1. Cf Para. 1 of Summary in Joined Cases 79 and 82/63.
2. Any official may submit a request or complaint through his immediate superior to the appointing authority of his institution under Article 90 of the Staff Regulations. The appeal to the Court provided for in Article 91 must, failing any provision to the contrary, follow the like rules and be brought against the same authority.
3. The application of Article 45 requires no measure for giving effect to it other than that laid down in Article 43, to which Article 45 refers by implication. The application of this provision presupposes that reports have been made on the ability, efficiency and conduct in the service of officials, these reports being one of the factors in the consideration of the comparative merits of the officials eligible for promotion.
4. The fact that, during the period of adaptation of the Regulations, the Commission did not adopt general provisions which would have allowed the reports provided for in Article 43 to be made, cannot be regarded as an error of such a nature as to invalidate a promotion.
5. Cf. Para. 1 of Summary in Case 27/63.
6. Cf. Para 2 of Summary in Case 27/63.
7. Cf. Para 3 of Summary in Case 27/63.
8. Application forms submitted by the persons concerned themselves, without any verification or check by the appropriate departments of the Commission, are documents of an essentially subjective nature, the content and scope of which can be evaluated only with considerable care in a matter requiring as objective a consideration as possible of the merits of the candidates. The observance of this requirement is especially important in cases where the Commission takes its decision by written procedure and therefore without the possibility of any discussion and in the absence of reports on the ability, efficiency and conduct of candidates in the service. In such cases the appointing authority must supplement its information by consulting the personal files of the candidates.

In Joined Cases 94 and 96/63

PIERRE BERNUSSET, an official of the Commission of the European Economic Community, represented by Marcel Slusny, Advocate of the Cour d'Appel, Brussels, lecturer at the University of Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, avocat-avoué, 6 rue Willy-Goergen,

applicant,

v

EUROPEAN ECONOMIC COMMUNITY AND THE COMMISSION OF THAT COMMUNITY, represented by the latter's Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application for

Case 94/63: annulment of the Decision of 8 July 1963 whereby the EEC Commission appointed Mr Edoardo Volpi to the post of Assistant in the Directorate General of Administration, declared vacant by Vacancy Notice No 546;

Case 96/63: annulment of the Decision of 3 July 1963 whereby the EEC Commission appointed Mr Dieter Rogalla to the post of Principal Administrator in the Directorate General of Administration, declared vacant by Vacancy Notice No 515,

THE COURT (Second Chamber)

composed of: Ch. L. Hammes (Rapporteur), President, R. Rossi and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT
Issues of fact and of law

I—Facts

Case 94/63

Following Vacancy Notice No 546, which appeared in the Staff Information Bulletin of the EEC Commission, No 29 of 29 March 1963, a post of Assistant in Grade A4 was declared vacant in the Directorate General of Administration. The vacancy notice gave particulars of the duties and qualifications required; officials interested were invited to submit their applications before 12 April 1963.

The Administration Department re-received seven applications, including those of the applicant and Mr Volpi, both of whom were classified in Grade A5.

The Commission decided on 8 July 1963 by written procedure to award the vacant post to Mr Volpi and to promote him to Grade A4 with effect from 1 April 1963; this decision was posted on the notice boards in the Commission's premises from 8 to 15 August 1963.

On 28 October 1963 the applicant lodged an appeal at the Court Registry against the appointment of Mr Volpi.

Case 96/63

Following Vacancy Notice No 515, which appeared in the Staff Information Bulletin of the EEC Commission, No 23 of 22 February 1963, a post of Principal Administrator in Grade A4 was declared vacant in the Directorate-General of Administration, Personnel Administration Division.

The vacancy notice gave particulars of the duties and qualifications required:

any officials interested were invited to submit their applications before 8 March 1963.

The Directorate General of Administration received eleven applications, including those of the applicant and Mr Rogalla, both of whom were classified in Grade A5.

The Commission decided on 3 July 1963 to 'transfer' Mr Rogalla to the vacant post on a temporary basis and to promote him to Grade A4 with effect from 1 November 1963.

On 28 October 1963 the applicant lodged an appeal at the Court Registry against the appointment of Mr Rogalla.

II — Conclusions of the parties

The *applicant*, in his applications, claims that the Court should:

In Case 94/63:

'declare null and void the decision whereby Mr E. V. was appointed to the post in Grade A4, advertised in Vacancy Notice No 546;'

In Case 96/63:

'declare null and void the decision whereby Mr D. R. was appointed to the post in Grade A4, advertised in Vacancy Notice No 515;'

In both Cases:

'order the European Economic Community or, alternatively, the Commission to bear the whole of the costs of the proceedings;

note that the applicant reserves his right to raise any fresh issues of fact or of law as shall seem to him appropriate after the other parties have presented their defence and after production by them of any documents.'

In his replies the applicant claims 'that the Court should:

— declare the requests admissible and well-founded;

— as a subsidiary point, order the opposite party to produce all documents submitted to the Commission and in particular the undermentioned, whilst in no way limiting his claim to production of these:

1. the proposal of the Executive Secretary,
2. the opinions given by the administration,
3. the personal files of the candidates'.

The *defendant* contends in each case 'that the Court should:

— declare the application unfounded;

— order the applicant to bear the costs according to the relevant provisions.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *As to the admissibility of the applications and the naming of the defendants as parties*

The *applicant* has brought his actions both against the European Economic Community and against the Commission of that Community on the grounds that, having regard to the opinion of the Advocate-General in Case 25/60 and the decisions of the Court, he wished, on the one hand, to satisfy the requirements of Article 91 of the Staff Regulations and, on the other, to gain access to the work done in preparation for the regulations of the Councils in formulating the Staff Regulations.

The *defendant* does not express any view on this point and does not contest the admissibility of the applications.

B — *As to the substance*

Submissions common to both applications

1. *Infringement of Article 110: Absence of general measures for giving effect to Article 45*

The *applicant* claims that the contested

decisions are void for infringement of Article 110 of the Staff Regulations: general measures giving effect to Article 45 (1) should have been adopted, after consultation with the Staff Committee and after the views of the Staff Regulations Committee had been obtained, and should have been brought to the notice of the staff.

Promotion is such an important matter that it cannot be made in an authoritarian manner, without the Staff Committee, representing the interests of the whole staff and the Staff Regulations Committee, as the body responsible for ensuring coordination and harmonization between the various institutions, being consulted or heard in accordance with Article 110.

Further, Article 45 is not complete in itself; in the exercise of the discretionary power which it confers, the appointing authority must observe two essential formal requirements: consideration of the comparative merits of the officials eligible for promotion and a comparison of their reports. Moreover these reports are mentioned in Article 43 of the Staff Regulations which expressly refers to Article 110; they must therefore be made in accordance with the procedure set out in Article 110.

The *defendant* replies that Article 45 (1) is complete in itself and is applicable without any need to supplement it by a provision for giving effect to it; it establishes all the factors necessary for enabling promotion to be determined.

Promotion is made exclusively by selection after consideration of the merits of officials eligible therefor; the appointing authority, which is given a discretionary power by the Staff Regulations, may undertake this comparison without the need for a general regulation setting out the detailed procedure. No deduction can be made from the reference in Article 43 to Article 110 that the consideration of the comparative merits provided for in Article 45 must also be governed by a general provision for giving effect to the Staff Regulations.

As the procedure for drawing up the reports had not yet been adopted there were no reports existing which could be taken into consideration at the time when the contested decisions were made. In the meantime the institutions had to effect promotions and in so doing had to base them solely on a consideration of comparative merits.

2. *Infringement of Article 5 (4): Absence of any description of the duties and powers attaching to the posts*

The *applicant* invokes the illegality of the contested decisions on the grounds that they were taken in infringement of Article 5 (4) of the Staff Regulations: that it was impossible to judge the ability of an official to fill a given post if the duties and powers attaching thereto were not defined in advance in accordance with Article 5, that is to say, after obtaining the views of the Staff Regulations Committee and consulting the Staff Committee. The Commission is alone responsible for the delay in this matter and has only itself to blame if it cannot undertake promotions in a legal manner. The exigencies of the service did not call for these vacant posts to be filled immediately: auxiliary staff could have been taken on or the interim procedure used.

The distinction which the defendant seeks to draw between the definition of duties set out in Article 5 of the Staff Regulations and the definition of duties contained in a vacancy notice is unfounded. In order to determine whether candidates have the required qualifications the theoretical definition of the post and the actual abilities of the candidates must be considered together; but to ensure equality of treatment the theoretical definition must be given in advance in accordance with legal requirements.

The allegation that the definition con-

tained in the vacancy notice conforms with that laid down in Article 5 of the Staff Regulations is pure supposition.
According to the *defendant* this submission shows that any promotion or appointment should have been suspended until the institution had decided on the definition of duties provided for in Article 5. The effect would have been to paralyse Community activity as the definition of duties is a lengthy business. The exigencies of the service call for vacant posts to be filled immediately. The applicant is in fact confusing the definition of duties contained in a vacancy notice and the definition of duties provided for in Article 5 of the Regulations for the purpose of classifying posts.
In the present case the issue was not the abstract one of determining whether the candidates were in a position to carry out the duties of assistant or of principal administrator but of selecting the individual candidate most suited to carry out the duties defined in Vacancy Notices Nos 546 and 515. Even without the definition of duties and powers required under Article 5 for each post, the appointing authority was in a position to assess the abilities of the candidates.
The defendant further observes that the definition of duties fixed by the Commission under Article 5 of the Staff Regulations does not run counter to the description given in Vacancy Notices Nos 546 and 515 and that if it had been adopted before the contested appointments, the appointing authority would not have had before it any other criteria than those obtained from the vacancy notices.

3. *Infringement of Article 45 (1)*:
Absence of criteria for promotion laid down in advance

The *applicant* complains that the contested Decisions represent an incorrect application of the first subparagraph of Article 45 (1) of the Staff Regulations since the Commission did not decide in advance, and independently of the promotions it had to make, what criteria it would apply in selecting the official best suited for filling the given post.
The determination in advance of the factors to be taken into account and the relative weight to be given to each constitutes the only guarantee of the strict application of Article 27 of the Staff Regulations and against a misuse of powers.
Even though Article 45 does confer a discretionary power on the Commission it also provides for consideration of comparative merits on the basis of reports. It is unthinkable that there could be no preconceived objective rules known to servants in advance.
The *defendant* replies that the applicant is seeking to impose on the Commission an obligation not laid down expressly or by implication in any provision of the Staff Regulations. The determination of criteria would either add no additional guarantee to those which officials enjoy or adversely affect the wide discretionary power expressly conferred on the appointing authority by Article 45 (1), and would therefore be illegal.

4. *Infringement of the first paragraph of Article 25*:
Absence of a statement of reasons

The *applicant* seeks the annulment of the contested decisions for lack of a statement of reasons.
Under Article 25 of the Regulations any decision adversely affecting an official, indeed any decision affecting an individual, must state the reasons on which it is based: the rejection of an application adversely affects the unsuccessful candidate and reasons for it must therefore be given so as to allow him to decide whether his legitimate interests have been taken into account and to allow the Court to examine the legality of his

rejection.
The defendant has itself admitted that the contested measures adversely affect the applicant because it has offered no objection to the admissibility of the applications.
The *defendant* replies that Article 25 of the Regulations only requires a statement of reasons for individual decisions adversely affecting an official. Moreover a decision making an appointment or a promotion is undoubtedly an individual decision in relation to the official appointed or promoted but it does not adversely affect him and need not therefore state the reasons on which it is based.
The appointing authority does not have to take an individual decision concerning each candidate whose application is not accepted. Admittedly the promotion of another candidate may be tantamount to an implied refusal of the applications of the others but this refusal does not resolve itself into a series of individual decisions and by reason of its implicit nature does not call for a statement of reasons. It is not feasible for the positive decision on a promotion to be accompanied by as many negative decisions as there are candidates and certainly not as there are officials who have no claim to promotion but are merely eligible for it.

5. *Infringement of Article 45 (1)*:
Absence of inadequacy of consideration of comparative merits of candidates

The *applicant* maintains that it has not been established that the Commission gave consideration to the comparative merits of the officials eligible for promotion and of the reports on them as it was required to do by Article 45 of the Staff Regulations.
It is for the defendant to show that it gave this consideration and for this purpose it must produce the minutes of the meeting of the Commission during which the decision was taken or at least the documents in the written proceedings if there were any such. The defendant admits that there was no consideration of reports. The arguments which it advances to justify the absence of reports are irrelevant as a test of legality. The legal safeguards laid down in Articles 43 and 45 of the Staff Regulations are the counterpart of the discretionary power vested in the Commission concerning promotions; it must observe these safeguards.
The *defendant* contends that the legality of a measure is presumed and that the burden of proof can be transferred only so far as the party contesting the legality of the measure at least adduces *prima facie* evidence to show that his allegations have some merit, which is not so here. In fact the Commission compared the qualifications and merits of all candidates before selecting the one who appeared most suitable. Furthermore illegality as regards the promotions made cannot be inferred from the absence of any reports on the candidates. Article 45 in no way prohibits promotions being made to meet the exigencies of the service where, owing to circumstances, the reports provided for in Article 43 are not available.

Submissions relating to the individual applications

Case 94/63

1. *Infringement of the second paragraph of Article 25*:
Failure to publish the contested decision

The *applicant* seeks the annulment of the contested decision for infringement of the second paragraph of Article 25 of the Regulations, the decision regarding promotion not having been posted at once in the Commission's premises or published in the Monthly Staff Bulletin of the Communities. Promotion is the type of measure which is not perfected until all formalities have been completed;

publication is an intrinsic element for the legality of the measure.

The *defendant* points out first that publication of the contested Decision did in fact take place. It further contends that publication is not an essential formality and that if it is not effected the decision to make the appointment is not thereby stripped of all legality; it is merely an inessential formality required to follow the measure, already complete in itself; late publication, or indeed no publication at all, has no effect on the legality of the act.

2. *Infringement of the rules on the written procedure*

The *applicant* in his reply raises a further submission for annulment which falls into three parts.

(a) The Commission, which claims that it adopted the written procedure, should have decided on the procedure for the application of Article 11 of its internal regulations and if that was not done there is at least an infringement of an essential procedural requirement or of a rule of law relating to the application of the Treaty.

(b) The Commission should have stated its reasons for making an exception to Article 2 of its internal regulations which provide that in general it must meet to make its decisions.

(c) The agreement of the Commission was arrived at as the result of the initiative of the Executive Secretary whereas the first paragraph of Article 11 of the internal regulations provides that where the written procedure is used agreement shall be reached on a proposal by one of the members of the Commission.

The *defendant's* reply to this threefold submission is essentially as follows:

(a) The first part does not accord with the facts, since the Commission, after adopting its internal regulations, maintained its own procedure, laid down on 8 December 1960, for applying the written procedure and applied it in the present case.

(b) The joint effect of Articles 2 and 11 of the internal regulations is that these leave it to the Commission to decide, in the exercise of its discretion, from one case to another, whether the decision shall be made when it meets or under the written procedure, save that, as a general rule, it shall not reach a decision by means of the written procedure. When the Commission in the exercise of its discretion adopts the written procedure, it is not obliged to state its reasons for so doing.

(c) The proposal adopted in the present case is indeed a proposal of the President of the Commission. The Executive Secretary acting on instructions merely set the machinery of the written procedure in motion.

Case *96/63*

1. *Misuse of powers by infringement of Article 45 in conjunction with Article 108*

The *applicant* claims that the contested decision should be annulled on the ground that it was made to take effect on 1 November 1963 with the sole aim of evading the formal requirements of Article 45 whereby an official can only be promoted after having completed a minimum period of two years in his grade. To allow the appointing authority to infringe this perfectly clear rule would amount to blocking posts for the future, something which would seriously harm the interests of all officials who have a right to a normal career. No abnormal situation is of a kind to justify such an infringement of the Regulations: moreover in the present case there is a complete lack of any statement of reasons which might justify such an infringement.

The *defendant* replies that the vacancy notice under Article 108 of the Regula-

tions did not require that candidates should have completed a minimum period of two years in their grade. The vacancy notice was published and applications were received before 31 March 1963, that is, before the period of validity of Article 108 had expired. Mr Rogalla could legally have been chosen before that date. The Commission, not being in a position to do this by reason of circumstances, was quite properly able to adopt the contested decision later, having regard to the exceptional situation created by a transitional provision in the Regulations, and not to put it into effect until 1 November 1963, that is to say, on the day on which Mr Rogalla would have completed a minimum period of two years in his grade.

2. *Misuse of powers by infringement of Article 45*

The *applicant* maintains that Mr Rogalla was promoted only because of his nationality and in order to take into account, illegally, geographical considerations in the distribution of posts. Moreover, Article 45 contains no reference to considerations of recruitment on a geographical basis as set out in Article 27. The Commission did not act in the interests of the service but pursued a political aim. The applicant by virtue of his training and experience has the qualifications required to a greater degree than Mr Rogalla.

The *defendant* on the contrary maintains that the Commission selected Mr Rogalla because it considered him the most suitable person to fill the vacant post. Without questioning the merits of the other candidates, especially those of the applicant, the Commission gave preference to Mr Rogalla by reason of his theoretical and practical knowledge of German law relating to the public service. The Commission is perfectly entitled to select from candidates of equal merit the one whose knowledge proves particularly suited to the efficient running of the service. Its assessment as to this is not subject to review by the Court. The alleged misuse of powers is thus in no way established.

IV — Procedure

The written procedure in Cases 94/63 and 96/63 took the normal course.

The Second Chamber of the Court, to which the two cases were assigned pursuant to the decision of the Court of 9 October 1963 (Official Journal of 29 October 1963, p. 2598), decided on 12 March 1964 to open the oral procedure without a preparatory inquiry. By order of 7 April 1964 the Second Chamber decided, after hearing the Advocate-General, to join the two cases for the purposes of procedure and judgment.

The parties were heard on 22 April 1964. In the course of the hearing they produced certain documents.

At the hearing on 5 May Mr Advocate-General Roemer delivered his reasoned oral opinion in favour of annulment of the two contested decisions.

Grounds of judgment

A — As to naming the defendants as parties and as to the admissibility of the applications

The applications are made against the European Economic Community 'or, alternatively', against the Commission of that Community. It is there-

fore appropriate to determine which of the defendants must answer the applications.

Article 179 of the EEC Treaty provides that 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'. The expression 'the conditions laid down in the Staff Regulations' necessarily implies competence to be a party to legal proceedings vested in the appointing authority which exercises in fact the powers of employer in relation to officials. The appointing authority in the present case is the EEC Commission. This view is confirmed by the actual wording of the Staff Regulations of officials of the EEC. Article 91, under Title VII headed 'Appeals', follows Article 90 which governs appeals through an official's immediate superior and it is both logical and desirable that this procedure should be used before an appeal is made to the Court of Justice. Any official may submit a request or complaint in this way through his immediate superior to the appointing authority of his institution. The appeal to the Court provided for in Article 91 must, failing any provision to the contrary, follow the like rules and be brought against the same authority. The appeal must be deemed to be brought against the Commission.

The admissibility of the appeal is not contested by the defendant and no grounds exist for the Court to raise the matter of its own motion.

B — As to the substance

As to the submissions common to both applications

1. *As to the first submission*

The applications seek the annulment of the appointment of Mr Volpi to the post of Assistant in the Directorate-General of Administration and the annulment of the appointment of Mr Rogalla to the post of Principal Administrator in the same Directorate for infringement of Article 110 of the Staff Regulations on the ground that general provisions for giving effect to Article 45 (1) of the Staff Regulations were not duly adopted and published.

The application of Article 45 requires no measure for giving effect to it other than that laid down in Article 43, to which Article 45 refers by implication. The application of this provision pre-supposes that reports have

been made on the ability, efficiency and conduct in the service of officials, these reports being one of the factors in the consideration of the comparative merits of the officials eligible for promotion.
It is established in this case that the periodical reports provided for in Article 43 and made in accordance with conditions to be determined by each institution by means of general provisions for giving effect to the Staff Regulations within the meaning of Article 110 were not in existence at the time when the contested decisions were made. But however regrettable may be the delay in this connexion in putting Article 110 into effect it must be said that none of the institutions was in a position at the time to adopt the general provisions for giving effect to the Staff Regulations — and it is the failure to do this which is alleged in the action — by reason of the date of publication and entry into force of the Staff Regulations.

As the Staff Regulations were not published until 14 June 1962 and took retroactive effect only on 1 January 1962, it must be admitted that, at the date when the contested decisions were made, the institutions of the Community were still in a transitional period as regards the application of the Staff Regulations. In particular the fact that at that date the Commission had not yet adopted general provisions which would have allowed the reports provided for in Article 43 to be made, cannot be regarded as an error of such a nature as to invalidate the decisions at issue.

Moreover Article 43 provides that periodical reports shall be made at least every two years. The Commission thus could not have been in breach of this duty at the date when the decisions at issue were made, that is to say, on 8 and 3 July 1963 respectively. Article 45 had therefore to be applied before the said general provisions for giving effect to the Regulations had been drawn up.

The exigencies of the service make it impossible to regard this procedure as illegal at the time when the contested decisions were made.

The first submission is therefore unfounded.

2. *As to the second submission*

The applicant complains that the contested decisions were made contrary to the last part of Article 5 of the Regulations in that the relevant vacancy notices were not preceded by a definition of the posts within the meaning of that Article.

This submission refers to both the inadequacy of the vacancy notices for the

vacancies filled by the contested decisions and to the general failure to act on the part of the Commission in defining the duties and powers of all the posts in its departments.

As regards the first part of this submission the alleged inadequacy of the vacancy notices lies in the absence of clearly defined criteria making it possible to select the candidates most suited to these posts. As this point is covered by the third submission, it will be appropriate to examine it later.

As regards the general failure to act on the part of the Commission, it must be admitted on this point that the contested decisions were legal in the present case having regard to the complexity of the tasks of defining the various posts, the time involved, the definitions actually contained in the vacancy notices and the need to fill the vacancies to meet the exigencies of the service.

3. *As to the third submission*

The applicant maintains that the Commission applied in the wrong way the first subparagraph of Article 45 (1) of the Regulations in that it failed to determine in advance and in a general manner its criteria for selection for promotion and also applied in the wrong way Articles 27 and 45 in conjunction with Article 43, in that these presuppose the existence of a predetermined and objective procedure with which officials would be acquainted in advance.

Article 45 provides that promotion shall be exclusively by selection after consideration of the comparative merits of the officials eligible for promotion and of the reports on them. The appointing authority has in this respect wide discretionary powers. Such powers presuppose that while great freedom is allowed in making the decision there must at the same time be a scrupulous examination of personal files each containing comparable information. This second factor provides the necessary guarantee that powers will be exercised with full knowledge of the facts.

Article 45 indicates as a criterion the reports provided for in Article 43; for the reasons set out above the fact that these reports were non-existent at the date of the contested decisions does not appear sufficient to render those decisions illegal. It would be too much to require the administration to draw up *ad hoc* reports to take the place of the reports provided for in Article 43 during the adaptation period.

The absence of reports makes it vital that the appointing authority should

make sure that the other particulars on the basis of which it must consider the comparative merits of the candidates should be as full and objective as possible. An examination of the factors actually taken into account by the Commission in taking the contested decisions can suitably be considered under the fifth submission.

In the circumstances the present submission is therefore unfounded.

4. *As to the fourth submission*

The applicant claims that the decisions in question should be annulled on the grounds that the reasons on which they were based were not stated. Under Article 25 of the Staff Regulations any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned and any decision adversely affecting him shall state the reasons on which it is based. Following this line of thought, it must be said that there was no need to give reasons for the decisions at issue as respects the persons to whom they were addressed, that is to say the officials whose applications were accepted and who could not consequently be adversely affected. As regards the other candidates it may be observed that, although the appointing authority has very wide discretionary powers in making its selection, the factors to be taken into account in applying that discretion depend not only on ability and efficiency, that is to say, on the aptitude of those concerned in the performance of their duties, but also on their conduct in the service, that is to say, their behaviour, their character and their general personality. By their very nature findings on these matters thus are not appropriate as statements of reasons, the particulars of which might, moreoever, prejudice officials whose applications were not accepted.

On this point the applications must be dismissed.

5. *On the fifth submission*

The applicant claims that the contested decisions should be annulled on the ground that they were taken without the Commission's having adequately considered, in its capacity of appointing authority, the comparative merits of all the candidates and in particular those of the applicant. The Commission thus did not observe the safeguards afforded by Article 45 of the Regulations to officials eligible for promotion, those safeguards being the counterweight to the wide powers available to the Commission in this matter.

It is agreed that the two posts for which the applicant in the present case had applied were to be filled by promotion and therefore after consideration of the comparative merits of the candidates. The Commission, wide as its discretionary powers may be, must treat all candidates alike and take into consideration comparable sources of information in making its comparisons. It is appropriate to check whether these conditions have been fulfilled in each of the present cases.

In Case 94/63 the contested decision was taken under the written procedure laid down in Article 11 of the internal regulations of the Commission of 9 January 1963 (Official Journal of 31 January 1963, pp. 181 et seq.). Pursuant to this provision the Executive Secretary notified all members of the Commission on 2 July 1963 of the written text of a communication from the President of the Commission headed 'Promotion de Mr Edoardo Volpi'. In that communication the President of the Commission recommended that 'after a full examination of the applications and an interview with the persons concerned the Director-General of Administration has come to the conclusion that Mr Volpi is the most suitable candidate to fill the post in question. I accept this conclusion in agreement with the members of the Committee of Chairmen'.

After setting out particulars of the career and qualifications of Mr Volpi, the communication ended with the following proposal:

'I therefore propose, in agreement with the Committee of Chairmen, that the members of the Commission should adopt the following decision:

"The Commission, after consideration of the comparative merits of the candidates, has decided that Mr Edoardo Volpi shall fill the post of Assistant to the Director-General of Administration, the vacancy for which was published under No 546. The said official is promoted to Grade A4 with effect from 1 April 1963".'

There was annexed to the said communication Vacancy Notice No 546, the applications containing particulars of the candidates, especially as regards their standard of education, their previous posts, including their service with the Communities, their knowledge of languages and of shorthand and typewriting and any observations by them.

The abovementioned notification of 2 July stated that, unless notice of any observation or objection were given to the Executive Secretariat before 6 p.m. on 8 July, the President's proposal could be deemed to have been accepted.

The minutes of the 236th meeting of the Commission held on 17 July 1963 contained the following:

'The Executive Secretary gives notice that, the respective time-limits having expired, no observations on or objections to the promotions submitted for approval to the Commission by written procedure have been made.

'The Commission accordingly adopted the decisions . . . mentioned below . . .

'The Commission, after consideration of the comparative merits of the candidates, has decided that Mr Edoardo Volpi shall fill the post of Assistant to the Director-General of Administration the vacancy for which was published under No 546. The said official is promoted to Grade A4 with effect from 1 April 1963.'

It follows from the foregoing statements that the only particulars available to the Commission for consideration of the comparative merits of the candidates were the communication from their President and the application forms.

The proposal of the President to promote Mr Volpi did not contain so much as a reference to the possible merits of other candidates. The application forms submitted by the persons concerned themselves, without any verification or check by the appropriate departments of the Commission, are documents of an essentially subjective nature, the content and scope of which can be evaluated only with considerable care in a matter requiring as objective a consideration as possible of the merits of the candidates. The observance of this requirement is especially important in cases where the Commission takes its decision by written procedure and therefore without the possibility of any discussion and in the absence of reports on the ability, efficiency and conduct of candidates in the service.

It has not been claimed nor has any evidence been tendered that the Commission supplemented its information by consulting the personal files of the candidates. It follows that the factors on which the Commission took its decision were inadequate.

In Case 96/63 the contested decision was taken by the Commission in accordance with the normal procedure in the course of its 234th meeting held on 3 July 1963.

On 1 July the members of the Commission received notification of a pro-

posal of the President of the Commission headed 'Transfer and promotion of Mr Dieter Rogalla'. The President stated therein:

'All candidates have been seen by the Director-General of Administration. As proposed by him I have come to the conclusion after full investigation that Mr Dieter Rogalla, an official of the Directorate-General of the Internal Market, is the most suitable candidate.'

After a statement on the career and qualifications of Mr Rogalla the proposal mentioned that 'the factors relating to the other candidates will be communicated to the Commission orally' as will the opinion of the members of the presidential committee.

At the end of the notification was the following proposal:

'To sum up, I propose that the Commission adopt the following decision:

"The Commission, after considering the comparative merits of the candidates, has decided to appoint Mr Dieter Rogalla to the vacant post in Grade A4 in Division IX — A — 3 (Personnel Administration Division in the Personnel Directorate, Directorate-General of Administration) under No 515. This official is transferred to Division IX — A — 3 with effect from 1 June 1963 and promoted to Grade A4 with effect from 1 November 1963".'

In the course of the proceedings the defendant maintained that the various applications of the candidates were annexed to the proposal of the President of the Commission. The minutes of the meeting of the Commission of 3 July 1963 contained the following:

'The Commission received applications from various officials of the Commission for the vacant post in Grade A4 in the Personnel Adminstration Division in the Personnel Directorate of the Directorate-General of Administration in response to the notification of vacancy of this post (PERS/1/63). The Commission examined the proposal of the President to appoint to this post Mr Dieter Rogalla, at present an official in Grade A5 in the Directorate General of the Internal Market.

'After undertaking an examination of the comparative merits of the candidates, the Commission appointed Mr Dieter Rogalla to the post in Grade A4 in the Personnel Administration Division in the Personnel Directorate. Mr Rogalla is accordingly transferred to this post with effect from 1 June 1963 and promoted to Grade A4 with effect from 1 November 1963.'

From these minutes it does not appear that there was any verbal notification to the members of the Commission on the 'factors relating to the other candidates'.

It has not been established and moreover the defendant has not maintained that the Commission supplemented its information by consulting the personal files of the candidates. In the circumstances the considerations upon which the contested decision was based must be considered inadequate.

From a consideration of the facts set out above, it is appropriate to annul the decisions taken on the ground that they infringe the first subparagraph of Article 45 (1) of the Staff Regulations of the EEC, and there is no need to examine the other grounds pleaded in support of each application or more especially to declare as regards Case 96/63 that the disputed promotion constituted an infringement of Article 45 (1) of the Staff Regulations, inasmuch as the requirement regarding the period of service in his grade was not met at the time of his appointment in the case of the candidate promoted.

Costs

The applicant has succeeded in his principal conclusions. Under Article 69 (2) of the Rules of Procedure the defendant must bear the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 179;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of officials of the European Economic Community, especially Articles 5, 25, 27, 43, 45, 90, 91 and 110;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of 8 July 1963 whereby the Commission of the European Economic Community appointed Mr Edoardo Volpi to the post of Assistant in the Directorate-General of Administration, declared vacant by Vacancy Notice No 546;**

2. **Annuls the decision of 3 July 1963 whereby the Commission of the European Economic Community appointed Mr Dieter Rogalla to the post of Principal Administrator in the Directorate-General of Administration declared vacant by Vacancy Notice No 515;**

3. **Orders the Commission of the European Economic Community to bear the costs.**

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 5 MAY 1964[1]

Mr President,
Members of the Court,

As in the recently decided proceedings 27/63 (*Raponi* v *Commission of the European Economic Community*), the present cases relate to the consideration of decisions on promotion by the Commission. They were taken in one case on 3 July 1963 in order to fill a post in the Personnel Administration Division (Grade A4) and in the other on 8 July 1963, following the completion of the written procedure, in order to fill the post of Assistant to the Director-General of Administration (also Grade A4). In both cases the applicants, already officials of the Commission classified in Grade A5, submitted applications, but in both cases the Commission selected other candidates. Hence the applicant's decision to contest the aforementioned decisions on promotion by applications for annulment.

The legal consideration of the present cases is made very much easier by the fact that the arguments advanced are largely covered by arguments we have heard in the Raponi case. This applies especially to the complaint of infringement of Articles 5, 25, 45 and 110 of the Staff Regulations. As the parties have decided not to argue their cases in oral procedure and as the Court has not to consider any fresh views of its own motion I can content myself with a

1—Translated from the German.