# OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 JUNE 1969[1]

*Mr President,*
*Members of the Court,*

The applicant in the present case is a Netherlands citizen who was born on 9 June 1906 and who entered the service of the High Authority of the European Coal and Steel Community on 17 May 1953. He started work as a secretary then, from 1 January 1958, as Deputy Director of the Press and Information Department in Grade A3. After this designation had been abolished in the departments of the ECSC he became an 'Adviser'. It was in this capacity and with the same grading that he was later posted to the joint Press and Information Department of the three Communities. His place of work was Luxembourg, where one of his duties was to act as liaison officer between the High Authority and the other Community institutions established in that city. After entry into force of the Treaty establishing a single Council and a single Commission of the European Communities, he became an official in the Directorate-General for Press and Information of the single Commission, with the same responsibilities.

When, after Council Regulation No 259/68, with which we are familiar from other cases, came into force, the Commission began to make changes in its administrative organization and to rationalize its departments, in accordance with the task which had been assigned to it under Annex I to the Merger Treaty, the applicant was one of those affected. By letter of 22 May 1968, the President of the Commission informed him that he had been placed on a list of officials the termination of whose service in accordance with Article 4 of Regulation No 259/68 was under consideration. He was also asked to make known his views on the matter. He did this in a letter of 14 June 1968, addressed to the President of the Commission, in which he raised objections to the proposed measure and asked to be assigned to another vacant post, if possible that of Head of the Commission's Information Office at The Hague. In a letter of 24 June 1968 addressed to the President of the Commission, the applicant reiterated his objections and stated that he was also interested in an A5-A4 post which was becoming vacant in the Spokesman's Group at Brussels.

On 26 June 1968, the Commission nevertheless took a decision, pursuant to Article 4 of Regulation No 259/68, terminating the applicant's service, the measure taking effect from 1 October 1968. The decision was communicated to him on 28 June 1968 by letter from the President.

The applicant, however, was not minded to accept this and on 15 July 1968 he lodged a formal complaint with the President of the Commission under Article 90 of the Staff Regulations of Officials. In this he repeated the objections which he had submitted earlier against the measure taken to dismiss him and renewed his request to be assigned to the post at The Hague. As he had received no reply at the end of two months (in fact, his complaint was expressly rejected only by a letter from the President of the Commission dated 31 October 1968) and after he had heard that, on 17 October 1968, Commission staff had been informed that the vacancy in the post at The Hague would be filled in accordance with Article 29 of the Staff Regulations of Officials, he lodged an application with the Court of Justice on 13 November 1968.

1 — Translated from the German.

In his application, the applicant requests the Court to:

1. annul the decision of 26 June 1968;
2. annul the decision rejecting the applicant's request which must be regarded to have been taken by implication in the absence of any express reply within two months to the complaint of 15 July;
3. annul the decision if 31 October 1968 expressly rejecting the applicant's complaint;
4. declare that the applicant has remained an official of the Commission;
5. order that he be restored to his previous financial position and rights under Staff Regulations.

An accompanying request for suspension of the operation of the decision of 26 June 1968 and of all procedures for filling the post at The Hague was dismissed as unfounded by order of the President of the First Chamber on 12 December 1968.

The Commission contends that the application is wholly unfounded and asks the Court to dismiss it.

These facts and the arguments submitted by the parties give rise to the following considerations.

*Legal consideration*

First submission

In arguing that jurisdictional rules have been infringed and that powers have been unlawfully delegated, the applicant directs his main challenge against the *legal basis* of the decision to dismiss him. He attributes vital importance to the task assigned to the Commission under Annex I to the Final Act of the Conference held in Brussels on 8 April 1965 for signature of the Merger Treaty, and under which the Commission had to take the necessary steps to rationalize its departments. The applicant maintains that, as at present worded, the Treaties do not permit the Commission to carry out a task assigned to it by the Plenipotentiaries of the Member States (and in fact it is with such a task that Annex I is concerned). He also takes the view that the Council cannot delegate to the Commission the power to take decisions creating exceptions to the provisions of the Staff Regulations of Officials.

As regards this argument, it must be said at once that the legal basis for the decision to dismiss the applicant, which is Chapter II of Regulation No 259/68 of the Council, is not based on the task referred to in Annex I to the Merger Treaty but, beyond any doubt, on Article 24 of the Merger Treaty, which, like the provisions of the Treaties themselves, came into force after ratification by the national parliaments. Under that article, just as under the formerly applicable Article 212 of the EEC Treaty, it is incumbent on the Council of Ministers 'on a proposal from the Commission and after consulting the other institutions concerned' to 'lay down the Staff Regulations of Officials'. This it did in Chapter I of Regulation No 259/68. There can, however, be no doubt that the 'Special measures' in Chapter II of the Regulation governing the procedure for dismissal of officials for reasons connected with rationalization of the Commission's departments also form part of the rules referred to in Article 24. That the preamble to Regulation No 259/68 mentions, *inter alia,* Annex I to the Merger Treaty, is not, in my view, to be interpreted as a reference to an authority to legislate (which, in any case, is nowhere to be found in the Annex, which is addressed to the Commission alone and, moreover talks exclusively of a task 'within the framework of its responsibilities'). The fact that Annex I is cited in Regulation No 259/68 could at most be regarded as a reference to a *reason* for legislating but I am not prepared to accept that it could have been an essential link or cause, since the decisive consideration which led to adop-

tion of the special measures which are criticized is clearly to be found in the need for a rationalization and re-structuring of the administration in consequence of the merger itself (as provided for under the Treaty). The task mentioned in Annex I was not, therefore, a decisive factor for the purposes of the adoption of Regulation No 259/68.

Nor, moreover, can doubt be cast on the authority conferred on the Commission by the Council under the special measures in Regulation No 259/68 on the ground that the Council alone has power to legislate in matters affecting the law governing civil servants. Chapter II of Regulation No 259/68 did not, in fact, delegate to the Commission any kind of legislative powers which would enable it to take action at variance with the Staff Regulations of Officials. Rather it was the Council itself which enacted legislation enabling the Commission, provided that it complied with certain criteria (and thus kept 'within the framework of its responsibilities'), to adopt measures individually affecting certain officials in order to meet a particular situation. Whether these rules are to be criticized on other grounds, for example, because of a violation of certain elementary principles of the law governing civil servants, is only of significance in the context of the second submission of this application. In any case there can be no question of an illegal *delegation* of powers.

In my view, therefore, the first submission does not disclose anything which could nullify the legal basis of the contested decision or, consequently, the decision itself.

## Second submission

The second submission is also directed against Regulation No 259/68. The applicant maintains that Chapter II of the Regulation ignores the guarantees provided for under Staff Regulations; that it creates special legislation, adopted for reasons of political expediency, in respect of certain officials; and that it wrongfully provides that the selection of officials who are to be the subject of measures terminating their service shall be left to the discretion of the Commission and, consequently, not tied to objective standards.

In this connexion let me say at once, in fact, the Staff Regulations do not contain guarantees in the sense understood by the applicant. There was already provision in Article 41 of the former Staff Regulations for loss of employment by assignment to non-active status as a result of reductions in the number of posts, and established status was no protection. The new regulations contain nothing substantially different; the only new feature is that they apply to events whose scope far exceeds anything experienced hitherto. Officials affected are entitled to choose between termination of service and assignment to non-active status. Moreover, provision is made for generous compensation which, incidentally, the applicant has not criticized as inadequate when compared with the national schemes applied in corresponding circumstances.

Nor, moreover, can it with any justice be said that the provisions of this regulation were motivated by considerations of political expediency. The foundation on which it rests is clearly an objective one: this is the undeniably commendable merger of the executives. As for the fact that the merger meant rationalization, with a consequential reduction in the number of posts, this was inevitable from the beginning owing to the numerous instances of parallel powers which were to be found in the former executives, and certainly does not deserve censure.

It is also impossible to accept the argument that the regulation introduces special legislation aimed at certain officials which is unlawful and ignores the principle of equal treatment. The reason why Chapter II of Regulation No 259/

68 grants an authorization to the Commission alone is to be found in the fact that the merger of administrative machinery was confined to the Commission. It was solely for officials affected thereby that special rules were necessary. There was obviously no need to provide for exceptions to be made to the Staff Regulations for the benefit of other officials of the Communities.

Finally, I would also like to refute the objection that the rules of Chapter II lack objective criteria. Article 4 in fact sets out such criteria in the following words: 'Taking into account the officials' ability, efficiency, conduct in the service, family circumstances and seniority'. It seems scarcely possible to be more specific, for example, by laying down a general order of priority or by weighting these various factors in some way. As the application of the law governing civil servants or of administrative law itself so often demands, each case must be considered separately and a corresponding degree of discretion allowed. This does not, however, mean licence to take arbitrary decisions or measures motivated by political expediency since, in any case, the exercise of discretionary power is always subject to review, especially with reference to the requirements of effective rationalization.

In short, I am impelled to the view that none of the submissions attacking the general basis of the contested decision can succeed.

## Third submission

The other submissions are directly concerned with the contested measure itself. The applicant challenges its legality with special reference to the absence of any reason based on rationalization. He attaches vital significance to the fact that the Press and Information Department had, before the merger of executives, already been organized as a joint department and to the fact that the detailed list of posts for the Directorate-General which replaced it after the merger provided for a larger number of Category A posts than the former department. As regards his own case, the applicant further points out that, at the time when the decision to dismiss him was taken, the Commission had announced vacancies in several A3 and A5-A4 posts in the 'Staff Courier'. Of even greater importance, according to him, is the fact that the Commission could have placed him in charge of the Information Office at The Hague, as he had requested. Apparently, however, it had not even considered whether this posting was possible. The Commission was thus guilty of misuse of powers.

These arguments clearly lead us to the heart of the matter.

Before considering them, I must emphasize that such a drastic decision as a measure prematurely terminating an individual's service because of departmental rationalization deserves the most careful and detailed examination in order to avoid any suspicion that the rationalization was merely an excuse for a purge of staff for reasons of expediency. In this examination, the paramount consideration must be the principle of stability in the public service. This means unequivocal insistence on proof that, in this particular case, there were overwhelming reasons why this principle should be breached and that there was no possibility of finding any other, less drastic, solution.

Having made this clear, our first question must be what are we to make of the applicant's argument that the Press and Information Department was organized as a joint service before the merger of executives. Anticipating the answer, I think that this argument does not enable us to draw any conclusions of decisive importance in this case. In reality the joint departments were, before the merger, organized on the basis of three separate executives, established in different parts of the Community. It was, indeed, because of this situation

that the applicant had, as we know, been given responsibility for maintaining contact in Luxembourg with the High Authority and the other institutions of the Community established in that city. Thus even the joint departments were themselves liable to be affected by the merger of executives and by concentration of their services essentially in one place. Contrary, therefore, to the applicant's contention, there can be no *a priori* exclusion of the motive of rationalization or, in consequence, of application to the joint departments of the special measures taken under Regulation No 259/68. Nor, apparently, is there any greater weight, as a consideration in this case, in the argument that the Directorate-General of Press and Information, set up after the merger, contained a greater number of Grade A posts than the old Press and Information Department. I feel I ought to say at once that what is of importance in this case is not the number of Grade A posts taken as a whole but solely the number of posts in Grades A3 and A4. But we have been given no precise information on this point. Moreover, according to the Commission's statements, the Press and Information Directorate-General did not, apparently, merely take over only the functions of the old Press and Information Department. As part of the re-organization of the administrative departments as a whole, it also took over the tasks of other departments, including certain responsibilities of the Spokesman's Group and of the Documentation Department of the High Authority. Because of this, I agree with the Commission that there was clearly no question of a substantial increase in the number of Grade A posts in comparison with the old Press and Information Department.

Similarly, the mere fact that vacancies in other A3 posts had been published at the time when the decision to terminate his service was taken is insufficient to establish the illegality of this measure. The applicant is obviously looking at the general position in the departments of the Commission; and it appears to be equally obvious that he did not possess the qualifications to fill all or any of the vacancies which arose in the most varied spheres of responsibility. As he has not submitted more precise information on the subject of the posts for which he might have been considered as a candidate and as, apparently, he did not submit an application for one of these posts, no conclusions can be drawn from his present argument which might help his case.

A different attitude might perhaps be justified in the case of the argument that the Commission had, in the Press and Information Department, a post, which had been declared vacant, of Head of the Press and Information Office at The Hague to which the applicant could have been transferred in accordance with Article 8 of Regulation No 259/68 because it was a post in Grade A4. The Court must pay special attention to this argument. In it, the applicant maintains first that the Commission failed to consider whether this transfer was possible and that, in so doing, it ignored not only his request but the obligation incumbent upon it by virtue of Chapter II of Regulation No 259/68. In fact, there is no evidence, the minutes of a meeting for example, showing that the Commission went into the matter as requested by the applicant. The decision to terminate his service simply indicates *in general terms* that the applicant's age and the length of time necessary for adjustment do not appear to justify assigning him to duties in Grade A3 demanding a more extensive and specialized knowledge than that which he has as well as training and experience different from his own. Whether, however, we can draw from this the conclusion that the Commission did not consider the applicant's suitability for the post at The Hague, despite its express assurance that it did, and that it there-

fore failed to consider an essential matter, seems to me far from certain. I feel, therefore, that it would be of more use to go to the heart of the problem and consider whether, as the Commission maintains, there really were objective reasons why the applicant could not be considered for the post at The Hague. In so doing I shall not in any way take it upon myself to exercise the right, which belongs to the Commission alone, to make a value judgment on questions of suitability, at least so long as I confine myself to indicating anything tending to throw doubt on the validity of its judgment. As you know, the Commission lays particular emphasis on the fact that the duties associated with the post at The Hague are substantially different from those he discharged previously. Had he been transferred to The Hague it would have been necessary to reckon with a lengthy period of adaptation. Another point made by the Commission is that the applicant was now only three years away from retirement. In this connexion it can be accepted as true that, as appears from a note of 11 March 1963, the applicant's responsibilities in the Press Department until his dismissal were in the main connected with the activities of the Coal and Steel Community, relations with the European Parliament Press Department and contacts with other Community institutions at Luxembourg, whereas the duties of head of an information office in a Member State undoubtedly embrace the whole of the three Treaties. It seems, therefore, that the duties of the post at The Hague were to some extent new ones for the applicant, even though they are carried out within the general context of press and information work, and there appears to be no dispute that he had previously carried out *some* assignments which fell within the scope of the EEC. On the other hand, it must be borne in mind that he was a senior official. He had, as an employee of the European Coal and Steel Community, worked as Deputy Director of the Press and Information Department and even in the joint Press and Information Department he ranked second. According to his last periodic report, which consists almost wholly of the assessments 'good' and 'very good', and which testifies that the applicant is well able to adapt himself, he has always carried out his responsibilities to the satisfaction of his superior. It seems reasonable to believe, therefore, that he avoided a narrow specialization; that he tried to take a coherent general view of his sphere of activity as a whole; and that, moreover, he kept himself informed of events outside his own sphere, when they were not unconnected with it. Since, moreover, it is no part of the Commission's case that the applicant was unacquainted with the subject-matter of the EEC and Euratom Treaties, there was every reason to expect that he could after a relatively short period of adjustment, particularly in familiar surroundings, still render valuable service to the Community in the post at The Hague for a considerable time yet. This is further confirmed in particular by the fact that, as long ago as December 1967, a chef de cabinet asked him if he would like to be put in charge of the office at The Hague; it is also confirmed by the discussions he had with a member of the Commission about the system of work which would be appropriate there. In the light of all these circumstances and of the need, already mentioned, to implement with very special care the grave measures provided for under Article 4 of Regulation No 259/68, the Commission should have given clear proof that to assign the applicant to the post at The Hague would not have been in the interests of the service. But this proof has not been provided. The Court may accordingly draw the conclusion that the Commission did not consider when laying the basis for its discretionary decision the possibility of making ade-

quate use of the applicant's services and in this way failed to take sufficient account of its established officials' interests at the time when its departments were rationalized.

If, however, the need to terminate the applicant's service is not proved, the Court must declare the Commission's measure to be illegal. The principal head of the conclusions is therefore well founded.

Fourth submission

In consequence, there is not much to be said about this submission, or indeed about the fifth; they are in fact closely connected with each other. They argue that insufficient reasons were given for the contested decision in the sense that the decision contains no reference to facts; that it does not explain how the list of officials whose services were to be terminated was drawn up, or how the required choice was made; and that, finally, it gives no indication of the reasons why the applicant was refused the post at The Hague.

It is certainly not true that the decision omits any reference to facts. On this point, reference must be made to the first three recitals of the decision indicating the circumstances which led the Commission to place the applicant on the list of officials the termination of whose services was under consideration.

As regards the selection of the officials to whom, on the basis of the criteria laid down in Article 4 of Regulation No 259/68, these measures were to be applied, this involves a process of considerable complexity, including a number of value judgments which do not lend themselves to review; it is a decision-making process, therefore, whose every detail one can scarcely expect to be exactly explained.

Finally, the reason for refusing to assign him to another post is given in the fourth recital of the decision. Here, too, the comments I have made concerning the selection of officials whose services were to be terminated have the same validity in connexion with assessment of the respective merits of officials who were considered for the vacancy. Similarly, the Commission can hardly be blamed for not having given separate consideration to every one of the posts to which the applicant might have been appointed.

Taken as a whole this by no means presents an ideal picture of what a statement of reasons should be; in view of the drastic nature of the measure it could have been more precise. However, as the essential reasons for the decision are clear, it is difficult to say that the statement of reasons is so inadequate that the decision must be annulled on formal grounds.

Summary

My opinion is as follows:

Of all the submissions in my view the only one to succeed is that which argues that the Commission neglected to offer another post to the applicant. This is enough for the Court to declare illegal the decision to terminate the service of the applicant and annul the confirmatory decision rejecting the applicant's complaints which is deemed to have been taken on expiry of a period two months after submission of the complaint.

At the same time, it is clear that the applicant is still in the service of the Commission.

The judgment of the Court cannot, however, contain an injunction of any kind, for example to the effect that the applicant must be appointed to the post at The Hague. It is for the Commission to draw the necessary administrative conclusions from the judgment annulling the decision.

As the application is well founded, the Commission must pay the entire costs of the action.

## ORDER OF THE PRESIDENT OF THE FIRST CHAMBER OF THE COURT

## 12 DECEMBER 1968[1]

In Case 27/68R

R. F. RENCKENS, official of the Commission of the European Communities, residing in Luxembourg, represented and assisted by Jacques Putzeys, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34/B/IV rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, assisted by H. Ph. Visser 't Hooft of the Commission's Legal Department, with an address for service in Luxembourg at the Chambers of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application for suspension of operation of the Commission's decision of 26 June 1968 in which, acting under Article 4 of Regulation No 259/68 of the Council of 29 February 1968, it adopted a measure terminating the service of the applicant and for the suspension, as a temporary measure, of any appointment to the post of Head of the Commission Press and Information Office at The Hague (Vacancy Notice COM/204).

1 — Language of the Case: Dutch.