

7. In accordance with a general principle of good administration an administration which has to take decisions, even legally, which cause serious detriment to the persons concerned, must allow the latter to make known their point of view, unless there is a serious reason for not doing so.

In Joined Cases 33 and 75/79

RICHARD KUHNER, an official of the Commission of the European Communities, residing at 10 Rue des Eglantiers, Luxembourg, represented by David Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of his representative, 34 B Rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, a member of its Legal Department, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, of 93 Avenue Brillat-Savarin, 1050 Brussels, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION in Case 33/79 for the annulment of a decision of the defendant relieving the applicant of his functions as head of department assigned to the special department for statistics relating to "Other countries" in Directorate F (External relations, transport and services statistics) of the Statistical Office of the European Communities and assigning him to the post of principal administrator in Division F 1 (Statistical methods and classification of external trade) of the Statistical Office of the European Communities and of the implied decision rejecting the applicant's complaint relating thereto and also for a declaration that the Commission is liable to pay damages,

APPLICATION in Case 75/79 for the annulment of the express decision rejecting the above-mentioned complaint,

THE COURT (Third Chamber)

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart, Judges,

Advocate General: H. Mayras

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties developed during the written procedure may be summarized as follows:

I — Facts and procedure

The applicant, who was appointed an official of the Commission of the European Communities on 1 April 1959, has been assigned to various posts in the Statistical Office where from 1 De-

cember 1976 he performed the duties in Grade A 4 of head of department in the special department concerned with statistics relating to "Other countries" in Directorate F (External relations, transport and services statistics). As part of a reorganization of the office on 7 June 1978 the Commission adopted a new organizational structure which involved Directorate F paying much more attention to the problems of external trade. This specialization is illustrated by the following comparative table.

Detailed list of posts of Directorate F of the Statistical Office

Before 1 September 1978	After 1 September 1978
<p>Directorate F: External relations, transport and services statistics (S. Ronchetti)</p> <ol style="list-style-type: none"> 1. External trade (R. Sannwald) 2. ACP Countries (A. de Michelis) 3. Other countries (R. Kuhner) 4. Transport (H. G. Baggendorff) 5. Services (C. Simeoni) 	<p>Directorate F: External trade, ACP and non-member countries statistics (S. Ronchetti)</p> <ol style="list-style-type: none"> 1. Statistical methods and classification of external trade (R. Sannwald) <ul style="list-style-type: none"> — Special assignments on methods (R. Kuhner) 2. External trade statistics (J. Nols) 3. Analysis of external trade and statistics (A. de Michelis)

The new structure led to the specialized departments for statistics concerning "Other countries" and "ACP countries" being merged, with effect from 1 September 1978, into one department at the head of which was placed Mr de Michelis. As part of this reorganization the Commission decided by a decision notified on 29 June 1978 to the Director-General of the Statistical Office that the applicant would be assigned, without any change of grade, to Division 1 of Directorate F and given the post, no longer of head of department, but of principal administrator responsible for special assignments on methods.

On 26 July 1978 the applicant lodged a complaint, which was registered on 31 July 1978, against the arrangements made with reference to him. Since he received no reply to this complaint on 28 February 1979 the applicant brought an action before the Court of Justice asking for the annulment, on the one hand, of the decision assigning him to his new post and, on the other, of the appointment of another official as head of the "Wages and incomes" department in Directorate C (Demographic and social statistics) and also asking for damages (Case 33/79).

On 21 March 1979 the Commission forwarded to the applicant a decision which was taken out of time, rejecting his complaint.

By an application lodged at the Registry of the Court on 3 May 1979 the applicant brought a second action before the Court asking it to annul this express decision (Case 75/79).

By an order of 30 May 1979 the Court (First Chamber) decided to join Cases 33/79 and 75/79.

The Commission, in a pleading lodged at the Registry of the Court on 5 June 1979, raised the objection that the action brought in Case 75/79 was inadmissible.

The Court (First Chamber) by an order of 3 July 1979 decided to reserve its decision on the objection for the final judgment.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber, having jurisdiction by virtue of the decision adopted by the Court on 9 October 1979, Official Journal 1979, C 265, p. 8), decided to open the oral procedure without it being necessary to hold a preparatory inquiry.

II — Conclusions of the parties

Case 33/79

The *applicant* claims that the Court should:

- (a) Annul the purported decisions of the defendant, namely a letter of 30 June 1978 from Mr Petit-Laurent and a letter of 3 November 1978 from Mr Baichère, Director-General of Personnel and Administration, relieving him of his functions as head of the special department for statistics relating to "Other countries" and assigning him to Directorate F.1 "with responsibility for special assignments on methods";
- (b) Annul the implied decision rejecting his complaint in consequence of the Commission's silence for more than four months following the registration of his complaint on 31 July 1978 under No 139778;
- (c) Order the Commission to pay him damages for the material and non-material damage which he has suffered as a result of the above-mentioned decisions;
- (d) Order the defendant to pay the costs.

In the alternative the applicant requests the Court to allow him to bring evidence that “during a conversation on 18 July 1978 in Luxembourg the Director-General of the Statistical Office asserted: (a) that he had the greatest difficulty in finding a new posting for him and (b) that the unfavourable assessment of the quality of his work was not unconnected with his transfer”.

The applicant, who in his application originating proceedings also asked the Court to annul the appointment of another official, G. Lohmann, as head of the “Wages and incomes” department of Directorate C (Demographic and social statistics) has withdrawn this request in his reply.

The *defendant* contends that the Court should:

- (a) Reject the appeal in part as being inadmissible and in any event as unfounded;
- (b) Order the applicant to pay the costs.

Case 75/79

The *applicant* claims that the Court should:

- (a) Annul the express decision of 21 March 1979 rejecting his complaint registered on 31 July 1978;
- (b) Order the defendant to pay the costs.

The *defendant* contends that the Court should:

- (a) Dismiss the application as inadmissible and in any event as unfounded;
- (b) Order the applicant to pay the costs.

III — Summary of the submissions and arguments of the parties

A — Admissibility of the appeals

Since the defendant has pointed out that the first application (Case 33/79) is

admissible only in so far as it is directed against the Commission’s decision relating to the contested assignment of the applicant to a post rather than against the communication of 29 June 1978 or the letter of the Director-General of Personnel and Administration of 3 November 1978, neither of which are decisions, the applicant replies that the two communications against which he has directed his application are the only two documents by means of which he was informed of the contested decision assigning him to a new post and that it is clearly that decision which is the subject-matter of the application.

As the defendant has likewise pointed out that the second application (Case 75/79) is inadmissible because the express rejection of the complaint is merely a confirmatory document, the applicant replies that it is nothing of the kind because the express rejection contains a statement of the grounds upon which it is based, which is to be found in neither the contested decision nor, by definition, the implied decision rejecting the complaint resulting from the absence of any reply by the Commission. The applicant refuses to accept the relevance of the decided cases quoted by the Commission pointing out that those cases deal with disputes in which the applicants relied on a purely confirmatory document as a pretext to re-open the time-limit for challenging a decision which had become definitive. Those decided cases do not apply to this case since the original decision was challenged within the prescribed period.

B — The substance of the two applications

I — The annulment of the contested decisions

1. The applications

In his first application the applicant submits in substance that there are four

grounds for the annulment, namely: (1) breach of the obligation to give a statement of the grounds upon which the decisions are based which is imposed by Article 25 of the Staff Regulations of Officials of the European Communities; (2) failure to observe the rights of the defence; (3) infringement of Articles 5 and 7 of the Staff Regulations; and (4) breach of the duty of administrative authorities to look after the well-being of officials ("Fürsorgepflicht"). Furthermore the applicant in his second application, which relates specifically to the express decision rejecting his complaint, complains essentially (5) of the stated grounds for rejecting his complaint as being belated and incorrect and (6) of misuse of powers by the Commission.

(1) The Commission has infringed Article 25 of the Staff Regulations by not stating the grounds on which the decision assigning the applicant to a new post was based even though this new posting is likely to affect him adversely. According to the applicant it is clear from the case-law of the Court of Justice and in particular from the judgment of 27 June 1973 (Case 35/72 *Walter Kley v Commission of the European Communities* [1973] ECR 679) that a decision to transfer an official taken against his wishes is likely to affect the latter adversely and therefore the grounds upon which it is based must be stated. Although the transfer of the applicant does not amount to demotion in the table of descriptions of posts and functions (drawn up by the Commission on 29 July 1963), it is no less in fact an actual reduction in rank which seriously prejudices his legal status fundamentally calling in question his reputation and standing, because it appears to be a disciplinary measure for his incompetence or for serious mistakes in the performance of his duties. The contested decision does not however state any of the grounds on which it is based and

should therefore for this reason in itself be annulled.

(2) *Failure to observe the rights of the defence*

According to the applicant when any administration makes a decision likely to have a serious adverse effect on the interests of individuals, it is under a duty to make it possible for the persons concerned to make their point of view known and this principle has been recognized by the Court of Justice in its judgment of 11 May 1978 (Case 34/77 *Josef Oslizlok v Commission of the European Communities* [1978] ECR 1099).

The appointing authority never afforded him the opportunity to put forward his interests and systematically endeavoured to present him with a *fait accompli* by notifying him only at the last minute of decisions affecting him and by not stating the grounds upon which they were based and this has prevented him from effectively defending his position.

(3) *Infringement of Articles 5 and 7 of the Staff Regulations*

According to the applicant, even though the administrative authority alone is responsible for the organization of its departments, the discretion which it has must nevertheless be exercised with due regard to the rights which officials derive from the Staff Regulations. The effect of Articles 5 and 7 of the Staff Regulations is that an official is entitled to expect that the duties with which he is entrusted are, taken as a whole, consistent with the post corresponding to his grade, and the withdrawal from him of some of the departments under his authority could in certain circumstances prejudice this right which is what happened in the applicant's case. Whereas before he was directly under a director he now finds that he has been placed under the orders of a head of division with whom he was previously on an equal footing and his

duties are limited to the study of methodological problems which do not have any topical interest, when he was formerly head of a specialized department having a very wide field of action and study and with corresponding responsibilities. In spite of the fact that his assignment to a new post was strictly within the letter of the law it amounts in fact to a demotion which raises the presumption of a misuse of powers with the purpose of imposing a disguised disciplinary measure.

(4) *Breach of the administration's duty to look after the well-being of officials ("Fürsorgepflicht")*

The applicant submits that, although the Staff Regulations do not expressly impose on the administration a duty to look after the well-being of officials within the meaning of the German law applicable to civil servants, they nevertheless by implication incorporate the same principle whereof Articles 24, 58 and 76 constitute several specific applications; he points out that legal writers (Euler, *Europäisches Beamtenstatut*, p. 225) advocate a broad interpretation of these provisions. In his view both his transfer and the circumstances in which it has been carried out constitute a serious breach of the administration's duty to look after his well-being because, when it took the contested decision it did not correctly assess the mutual interests of the department and the applicant and it did not take sufficient account of his length of service, abilities, experience and his previous responsibilities. By means of the contested decision the Commission has "not only brought to an abrupt halt the progress of the applicant's brilliant and promising career but also cast doubts on his abilities or raised the presumption that he has been guilty of some failing in his work".

(5) and (6) The applicant in his second application (Case 75/79), for the annulment of the express decision

rejecting his complaint of 31 July 1978 submits that this rejection must be annulled, on the one hand, because it occurred after the expiry of the binding time-limits which the Commission is allowed under Article 90 of the Staff Regulations and because a later statement of grounds cannot make good the defect inherent in the earlier decisions which were unlawful because of the failure to state the grounds upon which they are based and, on the other, because this late statement of grounds is moreover incomplete and incorrect. It is incomplete because the defendant has not answered all the points set out in the applicant's complaint and because it is based on grounds which are incorrect because it refutes complaints which the applicant has not raised.

2. *The defences*

The *Commission* in its defences (in Cases 33/79 and 75/79) considers the applicant's submissions in the order in which they have been made.

(1) The defendant, after considering the submission that no grounds are stated, points out that although the principle laid down by Article 25 of the Staff Regulations cannot be challenged, it must nevertheless be stressed that the decided cases quoted by the applicant are irrelevant, because they concern cases where officials were transferred and the applicant has not been transferred but "assigned with his post to another division". As far as concerns the requirement that the grounds on which a decision is based must be stated the defendant observes that, according to the case-law of the Court (judgment of 14 July 1977 in Case 61/76 *Jean-Jacques Geist v Commission of the European Communities* [1977] ECR 1419 at p. 1432), for the purpose of deciding whether the conditions of the second paragraph of Article 25 have been fulfilled "it is necessary to consider not only the transfer decision in itself but the staff memoranda on which it is based

which were duly brought to the knowledge of the applicant and which clearly informed him of the reasons upon which that decision was based". In this case the contested decision was preceded on 17 February 1978 by a statement by the Director-General of the Statistical Office to all the officials and the applicant has on several occasions had the opportunity to acquaint himself with the reasons for the contemplated reorganization and planned disappearance of the specialized department which he directed. Moreover the grounds of the contested decision are evident from the minutes of the meeting of the Commission of 7 June 1978 and from the communication to this institution from Mr Ortoli and Mr Tugendhat of which documents the applicant was aware and to which he refers in his complaint.

The contested decision is therefore based on grounds which have been communicated to the applicant and it fulfils the conditions prescribed by the second paragraph of Article 25 of the Staff Regulations.

(2) With regard to observance of the rights of the defence, the defendant, after having questioned the relevance of the applicant's references to the case-law of the Court (Case 121/76 *Alessandro Moli v Commission of the European Communities* [1977] ECR 1971 and Case 34/77 *Josef Oslizlok v Commission*, mentioned above), submits that an institution which undertakes a reorganization of its departments, involving changes in the posts assigned to numerous officials, cannot be required to obtain the views of each of the latter in turn on the advisability of the said reorganization and on the attendant consequences. It points out in addition that the applicant was informed of the terms of the proposals for the reorgan-

ization of the Statistical Office and that he had meetings with the Director-General several times so that he was put in a position to submit observations.

(3) With regard to the infringement of Articles 5 and 7 of the Staff Regulations the defendant submits that although it is true that the withdrawal from an official of some of the departments for which he was previously responsible could, in certain circumstances, prejudice his rights under the Staff Regulations, it does not thereby follow that every departmental reorganization may be called in question. It is not sufficient that such a reorganization brings about a change or even any reduction in his responsibilities but it is necessary that, taken together, his remaining responsibilities should fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope (judgment of 20 May 1976 in Case 66/75 *Margherita Macevicius v European Parliament* [1976] ECR 593).

In this case the applicant, an official in Grade A 4, occupied a post described as head of a special department. Following the reorganization of the Statistical Office he was entrusted with special assignments on methods, namely advisory duties corresponding both to those of a head of a special department and to the basic post of principal administrator, as emerges from the description of the duties and powers attaching to each basic post adopted by the general provisions for giving effect to Annex I A to the Staff Regulations. The fact that the applicant no longer directs an administrative unit and no longer, according to his own statements, has any administrative responsibility does not indicate that he has been downgraded either; it follows from the description of

the duties and powers attaching to basic posts that officials in Grades A 1 to A 5 perform duties of a kind which cause them, according to circumstances and within each grade, either to direct administrative units or to carry out advisory duties or to advise an institution without any of these duties being considered more important than the others.

Nor has the applicant shown that his present duties are clearly less important than those corresponding to his grade and post or that the reorganization of the Statistical Office is not in the interests of the service. The applicant has not proved that there is objective, precise and concordant evidence of misuse of powers (Case 35/72 *Kley v Commission*, mentioned above). It is clear on the other hand from the communication dated 31 May 1978 from Mr Ortoli and Mr Tugendhat that incorporating a number of specialized departments into one larger administrative unit has been justified by the too limited size of these departments. Furthermore the abolition of the applicant's specialized department as such has been justified by the increasing importance of questions relating to the enlargement of the European Communities. It is moreover inconceivable that the Commission has carried out a large scale reorganization of the Statistical Office solely for the purpose of taking concealed disciplinary action against the applicant and in this connexion it mentions the cases of several officials who have been assigned to different posts as a result of that reorganization.

(4) The defendant does not accept the applicant's conception of the scope and

substance of the administration's "Fürsorgepflicht" (duty to look after well-being of officials). It is true that when the latter assigns an official to a specific post it is under a duty to take into account his abilities and the interests of the service but those are assessments which are primarily a matter for the administration (Case 35/72 *Kley v Commission*, mentioned above). Compliance with these two obligations is guaranteed by Articles 5 and 7 of the Staff Regulations without it being necessary to have recourse to other rules and also by the Court of Justice reviewing if need be the existence of misuse of powers. Finally the defendant points out that the duty to look after the well-being of officials on which the applicant relies is similar to the duty to assist officials which the case-law of the Court derives from Article 24 of the Staff Regulations, but that the applicant has proved neither the existence nor *a fortiori* the seriousness of the detrimental effects to his standing and reputation caused by him being assigned to a new post. This new posting has not meant that his duties are less important and is certainly not due to the fact that the services that he has rendered, the value of which is acknowledged, are in any way inadequate. The retention of his name in the directory of the Statistical Office is also calculated to maintain his reputation *vis-à-vis* third parties.

(5) and (6) With regard to the complaints which the applicant raises in his second application (Case 75/79) the *defendant* contends first that the period prescribed in the last paragraph of Article 90 (2) of the Staff Regulations to enable the appointing authority to reply to a complaint is not an essential procedural requirement non-compliance with which leads to the reply to the complaint being a nullity. If the

appointing authority is allowed, by letting the prescribed period expire, to reply by implication to a complaint, it must *a fortiori* be able to reply expressly to a complaint even after the expiry of this period. Moreover this hypothesis has been specifically provided for in Article 91 (3) *in fine*. The defendant submits that in any case, even if the delay in replying to the complaint was of such a kind as to make it irregular, such irregularity cannot have any effect on the determination of the question whether the decisions adversely affecting the applicant, which are the actual subject-matter of the application, were properly taken.

The Commission then considers the complaints that the grounds which allegedly serve as the basis of the contested decision were late, incorrect and inadequate and also the submission that there has been a misuse of powers. The grounds referred to have not been stated out of time as the analysis of the circumstances which led to the contested decisions contained in the defence (Case 33/79) indicates. On the other hand the fact that the reply to the complaint did not deal systematically with all the applicant's arguments — in so far as the rejection of the complaint must be regarded as an act adversely affecting the official which the defendant disputes — is not of such a kind as to invalidate that rejection. The statement of the grounds on which a decision adversely affecting an official is based is in fact adequate if those grounds are shown clearly and unambiguously (judgment of 2 July 1969 in Case 27/68, *Reinaldus Renckens v Commission of the European Communities* [1969] ECR 255). Although the administration was not under a duty to obtain the views of the applicant the latter nevertheless on several occasions had the opportunity to submit his observations in connexion with the proposed reorganization.

The defendant quotes the judgment of the Court of 29 September 1976 (Case 9/76 *Carmelo Morello v Commission of the European Communities* [1976] ECR 1415), by virtue of which even if the grounds on which a decision was based were inadequate, the applicant can have no legitimate interest in the annulment of the decision when it could certainly be confirmed in substance in the absence of a mistake of law or of fact.

With regard to the submission that there has been a misuse of powers the defendant maintains that no argument has been put forward in support of it and that it must consequently be rejected.

3. Reply

The *applicant* replies that with regard to the question whether the defendant has complied with the obligation to state the grounds upon which the contested decision was based the defendant has not even met the requirements of the decided cases which it has itself quoted. Although it is perfectly true that the Director-General of the Statistical Office informed all the officials concerned of the reasons for the projected reorganization he gave no indication of the new postings which would result therefrom. Moreover if a statement of the grounds on which a decision is based is to comply with Article 25, it must be in writing and, apart from the fact that the references in the Commission's minutes do not contain a statement of the said grounds, the applicant was not aware of them and contrary to the Commission's statement did not refer to them in his complaint.

The applicant's reply to the Commission's statement regarding observance of the rights of the defence is that the resultant obligation is not restricted to disciplinary proceedings but has a much wider application. In spite of making

several requests for an interview the applicant was not seen by the Director-General of the Statistical Office until 17 February 1978, when he heard that his department was going to be abolished, and after that until 18 July 1978, when his assignment to a new post was discussed.

With reference to the infringement of Articles 5 and 7 of the Staff Regulations the applicant submits that it is in fact the administrative practice of the Commission to regard the duties of a head of a special department as being of greater importance than the other duties corresponding to Grades A 4 and A 5 and these are equivalent to the duties corresponding to Grade A 3. This special status involves numerous non-material and even material privileges and advantages at work which other officials in Grades A 4 and A 5 do not enjoy. In support of his assertions the applicant quotes a number of facts and documents and repeats his assertion that both the nature and extent of his present duties fall clearly short of those corresponding to his previous post.

Even if the reorganization of the Statistical Office was obviously not planned in order to apply to him a disguised disciplinary measure (and he has never claimed that it was), it nevertheless served as the pretext to "get rid of him". There is some evidence to suggest that the interests of the service were not the main reason for his new posting. In this connexion the applicant sets out the following facts:

- (1) setting up a new administrative unit and abolishing it fourteen months later, each time referring to the importance of the field of studies in question;
- (2) the Director-General of the Statistical Office led him to understand

that it was difficult to find him another post in the new scheme of posts and that the quality of his work left something to be desired;

- (3) he was not offered the post of Director of the special department on "Wages and incomes" which became vacant in consequence of the reorganization of the Statistical Office in spite of his ten years' experience in this field and the Commission appointed an official who had never held the office of head of a special department and did not have any specific experience in the field of wages statistics;
- (4) the chefs de cabinet had a different conception of the interests of the service at their meeting on 5 June 1978 during which they approved the proposal for the reorganization of the Statistical Office subject to the express reservation that the applicant's special department, together with its head, was to be retained; and finally
- (5) that the post at present occupied by the applicant was created out of a miscellany of duties and was not found in any of the former schemes of posts.

In connexion with the administration's duty to look after the well-being of its officials the applicant does not accept the defendant's restrictive interpretation of this concept. Moreover French law relating to civil servants also imposes upon the administration the duty to act carefully and diligently when it decides to assign its servants to new posts. In his view he has shown in his application as well as in his reply that the defendant's policy on postings is inconsiderate and inhumane and that the interests of the

service have only played a very minor part in determining his new posting.

With regard to the fact that his reputation in the eyes of third parties has been maintained by his name being kept in the directory the applicant submits that initially it completely disappeared from the latter and that putting his name in the current directory makes no difference, since it appears under a head of division, a position with which he had previously been placed on an equal footing as head of a special department. He maintains that the publicity thereby given to the measure affecting him in fact damaged his professional reputation.

In answer to the arguments put forward by the Commission concerning the legality of the express decision rejecting his complaint the applicant points out that the period prescribed for reply to a complaint is an essential procedural requirement non-compliance with which makes this reply invalid. Since the periods prescribed in Articles 90 and 91 have to be strictly observed by officials it is not possible to accept a different system when these periods run against the appointing authority. He then expresses the view that the hypothesis envisaged in Article 91 (3) does not apply in this action because it relates only to the case where the appointing authority makes its decision before an action is brought before the Court of Justice.

The applicant repeats that the statement by the defendant, in its express decision rejecting his complaint, of the grounds on which the decision is based is out of time and cannot remove the illegality of the decisions challenged in his complaint and in his first application.

Even if it has to be accepted that this last statement of grounds may be taken into consideration in order to assess whether the rejection of his complaint was lawful, it would have to be held that this statement of grounds is inadequate,

because the defendant has failed to state the facts of the case which show clearly and unambiguously the grounds upon which the decision adversely affecting him is based.

With reference to the defendant's silence regarding two of the four heads of complaint, namely the duty to consult him and the appointment of another official as head of the special department for "Wages and incomes" the applicant submits that the defendant cannot make good this omission by referring to what it says in its defence in Case 33/79, because this defence is subsequent to the express decision rejecting his complaint.

With regard to the incorrectness of the statement of grounds the applicant maintains that, contrary to what the defendant has stated in its express decision rejecting his complaint, he has *de facto* been downgraded since the defendant has in fact itself created, outside the description of the duties and powers attaching to each basic post in Annex 1 A, a post having the status of an official who is a head of department treated on the same footing as Grade A 3 officials.

With reference to misuse of powers the applicant refers to his application in Case 33/79.

4. Rejoinder

The defendant in its rejoinder repeats that the requirement that there must be a statement of the grounds on which a decision is based, as defined by the case-law of the Court, has been met in this case.

It draws attention to the different facts and communications, both written and oral, to which it has already referred and infers from them that the grounds on which the decision to reorganize the Statistical Office and the decision to assign the applicant to a new post were based, were stated and that the applicant

was acquainted with these statements of grounds. The Commission's decision of 7 June 1978 is not in any case a decision relating to a specific individual and consequently is not subject to the conditions of Article 25 of the Staff Regulations as was indicated in *inter alia* the opinion of Mr Advocate General Roemer in Joined Cases 109/63 and 13/64 (judgment of the Court of 16 December 1964, *Charles Müller v The European Economic Community* [1964] ECR 663 at p. 678 *et seq.*). The decision assigning the applicant to a new post is merely a direct consequence of the reorganization of the Statistical Office and is therefore based on the same grounds of which the applicant is aware. The letter from Mr Baichère, Director-General of Personnel and Administration, dated 3 November 1978, is only a mere confirmatory document which could not adversely affect the official and is not subject to the provisions of Article 25 of the Staff Regulations.

On the question of observing the rights of the defence the defendant asserts that the principle has been invoked mainly in connexion with contentious disciplinary matters and does not in any case apply where the individual interests of officials could not be seriously damaged, as in the event of assignment to a new posting in the interests of the service. On the strength of the judgment of the Court of 14 July 1977 in Case 61/76 (*Jean-Jacques Geist v Commission of the European Communities* [1977] ECR 1419) the defendant maintains that it was entitled to undertake a reorganization of the Statistical Office and to assign the applicant to a new post without consulting him. However, it did not confine itself to these principles and informed him on several occasions of the content of steps planned, thereby making it possible for him to submit observations which he did not fail to do.

With regard to the alleged infringement of Articles 5 and 7 of the Staff Regu-

lations the defendant does not accept the facts pleaded by the applicant and considers that the head of a special department cannot be placed on the same footing as even a potential head of division; in any case it is clear that arguments of a purely factual nature, even if the existence of the facts has been proved, which is not the case here, cannot prevail over the legal rule which draws a clear distinction between the duties corresponding to Grade A 3, on the one hand, and Grade A 5 and Grade A 4 on the other.

The defendant also does not accept the argument that the importance of the applicant's present post falls clearly short of that of his previous duties. On the basis of the judgment of the Court of Justice of 20 May 1976 (Case 66/75 *Margherita Macevicius v European Parliament* [1976] ECR 593) it submits that Articles 5 and 7 of the Staff Regulations are only infringed in cases where the remaining duties of the official fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope, and even the applicant does not allege this.

The defendant also disputes the applicant's statement that the reorganization of the Statistical Office in general and the abolition of his specialized department in particular are not justified by the interests of the service. In its view this argument should rather be put forward in support of a submission based on misuse of powers, but, however that may be, it maintains that the facts set out in the reply do not constitute objective, precise and concordant evidence of any misuse of powers.

With regard to the "Fürsorgepflicht" [duty to look after the well-being of officials] the defendant considers that in this case there has not been a breach of

this principle, which moreover has not been proved to be common to the laws of the Member States. According to French law an official cannot avail himself of a right to perform specific functions or to occupy a particular post and the administration must be able to adapt to constantly changing tasks (Plantey, *Traité pratique de la fonction publique*, 3rd Edition, 1972, Vol. 1, Nos 1277 and 1286). Keeping the applicant's name in the directory of the Statistical Office has preserved his reputation in the estimation of third parties.

Finally as far as concerns the applicant's offer, in the alternative, to produce evidence the defendant considers that it has no relevance since the content of the applicant's conversation with the Director-General is known owing to the minute drawn up by the latter and entered on the Court file. Consequently the decision to reorganize the Statistical Office has no connexion with the applicant's professional qualifications which have not been called in question but only reassessed in relation to those of other officials on an equivalent level.

II — The claim for damages

In his application the applicant maintains that the reasons for which the contested decisions are illegal each represent wrongful acts or omissions on the part of the Commission which have caused him direct material and non-material damage so that he has a claim for such damages "as the Court sees fit".

The Commission points out in its defence that it disputes the illegalities complained of and that the applicant does not even allege that the Commission is guilty of any wrongful act

or omission in the performance of its functions. In the alternative it states that the applicant has neither proved nor offered to prove that he has suffered any damage whatsoever, either material or non-material.

In his reply the applicant states that the contested decisions have caused him not only non-material damage, namely to his professional reputation, but also material damage, namely loss of promotion prospects, especially in his particular case, since he is approaching the end of his career. He goes on to say that future damage may also be the subject of compensation even if it cannot yet be accurately quantified. In his view he is entitled to ask the Court to order the Commission to pay nominal damages of one unit of account.

The defendant, in its rejoinder, reaffirms that none of the conditions laid down by the case-law of the Court, in particular in its judgment of 9 July 1970 (Case 23/69 *Anneliese Fiehn v Commission of the European Communities* [1970] ECR 547) for the award of damages are present and that this claim must be rejected.

IV — Oral procedure

The applicant, represented by David Arendt, of the Luxembourg Bar, and the Commission of the European Communities, represented by Denise Sorasio, a member of its Legal Department, assisted by Daniel Jacob, of the Brussels Bar, presented oral argument at the hearing on 14 February 1980.

The Advocate General delivered his opinion at the sitting on 20 March 1980.

Decision

- 1 The applicant has brought two actions against the Commission of the European Communities, the first dated 28 February 1979, the second dated 3 May 1979.
- 2 In the first case (33/79) the applicant claims that the Court should:
 - (a) Annul the “decisions” of 30 June 1978 of Mr Petit-Laurent and of 3 November 1978 of Mr Baichère which allegedly relieved him of his post as head of the special department for statistics relating to “Other countries” within the Statistical Office and assigned him to the post of principal administrator with responsibility for special assignments on methods in the special “Statistical methods and classification of external trade” department of the Statistical Office after its reorganization;
 - (b) Annul the Commission’s decision of 7 June 1978 assigning G. Lohmann to the post of head of the special “Wages and incomes” department of the Statistical Office;
 - (c) Award damages.
- 3 In the second action (75/79) the applicant claims that the Court should annul the express decision of the Commission of 21 March 1979 rejecting his complaint dated 26 July 1978 and registered on 31 July 1978 against the decision to transfer him.
- 4 By an order of 30 May 1979 the Court (First Chamber) decided to join the two cases. In the course of the proceedings the applicant for his part withdrew his claim relating to the posting of G. Lohmann.

I — The subject-matter and admissibility of the actions

- 5 On 7 June 1978 the Commission initiated a reorganization of the Statistical Office. This reorganization involved, *inter alia*, the merger of two special departments in Directorate F, namely the “ACP countries” department and the “Other countries” department, of which A. de Michelis and the applicant

were the respective heads, into one department called "Analysis of external trade and statistics" assigned to A. de Michelis. Since the applicant's post had thus been abolished, the Commission, by decision of 7 and 29 June 1978, notified to the Director-General of the Statistical Office on 30 June 1978 and to the applicant on 3 November 1978, entrusted to the latter as principal administrator, that is to say without any change in his grade, special assignments on methods in the reorganized "Statistical methods and classification of external trade" department, at the head of which was Mr Sannwald.

- 6 As from 26 July 1978 the applicant, who knew of the decision affecting him, although he had not yet been notified thereof, submitted to the appointing authority a complaint within the meaning of Article 90 (2) of the Staff Regulations, which was registered on 31 July 1978, protesting against the decision affecting him and asking to retain the functions of head of department. The Commission did not reply to this complaint within the period of four months prescribed by the said Article 90 so that it is deemed to have taken an implied decision rejecting it against which the first action is directed.

- 7 On 21 March 1979 the Commission gave notice, out of time, of the above-mentioned express decision rejecting the applicant's complaint. It pointed out that the assignment in dispute had been to another post within the same basic post, namely that of principal administrator corresponding to the career bracket A 4-A 5, as that to which the applicant had previously been assigned, so that this new posting in no way amounted to a downgrading and did not affect the right of an official to occupy a post corresponding to his grade.

- 8 It is against this express decision that the second action is directed, which the Commission considers to be inadmissible since it is merely of a confirmatory nature.

- 9 Although the course of bringing a second action against an express decision rejecting an official's complaint after the time-limit for so doing has expired originates in the Commission's bad practice of not replying to officials'

complaints within the period of four months prescribed by Article 90 of the Staff Regulations, it is none the less true that, although an express decision which purely and simply rejects a complaint may disclose the grounds for this rejection, it only confirms the implied decision which preceded it. It is moreover necessary to point out that every decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged. It is only when this decision upholds all or part of the complaint of the person concerned that it will, in appropriate circumstances, constitute by itself a decision against which an action can be brought.

- 10 It is therefore necessary to conclude from the foregoing that the second action has no purpose and is therefore inadmissible and that the first action is in substance concerned with the applicant's posting as head of department being changed to that of principal administrator.

II — The substance

A — The annulment of the decision relating to the applicant's posting

The first submission

- 11 The first of the applicant's arguments against the contested decision is that it infringes the second paragraph of Article 25 of the Staff Regulations according to which any decision adversely affecting an official shall state the grounds on which it is based.
- 12 Although doubts may be entertained whether the decision assigning the applicant to a new post should be regarded as a transfer within the meaning of the Staff Regulations rather than as an internal measure relating to the reorganization of the department, the fact remains that in this case it has had the same effect as a transfer, a measure which the Court has held, in particular in its judgment of 27 June 1973 (Case 35/72 *Walter Kley v Commission of the European Communities* [1973] ECR 679), may amount to a decision adversely affecting an official.
- 13 In fact, although the assignment to a new posting was effected in the same basic post of principal administrator and in the same grade, the fact must be borne in mind that this basic post includes activities the different nature of

which is evident from their description, namely: (1) official in charge of one sector of activity in a division; (2) head of a special department; (3) higher official engaged in planning, advisory and supervisory duties in one sector of activity; and (4) assistant to a head of division. This difference is moreover visible in the fact that two different names of principal administrator or head of department correspond to the posts comprised in the basic posts. Such a modification of the duties assigned to an official which results in an alteration of the description of duties could have an effect on the future prospects of the official concerned and may be such as to affect him adversely.

14 It follows that the decision in question had in principle to set out the grounds on which it is based and it is necessary to ascertain whether this requirement has been met while taking into account the fact that, since it is a measure concerning organization of the department, the duty to give a statement of grounds must be related to the discretionary power which the appointing authority exercises in this connexion and also to the marginal nature of the disadvantages which result for the official concerned from this kind of measure.

15 The notification of the contested decision to the applicant on 3 November 1979 from the Director-General of Personnel and Administration itself does no more than merely justify the new posting by reference to the measures for the reorganization of the Statistical Office. In order to decide whether the requirement laid down in Article 25 has been met it is advisable however to take into consideration not only the document giving notice of this decision but also the circumstances in which it was taken and brought to the knowledge of the official concerned as well as the departmental memoranda and other communications underlying it which have clearly given the applicant information as to the grounds and the basis of the said decision. Since the purpose of the duty to state the grounds on which a decision is based is both to permit the official concerned to determine whether the decision is defective making it possible for its legality to be challenged and to enable it to be reviewed by the Court, it follows that the extent of this obligation must be determined on the basis of the particular facts of each case.

16 In this instance it is quite clear from the file on the case that the applicant was given ample information on the Commission's intention to effect a merger of the special department of which he was head with another

department and also on the consequential abolition of one of the posts of head of department. The complaint dated 26 July 1978 and registered on 31 July 1978, that is to say before he had been officially notified of the decision affecting him, leaves no doubt on this point, especially as it mentions that in February and July 1978 the applicant discussed the projected reorganization and its consequences with the Director-General of the Statistical Office.

- 17 In those circumstances and since the decision at issue is necessarily linked to the organization of the service in the interests of the service, in respect of which the competent authority must necessarily have a wide discretion, the contested decision may be considered to have set out adequately the grounds on which it is based so that the submission made in this connexion must be rejected.

Second and third submissions

- 18 The applicant then pleads infringement of Articles 5 and 7 of the Staff Regulations on the ground that the duties assigned to him are not consistent with a post corresponding to his grade so that the contested decision is in fact a downgrading. In support of this complaint his main submission is that his previous duties were, by reason of their extent, importance and the official prerogatives attaching to them, of a distinctly higher order than his present duties. He emphasizes in particular that it is the practice of the administration to treat the head of a special department, especially with regard to the information which he receives, on the same footing as officials in Grade A 3. He pleads in addition breach of the duty known in German administrative law as "Fürsorgepflicht" [duty to look after the well-being of officials] according to which when the authority enacts measures it must take account not only of the interests of the service but also of the interest of the official in avoiding any detriment to his career.

- 19 Both of these submission must be rejected.

- 20 Regarding the submission based on Articles 5 and 7 of the Staff Regulations it should be noted that the rule that the post must correspond to the grade,

set out in particular in Article 7 of the Staff Regulations, involves, in the event of a change in the duties of an official, a comparison between his present duties and his grade and not between his present and previous duties. In this connexion the applicant does not deny that the duties to which he was assigned, described as those of a principal administrator, when he was entrusted with special assignments on methods, correspond very closely to one of the descriptions of posts comprised in the basic post of principal administrator at the Statistical Office, namely "higher official engaged in planning, advisory or supervisory duties in one sector of activity".

- 21 Furthermore if the differences in the nature of the tasks and in the situation of officials in the same basic post are justified by their differing duties, such differences do not permit an official, who, when changing from one post to another, ceases to enjoy these special characteristics of his work, to conclude that his interests have been adversely affected. The special characteristics of certain duties, be they favourable or unfavourable, attach to the duties and not to the official personally.
- 22 With regard to the breach of the "Fürsorgepflicht" (duty to look after the well-being of officials) it should be noted that, although this concept is not mentioned in the Staff Regulations of Officials of the European Communities, it reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants. A particular consequence of this balance is that when the official authority takes a decision concerning the situation of an official, in this case his assignment to a specific post, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the individual concerned.
- 23 Examination of the file on the case and of the matters to be taken into consideration which emerged from the written and also from the oral procedure have brought to light no factor of such a kind as to raise a presumption that the Commission failed to carry out a comprehensive examination of all the determinative factors including those relating to the personal situation of the applicant before assigning him to his present duties. In particular there is no reason to suppose that, by appointing another official, who had also previously directed a special department to direct the

departments which had been merged, the Commission allowed itself to be influenced by reasons unconnected with the principles of justice and of good administration. Moreover according to the consistent case-law if the appointing authority makes a choice from several officials having the same qualifications, it does not, in so far as concerns the official which it has not selected, have to justify its reasons for deciding that his competitor was more suited than he was to meeting the requirements of the duties in question.

Fourth submission

- 24 According to the applicant the contested decision constitutes a breach of the rights of the defence because, as it is a measure likely to cause serious damage to (his) individual interests, it could not be taken without him being in a position to make his point of view known.
- 25 This case cannot be said to concern “the rights of the defence” but only a general principle of good administration to the effect that an administration which has to take decisions, even legally, which cause serious detriment to the persons concerned, must allow the latter to make known their point of view, unless there is a serious reason for not doing so. The contested decision, under which the applicant retains all the advantages of his grade and basic post, is not of such a kind as to make it necessary to comply with formal requirements other than those provided by Article 90 of the Staff Regulations for the purpose of protecting the interests of officials and servants, to which is to be added, if need be, judicial review by the Court.
- 26 It follows from the foregoing considerations that the application for annulment is unfounded and must be dismissed.

B — The claim for compensation

- 27 It follows from the foregoing considerations that the Commission has been guilty of no wrongful act or omission so that this claim must also be dismissed.

Costs

- 28 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.
- 29 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to pay their own costs.

Kutscher

Mertens de Wilmars

Mackenzie Stuart

Delivered in open court in Luxembourg on 28 May 1980.

The Registrar
by order

H. A. Rühl

Principal Administrator

H. Kutscher

President