the officials concerned should have submitted a complaint within the period for bringing an application before the Court. This notification, containing a specific statement which is not subject to any reservation, might be regarded as indicative of a definitive measure (see by analogy, for a decision classi-

fying a post, Case 34/65, *Mosthaf* v *Commission of the EEC*, 15 December 1966, Rec. XII, 1966, p. 754). However, that decision is based upon the fourth paragraph of Article 97 of the new ECSC Staff Regulations, while in their application before the Court the applicants are relying on the first paragraph of Article 97 and thus base themselves on legal grounds different from those of the Commission. Like the defendant, I consider that the applications are admissible within this context at least.

III

I must now consider the substance of the applications. The action arises out of the fact that in less than 15 years three bodies of Staff Regulations have been successively applied to the applicants, each of which differs to a greater or lesser extent from the earlier one and contains transitional provisions in favour of officials who were already in the service at the time of its entry into force.

It is in fact the transitional provisions which are invoked by the applicants. They rely upon a single submission concerning both the infringement of Article 97 of the ECSC Staff Regulations of Officials (1962), which was maintained in force by the last paragraph of Article 2 of Regulation No 259/68 of the Council laying down the Staff Regulations of Officials of the European Communities, *and* Article 106 of these latter Regulations.

1. Let me say at once that although Article 106 may perhaps help to interpret Article 97 of the ECSC Staff Regulations, it is at all events not directly applicable in this instance. The applicants, who had been covered by the ECSC Staff Regulations of 1956 subsequently came under the new ECSC Staff Regulations of 1962. On its entry into force Article 106 of the EEC Staff Regulations did not affect them, as it determined the transitional provisions applying to officials who were covered by the scheme laid down in those EEC Staff Regulations. They remained unaffected when under Regulation No 259/68 this text became the Staff Regulations of all officials of the Communities since, as I have said, Articles 93 to 105 of the ECSC Staff Regulations of 1962 then remained applicable to those officials who were previously subject to them. It is thus only Article 97 of the ECSC Staff Regulations which may, in appropriate cases, be invoked by the applicants.

Let me recall here the terms of this Article 97 which contains in particular two paragraphs whose scope is discussed by the parties.

The first paragraph, which is invoked by the applicants, reads as follows:

> 'An official in receipt of a separation allowance before these Staff Regulations were applied who does *not* qualify for an expatriation allowance under Article 4 of Annex VII of these Staff Regulations shall be allowed the same amount as that which he would have received by way of separation allowance under the scale of renumeration laid down in the former ECSC Staff Regulations and General Regulations. Such amount shall not in future be varied for any reasons whatever, save where the official qualifies for an expatriation allowance by satisfying the requirements therefor.'

The fourth paragraph, on which the Commission bases its argument, is worded as follows:

> 'Where as a result of a change in his place of employment an official integrated under Article 93 *no longer* qualifies for an expatriation allowance under Article 4 of Annex VII, he shall continue to receive such allowance if under the former ECSC Staff Regulations he was entitled to receive the separation allowance.'

2. The Commission maintains that only this latter text was applicable to the applicants. In fact, when the ECSC Staff Regulations of 1962 were applied to them they qualified for an expatriation allowance under Annex VII (there were not nationals of the country in which they were employed —Luxembourg—and previously had neither habitually resided nor carried on their main occupation there). They ceased to qualify when they were posted to Brussels but did not qualify for a separation allowance under the Staff Regulations of 1956 as their new place of employment was the same as their place of origin. Under Article 9 (b) of the General Regulations of 1956,

entitlement to this allowance is lost when, following a new posting, an official settles less than 25 km from the place where he was resident before he took up his employment.

3. The applicants put forward another argument in answer to this: they do not seek the application of the fourth paragraph of Article 97 but rather of the first paragraph of Article 97, which entitles them to the amount which they would have received by way of separation allowance. When they provided for this allowance—as, moreover, when they provided for the expatriation allowance—the authors of the Staff Regulations intended to take account of changes in the living conditions of officials and on the transfer from one body of Staff Regulations to another they always sought to maintain existing situations. In order to be able to claim the benefit of the first paragraph of Article 97 of the new ECSC Staff Regulations, it is thus sufficient to have received the separation allowance before the entry into force of those Regulations and not to qualify under Article 4 of Annex VII. The defendant is unjustified in requiring in addition that the officials concerned should qualify for this allowance under the Staff Regulations of 1956, since the purpose of the first paragraph of Article 97 is not to award the allowance itself but merely to award an equal and invariable amount in compensation. Moreover, the text referred to is identical to Article 106 of the EEC Staff Regulations and thus requires the same interpretation: there is no doubt that the applicants qualify for the application of Article 106.

4. These arguments are not convincing.
Firstly, although Article 97 contains two transitional provisions, they cannot be considered separately and in order interpret the first paragraph correctly it must be considered in conjunction with the fourth paragraph. By its very terms this paragraph affects the official who no longer qualifies for an expatriation allowance, *as a result of a change in his place of employment*. It has therefore to be accepted that the first paragraph applies on the contrary to the official who has not changed his place of employment. It will, in addition, be noted that these two texts use different terms: the first paragraph contains the words 'does *not* qualify', the fourth paragraph the words '*no longer* qualifies', which appears to indicate that the first paragraph refers to situations existing on the entry into force of the new Staff Regulations and the fourth paragraph to those which arise subsequently from a change in the place of employment. This being so it is pointless to compare the first paragraph of Article 97 with Article 106 of the EEC Staff Regulations, as in the absence of any provision similar to that of the fourth paragraph that article may be given a wider significance and may also apply to officials who are transferred after 1 January 1962 to the country of which they are nationals. Thus, only the fourth paragraph of Articles 97 is applicable to the applicants, as the Commission held in the contested decisions.
Even if it is accepted, as is claimed in the applications, that the first paragraph of Article 97 may concern officials who have changed their place of employment since 1962, for this to be so the new place of work must be situated at least 25 km from the place of recruitment. The defendant has given what it takes to be the textual justification for this interpretation. However, I regard as much more cogent the idea that a transitional provision issued on transition to a less generous system does not normally aim to give employees more extensive rights than those they had under the system which is revoked. We know that servants who under the former ECSC Staff Regulations received the separation allowance lost it when, as the result of a new posting, they settled in an area less than 25 km from the place where they were resident before they took up their employment. It is possible that this provision has never applied in relation to the High Authority as that institution had, if not its seat, at least its offices in Luxembourg. This is unimportant however: the provision existed and could be applied to cases where departments were transferred elsewhere. Thus, under the former Staff Regulations, the continued payment of the allowance was in no way guaranteed to officials, and it is not clear why a transitional provision should have conferred greater rights on them under the

new Regulations. As the applicants have referred to a memorandum from the Legal Service of the Council I shall refer again, with the defendant, to the point of view held by that department: 'The purpose of these transitional provisions is in fact to maintain, within the limits determined by their wording, the *rules* existing before the entry into force of the new Staff Regulations'. Thus, the separation allowance may only be granted where the requirements under the earlier Staff Regulations for the continued payment of that allowance were fulfilled. Finally, although, as the applicants state, the purpose of such allowances is to take into account changes which have occurred in the living conditions of officials, it must be stated that these are changes in relation to conditions which would have been enjoyed by the servants concerned in their place of origin. As from the time when they return to their place of origin there is no longer any reason for the allowance to exist.

Therefore, even supposing that the first paragraph of Article 97 may apply to a transfer effected in 1969, it can in no way entitle the applicants to receive an amount corresponding to the separation allowance since, on account of their new posting, they are settling in an area less than 25 km from the place where they were resident before taking up employment; according to Article 9 (b) of the General Regulations of 1956, this would have been sufficient under the former ECSC Staff Regulations to extinguish their right to the separation allowance. It must be added that, contrary to the applicants' point of view, the result would have no doubt been the same if, on their posting to Brussels, they had settled more than 25 km from that city, since, taking into account the provisions of Article 20 of the Staff Regulations, the administration would have been justified in refusing to take account of a course of action based on personal considerations scarcely compatible with the service. I shall therefore propose that you set aside the first head of claim in the applications.

IV

The claims for damages are also unfounded. They are based in the first place on the allegation that the applicants were abruptly and without warning placed in a difficult psychological and financial situation and, in addition, on the wrongful act or omission represented by the conditions under which the Commission took the contested decisions. They claim to have been belatedly informed of what they were to expect and even misinformed, as the letters of 11 June and 5 July 1968 failed to tell them that they could retain the expatriation allowance by settling more than 25 km from Brussels. In addition, Mr Chuffart and Mr Jaeger complain that a sum amounting to three months' expatriation allowance was deducted from their remuneration on 15 October 1968 in a single operation.

I consider that what I said at the beginning of my opinion is sufficient to show that the applicants were notified, collectively as from March 1968 and individually from June, of what might happen to them. The notification was therefore not belated. Moreover, it was not incorrect since, as we have seen, the officials concerned are mistaken as to their right to retain the allowance by choosing to settle more than 25 km from their new place of employment. As regards the deduction of three months' expatriation allowance on 15 October, this arose from the fact that those concerned moved house before the dated fixed for their change of posting: they had been duly notified that in such a case the allowance would be discontinued as from the date of removal. I am thus unable to see any wrongful act or omission in the behaviour of the administration, and I am therefore not required to ascertain whether the officials concerned have suffered loss. The claims for damages should therefore be set aside.

I am therefore of the opinion that:

— the applications submitted by Mr Chuffart, Mr Jaeger and Mr Janssen should be dismissed;

— the costs should be shared according to the terms of Article 70 of the Rules of Procedure.