OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 5 MAY 1983 [1]

Mr President,
Members of the Court,

1. Introduction

Cases 36, 37 and 218/81 with which I am to deal today were joined by order of 29 October 1981. Despite differences in subject-matter and the contentions advanced, the cases are in fact connected in a way which goes beyond the person of the applicant and concerns in particular the background to all three disputes. That background consists of the influence which differences of opinion about the contents of the Community policy to be developed for transport had, according to the applicant, on his career. He alleges first that the differences of opinion led to the issue of a periodic report, which he contests in Cases 36 and 218/81 and which (in comparison with his previous reports) was much delayed and what is more eventually less favourable. Secondly, the differences of opinion led, he claims, to his transfer from the specialized branch for the harmonization of social legislation, of which he was the head, to a "sector of activity in a division", which, besides comprising the sector covering working conditions, of which he was to be in charge, also comprised all other aspects of inland transport markets policy. That transfer is contested in Case 37/81 which was brought at the same time as Case 36/81. A second division of the directorate concerned remained responsible for structural policies relating to inland transport as well as for market analysis and statistics. It is clear from the decision to carry out the reorganization, which is attached as Annex 4 to the defence lodged in Case 37/81, that the applicant's specialized branch was certainly not the only victim of the reorganization, a fact which, I think, is not entirely immaterial to consideration of this application. As far as I know, the other victims of the reorganization have not made any appeal. The smallness of the division, although it comprises many very important branches, of which the applicant now forms part, reflects in part the stagnation in the implementation of a common transport policy prescribed by the Treaty. Such stagnation inevitably leads also to personal frustrations. When one studies Annexes 7 and 8 to the defence lodged in Case 37/81, one is struck by the degree to which attempts to implement a common transport policy have failed.

It appears from the file that the immediate reason for converting a specialized branch answerable directly to the director concerned into a "sector of activity" in a division covering all aspects of market policy lay in the attempts to rationalize the departments of the Commission in the light of the recommendations made by the external Spierenburg Commission and then by the internal Ortoli Commission. I think that

1 — Translated from the Dutch.

it is conceivable that the wish to integrate the policy on harmonization of social legislation into a policy covering all aspects of market policy did play some part in the Commission's decision to make the conversion. The file gives no decisive indication. In any event the conversion itself will almost inevitably lead to the greater integration of the policy on harmonization of social legislation or on working conditions in the wide sense used in the annex to which I have referred into a more comprehensive market policy. In other words, instead of remaining a relatively independent aspect of policy, in the new organization the harmonization of social legislation almost inevitably becomes one of the aspects of a common transport policy, as Articles 74 and 75 of the EEC Treaty intended. However, the consequences of such a change of policy in terms of organization and staff policy, which are now contested, are in any case in my view bound to flow from the discretion which the Commission has to organize its departments rationally as well as to determine its policy. Whether the Commission may have infringed officials' rights when working out its policy in this respect is a question to which I shall revert. On the main issue, however, the applicant cannot in my view succeed in reversing the reorganization for the very reasons I have outlined.

It appears from the fact that Applications 36 and 37/81 were lodged together as well as from the contentions in support of the applications in Cases 36 and 218/81 that in the applicant's view the background I have outlined also played a part in the last two cases. The applicant was in fact entirely in disagreement with his superiors' views on the place and importance of the harmonization of social legislation in the common transport policy and, as the file on the case shows, he maintained his own different views *vis-à-vis* his superiors with great obstinacy. The report produced at the request of the responsible Member of the Commission, Mr O'Kennedy, by a senior official of the Commission wholly unconnected with the issues involved gives a clear picture of the friction which the differences of opinion caused between the applicant and his superiors. The applicant is described in that report as "a thoroughly honest man, imbued with a sense of the political importance and human value of what had become his own personal mandate" (Annex II to the Commission's defence in Case 37/81, at page 9). However, the report also stresses the handicaps which the applicant's lengthy period of specialization in a limited field presumably placed on his ability to have regard to other aspects of the common transport policy. The definitive version of the contested periodic report, eventually produced after much delay, emphasizes in particular, after a similar opinion had already been expressed unemphatically in the original 1976 version of the report, that after his appointment in 1974 as head of a specialized branch he lacked the ability to run an independent unit including various colleagues. An outstanding member of staff is not necessarily an outstanding manager of a separate organizational unit and that fact alone may in my view provide a sufficient explanation of the applicant's less favourable assessment in the

contested report which should not in any way be regarded as a denial of his great specialized skills or consequently as an insult, as the applicant thinks.

In fact in the previous period of assessment the applicant was still not the head of a specialized branch and therefore he was assessed entirely on his ability as a "qualified official engaged in planning . . . duties". Moreover, in so far as the applicant's inflexible attitude towards his superiors and his inability to integrate his own field of responsibility into the directorate's general policy did play a part in the assessment (a modest one to judge from the periodic report), the assessor's right to take into account those shortcomings arising from his firm and jealously defended views on policy cannot, in my view, be challenged.

Despite those incidental comments, however, the legal guarantees of objectivity and care which are laid down in the Staff Regulations and the Court's case-law and which are relatively important in the assessment procedure, must still be respected. I shall therefore now consider the applications in the light of those legal guarantees.

2. The contested assessment procedure (Cases 36 and 218/81)

For the actual course of the contested assessment procedure I refer to the Report for the Hearing. It is clear from the report that seventeen months of the delay contested in Case 36/81 in the drawing up of the final periodic report is attributable to the length of the appeal procedure before the Joint Committee on Staff Reports. On the other hand it seems to have taken two years and three months for effect to be given to that Committee's recommendation that the reasons why the assessor's and appeal assessor's judgments were less favourable than in the previous report should be stated. What is more, the procedure was concluded on 30 July 1980 only after the applicant had lodged the first of his complaints under Article 90 of the Staff Regulations on 17 July of that year.

In Case 36/81 the applicant asks the Court to annul the protracted assessment procedure on the grounds of infringement of Article 43 of the Staff Regulations and to award him damages. In Case 218/81 he asks the Court to annul the periodic report itself. The second application is based on the following submissions:

The Commission's failure to consult the Joint Committee on Staff Reports (a second time) on the complaint lodged against the final periodic report in accordance with the provisions of the Guide to Staff Reports;

The incorrect description of duties given by the appeal assessor;

Misuse of power in so far as the report was later used for the purpose of abolishing the specialized branch in question in Case 37/81.

On the application in Case 36/81 I think I need only say that a procedural delay does not on its own create a right of action for the annulment of the procedure. That application must be dismissed for that reason alone, however justified criticism of the delay may be. Furthermore, no damages can be awarded in that case in respect of the chances of promotion allegedly lost because of the delay since the applicant

never appealed against the rejection of his applications for the A 3 posts in question and there is no evidence to suggest that his applications were rejected because of the absence of a periodic report.

Of all the contentions advanced in the three cases the applicant's first submission in Case 218/81 (that the Joint Committee on Staff Reports was not consulted about the complaint) has, I think, the most force. Although a similar submission was rejected in paragraph 13 of the Court's decision in Case 782/79 (*Geeraerd* [1980] ECR 3651, at p. 3663), one of the reasons for its rejection was also the existence of a very special situation which permitted departure from the rule in question.

The passage cited from the Guide to Staff Reports on page 9 of the reply expressly provides that the Joint Committee on Staff Reports must be consulted on complaints lodged under Article 90 of the Staff Regulations against an appeal assessor's report. As in the *Geeraerd* case, the provision in question certainly does not constitute "an implementing provision prescribed by the Staff Regulations but an internal measure, introduced by the Commission of its own accord which cannot therefore be regarded as having the character of strict law" (paragraph 13). However, I share Mr Advocate General Sir Gordon Slynn's view expressed in his opinion of 3 March 1983 in Case 282/81 that the Commission must consider itself bound by such a procedural rule which it has imposed upon itself and also published. [1]

1 — The same view is expressed in paragraph 18 of the Court's judgment of 21 April 1983 in Case 282/81 *Ragusa*.

My colleague Sir Gordon Slynn also cited paragraph 17 of the decision in Case 105/75 *Giuffrida* [1976] ECR 1409 in which the same view was expressed. I would add that such a procedural rule is in fact the only real guarantee of an objective assessment based by all assessors on the same criteria, which, in a large administration like the Commission, must be considered to be of great importance. The Commission's argument that the Joint Committee had already given its opinion on the assessment is, in my view, a weak one. For all that the Joint Committee could at that time find in its opinion was that the explanations given did not adequately state the reasons for the relatively unfavourable assessment. Since a statement of reasons had in the meantime been provided in response to the Joint Committee's opinion, it would certainly not have been pointless for the Committee to make an objective examination of those reasons.

Like Advocate General Sir Gordon Slynn (see page 13 of the typescript of his opinion cited above) and Mrs Advocate General Rozès in her Opinion in Case 125/80, *Arning* [1981] ECR 2560, with further references) I believe, however, that such a procedural defect cannot automatically lead to the annulment of the periodic report. For it to do so the applicant would have to show that, but for the defect, the Commission's ultimate decision on his complaint would have been different (on this point see, in addition to the opinions already cited, the opinions of Mr Advocate General Warner in Case 90/75 *Deboeck* [1975] ECR at pages 1140 and 1141 and in Case 25/77 *Roubaix* [1978] ECR at page 1096 as well as paragraph 24 of the

decision in Joined Cases 156/79 and 51/80 *Gratreau* 3943 at page 3955). In my view the applicant has provided no such proof either here or in his other two submissions which have not yet been discussed. Those submissions are, first, that the appeal assessor misunderstood his rôle. In the applicant's view the appeal assessor had a conciliatory rôle and therefore ought not to have simply acted on the first assessor's opinion as to how the Joint Committee's opinion should be complied with. That view of the appeal assessor's rôle does not seem tenable to me. Although he must form an independent judgment whilst exercising the necessary care, there is nothing to prevent him, after an independent examination of the Joint Committee's opinion, from deciding that he can give effect to it, in conformity with the first assessor's opinion.

I do not think that evidence has been adduced to indicate any misuse of power either, or that the appeal assessor's relatively unfavourable judgment was prompted by the wish to justify the reorganization contested in Case 37/81. The applicant's contentions in this regard rather lack credibility for the very reason that the assessment of the applicant as "average" and no longer as "above average" was made on 15 November 1976 at a time when the Commission's rationalization measures were still not in preparation in any way at all. The additional explanation given in 1980 of that assessment may quite simply be regarded as having been made to comply with the opinion of the Joint Committee on Staff Reports. In view of my introductory remarks on the background to the three actions I do not believe, either, that the additional explanation appears implausible, apart from the fact that the applicant should have *demonstrated* that, if the Joint Committee had been consulted once again about his complaint, it would have rejected the reasons given. Of course, the mere *possibility* that this might have happened naturally cannot be excluded, but, like the other Advocates General whose Opinions I have referred to, I am of the view that such a *possibility* is not a sufficient ground for concluding that the periodic report should be annulled. I must stress however that is is highly deplorable that the Commission did not observe the procedural guarantee for objectivity which it had itself introduced, but the Court's limited powers of review do not enable it to remedy that irregularity.

3. The contested reorganization and transfer decision (Case 37/81)

In Case 37/81 the applicant asks the Court to annul the decision notified to him on 30 January and 9 February 1981 to transfer him as head of sector to a "sector of activity in a division" to be set up upon the abolition of his specialized branch. As I mentioned, besides being responsible for the harmonization of working conditions in the wide sense (of which he remained in charge), that division was also made responsible for all other aspects of the market policy to be worked out for inland transport. The applicant also asks the Court to award

him compensation for the damage he has suffered as a result of the transfer.

Before considering the submissions advanced in this application I consider it advisable to answer first the question whether in fact there is any act or decision in this case which may adversely affect the applicant, as is required by Article 90 (2) and the second paragraph of Article 25 of the Staff Regulations in order for an action to be admissible. That question should in my view be answered in the affirmative, regard being had to the Court's judgments in Case 35/72 (*Kley* [1973] ECR 679, paragraph 4 at page 688), in Joined Cases 33 and 75/79 (*Kuhner* [1980] ECR 1677, paragraphs 12 and 13 at page 1694) and in Case 60/80 (*Kindermann* [1981] ECR 1329, paragraph 8 at page 1340, as well as the Court's previous case-law discussed in detail on pages 1346 to 1349 of the Opinion of Mr Advocate General Reischl in that case) and also in view of what may be implied from the judgment in Case 125/80 (*Arning* [1981] ECR 2553). In particular, the paragraphs just cited in the decision in *Kuhner*, which may be compared to this case, admit, in my view, of no other conclusion. As a legal guarantee the right of appeal to this Court is of course particularly important in the event of an alleged misuse of the Commission's power to carry out reorganizations or in the event of a neglect of the care required as regards the interests of staff affected by a reorganization measure.

As to the contentions advanced in Case 37/81 I can be quite brief.

It is clear from the file that the first submission, alleging that the decision was taken by an authority without power to adopt it, has no factual foundation since both the reorganization decision and the ensuing decision to transfer the applicant were duly adopted by the Commission itself on 8 October 1980. The contested decision of the Director General for Personnel and Administration of 30 January 1981 was simply a measure for carrying out that decision for which authority had been conferred by the Commission in a previous decision.

The second submission based on the second paragraph of Article 25 of the Staff Regulations alleging that the applicant was not promptly informed and that the decision did not adequately state the reasons on which it was based) is, strictly speaking, factually well founded inasmuch as the applicant was not given official notification of the decision to transfer him until three months after his transfer (on 1 November 1980). In actual fact, however, the applicant, like his colleagues, had already been given detailed information at a meeting with the staff held on 15 October 1980, which was confirmed in writing on 30 October 1980 so that in the final analysis the second submission has no sufficient factual foundation either. As to the allegedly inadequate statement of reasons, it is clear from the facts which emerge from the file on the case that the Court's declarations in the cases cited (paragraph 15 in *Kuhner*, paragraph 16 in *Kley* and paragraph 13 in *Arning*) also apply here. The Court there held in fact that consideration must be given not only to the individual decision but also to the circumstances in which it was taken and brought to the knowledge of the official concerned. It is clear from the general course of the reorganization that, like the applicants in the earlier cases which I have cited and his other colleagues affected by the reorganiz-

ation, the applicant was constantly informed about the extensive reorganization which was in preparation, although from the point of view of staff relations policy a more personal approach to the applicant would certainly have been preferable.

The applicant's third submission is that in view of the judgment in Case 18/70 *Almini* [1971] ECR 623 he should have been allowed the opportunity to give his views in good time on the question whether the measure at issue was in the interest of the service. For the reasons why I think that contention should be rejected I refer to paragraph 17 of the decision in the *Arning* case which I have cited. As far as this case is concerned, I would merely add that it is clear from the evidence provided by the applicant and the Commission in all three cases that the applicant's views on the planned measure were certainly sufficiently known.

The applicant's fourth submission is that his material and non-material interests as well as his chances of promotion were adversely affected by his transfer. In view of the Court's statements in paragraphs 20 and 21 of the decision in the comparable *Kuhner* case this contention must also be rejected. As in the *Kuhner* case, the applicant's new duties as "head of a sector of activity in a division" correspond "very closely to one of the descriptions of posts comprised in the basic post of principal administrator". In my view the Commission satisfactorily refuted the submission made at the hearing that there is no such correspondence. I would add that, unlike the other distinguishable activities of the division in question, his sector of activity is in fact mentioned separately in the general description of the division's work and that it is clear from the report of Mr Verheyden to which I referred earlier that he does have a rather privileged position *vis-à-vis* his colleagues in the division. Finally, I repeat my conclusion in the introduction, namely that in the interests of the service the Commission must be considered to be fully entitled to adopt the reorganization measures in question. Owing to the care with which the consequences of that measure upon the applicant were adjusted, not only was his status fully respected but furthermore his personal interests were reasonably taken into account.

Finally, the last submission as to misuse of power must, I think, also be dismissed. On this point I refer to the judgments in *Kuhner* and *Arning* as well as to my introductory remarks. The reorganization was the result of the external Spierenburg Report and the internal Ortoli Report and considerations such as those mentioned in my introductory remarks were a clear justification of the need for it. As was also held in the judgments I have just cited, it is not for the Court to pass any judgment on the expediency of the reorganization or its effects upon the applicant. However, the course of events shown by the evidence submitted by the applicant and the

Commission gives no reason to doubt that only considerations bearing upon the interests of the service were taken into account when the contested decision was adopted and that those considerations were wholly unrelated to the applicant personally.

For those same reasons the claim for damages should be dismissed.

4. Summing-up and conclusion

To sum up, I think that serious criticisms may indeed be made against the Commission, particularly as regards the assessment procedure followed. These concern first the delay in assessment, which should mostly be attributed to the Commission. Secondly they concern the Commission's disregard of the procedural guarantees which it had itself introduced for an objective consideration of a complaint lodged against a final assessment. However, in view of the Court's previous decisions and other considerations, the irregularities noted cannot lead to the annulment of the decisions in question or to an award of the damages claimed. Therefore in my opinion all the applications should be dismissed and both parties ordered to pay their own costs in accordance with Article 70 of the Rules of Procedure.