On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the applications;**

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

Pescatore Touffait Due

Delivered in open court in Luxembourg on 24 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 12 FEBRUARY 1981 [1]

Mr President,
Members of the Court,

Maria Grazia Carbognani and Marisa Coda Zabetta had both worked for the Commission, the former in Luxembourg since September 1962 and the latter in Brussels since September 1965, when they were assigned as secretaries to the Information Office in Rome, where they took up their duties early in September 1968.

Relying on an established administrative practice of leaving officials permanently in the same place of employment, they had long assumed that the assignment was to be permanent, in other words that they were to remain in Rome definitively. They reacted immediately, therefore, when they received a circular dated 17 December 1979 signed by the Director-General for Personnel and Administration to the effect that they were to prepare for their return to headquarters, in September 1980 at the

1 — Translated from the German.

latest, in accordance with a decision taken by the Commission on 28 November 1979.

The letter and the decision merely put into effect the rotation system for staff in the Information Offices (Annex V to the application) introduced by the Commission on 24 November 1976. The system provides *inter alia* that the normal length of the initial assignment to an office is to be three years (paragraph 3.2), with the possibility of extending that period exceptionally up to a maximum of six years (paragraph 3.3). At the end of that period officials are then re-assigned to Brussels, one of the provisional headquarters of the Commission or, if they so wish, to another information office or even, as may be seen from the rotation form to be filled in by officials in those offices in 1979, to one of the Commission's external delegations. Their duties are usually taken over by other officials in their grade, as implied by the term "rotation" (paragraphs 1.2 and 2.1).

The rotation system applies to officials in Categories A, B and C, but the Commission provided in its decision of November 1976 for a more flexible procedure in the case of officials in Categories B and C so that in certain circumstances problems relating to the service or difficulties of a personal nature which might arise could be taken into account. From the documents before the Court (Annex VI to the application, p. 14) it appears that officials are exempted from participation in the rotation system if their assignment to an office was made before the decision introducing the system was adopted and either they are aged 55 or over, or their personal, family or social situation stands in the way of their transfer.

The system was originally intended to come into effect on 1 July 1979 at the latest (see the section headed "III — Transitional Period" in the decision of 24 November 1976). However, in view of the activities connected with the election of the European Parliament, the Commission later decided to postpone all rotation decisions until September 1979 (memorandum dated 7 November 1979, Document SEC (79) 1781 p. 3, Annex VII to the application) and the system was not in fact introduced until 1980.

In the rotation forms filled in by the applicants for the transfers to be effected in 1980 both declared that they did not wish to be re-assigned for the personal and family reasons they set out therein. Their cases were considered by the rotation committee created by the decision of 24 November 1976 (paragraph 2.3) when it met on 2 October and 26 November 1979. The committee found that the personal and family reasons put forward by them were not sufficient to warrant their exemption from the system; on the contrary, it included their names in the staff rotation list proposed for 1980. On 28 November the Commission approved the proposal and formally placed the applicants' names on the list; the applicants were informed of this by the Director-General for Personnel and Administration in a circular sent to each of them on 17 December 1979.

As the Director-General had announced in his letter, the rotation procedure followed its course with a notice in the Staff Courier of 25 January 1980 inviting applications for the vacant posts of Miss Carbognani and Miss Coda Zabetta as "Italian-speaking Secretaries (Grade C)" in the Information Office in Rome.

At the same time the applicants endeavoured to have implementation of the Commission's decision in their cases stopped or at least postponed. On 16 January 1980 Miss Coda Zabetta drew the attention of the authorities to her case by means of a letter to the Commission's Spokesman and Director for Information; the latter replied that the details of her personal and family circumstances had been known to the rotation committee when it examined her case and made its proposal. On 12 March 1980 the applicants submitted complaints under Article 90 (2) of the Staff Regulations of Officials against the decision of 28 November 1979 contained in the circular of 17 December 1979.

Without waiting for a reply to those complaints or the expiry of the period allowed for such a reply in the Staff Regulations, the applicants brought the present actions on 11 July 1980 under Article 91 (4) of the Staff Regulations, accompanying the applications with requests for the suspension of the execution of the decision of 28 November 1979 communicated to them in the letter of 17 December 1979.

In an order of 31 July 1980 the Judge acting as President of the Court of Justice declared that in the light of the Commission's written observations and the submissions of the parties in the oral procedure which had taken place that day it was not necessary to adjudicate upon the applications for the adoption of interim measures as the Commission did not intend to take any action on the intention evinced in the letters of 17 December 1979 until it had adopted formal "re-assignment decisions" with regard to the applicants which would allow reasonable periods for their implementation. That same day, in the evening, the Head of the Management and Organization Department adopted the said formal decisions in his capacity as appointing authority for the re-assignment of officials in Categories C and D together with their posts (Annex VIII to the Commission's observations on the first application for the adoption of interim measures). By means of those decisions the applicants were re-assigned together with their posts with effect from 1 January 1981. They were immediately informed thereof by telex.

The express decision rejecting the applicants' complaints of 12 March 1980 was issued subsequently and notified to them on 3 September 1980, that is to say *after* expiry of the time-limit, as happens only too often.

A complaint under Article 90 of the Staff Regulations against the decisions of 31 July 1980 was submitted by the applicants on 20 October 1980, that is to say, after they had lodged their reply on 16 October and only a few days before the expiry of the three-month period allowed for submitting complaints under Article 90 (2).

Finally, on 5 December 1980 the applicants lodged a second application for the adoption of interim measures, again requesting the suspension of their transfer from Rome to Brussels. They withdrew the application, however, on 17 December 1980, after the Com-

mission had in the meantime stated that it was prepared to allow them a further postponement until 1 April 1981 at the latest. The granting of this additional postponement was founded on the fact that the rotation system had only recently come into operation and on the hope that the action would soon proceed to judgment.

I — The first question to be dealt with concerns the admissibility of the applications.

1. In its observations on the first applications for the adoption of interim measures the Commission submitted that the applications were inadmissible because at the time when they were lodged no formal decision had yet been taken with regard to the applicants' change of assignment. The letters of 17 December 1979 from the Director-General for Personnel and Administration and the notice in the Staff Courier of 25 January 1980 inviting applications to fill the applicants' posts in Rome were merely preparatory measures and were therefore not capable of adversely affecting the applicants.

In its defence to the main applications, however, the Commission left this question to the discretion of the Court. On that occasion it took the view that it would be excessively formalistic to require the applicants to lodge complaints against the formal decisions of 31 July 1980 re-assigning them when the Commission had already given its views on all aspects of the problem in its decisions rejecting the complaints lodged by the applicants prior to the adoption of the formal decisions, so that its reply to complaints directed against the latter could only have identical import.

2. I have no hesitation in holding the applications to be admissible.

(a) Let me say, first, that I share the Commission's point of view. Too slavish an adherence to the letter of the Rules of Procedure would have purely dilatory effects here which would obstruct the proper course of the proceedings.

(b) Next, it is quite clear that the *cause* of the dispute lies in the decision concerning the transfer of Miss Carbognani and Miss Coda Zabetta from Rome to Brussels. *That* decision, however, was clearly not taken by the Head of the Management and Organization Department on 31 July 1980, but by the Commission itself on 28 November 1979 on a proposal of the rotation committee. It was the Commission itself which, acting on its decision of 24 November 1976 introducing the rotation system, drew up the list of officials to be transferred in 1980, a list which included the applicants. Even if there is no doubt that the letters of 17 December 1979 from the Director-General for Personnel and Administration and the notices published in the Staff Courier of 25 January 1980 were measures in preparation for the adoption of formal decisions, yet they are in my opinion primarily to be regarded as measures intended to *implement* the basic *decision* to transfer the applicants taken by the Commission itself.

In my view, that applies equally to the formal re-assignment decisions taken on 31 July 1980 by the Head of the Management and Organization Department in his capacity as appointing authority for the re-assignment of officials in Categories C and D, together

with their posts, which the Commission originally considered to be the only measures which could be regarded as adversely affecting the applicants. The authority held by the official who adopted those measures is undoubtedly an authority to *implement*, a fact which was expressly confirmed to us by the Commission's representatives in the course of the oral procedure. The scope of his discretion is restricted to determining the date on which the Commission's decisions are to be put into effect, doubtless after consultation with the departments in which the officials recalled to Brussels are to take up their duties, and to deferring their implementation where necessary. In this instance he allowed the applicants such a deferment on two occasions and might perhaps grant Miss Coda Zabetta a further postponement, if that is compatible with the proper functioning of the service to which she is to be assigned in Brussels, so that her young son need not change schools in the course of the school year. However, he cannot on his own authority make alterations to the list of officials whose posting is to be changed by rotation. Only the Commission itself has such a power, and perhaps the Court of Justice also, should it uphold the complaint against the rotation decision.

I am therefore of the opinion that the Commission's original decision to alter the posting of an official under the rotation system must be regarded as a measure adversely affecting that official for the purposes of a complaint against a decision made within the framework of the rotation system, but that a measure which is taken in order to implement that decision and which may only regulate the details thereof cannot be so regarded.

(c) I think that interpretation is further supported by the fact that the decision of 28 November 1979 is not expressly referred to in the application. The latter in fact seeks the annulment of "... the decisions notified on 17 December 1979 whereby the Commission declared the applicants' posts in the Information Office in Rome vacant and ordered the transfer of the applicants to Brussels". It is not difficult to realize that when the applicants speak of "the decisions notified on 17 December 1979" in the letters from the Director-General for Personnel and Administration they refer primarily to the Commission's decision of 28 November 1979 including the applicants' names on the list of officials recalled to Brussels from the information offices under the rotation system.

3. Even if the Court does not share the view that the Commission's decision constitutes the measure adversely affecting the officials, I consider that the applications are still admissible on another ground.

In my opinion on Case 17/78 *Deshormes* [1979] ECR 297, I expressed the view, taken from German civil service law, that an official of the Communities has an interest in bringing an action where he has "a right to future enjoyment, the substance of which cannot simply be encroached upon even though certain details may still be altered ...". In its judgment of 1 February 1979 in that case the Court (Second Chamber) likewise took the view that it may in certain circumstances be assumed that an administrative act "immediately and

directly affects the legal situation of the person concerned even if that act is to be implemented only subsequently " ([1979] ECR 189 at p. 197, paragraph 10 of the decision).

In my opinion that statement of the law should be applied in the present instances. I think that the applicants had "a legitimate, present, vested ... interest" *(Deshormes,* paragraph 12 of the decision) in challenging the Commission's decision under Articles 90 and 91 of the Staff Regulations as soon as that decision was officially notified to them. Regardless of their prospects of success it was, from the purely legal point of view, not necessary for them first to await the formal decisions on their re-assignment because the authority responsible for issuing them was bound by the decision of a superior authority and therefore legally bound to adopt them.

II — The *first submission* relied on by the applicant divides into two parts of quite different weight. If I understand the applicants' arguments correctly, the essence of their view is that application of the rotation system in their cases is inadmissible because on the one hand it was given retroactive effect and on the other hand it runs counter to the interests of the service and therefore contravenes Article 7 (1) of the Staff Regulations.

1. I should like to begin with a comment on terminology. The applicants constantly refer to their "transfer" from Rome to Brussels. The use of that term is certainly correct if understood in its customary sense, but it does not reflect the precise meaning given to it in the Staff Regulations.

Articles 4, 7 (1) and 29 (1) of the Staff Regulations make it unmistakably clear that transfer implies the existence of a vacant post. A transfer within the meaning of the Staff Regulations cannot be made otherwise than to a vacant post. If no such post exists the moving of an official from one service to another, whether it involves a change of location or not, is termed a change of posting or a re-assignment of the official together with his post. That is what happened in the case of Miss Carbognani and Miss Coda Zabetta.

2. Turning now to the applicants' analysis of the rotation system itself, I find it useful, in order to gain a better understanding of their submissions, to commence with the distinction drawn by them between officials who were assigned to the information offices *after* 24 November 1976 and those who, like themselves, were assigned to them *before* that date.

The applicants concede that application of the rotation system to officials who were assigned to an office after 24 November 1976 is lawful. Such officials were aware of the rotation procedure and therefore accepted that their assignment to an office was for a limited period only. When they applied for an assignment they knew that at the end of a period fixed in principle at three years they would be required to return to headquarters or, if they so wished, to be assigned to another external office of the Commission. In this context I should like to correct what appears to be a misapprehension on the part of the applicants. The rotation system does not imply that an official is to change his place of

residence every three years; officials who were previously assigned to an office are subsequently re-assigned to another office or to a different external department, instead of returning to headquarters, only at their express wish. The result of what was said above is that, in the opinion of the applicants, the transfer — or more precisely the re-assignment — of officials who are in such a position must be deemed to be effected with their consent. Their legal position is said to be based on Article 7 of the Staff Regulations, the scope of which is restricted to transfers which are made with the consent of the officials concerned and which are required in the interests of the service. The applicants concede that the introduction of a rotation system as far as officials assigned after 24 November 1976 are concerned may, in general, be regarded as being in the interests of the service.

But the applicants say that the situation of officials who, like themselves, were assigned to an office *before* 24 November 1976 is quite different. To change their posting is unlawful simply because its effect is *retroactive.* Like the Commission, I find that argument difficult to follow. It is hard to see how the application in 1980 of a system which was introduced in 1976 can amount to a retroactive legal act.

3. The applicants further object to their change of posting on the ground that it was decided upon *against their wishes.* They argue that since the rotation system was not yet in existence when they were assigned to the office in Rome they could not of course have consented at the time, even tacitly, to its application to them. Having been thus forced upon them, the change of assignment could no longer have any legal basis. In the opinion of the applicants a change of assignment is in principle allowed under the system of rules embodied in the Staff Regulations only with the consent of those concerned. There are only two exceptions to this, which do not apply in their cases, namely transfer as a disciplinary measure and re-posting, the latter being a transfer of the official necessitated by the abolition of post or office.

(a) The first point to be made with regard to those observations is that under the rules governing the employment of Community officials, which in this respect follow the practice of all the other systems governing the relationship between an administration and its officials known to me, the consent of the official is not an essential pre-condition for the lawfulness of an alteration in his assignment. That does not mean that re-assignment is subject to the whim of the authorities. But it is dependent on certain material requirements, to which I shall return shortly. The consent of the official concerned is not, however, one of those requirements. As the Commission correctly observed, that is a consequence of the fact that "the legal link between an official and the administration is based upon the the Staff Regulations and not upon a contract" (judgment of the Court of Justice (Second Chamber) of 19 March 1975 in Case 28/74 *Gillet* v *Commission* [1975] ECR 463 at p. 472, paragraph 4 of the decision). Whilst relationships governed by classical

employment law are based on a contract between the employer and his employee, the terms of which may in principle be altered only with the consent of both parties, "the administration is . . . entitled at any time to amend the provisions of the [Staff] Regulations in any way which it considers in accordance with the interests of the service" (Opinion of Mr Advocate General H. Mayras in Joined Cases 177/73 and 5/74 and Case 10/74 *Reinarz* v *Commission* [1974] ECR 831 at p. 834).

The decision of 24 November 1976 leads one to conclude that the rotation system does not represent an exception to that rule. On the contrary, the special implementing provisions regarding officials in Categories B and C state that the latter are exempted "if they are aged 55 or over, or if their personal, family or social situation stands in the way of their transfer". The use of the word "exempted" shows clearly that whilst officials who meet the conditions I have set out cannot be compelled to undergo re-assignment under the rotation system, all those who do not fulfil those conditions are not exempt from the scheme and accordingly may be transferred together with their posts without their consent being required.

(b) A further consequence of the fact that the applicants are subject to the Staff Regulations is that they have no claim, based on their having been assigned to an office before the introduction of the rotation system, to maintenance of the rules which were in force at the time of their assignement. It is true that the law governing Community officials recognizes the right to the maintenance in force of certain earlier provisions in favour of certain officials, as for example the method of calculating pensions for officials who were engaged before the entry into force of the Staff Regulations of Officials of the ECSC in 1956. However, such examples are merely exeptions whereby the legislative body has expressly agreed to preserve the rules. That cannot be the general rule, for as Professor Weil, whom the Commission rightly quoted, observes, recognition "of a vested right to the maintenance of the rules in force at the time of recruitment would lead to a multiplicity of rules, which would ill serve the requirements of good administration, for ultimately there would then be as many rules to apply as people who had entered the service at various points in time" (La nature du lien de fonction publique dans les organisations internationales, Revue Générale de Droit International Public 1963, p. 274).

4. Lastly, the applicants allege that the Commission exceeded its powers by using the rotation system to alter, without having been empowered to do so, the first subparagraph of Article 7 (1) of the Staff Regulations, a provision which was adopted by an institution with superior authority in the matter, namely, the Council.

At this point I should like to say, first, that the first subparagraph of Article 7 (1) of the Staff Regulations, under which the legality of a transfer is subject to its having been made in the interests of the service, does not really furnish a suitable foundation in law for the present case. As the Commission has explained, that article is one of the group of provisions on the basis of which it must be concluded that a transfer under the Staff

Regulations presupposes the existence of a vacant post. As that is not the case here, that provision cannot be relied on. But the principle that is expressed therein, to wit that any re-assignment is unlawful unless it is made in the interests of the service, undoubtedly reflects a general principle common to the law governing Community officials and the law applicable to national civil servants. The Court must therefore, I believe, take this submission of the applicants to be that the rotation system does not correspond in their eyes to the interests of the service.

The Commision does not dispute the fact that regard for the interests of the service constitutes one of the restrictions on the broad discretionary powers which decisions of the Court have recognized it to have as far as the organization of its services is concerned; the rotation procedure is also, despite the applicants' view to the contrary, undoubtedly a procedure relating to the organization of the Commissions's services. When contemplating a transfer, and likewise a change of assignment or a re-assignment with the same post, the Commission must have regard to the following requirements:

(i) the interests of the service must be satisfied;

(ii) there must be no misuse of powers, and

(iii) the rights enjoyed by every official under the Staff Regulations must be protected, namely the right to the maintenance of salary and the right to be assigned to a post corresponding to the official's grade.

As to that last requirement, I should like to make it clear that it comprises not only the general duty to assign the official to a post in his category and grade, but also the more specific duty to assign him to a sphere of activity which reflects his grade and which is described in the list of basic posts and corresponding career brackets set out in Annex I A to the Staff Regulations (judgment of the Court (Third Chamber) of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 13 of the decision).

I think that two further requirements to be found in the above-mentioned *Kuhner* decision should be added to the conditions. When the administration is contemplating the transfer of one of its officials it has a duty to ensure that regard is had not only to the interest of the service but also to the interests of the official, a requirement which is known in German civil service law as the "Fürsorgepflicht" [duty to have regard to the interests of officials] (paragraph 22 of the decision in the *Kuhner* judgment). In so far as a decision concerning re-assignment might cause serious detriment to the interests of the official concerned the general principle of good administration requires that, unless exceptional circumstances exist, the official be given an opportunity to state his views (paragraph 25 of the decision in the *Kuhner* judgment). It may be assumed that in certain cases a re-assignment is capable of seriously prejudicing the interests of an official, especially if it requires a major change of location.

In the present instance the applicants have expressly pleaded only a breach of the requirement that the interests of the service be satisfied. They perceive such a

breach not only in the fact that the Commission has no power to alter the provision which, as we have seen, contains that requirement, but also in other respects.

Thus they claim that it is not sufficient for the administration to rely on the interests of the service in general in order to make the re-assignment lawful. It must go further than that and indicate in what precisely those interests consist, and also that they are of sufficient importance in comparison with the interests of the official concerned which is thereby prejudiced. By postulating that last-mentioned requirement the applicants refer, without expressly naming it, to the duty to have regard to the interests of officials, the scope of which was defined by the Court of Justice in the *Kuhner* judgment. There would in fact be a breach of that duty if a re-assignment were of very minor importance for the administration but had grave consequences for the officials who were the victims thereof.

I think this is precisely the position as regards the system in question, at least in certain circumstances. As has been generally agreed, it is in the interests of the service for the rotation procedure to be periodically applied in the case of officials in Category A who have executive responsibility, and especially the heads of information offices. One might likewise go so far as to say that, in view of the discretion enjoyed by the administration in organizing its services the rotation system may also apply in principle to officials in Category B, including senior secretarial assistants, because of the independence required of them in carrying out their duties. However, I cannot conceive how it can be in the interests of the service to extend a system as cumbersome in form and stringent in terms as the rotation system to clerical officials in Category C such as secretaries. *In the absence of any interest of the service I consider the applicants' first submission well founded.*

It is, in my view, equally well founded if one compares, on the one hand, the absence of any interest on the part of the administration in applying the rotation system to the applicants and, on the other hand, the latters' interest in resisting its application. Even if a transfer from one country to another cannot be viewed as an unusual and unforeseeable incident in the career of Community officials it is understandable that it may cause considerable difficulties of a personal and human nature, such as those which have been described by Miss Carbognani and Miss Coda Zabetta (Annex IV to their applications) and into which I do not wish to enter more deeply here for the sake of discretion. In this context it is clearly not without significance that the applicants were assigned to the office in Rome more than ten years ago and that they assumed — incorrectly, but on the basis of a consistent administrative practice which has not been denied by the Commission — that the assignment was to be permanent. In these circumstances I consider that the decision to apply the rotation system to the applicants in 1980 constituted a breach of the administration's duty to have regard to their interests.

III — In *their second submission* the applicants allege that there has been an infringement of the second paragraph of Article 25 of the Staff Regulations which

states that "any decision adversely affecting an official shall state the grounds on which it is based". Those grounds must, I would add, be given *in detail.* In the opinion of the applicants the statement of grounds contained in the letter of 17 December 1979 from the Director-General for Personnel and Administration and in the invitation for applications published in the Staff Courier of 25 January 1980, to the effect that the measures were adopted in order to implement the rotation system, is inadequate.

The fact that those documents do not represent measures adversely affecting the officials does not in my opinion constitute an obstacle, for the Commission's original decision of 14 November 1979, to which I attribute just that character, contained the same statement of reasons as those documents, which constitute measures for the implementation of that decision. It could not be otherwise, for, as we have seen, that decision, whereby the list of staff movements between headquarters and the various offices for 1980 was drawn up, was the first decision concerning implementation of the rotation system.

In my view this submission divides essentially into three parts.

1. As to the first complaint made here against the disputed decision, the applicants reiterate their view that application of the rotation system in their case is being made retroactively. But there was no provision for such retroactive application in the Commission's decision of 24 November 1976 introducing the system. Therefore, according to the applicants, the decision in which the rotation system is given as justification for their transfer is incorrectly grounded.

It is clear that this argument is constructed on false premises. As I have already maintained, the application in 1980 of a decision issued in 1976 cannot be described as retroactive without distorting the meaning of the word.

2. The second part of the submission based on an inadequate statement of reasons appears to me to be well founded. As I have already said, the decision of 24 November 1976 established "the principle of rotation for B and C staff with a measure of greater flexibility to allow for any problems relating to the service or difficulties of a personal nature which might arise".

The more flexible rules for the application of the system consist, as we have already seen, in not applying the rotation procedure in the case of officials in Categories B and C if their assignment was made prior to the decision of November 1976, provided also that they are aged 55 years or over or their personal, family or social situation stands in the way of such a transfer. It was on the basis of those criteria that in 1980 rotation was deferred on personal grounds in the case of 22 officials in Categories B and C who had been assigned to offices prior to the implementation of the decision of November 1976; three of them had been assigned to the office in Rome.

Miss Carbognani and Miss Coda Zabetta, officials in Category C, also sought a deferment and stated the reasons of a personal and family nature which they considered warranted such a deferment. It is apparent from the documents in the case that the

administration was aware of those reasons but considered them to be insufficient. In the case of Miss Coda Zabetta that is expressly stated in the letter of 7 February 1980 from the Spokesman and the Director General for Information (see Annex V to her application) and in the case of Miss Carbognani it may be implied from her inclusion in the rotation movements by the rotation committee (see the memorandum of 7 November 1979 from Mr Tugendhat to the Commission, Annex VI to her application).

The applicants complain, however, that the Commission failed to indicate why it considered those reasons inadequate and so refused the applicants, in contrast to the procedure in the case of 22 other officials, the deferment of rotation which they sought. The applicants do not thereby imply, as the Commission concluded, that it was bound to support the staff movements it had decided upon with a statement of reasons comprising a comparison between the personal grounds advanced by the applicants and the grounds put forward by the other officials of the same category employed in Rome who had been granted a deferment of the rotation measures affecting them.

They do, however, consider that the Commission had a duty to state the general criteria on the basis of which it proceeded to make its selection of those officials who were granted a deferment of the rotation measures, thereby indicating what kind of personal, family or social situation was recognized as sufficient to warrant deferment of the rotation measures. That is essential in order to enable them to decide, and the Court to judge, whether such criteria are appropriate and whether they were properly applied in the case of the applicants.

That conclusion is, in my view, in line with the Court's recent ruling that "the purpose of a duty to state the grounds on which a decision is based is both to permit the official concerned to determine whether the decision is defective making it possible for its legality to be challenged and to enable it to be reviewed by the Court" (last sentence of paragraph 15 of the decision in the *Kuhner* judgment, cited above).

In the same judgment the Court further stated that in deciding whether a requirement to state reasons has been satisfied "it is advisable ... to take into consideration not only the document giving notice of this decision but also the circumstances in which it was taken and brought to the knowledge of the official concerned as well as the departmental memoranda and other communications underlying it which have clearly given the applicant information as to the grounds and basis of the said decision" (second sentence of paragraph 15 of the decision).

Thus was extended, in the case of a re-assignment, without an alteration of residence within the Statistical Office, the formula applied earlier in a case similar to the present one, where a Scientific Officer challenged this transfer from the Joint Research Centre's establishment at Petten (in the Netherlands) to its establishement at Ispra (in Italy). In that case it was held that: "For the purpose of deciding whether the requirements of Article 25 have or have not been fulfilled, it is necessary to consider not only the transfer decision in itself but the staff memoranda on which it is based which were duly brought to the knowledge of the applicant and which clearly informed

him of the reasons on which that decision was based" (judgment of the Court (Second Chamber) of 14 July 1977 in Case 61/76 *Geist* v *Commission* [1977] ECR 1419, at p. 1432, paragraph 23 of the decision).

If the formula outlined in *Kuhner* judgment is applied to the case of Miss Carbognani and Miss Coda Zabetta I think that the circumstances which were brought to their notice were not sufficiently informative. It appears from the documents before the Court that for general information they could have recourse to the Commission's decision on the introduction of the rotation system (Annex V to the application in Case 161/80) and the memorandum of 7 November 1979 which explained the methods for implementing that decision in the case of officials in Categories B and C (Annex VI to the application in Case 161/80). The only document of special relevance to her particular case presented by Miss Coda Zabetta is the letter from her Director-General in which it was stated that the rotation committee was aware of her personal situation when it issued its proposal, whilst in Miss Carbognani's case all that can be deduced from the memorandum of 7 November 1979 is that the personal reasons put forward by her were not considered sufficient to waarant granting her the deferment she sought.

Admittedly it seems inappropriate to state in a re-assignment decision the precise circumstances in the official's situation which did or did not entitle him to deferment of the rotation measure, something which might indeed be embarrassing both for him and for his colleagues. In that respect I support the extension suggested by the Commission of the Court's *dicta* on promotion (judgment of the Court (First Chamber) of 13 July 1972 in Case 90/71 *Bernardi* v *Parliament* [1972] ECR 603, at p. 609, paragraph 15 of the decision).

Nevertheless, I believe that it is still necessary to make known the general criteria to be observed by the rotation committee when assessing the "personal, family or social situation" in order to decide whether or not to grant a deferment. Those criteria having remained secret I think that the applicants were not able to judge, and the Court is not able to review, whether their situation was assessed "objectively and without any arbitrariness", to use the words which I employed in my Opinion of 7 February 1980 in Case 89/79 (*Bonu* v *Council* [1980] ECR 553 at p. 568). The requirement of secrecy, which is of course important in decisions such as those which are at present under discussion, must not go so far as to preclude judicial review.

I do not believe that my argument can be countered with the claim that the Commission is free to transfer the officials employed in its information offices without the aid of the rotation system, the interest of the service being a sufficient basis and reason therefor, and that, since it was unnecessary to give a statement of reasons, the inadequacy of the reasons given is not relevant. On the contrary, my view is that *if the Commission adopted a decision originally on the basis of the rotation system it must make it possible for the officials affected thereby to ascertain whether application of the system in their case is consistent with the criteria laid down by the Commission itself.*

3. In their reply the applicants submitted further that the reasons given for the decisions affecting them were defective in another respect; this point was treated by them in the course of the oral procedure as a new issue.

(a) They contrast two facts. Their re-assignment was decided upon as part of the rotation system, which presupposed that the activities of each official who was transferred would be taken over by another; yet they were not replaced in the Information Office in Rome. They conclude from that that the grounds which were given for the transfer were incorrect.

The Commission submits in its rejoinder that the reasons which were given when the list of officials to be affected by the rotation system in 1980 was drawn up on 14 November 1979 were correct; subsequently, however, the appointing authority had come to the conclusion that the interest of the service required that the applicants should not be replaced. A comparison of the Information Office in Rome with that in Bonn revealed in fact that, whilst the number of officials in Categories A and B was similar (9 in Bonn, 8 in Rome), the number of secretaries in Rome (14) was almost three times the number of those in Bonn (5). The Commission therefore concludes that the reasons originally given for a decision are not to be considered incorrect merely because a further reason, based on the interests of the service, is added to them.

(b) Discussion of this point took a different turn in the course of the oral procedure when it was submitted on behalf of the applicants that the rejoinder had brought to light the true reason for the decision taken with respect to them, namely the reduction of the number of secretaries in the Information Office in Rome. Thus in using the rotation procedure to effect a simple transfer, thereby applying its powers for a purpose other than that for which they had been conferred upon it, the Commission is alleged to have committed a clear misuse of powers. That gives rise to a third ground of challenge, which the applicants say may be relied upon pursuant to the first subparagraph of Article 42 (2) of the Rules of Procedure, since it came to light only later.

In my opinion that cannot be accepted: it is merely a question of an attempt to give a different classification to a procedure which was already known to the applicants beforehand. Counsel for the Commission had already mentioned, in the course of the oral procedure in the application for the adoption of interim measures on 31 July 1980, that is to say before the defence was lodged, the fact that there were too many secretaries in the Rome office and indicated that the Commission contemplated assigning two of them to a branch office thereof which is to be opened in Milan. Besides, I think it is clear from the content of this allegedly new issue that it merely takes up once more the argument in the reply which I have just outlined.

(c) Those considerations do not relieve us, however, of the necessity to examine that argument in its original form. After some hesitation I have come to the conclusion that it is not well founded.

Of course it must be accepted that the use of the term "rotation" to describe the system in question is not entirely

correct; it implies that officials from the offices concerned are, in principle, to be replaced. That also seems to be the tenor of the provisions of the decision introducing the system which emphasize the need to ensure continuity in the service (see I: Purpose of the Rotation System; II: Application of the Rotation System, paragraph 2.1), especially the provision that officials employed at the Commission's other locations, particularly Brussels, be informed as to the opportunities for transfer to the information offices in order to enable them to submit their applications within the context of the rotation system (see II: Application of the Rotation System, paragraph 1.2). If one reads them carefully, however, those provisions do not say that every official assigned or re-assigned to Brussels must be replaced, if the administration finds that the duties for which he was responsible can be assumed by colleagues who remain on the spot.

Naturally, it would be logical to assume that if the administration has taken the first steps in a procedure for transfer by means of rotation, by informing officials of their change of assignment and publishing invitation for applications to succeed them, it will continue the procedure to its end. However, if it decides in the meantime that it would be preferable not to replace the officials I do not think it can be reproached for doing so as it would be equally within its powers to re-assign the superfluous officials without recourse to the rotation system, solely on the basis of the interests of the service (judgment of the Court (First Chamber) of 11 July 1968 in Case 16/67 *Labeyrie* v *Commission* [1968] ECR 293, at p. 302 et seq; judgment of the Court (First Chamber) of 16 June 1971, *Vistosi* v *Commission* [1971] ECR 535, at p. 542, paragraph 14 of the decision; judgment of the Court (Second Chamber) of 14 July 1977, *Geist* v *Commission* [1977] ECR 1419, at p. 1434, paragraph 38 of the decision). In the case of Miss Carbognani and Miss Coda Zabetta I am of the opinion that the information supplied by the Commission sufficiently explains the interests of the service.

IV — In conclusion I propose, for the reasons explained in Sections II and III.2 above, that the Court:

— Annul, in so far as it concerns Miss Carbognani and Miss Coda Zabetta, the Commission's decision of 28 November 1979 adopting the list of officials in its information offices to be included in the rotation system in 1980;

— Order the Commission to pay the costs of the action in accordance with Article 69 (2) of the Rules of Procedure.