Procedure, under the provisions of which the Court may order that the parties bear their own costs in whole or in part where the circumstances are exceptional. It must in fact be admitted that the silence of the Staff Regulations as to the legal position of a deputy was such as to create uncertainty regarding the rules of law applicable.

Furthermore, taking into consideration the facts in this case, it would be particularly unjust to order the applicant to bear all his own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of Officials of the European Communities, especially Article 7;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses Application 26/67 as being unfounded;**

2. **Orders the defendant to bear its own costs and three-quarters of the applicant's costs.**

Strauß Trabucchi Pescatore

Delivered in open court in Luxembourg on 11 July 1968.

A. Van Houtte — W. Strauß

Registrar — President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 27 MAY 1968[1]

Mr President,
Members of the Court,

Before examining the merits of the application made by Mr Danvin—an official of whom the defendant institution speaks highly, but whose request it declares itself unable to satisfy—I should like to recall briefly how the dispute arose.

For the creation in 1958 of the Development

1 — Translated from the French.

Fund for Overseas Countries and Territories, Provisional Regulation No 6 of the Council of 3 December 1958 provided for the appointment of an accounting officer by the President of the Commission. In fact, with the aim of ensuring the performance in all circumstances of the tasks entrusted to this officer, a decision of the President of 5 June 1959 provided that the chief accounting officer should be aided by an assistant to be appointed according to the same procedure who should deputize when the former was absent or prevented from attending to his duties. Another decision of the same date appointed Mr Danvin as the assistant accounting officer.

The functioning of the second European Development Fund, arising from the Yaoundé Convention which entered into force on 1 June 1964, necessitated a number of quite fundamental changes in the administrative organization of the Fund, notably the creation of an independent department controlling the accounts, the establishment of which necessarily reduced to some extent the powers and responsibility of the accounting officer. The implementation of the reform took place over a long period and was marked by the following events: on 25 February 1965, Mr Heusghem, until then chief accounting officer, was appointed as officer responsible for accounts; by decision of the Communities of 20 December 1965, Mr Bering, a Principal Administrator, was appointed as accounting officer of the Fund, but did not take up his duties until the following June, during which time Mr Danvin had to deputize for him on the ground that the former was absent or prevented from attending to his duties. From 25 February 1965 to 1 June 1966 inclusive, Mr Danvin, who was a Principal Administrative Assistant (B1) and the assistant accounting officer, deputized successively for Mr Heusghem and Mr Bering.

On 12 January 1966 he claimed the differential allowance provided for by Article 7(2) of the Staff Regulations for an official occupying a post temporarily; this was refused him for reasons which I shall examine later. Today he asks the Court to order the Commission to pay to him an allowance calculated on the basis of the principles set out in Article 7(2) and which he estimates, provisionally, at BF 100 000.

We must examine the merits of his claims.

A — The first submission of the action —and practically the only one—is based on infringement of the Staff Regulations.

Mr Danvin considers that he has in reality been given a temporary posting within the meaning of Article 7. Even if this was conferred upon him in circumstances which do not conform to the Staff Regulations, nevertheless he was bound to comply with the orders of his superiors. This being the case, he claims, the irregularity committed constitutes a wrongful act or omission either directly on the part of the Commission or through the intermediary of its heads of department and this wrongful act or omission gives rise to liability on the part of the Community.

The defendant institution rejects this argument and claims that there was no temporary posting in Mr Danvin's case, but an automatic application of the decision of the President of 5 June 1959 and of the decision of the Commission of 20 December 1965 making provision for the assistant to deputize for the chief accounting officer. In this case, no allowance is provided for by law and none can therefore be granted.

Several questions arise from this:

1. First, it is necessary to define the two concepts of temporary posting and deputizing and to distinguish them in so far as is possible. The first concept is familiar to us from Article 7(2) of the Staff Regulations which lays down the conditions under which temporary posting may occur. It is the second concept which is referred to—although not expressly—by the two decisions of 1959 and 1965 concerning Mr Danvin. It is, in any case, to the second concept that Article 26 of the internal rules of procedure of 9 January 1963 adopted by the Commission for the organization of its departments pursuant to Article 162 of the Treaty (Official Journal of 31 January 1963, p. 181) corresponds: 'Save where the Commission decides otherwise, any official who is absent or prevented from attending to his duties shall be replaced by the most senior subordinate official present, and in the case of equal seniority the oldest, in the highest category and grade'.

It is beyond question—the defendant admits it—that the object of both temporary posting and deputizing is to allow the public service to continue to function in its normal manner even in the absence of one of its servants. On the other hand, it is uncertain whether one may differentiate as clearly as the Commission claims between the powers of an official occupying a post temporarily and a deputy, inasmuch as the former is entitled to alter the general orientation given to the activity of the department by the official holding the post whereas the latter does not have this power. The real difference—if one refers to Community provisions, to the Staff Regulations to the decision of the President and to the internal rules of procedure of the Commission, which conform to the practice of a number of national legal systems—lies in the method of conferring on an official the position of deputy or a temporary posting. The first is conferred in advance by a decision of the authority entrusted with the task of organizing the department, in order to avoid any difficulty which might arise in the future; the deputy can be designated either by name or by precise characteristics ('the most senior subordinate official present', in the words of Article 26 of the internal rules of procedure). Once an official is prevented from attending to his duties and on every occasion on which this occurs, the deputy is automatically in charge without the need at such time for a decision of the senior official; at the most, there may be a declaration of the existence of conditions which necessitate the deputy's taking charge.

On the other hand, when the Staff Regulations provide that an official *may* be called upon to occupy temporarily a post in a career bracket in his category or service which is higher than his substantive career bracket, this implies necessarily that such a temporary posting is conferred by a decision subsequent to the event justifying it, and this decision if one compares paragraphs (1) and (2) of Article 7, must emanate, it seems, from the appointing authority.

It seems clear on the other hand that the scope of deputizing is not as extensive as that of temporary posting. The different provisions which allow for the appointment of a deputy have always in view the case where an official holding a post is prevented from attending to his duties, which seems to refer to accidents, sickness and unforeseen events which affect an official who, once these circumstances no longer obtain, resumes the duties which he temporarily relinquished. An official who is appointed to another post cannot be replaced by a deputy since, in this case, he no longer occupies the post which he previously held and which has fallen vacant.

There can be no objection however to appointing an official to occupy temporarily a vacant post until the appointment of a new permanent official. But, contrary to the argument advanced by counsel for the applicant at the hearing, that is not the only conceivable case which may give rise to a temporary posting. To be convinced of this we need only recall that Article 7(2) provides for replacement of an official who is seconded to another post in the interests of the service and, according to Article 38, this official retains his post. This example—like the others set out in the same paragraph and in which cases the temporary posting may exceed one year—shows that the scope of temporary posting is wider than that of deputizing and that the official occupying a post temporarily may be called upon to act in such a position for a longer period than a deputy.

2. If we now examine Mr Danvin's position between 1965 and 1966, it seems clear that Article 7 of the Staff Regulations was not applied in his case and could not be so applied. The applicant claims that he was appointed through a document issued by the Director-General of Overseas Development, which however he has never produced. One can imagine that this senior official—who was his superior but not the appointing authority—merely made a declaration that pursuant to the existing provisions Mr Danvin was to replace the chief accounting officer. However, as the latter occupied a post in Category A, this post could not be occupied on a temporary basis by the applicant who is in Category B. You remember that at the hearing there was a great deal of debate on this point. Reference was made to the words of Article 7 'post in a career bracket in his category *or service*' and from

this arose the allegation that the temporary posting could therefore operate, without regard to the consideration of the category, within the 'administrative service' to which Mr Danvin is attached. The error is clear. Article 5(1) of the Staff Regulations lays down the principle that posts shall be classified in four categories; it adds in the sixth paragraph thereto that 'By way of derogation from the preceding provisions ... posts coming within the same specialized professional field may ... be formed into services embracing a number of grades of one or more of the foregoing categories'. The only ones are the Language Service—completely comprised in Category L/A—and the scientific or technical services of the Joint Nuclear Research Centre referred to in Article 92 of the Staff Regulations and in Annex IB thereto. There is no 'administrative service' but a number of posts divided into categories, and temporary posting can only operate within a particular category.

3. It is accordingly on the basis of the decision of the President of the Commission of 5 June 1959 that Mr Danvin replaced Mr Heusghem with effect from 25 February 1965. By establishing a system of temporary posting did not the Staff Regulations of 1962 cause the implicit revocation of the decision in question? This is the argument put forward by the applicant, which I cannot support. A distinction must in fact be drawn between matters which fall within the ambit of the Staff Regulations of Officials, their rights and obligations fixed by regulation of the Council pursuant to Article 212 of the Treaty, and matters which simply concern the organization of the services, which come within the province of the Head of the Administration. The decision of the President of the Commission clearly falls in the second category. The measure taken was especially necessary as the duties of accounting officer are such that any interruption is inconceivable: it is useful to recall in this connexion that under Regulation No 6 orders for payment are only enforceable when they bear the prior signature of the accounting officer attesting the existence of appropriations, the correctness of the charge made on the accounts and the regularity of the supporting documents; consequently it is necessary that there should always be present an official who has this power to sign. The decision of 1959 which applies in a different context from the Staff Regulations of 1962 does not seem to me to be incompatible with these Regulations or to have been revoked by them by implication. If it were not so, there would be very grave doubts as to the validity of the subsequent decision of the Commission of 20 December 1965 and as to the validity of the general system of deputizing instituted in 1963 in the internal rules of procedure of the Commission.

4. But, although the rule which provides for the replacement of the chief accounting officer by a deputy does not seem to me to be open to criticism, it is the application which was made in this case which seems extremely questionable. The purpose of deputizing is to meet unforeseen difficulties and to cater for matters which are extremely urgent by permitting the deputy to take essential decisions which cannot be deferred; deputizing is essentially of a temporary nature. In this case, it lasted for more than fifteen months, during which time Mr Danvin was entrusted with complete responsibility for the department and replaced successively two permanent officials, one of whom was no longer employed and the other of whom had not yet taken up his duties. It is paradoxical that a servant in Catergory B should have been entrusted for fifteen months with a task which is very similar to one which he would only have been able to exercise for a year if he had been in Category A and, what is more, he had to do it without the financial compensation which would have been granted to him under Article 7 of the Staff Regulations. It is enough for me to say that, for reasons which it is not for me to examine but which I can understand very well, there has been abuse of the object of the system of deputizing, the result being that Mr Danvin has suffered an abnormal increase in his responsibilities and duties and, in all honesty, account must be taken of this. His position, despite the absence of an express decision which, moreover, could not have been taken in his case, was similar to that of an official occupying a post temporarily; I also think that in this particular case his claim to be entitled to an allowance is

justified; but how should it be calculated? The sum of BF 100 000 which Mr Danvin asked for in his application does not seem to be founded on any convincing basis. The simplest method is to base the calculation on the provisions of Article 7 of the Staff Regulations regarding the differential allowance. The calculation which has been arrived at in this way by the defendant and the accuracy of which the applicant has only belatedly contested gives a sum of BF 16 783. This is the sum which I advise the Court to accept, or at least a sum which is very close to it, if you wish to avoid confusing Mr Danvin's position with that of an official occupying a post temporarily.

B — The above discussion saves me from having to deal at length with a submission advanced on a purely subsidiary basis and which is concerned with unjust enrichment. First of all, I am not at all certain that such an action can be invoked in relations between an institution and its servant, which are governed by the Staff Regulations. Moreover, what does unjust enrichment involve in this case? Likewise, what is the damage which Mr Danvin has suffered? I think there is nothing to be gained from transposing concepts of private law into an area for which they have not been conceived.

However that may be, I think the Court should:

— annul the implied decision of the Commission of the European Economic Community rejecting Mr Danvin's appeal through official channels;

— order the Community to pay to the applicant the sum of BF 16 783;

— order the Community to bear the costs of the action.