2. Orders the parties to bear their own costs.

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 4 February 1970.

A. Van Houtte
Registrar

R. Monaco
President o Ithe First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 3 DECEMBER 1969[1]

Mr President,
Members of the Court,

The case upon which I have to give my opinion today is connected with Case 35/67. In respect of the main points I can therefore refer to the facts of that case and have therefore only to mention briefly the following:

As you know, after conducting formal disciplinary proceedings the Euratom Commission decided on 4 July 1967 to remove the applicant from his post as from 1 August 1967. That decision was annulled by the judgment of the Court of 11 July 1968 on the ground that the Commission could not delegate one of its officials to hold the final hearing of the applicant provided for by the third paragraph of Article 7 of Annex IX to the Staff Regulations. It was consequently clear that the applicant remained in the service of the Communities. By letter of 20 July 1968, the applicant stated that he was available to serve the new single Commission which had been formed in the meanwhile. However the applicant was not actually reinstated. By letter of 1 August 1968 the Commission informed him first of all that the question of his reinstatement was being examined and that he could apply for leave on personal grounds or possibly take the annual leave to which he was entitled. After the applicant had replied by letter of 12 August 1968 in which he stated again that he held himself at the disposal of the Commission with a view to taking up active service again, he was invited by letter from the Directorate General of Personnel and Administration dated 20 September 1968 to a meeting during which the various aspects of his administrative situation were considered. The meeting was held on 3 October 1968. It remained however without result, since according to the undisputed statement of the applicant the only advice given to him, which he did not accept, was to resign *voluntarily* from the service. Later in accordance with the judgment of the Court of 11 July 1968 the Commission by a decision of 13 November 1968 entrusted three of its members to conduct the hearing required by Article 7 of Annex IX to the Staff Regulations. The hearing should have taken place on 10 December 1968 in Brussels. Although he received in good time the letter of 20 November 1968 calling upon him to attend, the applicant did not comply with the summons. He confined himself instead to stating in a letter of 6 December 1968 that because of circumstances he had nothing to say except to reserve his position. That situation led the Commission on 18 December 1968 to adopt a decision terminating the disciplinary proceedings without having heard the applicant. Taking account

1 — Translated from the German.

of the opinion of the Disciplinary Board of 23 June 1967, it decided again to remove the applicant from his post, that decision to become effective as from 1 January 1969. According to the applicant, the decision was notified to him on 24 December 1968. He therefore made a new application to the Court on 10 March 1969, and commenced the present proceedings.

In his application the applicant claims that the Court should:

(1) Annul the decision of 18 December 1968;

(2) Hold that he is entitled to the salary and all other allowances attaching to the position of an official of the Communities as from 1 January 1969;

(3) Hold that the Commission is required to reimburse him the costs occasioned by the disciplinary proceedings and order it to pay him under this head a sum of 25 000 FB;

(4) Hold that the contested decision constitutes a wrongful act or omission and order the Commission under this head to pay him damages, the amount of which is left to the discretion of the Court.

The Commission considers, for its part, that the conclusions of the applicant are unfounded and that they must consequently be dismissed.

When we now consider what conclusions to reach on these submissions it seems appropriate to divide our examination into sections and to consider first the main burden of the applicant's argument, namely whether the decision to remove him from his post is legal.

I — On removal of the applicant from his post

The applicant considers for various reasons that the disciplinary measure which was taken on 18 December 1968 in respect of him is illegal.

1. The argument which he bases upon the provisions governing the conduct of the disciplinary proceedings has, in his eyes, a particular importance. As you know the third paragraph of Article 7 of Annex IX to the Staff Regulations provides that the appointing authority shall take its decision within one month, after receiving notification of the opinion of the Disciplinary Board. The applicant considers that this is a provision which must be construed *strictly*, and therefore one which lays down a period of limitation comparable to those which apply to the institution of proceedings before a court. Disciplinary decisions can no longer be taken once this period has expired and those which have been taken in these circumstances must be declared void. This also has the effect of invalidating the whole of the disciplinary proceedings including the opinion of the Disciplinary Board. In the present case such a result is inevitable, since the said period of one month began to run either on 26 June 1967 (the date of the notification of the opinion of the Disciplinary Board to the Commission) or on 15 July 1968 (the date of the notification of the judgment of 11 July 1968 of the Court of Justice concerning the first disciplinary decision).

There is thus no doubt that we are faced with a very difficult problem.

The interests involved themselves constitute a source of difficulties. It must be accepted on the one hand that officials who are involved in disciplinary proceedings have the legitimate right to have the proceedings terminated as rapidly as possible. I have already emphasized that in my opinion in Joined Cases 18 and 35/65 [1966] ECR 103 and it appears clearly from the various periods stipulated in Article 7 of Annex IX to the Staff Regulations. On the other hand it must also be accepted that the period of one month mentioned by the applicant may cause considerable difficulty to the appointing authority and particularly to the Commission which is the appointing authority for officials in Category A. It is within this period that the person concerned must be heard, which requires certain preparations which are also of a technical nature; it is necessary, further, in connexion with the hearing, to conform to a certain time-limit for the purpose of inviting the applicant to appear when, as is the situation in the present case, he is not actively employed with the Commission. Thereafter the final decision has to be taken, often on an extensive range of facts and after difficult

evaluations. All that must, further, be carried out at the same time as a programme of work the extent of which, it may be said, above all in the case of the Commission, is always considerable. It should therefore not be a matter of surprise that the Commission inclines to the view that the term laid down in Article 7 cannot be mandatory.
I must admit, further, that it is hardly possible to resolve our problem by the comparative study of similar rules. That applies in the first place to the remarks I made in the Gutmann case [1966] ECR 103 concerning the time-limit under Article 88 of the Staff Regulations. One would find on reading them that I said nothing concerning the nature of the period applicable to a measure suspending an official and that I confined myself to stating that the expiration of this period would not exclude *investigatory* measures, that is, measures which do not relate to the suspension itself. One cannot consequently use arguments based on that passage in the present case.
In *national* law a series of provisions appears at first sight to support the argument of the Commission that the period laid down in Article 7 of Annex IX to the Staff Regulations is an ordinary term which is not of strict application. In fact as a general proposition one may regard time-limits applicable under national law to the actions of administrative authorities or judicial bodies as being non-mandatory or so-called 'apparent' time-limits (uneigentliche Fristen) and only very rarely as periods of limitation. I would refer on this subject to the 'Traité élementaire de droit administratif' by André de Laubadère (3rd Edition, Vol I, No 460). In a comparative study the Commission arrived at similar conclusions as regards criminal law, which is related to disciplinary law (p. 8 of the statement of defence). Concerning disciplinary law properly so-called, one arrives at an analogous finding by studying German law which on this point is strongly formalistic in character as I have already emphasized. According to paragraph 66 of the Bundesdisziplinarordnung, the charge must in fact be notified to the official concerned within a period of six months from the notification of the measure initiating the proceedings. However the legislature has stipulated expressly that failure to comply with this term shall not automatically bring the proceedings to an end and that, on the contrary, the proceedings shall only be terminated by the Federal Disciplinary Court (Bundesdisziplinargericht) after it has set a new time-limit and found that there has been undue delay in conducting the proceedings. Lastly we may also refer, as the Commission has done, to Italian law which provides *expressly*, in case of expiry of a particular period, that disciplinary proceedings cannot be re-opened (see Article 119 of the 'Testo unico delle disposizioni concernenti lo statuto degli impiegati civili dello Stato' — Decree No 3 of the President of the Republic of 10 January 1967).
These considerations could in fact lead to the conclusion that the term applicable under our disciplinary law in the present case is not a strict period of limitation. It appears to me however doubtful that the considerations set out above are of compelling force.
First it must not be forgotten that even administrative and judicial authorities may be required to conform to *genuine* periods of limitation and that this depends solely on the question whether 'le texte en question a entendu donner au délai un caractère impératif' ('the provision in question was intended to impart to the period a mandatory character'), as Laubadère states (op. cit.). In order to reply to that question it is necessary first to accept that the examples which the Commission takes from *criminal* law can hardly be regarded as being decisive in the present case. It is in fact frequent in criminal law, and particularly according to the drafting and the reading of judgments, that the actual wording of the applicable provisions indicates that they are not peremptory. Apart from that the interests involved are also different. It would clearly be illogical to exclude decisions given on appeal after the expiration of a certain period of time, given that this would be equivalent to a denial of justice. Further, the fact that there are rules of limitation in criminal law raises the presumption that the time-limits relied upon are strict time-limits.
Concerning the example of Italian law, let us note that it can never by itself justify an argument *a contrario* and that is so because,

to define the character of the time-limit which it has decided to lay down for an administrative authority, the legislature has at its disposal means other than the explicit indication of the legal consequences.

To decide our case, we need thus to keep above all to the actual *wording* of Article 7 of Annex IX to the Staff Regulations. The categorical form which we find therein appears to be fundamental. Article 7 (German version) provides in fact: 'Die Anstellungsbehörde hat ihren Beschluß innerhalb einer Frist von höchstens einem Monat zu fassen'. The unambiguous form of the versions in the other languages corresponds also to that, the French text saying 'dans le délai d'un mois au plus' and the Italian wording for its part 'nel termine massimo di un mese'. To that is added also the fact that the Court has already emphasized in Case 35/67 (Rec. 1968, p. 504) that it is a matter of a 'strict requirement of law'. The fact that it has further stated that no objection can be taken to the procedure before the Disciplinary Board and the opinion of the latter (from which the Commission has properly concluded that it could continue the disciplinary procedure on that basis) provides no argument that the time-limit in Article 7 is purely indicative. The implied finding of the Court of Justice, of which I have spoken, may in fact mean also that after an annulment of the decision of the Commission for formal reasons, thus after the clarification of the disputed question of procedural law, the Commission may so to speak *re-open* the procedure, as also is provided in national law in similar cases (I can refer on this subject to an order of the Bundesverwaltungsgericht (Federal Administrative Court) of 14 March 1957, reproduced in Verwaltungsrechtsprechung, (Reports of Cases before the Administrative Court), Volume 10, No 189). Applying by analogy the principle which was stressed in Case 6/60 (Rec. 1960), one may also argue that in the interpretation of provisions which are clearly intended to protect individual interests, it is necessary to prefer the interpretation which ensures that protection most effectively. But in our case this undeniably means accepting that the period laid down in Article 7 is a strict period of limitation and further that failure to observe it does not justify merely an application for damages (difficult to achieve as a general rule) but involves the *nullity* of the decision taken by the appointing authority.

It would thus appear that it is necessary to accept the conclusion which the main argument of the applicant suggests that we should deduce. The considerations which I have just set out do not however in themselves make this conclusion inescapable.

In fact with regard to the difficulties mentioned at the beginning of my opinion and which the administration may experience in a given case, it is necessary at least to allow proof to be given that for pressing reasons it has not been possible for it to conform to the time-limit fixed by Article 7, that is, it is necessary to consider whether there is a case for the Commission to *restore* the original state of affairs, as is generally possible in the case of accident or of absolute necessity. In this connexion I would recall the following facts. The notification of the Court's judgment, from which one may regard time as having commenced running, was given on 15 July 1968. After that the applicant received a letter from the Commission dated 1 August 1968, in which it was said that the question of his reinstatement was being considered. On 3 October 1968, there was a meeting between the applicant and the Director General of Personnel and Administration, the essential purpose of which was apparently to induce the applicant to resign voluntarily. On 13 November 1968, the Commission entrusted three of its members with hearing the applicant in accordance with Article 7 of Annex IX to the Staff Regulations. That hearing should have been held on 10 December 1968. As the applicant was not present, the decision which is the object of the present application was taken on 18 December 1968. The Commission justifies the fact that it let such a long time pass between the notification of the judgment and the conclusion of the disciplinary procedure by maintaining in essence that the period had begun to run at the beginning of the holidays and that within the framework of the duty of assistance which was incumbent upon it it wished first of all to give its official the possibility of resigning and that further it

was occupied at the time by the restructuring of its administration.

Let us see therefore whether it is possible to justify it because of the fact that its decision was taken only five months after the notification of the judgment of the Court. I will anticipate the reply: it appears that we cannot follow the Commission in its conclusions.

First of all its reference to the holiday period is not satisfactory. It is certain that the Commission cannot defer the disposal of important and urgent matters because of holidays and according to the unequivocal definition of the Staff Regulations decisions on disciplinary matters are important matters. The same applies to the discharge of the duty of assistance which, as the applicant has rightly observed, becomes precisely the reverse when the appointing authority delays too long in concluding disciplinary proceedings. It could be different only in respect of the restructuring of the administrative organization which the Commission was required to make following the merger of the executives. However on this point we find that on 3 October 1968 it had a meeting with the applicant concerned with regularizing his administrative situation. Consequently the administration must already have finished the preparation of the case at that time and the applicant's file must have been ready for the disposal of the matter. The necessary steps for continuing and concluding the disciplinary proceedings could consequently have been taken at the latest, during the following weeks. Even taking an indulgent view it cannot therefore be accepted that this was only done in December 1968.

My conclusion is therefore clear: if the wording of the Staff Regulations is not to lose all meaning, there can in fact be only one conclusion, namely that the Commission did not pursue the disciplinary proceedings commenced against the applicant with the necessary despatch. That requires the annulment of the decision taken in December 1968, in accordance with the request of the applicant. I will consider later the further consequences which follow from this as regards the disciplinary proceedings.

2. But before that, it is necessary again for me to consider the *arguments* relied upon *in the alternative* by the applicant in support of his main conclusions. I feel this to be necessary since the considerations dealt with so far have clearly raised questions which are very delicate and extremely controversial.

(a) The first alternative argument includes several aspects on which a view must be expressed.

The applicant maintains first of all that in reality the Commission made a disguised application of Article 51 of the Staff Regulations, that is, of the provision according to which an official who proves *incompetent* in the performance of his duties may be dismissed. That allegation does not call for a lengthy commentary. The only indication existing on this subject is the penultimate paragraph of the grounds of the decision. It is said there that there is no prospect of the applicant's making a useful contribution to the work of the Commission in future. On closer inspection, however, it is apparent that the Commission in so saying referred to the *reprehensible* conduct of the applicant in the past which is mentioned in the previous paragraph. From this it concluded that it did not appear appropriate to inflict a less severe *disciplinary* penalty as the Disciplinary Board had suggested. For the rest the fact that this is in fact a *disciplinary* decision appears equally from the fact that in Case 35/67 the Court of Justice expressly stated that the opinion of the Disciplinary Board was free from objection. In view of this it was natural for the Commission to rely upon the complaints mentioned by the Disciplinary Board and to draw from them the possible disciplinary consequences. On the other hand it would have been incomprehensible if, instead of that, it had diverged on to the provisions of Article 51 (to which, furthermore, the same rules of procedure apply as for disciplinary decisions). There is therefore certainly no reason to speak of a misuse of procedure.

In another submission the applicant maintains that the Commission based a serious disciplinary measure on considerations of *expediency*. He relies in this respect upon a phrase in the grounds of the decision

where it is said that it was not expedient only to impose the lighter measure suggested by the Disciplinary Board. I cannot follow the applicant upon this point either. The whole context of the grounds of the decision shows in fact how that passage must be understood. It was clearly a matter of arriving at a judgment on the question whether it was appropriate to give the applicant the opportunity recommended by the Disciplinary Board, taking account of the past behaviour of the applicant (more exactly, of the finding that he had not shown any initiative in the Library Department and that he had even refused to carry out his duties). This the Commission, in its wholly independent evaluation of the applicant's behaviour, could not accept and it accordingly came to the view that the most severe disciplinary punishment was appropriate. The measure imposed on the applicant was not therefore inflicted for reasons of expediency. By using the expression in question, the Commission intended more to *give reasons for* the choice of the penalty inflicted which appeared to it appropriate having regard to the proposal of the Disciplinary Board.

In a third objection the applicant states he was given the opportunity to work for the Commission either before or after the pronouncement of the judgment in Case 35/67, that is to say, to conduct himself in a manner which would have deprived the disciplinary complaint of its substance. In this connexion he again refers to the 'opportunity' which is mentioned in the penultimate recital of the statement of reasons for the decision and of which I have already had occasion to speak.

On this subject it is appropriate to draw the following distinction:

In so far as the applicant relies on the period before the pronouncement *of the said judgment*, there is no doubt that his argument is of no value in the present context. That calls for no commentary on the period *after the previously contested* decision to remove him from his post. That decision was in effect immediately enforceable and it thus deprived the applicant of the possibility of working for the Commission. It is the same in respect of the period *preceding the previously contested decision*, and for the simple reason that today it is necessary to refuse the applicant the possibility of having the evaluation of his behaviour by the Disciplinary Board reviewed with the help of excuses which could have been put forward earlier. Otherwise one would allow, without the requisite conditions being fulfilled, the re-opening of the discussion on the findings of which the Court expressly said in its judgment in Case 35/67 that no objection could be taken.

But it is clear that, when the applicant maintains that he remained without being allocated to a post after the judgment in Case 35/67 annulling the Commission's decision, that argument cannot be dismissed out of hand. The letters of the applicant of 20 July 1968 and of 12 August 1968 which have already been raised in the statement of facts appear to me to prove that he was ready to put himself at the service of the Commission. The clear reserves which the Commission thought it saw in the said letters, in view of another activity accepted meanwhile by the applicant, cannot in my opinion be read into their wording. The Commission did not however re-instate the applicant; it contented itself as it stated with an 'integration to comply with the the regulations' thus essentially with paying his salary. Such a *status* is not provided for in our law relating to officials. It does not moreover appear to me to be proved that during the period in question (I will leave out of account a certain preparatory period) the Commission was prevented for technical administrative reasons from giving to the applicant any appropriate duties whatever. On the other hand I cannot exclude the possibility that the applicant would have fulfilled his new duties in a proper manner if he had been able to re-commence active duties with the Commission. In fact this could have had a bearing upon the evaluation of his behaviour from the disciplinary point of view, because all the facts of the case, including his conduct in the service after he had committed the breaches of duty which were the subject of complaint, are of importance in deciding upon the appropriate disciplinary measure. In that way it would actually be possible to regard the fact that the Commission did not re-instate the applicant after the annulment of the

decision which was the subject of the previous application a further factor confirming the wrongful nature of the decision taken in December 1968. I will nevertheless refrain from enlarging upon these considerations since in my opinion the contested decision must already be annulled for infringement of Article 7 of Annex IX to the Staff Regulations.

(b) I shall speak even more briefly concerning the second alternative argument. The applicant maintains that disciplinary reasons amounted only to a pretext to remove him from his post and that really that measure comes within the framework of the general reduction of the scientific staff of the Euratom Community. There is no doubt that such a serious allegation of mususe of powers requires detailed grounds and the adducing of weighty evidence. The mere presumption that the deplorable situation of Euratom could ultimately also have played in the part in the considerations of the Commission, a situation moreover, for which the Council bears responsibility and not the Commission, is insufficient. As we have not however been able to discover any substantial evidence, that complaint must also be rejected without further ado.

(c) Finally, the applicant, in a third alternative argument, complains that the Commission did not correctly evaluate his conduct in the service of the library at the Nuclear Research Centre at Ispra. That argument refers to a complaint made in the opinion of the Disciplinary Board and in the contested decision that the applicant displayed no initiative and even refused to carry out the duties which devolved upon him.

To the extent to which the applicant here attempts to question the *validity* of the complaints made against him (as he does in several respects) I can be brief. I have already said that in principle it is not possible to do it. What is decisive in this matter is the fact that in Case 35/67 the Court stated expressly that the opinion of the Disciplinary Board must be regarded as lawful (Rec. 1968, p. 503). As the applicant, however, was adduced no proof, even in the present context, throwing doubt upon the findings of the Disciplinary Board which he could not already have relied upon in the previous proceedings, he must accept that his present argument must be disregarded. The scope of the applicant's arguments is however wider. It would appear also to bear upon the evaluation *by the appointing authority* of the conduct established by the Disciplinary Board, and thus upon the manner in which the *degree of punishment was assessed.* In respect of this aspect of the matter I would like first of all to refer to my opinion in Case 35/67 (Rec. 1968, p. 522). I maintained at the time that the disciplinary evaluation of the conduct of an official involves value judgments, the details of which cannot later be reviewed in the course of judicial proceedings. One might, if need be, consider whether looked at as a whole, such an evaluation appeared appropriate and reasonable. I am always ready to accept that idea. In fact I remain convinced that the Court cannot *substitute* its own evaluation for that of the Commission. We are not concerned with proceedings in which the Court has unlimited jurisdiction (pleine jurisdiction). Such jurisdiction was provided for in a *draft* of the Staff Regulations, but it did not become law. It cannot be justified either on the basis of Article 91 of the Staff Regulations, that is to say, by the fact that removal from post is bound up with property rights. Consequently we must confine ourselves to a review of legality which is furthermore the ordinary custom in the disciplinary law of the Latin countries by which the Community system is clearly inspired (I am referring on this subject to the description of Belgian, French, Italian and Luxembourg disciplinary law which Clemens has undertaken in his book 'Der europäische Beamte und sein Disziplinarrecht', pp. 163, 167, 170 and 172). One could therefore first of all ask oneself whether the Commission's evaluation contains an obvious error or whether it is outrageously severe. But that is hardly the case taking account of the gravity of the matters complained of (prolonged and repeated unauthorized absences, lack of initiative, refusal to work) and although it has been established that the applicant worked in the library of the Ispra centre only during a relatively short period of time.

Apart from that there still perhaps remains the examination of the question whether the *reasons* relied upon suffice to justify the punishment imposed. On this point, which the Court did not consider in its judgment in Case 35/67, I wish to say that the view which I advanced in my previous opinion no longer seems defensible to me. It is necessary in fact to be particularly demanding with regard to the statement of reasons for a decision which imposes the heaviest disciplinary measure known to our disciplinary law, and when the Commission sets aside a less severe proposal from the Disciplinary Board, that is to say, when it corrects the opinion of a body which has meticulously examined all the details of the case. I have already mentioned what has been said in the present case concerning the reasons upon which the decision in question is based. In essence it concerns the penultimate recital of the decision, worded as follows: "Whereas, having regard to the conduct of the person concerned, as just described, there is no possibility that the person concerned will in future provide a useful contribution to the work of the Commission; and whereas consequently it does not appear expedient to impose a disciplinary measure allowing him such an opportunity as the members of the Disciplinary Board have suggested". This in fact can hardly be regarded as sufficient if the duty to state reasons for a decision has any meaning at all.

Thus there is added one more procedural defect to those which I have already pointed out justifying the annulment of the contested decision.

II — The applicant's claims for damages

Having considered so far the legality of the decision to remove the applicant from his post, it now remains to say a word on the applicant's claims for the payment of certain sums of money. Here also I can be brief.

1. This is true especially as regards the request for reimbursement of the *costs* of the disciplinary proceedings occasioned by the fact that the applicant had an advocate to help him. In this respect I consider that we can proceed in the same manner as in Case 35/67. In fact if you follow the considerations I have advanced so far, the disciplinary measure must be annulled. Nevertheless it does not necessarily follow that the whole of the disciplinary proceedings must be regarded as void (in which case the costs occasioned thereby must in fact be borne by the Commission according to Article 10 of Annex IX to the Staff Regulations). I believe on the contrary that it may be said that the disciplinary procedure and the opinion of the Disciplinary Board are valid, the annulment of the contested decision being due principally to the failure to observe the time-limit laid down by Article 7 of Annex IX, and therefore of the application of a provision which should be regarded as a 'lex imperfecta' and is now being clarified for the first time in the proceedings before the Court. In such a case it is permissible to restore, as it were, the *status quo* (as judgment in Case 35/67 has already indicated); that is to say, to continue the procedure from the point where it was conducted in an improper manner following the notification of the judgment in Case 35/67. The application for reimbursement of the costs of the disciplinary proceedings therefore necessitates no decision in this case, just as in Case 35/67.

2. I shall be even more brief on the subject of the claim for damages. In this respect I would follow the Commission in pointing out that the applicant has not indicated in what manner he has suffered damage beyond that resulting from the financial consequences of his removal from post, consequences which are compensated for by the annulment of the contested decision. Consequently the claim for damages must be rejected without further ado as unfounded.

III — Summary

My opinion is thus as follows.

The application of the applicant is admissible and well founded to the extent to which it seeks the annulment of the Commission's decision removing him from his post as from 1 January 1969. It is for the Commission to draw the administrative consequences following upon the decision of the Court. The judgment does not require any particular findings on this subject. The Court need not decide upon the application for reimbursement of the costs occasioned by the disciplinary proceedings. The claim for damages must be rejected as unfounded.

As the applicant has succeeded in the essential part of his application, the whole of the costs of the proceedings must be borne by the Commission.