

Upon hearing the report of the Judge-Rapporteur;
 Upon hearing the parties;
 Upon hearing the opinion of the Advocate-General;
 Having regard to the Treaty establishing the European Economic Community;
 Having regard to the Staff Regulations of the European Communities, especially Articles 5, 91, 102 and Annex I;
 Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT (Second Chamber)

hereby:

- 1. dismisses Joined Applications 109/63 and 13/64 as being inadmissible or unfounded;**
- 2. orders the applicant to bear the costs, with the exception of the costs of the Commission.**

Delivered in open court in Luxembourg on 16 December 1964.

Donner

Lecourt

Monaco

A. Van Houtte

Registrar

A. M. Donner

President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER
 DELIVERED ON 18 NOVEMBER 1964¹

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*Mr President,
Members of the Court,*

Both cases, with which my opinion is concerned today, call for the consideration of problems regarding the grading of an official in accordance with the definition of posts by the Commission as well as of questions concerning the right to deputize for a superior. They were brought before the Court by an official of the Commission of the European Economic Community in two separate applications, but as a

result of an order of the Court of 1 July 1964 they were treated as one application in the oral procedure and I must therefore also examine both of them in one opinion.

The official who brought the proceedings was, by reason of the application by analogy of the provisions of the Staff Regulations of the ECSC, classified during the time he was employed under contract with the Commission in Grade B (first B 7-3, later B 6-3, B 6-5), and remained an official in category B 1 (which corresponded to Grade B 6 of the

former Staff Regulations for officials of the ECSC) after being integrated by a decision of the Commission of 12 December 1962. It is his view, however, that, following the issue by the Commission of its definition of posts of 29 July 1963, he is entitled to a higher grading having regard to the duties he has in fact performed in the Directorate-General of Administration, Staff Directorate, Salaries and Mission Expenses Division. For this reason he sent the Commission a letter of 28 August 1963 and asked to be classified in Category A, Grade 5 or 4 with effect from 28 August 1963. When the Commission merely replied that it was examining his request he decided after the expiration of the period laid down in Article 91 (2) of the Staff Regulations to institute proceedings before the Court (Case 109/63).

The second case arose out of a decision of the Commission of 29 July 1963 that in all divisions, where only the heads of department had posts in category A, the task of deputizing for a head of department must fall on the head of another department. This decision affected the applicant, because in the Salaries and Mission Expenses Division he was in fact charged with deputizing for the Head of Division during his absence. He was therefore notified by a decision of the Director-General of Administration of 11 September 1963 that this right had been transferred with immediate effect to another official in Grade A and that he was no longer entitled to deputize for his head of department.

He also endeavoured in this case by a letter of 16 December 1963 to defend his interests in administrative proceedings under Article 90 of the Staff Regulations. Since he did not within the prescribed time receive a definite answer to the effect that the measures taken had been withdrawn he lodged a second application (Case 13/64).

In both cases we have to examine the following conclusions:

Conclusions of the applicant

Case 109/63

- for the annulment of the implied decision of the Commission to refuse the request of 28 August 1963;
- for the annulment of the integration of the applicant to the extent that he was classified in Grade B1;
- for a declaration that the Commission must classify the applicant in Grade A 5 with effect from 1 January 1962 (following the amendment of the conclusions in the reply, at least with effect from 28 August 1963);
- for an order that the Commission pay arrears of salary amounting to one Belgian franc (following the amendment of the conclusions in the reply, to pay the actual arrears of salary);
- for an order that the Commission pay one Belgian franc by way of damages for non-material damage;

Case 13/64

- for the annulment of the decision of the Director-General of Administration of 11 September 1963;
- in the event of this decision's being held to be based on the decision of the Commission of 29 July 1963, for the annulment of the latter decision as well;
- to order the Commission to pay damages for non-material damage amounting to one Belgian franc.

Conclusions of the Commission

- in the first case: for the dismissal of the claim for annulment of the decision establishing him as being inadmissible and in any event for the dismissal of this claim and the remainder of the application as being unfounded;
- in the second case: for the dismissal of the entire application as being inadmissible.

Legal Consideration

Although the two cases have been joined it is advisable to consider the legal issues of each case separately. I shall therefore deal first with Case 109/63 taking the conclusions in the order in which they appear in the application.

I — CASE 109/63

1. Before considering the conclusions a few words must be said concerning the choice of defendant, a question to which counsel for the applicant attached great importance. In his view the Community as such as well as the Commission of the EEC is a defendant with the result that the Council of Ministers must also be regarded as a party. The applicant refers in this connexion to Article 90 of the Staff Regulations, to the opportunity during the proceedings to call for production by the Council of the preparatory documents relating to the Staff Regulations and also to the fact that the Commission asked the Council of Ministers without success for a post in B 1 to be upgraded to A 5 in its detailed list of posts. This is proof that the applicant has an interest, which exists also in connexion with his claim for damages, in receiving information from the Council of Ministers on this point and in obtaining a declaration as to its responsibility.

My comment on this submission is simply that all the applicant's arguments have been repeatedly put to the Court and have been exhaustively examined not only in the opinions but also in the judgments. I am therefore content to refer to these opinions and judgments and to confirm that according to our established procedure in a case of this type the Commission alone is the defendant. In any case naming the European Economic Community as a defendant as such cannot make the Council of Ministers a party to the proceedings.

So far as other procedural questions are

concerned, in particular the question of the admissibility of the claims, I will deal with each of them as and when they arise.

2. The first head of the conclusions is for the annulment of the Commission's implied decision of refusal, that is to say, of the negative decision which it is deemed to have taken, after the expiration of the period laid down in Article 91 of the Staff Regulations, on the applicant's request to be classified in Grade A 5. The refusal is alleged to be unlawful, because the applicant — so runs his argument — must, according to Articles 102, 5 and to Annex I to the Staff Regulations read together with the Commission's definition of posts, be classified in category A 5 in view of the duties he in fact performed.

(a) Taking first of all Article 102 of the Staff Regulations as a basis for the claim, I need not quote its wording which has been referred to on several occasions during the proceedings before the Court. It is not necessary to consider any further the applicant's view that a grade is 'impliedly accorded' within the meaning of Article 102 by the allocation of specific duties, if it is shown that these duties called for integration in an equivalent grade.

Since the Maudet judgment (Cases 20 and 12/63) it is clear that the expression 'impliedly accorded' does not refer to duties performed but to the fixing of the salaries of the so-called 'Brussels contract officers' by applying by analogy the salary grades of the Staff Regulations of officials of the ECSC. I see no reason to depart from this view. As however the salary grades 'accorded' to the applicant in the prescribed manner in various decisions of the Commission are precisely known and as it is not disputed that his last grading under his contract of employment corresponds to the grade mentioned in the decision to integrate him, the applicant cannot on the basis of Article 102 of the Staff

Regulations claim the right to be regraded.

(b) On the other hand it is more difficult to answer the question whether any rights can be established to a grading which does not comply with Article 102, based on Annex I to the Staff Regulations together with the definition of posts by the Commission, if it is shown that the duties actually performed justify a higher grading.

The applicant is of the opinion that he has such a right. He relies for this purpose on the definition by the Commission of the duties of a Principal Administrator (categories A 5, A 4) which are defined as follows:

- Head of one particular sector of activity in a Division
- Head of a Specialized Department
- qualified official engaged in planning, advisory or supervisory duties in one sector of activity
- assistant to Head of Division.'

and he relies on the Maudet judgment of which the decisive passage is (Rec. 1964, p. 229).

'However every servant, who, after establishment under the Staff Regulations, has been maintained in an already existing post which, in the light of the duties which it involved, should correspond under the new Staff Regulations to a higher grade than that obtained in accordance with the procedure referred to in Article 102, is entitled to have his position regularized according to the principle of the correspondence between duties and grades drawn up in Annex I.'

However easy the solution of our problem appears at first sight according to this quotation a closer inspection however shows that this is not the case.

Even if we leave aside the legal consideration that the applicant in the Maudet case could rely directly on the wording of the Staff Regulations (Annex I), whereas in this case reliance must be placed on the Commission's definition of

posts whose legal importance and force cannot perhaps be equated with the definitions in Annex I to the Staff Regulations, there remain nevertheless, as far as the facts of both cases are concerned, essential differences.

In the Maudet case it was not disputed that the applicant entered the service as a head of division, that he was employed as head of division at the time when he lodged his application, that he was described as head of division in all official documents and that the persons occupying similar posts in the Commission are classified in the grade of a Head of a Division (A 3). The only substantial objection of the Commission to the claim by the applicant Maudet to be classified was that there was no vacancy in its detailed list of posts.

The facts in this case are different. The Commission strenuously opposes the claim that the applicant in fact carried out the duties of a Principal Administrator and that he was engaged as assistant to the Head of Division and has been confirmed in this capacity.

It is therefore out of the question simply to apply the arguments of the Maudet judgment and we can do no other than examine carefully the individual facts of this case.

I will in so doing consider first the Commission's definition of the posts which, so far as its application in the service is concerned, raises the following questions:

- Is or was the applicant assistant to a head of division (*adjoint d'un chef de division*)?
- Is the applicant the head of one particular sector of activity in a division (*chef d'un secteur d'activité d'une division*)?
- Is the applicant a qualified official engaged in planning, advisory or supervisory duties in one sector of activity (*fonctionnaire qualifié chargé de tâches de conception, d'études ou de contrôles d'un secteur d'activité*)?

The first point

As I see it, in dealing with this point there is first of all a legal question to be considered. It is: are the duties which he has in fact performed determinative for the grading of an official or is the decisive question what duties were allocated to an official by the appointing authority which has to make decisions as to grading and promotion?

In my opinion there is no doubt that this question must be answered in the latter sense. Any other answer to the question would mean that legal certainty would be impaired to an unacceptable degree and that an administrator's powers of organization would be undermined, because an official, possibly with the connivance of his superior, could assume more important duties.

This view cannot be challenged by the argument that the concept 'appointing authority' only came into being after the entry into force of the Staff Regulations. Logically it must be assumed that during the preceding period only the measures of the Commission were determinative, if no effective delegation of powers can be proved under the law governing staff questions.

How does this argument apply to the post of assistant (adjoint) to the Head of Division which the applicant claims he occupied?

The fact that no such post was provided in the detailed list of posts of the Commission can certainly not be conclusive, because, as the Maudet case showed, it is equally possible to transfer to an official the duties of a higher grade and with them the right to an equivalent grading.

Conversely the title which the applicant assumed is equally not a determinative factor because an implied assignment of duties by way of acquiescence in a particular course of conduct of an official cannot be recognized. The alleged promises of the applicant's present immediate superior and of the Director

of Personnel of the Commission before the applicant's entry into the service appear to me to have no more probative value than all those documents from the mass of papers produced to us, which do not emanate from the appointing authority itself or were not approved by it, but possibly came from the present superior of the applicant (in the form of directives to the officials of the Salaries and Mission Expenses Division or to other divisions and directorates of the Commission), from the Director-General of Administration (concerning the applicant's right to deputize), from a *chef de cabinet* of the Commission or the Director-General of Administration (concerning an official report on the applicant and intended for his national administration) — or even from a member of the High Authority in his capacity as a General Commissioner of the Communities at the international exhibition at Turin on which occasion the applicant was apparently also present in the capacity of 'Adjoint' (assistant) to his immediate superior, because the authors of these documents have no authority to make any binding arrangements as regards the employment of the applicant in a post higher than the one to which he was directly appointed. On the other hand what is conclusive is that none of the really important documents, neither his letter of appointment nor the document by which he was integrated, nor the reports on his ability, efficiency and conduct mention that he is to perform the duties of an 'Adjoint' to the Head of Division (cf. the letter of appointment of 18 November 1958 which merely states: 'Prévu pour traitements et missions' ('posted to Salaries and Mission Expenses')); note of the Director-General of Administration to the Executive Secretary of the Commission of 30 April 1959, concerning a higher grading for the applicant, which only refers to him as '*chef de la section frais et missions*' ('Head of Mission Expenses Section');

note of the Executive Secretary of the Commission to the General Director of 26 May 1959 concerning the grading of the applicant in B 6-3, as 'chef de section' ('Head of Section'); letter from the Director-General of Administration to the applicant of 26 May 1959 concerning his grading B 6-3, which also only mentions the duties of a 'chef de section'. So the applicant never carried out the duties of an 'Adjoint' (assistant) to his Head of Division by virtue of any authoritative instruction.

As a supplementary point, it should moreover be noted that after a perusal of all the documents produced it appears to be doubtful whether the applicant *in fact* carried out the duties of an 'Adjoint'. As the Commission rightly emphasizes, in order to establish this fact it would be necessary to show that the main occupation of the applicant was to assist the Head of Division continuously with the possibility of carrying out all the duties of a head of division. In fact the documents produced show only that the applicant deputized from time to time for the Head of Division when he was absent but that his authority as far as signing orders for payment were concerned was more restricted than that of the Head of Division. Further, the directives of the Head of Division contained the instruction that during his absence, important letters must be submitted to the Director of Personnel or the Director-General of Administration for signature, a limitation which appears to be hardly consistent with the duties of an 'Adjoint'.

It is therefore clear that the applicant cannot ask to be placed in a higher grade in the capacity of 'Adjoint' to his Head of Department.

The second point

We must now enquire whether he can base his claim on the fact that he is head of one particular sector of a division (chef d'un secteur d'une division).

This appears at first sight to be the case, because it is not disputed that the appointing authority posted him to the 'mission expenses' subsection of the Salaries and Mission Expenses Division, where he is in charge of a group of other officials (Categories B and C).

However I doubt whether it is appropriate to be content with superficial guidance derived simply from the literal wording of the definition of posts, while ignoring its context. Further, I am not convinced that the applicant is right when he argues that such sectors of a division are necessarily 'secteurs d'activité' ('sectors of activity') within the sense of Category A 5, because a comprehensive structuring of the administrative organization must correspond to the resultant subdivision of career brackets. It is quite conceivable that an administrative unit directed by a senior official includes subsections but that, having regard to the nature of the work which they do, they are not to be regarded as departments or sections which correspond in a particular sense to the definition of posts.

In fact, as the Commission rightly emphasizes, the definition of posts, which is presumed to be an evaluation of *duties*, is primarily concerned with the nature of the duties which are carried out and only as a secondary consideration with the administrative organization. This can be inferred from Article 5 of the Staff Regulations under which career bracket A includes posts which require university training or equivalent professional experience. It appears therefore to me that the only reasonable course is to centre our examination on the duties performed by the applicant and to draw conclusions from them regarding the justification of his claims. And so we come to

The third point

of our examination, that is to say, to the question whether the duties performed

by the applicant can be classified as 'planning duties' ('taches de conception') within the meaning of the definition of posts. It is obvious that this is among the most difficult questions in this case. It has to be answered in accordance with exceptionally vague concepts ('planning, advisory or supervisory duties', 'conception', 'études', 'contrôles') which presuppose, having regard to their nature, a subjective evaluation. In doing this the Court cannot place itself in the position of the administration but can do no more than determine whether it exercised its discretion in a proper manner. The answer to the question is moreover much more difficult owing to the fact that there are few indications from the competent appointing authority of the work done by the applicant, for it is clear that in this connexion all those factors material to an assessment which can be traced to the applicant himself (in progress reports) and to his immediate superior must be left out of consideration, because he obviously tended more and more to treat the applicant as his assistant ('Adjoint').

If this prerequisite is observed our attention must be mainly directed to the finding in the integration report that the applicant is a Principal Administrative Assistant, dealing with mission expenses. That the integration report also describes him as 'Verwaltungsbeamter' ('an administrative official') has, contrary to the view of his counsel, no legal significance, because this definition has only a general meaning in German, that is to say, it does not refer to the duties performed by an official at any particular level. According to the statements of the Commission the nature of the duties of a servant dealing with mission expenses includes the preparation of statements of account of mission expenses, the application of detailed provisions of the Staff Regulations to particular cases and the drawing-up and checking of accounts. There is no doubt

that this work is not always easy, but experience nevertheless shows (in particular when compared with national practice) that it is correctly regarded as work in the middle administrative range, and in no way as an occupation requiring previous academic training. That this view is correct is confirmed by the fact that in the High Authority and in the European Atomic Energy Community the corresponding work is undertaken by servants in category B. If the applicant disputes this on the ground that the volume of work in the Commission of the EEC is much greater having regard to the larger numbers of officials employed and to the particular tasks of the Commission of the EEC, this argument does not appear to be conclusive, because we can only be concerned with the nature of the work done and not with its volume.

Therefore on the facts before us we cannot conclude that the Commission, in evaluating the applicant's work, misused its powers.

It is true that during the oral procedure Counsel for the applicant obtained from the Commission production of a document, to which he referred, from which the inference was to be drawn that the Commission itself had in the meantime reevaluated the applicant's work and intended to classify it as falling within the duties of category A. The purpose of the document in question was to support an application to the Council for the budget appropriation for 1964. We must therefore ask ourselves whether this document upsets the conclusion which we have just worked out.

Clearly, this cannot be entirely true because only an assessment for the year 1963/64 can be extracted from the said document. But apart from this I have serious doubts whether this document can be accepted as evidence for the purpose of this case. It is clear that the Commission is endeavouring to enlarge its administration, *inter alia*, to enlarge

the Salaries and Mission Expenses Division. As its counsel stated during the oral procedure, the attainment of such an objective during the budgetary discussions is facilitated if a request is made for the regrading of existing posts and not for the creation of additional posts. Having regard to this objection the document is to be regarded as a preparatory document for negotiations with the Council of Ministers on a series of questions, that is to say, as a kind of declaration of intent. On the other hand there appears to be no justification for drawing from it the firm conclusion that the Commission from now on recognizes as binding another evaluation of the duties of the post in question without assigning to it more important additional duties and has definitely decided, if the outcome of the budget negotiations is successful, to give the upgraded post to the applicant. I am therefore inclined to regard the internal document intended for the budgetary discussions within the Commission as being insufficiently conclusive evidence to decide the question whether the Commission has correctly evaluated the applicant's activities within the limits of its discretion.

None of these arguments disturbs the finding that the applicant has no claim to be classified in category A 5 either because he is a 'Head of Section' ('chef de section') or carries out planning duties ('taches de conception') or is assistant ('Adjoint') to his superior. I would however like to point out expressly that the contrary conclusion would be inescapable, at least in respect of the period after the budgetary document referred to above was drawn up, were the Court to arrive at a different view when it considers this document.

3. As far as the second head of the conclusions is concerned — for the annulment of the decision integrating the applicant in so far as it classifies him in Grade B 1 — it is clear, having regard

to the arguments put forward so far, that it is also not well founded.

In the interests of a full and correct treatment of the subject I will however also give my opinion on the question of admissibility which is challenged by the Commission. It is in fact clear that, if the date (18 December 1962) of notification of the decision, made on 12 December 1962, integrating the applicant, is taken as the date from which the three months' period for lodging appeals under Article 91 begins to run, then the application was lodged a considerable time after the expiration of this period (namely 23 December 1963). When the applicant points out in this connexion that while this time was running he could not have been expected to file an appeal, because an essential legal factor to enable his application to be considered, namely the publication of the definition of posts, was missing, he is certainly not wrong. On the other hand this fact does not constitute a ground for revival which could make it possible for an appeal to be filed after the expiration of the legal time-limit. The only consequence in law connected with this situation is that, in view of the changed legal circumstances, an application could be brought to vary the decision integrating the applicant and, if this application were rejected by the Commission, an application for *failure to act* could be brought, a procedure adopted in fact by the applicant in the first head of the conclusions. At the same time it appears however to be impossible to apply for the annulment of the decision integrating him, so that as far as the second head is concerned we must in fact hold that it is not only unfounded but also inadmissible.

4. With reference to the third head of the conclusions seeking a declaration that the applicant must be classified in a particular grade with effect from 1 January 1962, I should like to say that, contrary to the view of the Commission, I do not consider it to be inadmissible

and refer in this connexion to the judgment of the First Chamber of the Court (Case 18/63). The conclusion to be drawn from that case is that in staff cases not only actions for annulment and for specific performance but also actions for a declaratory judgment are admissible. I do not have to go into this argument in detail, however, because in any case, after what has been said so far in connexion with the consideration of the facts, the applicant's claim is unfounded.

5. No further arguments are required to show that for the same reason head No 4 of the conclusions, seeking payment of arrears of salary, is unfounded, because it depends upon the applicant's claim for a grading being upheld.

6. Finally with reference to the claim for damages it is to be noted that, as the Commission rightly points out, there are serious doubts occasioned by the manner of pleading in the application. The applicant has wholly failed to state in what respect he thinks that the Commission's determination of his grade constitutes a *wrongful act or omission*, obviously in the mistaken view that proof of an omission of the Commission which, objectively speaking, is unlawful, is sufficient to substantiate his claim for damages. Therefore there are already formal reasons for dismissing this claim. But in addition it is obvious that it is not well founded, because the Commission cannot be held to have acted unlawfully, as was argued in connexion with the other heads of the conclusions.

7. All things considered and without its being necessary to adduce further evidence it must be held that the conclusions in Case 109/63 must be dismissed as being in part inadmissible but in any event unfounded.

II — CASE 13/64

In the second case the applicant submits that this authority to deputize for

the Head of the Salaries and Mission Expenses Division was unlawfully withdrawn. He asks for the annulment of the corresponding decisions on the ground that the Director-General of Administration did not have the authority to take such a step, that he is entitled to continue to perform these duties, and that the reasons given for the measures in question were inadequate and that, if they are held to be general decisions, it was wrong not to publish them. In addition he claims, in this case as well, damages for non-material damage alleged to have been caused by the disputed measures.

The Commission is of the opinion that the second application is inadmissible and in particular because the measures which the applicant requests should be annulled are by their very nature not capable of being the subject of an application by the officials to which they refer.

In fact — as I will immediately explain — the main point to be examined in the second case is the admissibility of the claim.

1. Admissibility of the application

(a) *The requests for annulment*

According to Article 91 of the Staff Regulations, the Court shall have jurisdiction in any dispute between the Community and persons referred to in the Staff Regulations *regarding the legality of an act adversely affecting such person* ('acte faisant grief à une personne'). It is therefore necessary to consider what is meant by 'an act adversely affecting' a person within the meaning of the Staff Regulations, because it is obvious that it is not every direction given to an official by his administrative authority that can form the basis of an application for annulment, for otherwise the Court would be overburdened with staff cases and the functioning of the administra-

tion would be called in issue. In national legal systems this problem is well known because their legal theory and the decisions of their Courts show that constant endeavours are made in the field of the law relating to public officials to draw a line in a sensible manner between administrative measures which are actionable and departmental orders which are not.

So far as German law is concerned the view is generally held that legal actions by officials are not permitted against administrative measures relating to the running of the service, its internal working, its organization and the distribution of work within it.¹ To these examples must also be added such cases as the allocation of other duties to an official in the same authority or measures for the redistribution of duties, which result in the withdrawal from an official of an important part of the work falling within his former field of activity.² An application for annulment is only considered admissible with reference to measures concerning the relationship between an official and his superior as such, the official himself as the holder of rights of his own, or other legal relationships of the official.

The same legal situation apparently exists in French law as I believe I can demonstrate by reference to French legal theory³ and to a series of judgments of the Conseil d'État. According to this law instructions concerning the organization and running of the service in general cannot be challenged. An action is admissible when the privileges and the features of the post occupied by public servants are concerned, when

rights laid down in staff regulations have been infringed, career prospects are impaired or when official instructions are in the nature of sanctions. Here are some examples taken from the decided cases: proceedings have been held to be admissible against measures determining the duration of the working week,⁴ abolishing a post,⁵ restricting the right to strike,⁶ removing privileges enjoyed by the senior garrison officer of the highest rank in his capacity as 'commandant d'armes'⁷ etc. On the other hand the right to bring proceedings against measures for changing the conditions of recruitment,⁸ classifying posts in an official list⁹ or creating new posts¹⁰ has been refused.

It seems to me that these cases provide useful pointers for the solution of our case.

It is essential that the contested measures should not in any way interfere with the duties of the post which was given to the applicant by the appointing authority. This emerges clearly from the findings in Case 109/63, in particular from the allegation of the applicant that he entered the service of the Commission as an 'Adjoint' (assistant). As head of the Mission Expenses Subsection of the Salaries and Mission Expenses Division he retains all his powers and his established status (category, grade, step), upon which alone his future career prospects depend, is not affected by the measures which he challenges. An amendment to the general rule on deputizing in Article 26 of the Commission's internal regulations, as the Commission rightly emphasizes, is no more than a measure dealing with

1—Plog — Wiedow, Kommentar zum Bundesbeamtengesetz, para. 172, Notes 8, 9 and 11; Bochalli, Kommentar zum Bundesbeamtengesetz, 2nd Edition, Note to para. 172.

2—Cf. OVG Lüneburg, judgment of 14 August 1953, DöV 54, 509.

3—Plantey, *Traité pratique de la fonction publique*, 1963, T. II, pp. 569 et seq.

4—CE 35, 1135.

5—CE 58, 58.

6—CE 58, 596.

7—CE 59, 921.

8—CE 48, 336.

9—CE 36, 670.

10—CE 20, 523.

internal organization, which does not encroach upon the rights of the officials affected by it, because the Commission's internal regulations do not create individual rights. This results from the reservation in Article 26 according to which the Commission can at its discretion make arrangements in the interests of the service for the appointment of deputies, which differ from those originally laid down.

I should therefore like to assume in support of the Commission's argument, that the new arrangement for the appointment of deputies in the departments which have no official in category A apart from the Head of Department constitutes an administrative measure of organization by the superior, for which he does not have to account to the official who may be affected. There has not been any act adversely affecting the person concerned within the meaning of Article 91 of the Staff Regulations, so that the first head of the conclusions must be dismissed as being inadmissible.

(b) *The claim for damages*

With reference to this claim the applicant in fact submits in his application that the Commission by withdrawing his authority to deputize has infringed his vested rights and that he has thereby suffered non-material damage. This argument set out in four lines cannot in my opinion be regarded as an adequate statement of the basis of this claim. It is true that Protocol on the Statute of the Court of Justice and the Rules of Procedure of the Court only prescribe that there must be a *brief* statement of the grounds upon which the application is based; but, properly understood, this means that the grounds must be particularized at least to the extent that all the necessary factors to support a claim are indicated. In the case of a claim for damages a *wrongful act or omission* must be alleged and pleaded. As the application is silent on this point, this claim for

damages, like the similar claim in Case 109/63, must be dismissed as being inadmissible.

(c) In fact the entire application in Case 13/64 is therefore inadmissible. I will however endeavour to demonstrate in a few words that it is also unfounded.

2. The substance

(a) *The requests for annulment*

(aa) *First complaint*

In the first place the applicant submits that the Director-General of Administration, who made the decision of 11 September 1963, has no authority to decide who should perform the duties of deputy in the applicant's division. It is reasonable to interpret this complaint as meaning that only the Commission has such powers. But this only proves that the argument is untenable. In fact the withdrawal of the right to act as deputy, which the applicant enjoyed in the Salaries and Mission Expenses Division, originated in the Commission's decision of 29 July 1963, which provides that officials in category B would no longer be permitted to deputize for Heads of Division. The decision of the Director-General of Administration of 11 September 1963 merely provides for the implementation and notification of this instruction in the case of the applicant. The Director-General undoubtedly had the authority to do this. Whether he also had authority to make a *positive* decision as to the representation of the Head of Division in his absence by appointing a particular official as deputy is a question which need not be decided, because it is clear that the applicant is only concerned with that part of the instruction which states that *his authority to deputize has been withdrawn*.

(bb) *Second complaint*

In the opinion of the applicant the

Commission's decision of 29 July 1963 is a measure contravening the rule in Article 26 of its internal regulations, which lays down the general regulations for the appointment of deputies in the departments of the Commission. As such the measure directly affects the applicant as an individual and the reason upon which it is based must be stated in accordance with Article 25 of the Staff Regulations. It is obvious that this inference is from the outset incorrect. The wording of the Commission's decision of 29 July 1963 makes it clear that it was a measure intended to apply to all divisions in which, except for the head of division, there were no posts in category A and to cases which had arisen at the time when this decision was made as well as cases which would arise in the future. This means that the decision of the Commission is a general decision. As such there is no obligation under Article 25 to state the reasons upon which it is based.

(cc) *Third complaint*

The applicant then proceeds in the alternative on the basis that the decision mentioned above, as has just been explained, is a general decision. In his view, as it is classified as a general decision, it must be regarded as a measure which amends the Commission's internal regulations (Article 26) and should have been published in the same way as the adoption of these regulations was published, namely in accordance with Article 162 of the EEC Treaty. This view also appears to be wrong. Article 26 of the Commission's internal regulations provides that decisions for the appointment of deputies can be taken which depart from the general rules on this subject. Such decisions can not only take the form of instructions applying to an individual case but also of general directives applying to a series or group of cases. If such general decisions do not interfere with the principle

of Article 26, if they only infringe this principle in their application to a *few* cases, they do not in such circumstances amount to measures amending or supplementing the Commission's internal regulations but are measures by which the internal regulations are *applied*. Therefore, properly understood, they do not require to be published so that the claim cannot be successfully based on Article 162 of the Treaty.

(dd) *Fourth complaint*

In the opinion of the applicant the decision of the Commission should finally be annulled on the ground that it infringes his vested rights. A subjective right to act as a deputy cannot be recognized in this case for the reasons explained in Case 109/63. The power to deputize for the Head of Division is not one of the duties which attach to the applicant's post, so that no right to exercise this power can be based upon an appointment to this post. To the extent to which this claim is founded on Article 26 of the Commission's internal regulations the claim that the general regulations must be adhered to must therefore fail, because in its internal regulations the Commission expressly reserves the right to make in its discretion decisions derogating from them. In fact this explanation of the legal situation meets the requirements of a sensible organization of the administration, which in general must be free so to order its affairs as to meet the requirements of the service. Thus the claim that subjective rights have been infringed cannot either be upheld.

(b) *The claim for damages*

In view of all that has already been said concerning the claims for annulment the claim for damages must at least be dismissed as unfounded because the measures taken by the Commission were not illegal.

3. Summary

entirety if not on the ground that it is inadmissible then at least as being unfounded.

Therefore the application in Case 13/64 must also be dismissed in its

III—Conclusion

In all, my opinion is as follows:

The claims submitted in Cases 109/63 and 13/64 must be dismissed as being in part inadmissible and in part unfounded. The applicant must bear the costs of the proceedings with the exception of the Commission's costs (Article 70 of the Rules of Procedure).