THE COURT (First Chamber)

hereby:

1. **Dismisses the applications in Cases 27/64 and 30/64;**
2. **Orders the defendant to bear the costs incurred by it both in respect of the main proceedings and of the application for the adoption of an interim measure and in addition one-quarter of the costs incurred by the applicant;**
3. **Three-quarters of the costs incurred by the applicant, both in the main proceedings and in the application for the adoption of an interim measure shall be borne by him.**

Lecourt Delvaux Trabucchi

Delivered in open court in Luxembourg on 8 July 1965.

A. Van Houtte
Registrar

R. Lecourt
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 16 JUNE 1965[1]

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Mr President,
Members of the Court,

In the two cases with which I have to deal today, the applicant has been in the service of the European Atomic Enery Community since 1 November 1964. He was first of all employed in the European Centre for the Processing of Scientific Information (CETIS) in Brussels, receiving the salary corresponding to classification A 5-2 of the salary table of the Staff Regulations of the ECSC. Later he was employed as a scientific official in the Ispra Joint Research Centre. At the time when he lodged his application, he was classified in Grade A 5-4 of the Staff Regulations of the European Atomic Energy Community.

This classification has caused repeated complaints on his part. Convinced of having been neglected within the framework of the decisions regarding promotion of officials at Ispra for the year 1963, which were published by being posted in the official buildings there on 9 January 1964, the applicant on 12 February 1964 lodged a complaint through official channels with the Commission, based on Article 90 of the Staff Regulations. By a letter of 7 April 1964, the Commission informed him that, according to its findings, he had not been excluded from the consideration of the comparative merits of candidates eligible for promotion, that the promotion procedure furthermore had proceeded properly and that after a further review of the facts it saw no reason to rescind its decisions regarding promotion.

It is against this decision, notified to the applicant on 8 April 1964, that the applicant in Case 27/64 is directed.

Shortly after lodging the beforementioned complaint through official channels, the applicant referred to the Commission on 21 February 1964 a new complaint in which he asked for the intervention of the Commission against certain improper conduct which had occurred at Ispra during the preceding months and which prejudiced both his professional reputation and his honour. No decision having been taken on this complaint within the time-limit provided for by Article 91 of the Staff Regulations (two months), the applicant lodged a second application (Case 30/64) on 13 July 1964.

Informed in the course of these proceedings that on 24 June 1964 the Commission had in a formal decision rejected his complaint as unfounded, the applicant later amended his application so as to direct it against that decision.

This second application, furthermore, is directed against the decision of the Commission of 26 March 1964, notified to the applicant on 24 April 1964, imposing a disciplinary measure of reprimand on the applicant, and against a decision of the Commission of 24 June 1964 ordering him to go without delay to Brussels.

The Court of Justice having decided, by order of 12 November 1964, to join these two cases, I now have to consider the following conclusions:

In Case 27/46:

That the Court should:

Annul the decisions regarding promotion taken by the Commission for the year 1963, at least in so far as concerns the promotions from Grade A5 to Grade A4;

Secondarily, after establishing and declaring the illegality of all the decisions regarding promotion, annul the defendant's decision of 26 March 1964, which was the reply to the applicant's complaint through official channels;

Declare that the Commission is obliged to undertake a fresh consideration of the comparative merits of officials eligible for promotion in 1963.

In Case 30/64:

That the Court should:

Annul the decision of the Commission of 24 June 1964, by which the complaint made by the applicant through official channels on 21 February 1964 was rejected; alternatively, annul the implied decision of rejection given two months after the said complaint was made;

Annul the decision to issue a reprimand taken on 26 March 1964 by the Commission in respect of the applicant;

Annul the decision taken by the Commission on 24 June 1964 to transfer the applicant to Brussels;

Order the Commission to pay one Belgian franc as compensation for the damage caused by the decision to transfer the applicant.

The Commission considers that these conclusions are inadmissible both because they are formulated in Application 27/64 and because they are directed in Application 30/64 against the decision taken in respect of the complaint of the applicant of 21 February 1964. Furthermore it submits that the applications should be dismissed as unfounded.

Finally, it should also be mentioned that the second application was accompanied by a request for the suspension of the operation of the decision of 24 June 1964, in so far as it ordered the applicant to go to Brussels. This was dismissed as inadmissible by Order of the President of 7 August 1964 on the ground that at that time the applicant had already complied with the Commission's order. The costs were reserved.

Legal examination

In examining these questions in detail it is natural to give first place to the objections of inadmissibility raised by the Commission.

I — Admissibility of the Applications

1. *Case 27/64*

The Commission is of the opinion that the application in Case 27/64 is inadmissible as being made out of time. According to the Commission, the application disputes express decisions which were published on 9 January 1964. Since between this date and the lodging of the application (29 June 1964) more than three months elapsed,

in accordance with Article 91 (2) of the Rules of Procedure the application must be regarded as out of time. This, says the Commission, is not altered by the fact that on 12 February 1964, the applicant first of all lodged a complaint through official channels based on Article 90 of the Staff Regulations, and that he directed his appeal to the Court against the decision taken by the Commission on 26 March 1964 (notified on 8 April 1964) on that complaint.

If one did no more than look at the wording of the Staff Regulations, one would be inclined to say that the Commission is right because the Regulations clearly state that appeals made in accordance with Article 91 must be filed within time-limit of three months, to be calculated from the day of the publication of a general measure, or from the day of the notification of an individual measure; these rules do not provide at all for the interruption of time running by the lodging of a complaint through official channels.

Nevertheless, I believe that this opinion of the Commission is neither satisfactory nor correct in law. I have already pointed out in my opinion in the case of *Elz v. High Authority* (Cases 22 and 30/60, Rec. 1961, p. 383), that the duty of loyalty on the part of officials requires them, before publicly asserting their alleged rights in judicial proceedings, to defend their interests in an appeal through official channels. This idea recurs in several more recent judgments of the Court which, although not in the context of a discussion of the present question of admissibility, are consistent in pointing out that a complaint through official channels logically precedes any appeal to the Court (Case 18/63, Rec. 1964, p. 167; Case 27/63, Rec. 1964, p. 264), or which declare that the lodging of such a complaint is expedient and desirable before making an appeal to the Court (Cases 79 and 82/63, Rec. 1964, p. 527). Particular mention should be made here of Case 69/63 (Rec. 1964, p. 495) in which an action brought in 1963 (after the entry into force of the Staff Regulations, and after the establishment of the applicant) against a decision taken in 1961 was held to be admissible because, reckoning from the commencement of the appeal through official channels, the appeal to the Court was lodged in good time. And the reasons on which this is based are the very considerations which I had already advanced in the case *Elz v. High Authority*.

Even if there still remained any doubts as to the influence of an appeal through official channels on the running of time, they would in the present case have to be emphatically dismissed. In pursuing this point I may refer to German administrative law, in which the rule is established, at any event on the basis of an express statutory provision (paragraph 191 of the Code of Procedure before the Administrative Court (Verwaltungsgerichtsordnung)), combined with paragraphs 68 et seq. and above all paragraph 74) that before lodging an application for annulment in cases involving public servants it is necessary to pursue the matter through official channels; in consequence, the period of time for instituting legal proceedings only begins to run as from the date of notification of the administrative decision given against the person concerned. In particular reference may also be made to French law, in which the case-law of the Conseil d'État has developed, in the absence of any statutory basis, corresponding principles, not only in respect of a 'recours hiérarchique' but also in respect of a 'recours gracieux' (judgment of the Conseil d'État of 13 April 1881, Recueil Sirey 82, III, 29; judgment of 12 January 1917, Recueil des décisions

du Conseil d'État, p. 42), at any event to the extent that the complaint through official channels results in a new examination of the facts (judgment of the Conseil d'État of 22 February 1918, Recueil, p. 190; judgment of 26 April 1944, Recueil p. 123).

It is necessary, therefore, and this is my argument, in cases before us concerning the law relating to public servants to recognize the validity of the principle that the defence of legal rights must first be pursued, obviously within the normal time-limit for appeals by means of an appeal through official channels, and that the time-limit for an appeal to the Court must be calculated as from the lodging of the former (that gives a time-limit of four months in the event of the silence of the administration, and of three months from the issue of a decision, when it is taken within two months from the commencement of the appeal through official channels). At least it is necessary to this extent to speak of a *right* of officials, and at most to deny the necessity of preliminary administrative proceedings, with all the consequences that entails for the time-limit for making appeals to the court, where it is a matter of disputing an act which has been adopted in accordance with a detailed administrative procedure and after hearing the person concerned. In my opinion, it is only thus, by proceeding on the basis of allusions in our case-law to the practical value of an administrative procedure, that we may construct a logical system, whilst the considerations propounded by the Court would be of no use if it were desired to require of the official concerned that he should institute an appeal to the Court in order to preserve his position although he had already commenced administrative proceedings. This point of view is strengthened by the fact that it must especially be remembered that judicial protection within the Communities is limited to a single court, and that a reinforcement of this protection which perhaps could serve to relieve the Court of Justice of some of its burden, can only be achieved by the greatest possible development of administrative procedure.

Since in the present case the applicant lodged with the Commission his complaint through official channels within the time-limit of Article 91, and since this appeal has given rise to a fresh examination of his case, (the Commission admits it expressly), which has led to a new, and not only confirmatory act, within the time-limit of two months provided for by Article 91 and since, lastly, the appeal, calculating as from the date of this decision, was lodged with the Court of Justice before the expiry of the time-limit of three months, no objection to its admissibility can be based on the matter of compliance with the time-limit.

2. Case 30/64

In respect of the second application, the Commission raises objections only against the first conclusion. Here too it is of the opinion that the application was lodged out of time, that is to say, after the expiration of two months from the implied decision of rejection of the applicant's appeal through official channels. On the other hand, the decision taken expressly on 24 June was not of such a character as to set a new time-limit, since it amounted only to an act confirming the implied decision of rejection.

In fact, even taking into account distances (Annex II to the Rules of Procedure) and any public holidays during which time does not run, there cannot be any doubt that the application lodged on 13 July 1964, if the time-limit is calculated as from the date of the appeal through official channels (21 February 1964), was

lodged out of time, since the time-limit expired on 4 July 1964 at the latest.

Neither can I allow that the applicant succeeds in his attempt to prove an objective relationship between the subject matter of his complaint through official channels and the decision taken on 24 June concerning the alleged transfer to Brussels, a decision which was disputed within the time-limit, by the application in Case 30/64. As the Commission properly points out, during the examination concerning the formal requirements, among which must figure the time-limit, there can be no question of dealing with the substance of the case. On the other hand I think it is clear that the subject of the appeal of 21 February 1964 through official channels, and in consequence that of the implied decision of rejection, may objectively be separated from the alleged decision of transfer of 24 June 1964, so that it is not possible by disputing the latter also to deal with the subject matter of the appeal through official channels.

On the other hand, it is more difficult to answer the question what influence does the Commission's decision of 24 June 1964 have on the right to bring an action to the extent that it deals expressly with the complaint of 21 February 1964—and here I am not referring to the amendment introduced in the reply (conversion of the appeal for failure to act into an appeal for annulment), since that amendment was clearly motivated by the production by the Commission of documents which were previously unknown to the applicant. On this point there was therefore reason to envisage, at least by analogy, the application of Article 42 of the Rules of Procedure or the application of certain of the fundamental principles which are expressed therein.

On the contrary, the really delicate problem is that of the classification of the act of 24 June 1964, and the interpretation of the relationship between that act and the implied decision of refusal which is deemed to have occurred on 22 April 1964.

I consider that one might envisage the possibility of considering the decision of 24 June 1964 as a purely internal measure, that is to say, as something against which there is no right of action. It is significant, in any case, that this measure was neither communicated nor notified to the applicant, but that on the contrary, it became known, purely by accident, during the course of the present proceedings, since it was taken in the same meeting in the course of which the Commission decided on the alleged transfer of the applicant to Brussels. One might therefore say that the Commission did not intend this measure to settle a legal situation and that its only aim was to make a declaration on the purely internal level that a particular case, namely the applicant's complaint, was already settled because of another decisive event (expiration of the time-limit provided for in Article 91 of the Staff Regulations).

Even if this view is not regarded as apposite, it is necessary nevertheless to accept the argument of the Commission, to the extent that the latter sees in the decision of 24 June 1964 a purely confirmatory measure, approving the implied decision of rejection of 22 April 1964, which caused no change in the legal situation and could not therefore set a new time-limit. Consequently one cannot apply the ideas which were developed with regard to the first objection of the Commission, since in that situation—adoption of an administrative act followed by an appeal through official channels—*the person concerned himself* may introduce new aspects which the administration must consider, and which remove from the implied decision of rejection the legal nature of a

purely confirmatory act. On the other hand in the present case, there is reason to state at the most that, even after the implied decision of rejection, certain questions which had been prompted by the complaint through official channels were examined at administrative level (see note from the Directorate General of Administration of 11 June 1964). However, under the mandatory system of Article 91 of the Staff Regulations, this examination brought about by the appeal through official channels, must be regarded as ended by the implied decision of rejection and it cannot for this reason constitute a factor which would enable the latter *express* refusal to be regarded as an act which may itself be the subject of an appeal to the Court.

Thus in the final analysis it is the view of the Commission which appears the correct one: the first head of the conclusions of application 30/64 must be dismissed as being inadmissible on the ground of non-compliance with the time limit.

In consequence the rest of the examination can only deal with the conclusions of the first application, as well as heads 2, 3 and 4 of the conclusions of the applications in Case 30/64. It is this examination which I will now undertake.

II — The substance of the case

1. *Case 27/64*

As we know, Case 27/64 is concerned with the Commission's decisions regarding promotion for the year 1963, which were brought to the knowledge of the staff at Ispra by posting in the administrative buildings on 9 January 1964. They are said to be illegal for a number of reasons, and particularly because the applicant had been excluded from the consideration of the comparative merits, or at least because the promotion procedure was defective in several respects.

In the face of this argument it seems logical to me to begin with a short account of the promotion procedure used by the Commission. The latter has explained to us in this respect that in view of the large number of its officials and the fact that these are employed in various places, it considered it should have decisions regarding promotion duly prepared every year. For this purpose a general instruction was brought to the knowledge of the staff by Circular 11/63 of 23 April 1964. According to this circular, local promotion committees were set up including one at Ispra, on which, inter alia the staff was represented and of which, at least as regards category A, the Director-General of the Joint Research Centre was also a member. This committee considers the qualifications of the candidates for promotion in order to prepare a promotion list comprising suggestions for promotion. This procedure is followed and repeated by a Central Promotion Committee in Brussels. The proposals of the latter are submitted to the Commission through the Directorate-General of Administration, and the Commission then draws up a list of suitable candidates which it publishes and which includes more candidates for promotion than there are posts free in the course of a year. Lastly on the basis of this list of suitable candidates, the Commission itself takes the various decisions regarding promotion.

It appears to me that this system is quite reasonable and practical; everything appears to show that its application is especially in the interests of the staff. On the other hand, one cannot deny that it may give rise to mistakes. Let us see in consequence what are the complaints which the applicant makes in respect of his own case.

(a) The first objection is of a formal nature. The applicant considers that in publishing the instruction mentioned above, the Commission adopted general provisions for giving effect to Article 45 and that, in doing so, it failed to conform to the procedure laid down by Article 110 of the Staff Regulations.

I cannot accept this criticism. The Court of Justice has declared several time that Article 45 of the Staff Regulations does not require general provisions for giving effect to it and that it may be applied directly in its present version (Cases 94 — 96/63; 27/63). This principle applies also in respect of the application of this Article by the Euratom Commission. In fact the text of the instruction in question gives the impression that it is really the Commission itself which in fact has the power of promotion and the Commission confirms this and that therefore there has been no delegation of power to other authorities. The participation of promotion committees has no other significance than that of making preparations for promotions and helping the Commission; they amount then to purely *internal* administrative bodies for the organization of which legislative provisions are not necessary. Thus it is not necessary to hear the Staff Regulations Committee, in accordance with Article 110 of the Staff Regulations (as to the Staff Committee, the Commission states that it was heard).

(b) Next, the promotion procedure is said to have been defective because the applicant was not considered during the consideration of the comparative merits, and this despite the fact that he fulfilled the conditions regarding the period of service provided for in Article 45 (classification A5 since 1959).

However, this complaint appears baseless so far as it concerns the consideration of the applicant in the preliminary examination carried out by the promotion committee at Ispra. In particular it is clear from Schedule 2 to the statement of defence that the name of the applicant appears on the list of officials who fulfill the requirements regarding length of service for promotion during the course of the year 1963 and whose qualifications for promotion were considered by the promotion committee at Ispra. The Commission states that the same list was submitted to the promotion committee in Brussels; in any case nothing emerged in the proceedings to indicate that the contrary was true.

Reservations only arise in respect of the examination undertaken by the Commission itself. It is true that we have been assured that it does not regard itself as bound by the list of proposals from the promotion committee, and that is confirmed by the production of minutes (Schedule I to the rejoinder) from which it is apparent that the Commission has granted promotions to officials who did not appear on the promotion list. On the other hand, it is shown in the minutes of the 219th meeting of 25 September 1963 (Schedule 1b to the rejoinder) that the Commission considered the proposals for promotion put forward by the Directorate of Administration and Personnel; I quote: 'The Commission next considered the proposals submitted by the Directorate of Administration and Personnel and made the promotions set out in Schedule 3 to the present minutes'. These words might suggest that, during the consideration of the comparative merits, the Commission did not take account of all the officials fulfilling the objective conditions for promotion during the year 1963, but only of those cases that the promotion committees had submitted with a recommendation for promotion.

Nevertheless, in the last analysis, this suspicion has no importance for the

present case, since as is apparent from the decision of the Commission of 7 April 1964, following the applicant's appeal through official channels of 21 February 1964 his case was closely examined once more. In consequence, it appears that the requirements of Article 45 were adequately observed. The fact particularly that the Commission did not as a preliminary matter annul the decisions regarding promotion for the year 1963 does not appear to give grounds for criticism, since even without such a measure it could have undertaken correctly its consideration of the comparative merits of all the candidates for promotion.

(c) In respect of the preparation of decisions regarding promotion, the applicant points out also that the promotion committee at Ispra did not have his personal file, and that he himself did not have the chance, before the termination of the work of the committee, to make observations on the report made upon him for the year 1963.

In respect, first of all, of the knowledge of the personal file of the applicant, which still appears indispensable to me, even though the annual report provided for by Article 43 is to hand, the Commission has assured us expressly that this file was *at the disposal* of the promotion committee at Ispra and of the central promotion committee at Brussels. The applicant was not able to let us know anything more than contrary statements and suppositions as to the place where his personal file was at this time. In the final analysis, what should turn the scale for a decision on this point is the fact that the Commission itself was able to consider the personal file of the applicant at least during the examination which took place after the lodging of the appeal through official channels.

It is the same in respect of the applicant's observations, dated 5 July 1964, on his annual report of 15 June 1964, since the work of the promotion committee was finished on 17 and 18 June 1964. It is true that I cannot say I am satisfied with the Commission's explanation that the annual report submitted to the Committee was favourable to the applicant, and the observations of the latter could not give new information (the applicant nonetheless speaks of certain particular work and certain particular personal merits). It appears to me all the same that what is decisive is that in drawing up the lists of suitable candidates of 25 July 1963, or at least in considerating the case of the applicant in March 1964, the Commission was able to take account of his observations on the remarks in the annual report.

Since no account can be taken of the complaint of infringement of Article 4 of the Staff Regulations, raised only in the oral proceedings, that is to say out of time (Article 42 of the Rules of Procedure), I therefore arrive at the conclusion that it is impossible to accept that there was an infringement of any substantial procedural requirements during the preparation of the contested decisions regarding promotion.

(d) As to the applicant's remark that his merits were at least equal to those of certain promoted candidates on the basis of reports, so that he therefore had just as much right as they to be promoted, I can confine myself to a few brief remarks. The applicant forgets, first of all, that according to the case-law of the Court of Justice, a promotion is not justified only by merit in respect of work, but also by other subjective facts that are considered concerning the character and the personality of officials. Furthermore, the Court has properly refused on several occasions to substitute its own judgment in respect of promotion for the subjective evaluation of the administration. In principle, complaints of this kind cannot therefore be taken into account in proceedings concerning promotion.

(e) In the same way, one last complaint

of a formal nature may quickly be eliminated by reference to the case-law of the Court. Since the Court considers that it is not indispensable that promotion decisions should be reasoned in respect of candidates not promoted, it is not possible to regard as a substantial defect the fact that the promotion committee at Ispra, which carried out only *a preliminary examination* has not given reasons for the exclusion of the applicant from its list of those proposed for promotion.

(f) I thus arrive at the conclusion that none of the complaints raised in Case 27/64 can succeed. In consequence the application must be dismissed as unfounded.

2. *Case 30/64, second head of the conclusions*

Since in my opinion the first head of the conclusions in Case 30/64 should be dismissed as inadmissible, I will begin immediately with the examination of the second head. This is concerned with a disciplinary decision of the Commission taken on 26 March 1964 and more precisely the issue of a reprimand to the applicant, under Article 85(2)(b) of the Staff Regulations, for having conducted a systematic campaign of disparagement for weeks with the help of unfair methods against other officials at the research centre at Ispra, and for having thus damaged the dignity of his office and spoiled the working atmosphere.

This decision must be considered in the light of two complaints.

(a) First the applicant advances criticisms concerning procedure, from two points of view: first of all he criticizes the non-participation of the Disciplinary Board in the conduct of the disciplinary procedure, as well as the manner in which he himself was heard.

In respect of the first point, it appears to me that the complaint raised is not justified. According to the clear wording of Article 87 of the Staff Regulations, light disciplinary penalties (written warning and reprimand) may be imposed by the appointing authority without consultation with the Disciplinary Board. In consequence the Commission is right in considering that power to act in disciplinary matters depends solely upon the nature of the punishment imposed, and not on the gravity of the accusations made. In this way a kind of discretion is vested in the appointing authority, that is to say, by commencing disciplinary proceedings, it may seek to impose mild penalties by establishing in advance criteria which are not severe. This is in no way the equivalent of deciding a particular punishment in advance which the applicant considers illegal.

With regard to the question of the proper hearing of the applicant in the disciplinary procedure it could first be objected that this is a new submission, raised for the first time in the reply and, because of this, inadmissible. But if we do not wish to be so severe, because the applicant has already argued procedural objections, albeit of a different nature, in his application, it must then be asked whether the fact that he was heard only by the Assistant Director of the Ispra Joint Research Centre may be regarded as sufficient. I think I am able to answer this question in the affirmative, because Article 87 of the Staff Regulations does not provide expressly that the official concerned must be heard by the appointing authority itself. Certainly such a procedure might be desirable in the interest of the 'principle of immediacy' (Unmittelbarkeitsprinzip), but it is none the less certain that, particularly in the case of Category A, for which the Commission, acting as a body, is the appointing authority, it would frequently finish by complicating administrative management. In the interests of the practical management of the disciplinary procedure there should therefore be no

objection to a preparatory hearing conducted by a senior official. There cannot here be a question of a real delegation of powers (it would be otherwise as respects the imposition of the penalty itself), so that it is not necessary for the time being to reply to the question whether in the present case when the applicant was heard (February 1964), the Director of the Ispra Research Centre was acting under a delegation of powers in disciplinary matters, or whether this delegation became effective only at a later date (by Circular 7/64 in June 1964).

In consequence the complaint of an infringement of the rules of the disciplinary procedure cannot lead to the annulment of the contested decision.

(b) The first complaint is allied with a second objection of a formal nature. According to the latter the reasons for the disciplinary decision are contradictory and were thus insufficient because, on the one hand, this decision accuses the applicant of a serious infringement of his official duties and, on the other, it imposes only a mild disciplinary sanction.

I am of the opinion that this argument must also be set aside. Clearly in accordance with its discretion, which has been mentioned before, the appointing authority has the right (provided, of course, that there is respect for equality), not only to refrain from instituting any disciplinary procedure at all, but it may also consider a mild punishment to be appropriate, for example for reasons which have nothing to do with the offence itself (irreproachable service for many years), without that amounting to an evaluation in one way or another of the degree of seriousness of the behaviour censured. In consequence the contradiction alleged by the applicant is only apparent and the contested measure may be regarded as properly stating the reasons on which it is based.

(c) In respect of the objective basis of the disciplinary decision and the correctness of the facts on which it relies it is necessary to distinguish several points:

— The applicant seeks first of all to ward off the criticism that he spread untrue rumours about other officials at Ispra by proving that the rumours were true. According to his information it can be proved that the officials in question used titles to which they had no right and that they made false declarations concerning their previous professional activities.

But the Commission quite rightly replies that his efforts are beside the point. In fact the complaint against him is only his statement, which is based upon deductions made from rumours circulating at Ispra as well as on 'vague memories' concerning information given in a proposal for appointment, that the officials in question had given false information *to the Commission* when applying for positions (cf. note of the Director-General of Administration of 25 March 1964). According to the express assurance of the Commission such is not the case and so, without its being necessary to institute measures of inquiry, particularly by examination of the files of the officials in question, it is proved that the complaint made against the applicant is well founded.

— When the applicant next tries to mitigate his offences by pointing out that the content of the allegations put out by him was *public knowledge* at Ispra, and that in consequence they could not *harm* the working atmosphere, we must state in this respect that he does not prove the notorious character of facts stated in the allegations, in so far as they say that the officials concerned had given false information *to the Commission.* But furthermore, and that is decisive, because that relieves us from hearing witnesses, the punishable character of a defamatory statement does not depend on whether the content of the defamation is already known by other persons.

— Lastly the applicant has not been able either to refute the complaint of infringement of his duty of loyalty by going to a private enquiry agency in order to check certain facts concerning the careers of other officials. In my opinion it is not necessary to explain that such behaviour, which in fact the applicant does not deny, is detrimental to the reputation of Community institutions and is therefore reprehensible. I do not see either how the reasons advanced by the applicant could justify his conduct. Such is the case in respect of his statement that he acted in that way only to defend his own interests: For, not only is there not sufficient reason to justify his fear of being removed from the institution's detailed list of posts, but it is not possible to see why the means of defending his interests available within the Community were insufficient. It is the same thing in respect of the statement that he had the intention of informing the Commission at the right time of the result of his investigations, because, quite apart from the fact that there is no proof of such an intention, that can in no way eliminate the disapproval which attaches to the ways and means used by the applicant.

(d) All told, the applicant has not succeeded in demonstrating the existence of wrongful acts or mistakes in the issue of the disciplinary decision concerning him, and this obliges us to dismiss the second head of the conclusions also.

3. *Case 30/64, third head of the conclusions*

It only remains to consider that head of the conclusions disputing the decision of the Commission of 24 June 1964, concerning the alleged secondment or transfer of the applicant to Brussels or to Jülich.

In this respect the parties are, first of all, in disagreement on whether the subject matter of this decision was in fact a secondment or a transfer, or only a temporary mission.

In my opinion, this question is important, because upon its solution may depend not only whether the application is well-founded, but even also its admissibility. In fact not all decisions taken within the context of the status of officials are legal measures which can be contested in the sense of Article 25 of the Staff Regulations. I refer on this subject to my conclusions in Joined Cases 109/63 and 13/64 (Rec. 1964, pp. 1321 et seq.), in which I set out the criteria used by national laws for this demarcation. In particular it appeared that one crucial question is whether a decision taken in the service affects *the status* of an official. As regards simple orders to go on a mission, there is no doubt in my mind, that measured against these criteria, they cannot be classified among contestable legal measures but that they are purely internal matters within the service.[1]

In consequence if it appears that the contested measure in the present case was restricted to ordering a mission, one must necessarily conclude that there is no room for review by the Court and that the corresponding head of the conclusions must be dismissed as inadmissible.

In retrospect, the case before us hardly presents any difficulties in this respect. As concerns Jülich, the applicant stayed there only a short time (a few days or only one). As to Brussels, he stayed first of all three or four days; he then took his annual leave, after which he returned to Brussels until the end of the month of September, on the verbal order of the Director-General of Administration. It was only by the decision of 10 October 1964 (notified to the applicant on 15 October 1964) that his final transfer to Brussels took place and he had been told of the possibility of this in a letter of 16 September 1964 from the Director-General of Adminis-

1 — Cf. Plog-Wiedow, Kommentar zum Bundesbeamtengesetz, notes 8 and 11 to paragraph 172.

tration. Accordingly an account of the applicant's expenses was drawn up in accordance with the rules concerning mission expenses. It is also impossible to dispute the character of the mission on the ground that the requirements of Circular No 36/63 relative to authorization of missions were not observed, since this circular applied only when the order for a mission does not come from the Commission itself (as was the case in the present instance).

Nevertheless it is more difficult to judge the situation if one relies only on the documents of which the applicant knew before his departure on a 'mission', and that is so even if one sets aside as irrelevant certain documents that he has introduced because they refer to previous matters which are now settled, particularly the consideration given to a possible transfer following an application which he had made (decisions of the Commission of 26 March 1964 and of 15 April 1964; note of 25 March 1964, letter of 9 June 1964, note of 11 June 1964, all from the Directorate-General of Administration), or because they came from officials who had no power to take decisions in this matter (letter of 26 August 1964 from Mr Gazzano).

Nevertheless, several memoranda communicated to the applicant on 25 and 26 June 1964 by the Director of the Ispra Research Centre state that he had to go to Brussels on 29 June *to take up his duties there*: certainly this expression is qualified by the word 'provisionally' and the addition of a request for him to go to Jülich the following week but, if looked at objectively, it calls to mind a secondment or a transfer rather than a mission. Nevertheless what must be decisive in the final analysis, is the wording of the decision taken by the Commission: 'If the person concerned cannot actually take up his duties at Jülich within the shortest possible time, he shall be asked to go forthwith to Brussels there to receive all proper instructions'. In my opinion, this leaves no doubt that the decision did not order a secondment to Jülich but that the applicant was to go to Brussels for a preparatory visit.

In consequence, and taking account of the actual carrying out of the order, it remains that we have only an order for a mission, that is to say, an internal service decision which is not subject to review by the Court. The corresponding head of the conclusions must therefore be dismissed as inadmissible. At most it would be possible, in considering the decision on costs, to take into consideration that the facts surrounding the case have left a large number of doubts and uncertainties and could objectively therefore have given rise to the lodging of an appeal with the Court.

If one does not adopt this opinion on the subject of defining the rights of appeal of officials, because mission orders too, particularly when they lead to a long absence or interfere with private arrangements (holiday), may have a noticeable effect upon the personal conditions of life of an official, it is necessary to ask oneself whether the submissions put forward against the contested decision are valid.

(a) This is certainly not the case in respect of the complaint that the wording of the decision was not communicated to the applicant. In so far as Article 25 of the Staff Regulations requires the communication to be in writing, in the present case this principle is sufficiently complied with by the communication of the substance of the disputed decision in the memoranda of the Director of the Ispra Research Centre which I have cited. Further, it is necessary to state that the failure to communicate a measure taken does not make the measure itself illegal. As the Commission rightly points out, and as I have already stressed in other cases, the only purpose of communicating the decision is to make it binding on the person to whom it is directed, and to

cause time to begin to run for the purposes of lodging an appeal.
(b) It is not possible either to criticize the decision of the Commission on the ground that the applicant was a member of the local Staff Committee. While he alleges that the decision of secondment to Brussels was one of a number of systematic attempts to remove him from this committee, it is proper to object that the decision in dispute here led only to a *temporary* absence. Further, the applicant has not been able to convince us that his absence, upset the activity of the Staff Committee: that could only have been the case if, just during that time, the applicant had to carry out important duties and if it had not been possible for other members of the committee to act in his stead.
(c) But I have serious objections to the shortness of the notice he was given when summoned and the fact that this affected his annual holiday which had long been arranged, and resulted in an absence of long duration. Without doubt, should the occasion arise the interests of the service may require the acceptance of such trials. But then it is necessary for the authority within the service to provide adequate justification. In the present case on the contrary, the facts which we know rather give the impression that the precipitate measure of the Commission was not absolutely indispensable, either to prepare for another posting of the applicant which did not take place until October 1964, or to put an end to a strained atmosphere in the services at Ispra.
It would thus be possible to speak of a breach by the Commission of its welfare duties, which obliges the Court to declare the Commission's measure to be illegal, and the applicant's additional request for damages well-founded. At least further explanation on the point would be necessary before the applicant's criticism could be rejected as unfounded, always supposing, of course, that, contrary to what I believe, it is regarded as admissible.

III — Summary

In recapitulating all these considerations, I arrive, without having to consider the requests concerning the question of proof which have been submitted, at the following conclusions:

As regards the application in Case 30/64, the requests for annulment of the decision dismissing the complaint lodged by the applicant on 21 February 1964 and the decision concerning the alleged secondment to Brussels must be dismissed as inadmissible. The other requests lodged in Applications 27 and 30/64 must be dismissed as unfounded. As regards the costs of the proceedings, including those of the proceedings for the adoption of an interim measure, under Article 70 of the Rules of Procedure the Commission in any case must bear its own costs. Moreover, considering the obscurities of the contested secondment decision, it appears to me equitable to make the Commission bear part of the applicant's costs, the remainder to be borne by the applicant himself.