OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 MAY 1970[1]

Mr President,
Members of the Court,

The applicant in the case with which I shall deal today entered the service of the High Authority of the European Coal and Steel Community on 1 February 1960, after a lengthy career in the Italian steel industry. There he was initially given Grade A2, and headed the Directorate of Markets within the Directorate-General for Steel. After the departure of the Director of that Directorate-General, the applicant was promoted to Grade A1 and entrusted with the leadership of the Directorate-General. When in July 1967 pursuant to the Merger Treaty of 8 April 1965 a single Commission was established for the three Communities, the problem of the reorganization of their administrative structure immediately arose. Twenty-four Directorates-General were then established and their directors nominated. No longer was provision made for a special Directorate-General for Steel, and it became a Directorate within the Directorate-General for Industrial Affairs. When the posts of directors-general were allocated, none fell to the applicant. With the same grade he became first of all Assistant Director-General for Industrial Affairs, entrusted in particular with steel problems. On 22 December 1967 the Commission subsequently decided to create a further Directorate-General concerned with the dissemination of information under the Euratom Treaty. The applicant learned of this from a letter from the President of the Commission of 6 January 1968 which informed him at the same time that provision was being made to appoint the applicant Director of this Directorate-General. His official appointment to this post followed in a decision of 20 March 1968 with effect from 28 March 1968, and the applicant was notified of this by a letter of 22 March 1968. It was however evident that this decision was not calculated to satisfy the applicant. About the same time, more precisely on 27 March 1968, he in fact applied for the advertised post of Director-General for Industrial Affairs which had in the meantime fallen vacant. Another official was however assigned to this post by way of promotion, by a decision of 9 April 1968. This led the applicant on 17 April 1968 to request the termination of his service relationship in accordance with Article 4 of the well-known Regulation No 259/68 of the Council. But in this, too, he was unsuccessful: by a letter from the President of 13 June 1968 the applicant was informed that the Commission could not dispense with his services and the request he had made was thus rejected. Even before this, that is by a letter of 17 May 1968, the applicant had approached the President of the Commission and, referring to the special requirements of the post to which he had been assigned, and to which his capacities, experience and training did not correspond, had repeated the application which he had made under Article 4 of Regulation No 259/68. Likewise, before the express rejection of the applicant's request of which he knew in advance, he submitted a complaint to the Commission wherein he requested that Article 50 of the Staff Regulations of Officials be applied to him, and consequently his retirement in the interests of the service. On 10 October 1968 the applicant addressed a letter of complaint to the President wherein he continued to insist that he be released from his duties in accordance with Article 50 of the Staff Regulations of Officials. Further contacts with members of the Commission followed and on 3 February 1969 the Vice-President of the Commission, Mr Levi Sandri, addressed a letter to the applicant pointing out that the latter could perfectly well perform the duties assigned to him and that on the other hand the application of Article 50 a few months after such assignment appeared extraordinarily difficult. From March 1969 the applicant stayed in Italy because of illness. As he endeavours to

1 — Translated from the German.

prove by a medical certificate dated 21 April 1969, this illness is said to have been caused by the conditions of service which he criticized. In March 1969 he also approached the President of the European Parliament in order to acquaint the latter with his problems. The differences then appear to have reached a head in May 1969. In particular, the doctor treating the applicant is said to have declared that the latter, who in the meantime had almost recovered, would suffer a relapse if his conditions of work remained unchanged. The applicant therefore wrote a letter to the Commission on 26 May 1969 in which, after repeated complaints about the development of his career and after indicating that he had since become ill as a result of the assignment to him of unfamiliar duties, he declared that he felt himself compelled to tender his resignation and a date for this should be fixed as soon as possible; furthermore, since the Commission was at fault, his pecuniary rights must be calculated in accordance with Article 42 of the former Staff Regulations of Officials of the ECSC, that is, the provision which governed retirement in the interests of the service and which continues to be applicable under Article 99 of the Staff Regulations of Officials of the ECSC. This led the Commission to take very quickly the decision which gave rise to the present dispute. In fact the Commission decided on 4 June 1969 to accept the applicant's resignation in accordance with Article 48 of the Staff Regulations of Officials, with effect from 10 June 1969. It did not, however, prescribe that Article 50 of the Staff Regulations of Officials, in conjunction with Article 42 of the Staff Regulations of Officials of the ECSC, should apply to his pecuniary rights; instead they were to be governed by Article 12 of Annex VIII to the Staff Regulations of Officials which means that in view of his years of service he could only claim a severance grant. These decisions were notified to the applicant in a letter from Vice-President Barre of 5 June 1969. As he did not concur in the settlement adopted, the applicant brought the matter before the Court of Justice on 4 August 1969, having apparently taken up a post in the Italian steel industry with effect from 1 July 1969. In his application he stated expressly that he did not oppose the decision terminating his service as such or the date fixed for termination. He does, however, contest the application of Article 48 of the Staff Regulations of Officials which governs resignation upon request and the determination of his financial claims in accordance with Article 12 of Annex VIII to the Staff Regulations. He is convinced that he may claim the application of Article 42 of the former Staff Regulations of the ECSC, if only in the form of damages. In this way the damages arising from the difference between his earlier and his present incomes would be made good. It is to this end that he formulated his claims for annulment, a declaration and damages, as also his request that the Commission should be ordered to pay in addition 1 lira for non-material damage.
Let us now consider whether these claims, which the Commission maintains are entirely unfounded, can succeed.

Legal consideration

I — Admissibility

No objections with regard to admissibility were submitted. They do not require to be raised by the Court of its own motion, neither in connexion with observance of the time-limit — this follows from a comparison of the dates in question — nor with the fact that the decision taken on 4 June 1969 is only partly contested. We can thus turn directly to the question whether the claim is well founded.

II — Substance

As you know, the main argument as to whether the applicant's claims are well founded is to the effect that he did not *voluntarily* terminate his service under Article 48 of the Staff Regulations, but rather that he was *forced* to take this step through his conditions of work which had even brought on illness. It is thus possible to speak of termination of the service

relationship for just cause or because of a wrongful act or omission on the part of the administration, for which express provision indeed exists under Italian law. In this connexion the applicant refers to Article 2119 of the Italian Civil Code ('recesso per giusta causa') ('resignation for just cause') which, in accordance with Article 2129 also applies to employees of public bodies ('prestatori di lavoro dipendenti da enti pubblici'), and in Law No 604 of 15 July 1966, under Article 1, service relationships existing between public bodies ('enti pubblici') and employees may be terminated by the latter for just cause ('giusta causa'). In Community law in such cases there must at least be applied the principle that termination of service relationships must be on the most favourable conditions possible, that is, by applying by analogy, not formally, Article 50 of the Staff Regulations of Officials, or — in the case of ECSC officials — Article 42 of the former Staff Regulations of Officials of the ECSC. In addition account must be taken of the failure to observe the principles contained in Articles 5 and 7 of the Staff Regulations, according to which grades and duties must correspond, in that the applicant has been *de facto* reduced in status by the abolition of the Directorate-General for Steel of which he was formerly head. Furthermore the statement of reasons for the decision to dismiss him must be objected to as inadequate. Finally, the applicant is entitled at least to compensation for the material and non-material damage, a claim which could be satisfied with his consent by the application of Article 42 of the former Staff Regulations of Officials of the ECSC.

The Commission is indeed correct when it objects initially to this line of argument that under the provisions of the Staff Regulations of Officials in force Community law only recognizes the voluntary termination of a service relationship under Article 48 on the basis of an unequivocal statement of his intention by the official in question which can be succeeded — where the conditions are met — only by a settlement under Article 12 of Annex VIII to the Staff Regulations of Officials. But equally pertinent is the applicant's argument that although the term 'resignation' ('dimissione') and wording which corresponds to some extent to Article 48, appear in his application, he in fact submitted more than a simple request to resign. In fact in his letter of 26 May 1969 to the President of the Commission the applicant referred to the change in the conditions of his service, which had even had adverse effects on his health, and going on from there he spoke of a wrongful act on the part of the Commission and of the *necessity* ('necessità') to terminate his service relationship, which, as he had likewise declared in the said letter, justified the application of Article 50 of the Staff Regulations of Officials or of the former Staff Regulations of Officials of the ECSC. Therefore, leaving out of account the wording of Article 48 of the Staff Regulations of Officials, we must consider how this matter is to be judged from the point of view of the law governing the public service.

(a) One thing, however, is clear: a reference to Italian law alone can be of no further assistance to us. In saying this I am not so much thinking of the fact that the abovementioned provisions of the Codice Civile relate only to *contractual* relationships and that Law No 604 (assuming that it is applicable to situations governed by public law created unilaterally) does not in any event apply if, as in the case of civil servants, the permanency (stabilità) of their situation is conceded. In fact these questions can in the last resort be left in abeyance since other matters are more important. In consequence it is certainly quite wrong to claim the direct application of Italian law on the ground that Community law, whose structure is different, may not have the effect of infringing or suppressing vested rights under national law. Persons entering the service of the Communities submit themselves to Community law which, in principle, constitutes the sole authoritative body of rules. Indeed this must form our point of departure since, assuming that every official in the Communities were, so to speak, to bring with him his own national law the *unity* of the law governing the European civil service could no longer be assured, quite apart from the fact that national law itself in principle restricts its area of application.

At most national law may come into play as an indirect source of law in so far as Community law has many gaps and must then be supplemented with the aid of the common principles of the legal systems of the Member States. The legal practice of the Communities affords many examples of this nature. But since it is not apparent that there is a principle in the law governing the public service in the other Member States of the kind which the applicant wishes to establish as an integral part of Italian law, in my opion it is impossible to recognize it as an integral part of the law governing officials of the Community. Accordingly the applicant cannot in fact achieve success in his application by relying on the termination of his service relationship for just cause or because of a wrongful act on the part of the Commission.

(b) With regard to the application of Article 50 of the Staff Regulations, by analogy if necessary, which the applicant has repeatedly claimed, the last time being in his request to be retired, the decisive factor in considering that provision is that it is potestative and was created with a view to its being applied 'in the interests of the service'. No one has the right to demand its application; on the contrary the discretionary element predominates. Consequently the only complaint which may be made against a failure to apply Article 50 is that of misuse of powers. Nevertheless the evidence which has been adduced in the present case is insufficient for this purpose. (I shall later return to this point in discussing the details of the claim for damages). Conversely, as the Commission has rightly pointed out, even the application of Article 50, shortly after the repeal of the similar provisions laid down in Regulation No 259/68 whose exercise in favour of the applicant had been repeatedly refused, and shortly after new and important duties had been conferred on the applicant, might have seemed like a misuse of powers. It is consequently clear that the reference to the possibility of applying Article 50 directly or by analogy is of no assistance to the applicant.

(c) With regard to taking account of the principles contained in Articles 5 and 7 of the Staff Regulations of Officials, that is, to the correspondence which must exist between posts and grades, it must be said that this is undoubtedly an essential consideration, the importance of which has already repeatedly been emphasized in the case-law (for example in Case 15/65, ECR 1965 1045) and has already produced favourable results for applicant officials. Nevertheless I do not consider in the present case that this principle has been ignored or that conclusions may be deduced from it favourable to the applicant, for example in the form of compensation.

In this respect there are certainly no grounds for considering the complaint that the applicant was reduced in status in *July 1967* because of his appointment to the post of Assistant Director-General for Steel with special duties (*inter alia* because he now had only a reduced staff of officials at his disposal), since this decision was replaced by the allocation to him of other duties in March 1968 and in addition it was not submitted for review by the Court in sufficient time. In the present context, rightly understood, the only question is whether the post conferred on the applicant, that of Director of the Directorate-General for Dissemination of Information, corresponded to Grade A1. When the applicant argues on this point that the said Directorate-General was less important than other Directorates-General because it only fulfilled executive duties and no provision was made for close cooperation with the Commission itself in the development of the common policy, in my opinion the reply must be that distinction of this nature may well exist (this is plain because it is impossible for all the administrative units in the Commission to have a completely similar structure), but that this does not justify the creation of a *scale of values*. The sole determining factor must rather be whether the Commission, in exercising its discretionary power in matters of organization, can be said to have misused it. However, in actual fact I can see no evidence for this.

It seems to me quite clear that it is in addition impossible for the applicant to speak of his reduction in status on the ground that the post conferred upon him

does not correspond to his abilities (I shall subsequently return to this question). This argument is clearly irrelevant since in the present context, that is to say, with regard to Articles 5 and 7 of the Staff Regulations of Officials, only the correspondence between post (duties) and grade is material, and not personal qualities such as suitability in respect of which it must also be mentioned that there is a discretionary power which *prima facie* is not subject to review by the Court.

(d) Finally, the complaint based on a deficient statement of reasons, also made within the framework of the application for annulment, that is to say, that the decision of the Commission of 4 June notified to the applicant by letter of 5 June 1969 contained an insufficient statement of reasons, provides no support for the application.

In so far as the said decision, in accordance with the applicant's request, provided for the termination of the service relationship and, also as requested, at the earliest possible time, it cannot be regarded either as a measure having an adverse effect or as requiring a statement of reasons. In so far, however, as the applicant's request for the application of Article 50 of the Staff Regulations of Officials or of Article 42 of the former Staff Regulations of Officials of the ECSC was rejected, it must be said that a statement of reasons has not been omitted. In this connexion the Commission has declared that the conditions for the application of those provisions were not fulfilled, which appears correct merely from reading the text of the provisions and comparing it with the facts of the case. In my opinion the Commission thus fulfilled its obligation to provide a statement of reasons; further explanations could be reserved for the proceedings before the Court.

In this connexion, in passing as it were, another complaint of failure to state sufficient reasons may be disposed of, namely that in relation to the letter from the President of 13 June 1968 whereby notification was given of the rejection of the applicant's request for the application of Article 4 of Regulation No 259/68. In fact this complaint, too, does not hold good. Apart from the fact that the decision relating to those requests for the issue of administrative measures in favour of an official, which cannot be claimed as of right, do not appear to require a statement of reasons (as is further indicated by the possibility of refraining from any comment whatsoever) I should in fact emphasize that in the said letter the President stated that in the interests of the service it was impossible to forego the applicant's assistance and that he continued to expect him to make a real contribution to the work of the Commission. Moreover it is basically impossible even to consider the legality of the said measure since it was not contested in good time. In any case this holds true of the complaint of an inadequate statement of reasons which in the context of the claim for damages, the only claim which remains to be dealt with, can be of no assistance to us in any form.

To summarize, we thus find that the complaint of an infringement of essential procedural requirements in no way assists the applicant's claim.

(e) As I have just indicated, we must nevertheless consider whether the applicant can obtain something through his claims for damages. In this connexion he alleged that he was really *compelled* to retire owing to the arrangements with regard to his conditions of work in the period from July 1967 to June 1969, particularly as he was given duties to which he felt himself unfitted and, apart from this fact, pressure was also brought to bear on him to seek to be retired. As it must be acknowledged from the outset, claims for damages may in fact be founded in this way precisely because it is conceivable that a wrongful act on the part of the administration may lead to a request for dismissal, which permits the conclusion that but for this fault the official in question would have remained in the service. Let us then consider in greater detail the line of argument put forward by the applicant in the present context.

In this connexion certain arguments which must be considered as irrelevant to the applicant's request can be dismissed immediately. This is so with regard to the

argument that the post of Director of the Directorate-General for Industrial Affairs for which he applied, was filled both in July 1967 and in April 1968 in circumstances amounting to a misuse of powers, that is to say, on the sole basis of the nationality of the official appointed. This argument cannot be taken into consideration because the applicant failed to contest the corresponding appointments within the appropriate time-limit. As I understand it, he is thus unable to make this complaint indirectly in proceedings founded on the liability of the administration which, moreover, may turn — let it not be for gotten — as a contributory fault on the part of the applicant which may reside precisely in his failure to initiate proceedings.

A similar negative conclusion is also called for as regards the argument that since the applicant did *not apply* for the post assigned to him, the Commission was wrong in assuming that these duties interested him. In this connexion there must be recalled first of all the letter from the Vice-President, Mr Levi Sandri, of 3 February 1969 according to which the post in dispute was assigned to the applicant 'with his full consent' and the applicant's letter of 15 March 1969 addressed to the President of the European Parliament in which he declared himself unable to refuse the post of Director of the Directorate-General for Dissemination of Information. Apart from this the really decisive factor, however, is that the applicant's consent was in no way necessary since posts are in principle allocated by unilateral discretionary acts taken solely in the interests of the service.

Let us rather ask, therefore, what is to be made of the applicant's other arguments with regard to the assignment and retention of the duties of Director of the Directorate-General for Dissemination of Information, the last he performed before leaving the service of the Commission. In this connexion several aspects are to be distinguished. We shall not have to dwell long on a first point, that is, the complaint that the applicant was left uncertain as to what his duties of his post were because the task was not of a special nature nor was any definition of his duties given, as was done in 1970, when, after his departure, the post was opened to competition under No COM/20/70. In reality, this factor may be regarded as unimportant. Apart from the fact that the Treaty itself devotes a special chapter to the dissemination of information (which might have served as guidance) it must be expected of a senior official that he should himself endeavour to obtain the necessary clarification, in particular by communicating with his colleagues or raising the matter with the Commission. If he fails to do so he cannot subsequently complain that the nature of the duties assigned him was not precisely defined.

A similar fate must befall the applicant's argument that linguistic reasons, that is to say, the fact that the applicant's lack of English which is of prime importance in internal relations prevented him from properly administering the Directorate-General for Dissemination of Information. In this connexion the applicant has put forward correspondence exchanged between him and the Director of his former Directorate-General. In my opinion however this very correspondence militates against the applicant. In the request of this director of 7 May 1968 to be allowed to use English for drafting confidential and technical notes, it is in fact said that he understands French without difficulty and can express himself verbally in this language. Furthermore the applicant's reaction to this request is instructive. In fact he declared in quite general terms in a letter of 30 May 1968 that he had no intention of altering the languages in which the Directorate-General worked; on the contrary he did not make any attempt, which would have been in line with his present argument, to suggest limiting or altering those methods. Consequently the applicant cannot now be allowed to put forward linguistic problems as a reason justifying his request to be retired on principally because the possibility existed (and was apparently even used by the applicant) to overcome the existing difficulties by selecting an assistant with a knowledge of languages.

On the other hand greater weight might be accorded to the applicant's explanation that the technical and administrative requirements of the post assigned to him and which were the predominant requirements for

filling it, were such that he could not meet them on the basis of his training in economics and his experience, which was largely industrial. This becomes clear if it is recalled that there was no one in his Directorate-General capable of following specialized technical, legal and scientific works (for example in the field of patent law) or of dealing with scientific information through electronic equipment. In this way the applicant was gradually reduced to a tormented state of frustration, a neurotic frustration syndrome, which finally led him to tender his resignation. With regard to this argument it cannot in fact be denied (nor does the Commission deny it) that for the applicant, as someone whose previous duties related principally to steel, there might be difficulties in performing duties for which, in the words of the abovementioned notice of competition, the requisite qualifications were as follows: knowledge of and professional experience in the field of information and scientific documentation; knowledge of the problems relating to the management of scientific research and its international relations in this subject; knowledge of the law on the protection of industrial property and of documentation in the field of patent law. Nevertheless I must accept, following the Commission, that these do not constitute insuperable difficulties. In this connexion the important factor is not solely that senior and highly qualified officials may be expected to have a certain adaptability and the capacity within a relatively short time to acquire competence in a new field of activity. The determining factor is above all, as was pointed out in particular in the letter of 3 February 1969 from the Vice-President Levi Sandri, that the duties assigned to the applicant require 'qualities of management and personal authority rather than detailed technical knowledge'. I therefore agree with the view, expressed by the President of the Commission in his letter to the applicant of 13 June 1968, that he was convinced that the applicant could make 'a genuine contribution to the efficient running of the institution' as Director-General, with which Vice-President Levi Sandri concurred in his abovementioned letter of 3 February 1969 wherein he stated that the applicant was able, if only he so wished, to adapt himself perfectly well to the duties assigned to him. It thus only remains to ask whether the applicant made the necessary effort to familiarize himself with his duties or whether he neglected to do so because from the very outset he concerned himself more with other ends. In fact the latter seems to be the case judging by the applicant's repeated claims noted in the statement of facts. Viewed in this light, it also appears far from certain whether the objective difficulties of running the department caused the illness which occurred in March 1969. In my opinion it is in any event impossible to support this argument by the certificates produced by the applicant and issued by his family doctor. Since, finally, there is no evidence to be found for any other pressure brought to bear on the applicant with a view to procuring his departure, it is clear that there are no grounds for speaking of a wrongful act or omission on the part of the Commission. In conclusion I should like to add that even if such a wrongful act or omission had occurred a request to be retired and the related assertion of claims for damages would not appear unconditionally justified. We should rather require the exhaustion beforehand of all other remedies, including the institution of proceedings, for the purpose of altering the situation in dispute, if every element of contributory fault is to be excluded.

Accordingly we arrive finally at the finding that since there was neither illegality nor the occurrence of a wrongful act or omission in the allocation and retention of the duties entrusted to the applicant, there can be no question of a claim for damages either in the form of the sums which the applicant has variously assessed in his pleadings or under Article 42 of the former Staff Regulations of Officials of the ECSC.

(f) These findings also render superfluous further comment on the claim for non-material damages for which the applicant has claimed the award of one lira. In this connexion the precondition of illegality is absent because, as I have already indicated, it is impossible to speak of a *de facto* reduction in status of the applicant and

because it must be accepted that he could have surmounted the difficulties in which he claims to have found himself by reason of his lack of the appropriate abilities after his last post was assigned to him by the Commission. Moreover the applicant has failed to prove that his conditions of service caused his illness in March 1969.
In fact it is therefore clear that an award of compensation for non-material damage is likewise inappropriate.

III — Summary

Without the necessity of considering the applicant's offers of proof I can therefore formulate the following opinion:

The Commission was right in acquiescing in the applicant's unequivocally stated wish to leave the service and to take a decision to this effect. Since it cannot be said that the applicant's tender of resignation was occasioned either by a wrongful act or omission or through compulsion the Commission was justified in applying Article 48 of the Staff Regulations of Officials and, with regard to the calculation of his pecuniary rights, Article 12 of Annex VIII to those Regulations. The application which has been made must thus be dismissed as unfounded and with the further consequence that the applicant must bear the costs incurred by him in the proceedings.