Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 179;
Having regard to the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing the European Economic Community;
Having regard to the Staff Regulations of officials of the European Economic Community, especially Articles 43, 45, 90, 91 and 110;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision to promote Mr Gennaro Pandolfelli to the post declared vacant by Notice No 690 in Division III-C-2;**

2. **Orders the Commission of the European Economic Community to bear the costs.**

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 7 July 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 24 JUNE 1964[1]

Mr President,
Members of the Court,

The case in which I am delivering my opinion today concerns a question of promotion, just as in the Riponi and Bernusset cases against the Commission of the EEC.
By a Vacancy Notice published in the Staff Information Bulletin of 12 July 1963, the Commission made it known that a post of Head of Division (Grade A 3) was vacant in the Directorate-General of the Domestic Market, Right of Establishment and Services Directorate.
The applicant, who had been in the service of the Commission since December 1958 as an official in Grade A 4 in the Directorate-General of the Domestic Market, applied for this post. However the Commission selected another candidate who, by a decision of 29 July 1963, was appointed Head of Division

1—Translated from the German.

with effect from 16 August 1963.

The application for annulment which I am now about to examine disputes this decision. My task will be considerably aided by the judgments of the Court in Case 27/63 and Joined Cases 94 and 96/63 which, by and large, present the same problems as our case today.

This similarity has led the parties to abandon in the course of the oral procedure any discussion of a series of legal arguments which do indeed appear in their statements, but which may be regarded as settled by the judgments of the Court, after the close of the written procedure.

For this reason I do not intend to spend more time on the following questions:

1. Who is the defendant party in the case, the European Economic Community as such or only the Commission of the EEC?
2. Does Article 45 of the Staff Regulations require the adoption of general provisions, in accordance with Article 110 of the Staff Regulations, for giving effect to those Regulations, particularly the prerequisite general adoption of standards of evaluation for the selection of candidates for promotion?
3. Could promotions not take place until after the publication of the definition of the posts provided for in Article 5 of the Staff Regulations?
4. Must a decision on promotion state the reasons on which it is based, so far as the candidates not promoted are concerned?

Only the methods of preparing the promotion decision, a theme to which the parties have devoted the greater part of their oral pleadings, deserve a detailed examination and that only to the extent that it is a matter of the selection, as laid down in accordance with Article 45, of the candidate to be promoted, after evaluation of his merits because, according to the case-law of the Court, the absence of the periodical reports provided for in Article 43 at the time the decision on promotion is adopted cannot be regarded as a wrongful omission.

In the present case the promotion procedure ostensibly took place thus: after the applications had been submitted, the Directorate-General of Administration commenced by investigating the legal requirements (seniority, grade etc.). It then announced which of the candidates admitted appeared best fitted for the vacant post. The head of the working group of the Domestic Market took up this proposal which was supported by written reasons and communicated it to the other members of the Commission by the Executive Secretariat of the Commission on 26 July 1963.

During its 238th meeting on 29 July 1963, the Commission, as stated in the minutes, decided, after being informed of the candidatures, after considering the proposal of the chief of the working group of the Domestic Market and after undertaking the 'examen comparatif des merites des candidats' (consideration of the comparative merits of the candidates') to promote the candidate proposed. It is open to argument whether, in the course of this meeting at which the decision was made, the members of the Commission had in their hands the application forms of the various candidates. The Agent of the Commission states that this was so; the applicant expresses doubts on this point.

In comparing these facts with those of the Bernusset case, one can see in the outward development of the events a similarity which goes right down to the details. I need not go over this in detail because the memories of the Bernusset case are still fresh in our minds.

So we must now see whether it is nevertheless possible in the present case to consider things from a different angle, as the Commission claims, because of certain special features.

First of all in fact there remain certain doubts on the disputed question, namely

whether the members of the Commission had the application forms of the candidates put before them or whether only the promotion proposal mentioned above was available to them. The minutes of the meeting of the Commission, where the expression 'la Commission a été saisie des candidatures' ('the Commission was informed of the applications') appears, is not perfectly clear and quite evidently, the assurance of the representative of the Commission that the promotion decision was made in due form is not sufficient. But one may very well suppose that the procedure was carried out just as in the Bernusset case, although in the present case the note 'P.J.' (pièces jointes) (annexures), does not appear in the memorandum from the Executive Secretariat. In any case I wish to refrain from proposing that the Court should take evidence with a view to elucidating this issue.

Further in respect of the unusual points of procedure in the case mentioned by the Commission, there is reason to say that in fact the documents submitted by the applicant relating to the application were particularly detailed and of such a nature as to tell the members of the Commission all the details of his career in the Commission and outside it. It could well be that even the personal file of the applicant gives no more complete information on the material facts of his career.

However, this circumstance should not be essential, in view of the requirements of Article 45, and I do not see that it could be decisive according to the present case-law of the Court on questions of promotion. What the Court, and in my opinion properly, criticized in the Bernusset case was the fact that apart from the promotion proposal which applied only to one candidate, the members of the Commission had before them only the other candidates' *own* statements on their careers to enable them to judge their suitability for promotion. I quote: 'The application forms submitted by the persons concerned themselves, without any verification or check by the appropriate departments of the Commission, are documents of an essentially subjective nature, the content and scope of which can be evaluated only with considerable care in a matter requiring as objective a consideration as possible of the merits of the candidates'.

It is thus not important whether these statements of the candidates were too full or too meagre, but what is, is the simple fact that they provided only a subjective account of the facts, a personal statement by the applicants themselves, which either gave no evidence about their merits or at least did not allow an objective judgment to be made on them. In fact it must not be forgotten that Article 45 requires as a general rule a consideration of the comparative merits on the basis of *reports* made by third parties on the candidates. But even in an inevitable 'période d'adaptation' ('period of adaptation') to the requirements of the new Staff Regulations a derogation from the rule of Article 45 cannot go to the point where personal declarations by candidates themselves are a sufficient basis for promotion decisions.

In consequence in this case it appears that the same solution is indicated as I recommended in the Bernusset case, where I was followed by the Court: as we cannot infer from the documents of the Commission that its members were more fully informed on the merits of the different candidates there is no other solution than to annul the disputed promotion decision for inadequate preparation.

Taking into account this outcome it seems to me unnecessary to go into the other arguments in the application (late publication or failure of publication of the decision on promotion, erroneous evaluation of the facts, misuse of powers in various aspects).

My opinion is as follows: the application is admissible and well-founded. The disputed decision must be annulled; the Commission must be ordered to pay the costs in accordance with Article 69 of the Rules of Procedure.