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

Andreas Reinarz
v Commission of the European Communities

Case 17/68

Summary

1. *Officials — Recruitment — Criteria — Interests of the service and geographical balance — Reconciliation of these requirements — Nationality as an overriding criterion if qualifications are equal*
   (Staff Regulations of Officials of the European Communities, Articles 7, 27)

2. *Officials — Recruitment — Criteria — Geographical balance — Directorate-General as field of application*
   (Staff Regulations of Officials of the European Communities, Article 7)

3. *Officials — Recruitment — Criteria — Rationalization of the service as a result of the Merger Treaty — Principle of entitlement to career prospects — Overriding criterion in relation to the principle of geographical balance*
   (Merger Treaty, Annex I)

1. It is clear from Article 7 of the Staff Regulations read together with Article 27 thereof that, when the Commission recruits, promotes and assigns its servants to posts, it must be guided on the one hand by the interests of the service without regard to nationality and on the other hand must ensure that they are recruited on the widest possible geographical basis from among nationals of the Member States of the Communities. The Commission reconciles these requirements when, in those cases where the qualifications of the various candidates are substantially the same, it makes nationality the overriding criterion in order to maintain or re-establish a geographical balance among its staff.

2. The fulfilment of the obligation to secure the recruitment of officials on the broadest possible geographical basis must not be limited to a small number of posts within a single Directorate-General.

3. In the special conditions applicable to the task imposed by the Merger Treaty compliance with the principle that proper regard should be had for the career prospects of officials must take precedence over considerations relating to the maintenance of a geographical balance in the composition of the staff of the Communities.

In Case 17/68

ANDREAS REINARZ, an official of the Commission of the European Communities, resident in Dworp (Belgium), represented and assisted by Henri

1 — Language of the Case: French.

Rolin and Marcel Slusny, Advocates at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the offices of André Elvinger, Advocate, 84 Grand rue,

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

defendant,

Application

(a) for the annulment of the decision of 26 June 1968 terminating the service of the applicant;
(b) for the annulment, to the extent to which it may be necessary, of the decision of 20 March allocating the applicant on a provisional basis to the post of Principal Adviser and of the decision of 30 May 1968 notified by a letter from the President of the Commission dated 31 May 1968, entering the applicant's name on the list of officials who might be affected by a measure terminating the service of certain officials;
(c) for a declaration that the applicant shall continue to be paid his remuneration and to enjoy all the benefits attached to his post,

THE COURT (First Chamber)

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The applicant, who entered the service of the High Authority of the ECSC in 1952, became in 1959 Director (Grade A 2) of the Transport Rates and Conditions Directorate of the Directorate-General for Transport of the Commission of the EEC.

The applicant having previously expressed his intention of leaving the service of the Commission, gave notice by a letter of 11 March 1968 addressed to his superior, Mr Rho, Director-General for Transport that he had changed his mind but reserved the right to avail himself if necessary of the provisions of Article 4(3) of Regulation No 259/68.

On 20 March 1968 the Commission at its 30th meeting allocated certain officials to the posts of Director and allocated certain other officials, including the applicant, on a provisional basis to the post of Principal Adviser.

By letter of 22 March 1968 the Commissioner responsible for the Directorate for Transport requested Mr Rho, the Director-General, to inform the applicant that his decision of 11 March 1968 was out of time. He went on to say:

'... As a result of the Commission's decision to reduce the four Directorates in the former detailed lists of posts to three a painful choice would have to have been made from among the four Directors whose personal and professional qualifications are excellent.

The decision which Mr Reinarz communicated to you at that time has enabled us to avoid this painful choice and at the same time to give effect to the personal wishes of Mr Reinarz. As you are aware the Commission took note of this proposal and therefore designated the other three Directors for the new Directorates.

For your personal guidance I would mention that, if the selection of the officials is called in question, this would lead to another discussion within the Commission concerning a geographical balance which was only achieved with great difficulty.'

By a letter of 14 April 1968 addressed to the President of the Commission the applicant reminded him that he had withdrawn his previously expressed consent to leave the service voluntarily; that this consent was moreover conditional and that he was therefore forced to emphasize that a decision based on a 'consent which was expressly made subject to a condition' appeared to him to be entirely unjustified.

At its 39th meeting on 30 May 1968 the Commission considered whether to adopt measures terminating the service of certain officials, including the applicant, and instructed the President to inform the persons concerned 'so that they can submit any comments they may wish to make to the Commission' before it made its final decision in the last ten days of June 1968.

On 31 May 1968 President Rey notified the applicant of this decision and informed him that the decisions of 20 March 1968 which allocated certain officials to the post of Principal Adviser did not in any way anticipate the terms of the final decisions to be taken subsequently with regard to the persons affected, and that the Commission was ready to take note of all the comments which the applicant wished to submit.

On 19 June 1968 the applicant lodged a complaint through official channels against the decision of the Commission of 20 March 1968.

By a decision of 26 June 1968 the Commission decided with effect from 1 October 1968 to apply to the applicant a measure terminating the service of certain officials as provided for by Article 4(1) of Regulation No 259/68 of the Council of 29 February 1968.

The present application was lodged at the Registry on 29 June 1968.

The pleadings of the parties were delivered within the prescribed time-limits and the procedure followed the normal course.

During the hearing of 14 January 1969 the Court (First Chamber) heard the preliminary report of the Judge-Rapporteur and after hearing the views of the Advocate-General decided to open the oral procedure without ordering any preparatory inquiry.

The oral submissions of the parties were presented at the hearing of 25 February 1969.

At the end of the hearing the applicant lodged a document which had been previously communicated to the defendant. He also lodged a note containing a claim in the alternative for damages and interest and an indication of the evidence relied on in support of this claim.

The Advocate-General delivered his opinion during the hearing of 13 March 1969.

II — Conclusions of the parties

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

(1) Declare that the decision of the Commission of 26 June 1968 terminating his service with the Commission is null and void;

(2) Declare, to the extent to which it may be necessary, that the decision of 20 March 1968 and the decision, the date of which is not known, mentioned in the letter of the President of the Commission of 31 May 1968 are null and void;

(3) Declare that the applicant shall continue to be entitled to receive his salary and to enjoy the benefits attaching to his post;

(4) Order the defendant to pay the costs.

The *defendant* in its statement of defence and in its rejoinder contends that the Court should:

(1) Declare that the application is inadmissible in so far as it is directed against the decision of 20 March 1968 and against the decision of 30 May 1968;

(2) In addition dismiss it as unfounded;

(3) Order the applicant to pay the costs.

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

Declare that the application is admissible and well founded.

III — Submissions and arguments of the parties

A — *Admissibility*

The *defendant* contends that the application is inadmissible in so far as it is directed against the decisions of 20 March and 30 May 1968.

The decision of 20 March 1968 is only an ordinary internal administrative measure and, moreover, since its only purpose is to alter the applicant's duties by giving him on a provisional basis new tasks corresponding to his grade, such a measure taken in order to rationalize the departments is not of a kind which can adversely affect him.

The decision of 30 May 1968 is not a measure which can have direct effect on a specific legal situation, as in it the Commission only makes a declaration of intent. The final decisions made at the meeting of 26 June 1968 moreover proved to be different from those at the meetings held between 28 and 31 May 1968.

The *applicant* replies that the decision of 20 March 1968 is not a modification of the duties assigned to him which might be provisional but logically and necessarily had to be followed by the decision of 26 June 1968. He invokes in support of this argument the letter of 22 March 1968 of Mr Bodson and the fact that from 29 April 1968 the staff was informed in No 28 of the 'Staff Courier' of the final appointment of a number of new officials to the posts of Director provided for in the detailed list of posts. As all the posts were filled, the dismissal of the Principal Advisers could no longer be in doubt. The application is therefore admissible in so far as it is directed against the decision of 20 March 1968, because the assignment of new duties to the applicant was only a pretence and the decision was in fact the first measure indicating that his service would be terminated.

With regard to the decision of 30 May 1968 the applicant submits that it was not a declaration of intent but a decision even if it was only provisional.

B — *The substance*

1. The first complaint

The *applicant* submits that the decision of 20 March 1968 was taken, as is shown by the letter of 22 March 1968 of the Commissioner Mr Bodson, without first examining the comparative situations of the officials affected.
He goes on to say that the two later decisions are only repetitions of the first.
The *defendant* takes the view that the minutes of the meeting held by the Commission on 20 March 1968 show that a first examination of the comparative situations of the officials affected had already taken place before the adoption of the decisions made on the same day relating to the modifications of the assignment of duties.
The contested measure of 20 March 1968 is a provisional modification of the assignment of duties but is not the necessary condition precedent to a measure terminating the service of officials. Moreover, several officials who had similarly been assigned different duties on a provisional basis were subsequently confirmed in these new posts.
The decision of 26 June 1968 terminating the service of the applicant created a situation which was fundamentally different from the one arising out of the decision of 20 March and each of these two measures could have been taken independently of the other and cannot be regarded as a mere repetition of the other.
Furthermore, the defendant asserts that the decision of 26 June 1968 was in fact preceded by a comparative examination as is shown by the minutes of the meeting of the Commission on 26 June 1968 and in particular by the words 'having carried out a fresh examination of all the personal files' and 'the results of the comparative examination of the cases of the various officials in Grades A 1 and A 2'.
The *applicant* replies that the defendant's submission that the two main decisions which are disputed were preceded by a comparative examination implies that the Commission admits that it cannot shelter behind the general provisions of Article 50 of the Staff Regulations of Officials in order to avoid the obligation to conduct a preliminary comparative examination.
Regulation No 259/68 implies that even in the case of officials of Grades A 1 and A 2 a similar examination must precede any measure terminating the service of officials. The reference to a comparative examination in the minutes produced by the Commission are only formal expressions. The letter of 22 March 1968 proves that the comparative examination was limited to taking note of a previous proposal by the applicant that he should be included among the officials who were contemplating voluntary retirement from the service, whereas he had withdrawn this proposal, which had from the beginning been conditional, on 8 March, and notified the Commissioner Mr Bodson of this withdrawal on 11 March 1968.
The Commission therefore based its decision to exclude him from consideration upon a reason which did not exist and it should therefore be annulled for lack of any such reason.
By stating that the notification of 11 March 1968 was out of time and by referring to the fact that the new detailed list of posts had already been drawn up the Commissioner, Mr Bodson, must be deemed to have indicated that, even before this date, the members of the Commission expected that the voluntary retirement of the applicant would facilitate a solution of the problem of staff reductions. As in the meantime the applicant's situation had changed, the

Commission should have taken this into account and its decision cannot therefore be regarded as valid.

The *defendant* argues that the letter of 22 March 1968 (which moreover did not bind the Commission) in no way proves that a comparative examination did not take place.

In fact, even if on 20 March 1968 the Commission had possibly wrongly thought that the applicant intended to retire voluntarily, this decision could only have been accepted if it was in the interests of the service to do so. Whether this condition, expressly provided by Article 4(3) of Regulation No 259/68 had been fulfilled, could only be determined if a comparative examination had taken place.

Even if this first comparative examination is deemed to be defective, it did not determine the final decision to terminate the service of the applicant. This was only made on 26 June 1968 after another comparative examination and at this date the Commission knew, thanks to the letter which the applicant sent to President Rey on 14 April 1968, that it was not or was no longer his intention to avail himself of the provisions of Article 4(3) of Regulation No 259/68.

2. Second complaint

The *applicant* submits that, even if the decision of 26 June 1968 is presumed to have been taken after a comparative examination of the cases of the individual officials affected, the grounds upon which it is based are inadequate in particular for the purpose of their review by the Court.

The decision does state that a comparative examination was carried out but it does not say whether this examination covered all the senior officials, Directors-General, Directors and Principal Advisers.

In addition, although in the case of Grades A 1 and A 2 officials the Commission was not bound by the criteria laid down by Article 4(2) of Regulation No 259/68, it nevertheless had to specify the criteria in accordance with which the comparative examination of individual cases was effected in order to enable the Court to review them.

The wide discretion which the Commission enjoys in the recruitment of officials of Grades A 1 and A 2 does not go so far as to entitle it to act arbitrarily.

In the applicant's view it is not enough to state 'that note was taken of the personal files of the officials concerned and that a comparative examination was carried out' when there is evidence that the decision was based on a consideration which had nothing to do with these files and this examination.

The *defendant* replies that officials in Grades A 1 and A 2 are a special category and there is a special procedure for appointing and dismissing them. Although the measures for compulsory retirement provided by the Staff Regulations imply that a statement of the grounds upon which the decision is based is always necessary, retirement under Article 50 of the Staff Regulations, which only applies to officials in Grades A 1 and A 2, is on the contrary exempted from this obligation.

Article 4 of Regulation No 259/68 did not introduce any additional requirement in relation to the rules governing retirement under Article 50 of the Staff Regulations and in the present case the defendant, in the exercise of its discretionary powers, is not even obliged to disclose the reasons upon which the decision of 26 June 1968 was based.

The defendant states as a general proposition:

(a) That the comparative examination covered all the officials in Grades A 1 and A 2 including Principal Advisers;

(b) The essence of a discretionary decision is that the various factors taken into account by the Commission

when it makes an assessment, which cannot be subject to review, of the interests of the service and the exigencies arising from them, are not disclosed, since the grounds of the decision relating in particular to the applicant's professional ability and the general nature of his personality are not subject to review by the Court.

The applicant's claim that the contested decision was based on a consideration which had nothing to do with the examination of the comparative merits of the persons concerned is not supported by any evidence or by an offer to produce such evidence.

3. Third complaint

The *applicant* takes the view that the decision of 26 June 1968 does not show that the examination by the Commission of the comparative situations of the individuals affected was preceded by an examination of their personal files.

The *defendant* takes the view that the minutes of the meetings of 20 March and 26 June 1968 show that the Commission on each occasion examined all the personal files.

4. Fourth complaint

The *applicant* criticizes the decision of 26 June 1968 for referring in one of its recitals to the 'observations' contained in the letter which he sent to the defendant on 19 June 1968.

This letter was an appeal through official channels against the decision of 20 March 1968 but did not contain any observations relating to a possible termination of his service. The Commission should have taken action on this appeal in accordance with the normal procedure.

Instead, the Commission made a decision concerning the applicant in a decision affecting a number of officials and thereby based it on incorrect grounds or at least did not adequately answer the applicant's observations.

The *defendant* states that it based its final decision on the objective facts contained in this letter which enabled it to evaluate the seniority, the family responsibilities and the scientific training of the applicant.

To plead in his reply the absence of any answer to his appeal through official channels amounts to raising a fresh issue which is inadmissible. Further, this submission is unfounded since the complaint against the provisional decision had no purpose following the adoption of a final measure.

5. Fifth complaint

The *applicant* submits that the action taken by the Commission was not for the purpose of rationalizing the service, because one of the three Directors kept on in the service would reach the retirement age at the beginning of September 1968.

Therefore there was nothing to stop the Commission from re-instating the applicant in his post or in another Directorate after the departure of Mr Noël Mayer, but this post was only advertized as being vacant in October 1968 so that the applicant could not offer himself as a candidate.

Although it has to be admitted that the criterion of nationality may be taken into account in considering the different applications, such considerations cannot justify the retirement of an official in order to reserve a particular post for nationals of a particular Member State.

The *defendant* takes the view that a decision could hardly be based solely on the ground that Mr Noël Mayer would soon reach the retirement age, because it would not have corresponded with the results of the examination of the comparative situations of the officials concerned. Other factors, which were just as important, that is to say, personal capabilities, the ability to run an

important administrative unit, the personality of the officials concerned and the allocation of posts on a geographical basis, all had to be taken into consideration.
The defendant states that considerations relating to its concern to uphold the principle of geographical balance at the level of the post of Director in the Directorate-General for Transport could legitimately have arisen which made it undesirable to 'remove Mr Noël Mayer from the staff' in preference to Mr Reinarz and to designate the latter as the successor to Mr Noël Mayer.

6. Sixth complaint

The *applicant* submits that an objective consideration of the history of his career made it imperative for him to be kept in the service. Therefore by terminating his service the Commission did not act in the interests of the service.
His personal file contained no reservation and he was the only official who had served in the ECSC and the EEC.
The *defendant* submits that it has a discretionary power in these matters.
A value judgment, which by its very nature cannot be verified objectively, had of necessity to be made on the applicant's personality, which was not recorded on his personal file, since he was a senior official.

7. Seventh complain

The *applicant* submits that the decision of 20 March 1968 which was repeated on 26 June 1968 was a concealed disciplinary measure in that it was based upon a comparative examination of cases of the officials affected which led the Commission to appoint in January 1969 another official as Director of the Directorate for Transport Rates and Conditions.
The fact that this measure was taken without giving any reason for a disciplinary measure and outside the procedure prescribed in Annex IX to the Staff Regulations shows that it was a concealed disciplinary measure amounting to a misuse of powers.
The *defendant* contends that there is no reason to suppose that the preference given to the other official could have the effect of transforming the contested decision into a concealed disciplinary measure.
Moreover, as Article 4(4) of Regulation No 259/68 provides that measures terminating the service of officials shall in no way constitute disciplinary measures, it would have been illegal to apply to such termination the procedure of Annex IX to the Staff Regulations. In addition, the recitals to the contested decision show that it was not in any way disciplinary.

Grounds of judgment

1 The principal object of the application is the annulment of the decision terminating the service of the applicant taken by the Commission on 26 June 1968 and a declaration that he shall continue to be entitled to be paid his salary and to enjoy all the benefits attaching to his post.

2 The application in addition asks for the annulment, to the extent to which it may be necessary, of the decision of 20 March 1968 transferring the applicant from his post of Director of the Directorate for Transport Rates and Conditions to the post of Principal Adviser in this Directorate-General and of the decision of 30 May 1968 whereby the Commission proposed to

adopt a final measure for terminating the service of various servants including the applicant.

3 Finally, during the oral procedure the applicant offered to adduce evidence and asked for an award of damages the amount whereof should be determined by the Court in the event of 'his re-instatement as Director being regarded as meeting with insuperable obstacles'.

Admissibility

4 The defendant regards the application as inadmissible in so far as it refers to the measures of 20 March and 30 May 1968 which it submits are not decisions adversely affecting an official within the meaning of Article 91 of the Staff Regulations.

5 The decision of 20 March 1968 constitutes a transfer. Although such a measure falls in principle within the discretionary power of the administration to organize its departments, it may however in certain circumstances amount to a measure adversely affecting an official.

6 To that extent the application is admissible.

7 During its meeting on 30 May 1968 the Commission considered the adoption of a measure terminating the service of various officials in Grades A 1 and A 2 including the applicant and instructed the President to inform the officials concerned so that they could submit any comments they wished to make before the Commission made its final decision.

8 Having regard to the fact that inclusion in the list provided for by Article 4 of Regulation No 259/68 is not required for officials of Grades A 1 and A 2, this resolution was only a declaration of intent which can have no legal effect but which was intended to be and has in fact been the subject of a new resolution.

9 To that extent the application is therefore inadmissible.

10 However, the applicant takes the view that this decision as well as the one adopted on 20 March forms part of a whole series of measures which amount to an abuse or misuse of powers and that the complaints made arising out of them must in any event be examined in connexion with the principal claim.

The substance

A — *The legality of the contested decisions*

11 In the view of the applicant the contested decisions must be annulled because they were taken without any prior consideration of the comparative merits and of the different situations of the officials likely to be affected by a

measure terminating the service of officials and in any event because, if this consideration did take place, it was not preceded by perusal of the personal file of each official.

12 Under Article 50 of the Staff Regulations an official holding a post in Grade A 1 or A 2 may be retired in the interests of the service. Further, it is clear from this provision that reasons do not have to be given for such decisions.

13 On the other hand Article 4(2) of Regulation No 259/68 provides that if the Commission intends to take measures terminating the service of officials of grades other than A 1 and A 2 it shall draw up a list of the officials to be affected by such measures, after consulting the Joint Committee, and taking into account the officials' ability, efficiency, conduct in the service, family circumstances and seniority.

14 If these two articles are read together it is clear that the Commission enjoys a wide measure of discretionary power when dealing with officials of Grades A 1 and A 2.

15 Such a discretionary power presupposes considerable freedom of decision and at the same time a scrupulous examination of the facts of each case.

16 The latter consideration is necessary as a guarantee that the said discretion shall be exercised with full knowledge of each case.

17 In the present case this requirement implied the consideration of the comparative qualifications and situations of the officials whose retirement from or retention in the service had to be considered.

18 It follows from the schedule to Document G (68) 175 A 1 of 24 June 1968 that at its meeting of 20 March 1968 the Commission intended to draw up a provisional list of officials of Grades A 1 and A 2 likely to be affected during the following weeks by a measure terminating the service of officials.

19 The letter sent to the Director-General for Transport on 22 March 1968 by the member of the Commission responsible for this Directorate-General shows that when the Commission discussed this matter on 20 March it was unaware that the applicant no longer intended, as he had previously stated, to retire from the service voluntarily and had duly informed his superior of his change of mind.

20 As a result therefore of a mistake of fact he was not included in the examination of the comparative qualifications and situations of the officials affected which the Commission carried out.

21 In fact, the Commission, convinced that the applicant still wished to leave the service, considered that it was released from the necessity of making a difficult

choice and assigned the three remaining posts to the other Directors who had previously been performing these duties.

22 As a result the Commission removed the applicant from his post of Director and transferred him to a post as Principal Adviser but made it clear that the decision was provisional until such time as a final measure could be taken in his case pursuant to the new provisions of the Staff Regulations, which would take account of the requests made by officials who, on their own initiative, had asked for the termination of their service.

23 The Commission therefore took this decision without having been able to take account of one piece of information which was vital for the full exercise of its discretionary powers.

24 It is true that during its meetings of 30 May and 26 June 1968 the Commission re-examined the applicant's case.

25 On these two dates it was aware of the fact that he had changed his mind and it had also taken note of the observations contained in the letter of 14 April 1968 and—before making a final decision—of those contained in his letter of 19 June 1968.

26 The decision of 26 June 1968 was taken, as the minutes confirm, after a re-examination of all the personal files.

27 However, the facts of this case make it clear that the personal files examined were those of all the officials whose future in the service was still in doubt and that the decisions taken on 20 March with regard to the allocation of posts were not called in question so far as the Directorate for Transport was concerned.

28 It was only to this extent that the applicant's case was compared with those of other servants. However, because of the abolition in the meantime in the 1968 budget of the post of Principal Adviser in the Directorate-General for Transport and having regard to the applicant's highly specialized training, this limited comparative examination made it virtually impossible for him to be excluded from a measure terminating the service of officials.

29 Further, the applicant submits that one of the four Directors involved was to reach the retirement age in September 1968 and was due to retire at that time.

30 In spite of this the Commission passed over the applicant and on 20 March 1968 gave this Director one of the three remaining Directorates and later confirmed this posting with the intention of allocating the post afterwards to an official of the same nationality.

31 The applicant regards this procedure as an infringement of Articles 7 and 27 of the Staff Regulations.

32 The defendant 'does not conceal the fact that considerations relating to its concern to uphold the principle of geographical balance at the level of the post of Director in the Directorate-General for Transport might legitimately have arisen which made it undesirable to remove Mr Noël Mayer from the staff in preference to Mr Reinarz and to designate the latter as the successor to Mr Noël Mayer'.

33 Moreover the before-mentioned letter of 22 March 1968 makes it clear that the allocation of posts effected by the Commission on 20 March in the view of the Commission took account of this concern.

34 It is clear from Article 7 of the Staff Regulations read together with Article 27 thereof that when the Commission recruits, promotes and assigns its servants to posts it must be guided on the one hand by the interests of the service without regard to nationality and on the other hand must ensure that they are recruited on the widest possible geographical basis from among nationals of the Member States of the Communities.

35 The Commission reconciles these requirements when, in those cases where the qualifications of the various candidates are substantially the same, it makes nationality the overriding criterion in order to maintain or re-establish a geographical balance among its staff.

36 In carrying out its task of rationalizing the administration, which it was under a duty to do by virtue of Annex I to the Merger Treaty, it had to take into account the same requirements.

37 However, the fulfilment of the obligation to secure the recruitment of officials on the broadest possible geographical basis must not be limited to a small number of posts within a single Directorate-General.

38 Further, the third paragraph of Article 27 of the Staff Regulations expressly prohibits the reservation of posts for nationals of any specific Member State.

39 The facts in the present case show that a Director was kept in his post, even though he was near the end of his career, mainly to facilitate his replacement at a later date by a servant of the same nationality.

40 Moreover the rationalization measures which the Commission was required to take consisted mainly in effecting considerable reductions of the number of servants in particular those of the same grade as the applicant.

41 The dismissal in such circumstances of officials in the service, on the ground that they are redundant, when their retirement from the service results soon

afterwards in the promotion of servants of a lower grade to the posts which they held, cannot be accepted in principle.

42 Otherwise the principle that proper regard should be had for the career prospects of officials would be called in question without this being absolutely necessary, and in the special conditions applicable to the task imposed by the Merger Treaty compliance with this principle had to take precedence over the considerations relating to the composition of the staff of the Communities on a mainly geographical basis.

43 The complaints that there was no consideration of comparative merits and that Articles 7 and 27 of the Staff Regulations were infringed or at least wrongly applied therefore appear to be well founded. The decisions of 20 March and 26 June 1968 must therefore be annulled.

44 It is therefore unnecessary to examine the applicant's other complaints against the contested decisions.

B — *The remainder of the claim*

45 The applicant asks the Court to declare that he shall continue to be entitled to receive his salary and enjoy all the benefits attaching to his post.

46 During the oral procedure the applicant claimed in the alternative an award of damages should his re-instatement meet with insuperable obstacles.

47 Under Article 19 of the Protocol on the Statute of the Court of Justice of the European Economic Community and Article 38 of the Rules of Procedure the subject-matter of the dispute and the form of order sought must be contained in the application and this excludes the addition of new claims during the proceedings.

48 The claim for damages made for the first time during the oral procedure must therefore be considered as out of time and consequently inadmissible.

49 Moreover it is for the Commission by virtue of Article 176 of the Treaty to take the necessary measures to comply with the judgment of the Court of Justice.

50 It is therefore unnecessary to decide upon the claim for a declaration or upon the claim for damages.

Costs

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

[52] As the defendant has failed in its submissions it must therefore be ordered to pay 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 Staff Regulations of Officials of the European Communities, especially Articles 7, 27, 29, 90 and 91;
Having regard to the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible to the extent to which it seeks the annulment of the decision of 30 May 1968;**

2. **Annuls the decision of 20 March 1968 assigning the applicant to the post of Principal Adviser and the decision of 26 June 1968 terminating his service;**

3. **Declares that it is unnecessary to decide upon the remainder of the claim;**

4. **Orders the Commission of the European Communities to pay the costs.**

Mertens de Wilmars Monaco Donner

Delivered in open court in Luxembourg on 6 May 1969.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber