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

26 However, under the terms of Article 70 of the said Rules, costs incurred by the institutions in actions brought by employees of the Community are to be borne by such institutions.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action as unfounded;**

2. **Orders each party to bear its own costs.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 21 November 1974.

A. Van Houtte — Registrar

Mackenzie Stuart — President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 10 OCTOBER 1974 [1]

Mr President,
Members of the Court,

1. In this case, which concerns the Commission's refusal to consider the request of one of its officials for the termination of his service under Regulation No 2530/72 of the Council of 4 December 1972, there is a preliminary question of admissibility. The defendant has in fact claimed that the action for the annulment of the Commissions's refusal to terminate service must be considered inadmissible

1 — Translated from the Italian.

since the request for termination of service no longer existed at the time when the Commission had decided to reject it.

The applicant never expressly withdrew his formal request for termination of service of 22 January 1973. The defendant however sees evidence of such a wish in the applicant's letter of 26 April 1973 in which he informed the Commission of his intention to request, in the future, his reinstatement in the Commission's service on the expiry of the second and final period of his leave on personal grounds which he enjoyed in accordance with the provisions of Article 40 of the Staff Regulations. This letter crossed with the Commission's letter of the same date informing the applicant that Regulation No 2530/72 did not apply to officials on leave on personal grounds. On 23 July the applicant submitted a complaint against this decision rejecting his request. On 27 November 1973 the Commission rejected this complaint, referring, in the main, to its discretionary power to consider requests for termination of service in the interests of the service. In that decision the Commission makes, however, not the slightest reference to the argument, which it has subsequently put forward in these proceedings, that the applicant impliedly withdrew his request of 22 January.

The preliminary examination which we must undertake of the applicant's behaviour, for the purpose of deducing the existence or otherwise of a wish on his part to withdraw the request which he had previously made, must be conducted in the light of the principle, which is universally accepted, that renunciation cannot be presumed: *nemo res suas iactare praesumitur*. It can only be deduced from an express statement or unambiguous conduct on the part of the person concerned.

Consequently, we must ask ourselves whether the applicant's request for reinstatement in the Commission's service made on 26 April must be regarded as absolutely incompatible with his request of 22 January to benefit under Regulation No 2530/72, and is therefore such as to lead to the conclusion, in all certainty, that the person concerned, by expressing a wish contrary to that previously made, wished to withdraw his first request.

The reply to this question is undoubtedly in the negative. The matter does not rest there, for the letter of 26 April could even be interpreted as raising a further argument in support of the request for termination of service, since this letter could appear as a reminder to the competent authority of the right which the applicant could alternatively have asserted to be reinstated in one of the posts which had become vacant. In fact, comparison with the applicant's previous letter of 22 January 1973, which the applicant sent to the Commission's departments on the same day as he sent the formal request for termination of his duties on the basis of Regulation No 2530/72, shows clearly that his real intention was in recalling his right to reinstatement in the service on the expiry of the period of leave. In this letter of 22 January, the applicant, disputing the information previously given to him by the Commission's departments, according to which Regulation No 2530/72 did not apply to officials on leave on personal grounds by reason of the fact that termination of service in their case would not have served to vacate a permanent post, pointed out in particular that, on the basis of the facts in this case, this objection seemed unfounded since under Article 40 of the Staff Regulations he had to be automatically reinstated on 12 October 1973, that is to say at a time when the Commission would still have needed permanent posts available for the prescribed recruitment of nationals of the new Member States.

In the light of this prior correspondence, the request for reinstatement announced in advance, which the applicant sent to the Administration on 26 April 1973,

assumes — or at least could reasonably be thought to assume — the significance of a reference to a right under the Staff Regulations, in other words it can also be regarded as a means of pressure to induce the Commission to grant his request for termination of service.

However that may be, even when considered in conjunction with the letter of 22 January, the letter of 26 April can in no respect justify the interpretation which is advanced by the defendant for the first time in these proceedings.

For these reasons, the plea put forward against the admissibility of the action must be dismissed as unfounded.

2. Moving on to discuss the merits, here also we must base the whole discussion on recalling a fundamental point to which the arguments deduced *hinc inde* must be referred in order to establish their value and significance.

In the implementation of Regulation No 2530/72, the Community executive undoubtedly enjoyed a wide measure of discretion: both for the principal purpose of making provision for vacant posts to be filled by nationals of the new Member States, and, within the context of that aim, for vacating posts which were already occupied. Article 2 (3) which is more directly of interest in this case provided that: 'if the interests of the service permit, the institution shall take into account the requests of officials that their service be terminated . . .'; the right to termination of service was however given only to officials of over 60 years of age.

It is therefore clear that in exercising the discretion so conferred on it the Commission could have refused to terminate the applicant's service without being required to give a detailed explanation of its action; it would only be to an official removed from his post through a decision of the administration that the Commission would have had to explain the reasons why it did not think fit to accord priority to requests for termination of service presented by officials of the same grade. But, in our case, the Commission did not merely turn down the request, invoking solely its appraisal of the interests of the service; it chose to give a more specific reason and declared that it could not accept the request on the ground that the official in question was not in active employment but on leave on personal grounds.

There are two aspects to the legal problem facing the Court. First of all, in the context of Regulation No 2530/72, is it true that there existed such incompatibility as is alleged in this case? Second, if, hypothetically, the reasoning adopted was incorrect, what are the consequences of this in relation to the decision which by its nature, as I have stated, did not require a specific and detailed statement of reasons?

3. I shall therefore examine, firstly, whether the argument of the defendant that Regulation No 2530/72 of the Council could not apply to officials who, at the time of presenting their request, were on leave on personal grounds, is correct.

Article 2 of the Regulation, in authorizing the Institutions of the Communities to adopt in respect of their officials measures terminating their service, refers to Article 47 of the Staff Regulations, which sets out the different causes of termination of service. The defendant sees in this general reference to Article 47 a reference to the specific case, included among those envisaged under this Article, of retirement in the interests of the service, which applies solely to officials who actually hold a post, and thus not to officials on leave. Regulation No 2530/72 establishes, however, an entirely special set of rules for retirement which had to be applied to a great number of officials in order to meet exceptional and temporary requirements. The argument taken from the terms of Article 2 of the Regulation and based on its reference to Article 47 of the Staff Regulations does not have the significance which the defendant

seeks to give it. The Regulation governing the scheme of retirement in the interests of the service is not only special, but also complete, and there was therefore no need for these measures to fall within the normal rules under the Staff Regulations. The reference to Article 47, which is made in general terms, serves simply to particularize the expression termination of service by equating it, as regards its effects on the employment relationship, with that already provided for in the Staff Regulations. This reference does not therefore imply a reference to the conditions prescribed by the Staff Regulations for the application of Article 47 in respect of retirement in the interests of the service.

In view of the fundamental objective of the special temporary scheme established by the Council Regulation for the purpose of satisfying, in the most suitable manner, the 'requirements resulting from the accession to the European Communities of new Member States', namely the need to vacate a certain number of posts conveniently distributed between the various grades and services for nationals of the new Member States, the defendant feels justified in inferring from this that the scheme is inapplicable to officials on leave since their termination of service would not anyway have had the effect of vacating a permanent post and, therefore, would not have been such as to meet the requirements for which the Regulation was adopted.

On the other hand, it does not seem that one is forced to admit, in absolute terms, that the application of the scheme of termination of service to an official who is on leave can never be consistent with the purpose of the Regulation. While it is indeed true that an official on leave does not actually occupy a post, it is also true that he is entitled to occupy the first vacant post which corresponds to his grade and his training. It is also necessary to bear in mind the fact that, although Regulation No 2530/72 could not be applied after 30 June, nevertheless the Institutions were not obliged to allot all the posts which fell vacant through terminations of service by the same date. One can therefore imagine that if a period of leave expired shortly after 30 June 1973, the official in question would have been entitled, on request, to occupy one of the posts made available even by application of the above Regulation, thereby frustrating the objective for which the vacancy was created. In such a case, the application to the official of Regulation No 2530/72 would not have appeared incompatible with the objectives sought by this Regulation.

Nevertheless, even though one can conceive of particular cases where the application of the Regulation even to officials on leave could have been compatible with its objectives, it is certain that, as a general rule, the Regulation was intended to be applied to officials occupying a permanent post.

Within the sphere of discretion conferred on it by the Regulation, the Commission was therefore free to adopt the general criterion, which it had determined in the session of 13 February 1973, whereby the Regulation was not to apply to officials on leave. By this decision, the Commission in particular defined the framework in which its departments were to examine requests submitted by those concerned. If, accordingly, the argument now advanced by the defendant, based on a narrow interpretation of Regulation No 2530/72, may appear to be too strict, nevertheless, there was nothing to prevent the Commission from limiting its sphere of discretion in the application of this Regulation in accordance with practical requirements relating to the interests of the service. As, in fact, I have already pointed, out, this Regulation did not confer on officials individually (with the exception of those who had attained 60 years of age) any right to benefit from a measure for termination of service. It conferred, instead, a very wide discretion

on the administration in selecting the officials to whom this measure was to apply. Even the duty placed on the institution to take into account in priority (1) the requests of officials that the provision for termination of service be applied to them was expressly stated to be subject to the interests of the service. The possibility that in respect of its staff the administration may limit the discretionary power which it holds is not, moreover, unknown in domestic law.

4. In view of the above, even that which I have presented as a possible error in law in the reasoning of the refusal may be regarded in another light. Even though it is not quite correct to state that the Regulation prevented the Commission from considering the request for termination of service presented by an official on leave, such a prohibition could in any case ensue from the said general decision adopted by the Commission itself for the purpose of defining the criteria for the implementation of the Regulation on the basis of the interests of the service.

It emerges clearly from the minutes of the Commission's session of 13 February 1973 that, in relation to requests for termination of service from officials on leave, the Commission did not merely consider the Regulation in its strictly legal aspects but, instead, 'decided to adopt as its own position on the matter' a negative attitude in respect of requests from this category of staff, considering that the satisfaction of their demands would have corresponded neither to the letter nor to the spirit of the Regulation.

Consequently, we are not faced in this case with a simple act confirming the wish of the legislator but with a specific decision, implying an autonomous act of will on the part of the Commission.

Beyond the strictly legal consideration of whether it is possible, in theory, to apply the Regulation to officials on leave, there is also a wider appraisal of the interests of the service which the Regulation intended to satisfy, which may justify the position adopted by the Commission.

This is confirmed by the text of the Commission's decision of 27 November 1973 in which it rejected the applicant's complaint. In this decision, the Commission did not in fact advance the strictly legal argument, which constitutes the nub of its defence in these proceedings, that it is absolutely impossible in law to apply the Regulation to officials on leave, instead, the Commission based itself exclusively on its appraisal of the requirements of the interests of the service.

Accordingly, in point of fact, it cannot even be said that there has been infringement of an official's right to have his request considered; because such consideration can be said to have been made in general terms, by reference to the fact that the particular case belongs to a category examined already and decided in that way beforehand.

5. If the Commission was free to lay down criteria which amounted, in the main, to limits on its discretionary power in respect of the implementation of the Regulation in question, it was nevertheless bound, in applying the general criteria which it established, to act in a nondiscriminatory manner. The applicant considers however that the Commission infringed, to his detriment, this general principle of non-discrimination by applying the provisions of the Regulation to two officials at a time when, like the applicant, they were on leave on personal grounds. The defendant raises the defence that, at the time when these two officials presented their requests to benefit under the Regulation they were in active employment, and their leave on personal grounds commenced only later, following rejection of their requests for termination of service. This consideration adopted by the defendant, which is linked with the situation existing at the time when the request is presented,

1 — *Translator's note:* 'con priorità' has not been translated in the English version of Article 2 (3) of Regulation No 2530/72.

should serve, in principle, to bring its behaviour into line with the restrictive interpretation of the Council Regulation, and at any rate with the general restrictive criterion defined for its application, excluding any official who is on leave. This consideration cannot, however, change the real position resulting from the way in which events actually turned out: the Regulation relating to termination of service under special preferential conditions was applied to two officials who, at the time, did not occupy a permanent post. If one considers that the purpose of the Regulation is the crucial consideration for its application, then it is impossible to see the difference, as regards satisfying that purpose, between the position of two officials who, even though they still occupied a post at the time they presented their requests for termination of service, nevertheless, following rejection of these requests, chose to go on leave, and the position of an official who was already on leave.

However, moving from the strictly legal context to a more substantial appraisal of the facts, we find an important difference between the applicant's case and that of the two officials mentioned above. Whereas Mr Giry was on leave on personal grounds independently of any action on the part of the Commission, the two officials in question had decided to ask for leave in consequence only of the Commission's refusing their request that the Regulation on termination of service should be applied to them. The Commission considered afterwards that it had been too severe in examining their two requests and decided to reverse its decision. It is true that as regards the applicant's claim, which can only be that his request should be considered, the Commission's negative reply is influenced, in the main, by the general interior of absence of any present interest in granting termination of service to someone who has already vacated his post. But there is nothing in the precepts of good administration to preclude the Commission from reviewing its own initial measure which was the original cause of the request for leave itself being submitted a short time before by the two officials in question. On this view of the facts, one can say that the Commission reviewed the requests submitted some time before and revoked the previous decisions in respect of the two officials on leave, thereby exercising that power of review of its own acts which the law recognizes it to possess as long as this does not affect the legitimate interests of third parties. Hence, there can be no question of discrimination.

In conclusion, I do not think it right to advise the Court to accept the action for the annulment of the administrative act in issue, despite the inaccuracies found in the statement of reasons in the contested decision.

As regards the costs in the case, I refer the Court to Articles 69 and 70 of the Rules of Procedure.