JUDGMENT OF THE COURT (FIRST CHAMBER)
6 MAY 1969[1]

André Huybrechts
v Commission of the European Communities
Case 21/68

Summary

1. Officials — Post — Re-assessment of post

2. Officials — Post — No right to a particular post

3. Officials — Promotion — No obligation to state reasons — Proof of inadequacy of reasons to be provided by the person alleging it
(Staff Regulations of Officials of the European Communities, Article 45)

1. There is no provision in the Staff Regulations either for re-assessment or for re-classification as such. Under the provisions of the Staff Regulations, the career of an official progresses on the basis of a system of categories and consecutive grades, commencing with the grade in which he was recruited.

2. The Staff Regulations do not give officials a right to any particular post; on the contrary, they leave to the appointing authority the power to assign officials in the interests of the service to the various posts which correspond to their grade.

3. Article 45 does not compel the appointing authority to state the reasons for decisions relating to promotion, in particular with regard to unsuccessful candidates.
It is for the party claiming that such a decision has no adequate basis to give grounds for or supply proof of his allegation.

In Case 21/68

ANDRÉ H. A. C. M. HUYBRECHTS, an official of the Commission of the European Communities, 41, Chemin Ducal, Wezembeeck-Brussels, assisted by Marcel Grégoire, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser Louis de la Fontaine, acting as Agent, with an address for service in

1 — Language of the Case: French.

Luxembourg at the Chambers of Émile Reuter, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

Application for appointment of the applicant to the post of Head of the Division of Development Studies in Directorate General VIII—B,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner, and R. Monaco (Rapporteur), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The applicant entered the service of the EEC Commission on 16 June 1958, when he was given a Grade A 5 post in the Directorate-General for Overseas Countries and Territories. Shortly afterwards he was placed in Grade A 4 (Principal Administrator) in which grade he was integrated on 1 January 1962.

By decision of 23 February 1966, which took effect as from 1 October 1965, he was appointed head of the special department for Development Studies within the same Directorate-General VIII (now the Directorate-General for Overseas Development). His title as Principal Administrator was 'converted simultaneously into that of Head of Department' (Annex 1 to the application).

The applicant was informed by a letter of 12 June 1968, signed by the Director-General for Personnel and Administration, that the Commission had decided to assign him with effect from 20 June 1968 to the post of Principal Administrator in the Division of Development Studies within Directorate-General VIII, entitled the Directorate-General for Development Aid (Schedule 2 to the application). On 13 June 1968 Staff Bulletin No 22 carried a vacancy notice numbered COM/40 relating to a Grade A 3 post with duties corresponding to those of Head of the Division of Development Studies (Schedules 3 and 4 to the application).

On 24 June 1968 the applicant made a complaint through official channels seeking:

— classification in Grade A 3 and the alteration of his title of Head of Division;
— withdrawal of Vacancy Notice No COM/40 and of the decision of 12 June 1968 terminating his previous appointment.

Expressly as a subsidiary point, he applied for the vacant post (Schedules 5 and 6 to the application).

The Commission decided on 17 July 1968 to fill the vacant post by appointing Mr Dieter Frisch Head of the Development Studies Division (Schedule 9 to the application).

On 7 September 1968 the applicant lodged the present application at the Court Registry.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the First Chamber of the Court made an order on 12 February 1969 requesting the defendant to produce no later than the day fixed for the oral proceedings:

(a) Document SEC (68) 444 of 7 February 1968 entitled 'Re-organization—Re-allocation of A 3's', and

(b) The detailed list of posts for Directorate-General VIII—B before and after the re-organization.

These documents were filed on 21 February 1969. The parties presented their oral submissions at the hearing on 25 February 1969, and the Advocate-General delivered his opinion at the hearing on 13 March 1969.

II — Conclusions of the parties

The applicant claims that the Court should:

A — *In the first place:*

1. Annul the contested decisions, namely:
   (a) The decision by the defendant of 17 July 1968 published in Staff Courier No 26 of 24 July 1968 appointing Mr Dieter Frisch—an official in Grade A 3—Head of the Development Studies Division—Directorate B—Directorate-General VIII—Brussels (Vacancy Notice No COM/40).
   (b) The decisions by the defendant 'published' on 12 and 13 June 1968 respectively altering the applicant's appointment and advertising the vacant post in Grade A 3 of Head of the Development Studies Division—Directorate B—Directorate-General VIII—Brussels (Vacancy Notice No COM/40);
2. In exercise of its unlimited jurisdiction, hold that:
   (a) The applicant must be classified in Grade A 3, at the step in that grade corresponding to the one currently occupied by him in Grade A 4;
   (b) The applicant's present title—Head of Department—must be altered to that of head of Division;
   (c) The applicant must perform the duties currently assigned to the Head of the Development Studies Division—Directorate B—Directorate-General VIII—Brussels;

B — *Secondarily:*

1. Annul the contested decisions, namely:
   (a) The decision by the defendant of 17 July 1968 published in Staff Courier No 26 of 24 July 1968 appointing Mr Dieter Frisch—an official in Grade A 3—Head of the Development Studies Division—Directorate B—Directorate-General VIII—Brussels (Vacancy Notice No COM/40); and
   (b) So far as may be necessary, the decision by the defendant notified to the applicant in a letter dated 12 June 1968 altering his previous appointment;
2. In the exercise of its unlimited jurisdiction, rule, or at least declare, that the applicant is or must be promoted to Grade A 3, at the step in that grade corresponding to the one currently occupied by him in Grade A 4, and appointed Head of the Development Studies Division—Directorate B—Directorate-General VIII—Brussels (Vacancy Notice No COM/40);

Further, declare that the procedure for filling the above-named post should be started anew;

C — *In any event:*

Order the defendant to pay the costs.

The applicant claims in his *reply* that the Court should:

1. Grant the requests contained in the conclusions set out in his application;
2. Secondarily, and before proceeding further:
   Order the defendant to produce the personal files and the periodic reports relating to Mr Dieter Frisch and himself, document SEC (68) 444 of 7 February 1968 entitled 'Reorganization of Grade A 3 posts'), and the proposal and report made to the Commission by Mr Rochereau and Mr Levi Sandri.

The *defendant* contends that the Court should:

1. Dismiss both the main application and the subsidiary one as being unfounded;
2. Order the applicant to pay the costs of the proceedings.

In its *rejoinder* it claims that since the Court does not have unlimited jurisdiction in the present case it cannot, if it annuls the Commission's refusal of the applicant's request for re-classification, itself order that re-classification; it must refer the case back to the Commission in accordance with its own case-law.

In addition, if the decision to appoint Mr Frisch were annulled the Court could not at the same time promote the applicant, since that promotion can only be made in accordance with the procedure laid down by Article 45 of the Staff Regulations.

III — Submissions and arguments of the parties

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

Admissibility

The *applicant* considers that the decision of 17 July 1967 appointing Mr Frisch to the post in question rejects by implication his complaint through official channels. That is why he asks in his main application for it to be annulled.

The *defendant* considers it not worth while to examine whether the decision is capable of being considered as an implied rejection, since it is not denied that the Commission did not reply to the abovementioned complaint, and that in any case the application was made within the time-limit for instituting proceedings against the administration for its failure to act. Its opinion is that since the limitation period has not been exceeded both the main and the subsidiary conclusions in the application are admissible.

The substance of the case

A — The principal conclusions in the application

1. *Failure to observe the principle of correspondence between grade and post*

The *applicant* claims that the contested decisions were taken without regard to the fundamental principle according to which any re-assessment of a post must be compensated by an adjustment in grade.

As early as 1965 the detailed list of posts for Directorate-General VIII included under the Studies Directorate a Division of Studies, but since no A 3 post was allowed for under the budget this administrative unit became a 'division in the process of formation' or, more precisely, a 'special department'. When finally in 1968 this A 3 post became available to the Commission, it was natural for it to have converted the special department into a division in accordance with the said list of posts.

The conversion would not in any case have entailed, with regard to the post of Head of Division, any alteration in the duties, powers and prerogatives attaching to the previous post of head of a special department. Had this been done in the present case it would not have created a new post but simply have re-assessed an existing one.

This re-assessment should have been accompanied, in accordance with the fundamental principle referred to above, by an adjustment in the applicant's administrative position, that is, his classification in Grade A 3 and the alteration of his title to that of Head of Division.

On all those grounds there was no justification for the vacancy notice, or for altering the applicant's appointment. Moreover, the fact that this appointment had been drawn up at the same time as the vacancy notice is sufficient to show that the post in question was in reality not vacant, but had illegally been made so.

The *defendant* replies in its statement of defence that the departmental re-organization which followed on the merger of the executives compelled the Commission to draw up a new detailed list of posts which was communicated to staff from 3 May 1968 onwards. All the posts named in the new list are to be considered as 'new posts' whether or not the names of the administrative units have changed. Accordingly none of those posts can be considered as already 'occupied' in the sense favoured by the applicant. To fill them the Commission had to re-appoint by decision all its officials. Some officials found themselves assigned to duties identical with or similar to those previously exercised, whilst others were given new duties. But in every case a new appointment had to be made by decision and the only rule that the Commission was bound to observe in making those decisions was that contained in Article 7(1) of the Staff Regulations.

When examined in the light of that provision the applicant's new appointment is found to be perfectly in order. The decision of 23 February 1966 making the applicant responsible for the Special Department of Development Studies stated that his administrative position was that of 'Principal Administrator established in Grade A 4'. It conformed in all respects to Article 7 since, according to the table describing basic posts provided for by Article 5 of the Staff Regulations, the basic post of Principal Administrator in career bracket A 5-A 4 includes, among others, the post of 'Head of Special Department'. Since that department no longer existed in the Commission's new detailed list of posts the Commission could not keep the applicant in it but had to appoint him to a new post, still in career bracket A 5-A 4. This it did by appointing him Principal Administrator in the new division.

It was not possible to make a decision appointing the applicant to a post in Grade A 3 since this would have been contrary to both Article 7 and Article 45 of the Staff Regulations, progress from Grade A 4 to Grade A 3 being allowed only by means of promotion according to the rules stated in Articles 29 and 45 of the Staff Regulations.

Lastly the defendant repudiates the suggestion that the case-law of the Court in Joined Cases 20 and 21/63 (*Maudet*) is applicable in the present case. Those cases arose from the fact that prior to the entry into force of the Staff Regulations certain heads of division (of whom Mr Maudet was one) had been classified in Grade A 4 and that the Regulations contained transitional provisions in Article 102. It is common ground, however, that the applicant never fulfilled the duties of head of division.

In his reply the *applicant* elaborates his argument that the special department concerned was a 'division in the process of formation', prevented until now from becoming fully formed by the lack

of provision for an A 3 post in the budget.

That this argument is well-founded is in any case proved by the reply given by the Commission to Written Question No 21/68 put by a member of the European Parliament (OJ No C 61, 1968, Schedule 12 to the application) from which it is apparent that the distinction between divisions and special departments is dictated solely by the lack of A 3 posts available.

The defendant is wrong to claim that the merger of the executives and the rationalization of the departments meant that in this case a new post was created.

Directorate-General VIII and the units subject to its control kept the same functions, the same detailed lists of posts, and the same complement of staff as beforehand: they were not affected by the re-organization which led to the creation in other sectors of new Directorates-General.

There can thus be no doubt that the post in question was 're-assessed'. The defendant's argument that the only rule to be applied by the Commission in the present case was Article 7 of the Staff Regulations is irrelevant: neither that Article nor Article 45 has anything to do with the problem, there being no question here of either transfer or promotion.

Nor is it correct to assert that the applicant's request is not a request for re-grading similar to that before the Court in Joined Cases 20 and 21/63. Whilst it is true that the applicant was not expressly and formally obliged to carry out the duties of Head of Division, it is also true, that, as a matter of fact, he was responsible for an administrative unit which was a division in the process of formation. The duties he actually exercised were in fact those of Head of Division, because:

— the employees in the administrative unit were responsible to him as their superior, and he himself was directly responsible to the Director;

— the defendant has itself provided evidence that it counted him among the Heads of Division when it accorded him an additional alcoholic drinks parcel.

Lastly the applicant acknowledges that Article 102 of the Staff Regulations is not relevant to the present case since it is a transitional provision which has nothing to do with the principle of correspondence between grades and posts, the principle governed mainly by Annex I to the Staff Regulations.

The *defendant* replies that the principle referred to above has not been violated in the present case. The post in which the applicant was established until the re-structuring of the departments was that of head of a special department, which was quite simply a Grade A 4 post, whereas the present post is that of Head of Division, in Grade A 3. Whilst the structure and the functions of the two administrative units are comparable they are not identical, as is evident from the same reply given by the Commission to Miss Lulling's question mentioned by the applicant.

Consequently the 'special department' was never a 'division' and therefore it is perfectly right for the applicant, as its head, to be classified in Grade A 4 and not in Grade A 3. Giving him an additional alcoholic drinks parcel cannot have the effect of altering his functions from that of head of a special department to those of a head of division: it is no more than a benefit which bears no relation to the administrative status of the recipient and which was also given to all the other heads of special departments and to the assistants of the directors-general.

If one were, in fact, to accept the applicant's argument, one would be compelled to admit that the heads of special departments are officials not subject to the normal Staff Regulations governing careers, because, although classified in Grade A 4, they would have an indefeasible right of promotion to Grade

A 3 on the day when their administrative unit was converted into a division.

Lastly the defendant concludes that as regards the provisions applicable to this case, it should be emphasized that in Joined Cases 20 and 21/63 it was precisely Annex I to the Staff Regulations and Articles 5 and 7 thereof which were applied by the Court. There is therefore no justification for claiming that Articles 7 and 45 are irrelevant to the present problem.

2. *Detraction from post*

The applicant claims that the decisions in question seriously detract from the post occupied by him and, *ipso facto*, from his status, both as regards the nature of his powers and as regards his position in the administrative hierarchy. The result of these decisions is, in effect a 'down-grading'.

The *defendant* replies that the posts listed in the table showing basic posts in career bracket A 5-A 4, where the post of 'Head of a Special Department' appears, are strictly equal and all correspond to the same career bracket. Thus the head of a special department, even when placed directly under the authority of a director, does not occupy a higher position in the hierarchy than the Principal Administrator answerable to a Head of Division.

In view of this equal status of posts the appointment of the applicant to a post of Principal Administrator cannot therefore amount to a down-grading.

The *applicant* replies that once more the defendant is reducing the issue to a question of mere form. Recalling the Advocate-General's opinion in Case 16/67, he claims that the decisions in question undeniably detract from the *substance* of the powers which he used to exercise in that:

— the applicant no longer enjoys the powers involved in exercising the authority of superior rank accorded to him in the special department. Officials on whom he kept records and for whom he was responsible for three years are now reported on and controlled by Mr Frisch, whilst the applicant has been placed among the subordinate staff;
— he had previously been directly answerable to a director, whereas at present he is subject to a head of division within the administrative unit once run by himself;
— his former duties were more interesting and placed him on a higher level;
— previously his name appeared in the detailed list of posts for Directorate-General VIII as being responsible for the unit in question, in the same way as the names of the heads of division, but now he no longer appears on that list. Whichever way one looks at it the applicant is therefore no longer responsible for that administrative unit.

In conclusion, the applicant claims that his old position gave him the opportunity of demonstrating his ability to fulfil a post of responsibility, and thus of distinguishing himself in furtherance of his career. To support this he produces the last periodic report on him (Schedule 2 to the application).

The *defendant* replies that the result of the applicant's argument is to substitute for the notions of career and post as defined by the Staff Regulations 'that of an *office* the ownership of which is vested in its occupant'.

The essential principle applicable in the present case is that which derives from Articles 5 and 7 of the Staff Regulations (confirmed by the Court in its judgment in Case 16/67) which says that an official is entitled to be given duties which conform to the post corresponding to the grade held by him in the scale of posts.

In the present instance this principle was observed (cf. statement of defence). The applicant was classified in Grade A 4 in accordance with the table of definition

of basic posts, and his new appointment does not detract from that classification. The fact that the duties of the new post are not the same as those of the previous one and that the present post does not carry certain prerogatives attaching to the previous post is of no importance provided that the new post still falls within Grade A 4.

B — The subsidiary pleas

These conclusions are formulated by the *applicant* on the assumption, in his view a wrong one, 'that there was no reassessment of post in the present case and, consequently, no need to adjust the applicant's career bracket'.

1. *Infringement of Article 45(1) of the Staff Regulations*

The *applicant* says that the Commission filled the vacant post by way of promotion, since Mr Frisch, too, was an official in Grade A 4. That being so it had to follow the procedure under Article 45(1) of the Staff Regulations, since otherwise the appointment would be void, and to consider in accordance with that provision the comparative merits of the officials eligible for promotion as well as of the periodic reports on them.
That procedure was not followed in this case.
The *defendant* replies that the appointment procedure was quite in accordance with Article 45(1) of the Regulations. The Commission did consider the comparative merits of the candidates on the basis of all the facts and sources of information necessary for that purpose.
To support this claim it produces document PERS (68) 876/z of 13 July 1968 and an extract from the special minutes of the 45th meeting of the Commission (Schedules 2 and 3 to the statement of defence).
The *applicant* replies that the minutes of the 45th meeting of the Commission produced by the defendant do not help at all to judge the extent to which the Commission considered the comparative merits of the candidates: on that point, it contains an entirely inadequate statement of findings which is little better than a purely formal clause. Even if the Court cannot question the judgment and choice exercised by the defendant it can at least review and verify the information, and its sources, on the basis of which that judgment and choice were made. In particular it must be able to decide whether the conditions laid down by Article 45(1) of the regulations were observed, namely:
— whether the Commission was sufficiently well informed:
— and whether the consideration of the comparative merits of the candidates was carried out 'on a basis if equality and the taking into account of information the source and content of which is comparable in each instance'.
The documents produced by the defendant include neither the personal files nor the periodic reports of Mr Frisch and of the applicant, nor the opinion of Mr Hendus, Director-General for Development Aid, nor, lastly, the proposals made by Mr Rochereau and Mr Levi Sandri. It is these proposals, in particular, as well as the detailed report of the candidates' qualifications drawn up by those two members of the Commission, which seem in the light of the minutes of the 45th meeting to be the most important pieces of information before the Commission.
The applicant concludes that without these documents the Court is not in a position to decide whether the conditions described above were observed, and asks that they be produced.
The *defendant* remarks, on the contrary, that it is evident from the content of the minutes of the 45th meeting of the Commission that the comparative merits of the candidates were considered in the present case. The Commission had before it:

— the applications, the particulars of which had been checked previously by the administration;
— the periodic reports on the applicants;
— the personal files of the applicants.

The differences between this consideration of the comparative merits and that condemned by the Court in Case 27/63 and Joined Cases 94 to 96/63 are quite plain, because in those cases the Commission had neither periodic reports nor applications which had been checked, and because it was not proved that the personal files of those concerned had been made available to it.

Lastly, the defendant states:
— that it has produced in the proceedings the applicant's personal file which also contains the periodic reports;
— since personal files are always a confidential matter, it is reluctant to produce the file on Mr Frisch, who is not a party to the case; but it has nevertheless produced the periodic reports concerning him.
— the report by Mr Rochereau and Mr Levi Sandri, and the opinion of the Director-General for Development Aid, were communicated orally to the Commission, and therefore there is nothing in writing which can be produced to the Court.

2. *Misuse of powers*

The *applicant* claims that if the power to appoint candidates is discretionary, that does not mean that it can be arbitrary. In the present case, however, the defendant exercised this power in interests other than those of the service. It should in fact have selected the applicant, bearing in mind his age and his length of service, including the time spent in Grade A 4, and in view of his periodic reports and his university and professional qualifications.

The applicant adds, reserving the right to adduce evidence by any means open to him in law and to request the Court to order any measures of inquiry necessary in this respect, that it is, moreover, well known that the appointment of Mr Frisch was decided upon well in advance of the opening of the appointment procedure. What was involved was a promise of promotion made to Mr Frisch, his immediate colleague, by Mr Hendus, Director-General of Directorate-General VIII, a promise which was implemented by Mr Rochereau.

The *defendant* objects that the decision to appoint the candidate was made on the basis of objective criteria and after a thorough examination of the applicants' personal files. In any case not one of the applicant's allegations proves that there has been a misuse of powers.

In the first place the applicant's complaint that he was not chosen as being the candidate most qualified is not relevant. By making this objection the applicant is inviting the Court to repeat the comparative examination carried out by the Commission, despite the fact that:
— the Court has on several occasions stressed that the Commission has wide powers of discretion in exercising its choice;
— this assessment is based not only on the efficiency and vocational aptitude of the applicants but also their character, behaviour and general personality (Case 27/63);
— the Court has always refrained from substituting its own value judgment for that of the institution concerned (Joined Cases 27 and 30/64).

Secondly, the Commission has no knowledge whatsoever of the alleged promise made to Mr Frisch and can only confirm what is in any case stated in the minutes of its 45th meeting, which shows that its choice was motivated by the desire to nominate the official best qualified to run the new Division of Development Studies.

The *applicant* replies that there is no question of asking the Court to substitute its assessment for that of the

Commission; it is merely being asked to determine whether or not there has been a misuse of powers on the basis of a number of facts, especially the following:

(a) As far as the applicant's qualifications and general merits are concerned (periodic report, qualifications, linguistic proficiency, length of service in the post in question), he possessed 'the complete range of major qualities required for his duties and for an appointment to the post which has undergone no change'.

(b) The defendant disclaims all knowledge of the promise of promotion made to Mr Frisch, but does not expressly deny the applicant's allegations. In deciding whether such a promise did or did not influence the decision selecting a candidate, it should be recalled that Mr Rochereau is a member of the Commission and one of the originators of the proposed appointment to the post in question, and also collaborated in making the report to the Commission on the suitability of each applicant to occupy the vacant post.

(c) It is also common knowledge that the appointment of Mr Frisch was decided well in advance of the commencement of the recruitment procedure. Mr Frisch was in fact accepted as head of the division in question in a confidential document for limited circulation entitled 'Re-organization—Re-allocation of A 3 posts' (Doc. SEC (68) 444) dated 7 February 1968, that is, a month before publication of the 'new' detailed list of posts and over four months before publication of the vacancy notice.

(d) The last factor to be taken into consideration is the haste with which the defendant accomplished the appointment of Mr Frisch (17 July 1968) even before relying to the applicant's complaint through official channels, made on 24 June 1968, in spite of the fact that it had acknowledged the view expressed on 4 July 1968 by the Staff Committee on the incompatibility between 'the intended publication of vacant posts and the opportunity given to officials of appealing against the appointment communicated to them, since some of the vacant posts might suit officials unhappy with their appointments'. In a note dated 19 July 1968, the Central Information Committee (Comité Centrale Informations) actually states that 'the administration has acknowledged that this argument is justified' (Schedule 14 to the application).

All these factors—the applicant concludes—indicate that the recruitment procedure was followed in this case '*pro forma*'. They make up the 'series of objective facts' mentioned in Joined Cases 18 and 35/65, which lead to the conclusion that there has been a misuse of powers.

The applicant closes his argument by requesting that additional measures of inquiry be ordered if the Court considers that some of the facts alleged have not been sufficiently substantiated.

The *defendant* replies to the applicant with the following arguments:

(a) The applicant's claim that from the point of view of his length of service, merits and qualifications he is the person best qualified for the post in question is no more than a subjective assessment. The Commission will not enter into a discussion as to the respective qualifications of the two applicants. However, it has produced in Court the periodic reports on Mr Frisch.

(b) As to the promise supposedly made to Mr Frisch it can only repeat that, even if this were proved, it could not affect the decision to be taken, which only the Commission was competent to take.

(c) As to the wholly confidential document No SEC (68) 444 designating Mr Frisch as Head of Division VIII—B 2, this was a working document used by chefs de cabinet to study the various steps to be taken in creating a single administration within the time-limits set by the Treaty of 8 April 1965. For this purpose the Directors-General had been

asked to submit proposals and suggestions concerning the re-structuring of departments and appointments of officials. The content of this document represents no more than working hypotheses, in many places very tentative due to the large number of unknown factors in the problems involved. At the time of this document, the die was certainly not cast: the Commission still did not know the number and the grades of the posts which the budgetary authorities would be able to grant it. In fact it was not until 29 February 1968 that the Council drew up the draft detailed list of posts, finally adopted on 25 March 1968, and it was not until after that date that the Commission was able to decide its preference in the matter of re-organization. In the circumstances it is clear that the proposals of the Directors-General in that document were in no way binding on the Commission, which made its decision in accordance with the provisions of the Staff Regulations.

(d) Lastly, as regards the haste with which the Commission decided to appoint Mr Frisch, one cannot conclude from the fact that the administration acknowledged the justification of the point made by the Staff Committee at its meeting on 4 July 1968, that the Commission for its part admitted that publication of the vacancy notices had been made prematurely. The note from the Central Information Committee of 19 July 1963 refers to the *administration* and not to the *Commission,* which did not share the views on this point of the Directorate-General of Administration. The Staff Committee was in fact well aware of this, since it adds, in that very note: 'The results of our request will be followed very closely'. It should also be noted that on 17 July 1968, the date of Mr Frisch's appointment the Commission made appointments of seven other heads of division. Accordingly the applicant cannot maintain that the Commission followed an abnormal procedure with regard to him.

3. *Absence of a statement of reasons*

The applicant raises this argument for the first time in his reply. With regard to its admissibility, he explains that he was not able to plead in the original application the absence of a statement of reasons because, according to the case-law of the Court, the administration is not obliged to give *formal* reasons, for its choice either in respect of the applicant appointed or in respect of the unsuccessful applicant. But that in no way implies that such decisions must not contain an indication of the reasons upon which they are based and the validity of which can be verified by the Court.

The defendant emphasizes the discretionary nature of its power of appointment which is not contested but does not explain its reasons for preferring Mr Frisch to the applicant, who had occupied the post in question for almost three years to the entire satisfaction of the Commission. The minutes of its 45th meeting produced by it throw no light on the subject.

In those circumstances there can be no effective judicial review of the reasons on which the disputed decision of promotion was based.

The *defendant,* after noting that the applicant has raised this argument only in his reply, answers that the reason on which the contested decision was based is quite clear. It was indicated in the statement of defence (page 10), where it is stated that the Commission appointed Mr Frisch because it considered that he was the official best able to run the new Division of Development Studies.

The applicant appears to require that the Commission give an account also of the reasons underlying this reason, a requirement contrary to all principles of law and to the very nature of the value-judgment made by the Commission. As has been acknowledged by the Court, such a judgment cannot be reviewed objectively.

Grounds of judgment

Admissibility

1 The admissibility of the application is not contested by the defendant and there is no ground for the Court to raise the matter of its own motion.

2 The application is admissible.

The substance of the case

3 The applicant's principal claim is that the post of Head of the Special Department of Development Studies in D.G. VIII—B, occupied by him from 1 October 1965 to 20 June 1968, was re-assessed as a post of Head of Division when the new detailed list of posts of the single Commission was established.

4 Since this re-assessment did not entail any essential alteration of the powers and duties attaching to the post of head of a special department the applicant claims that he should have been re-classified in Grade A 3, the grade corresponding to the post of head of division.

5 Since this was not done the contested decisions violate, according to the applicant, the principle of correspondence between grade and post and detract from the post held by the applcant and from his status.

6 There is no provision in the Staff Regulations either for re-assessment or for re-classification as such.

7 Under the provisions of the Staff Regulations the career of an official progresses on the basis of a system of categories and consecutive grades commencing with the grade in which he was recruited.

8 Although the Staff Regulations are intended to guarantee to an official the grade he has obtained and a post corresponding to that grade they give him no right to any particular post; on the contrary, they leave to the appointing authority the power to assign officials in the interests of the service to the various posts corresponding to their grade.

9 The applicant does not deny that the post to which he was assigned corresponds to his grade prior to the implementing of the Merger Treaty, which is still his at the present time.

10 Moreover, the alteration made to the detailed list of posts to which the applicant refers does not amount to a re-assessment of an existing post, but must be considered as substituting a division for another administrative unit.

11 This substitution in the present case on the one hand led to the creation of a new post of head of division with new responsibilities, and on the other necessitated a fresh appointment for the official who was previously head of the other administrative unit.

12 In these circumstances there is no legal foundation for the applicant's claim that he should be appointed to that new post by way of re-classification.

13 For the purpose of filling the new post, the appointing authority was bound to follow the procedures laid down by the Staff Regulations, in particular by Article 29(1), which states that it shall fill vacant posts by transfer, by promotion and by competition.

14 The only way in which the applicant could be appointed to the vacant post in Grade A 3, bearing in mind his classification in Grade A 4 and Article 7(1) of the Regulations, was by promotion or by competition.

15 In the present case the appointing authority filled the vacancy by way of promotion.

16 On 17 July 1968 it decided to appoint Mr Dieter Frisch to the vacant post and rejected the applicant's application.

17 As a subsidiary point the applicant claims that the said decision is irregular in that it contains no statement of reasons, constitutes a misuse of powers and was adopted in contravention of Article 45 of the Staff Regulations.

18 As to the first submission, the applicant maintains that the information supplied by the defendant both in the minutes of its 45th meeting and in its pleadings gives no indication of the points of fact or of law which could justify the contested decision.

19 Article 45 of the Staff Regulations does not compel the appointing authority to state the reasons for decisions relating to promotion, in particular with regard to unsuccessful candidates.

20 It is for the party claiming that such a decision has no adequate basis to give grounds for or supply proof of his allegation.

21 Since the applicant has indicated these grounds in his submissions relating to misuse of powers and infringement of the Staff Regulations, these complaints will be examined during discussion of his other claims.

22 Secondly, the applicant claims that the disputed decision promoting Mr Frisch to the post of Head of the Division of Development Studies constitutes a misuse of powers by reason of the fact that the decision making the promotion was taken before the opening of the procedure for making the appointment.

[23] In support of this he alleges that certain promises were made with regard to the promotion in question both by the Director-General of D. G. VIII and by a member of the Commission, and that document SEC (68) 444 and its annexes show that the decision promoting Mr Frisch was drawn up before the post was officially announced to be vacant.

[24] The applicant confines himself to saying in support of his complaint that the abovementioned promise was 'common knowledge', without providing the Court with better particulars capable of contituting *prima facie* evidence.

[25] On the other hand, the facts alleged must be considered in the context of the task of re-organization following upon the merger of the executives.

[26] It was to be expected that during these preparations departments should consider the different possibilities as to the promotions, transfers or appointments required by virtue of this general re-organization.

[27] That the documents criticized were purely preparatory documents with no decisive character is made clear moreover by the fact that for a large number of officials, including Mr Frisch, a number of new appointments or promotions was considered.

[28] In any case that fact cannot be relied on as being of such a nature as to indicate a misuse of powers in the present case.

[29] Lastly, the applicant considers that the haste with which the appointing authority adopted the decision to make the promotion in question is, taken together with other factors, a sufficient indication to enable one to conclude that there was a misuse of powers in the present case.

[30] In this connexion he claims that the said authority declared the post vacant and proceeded to make the contested promotion before it replied to his complaint through official channels, notwithstanding that the administration had conceded that it was appropriate to delay the publication of vacancy notices until the officials concerned had been able to submit complaints against their appointments.

[31] As regards the date of the vacancy notice it should be remarked that the facts in the case show that Vacancy Notice COM/40 was published on 13 June 1968, whereas it was not until the meeting of the relevant committee on 4 July 1968 that the administration agreed to delay publication of the vacancy notices.

[32] The contested promotion decision, however, was not taken until 17 July 1968, three weeks after the submission of the complaint through official channels on 24 June 1968.

33 Whilst such a lapse of time may not always be sufficient to enable the appointing authority to give a reply to the complaint before it, it can, however, be considered long enough for it to decide what position to adopt with regard to the complaint.

34 On those grounds the submission of misuse of powers cannot be held to be established and must therefore be rejected.

35 However, the circumstances of this case make it imperative for the Court to satisfy itself by way of a thorough examination that a comparative examination of the various applications was in fact made on the occasion of this promotion.

36 The applicant maintains that the contested decision is irregular in that it was adopted without the Commission's having considered the comparative merits of officials eligible for promotion and the periodic reports concerning them, as required by Article 45(1) of the Staff Regulations.

37 The minutes of the Commission's 45th meeting reveal that all the applications were communicated to the Commission after the information in them had been checked, and that the periodic report and the personal file of each candidate was available to the Commission.

38 The same minutes state that the Commission considered the comparative merits of the applicants and of the periodic reports on them.

39 The applicant has shown no reason why this should be doubted.

40 Furthermore, an examination of the periodic reports on the applicant and on the successful candidate justifies the conclusion that the promotion decision in question was not taken without due regard for, or in ignorance of, the objective facts in the case.

41 On these grounds this submission must be rejected as unfounded.

Costs

42 The applicant has failed in his application.

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

44 However, under Article 70 of the Rules of Procedure institutions shall bear their own costs in actions by officials of the Communities.

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;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice;

THE COURT (First Chamber)

hereby :

1. **Dismisses the application.**

2. **Orders the parties to bear their own costs.**

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 6 May 1969.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 MARCH 1969[1]

Mr President,
Members of the Court,

The applicant in the case with which my opinion is concerned today entered the service of the Commission of the European Economic Community on 16 June 1958 after working for five years in the Belgian Ministry for African Affairs. His salary was at first that of Grade A 5, but was raised to that of A 4 with effect from 1 March 1960.

From the first, the applicant was employed in Directorate-General VIII, originally entitled the Directorate of Overseas Countries and Territories and now known as that of Development Aid. He was in charge of the geographical section for Central Africa in the Directorate of Development Studies; from 1960 onwards he was in charge of the geographical section for Algeria and Overseas Departments and from June 1963, of the section for 'Studies'. When a

1 — Translated from the German.