OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 2 JUNE 1983

My Lords,

The Applicant, Mr Jean-Jacques Charles Geist, is an official occupying a post in the scientific and technical services of the Commission. In response to a notice published in the Staff Courier on 13 June 1980 he applied to be assigned to the Commission's delegation to the United States in Washington. The notice stated that the vacancy for employment No 120 was that of First Secretary in charge of scientific and technical matters; extensive experience in scientific and technical problems, particularly in the field of energy, was required. In addition, the notice specified that it was restricted to officials of the Commission paid out of the operating budget. As an official in the scientific and technical services, Mr Geist was paid from appropriations in the research and investment budget. The vacancy was advertised as arising under the rotation system, adopted by the Commission on 23 July 1975, for positions in delegations and offices in third countries. Under this system, officials may be assigned to a delegation or office in a third country, together with their budgetary post, for a period of years and then return to their base or are posted elsewhere. The scheme does not expressly limit the rotation system to officials paid out of the operating budget.

On 7 August 1980 Mr Geist received a letter, dated 14 July and signed by a Miss Lambert, which informed him that the appointing authority had not been able to accept his candidature. This is all that the letter said; it gave no reasons. The position was apparently filled by a Mr Lafontaine, pursuant to a decision made by the Commission's Director-General of Personnel and Administration on 18 July. On 13 October Mr Geist lodged a complaint against the letter of 14 July. The Commission did not reply to the complaint which was therefore treated as impliedly rejected after four months. On 14 May 1981 the application commencing proceedings was lodged at the Registry of the Court, within time when the periods of grace set out in Article 1 of Annex II of the Rules of Procedure are taken into account.

In this action Mr Geist claims (1) annulment of the decision of which he was given notice in the letter of 14 July 1980, (2) annulment of the decision, contained in the notice published in the Staff Courier on 13 June 1980, reserving the assignment to officials paid out of the operating budget, (3) annulment of all the decisions taken after the publication of the notice regarding the assignment and (4) costs.

Since the notice was published on 13 June 1980 and Mr Geist submitted his complaint only on 13 October, after the expiry of the three-month period for submitting a complaint specified in Article 90 (2) of the Staff Regulations, it follows that the action is inadmissible in so far as the second claim is concerned. However the Court has in the past held that, since recruitment procedures comprise several interdependent measures, an applicant may rely on the unlawfulness of an early step in the procedure when contesting a later decision (see, for example, Cases 12 and 29/64 *Ley* v *Commission* [1965] ECR 107 at p. 118). By analogy, therefore, the arguments concerning the unlawfulness of the notice may be taken into account to the extent that its unlawfulness has a bearing on the legality of the other decisions challenged in the action.

So far as the third claim is concerned, no details have been given of the decisions which are envisaged. This ought to be done so that the defendant is adequately informed of the case he has to meet, and to enable the Court to know precisely what order is sought, and to be satisfied both that the claim is brought in time and that the acts which it is sought to annul do adversely affect the applicant. In some instances it is, in the nature of things, impossible to identify with precision the measures whose annulment is sought (eg. Cases 18 and 19/64 *Alvino* v *Commission* [1965] ECR 789) but, in the normal case, a failure to specify the subject matter of a claim for annulment may lead to its inadmissibility (Case 30/68 *Lacroix* v *Commission* [1970] ECR 301). In this case, however, it is clear that Mr Geist intended to challenge the decision assigning Mr Lafontaine. This was adopted on 18 July 1980, although it is not evident that Mr Geist knew of it before the Commission lodged its defence. In the circumstances, the third claim should be read as referring to that decision. It must be regarded as inadmissible in so far as it seeks the annulment of any other decisions which the Commission may have adopted.

Mr Geist's root objection is that the decisions rejecting his candidature and assigning Mr Lafontaine are void because the whole procedure was vitiated by the unlawfulness of the notice advertising the assignment. It is said that this notice was unlawful because it excluded officials who were not paid out of the operating budget: this is discriminative, has no objective justification and is contrary to the decision taken by the Commission on 23 July 1975, which provides for the rotation of positions in delegations and offices in third countries without setting any limitation on the directorates-general or the budgetary posts which may be involved. The Commission's defence is that (1) officials paid from appropriations in the research and investment budget are paid out of money specifically allocated by the Council for certain research programmes and the Commission cannot use this money to pay them for performing other functions, as would be the case if an official in the scientific and technical services were assigned to a delegation in

a third country; (2) the decision introducing the rotation system is an internal measure intended to improve the organisation of certain of the Commission's services and the Commission can, if it thinks it fit to do so, properly restrict its application to officials paid out of the operating budget; (3) under the rotation system, officials are assigned to a delegation or office in a third country with their budgetary post and are, in principle, replaced by an official returning from abroad. The vacancy in question arose from the premature transfer to Brussels of the then occupant of the post, the details of which are to be found in the report of Case 174/80 *Reichardt* v Commission [1980] ECR 2665. That official had originally been assigned to DG XII and was not an official in the scientific and technical services; since Mr Geist could not, therefore, replace such an official other than on the basis of a competition (Article 45 (2) of the Staff Regulations), candidates were restricted to those paid out of the operating budget.

At the hearing Counsel for the Commission said that notices advertising assignments under the rotation system no longer state that they are limited to officials paid out of the operating budget but it seems that the Commission has not decided whether other officials can be assigned under the system. There may in future be more flexibility though the question does not seem to have been resolved as one of principle. Each case may depend on its own facts.

Although the decision of 23 July 1975 does not expressly restrict rotation to officials paid out of the operating budget, it makes it quite clear that there is no general right to take part in the rotation system; the possibility of taking part is dependent on the list of movements to be determined by the Commission each year on the basis of a proposal made by the Member of the Commission responsible for personnel matters with the agreement of the Members concerned. Both the number of posts and the type of official who may be assigned may be limited. That is in my view contemplated by the system of rotation adopted and it does not seem to me to constitute of itself unlawful discrimination.

As was held in Case 791/79 *Demont* v *Commission* [1981] ECR 3105 (citing Cases 161 and 162/80 *Carbognani* and *Coda Zabetta* v *Commission* [1981] ECR 543), the general provisions relating to the rotation system "derive from the general power vested in every institution to provide for its own internal organization in the interests of proper efficiency ... (The) institutions are at liberty to organize their offices with due respect to the tasks entrusted to them and to allocate the staff available to them in the light of such tasks. From that point of view, the general provisions laid down by the Commission in its decisions of 23 July 1975 ... relating to the rotation system in respect of officials assigned to non-member countries did not establish an inflexible system of rules but rather a system which, as regards the rules governing its operation, may be adapted where necessary, in the interests of the proper efficiency of the service and in the interest of the official, to the

needs of a given individual situation" (paragraph 8 of the judgment).

In the present case, the possibility of assignment did not arise in the context of the general periodic rotation of officials posted abroad: the Commission had to find a replacement for one official who had been prematurely reassigned to Brussels. The rotation system envisages that, in principle, officials assigned to a delegation or an office in a third country are replaced in the directorate-general from whence they came by an official returning from abroad. The official returning from Washington had previously been employed in DG XII and had been paid out of the operating budget. Since he and his post would, in the ordinary way, be reassigned to the directorate-general supplying his replacement, it was in my view objectively justifiable and compatible with the terms of the decision of 23 July 1975 for the Commission to limit candidates for assignment to Washington to those paid out of the operating budget. In the event, the successful candidate was also employed in DG XII and there appear to have been no problems arising over his replacement by the official from Washington. It cannot be contended that the successful candidate did not fulfil the conditions laid down in the notice advertising the assignment.

For these reasons, the notice advertising the assignment was not unlawful and the claim that subsequent decisions adopted in the course of the assignment procedure should be annulled must be rejected. It is not necessary, in my view, to consider the more general question whether or not officials paid out of the research and investment budget can be lawfully assigned to a delegation or office in a third country under the rotation system.

It is then said that the decision rejecting Mr Geist's candidature, contained in the letter of 14 July, must be annulled because (1) the official who signed it was not competent to make such a decision and (2) no reasons were given in it.

As the Court made clear in Case 195/80 *Michel* v *Parliament* [1981] ECR 2861 at p. 2876 and in earlier cases, reasons for a decision adversely affecting a person should be given to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by error of law. Such reasons must be given at the time of the decision and it is not sufficient that the reason emerges during proceedings before the Court.

Miss Lambert's letter was not a decision. It seems to me that it purported to convey a decision which was separate from the decision to appoint Mr Lafontaine on 18 July 1980. Mr Geist was not rejected because Mr Lafontaine was chosen as the most appropriate candidate. Mr Geist's application was not accepted as such because he was not qualified to apply since he was not paid out of the operating budget. In my view

both under the Staff Regulations and as a matter of good administration, the letter to him should have said so in simple terms.

However it is no less plain that the application form told Mr Geist clearly that he was not eligible to apply, and he must be taken to have known this. According to the conditional terms of the notice, there could only be one outcome to his application — its refusal. Whether on the basis that "the applicant can have no legitimate interest in obtaining the annulment" (Case 9/76 *Morello* v *Commission* [1976] ECR 1415 at p. 1422) or that, since only one result was possible and was known to be possible, it would be wrong as a matter of discretion to annul the decision for lack of reasons, I would reject the argument founded on Miss Lambert's letter. I prefer to reject the application on this basis than on the footing that the obligation to give reasons was satisfied on the facts of the case by an application of the principle stated in the *Demont* case at paragraphs 12 and 13, where the obligation was satisfied on the facts.

In the reply, counsel for Mr Geist raised a new issue in the form of a claim that the decision of 23 July 1975 setting up the rotation system should be annulled. This is based on two arguments: (1) the decision has not been published or brought to the attention of the staff and (2) it was not adopted in accordance with Article 110 of the Staff Regulations.

It is contended that this additional claim is inadmissible. Article 42 (2) of the Rules of Procedure provides: "No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure". In Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251 the Court held: "For a new fact to be able to justify the raising of a fresh issue during the proceedings the fact must not have existed or must not have been known to the applicant when the action was commenced" (paragraph 17 of the judgment). The decision in question was known when the application commencing proceedings was drafted because it is referred to in the application and its unlawfulness was therefore capable of being known and pleaded at that time. The only matter of fact or law which counsel for Mr Geist has relied on to justify raising a new issue is the fact that a copy of the decision was annexed to the Commission's defence. This is not, in my view, sufficient since the facts were known at the beginning.

It has been suggested that Article 42 (2) should not be applied strictly, at least where the opposing party has had an adequate opportunity to answer the points made (see, for example, Case 112/78 *Kobor* v *Commission* [1979] ECR 1573 per Mr. Advocate General Capotorti at p. 1581). In this case, Counsel for the Commission had an adequate opportunity to reply in the

rejoinder and at the hearing. In addition, there is authority that some procedural defects must be raised by the Court of its own motion (see Case 2/54 *Italy* v *High Authority* [1954-6] ECR 37 at p. 52 and Case 6/54 *Netherlands* v *High Authority* [1954-6] ECR 103 at p. 112 in the case of requirements to carry out consultations before acting), in which case Article 42 (2) cannot bar consideration of them (e.g. Case 110/81 *Roquette* v *Council*, 30. 9. 1982, as yet unreported). In consequence, in my opinion, this claim should not be rejected as being inadmissible.

In the *Demont* case the Court pointed out that the general provisions relating to the rotation system fall outside Article 110 and are measures for the internal organization of the Commission (paragraph 8 of the judgment). That in my view is sufficient to dispose of both arguments raised on the substance of the point.

Even if the adoption by the Commission of the rotation system amounts to a decision and that decision is annulled, it does not seem to me to help Mr Geist. To annul the decision abolishes the rotation system. The Commission could still lawfully in my view have decided to replace the official who has originally been assigned to Washington by another official paid out of the operating budget, and could refuse to transfer any official paid out of appropriations in the research and investment budget on the ground that this was, in the circumstances, in the interest of the proper organization of its services. In substance this is what happened under the rotation system in force. The refusal to transfer an official paid out of the research and investment budget is not based on any express or implied requirement of the rotation system but on the Commission's discretion in the light of all the facts under that system.

In the result, for the reasons I have given, it is my opinion that the application should be dismissed and each party ordered to pay its own costs pursuant to Article 70 of the Rules of Procedure.