OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 JUNE 1972[1]

Mr President,

Members of the Court,

In the cases before us today which have been brought by officials of the Commission we are concerned with problems of classification after change of category, that is, after promotion from Grade C1 into career bracket B5-B4 (in Cases 86 and 87/71) or after promotion from Grade B1 to career bracket A7-A6 (in all other cases). This promotion gives rise to problems since in the table set out in Article 66 of the Staff Regulations the salaries of Grade C1 are above the level of the final step in Grade B5 and the salaries of Grade B1, at least from Step 3 onwards, are above the level of the highest step of Grade A7. In addition the Staff Regulations contain no express provisions for classification in such cases, and in particular for the fixing of the appropriate grade.

The Commission therefore attempted to provide a general solution to the problem in a decision of 10 March 1971 on criteria for classification in cases of change of category. Under this decision, published in the Staff Courier of 15 April 1971, the following principles apply. Basically on promotion to a post in a career bracket of a higher category an official is classified in starting grade of that career bracket. The step is chosen in order that the basic salary is equivalent to or next above the basic salary of the official's previous grade. If this is not possible then the official is placed in the final of the new grade. If this means that the basic salary in the new grade is below the basic salary in the previous grade (taking into account the automatic advancement under Article 44 of the Staff Regulations) then the official concerned continues to receive the latter basic salary. This decision entered into force on 1 February 1971. However it was intended to be applied to appointments made after March 1970 in so far as they involved transfers from Category B to Category A and where classification as to step was expressly reserved.

This decision also affects the applicants in the present proceedings. They all took part successfully in competitions. As I have already stated these were to fill posts in career bracket B5-B4 or in career bracket A7-A6. In any case it was expressly stated that the filling of the posts depended upon budgetary considerations.

The applicants in Cases 55 to 76/71 were informed by notices from the Directorate-General for Personnel and Administration between 6 May 1970 and 4 January 1971 that they were appointed administrators in career bracket A7-A6 with effect from various dates which may be seen in the files. Their exact classification as to step was at first expressly reserved. A decision as to this was adopted after the issue of the abovementioned general decision by orders of 3 June 1971. Thus one of the applicants was placed in Grade A7, Step 5. For the other officials of this grade it was decided that they should be placed in the 6th (and final) step of Grade A7. In so far as the applicants received a higher salary in Grade B1 than they were entitled to in Grade A7 (which is the case, as I have said, from the third step of Grade B1 onwards) it was expressly stated in the decisions of appointment that payment of salary should continue to be made according to Grade B1. In addition for the application of Article 44 (automatic advancement to a higher step) the seniority attained in the step of Grade B1 was to be retained and the step and seniority in step of the official in Grade B1 was to be taken into consideration, on the first change of grade in the new category, for the application of Article 46.

In so far as the salary in Grade A7 was not lower than that in Grade B1 emolu-

1 — Translated from the German.

ments were to follow the new grading and the officials concerned were ensured in a covering note from the Directorate-General for Personnel and Administration that their salaries would be paid at the rate appropriate to Grade B1 as soon as the basic salary in the new grade fell below the basic salary for Grade B1 (taking into account the automatic advancement to a higher step). Moreover the note stated that a right to payment of salary according to the post in the old grade would cease when promotion to another grade in the new category was made and a point reached at which the salary was equal to or above the last step of the former grade.

The appointments which gave rise to Cases 86, 87 and 95/71 were made after the adoption of the general decision determining the criteria for classification in cases of change of category. Here therefore classification was not reserved but was made directly on the basis of this general decision. The Commission acted as in the situations previously mentioned, that is, the officials concerned were appointed to the last step of the lower grade in the new career bracket (B5-4 or A7-6). Since the corresponding salaries lay below the level of those in the previous grade, it was expressly provided that the earlier basic salary would continue to be paid and reference was made to Articles 44 and 46 of the Staff Regulations and a note similar to that mentioned above was sent at least to the official in Case 95/71.

The officials concerned however were not satisfied with this. Therefore, with the exception of the official who brought the last application (Case 95/71), they submitted complaints in accordance with Article 90 of the Staff Regulations to the appointing authority. These complaints stated in substantially similar terms that the appointment to the lower grade in the new career bracket entailed retroactive alteration of the conditions set out in the notice of vacancy. Previously in such cases Article 46 of the Staff Regulations had always been applied with classification in the higher grade of the new career bracket if the basic salary of the earlier grade, taking into account seniority, lay above the last step of the lower grade of the new career bracket. This had been the procedure applied only a short time previously for transfer from Category C to Grade B4. Therefore they argued that the general decision of 10 March 1971 should be annulled and that the applicants should be classified under Article 46 that is they should be placed in Grade A6 or Grade B4 as the case might be.

The complaints were however unsuccessful. The appointing authority takes the view that the general decision is not contrary to the Staff Regulations. It maintains that the regulations contain no obligation to appoint officials to the higher grade of the new career bracket when they change category; in particular Article 46 is not suitable to determine the grade in such cases. In addition the method applied by the Commission does at any rate guarantee the maintenance of the former level of basic salary. All officials concerned were expressly informed of this, although (with the exception of the applicant in Case 86/71) only after the expiry of the period set out in Article 91 of the Staff Regulations. On 3 August, 14 October, 15 October and 19 November 1971 the present actions were brought.

The following largely identical claims are made for the Court:

(1) to annul the general decision of 10 March 1971 concerning criteria for classification (in Case 95/71 a ruling that the decision is unlawful is sought);

(2) to rule that the classification of an official who is appointed to a post in a career bracket in a higher category is to be undertaken in accordance with Article 46 of the Staff Regulations for the purposes of classification as to grade and step;

(3) to annul the decisions of appointment in so far as they provide for grading in A7-6 or A7-5 or B5-4 without setting out seniority in that step;

(4) to rule that the applicants should be appointed at various steps in Grade A6 or Grade B4 from the time of entry into force of the various decisions

of appointment with or without the determination of a certain seniority in the relevant step and the corresponding payment of arrears of salary;

(5) to annul the implied rejection of the complaints through official channels (this claim is not made in Case 95/71; in Cases 86 and 87/71 there is the amplification 'in so far as is necessary, to annul the express rejection of the appeal through official channels').

I shall now examine these applications.

1. It has become clear from the above considerations that the main issue in the proceedings is whether the Commission was correct in applying the principle that in cases of change of category the official must be classified in the lower grade of the career bracket of the higher category of whether, as the applicants maintain, the Staff Regulations provide that classification must be undertaken in such cases in accordance with Article 46 of the Staff Regulations which provides that 'An official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade'.

One group of applicants is largely of the opinion that other provisions of the regulations, namely Article 62 and Article 66, would not be complied with if the change of category were not carried out in accordance with Article 46, that is, by ensuring the maintenance of the level of basic salary by classification in the corresponding grade and step of the higher career bracket. In addition, in support of their argument, they refer to the previous practice of the Commission and the practice of other Community institutions which, they allege, corresponded to it. On the other hand in support of the method it advocates the Commission refers to the budgetary limits imposed on its personnel policy and to its freedom of organization of posts and the use of budgetary posts whereby application of the system advocated by the applicants is frequently ruled out. In addition it refers to the career bracket system under the Staff Regulations and the fact that the career prospects of A7 and B5 officials could be detrimentally affected if the system advocated by the applicants were applied.

One thing may certainly be said in respect of these arguments. The reference made by the applicants to the earlier practice of the Commission and the practice of other Community institutions is of little value in the present proceedings. The argument as to the first head of application is rather a purely legal one: whether the Staff Regulations do in fact contain principles which require application of Article 46 to cases such as these, or whether the principles of the Staff Regulations are in fact such that the general decision adopted by the Commission concerning classification criteria is more appropriate to the spirit of the Staff Regulations.

It may also be said immediately that *direct* application of Article 46 of the Staff Regulations to cases such as these can be ruled out. This provision is contained in Chapter 3 of the Staff Regulations ('Reports, Advancement to a Higher Step and Promotion') directly after Article 45, that is, the provision whereby promotion shall be effected by 'the appointment of the official to the next higher grade in the category or service to which he belongs'. It is evidently specifically intended for this case and its purpose is to determine the seniority in grade of an official appointed to a higher grade by means of the notional steps. On the other hand by its very nature it is not suitable for determining the *grade* itself since it presupposes that this has already been done by *other* provisions of the Staff Regulations. However *analogous* application of Article 46 can be considered. The earlier practice of the Commission shows that it is possible in practice and in theory. Here examination whether analogous application of Article 46 is in fact the only possible solution under the Staff Regulations is decisive. It may be said at once that in this examination relevant factors cannot be drawn from the decided cases cited by the applicants, that is, the judgment in Joined Cases 15/64 and 60/65 (*Moreau* v *Commission of the EAEC* [1966]

ECR 459). Those cases were in fact concerned with classification on the basis of re-assessment of posts after the entry into force of the Staff Regulations and its Annexes. Whilst analogous application of Article 46 was accepted in such circumstances, that is, in cases where the grade was clearly determined by the Staff Regulations and only the steps remained to be determined and where in addition, as was stressed in the judgment, account had to be taken of the salary level then it does not necessarily follow that the same method must apply in the different situation of transfer from one category into the next higher one. The question of analogous application of Article 46 should therefore be left open for the moment.

Further it is clear that decisive support for the applicants' view cannot be drawn from Articles 62 and 66 of the Staff Regulations and from the basic principle of maintenance of the level of the basic salary, that is, from the second sentence of the second paragraph of Article 46. As you know Article 62 provides that an official is entitled to the remuneration 'carried by his grade and step'. Article 66 sets out the appropriate table. It is true that the method applied by the Commission does in certain circumstances deviate from these provisions (namely whenever the salary continues to be calculated according to the previous grade). However this is not an unacceptable disregard for the Staff Regulations. One may take the view that such a deviation is acceptable *in favour of* the officials if in an exceptional situation and for particular reasons it is necessary to protect acquired rights. With regard to the requirement in the second sentence of the second paragraph of Article 46 that in his new grade an official shall not receive a basic salary lower than that in his former grade, it may be said that in its context this requirement only relates to *promotions* in the technical sense. However if it is given wider scope and it is complied with in connexion with change of category this does not necessarily imply that the level of basic salary can only be ensured by corresponding classification in the higher career bracket. It may also be held that the principle is satisfied if, as was ordered in the general decision of the Commission of 10 March 1971, the level of the former basic salary is maintained or even if a compensatory amount ensures the maintenance of the level of the basic salary. The latter was, as you know, the view of my colleague Mr Advocate-General Gand in Case 11/65 (*Morina* v *Parliament* [1965] ECR 1017) that is in a case concerning the attempts of the defendant institution at least to maintain the salary level of a former C1 official who had been appointed following a competition to a B5 post where the basic salary lay below the level of that of Grade C1. It may also not be objected that such compensation is only provided for by the Staff Regulations for specified situations which do not include cases such as the present ones. It is clear (all the parties are agreed on this) that the Staff Regulations do not contain sufficient express rules for cases of transfer to a career bracket in a higher category. However in such a situation the granting of compensatory payments on the basis of analogous application of the relevant provisions at least seems as sensible and appropriate as the analogous application of Article 46 advocated by the applicants.

In fact, to reach the heart of the matter, the dilemma which arises over the inadequacy of the Staff Regulations in case of a change of category may only be dealt with satisfactorily of one seeks a solution which takes into account the whole system of the Staff Regulations and its underlying principles.

It becomes evident that a system of career brackets based on the career brackets defined in Article 5 of the Staff Regulations is a feature of the Staff Regulations of the Communities. Its importance was emphasized in the decided cases (Case 33/67, *Kurrer* v *Council* [1968] ECR 127) after the Advocates-General (my colleagues Messrs Lagrange and Gand) had repeatedly emphasized them (the opinions in Cases 11/65 and 33/67). This system complies with the requirement of making appointments in principle to the starting grade of a category. If appointment is made to a higher career bracket then generally the lower grade should be chosen (as was emphasized in the judgment in Case 33/67).

On this basis, according to the theory of career brackets, the officials are promoted to the next higher grade when they have completed a certain minimum period of service and therefore have the necessary experience, and upon consideration of the merits of all the officials concerned are deemed suitable for promotion. Change of category is clearly a rare exception (which accounts for the paucity of the rules provided for it). If the question arises then Article 45 requires a competition to be held. This guarantees that the candidates possess the qualifications for the higher career bracket. However nothing more is in fact achieved than equality with officials who are already in the higher career bracket and are in the starting grade of that career bracket. In my opinion that means that the requirement for the advancement of officials whose suitability for the higher career bracket has been shown, is in principle the same as that for officials appointed directly to that career bracket namely that they must prove their abilities for a certain minimum period before they may be considered for promotion to the next higher grade. However it would be quite contrary to the system of the Regulations for an official upon change of category to be immediately placed in the higher grade of the higher career bracket because of the remuneration in his former grade, that is to say for his position in the higher career bracket to be determined by factors (salary and seniority in the former career bracket) which bear no relation to experience and merits in the higher career bracket. It would be intolerable that in such cases officials who are transferred to a higher category should be enabled as it were to overtake other officials who were appointed directly to the higher career bracket and who have already been able to obtain some experience there. These considerations are in themselves sufficient for a solution to the present problem. It follows from them that in the case of change of category analogous application of Article 46 of the Staff Regulations is not appropriate but rather that the principle set out by the Commission in its general decision is the right one.

The following considerations are also relevant.

It appears to me important that the principle stated by the Commission best precludes the danger of inequality of treatment since it always entails classification in the lower grade of a higher career bracket. If we accepted the applicant's view and applied Article 46 then the possibility of classification in the higher grade of the higher career bracket would depend upon there being a corresponding post provided for in the detailed list of posts. However as the Commission rightfully emphasized that is purely a question of its discretion within the scope of the administrative organization and the use of budgetary posts and therefore is not subject to objective examination.

In addition the necessity to fall back continually on Article 46 might often make transfers to a higher category more difficult. Since, as I have said, the administration is free to organize its departments and to use its budgetary posts as it thinks fit, it is not prevented from filling posts in the higher grade of a category by promotion or by recruitment and from inviting applications only for the lower grade in competitions intended for internal applicants (as was done in Case 11/65 and was accepted without criticism). However in such a situation, if only Article 46 of the Staff Regulations could be applied, it would be impossible, for example, for B1 officials in the higher steps to gain access to Category A by means of competition. The rigid principle advocated by the applicants would therefore be against the interests of the staff in the long run. Such considerations must certainly be taken into account in examining the question whether the general rule set out by the Commission with its objective provisions excluding any discretion is appropriate and compatible with the fundamental principles of the Staff Regulations.

Finally it should also be said that some other objections raised by the applicants against the correctness of the conclusions to which I have so far come in no way shake my conviction.

This applies to the observation that the method applied by the Commission could

result in the payment of salary being made for a time according to Category B, then for a time according to Category A and subsequently according to Category B again and so on. This is correct and certainly not wholly satisfactory. However since this consequence appears inevitable if acquired rights are to be maintained and since it in addition entails no insupportable difficulties it is acceptable so long as no amendment of the Staff Regulations produces a more acceptable rule for the change of category.

The same applies to the complaint that the rules adopted by the Commission could in certain circumstances lead to category B officials from various grades being classified in the same grade in Category A. In my opinion, if it is not pure theory, such an occurrence is in no way alarming since in such a situation all officials start from the same point at the beginning of a new career bracket in the higher category for which their suitability alone comes into consideration. In addition the method of the calculation of the salary as contained in the general decision of the Commission concerning classification criteria ensures that at least for remuneration, and consequently for future promotion also, the appropriate differentiation is retained.

Thus in view of all the considerations raised by the first head of the application it must be held that the general decision of the Commission of 10 March 1971 does not infringe provisions of the Staff Regulations and therefore there are no grounds for annulling the appointment decisions based on it.

2. A second group of complaints relates to the alleged infringement of Articles 44 and 46 of the Staff Regulations. In the applications it was stated that the system adopted by the Commission is based on an artificial career bracket in the former grade since, both for the automatic advancement in step under Article 44 of the Staff Regulations and also for promotion, the step and seniority in the former grade are basic factors. This is not compatible with the principles of the Staff Regulations. In addition, in so far as it places officials in the highest step of the lower grade of a new career bracket, the Commission's decision is incompatible with the prohibition on taking notional steps into account beyond this step.

In the first place the Commission answers these complaints with an objection as to their admissibility. It states that the contested general decision produces additional advantages to those affected by the parts thereof which are challenged by the applicants. In this respect it must be accepted that the applicants have no legal interest in criticizing and obtaining partial annulment of the general decision.

In this connexion it must at once be said that the Commission's objection is based on a misunderstanding. In fact the applicants, as they have expressly made clear, are not seeking a partial annulment of the general decision; rather they take the view that the use of the method chosen by the Commission to preserve an infringement of indispensable minimum standards in cases of change of category necessarily involves the abovementioned provisions of the Staff Regulations. It follows consequently that the rules adopted by the Commission are unlawful in principle and this entails the annulment of the general decision in its entirety. Seen in this way the objection as to admissibility is not valid, particularly since proof of a legitimate interest is not necessary to justify particular objections in support of admissible applications.

As regards the factual basis of the criticism an important factor for its examination is the principle contained in Article 46 of the Staff Regulations that 'An official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade'. I have already stated in this connexion that it is certainly possible to argue that in view of the form of words chosen and the context the principle only relates to cases of promotion in the strict sense and it is therefore doubtful whether it also applies to cases of change of category. However if one believes that Article 46 expresses a fundamental principle to be observed for any advancement in the salary scale, then it may certainly be accepted that in cases of change of category this principle is satisfied by

ensuring the maintenance of the level of salary for which a compensatory payment is sufficient as my colleague Mr Advocate-general Gand thought. However it also seems possible to agree with the Commission that the principle may be inferred from Article 46 that the basic salary must remain unchanged and the career bracket in general must be affected as little as possible. If one agrees with this and if one bears in mind that jumping of grades on change of category is incompatible with the fundamental principle of the Staff Regulations, its career bracket system, then in view of the sketchy nature of the Statute in this respect it appears only reasonable to work on the basis of an artificial career bracket as the Commission in fact did. Properly understood that is not an infringement of the abovementioned provisions of the Staff Regulations (Articles 44 to 46) but only their reasonable application to a situation which cannot be handled satisfactorily by literal application of all the provisions. In the procedure chosen by the Commission I do not see that any part of Article 46 is infringed in that (as was emphasized in the judgment in Joined Cases 59 and 71/69, *Brembati* v *Commission* [1970] ECR 623) consideration of notional steps above the last step of the grade is excluded. It is in fact not true that notional steps are taken into account beyond, for example, A 7-6; they are considered solely within the scope of the artificial career bracket which is to be regarded as admissible that is within the scope of the former Grade B 1.

Finally with regard further to the applicants' reference to the pension rules in the third paragraph of Article 77 of the Staff Regulations and the view that the method applied by the Commission could have detrimental effects on pension rights since the basic salary of the grade and step in the three years preceding retirement from service are relevant, the following observations should be made (disregarding the fact that this objection was only raised in the rejoinder). In this respect also it must be remembered that in cases of change of category the Staff Regulations do not necessarily provide for the maintenance of the level of the basic salary but if need be only the maintenance of the level of remuneration by means of compensatory payment. Thus reductions in rights under the pension scheme cannot be excluded from the scheme of the Staff Regulations. If one assumes that the principle of the maintenance of the basic salary also applies to cases of change of category then, in view of the evident lacuna in the Staff Regulations in this respect, a reasonable application of Article 77 is possible, based on the concept of the artificial career bracket, and taking account of the former classification in order that all the benefits thereof, including pension rights, may be preserved.

Thus in all it may be held that the applicants' references to the requirements of Articles 44, 46 and 77 of the Staff Regulations do not show the method applied by the Commission to be unlawful and also fail, as did the other statements of the applicants, to make evident the necessity for grading on the basis of the provisions relating to promotion in cases of change of category.

3. With regard to the application for annulment there only remains the subsidiary objection of infringements of the principle of equality of treatment. It is composed of two parts. On the one hand (solely with regard to Cases 55 to 76/71) it is argued that the decision of 10 March 1971 only has a retroactive effect for transfers from Category B to Category A but not for transfers from Category C to Category B. The latter cases were accordingly still dealt with according to Article 46 of the Staff Regulations during the period referred to in the decision of 10 March 1971. On the other hand it is emphasized (with regard to all the applications) that even after 1 February 1971 (that is the date of entry into force of the general decision of 10 March 1971) transfers from Category C to Category B were dealt with outside the general rule, that is, under Article 46 of the Staff Regulations. Let us therefore examine this question.

(a) With regard to the first part of the objection which entails partial annulment of the general decision of 10 March 1971

(namely in so far as it has retroactive effects for transfers from B to A) the Commission replied that retroactive effects were not provided for transfers to Category B because the decisions of appointment in question did not contain corresponding reservations. It was possible to do without this because the budgetary position was different. So many B4 posts were available that their use for cases of change of category did not prejudice the career prospects of B5 officials.

In examining whether this is sufficient to justify the differential treatment, it must be remembered that the legal situation at that time was not yet clarified and the discussions for the appropriate rules in cases of change of category were still in progress. Since the use of Article 46 of the Staff Regulations was not obviously unlawful it could therefore be regarded as probable that this practice would also be followed in the future. Bearing this in mind it is not possible simply to dismiss the view that quite properly budgetary considerations were decisive at that time for classification on change of category. Consequently it is my opinion that the first part of the objection of discrimination is not well founded. My opinion is in no way altered by the applicants' reference to the fact that a sufficient number of A6 posts were available as well as the sufficient number of B4 posts. We need not here decide whether this is in fact correct. The decisive factor is that the Commission, as I have said, is free to use its posts as it wishes and the possibility cannot be excluded that it gave priority to other departments in its allotment of any existing vacant A6 posts.

(b) With regard to the second part of the objection as to discrimination it must first be recalled that the Commission challenged its admissibility in Cases 86, 87 and 95/71 on the grounds that it was only raised in the rejoinder that is to say out of time. However this objection is not well founded since it is clear that the objection is based on explanations which the Commission only gave after the submission of the applications, although this was in respect of other cases joined to these three cases. Therefore the conditions set out in the Rules of Procedure for the admissibility of belated submissions are fulfilled.

However, with regard to the factual content of the allegation here again I do not believe it is possible to accept the view of the applicants. The Commission has stated that the decisions appointing C officials to Grade B4 referred to by the applicants were adopted on 29 January, 22 February and 25 February 1971, that is, *before* the adoption of the general decision concerning classification criteria. In addition the written procedure for the adoption of the general decision evidently took longer than expected and therefore retroactive effects were only provided for later. At the times in question there was no conscious failure to comply with the general decision and the administration was able to act on the assumption that, for the time being, the former practice could be continued and therefore application of Article 46 was possible. This may be regarded as a particular factual situation which rules out any possibility of discrimination.

With regard to the objection as to discrimination it may finally be pointed out that even at the end of August, that is at the time when the applicant in Case 95/71 was classified according to the provisions of the general decision, a technical officer in Grade B3 was appointed directly to Grade A7 in career bracket A8-A5. This action may to a certain extent be justified by the consideration that in such cases a competition is unnecessary since the career bracket system has a different significance for technical officials and therefore application of Article 46 of the Staff Regulations is thus more appropriate than that of the general rules for cases of change of category. Moreover this is apparently the only instance of this nature. Even if this is to be regarded as an infringement of the general decision concerning classification criteria and therefore as an unlawful appointment nevertheless the objection of discrimination can scarcely be raised with the consequence that the applicant in Case 95/71 should be treated in the same way.

Finally it is thus evident that the applicants are also unsuccessful in all the arguments

based on the principle of equality of treatment.

4. The applicants' main claims (declaration of the illegality of the general decision of 10 March 1971, annulment of the classification decisions and annulment of the implied rejection of the complaints through official channels) should be rejected.
At the same time it is evident that the applications for classification in particular steps in Grades B4 and A6 must also be rejected since they are also based on the unlawfulness of the general decision and the necessity to proceed in accordance with Article 46 of the Staff Regulations.

5. My opinion may therefore be summarized as follows:

The applications submitted by a number of officials of the Commission are admissible; however they must be rejected in their entirety as being without foundation. Since there exist no exceptional circumstances the decision as to costs must be made in accordance with Article 70 of the Rules of Procedure.