OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 12 NOVEMBER 1981 [1]

Mr President,
Members of the Court,

Having been in business as a self-employed architect from 1957 until 1960, the applicant in the case with which we are concerned today entered the service of the Commission of the European Atomic Energy Community in August 1960 and received a remuneration corresponding to a classification in Grade A 7 Step 2. He was first assigned to the Joint Research Centre at Ispra, where he was head of an administrative unit until 1970. In 1963 he was appointed an official in Grade A 6 Step 1 and was later transferred, with effect from 1 October 1970, to the Directorate-General for Development Aid in the single Commission of the three Communities, which had meanwhile been created. There he was first employed in the Technical Operations Division of the Directorate for the European Development Fund. With effect from 9 March 1971, he was assigned to Division III (Construction, Industry, Agriculture, General Infrastructure) and, after being promoted to Grade A 4 Step 3 in 1974, was transferred to Division V (Urban works and Social Infrastructure) in Directorate C, where he is head of the section for West Africa, Central Africa, the Pacific and Maghreb and is required to replace the head of division in his absence.

As early as 1975 he took part in Internal Competition No COM/716/75 which was held in order to fill the post of Head of Division C 5. He was not successful but was placed on the list of suitable candidates.

In May 1979, this A 3 post in the Projects Directorate was once again the subject of a vacancy notice (COM/161/79). For a description of the duties attaching to the post and the abilities required, I refer for the time being to Annex I to the defence. It will be necessary to return to this later in another connection. A number of other persons applied for the vacant post, as well as the applicant. In a memorandum from the head of the Directorate-General for development dated 1 June 1979 it was stated that only the applicant and a Mr L. fulfilled the required conditions. In making the appointment, however, Mr L. was to be preferred on account of his experience.

This other candidate was assigned to the European Association for Cooperation from September 1973 to 1976 as a controller of the European Development Fund in central Africa. With effect from 1 June 1976, he was engaged by the Commission as a temporary servant in Grade A 3 Step 2 for two years and appointed Head of the West Africa Division in Directorate B of Directorate-General VIII. After taking part in an internal competition, he was appointed as a probationary official in Grade A 3 Step 3 by a decision of 23 January 1979 and was further assigned to the above-mentioned post with effect from 1 January 1979.

That candidate was then also the successful one in the context of Notice of Competition No COM/161/79. Following the Commission's meeting of 13 June

1 — Translated from the German.

1979, he was appointed Head of Division C 5 in Urban Works and Social Infrastructure, with effect from 1 July 1979, by decision of the President of the Commission of 13 June 1979. He was then established with effect from 1 October 1979 by decision of 11 October 1979.

The applicant was informed that his application was unsuccessful on 5 July 1979. He responded to this by submitting a complaint to the President of the Commission on 10 September 1979 and claimed that the decision appointing Mr L. as Head of Division C 5 should be annulled. That complaint was expressly rejected in a decision of 27 March 1980.

The applicant next submitted an application to the Court, claiming that the decision of 13 June 1979 and the rejection on 27 March 1980 of his complaint should be annulled.

My opinion on those requests is as follows.

1. The applicant founds his application first on the submission that, in filling the vacant post, only those factors which arose out of the vacancy notice and were connected with the post to be filled ought to have been taken into account. In this case, however, the decisive reason for the appointment of Mr L. was an "extraneous" consideration, as it were, that is to say, requirements which had arisen as a result of the reorganization of several divisions of the Directorate-General for Development. In this regard the applicant refers in particular to memoranda of February and March 1979 (Annexes 6 and 7 to the reply), which show how the detailed list of posts for the Directorate-General for Development was altered at that time. As evidence of the validity of his criticism, he further refers to a letter which was sent in June 1979 by a member of the Commission to the Belgian Foreign Minister, on the latter's intervention on behalf of the applicant, and in which it was stated that Mr L.'s transfer "met wider requirements as to the reorganization of several divisions of this directorate-general". In a supplementary pleading, he points out that the reorganization of Directorate B of the Directorate-General for Development was decided upon by a decision of 2 July 1980, which entered into force on 1 August 1980, and that Divisions B 2 and B 3 as well as B 1, which was previously headed by Mr L., were thereby abolished because they "have scarcely any management and coordinating duties".

In my view, there may be some doubt in relation to that argument, as to the correctness of its narrow premise that, in making appointments to posts, no factors should under any circumstances be taken into account other than those mentioned in the vacancy notice and relating to the post to be filled. In my opinion the "interest of the service", to which the applicant refers in this connection, does not prevent considerations relating to the reorganization of departments from being taken into account in making an appointment to a post. In any event, this would be permissible if, after the applicants have been assessed, only candidates of equal quality remain, and, after consideration of all criteria set out in the notice, the appointing authority has to decide which candidate is ultimately to be preferred. That does in fact seem to

be the case here. Indeed it even looks as if the candidate chosen in preference to the applicant was better qualified for the post, as is shown by the above-mentioned memorandum from the Head of the Directorate-General for Development of 1 June 1979. This being so, the fact that considerations relating to the reorganization of departments may also have been relevant to the appointment of Mr L. affords no grounds for alleging that the interest of the service was disregarded.

Furthermore, I would also point out, precisely because it is even disputed that the other applicant appointed to the vacant post was qualified for it, that it should not in fact be assumed that the decisive reason for his appointment was a change in the organization of the Directorate-General for Development. In this respect the assertion made by the applicant to the effect that there is a certain connection to be found between the organizational measures to which he refers and the vacancy notice and that it is of interest that Mr L. had already been entrusted with the concurrent direction of Division C 4, for some time at least, is not sufficient. It would be appropriate to speak of "requirements" and therefore of *constraints* of the reorganization of the department in connection with Mr L. only if it had already been considered at that time that the post which he held should be abolished, as this would have given rise to the necessity of moving him elsewhere. However, there was no question whatsoever of that in the spring of 1979. At that time, a simple rearrangement of various A 3 posts was taking place, as may be seen from the above-mentioned memoranda, including the transfer of a vacant A 3 post from Division B 2 to Division C 5, which made it possible to proceed with the notice of competition at issue. On the other hand there was no question whatsoever of the abolition of the post occupied by Mr L., indeed, a vacancy notice was proposed for it, as the memorandum of 1 June 1979 shows.

That ought surely to be decisive. In my view, the applicant is in no way entitled to rely, in support of his first submission, on measures which were not adopted until a full year later, that is to say, July 1980. In fact, there is no discernible connection between them and the filling of a post at issue in this case; on the contrary, it would be impossible to demonstrate conclusively that in regard to the last-mentioned matter any part was played by considerations which were connected with the abolition of the post held by Mr L.

This being so, in my view the above-mentioned letter of 25 June 1979 from a member of the Commission may also not be considered as evidence in support of the applicant's case. In this regard, I, like the representative of the Commission, would accept that this was only the rejection, couched in diplomatic terms, of an unwelcome intervention, rather than the disclosure of the decisive reason for the filling of the advertised post.

Therefore there is certainly no reason for annulling the contested decision on the ground that extrinsic considerations were decisive in filling the post.

2. In connection with the second submission, to which I now turn, the applicant points out that according to Vacancy Notice No COM/161/79 one

of the conditions for appointment to the vacant post was "thorough knowledge and experience of economic and technical problems in the field of social infrastructures and urban works in the developing countries". A very exacting condition for the admission of applications was thereby laid down. According to the applicant, that may be inferred from the fact that in an earlier notice relating to the same post (COM/716/75) the adjective "thorough" did not appear, apparently because at that time the duties attaching to the post were narrower in scope and less important. The Commission must, however, be criticized for wrongly assuming, on the basis of the personal file of Mr L. and his previous professional experience, that he fulfilled the requirements stated in the vacancy notice.

In any event, it must be reproached for failing to state to what extent Mr L. fulfilled the above-mentioned condition.

(a) In regard to this submission, if we look first at the formal aspect of the alleged inadequacy of reasons, mentioned in the second place, it is clear that the Commission is right in two respects.

Its view, in support of which it can refer to established case-law, that it is not at all necessary to give the reasons for decisions on promotions and appointments because they do not constitute acts adversely affecting the person to whom they are directly addressed, is correct. It is also correct that the rejection of the applicant's complaint does not lack a statement of reasons in the sense that, according to the case-law (judgment of 30 October 1974 in Case 188/73, *Daniele Grassi* v *Council of the European Communities* [1974] ECR 1099), in such cases a statement of reasons is required in the form of a reference to the legal conditions on which, under the Staff Regulations, the validity of such a measure depends. In this regard a single look at that measure, which is to be found in Annex 3 to the application, is sufficient.

However, in so far as the applicant complains — this clarification is to be found in the reply — that from the Commission's documents it is not clear to what extent it was possible for it to accept that Mr L. had a "thorough knowledge" and that there is therefore a lack of an *internal* statement of reasons which is required for every administrative decision, it is certainly a sufficient answer that he has not established the existence of a *formal* principle of law of such a kind. Whether those conditions were *in fact* laid down is another question to be considered later. It may therefore be concluded without further discussion that the contested decision may certainly not be annulled on the grounds of any form of deficiency in the reasons given for it, but that at most the question of annulment might be considered if in fact the objective conditions for admitting the appointed applicant to the list of admissible candidates were not met.

(b) Before I turn to this question, which is central to the case, it seems to me that some clarification with regard to the arguments of the parties is appropriate.

(aa) In its defence, the Commission relied mainly on case-law according to which the appointing authority enjoys a very wide discretion in assessing comparative merits in promotion procedures, and that value-judgments which

may have to be made in an independent assessment of that nature may be criticized only on the ground of manifest error. It also objected that the applicant had isolated *one* factor in the vacancy notice and concentrated his arguments on it. According to the Commission, however, it must be noted that a comparison of the applicants with regard to *all* the conditions contained in the vacancy notice was necessary. On the other hand, as it must be accepted that leadership and management qualities and experience in different sectors are particularly important for the post in question, it can scarcely be contested that Mr L. is better suited for this post than the applicant.

In fact it should be noted in regard to this argument, and the applicant has not failed to point this out in his reply, that the Commission is in this way failing, at least in part, to deal with the applicant's arguments. In reality it is not alleged that in the assessment of merits those of Mr L. were incorrectly judged to be greater. The issue is rather whether Mr L. fulfilled one of the conditions stipulated in the vacancy notice and therefore could be admitted to the list of those whose relative merits had to be assessed.

In a certain respect, however, the Commission's argument is undoubtedly deserving of consideration. Even if it is certain that the case-law concerning Article 45 of the Staff Regulations may not as such be invoked, one of its principles may well be relevant. Even the judgment as to whether an applicant possesses thorough knowledge in the sense of the vacancy notice, that is to say, knowledge of a particular quality, is undoubtedly a *value-judgment.* This undoubtedly is something which cannot be reconstructed in every detail by the Court. On the contrary, in this respect, too, it is necessary to proceed on the basis of a discretionary assessment and therefore to limit judicial review to the issue whether there has been a manifest error.

On the other hand, the Commission is in my view right in stating that, in checking the assessment of the applicants for the post on the point referred to above all by the applicant, it must be borne in mind that, in addition to that point, a series of other conditions were set out in the vacancy notice. Therefore there was no need for an unduly exacting standard to be applied in connection with the condition mentioned by the applicant, precisely because other aspects, such as leadership and management qualities, are especially important for the purposes of directing Division C 5. The condition relating to "thorough knowledge" might rather be understood, according to the appointing authority's sovereign interpretation of the conditions of eligibility, as meaning that *sound* knowledge in the field in question is sufficient.

(bb) It has thus also become clear — and this brings me to the second clarifying observation on the applicant's point of view — that the basic premise chosen by the applicant, as set out in his supplementary pleading, can certainly not be accepted. Here, as we know, he makes his own level of knowledge the compulsory standard and declares that, because in Division C 5 an official in Grade A 4 has to deal with a great many important projects, it must be accepted that the head of that division must possess at least the same level of knowledge and experience. This, to my

mind is not at all convincing and it even seems objectionable because it would inevitably lead to an intolerable and unnecessary restriction on the appointing authority's range of choice. It may not properly be required of the head of an administrative unit that he should possess all the knowledge and experience of his colleagues, but it is only necessary for him to have, in the area which he is to direct, sound knowledge of such a kind that he is able to instruct, supervise and coordinate his colleagues sensibly.

(cc) It is therefore clear from the outset that the examination to be undertaken in the context of the present submission may be limited to determining whether the factors of assessment which are cited by the Commission adequately show that it was correctly accepted that the appointed official had a sound and thorough knowledge of the economic and technical problems in the field of social infrastructure and urban works in the developing countries, or whether, upon the examination of those factors, in relation to which the Court obviously does not have to enter into every detail, it is established that there was no basis for a favourable judgment or even that there was a manifest error.

(c) In that connection the Commission has referred mainly to two documents which provide information concerning Mr L.'s activities as an architect in Rotterdam and in Rome between 1962 and 1973, that is to say, before he entered the service of the European Association for Cooperation (Annexes 7 and 8 to the defence). It further refers to the fact that Mr L. was able to supplement and reinforce the considerable relevant experience which he accumulated there, both in the period from 1973 to 1976, when he was a delegated controller of the Commission in central Africa, and thereafter in the post of Head of Division B 1 in the Directorate-General for Development.

In that regard I have the impression — let me say this at once — that there emerges from this a wholly sound basis for a favourable assessment of the appointed official and that in any event the criticisms raised by the applicant do not disclose any manifest error.

(aa) The applicant's chief criticism is, as we know, following the relative importance attached by the Commission to the factors for assessment, directed to Mr L.'s work in the private sector. He takes the view that the experience obtained from that work is *a priori* to be given only a relative value because it is far from recent.

In my view, however, that is mistaken, in view of the relevant periods and the absence of evidence that there had in the meantime been any fundamental change in the field concerned here. Furthermore it is significant that Mr L. was not afterwards involved in a totally different field, but held a post which was perfectly suited to maintaining and widening the experience which he had obtained.

The applicant further sought to cast doubt on the value of the experience gained by Mr L. in the private sector by explaining, on the one hand, that social infrastructure in the field of public health, publicly-financed dwellings and education were clearly at the centre of Division C 5 because in fact 95 % of all projects were concerned with those matters, and by pointing out, on the other hand, what the documents submitted by the Commission revealed

about Mr L.'s earlier involvement in projects relating to developing countries. According to these documents the successful applicant was concerned in only a small number of projects, which themselves related to only a few countries, whereas Division C 5 is responsible for between 60 and 80 developing countries. It is also clear that only six of those few projects belonged to the sphere of social infrastructure and urban works, whilst none concerned the sphere of public health and publicly-financed dwellings, and four projects from the field of education related only to a small sector of it.

However against that it must be pointed out that, apart from the fact that the applicant examines only one of the two documents laid before the Court by the Commission and makes no comment with regard to the other, a quantitative consideration of that kind is in any event bound to be fundamentally misconceived. Furthermore it must not be overlooked that the document in question indicates only the most important projects and thus does not contain an exhaustive list, and that in addition, with regard to the number of countries concerned, Mr L. was in any event able to obtain useful supplementary experience in his subsequent post.

(bb) Moreover, I also find it impossible to accept the applicant's view that, in assessing the appointed candidate, the Commission wrongly took into account his work from 1973 to 1976 as delegated controller in central Africa and after that as head of division in the Commission.

Indeed it may be true that, as appears from the description of the activities of Division C 5, the projects are prepared in Brussels and that in general their execution is also supervised from there. Nevertheless it may quite properly be assumed that a delegated controller who, as the Commission has convincingly assured us, not only has to undertake subordinate executive duties, but is to be regarded as a kind of ambassador with wide-ranging and important powers, may certainly also be in a position to acquire from a large number of projects useful knowledge for the purpose of the vacancy notice at issue in the present case. There is therefore plainly no need to go to the trouble of considering in detail the applicant's arguments, some of which are extremely petty, concerning the level of particular projects carried out in central Africa between 1973 and 1976 and the criticism which he has expressed in that regard.

On the other hand, so far as Mr L.'s duties as Head of Division B 1 are concerned, it may indeed be taken for granted, in view of the description of the duties furnished in the course of the proceedings, that in this capacity he was less intensively involved in projects than is possible in Division C 5. However since, contrary to what the applicant says, there is obviously more involved in Division B 1 than the mere registration of projects, and in any event it is also stated in his supplementary pleading that project descriptions and financial estimates were prepared, at least partly, by Division B 1 and C 5 jointly, and also at it could not be disputed that since 1976 Mr L. has taken part, in his capacity as head of division in a succession of important meetings in almost all the developing countries for which the division is responsible, it is beyond my understanding that no useful and sound experience could be obtained

in this way in relation to the field covered by Division C 5 as well.

(d) Therefore the applicant's second submission must also fail, because on the whole I have not gained the impression that the Commission was wrong in assuming that the appointed applicant fulfilled the conditions set out in the vacancy notice.

3. Finally, in his third submission the applicant alleges that the process of filling the vacant post, in relation to which, according to the documents placed before the Court by the Commission, the only question was whether the applicant or Mr L. ought to be appointed, was in any event carried out incorrectly because in that comparison the applicant's periodic report under Article 43 of the Staff Regulations for the years 1975 to 1977, and thus the last report on the applicant in existence at that time, was missing. In that regard the applicant says that it must not only be borne in mind that, according to case-law, such reports provide the essential grounds for all decisions concerning an official's career. There is no doubt either that consideration of the said report might easily have led to a different result. In fact it not only contains very favourable marks which, on account of an intervening change in criteria, represent an improvement in relation to earlier reports, but in particular it also relates to a period when the applicant's duties were extended and his responsibilities increased, because he was entrusted with the duty of standing in for the head of division.

In this connection it is true that the report on the applicant for the period from 1975 to 1977 was not in fact before the appointing authority when the contested decision was taken. A memorandum from the head of the Directorate-General for Development of 15 September 1980 shows how that situation occurred. According to that memorandum the report was prepared on 5 December 1977 and transmitted to the applicant. However, he did not accept it but requested instead, in a letter dated 15 December 1977, an interview with the reporting officer. After that interview had taken place, the report was changed and once again transmitted to the applicant. However the applicant still did not agree with it because of one sentence in the general assessment which he considered to be misleading but which in the opinion of his superior contained nothing unfavourable. He therefore retained that report, which was still not definitive, so that it was not in fact included in his personal file at the time of the contested decision and was only produced in the present proceedings when his reply was lodged.

The Commission takes the view that this circumstance nevertheless does not constitute grounds for annulment. It points out, on the one hand, that the applicant was under a duty to hand back three copies of the report relating to him within eight days, in accordance with the general implementing provisions laid down by the Commission in regard to Article 43. If he did not comply with that requirement, his own irregular conduct is to blame for the fact that the report could not be taken into account in the procedure for filling the post at issue here. On the other hand it is of the opinion that the fact that the report was not considered could in no way have been to the applicant's disadvantage. It is in fact not only manifestly less favourable than earlier reports appearing in the applicant's personal file; it is also

clear that for the Commission the decisive factor in making its choice, as is shown by the above-mentioned memorandum from the Director-General of 1 June 1979 and the Commission's decision on the complaint, was the fact that Mr L. possessed greater experience of African problems, and particularly of political problems.

In considering this difference of opinion, too, I find that I must agree with the Commission.

In the applicant's view the failure to return the report does not constitute a breach of duty for, quite apart from the fact that the report had not been officially communicated to him, it must be accepted that at that time — as is shown by a comparison of the new implementing provisions in regard to Article 43 with the old — there were no compulsory time-limits in force for such return, but only "délais d'ordre" [recommended time-limits in the interests of good order]. In any event, according to the rules in the Staff Regulations, the appointing authority's duty to make reports and to consider them in taking decisions affecting the official's career is the main consideration in this field. It was possible for that obligation to be satisfied because, according to the provisions of the "Guide to Staff Reports", a report becomes final if no objection is made to it within the prescribed period. The reporting officer could simply have stated that the prescribed period had expired and subsequently given the report definitive status by way of confirmation. However, there could be no question of assuming that the failure to consider the report was harmless because the report for the years 1975 to 1977 was less favourable than earlier reports appearing in the applicant's personal file, since, at least in relation to the main content of the report, a comparison in this regard clearly leads to the opposite conclusion.

In this connection it is not pertinent to go into the question how the relevant periods prescribed for the return of reports by the rules previously applicable in relation to Article 43 are to be interpreted and whether they were in fact only "délais d'ordre", the non-observance of which was not to be considered as a breach of duty (some phrases in the Guide to Staff Reports in force at that time seem to indicate the contrary). What is important in resolving the question is the judgment of 13 July 1972 in Case 90/71, *Giorgio Bernardi* v *European Parliament* [1972] ECR 608, as it related to a comparable state of affairs and concerned a legal position which corresponds with the present case. In that judgment it was held, following the opinion of the Advocate General, who spoke of the duties of loyalty and cooperation of the official concerned, that the failure to consider a report in the consideration of comparative merits of several candidates for promotion is irrelevant if it is a result of the behaviour of the official concerned. He may therefore not plead that there was an irregularity in the conduct of the promotion procedure, if he retained a report (as the official concerned in that case had done for four months). In my view there should be no departure from that principle. Therefore the applicant must accept — and in that regard it obviously does not matter whether the report at issue was officially communicated to him or not — that, knowing that the latest report made about him might be important for the purposes of his application, he must have thought of having it put on his file in

good time, and that after he had failed to do that, he may not on any account later successfully challenge the procedure for filling the post in which he had been concerned by invoking irregularities for which he himself was responsible.

Having said that, there is really no longer any necessity for me to examine further arguments, particularly the delicate question whether the report which was not considered is in fact less favourable than earlier assessments concerning the applicant. In conclusion I should only like to add, and this, too, casts doubt on the validity of the third submission, that in fact the impression may be obtained that even consideration of the report in question would in all probability not have led to a different result, so that the irregularity on which the applicant relies would be of no significance to the proceedings. On the one hand it is possible, without any inadmissible interference in an assessment reserved to the administration, to point to the memorandum from the Head of the Directorate-General for Development of 1 June 1979, which played a part in the preparation of the contested decision and according to which preference had to be given to the candidate Mr L. on account of his "feeling politique" [political intuition], which was necessary for the purpose of directing Division C 5. On the other hand the decision communicated to the applicant on his complaint is interesting. In that decision it is emphasized that the decisive factor for the Commission was that, by reason of the experience which he had obtained as the representative of the Commission in central Africa and as Head of Division B 1, Mr L. appeared better fitted to be the head of an administrative unit which has to establish regular contact with persons in authority in African, Caribbean and Pacific countries.

4. I can therefore only propose that the application should be dismissed as unfounded and that the costs in the proceedings should be determined in accordance with Article 70 of the Rules of Procedure.