OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 MARCH 1965[1]

Mr President,
Members of the Court,

The applicant in the case on which I give my opinion today entered the service of the Euratom Commission on 10 November 1959, on the basis of a 'Brussels contract'. At the outset his salary corresponded to that of Grade A 5 under the ECSC Staff Regulations, which, as we know, were partially applied by analogy to the contracts of employment concluded by the Communities of the Treaty of Rome. After a period of probation, his remuneration was raised on 20 September 1960 to the level of Grade A 4, Step 1, as from 1 May 1960, and later to the level of Grade A 4 Step 2, as from 1 November 1961.

During the integration procedure, designed to determine in which cases officials should be established on the basis of the Staff Regulations which came into force on 1 January 1962, the applicant's superiors drew up an unfavourable report on his ability, efficiency, and conduct in the service. The Establishment Board came to the same conclusion, after hearing evidence from several officials of the Commision under whom the applicant had worked, and after hearing the applicant himself (see the report dated 19 February 1963). It did not, however, propose merely that the existing appointment should be terminated, but that the applicant should be established in a grade below that in which he had previously been classified. The Commission, as the appointing authority, acted accordingly. On 8 January 1964 it took a decision establishing the applicant in Grade A 5, Step 5, as from 1 January 1962.

It is this decision which is contested in the present appeal. The applicant requests the annulment of the decision taken by the Commission on 8 January 1964 in so far as it classifies him in Grade A 5, Step 5. In addition, he asks for the annulment of all the steps in the integration procedure concerning him, and of the opinion issued by the Establishment Board on 19 February 1963.

In his reply, the applicant withdrew another claim in which he asked the Court to declare that the Commission must re-apply the integration procedure to him after it had complied with the formal conditions laid down in Articles 5 and 110 of the Staff Regulations.

Similarly, after certain documents were produced by the defendant, and after studying judgments subsequently given by the Court on integration problems, the applicant abandoned certain arguments originally made in the application. There is therefore no need to examine them in what follows.

Legal Consideration

I — Admissibility of the Appeal

I must start my legal analysis with certain observations on the admissibility of the appeal, to which the Commission has raised objections on several points.

1. The Commission submits that the appeal is inadmissible because the applicant unconditionally accepted his establishment in Grade A 5, and because, by signing the declaration provided for in Article 104 of the Regulations, he waived the benefit of the provisions of his contract, including his previous grade and step.

1 – Translated from the German.

Before examining this argument, I feel it advisable to point out a certain lack of consistency in the remarks made by the Commission during the proceedings in connexion with the measures and steps taken prior to the disputed decision.

Contrary to what one might imagine at first sight, it is not possible to deduce from the remarks made by the Commission that the applicant was dismissed or that he resigned. In fact, no written statements exist to that effect, and it cannot be denied that the applicant has remained without interruption in the Commission's employment.

Consequently, the only remaining way of analysing the sequence of events is to rely on those documents which were drawn up by the Commission and by the applicant, and which we have in our hands, namely, the decision of 8 January 1964 integrating the applicant, and the statement of 13 January 1964 by which the applicant waived the benefit of his contract.

If we now enquire, what is the legal significance to be attached to the declaration provided for in Article 104 of the Regulations, the answer required by the wording of that provision is as follows: 'the waiver implies the abandonment of the benefit of the provisions of the contract, which ceases to be in force and therefore disappears as an independent basis for the assertion of legal rights. The new Staff Regulations replace the 'Brussels contract'. However, the waiver does not mean that the Brussels contract no longer counts as a *legal factor* in the application of the Regulations, especially Article 102. Otherwise we would be faced not only with a waiver of the benefit of contractual provisions but also a waiver of the correct application of the Staff Regulations and the transitional provisions; and this would mean ignoring the principle that waivers must, in case of doubt, be interpreted restrictively in favour of the party waiving his rights. I therefore submit that the waiver in question does not entail the inadmissibility of the appeal.

The waiver is not, however, the only factor of legal significance in this context. We know that the applicant was integrated on the basis of Article 102 (2). This provides that the contract must be terminated if the Establishment Board gives an unfavourable opinion. The appointing authority may, however, offer such person establishment in a lower grade and in a lower step than his previous grade and step. The question therefore arises whether the integration procedure provided for in Article 102 (2) (*acceptance* of an *offer*) can be assimilated to the conclusion of a contract, so as to entail waiver of all complaints which might have been put forward against the integration procedure. Yet it seems to me that this hypothesis cannot be supported either. According to the case-law of the Court, steps taken in the course of the integration procedure cannot be contested as such, despite the damage which they sometimes do to the administrative careers of the officials concerned; they may be challenged only in so far as they are reflected in final decisions. In the event of the integration procedure's having a negative outcome, such a final decision, capable of being contested, is only to be found in a decision of dismissal taken by the administration, or in a measure establishing an official which fails to meet the requirements of Article 102 (1). But, if a decision establishing an official under Article 102 (2) could not be subjected to judicial review by virtue of the fact that it consisted in accepting a recommendation of establishment, the only possibility which would then be open to officials dissatisfied with the outcome of the integration procedure would be to provoke a decision of dismissal by refusing the recommendation of establishment. In other words, they could not appeal against the infringement, real

or alleged, of their rights during the process of integration, except by simultaneously resigning themselves to putting a complete end to their employment.

Such a consequence strikes me as inadmissible and incompatible with the duty of fair play demanded of the administrative authority. That is why I would not exclude the right of appeal, even in the case of establishment on the basis of Article 102 (2), when that right is exercised in order to obtain a better classification by invoking irregularities in the integration procedure—regardless of whether the official made such a reservation when accepting the offer of establishment, or whether he refrained because he had reason to fear that the institution would withdraw its offer. On this point, a circular issued by the Commission on 8 February 1963 is couched in similar terms, stating expressly that acceptance of establishment does not preclude claims on the subject of classification.

It seems to me that this analysis also clearly demonstrates the absence of the conflict of interests which the Commission sees in the applicant's claims. In reality, the applicant does not wish simply to challenge his establishment and have it annulled (which might possibly have unfavourable consequences for him), but only to object indirectly to the preparatory steps which were disadvantageous for him and which, on the basis of Article 102, gave rise to a less favourable classification. This must be possible in view of the case-law of the Court, where a careful distinction has always been drawn between the integration decision as such and the classification in the salary scale. We are therefore merely dealing with an application for annulment confined to the limits of the interests at stake, and it can be examined without injuring the applicant's status.

2. Another objection of inadmissibility concerns the second head of the applicant's conclusions, seeking the annulment of the steps taken in relation to the applicant during the integration procedure. On this point, however, the case-law of the Court decrees that the decision should go in favour of the Commission. Preparatory steps during the process of integration are not themselves open to annulment; they can only be attacked indirectly during an appeal against measures capable of annulment. Since the applicant did not, in this respect, act in accordance with the principles of case-law when he expressly altered his conclusions in his reply, this head of his conclusions must be dismissed as inadmissible, although obviously that does not prevent the complaint set out therein from being examined in the context of the first head of the conclusions.

II — The substance of the case

As regards the substance of the appeal, I will begin by examining a series of *formal objections*. The deal with the reasons stated in the opinion of the Establishment Board and with the conduct of the integration procedure.

1. The applicant considers that the formal reasons stated in the report provided for in Article 102 are insufficient in relation to the requirements of the Staff Regulations. However, according to the judgments given by the Court on integration problems, this complaint is not valid. In fact, a perusal of the report concerned shows that it contains at least as much first-hand evidence of the applicant's abilities, and at least as many references to documents at the disposal of the Establishment Board, as the reports filed in other integration cases, which were not criticized by the Court from a formal point of view.

2. The applicant next made two criticisms of the composition of the Establishment Board. First, he complains that

the Commission failed to produce any document to show that it had personally appointed the members of the Establishment Board. In the second place, the applicant considers that it was improper to alter the composition of the Establishment Board during the procedure, and to permit the participation of officials, who had not been present when witnesses were heard, in the voting and in the drafting of the opinion issued concerning him.

The first of these points certainly does not provide any ground for finding in favour of the applicant. In my opinion, the question of the regularity of the appointment of the members of the Establishment Board should be examined only if some evidence of irregularity were present. But the Commission cannot be obliged, merely at the request of the applicant, to produce written evidence concerning every question relating to the integration procedure. Circular No 3/62 of 2 February 1962, signed by the Director-General of Administration and annexed to the applicant's personal file, is thus sufficient for the purposes of the present proceedings.

The second criticism is equally irrelevant. This is so, not because I am at all convinced by the assertion made by the Euratom Commission that two of the officials mentioned by the applicant only dealt with other candidates for integration; the text of the minutes at our disposal throws no light on this point. But I consider that there would not have been a serious breach of procedural rules even if certain members of the Establishment Board had not in fact taken part in the taking of evidence during the integration procedure. This is not a requirement, any more than it is in ordinary judicial proceedings, where inquiries may sometimes be undertaken by a judge specially delegated for the purpose, or by a chamber of the Court, as provided for in our own Rules of Procedure. In such cases, it seems sufficient that the content of the witnesses' statements should be recorded in minutes (as happened in the present case), and that all the members of the Establishment Board should thus be able to have sufficient information concerning the meetings conducted in their absence.

3. On the other hand, more serious objections are occasioned by the complaint that the Establishment Board set about its work without written rules of procedure, or, alternatively, that the Euratom Commission refused to produce the text of such rules. As a result, the applicant alleges, it is impossible to ascertain the majority necessary for the Establishment Board's opinion, or whether the requirements concerning majority voting were respected in the present case.

On this point, the Commission informed us that there were in fact no written rules of procedure for the integration procedure. Before embarking on its work, the Establishment Board merely agreed orally to observe certain principles, which were also brought to the knowledge of the Staff Committee of the Commission.

In fact, no express provision requires the drawing up of written rules of procedure to be observed in the application of Article 102, and obviously the absence of such written rules does not deprive the officials concerned of the opportunity of objecting to irregularities, real or alleged, in the integration procedure; in particular, they can submit to the consideration of the Court the question whether the procedure was properly conducted and whether the rights of the defence were effectively assured.

But what is open to criticism is the risk of *inequality of treatment* of the officials concerned, which goes hand in hand with the absence of detailed rules. If the quorum for a valid resolution of the Establishment Board, and the majority necessary for drawing up the opin-

ion mentioned in Article 102, are nowhere laid down, there is always the possibility that opinions concerning different officials will be issued by a Board whose members vary and by a varying majority. Since the representative of the Commission has been unable to provide us with a satisfactory explanation on this point, we must at least consider requiring further elucidation of this point, unless the case can be resolved on other grounds (as I think it can).

4. The same goes for the complaints whereby the applicant alleges that he was not given sufficient information concerning the statements by his superiors during the integration procedure, and that the Establishment Board refused to take into consideration the work which he had produced for the purpose of the examination of his abilities.

No doubt, as regards the first complaint, it would be sufficient to refer to the minutes of the Establishment Board, especially to those of the meetings on 30 and 31 January 1963 which expressly mention that the applicant had been informed of the statements made by his superiors.

But on the other hand there is one question which is rather more delicate, namely, whether the applicant's rights of defence were restricted. Here I would like to state as a general principle that the Establishment Board, when examining the abilities of senior officials, and before issuing an unfavourable opinion, must extend the scope of its investigations rather than dismiss documentary evidence, although of course it cannot be obliged to take into account all the documents placed before it.

However, it really does seem impossible to come to a firm conclusion on this point. The parties are not in agreement as to the authorship of the documents submitted by the applicant, or, consequently, as to their evidential value, or whether the Establishment Board attached sufficient importance to them. But here again I think we can dispense with additional elucidation because, as I have already suggested, the case can be decided on other grounds.

5. These grounds are to be found when we look at another complaint by the applicant, which, in one form or another, concerns the *material accuracy* of the opinion of the Establishment Board as well as the question whether the facts underlying that opinion should be regarded as relevant and in accordance with the object of the procedure.'

When making this complaint, the applicant obviously cannot require the Court to examine his knowledge and abilities, that is to say, to form an assessment of the sort which the Establishment Board is required to make, since this would mean that the Court would be acting in place of the Administration. Nevertheless, facts may be brought before the Court which constitute *prima facie* evidence that the Establishment Board erred in its assessment. This would be so, for example, if all the facts at our disposal concerning the various phases of the procedure made it appear that the opinion was unfounded, incomprehensible or contradictory. In my opinion, such evidence does exist in the present case.

In saying this, I am certainly not thinking of the assertion, which frequently recurs in litigation concerning questions of integration, that the animosity of the applicant's immediate superior led him to make a false judgment of the applicant's abilities; indeed, just as in other cases, I imagine that the Court would not accept that argument, considering that the applicant's other superiors also arrived at a more or less unfavourable judgment. Nor do I propose, in the present context, to examine further the complaint that the applicant's immediate superior had not given him enough work from December 1961 onwards. This complaint would be important for de-

ciding the case only if the behaviour of his superiors had robbed the applicant of any possibility of demonstrating his abilities, which, however, was obviously not the case for the period between November 1959 and November 1961.

But other circumstances have some importance. In its opinion of 19 February 1963, the Establishment Board found, as the decisive factor in making its unfavourable assessment, that the applicant was lacking in certain respects in his abilities and knowledge, and also showed a lack of initiative. That was why, from a certain time onwards, he had been entrusted with duties of a level beneath that of the work which he had previously carried out.

In this respect, critical observations are called for from several points of view.

First of all, unless I am mistaken, the assessment by the Establishment Board is only partially justified by the reports from the applicant's superiors and by the statements which they made before it (for instance, as regards the applicant's degree of initiative). On the other hand, the oral and written comments by his superiors contain no trace of a statement which would have enabled the Establishment Board to ascertain that the applicant had been given work of an inferior level. Nor do any of the other documents produced in Court give any indication how the Establishment Board arrived at this assumption which is certainly important. For this reason alone, its entire assessment must therefore be regarded as defective.

As regards the alleged inadequacy of the applicant's knowledge and abilities, the written report of his superiors, dated 11 April 1962, informs us that it was above all the applicant's knowledge of *languages* which had been criticized, and on several occasions. A similar emphasis was placed on knowledge of languages in the oral statements made by these officials to the Establishment Board and this matter was the subject of particular discussion at the hearing of the applicant himself. So the impression inevitably arises that the Establishment Board attached importance, when taking its final decision, to this type of knowledge.

On the other hand, the Commission's representative stated emphatically during the oral procedure that knowledge of languages played no part in the integration procedure, and that integration could never have been withheld from officials who did not fulfil the requirement of knowledge of a second language when they had entered the Communities' service under the contractual régime. We are therefore fully entitled to ask whether the Establishment Board, in the applicant's case, was guilty of infringing a rule which is generally applied, by basing its unfavourable decision mainly upon an alleged inadequate knowledge of languages. It may also be supposed that the special emphasis put on knowledge of languages during the integration procedure misled the applicant and influenced the way in which he presented his case—which gives rise to further serious doubts as to whether the procedure followed the proper course.

However, the following fact is even more important. The report on the applicant at the end of his probationary period, drawn up by the same official who assessed his abilities during the integration procedure, is not merely favourable but even exceptionally good. All the headings, including those described in the report dated 11 April 1962 as 'requiring improvement', contain the comment 'very good'; two of them are even described as 'exceptional'. Knowledge of a second language is marked as 'fair'. The actual words of the superior's report were as follows: 'I am entirely satisfied with this official. Level-headed, thoughtful, and steadfast personality. Equable and friendly character. Spirit of initiative and great adaptability to the various tasks involved in his job'. Only one point—adaptability—is

marked lower in this report, but even so with the comment 'satisfactory'.
Admittedly these comments date from 17 May 1960. But the applicant's personal file discloses that even on 16 December 1960 it was suggested that he should receive a higher classification, in view of his now proven abilities; this point is made expressly in a letter from the Directorate-General of Administration. And we also find that as late as 1 November 1961 the applicant was regarded as deserving of an increase in salary, and was classified in Grade A 4, Step 2.
The only possible explanation is that at least until November 1961, that is to say, about six months before his superiors issued their unfavourable assessment, the applicant must have acquitted himself in a way that was not merely unexceptionable but also praiseworthy. Any other interpretation must be rejected, especially the assertion by the Commission's representative that the promotions and advancements occurred as a matter of course in the Euratom Commission, because that would be tantamount to saying that the Commission mismanages its administration.
It is of course conceivable that an official's work may deteriorate in the course of time. It is also possible that this may have happened in the applicant's case, prior to the start of the integration procedure, although such a possibility is contradicted by the evidence of one of his superiors, Dr Michaelis, before the Establishment Board, that there had been an *improvement* in the applicant's work in comparison with earlier periods. But, faced with such a development, and after all the previous assessments and promotions, the least that must be required of the Administration is an unequivocal and plausible statement of reasons. If this is absent, as in the present case, the impression arises that no attention was paid to the previous favourable assessments, a fact which, in view of its importance, constitutes a serious defect in procedure. If, on the other hand, it is supposed that the Establishment Board had notice of these factors and failed to take them into consideration, this would also imply a serious mistake, because it cannot be right to assess the ability of an official, who has worked for the Commission in a commendable manner for several years, on the basis solely of his work over a comparatively short period.
All told, we come to the conclusion that the substance of the opinion of the Establishment Board is open to criticism on several points. It must therefore not be taken into consideration as part of the basis for fixing the applicant's position in the administration, with the result that the Commission can decide on his final classification only after duly re-applying the integration procedure. It follows that the applicant is entitled to the emoluments derived from his previous contract of employment.

III — Conclusion

In conclusion I sum up as follows:

Judgment should be given in favour of the applicant in respect of the first head of the conclusions seeking the annulment of the decision establishing him in so far as it provides that the applicant shall be classified in Grade A 5. The second head of the conclusions seeking the annulment of all the steps concerning the applicant in the integration procedure, as well as of the

opinion of the Establishment Board, must be dismissed as inadmissible. As for costs, this finding should not, in my opinion, entail consequences to the applicant's disadvantage, because the contents of the second head of the conclusions can be regarded as arguments put forward in support of the first. Although submissions have been withdrawn, I recommend that no ruling should be made concerning costs to the applicant's detriment, since in my opinion his appeal must be allowed in substance. It is therefore the Commission which should bear all the costs.