Having regard to the Staff Regulations of Officials of the European Communities, especially Article 91;
Having regard to the Conditions of Employment of Other Servants of the European Communities, especially Article 52;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**
2. **Orders each party to bear its own costs.**

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 13 May 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 MARCH 1970[1]

Mr President,
Members of the Court,

The two cases (18/69 and 39/69) on which I am about to give my opinion were dealt with in joint oral proceedings on 4 February 1970. Since the same applicant lodged both, I can discuss them in one opinion. One advantage of this is that at least the facts can be summarized together. The following are the main facts.

The applicant is a French national who, after successfully completing his studies at the École des Sciences Politiques and working for a time for the United Nations, the French Civil Service and private concerns, entered the service of the Commission of the European Economic Community on 1 Septemper 1964. He was engaged on the basis of a contract of 12 August 1964 made initially for a period of six months. In law the applicant's position was that of a member of the auxiliary staff under Title III of the Conditions of Employment of Other Servants of the Communities; his remuneration was that of Category A I-II under Article 63 of those Conditions. Subsequently, despite several adverse reports, the applicant's contract was extended and for the last time on 10 July 1968 with effect until

1 — Translated from the German.

31 December 1968. As to the applicant's duties, we know that he was employed *inter alia* in the Directorate General for External Relations and in the Directorate General for Industrial Affairs.

In an effort to improve his status the applicant applied over the years for many advertised posts (mostly in Grade A 5, A 4 or A 3). In one instance—a vacant A 4 post in Directorate General VIII—he got as far as being included by the selection board on the list of suitable candidates for appointment. He was however never established as as official.

Being understandably dissatisfied with the situation outlined above, the applicant made complaints on several occasions (for instance, in a letter to the Secretary General of the Commission on 17 September 1968, and in a memorandum to the Head of the Recruitment and Careers Division on 27 November 1968). On the same grounds he submitted a formal complaint to the members of the Commission on 19 December 1968 under Article 90 of the Staff Regulations. In it he requested that he be established and given a classification in Grade A 4. As he received no reply, he lodged an application at the Court of Justice on 21 April 1969 in accordance with Article 91 of the Staff Regulations. This was how Case 18/69 began. The case puts forward two claims for our consideration: a claim for the annulment of the decision of refusal arising by implication from the lapse of two months after submission of the applicant's complaint, and a claim for a ruling that the applicant should be established in Grade A 4.

It should also be known that the Commission at first contended merely that the application should be rejected as inadmissible under Article 91 of the Rules of Procedure. This was not pursued by the Chamber, however, which decided on 17 September 1969 to defer consideration of the objection of inadmissibility until final judgment was given.

Even before the application to the Court was lodged the applicant's status was altered, a fact which is also relevant to the second application he has brought. On 23 December 1969 the Commission decided to appoint the applicant as a temporary servant under Title II of the Conditions of Employment of Other Servants of the Communities for a period of three months with effect from 1 January 1969. The appointment was however only to Grade B 1. This contract, too, was extended several times, in the last instance—as we were told in the oral proceedings—with effect until 30 June 1970. The applicant is now working in the Directorate General for Economic and Financial Affairs.

As I have said, the change in status provided grounds for bringing a second application. Now it should be noted that the applicant had not taken all the annual leave due to him whilst he was on the auxiliary staff. According to his calculations 47 days in all are involved. Since he took the view that this leave could not be carried forward he considers that the leave not taken should be paid for in accordance with Article 58 of the Conditions of Employment, and accordingly submitted a claim on 27 January 1969 to the Head of the Personal Rights Division. His complaint was at first successful in that the Head of the Division agreed that Article 58 applied. The applicant's opinion was also shared by the Remuneration and Allowances Division, which issued an order for payment accordingly. Objection was taken to this by the Financial Controller, however, whose duty it is under the provisions of the Financial Regulation to approve payment orders. As a result the Directorate-General for Personnel and Administration notified the applicant on 13 May 1969 that compensation under Article 58 of the Conditions of Employment could not be awarded him. The reason given was that the applicant could take his unused leave during the course of 1969, since he had remained in continuous service with the Commission. A reservation was added, however, to the effect that this applied only to 29 days' leave under the conditions published in the Staff Courier of 7 November 1968; the remainder of the leave from 1967 would have to be deemed forfeit.

It was against this decision that the second complaint was lodged in the Court on 11 August 1969. It seeks the annulment of the above-mentioned decision and an order that the Commission should pay compensation for unused leave of Bfrs. 77 093 together

with the interest provided for by law. The Commission's views on the applications—let it be said for the sake of completeness—is that they must both be dismissed: the first as inadmissible, or at least as not sufficiently well founded; the second as unfounded.

That is the subject-matter of the dispute, and it must now be considered from the legal point of view. This must, of course, be done separately for each of the various claims. Let us proceed first to closer examination of the claims in Case 18/69.

I — Case 18/69

1. *Admissibility*

The Commission insists that the application must be dismissed as inadmissible, so first we must see whether that is so. The problem presents a number of different aspects for consideration.

(a) The Commission relies mainly on the provision in Article 38 (1) of the Rules of Procedure, under which the application must contain, *inter alia*, the subject-matter of the dispute and a brief statement of the grounds on which the application is based. In its opinion the applicant has not met these requirements.

Few words are needed, however, to refute this view. The application does not, in fact, lack a definition of the subject-matter of the dispute, but refers to the regularization of the applicant's position and his claim to be entitled to establishment. In addition to this one finds a *brief* statement of the grounds (all that is required), for the applicant relies on an infringement of Article 52 of the Conditions of Employment, and refers to his alleged down-grading by his appointment in Category B. This at least indicates the considerations he thinks will bear out his claims. It is therefore my opinion that the application satisfies the formal requirements of Article 38 (1) of the Rules of Procedure although doubtless in content it barely exceeds the minimum acceptable for procedural purposes.

(b) A more difficult question on the other hand is whether or not the claims are *opposite*, a question which, as the Commission rightly believes, also falls to be considered under the heading of admissibility. The Commission thinks that there is a lack of grounds given for the application in that the applicant cannot simply ask to be established in a particular grade. Establishment depends on the observance of an appointment procedure in accordance with the regulations and the filling of a vacant post. The Commission claims, moreover, that it is accepted that the Court cannot issue specific instructions to the Commission as desired by the applicant in respect of his establishment in Grade A 4.

As to this assertion I should like to remark, first, that the Commission's argument which denies the existence any power on the part of the Court to issue instructions concerning the Commission is not correct, in my view. I have already raised the point in several other cases before the Court. There is no need to go into it further now, however, because I think that the Commission's view of the sufficiency of the grounds given for making the application is otherwise acceptable and enables the application simply to be dismissed as inadmissible—to anticipate the final result.

Naturally, I must look more closely at the grounds for this conclusion than the Commission has done. The correct view is that a clear exposition of the applicant's conclusions must be given in the application itself, or at least in a written pleading submitted to the Court within the time-limit for making an application. This must be so in my opinion in view of the fact that Article 38 (1) of the Rules of Procedure, in which the requirement of a statement of grounds is to be found, is not mentioned in Article 38 (7) among the provisions for *rectification* which may be called for by the Registrar. Nor does Article 19 of the Protocol on the Statute of the Court of Justice of the EEC apply here, as regards the similar requirement therein on complaince with certain formalities with regard to an application *after* expiry of the time-limit for making it. We must therefore decide which written pleadings were submitted within the time-limit for making an application and what they have to contribute to the apposite nature of the submissions.

Such an investigation does not in fact present any problems in the present case. The true starting-point is the formal complaint made by the applicant to the Commission on 19 December 1968 and the lack of any response to it. Bearing in mind the extension of the time-limit on account of distance allowed for applicants habitually resident in Belgium, it must be concluded that the time-limit for lodging an application to the Court on the subject-matter of the appeal expired on 21 April 1969. However, it is certain that all that came from the applicant before this period ended was the very first written application, which was drawn up with great economy of wording; the more detailed written pleadings were only received by the Court on 6 May 1969. Only the contents of the original application can therefore be considered in deciding whether or not the claims are adequately supported. I have already indicated what this shows: basically the applicant is content to refer to the infringement of Article 52 of the Conditions of Employment, that is, the provision which lays down the maximum duration of the contracts of auxiliary staff, and he claims that he was down-graded on being made a temporary servant in being classified only in Category B. It is difficult to find a positive answer to the enquiry made by the Commission whether the above can be considered to contain adequate grounds for a claim to be appointed an official in Grade A 4. The Staff Regulations lay down special procedures for the appointment of officials (for instance, completion of a probationary period) and start by stipulating (Article 4) that an appointment shall be made only in order to fill a vacant post. Argument on those lines must therefore be included in any application made by an agent employed on contract seeking thereby to be appointed an official. The failure to observe the provision fixing the maximum duration of contractual relationships with auxiliary staff is thus quite irrelevant as grounds for the claim to appointment, and equally irrelevant is the argument that the applicant is in a less favourable position as a temporary servant then he was when working on the auxiliary staff.

One is forced to say, therefore, if only the contents of the first written pleadings are taken into account—the only acceptable possibility, I think—that no adequate grounds have been given, and that consequently the application must be rejected as inadmissible.

(c) A third point to be commented on in the context of admissibility is the applicant's request that his classification in Grade B 1 be annulled. This the Commission thinks is inadmissible because the actual pleadings contain no such claim; they refer merely to the annulment of the implied decision to turn down the applicant's request to be appointed an official in Grade A 4.

Here, too, one must agree with the Commission. It is a fact that the applicant did not appeal within the time allowed against the contract making him a temporary servant in Grade B 1. That makes it certain that there can be no examination in the present proceedings of his classification *as a servant employed under contract.* The question of the applicant's grading could perhaps be the subject of a judicial review if his claim to be appointed an official in Grade A 4 came up for consideration. But—as I have shown—that possibility is excluded owing to the inapposite nature of the grounds of the application.

The general result of all this is that, as the Commission claims, Application 18/69 must be rejected on the ground of inadmissibility.

2. *Substance*

As in other cases I do not wish to confine myself to the foregoing discussion, but will investigate at least as a subsidiary issue the substance of the application. My remarks need only be brief in this context, however, granted what has already been said in relation to the appositeness of the grounds given for the applicant's claim to be appointed on the basis of on the infringement of Article 52 of the Conditions of Employment. The fact is that, as in those cases concerning contractual relationships prior to the introduction of the Staff Regulations, and in which the argument for the continuity of the legal relationship had to be rejected (Cases 43, 45, 48/59 – Rec. 1960,

p. 954), there is no getting round the fact that even employment as an auxiliary servant over a number of years and in clear contravention of the Staff Regulations does not create a right to be appointed an official. If the Staff Regulations on appointment are referred to even in connexion with temporary staff (Article 8 of the Conditions of Employment) then in the absence of any other provision for auxiliary staff the same must obviously apply. Thus the main obstacle to meeting the applicant's claim lies in the strictness of the requirements introduced for the purpose of ensuring the objectivity of the recruitment procedure.

There might be some hope of success for the applicant if the arguments set out in his *supplementary* written pleadings could be taken into consideration. I have already shown in the discussion on the appositeness of the grounds the strong reasons for doubting whether this is possible, bearing in mind the failure to observe the time-limit for applications and Article 42 of Rules of Procedure. Leaving that aside for the moment, however, let us examine the additional arguments to see whether they are sound. As you know, the applicant claims in these arguments that he was more or less *promised* appointment as an official. Three things are supposed to bear this out: a memorandum from the Directorate General for Industrial Affairs of 3 April 1968, a memorandum from the Secretariat General of the Commission of 18 December 1968 and a letter from the Directorate General for Personnel and Administration of 20 January 1969. On closer examination, however, it will be seen that none of these affords a proper basis for the applicant's claim, even assuming that—contrary to the scheme of the Staff Regulations—there can be binding *assurances* of appointment, that is to say, assurances which are actionable at law. The first-mentioned memorandum cannot be used as a basis for a claim, if only because its author is a Head of Division. Moreover, it mentions only a 'test' undergone by the applicant, and a *possibility* of establishment, that is to say, there is no assumption that satisfactory performance in the test is the only pre-condition for appointment.

The same is true of the memorandum of 18 December 1968. It does, in fact, contain references to the procedure for establishing auxiliary staff (including the applicant) being *in progress* ('en cours'). But even that cannot be considered to amount to a definite promise of appointment: at most it underlines the intention to make appointments as and when posts become vacant and in accordance with the provisions of the Staff Regulations. This view is supported in particular by the directive from the President of the Commission mentioned in a letter from the Directorate General for Personnel and Administration of 23 July 1968, drawing vacancy notices and the possibilities of applying for the relevant posts to the attention of auxiliary staff. Finally, the same conclusion can be drawn from the letter from the Directorate General for Personnel and Administration of 20 January 1969 with which the applicant was given his contract as a temporary servant. Indeed, it is difficult to infer a definite appointment from the words 'dans l'attente d'une décision concernant votre nomination comme fonctionnaire' ('pending a decision on your appointment as an official'). It must also be noted here that in any case there could only be question of an appointment in Grade B 1, at most: in no way whatsoever can be used as a means to prove a claim to Grade A 4, such as is put forward by the applicant. Thus, even if the arguments advanced by the applicant in his supplementary written pleadings can be taken into consideration—although I think they cannot—they would in no way aid the application. In view of this there is no need for further discussion of the question, also much disputed, which *Grade* is the relevant one in considering the applicant's establishment.

A word is due, however, on the applicant's criticisms concerning the manner in which applications for vacant posts advertised were handled. I think some observations are called for despite the fact that the applicant has not asked for the annulment of the appointments given to *other* officials as a result of the relevant vacancy notices, so that his criticisms seem from that point of view to be worthless from the outset as far as the application now to be examined goes. The explanations given to us by the Com-

mission are decisive on this point. These show that internal competitions were held in respect of only *eight* of the many vacancies applied for by the applicant. The remaining posts were filled by way of promotion or transfer so that the applicant's candidacy did not even have to be considered. Where there was a competition, the selection board found in seven cases that the applicant failed to fulfil the conditions of the advertisement. In one instance, which I have already mentioned, his name was placed together with that of another candidate second on the list of suitable candidates; but the Commission appointed the better candidate from the top of the list to the advertised post. The applicant has been unable to produce any substantial argument to counter this explanation. Even his claim to have predicted the result of the procedure for filling vacant posts before they were concluded, because each was intended to favour a particular candidate, must be disregarded, not least because the forecasts relate mostly to A 3 posts, that is, to proceedings which have no connexion whatsoever with the applicant's case. One can only say, therefore, that the applicant's criticisms about the filling of posts advertised as vacant is likewise of no help to this application.

In sum, then, the examination of the first application yields the following result: my opinion is, first, that the application must be rejected as inadmissible because the grounds given are insufficiently apposite. If, however, it is found to be admissible taking into account the arguments produced in the supplementary written pleadings then it must be rejected as unfounded.

II — Case 39/69

1. *Admissibility*

On the second application, to which I turn my attention now, the Commission has made no objections regarding admissibility. That does not enable us, however, to proceed without more ado to consider its validity: first we must see whether there are any doubts as to admissibility to be raised by the Court of its own motion.

That would seem to be so in fact in the case of the application for annulment. As I recall, the issue concerns a decision by the *Director General* for Personnel and Administration, not a decision of the Commission, nor—in the absence of a request under Article 90 of the Staff Regulations—an implied decision of that body. One must ask oneself therefore whether the Director General for Personnel and Administration can be said to exercise the powers of an appointing authority, within the meaning of Article 2 of the Staff Regulations, in the relevant matter (that is, in dealing with claims for entitlement to leave), for only then can his statements constitute binding acts which may be challenged before the Court. If in order to find the answer to this I turn to the Commission's decision of 6 July 1967, in which the powers of the appointing authority are defined and numerous opportunities of delegation provided for, then the answer is quite clear. None of the many instances of delegation carefully defined there allows the Director General for Personnel and Administration to exercise the powers of the appointing authority in the matters under discussion. But I think it is clear from this too that the decision challenged by the applicant cannot as it stands constitute a measure which is definitely binding. It therefore follows that the claim for annulment of the above-mentioned decision must be rejected as inadmissible.

2. *Substance*

Here, too, the negative reply I have given to the question of admissibility will not prevent me from examining the substance of the claim. This would in any case have to be considered if only because the application includes a request that the Commission be ordered to pay a specific sum of money, which is undoubtedly admissible under Article 91 of the Staff Regulations and raises almost the same questions as in the application for annulment.

As regards the substance of the application the main problem is whether or not the applicant can claim financial compensation in accordance with Article 58 of the Conditions of Employment for leave not taken in 1967 and 1968 (amounting to 47 days in

all) after expiry of the contract engaging him as an *auxiliary* servant, or whether by reason of the continuance of the employment relationship (albeit on a different basis) only the carrying over of leave to 1969 has to be considered, this moreover being restricted to the 29 days' leave which fell due in 1968 in accordance with the provisions published in the Staff Courier of 7 November 1968.

Even this sketch of the issues involved is sufficient to show that the question at issue in the administrative proceedings—whether in fact the requirements of the service prevented the applicant from taking the leave due to him up to 31 December 1968—is now irrelevant. In that respect the clear explanations provided by the Commission have removed all doubt. It also makes it unnecessary to go into the question of the allegedly arbitrary conduct of the Head of the Administration Division where the applicant worked until 31 December 1968.

The first argument to be taken up in connexion with the second claim is that the action which is challenged, the decision of the Director General for Personnel and Administration of 13 May 1969, wrongfully revokes an earlier decision recognizing the applicant's claim for compensation. Here it must be recalled from the facts of the case that an order for payment was, in fact, given by the Head of the Remuneration and Allowances Division on 28 March 1969 as the applicant requested and following a recommendation to that effect by the Head of the Personal Rights Division. But as the Commission has explained, it would be wrong to apply to this order the fundamental principles concerning revocation of favourable acts of the administration. The real significance of the payment order is to be found in the Financial Regulation of 30 July 1968. According to Article 39 of this, such acts require *prior* approval by the official responsible for financial control. Without such approval, therefore, they cannot have definitive legal force. In the present case this approval was, we know, withheld, and there followed on 13 May 1969 the decision of the Directorate General for Personnel and Administration which adopted in part the reasons given by the Financial Controller by refusing payment of any compensation under Article 58 of the Conditions of Employment on the ground that the applicant was remaining in the service of the Commission. That is enough to show, in the light of the general scheme of the Financial Regulation, that in the present case there is no question of a revocation of an earlier favourable decision.

In reality the legality of the measure challenged depends in the first place on the interpretation of Article 58 of the Conditions of Employment that is, on the meaning of the provision which reads as follows: 'Where it has not been possible, owing to the requirements of the service, for a member of the auxiliary staff to be given leave as provided in the preceding paragraph during his employment, any days of leave not taken shall be paid for as extra days worked'. In considering how to interpret this, it would, contrary to the applicant's view, be wrong to give too much weight to the *literal* text of the provision and its comparison with other provisions. I think, in fact, that the decisive factor lies not so much in the phrase 'during his employment' ('pendant la durée de son engagement') as in the fact that in the provisions for permanent officials or temporary staff (Annex V, Articles 1 and 4) the reference is to 'leaving the service' ('cessation des fonctions'), a different formula. Similarly one must guard against overestimating the significance of the argument *a contrario* which the applicant tries to base on the fact that Article 3 of Annex VIII expressly provides that periods of service completed in accordance with the Conditions of Employment of Other Servants must be taken into account for the purpose of calculating years of pensionable service. Even if Article 58 of the Conditions of Employment does not refer as clearly and explicitly to the continuity of the employment relationship that does not prevent the same interpretation from being given to it in the light of its sense and purpose.

In fact I agree with the Commission that the *function* of the rules relating to leave must be the foremost consideration and, should the leave entitlement for any particular year not be taken up, a settlement should be reached with this in mind. It is therefore essential to recognize the purpose of the

rules concerning leave as being to provide an opportunity to relax and recruit fresh energy for one's work. From this view it must follow that, when leave cannot be taken during the year owing to the requirements of the service, the carrying forward of the leave not used up must be considered as the most suitable alternative particularly as that seems to be the general rule in national law. Once this is accepted, the decisive point in a case such as this must likewise be that there was no break in continuity of service with the Commission and that it is still possible, albeit belatedly, to meet the claim to leave and let it fulfil its allotted function. The alteration in his employment position is, on the other hand, of no great significance. In fact, this approach compels us to acknowledge an element of continuity in the employment relationship. But there are good grounds for adopting this view, even in the light of Article 58 of the Conditions of Employment, especially because it fits in perfectly with what the case-law concerning auxiliary staff has previously laid down (particularly on the subject of their participation in internal competitions). Accordingly, we may adopt the important interim conclusion that a claim to financial compensation for leave not taken can only arise if the applicant's employment with the Community *ceases absolutely*, and that the correct view is that Article 58 of the Conditions of Employment cannot be applied in the case of the applicant because he has remained continuously in the service of the Commission.
The applicant, however, considers himself injured not only by the refusal to give financial compensation but also by the fact that the decision he complains of carries over only his leave from 1968 to the following year and deems the 1967 leave as forfeit in accordance with the rules published in the Staff Courier of 7 November 1968. Let me see if I can endorse the Commission's point of view here, too.
The rules referred to by the Commission appear to be—in the absence of more precise indication—a provision governing the application of the law on staff rights in the Community, dealing only partially with the question of leave carried over under Article 4 of Annex V to the Staff Regulations. So far as it is relevant for a decision in the present case, the decisive sentence is: 'Le report total ne pourra cependant excéder le droit de congé acquis par le fonctionnaire au cours de l'année ecoulée' '(The total amount carried forward may not however exceed the official's leave entitlement for the past year'). As far as its *substance* goes, there is really nothing to object to in this provision and its application to servants employed under contract, for similar basic principles are to be found in the national law relating to civil servants, which is the body of law to which reference must be made where gaps are found in the employment law of the Communities. I refer here to the German law relating to civil servants which says that leave entitlement is lost if not claimed by 30 September of the following year at the latest.[1]
French law also seems to be governed by the principle that leave not taken within the time allowed is forfeit and that it can only be carried over to the following year with special permission.[2] But the question remains, whether the Commission's Directorate General for Personnel and Administration can rely in the present case on the rules cited. For if the applicant has wished to safeguard his rights as provided for by them, he would have been obliged to take the leave outstanding from 1967 directly after publication of the above-mentioned rules in November 1968. One cannot say definitely that this was even *possible*, particularly in view of the Commission's clear statement during the proceedings that the applicant was prevented from taking his leave in 1968 by the requirements of the service. Apart from that it might also seem unreasonable to have a lengthy holiday just before the end of 1968, almost overnight as it were. Whilst no employee should assume a right to retain indefinitely his entitlement to leave from earlier years, I rater feel that the employer has a duty of care to alert employees in good time when they risk losing entitlement to leave and to

1 — Cf. Plog-Wiedow, Kommentar zum Bundesbeamten gesetz § 89. n 9.
2 — Cf. Plantey, Traité pratique de la fonction publique no 1480.

allow them adequate opportunity to avoid doing so. I would go further and say that the rules published in the Staff Courier of 7 November 1968 barely meet this requirement, if at all, in respect of leave due for 1967. If that is so then they cannot be applied to the applicant's case, and this means also that all his leave entitlement from 1967 and 1968 must be carried over to 1969.
On that basis the second application is at least partially well-founded, in the event of its not having to be found inadmissible, for the reasons already given, as regards its request for an annulment.

III — Summary

The final results of may examination can be summarized as follows:

In Case 18/89 the grounds for the application lodged before the expiry of the time-limit are insufficiently apposite. The application must accordingly be rejected as inadmissible. I have shown further that it would not in any case have been well-founded.

The request for annulment in Case 39/69 must be rejected as inadmissible because the measure is not one open to challenge in court. If it is found to be admissible, the application is well-founded in so far as the ruling in question allows only so much of the applicant's leave as fell due in 1968 to carried be over to 1969. But the request for an order that the Commission must pay compensation in accordance with Article 58 of the Conditions of Employment must be rejected as inadmissible.

As to the costs of the proceedings including the preliminary objection made under Article 91 of the Rules of Procedure, in view of the fact that the measure challenged in Case 39/69 has the appearance of a decision it seems reasonable to make the Commission pay half of the costs of the applicant.