OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 22 NOVEMBER 1966[1]

Mr President,
Members of the Court,

The application before us today is brought by an applicant who entered the service of the Commission of Euratom on 10 June 1960. He was first employed in the Directorate-General for Health and Safety, with emoluments appropriate to a classification in Grade 7, Step 1, of the Staff Regulations of the European Coal and Steel Community. His salary was increased as from 1 December 1960 so as to correspond to a classification in Grade 6, Step 1. On 29 March 1963, after the entry into force of the Staff Regulations, the Commission integrated the applicant by classifying him in Grade A 6, Step 1, with seniority in that grade from 1 December 1960. From 10 February 1962 the applicant worked as a member of the Commission Spokesman's Group in the section dealing with German-speaking countries. It was in this capacity that on 1 December 1962 he was promoted to Grade A 5, Step 1.

On 26 June 1963, the Commission had opened to competition one post of Principal Administrator (A 5 – A 4) in the Directorate-General for Industry and Economy, Economy Directorate, which had become vacant on 1 April 1963 on the departure of the official concerned. The applicant applied for this post and was appointed thereto by decision of 13 February 1964 with effect from 1 March 1964 at his previous salary. The applicant still holds this post; its assessment on the basis of the Staff Regulations and the definition of duties and powers drawn up by the Commission is the subject of present action.

Before bringing his application the applicant made a request on 17 August 1964 to the Head of the Directorate-General for Industry and Economy for promotion to Grade A 4; no action was taken on this request. Moreover, in accordance with Article 90 of the Staff Regulations, the applicant submitted a formal request on 22 January 1965 for the reassessment of his post and for promotion to Grade A 3. The applicant maintains that this request was justified as he performs the duties of Head of Division. The reassessment was to be made within the framework of wider action on the part of the Commission which resulted in a series of posts in Grade A 3 being filled in the spring of 1965. By decision of 3 March 1965 the Commission gave a negative answer to his request. The applicant was informed accordingly on 8 March 1965 by a written communication from the Director-General for Administration.

This decision forms the subject of the present application which contains the following conclusions:

— that the decision of the Commission of 3 March 1965 should be annulled;
— that the Commission should be ordered to reclassify the applicant in Grade A 3 as from 1 April 1965 (that is, from the date at which it was possible to grant his request).

The Commission maintains, first, that the application is inadmissible in that it was lodged out of time. In a special statement of defence submitted on 28 October 1965, it requested the Court to give a preliminary ruling on the question of admissibility. The Court refused to do so and instead decided to reserve its decision on the question of admissibility for the final judgment. Alternatively, the Commission requested that the application be dismissed as unfounded.

As regards the procedure, it must be remembered that the Court considered it necessary to conduct measures of inquiry by way of hearing witnesses. This hearing was held on 5 October 1966, by virtue of two orders of 9 March 1966 and 28 April 1966 which defined the subjects of the inquiry and the witnesses to be heard. In my legal examination I shall return to the outcome of this inquiry.

As the final arguments of the parties have been heard I consider that it is time for a decision to be given on the action.

1 — Translated from the German.

Legal consideration

I — Admissibility of the application

In the light of the principal objection put forward by the Commission, a legal consideration of the action requires a detailed preliminary examination of the admissibility of the application. As we know, the Commission maintains that it reached a final conclusion on the assessment of the post to which the applicant was transferred in its decision of 3 May 1963 on which was based the Vacancy Notice of 26 June 1963. The transfer decision of 13 February 1964, of which the applicant was informed by letter of 19 February 1964, was based on this Notice. Consequently, at the latest, objections to his classification should have been made in a complaint against the transfer decision. Secondly, the decision of the Commission of 3 March 1965 in reply to the applicant's complaint through official channels of 22 January 1965, only constitutes a *confirmatory* measure which cannot form the subject of an application, as after being notified of the transfer decision the applicant did not show that new factors had arisen or had come to his knowledge. According to the case-law of the Court judgments concerning questions of classification presenting similar problems cannot constitute such new factors. Moreover, the commission had not changed its administrative practices. It is, therefore, impossible for the applicant to raise the question of his classification at this stage.

Following these arguments, the first question which arises is whether the applicant's post was *finally* assessed, either by the Vacancy Notice of 26 June 1963, or by the transfer decision of 13 February 1964; we must therefore consider whether or not the classification decision was final.

The applicant strongly contests this point. To support his argument he refers first to the evidence of the Director-General, Mr Funck, regarding the general assessment of posts in career bracket A 5–A 4. Secondly, he refers to our case-law on certain integration cases in which a distinction was made between the establishment of an official in a particular post and grade in accordance with Article 102 of the Staff Regulations and the harmonization to be made, if necessary, under these Regulations between the classification in question and the duties performed. He considers that where a post is filled *after the entry into force of the Staff Regulations* it is also possible to distinguish, both logically and in terms of fact, between the appointment to a post and the final assessment of such a post under the Staff Regulations. Finally, the applicant refers to a number of preparatory documents concerning the meeting of the Commission of 3 May 1963 and, therefore, to the decision leading to the Vacancy Notice and assessment of the post at present held by the applicant.

I consider the applicant's argument to be unacceptable to the extent that he concludes from the first argument referred to above (the evidence of the Director-General, Mr Funck) that all classifications in career bracket A 5–A 4 have been and still are made subject to a general reservation concerning a subsequent review and that the principal result of this was that, as such appointments were not final, they could not cause the period for lodging applications to start to run. As the Agent of the Commission emphasized in the course of the proceedings, the maintenance of such a state of uncertainty over a period of several years was so unusual that, of itself, it gave rise to a presumption that the applicant's argument lacked credibility. Contrary to the applicant's interpretation of the evidence of the Director-General, Mr Funck, it may also be noted that on several occasions this witness himself emphasized the definitive nature which the Commission intended to attribute to the filling and assessment of the applicant's post in 1964. As a result, the evidence of Mr Funck, the Director-General, must logically be understood to mean that in certain individual cases and within the limits set by the budget, the Commission may, even in the future, reconsider its assessment of the posts in career bracket A 5–A 4 (as, for example, where there is a change in the duties involved). On the other hand, this statement is of no assistance in considering the admissibility of the application in this instance.

It is obviously far from easy to judge the value of the argument based on the docu-

ments referred to by the applicant which show that *his post* had at least been assessed provisionally in 1963. On this point I recall that shortly before the departure of the applicant's predecessor the Head of the Directorate-General for Industry and Economy requested (in a memorandum of 14 March 1963) that the post be reclassified in Grade A 3. The Director-General for Administration drew up for the meeting of the Commission which was to deal with this question a preparatory memorandum on this request which is so important that I shall quote its exact terms. This memorandum states: 'On this occasion I think it right to emphasize that in the context of the classification of the staff of the Commission on the entry into force of the Staff Regulations, appointments or promotions to Grade A 3 have been postponed in order to allow the posts at this level to be thoroughly considered in terms of the structures of each Directorate. I therefore consider it necessary to state once again that the general problem of the classification of new servants in Grade A 3 during the financial year 1963 must be re-examined and that it will be impossible in the immediate future to assess any suggested decisions which may be put forward. Moreover, I am unable to give a final reasoned statement of the level of the post to be filled, as is suggested by the Directorate-General for Industry and Economy, chiefly because I am at present unable to make valid comparisons with posts of the same level in other Directorates-General ... In these circumstances I have the honour to submit the request by the Directorate-General for Industry and Economy to the Commission for a decision. Should the Commission consider that the budgetary posts in Grade A 3 must remain vacant and if the Directorate-General for Industry and Economy can accept that the vacant post is to remain classified in career bracket A 5–A 4, then, in view of the urgency which it attaches to the filling of this post, I would propose that without delay this Directorate-General should initiate the procedure to fill this vacant post in career bracket A 5–A 4'. Following this, on 3 May 1963 the Commission made a decision which stated simply that this post should be filled by an official in career bracket A 5–A 4. In the light of this brief statement, of the fact that the meeting of the Commission in question had to deal with an agenda containing fourteen topics (including eleven administrative decisions) and, finally, of the fact that the decision of the Commission contained no reservation indicating any deviation from the proposal drawn up by the Director-General for Administration, the applicant concludes that the Commission has clearly given effect to the memorandum of 4 April 1963 and postponed a final assessment of his post. The applicant finds confirmation of this in the wording of the Vacancy Notice of 26 June 1963 which refers to the 'appointment to the post of Principal Administrator in career bracket A 5 – A 4 in the Directorate-General for Industry and Economy (Economy Directorate)' and mentions only the duties and powers involved in the post ('questions concerning joint undertakings; liability and insurance in the nuclear field; preparation of agreements to be concluded by the Directorate-General'), while making no statement as to the exact classification of this post within the organization and structure of the administration. At first sight this reasoning appears persuasive, in particular as it is possible to find serious grounds for postponing the final assessment of the applicant's post. For example, it must be remembered that the Commission only defined the duties and powers involved in the post at present held by the applicant shortly before it was opened to competition. It is therefore possible that uncertainties existed over the application of this definition, in particular as regards the posts in the higher career bracket. This might justify a delay for the adjustment and consideration of particular cases, quite apart from the budgetary problems which might arise, in view of the obviously limited number of posts available in Grade A 3.

In the end, however, doubts as to the accuracy of the applicant's conclusions might well prevail. In my view these doubts are not so much raised by the categorical way in which the definitive nature of the applicant's classification was emphasized in the Commission's decision replying to the complaint through official channels and in the arguments put forward by this body

in the course of these proceedings, as by the legal considerations put forward by the Agent of the Commission at the hearing. In particular, these arguments have shown the applicant's reference to several of the Court's judgments in integration cases to be of doubtful value in this instance to the extent that they make a possible distinction between the assignment of posts and the final classification of officials according to their duties; it is clear that we are dealing today with quite a different procedure. This case concerns the procedure to fill, *after the entry into force of the Staff Regulations* and the definition of duties drawn up by the Commission, a post which had already been in existence for a long time. In my opinion, such a case is governed by the rule that a detailed assessment of the post to be filled is made when it is opened to competition and that the subsequent appointment or transfer of an official must be final as regards his classification. This is so chiefly because the appointing authority is bound to respect the rules laid down in the Staff Regulations. Thus, when filling budgetary posts, the appointing authority is bound under Article 29 of the Staff Regulations to consider first whether the post can be filled by promotion or transfer within the institution. In accordance with Article 7 of the Staff Regulations, a transfer can only take place *within the same grade* and, as regards promotion, Article 45 provides that this should be limited to the next higher grade. In the light of these provisions any separation of the appointment to a specific post from the final classification according to the duties performed, which occurs relatively frequently in cases of integration, must be regarded as a rare exception to the normal case in which posts are filled after the entry into force of the Staff Regulations, since such a separation assumes that the appointing authority is prepared thereby to infringe the provisions of the Staff Regulations. Consequently, evidence to prove the existence of such an exceptional situation must be insisted on and it may be necessary to consider whether an *express* reservation was made concerning the postponement of the final assessment of the post filled. In the light of the fact that no such reservation appears in this instance either in the decision of the Commission of 3 May 1963 or in the Vacancy Notice and that, finally, it is not contained in the notification of transfer sent to the applicant, I have to accept that all these measures are final as regards the assessment of the applicant's post. Moreover, I consider this interpretation to be corroborated by the fact that the applicant's predecessor was always classified in Grade A 4, that after his departure the post was held for one year on an interim basis by an official in Grade A 4 and that, according to his own statement, before applying for the post in question the applicant had only been promised promotion to Grade A 4.

Since these considerations establish as untenable the view that the applicant's transfer and classification were subject to the reservation—at least implied—of a subsequent final decision, it is only possible to conclude that in principle the applicant was obliged, at the latest after being notified of the transfer decision, to have the question of his classification reviewed by the Court. Let me point out, however, in passing, that by doing so he would have created the paradoxical situation that if his request for reclassification had been successful, it would have proved at the same time that as an official in Grade A 5 he should not have been appointed by the Commission to the post opened to competition.

Moreover, one might ask whether a right of action against the applicant's classification could later revive. According to our case-law this occurs where new factors intervene after the expiry of the relevant period for bringing an application. A full examination of the case leads me to consider the admissibility of the application from this point of view. In doing so it is clearly unnecessary for other judgments in similar cases to be considered on this point; it has been repeatedly established by case-law that such judgments have no influence on the right of action and, furthermore, the applicant does not refer to them in order to justify the admissibility of his application, just as he does not refer to the definition of duties and powers drawn up by the Commission in 1963, that is, before his transfer. On the contrary, the only question of importance is whether it can be shown that after the expiry of the period for bringing applica-

tions against the transfer decision, the Commission *changed its administrative practice*; this, according to our case-law, could be regarded as a new factor. On this point the applicant refers to a series of appointments to Grade A 3 which took place during 1964 and, in particular, to additional action of the same type take by the decisions of 31 March 1965 and 8 April 1965, concerning in all thirteen posts in Grade A 3. However, I consider that even this reference cannot justify the admissibility of the application. In this respect it is not necessary to determine whether the abovementioned acts concerned a re-assessment of posts together with corrective classification measures in favour of the previous holders, or whether, as is emphasized by the Commission, they merely concerned promotion under Article 46 of the Staff Regulations. Even accepting that the actions in question concerned changes in classification (some evidence exists to this effect) these changes are still irrelevant for our purposes, and for two reasons. One cannot speak of a change in administrative practice capable of constituting a new factor within the meaning of the Rules of Procedure unless it is fairly common, even general, practice which, by its consequences, can be regarded as a change in the legal position. It is true that in this instance reference has been made to a number of appointments to Grade A 3, but it is difficult to see this as a change in the Commission's thinking. I must therefore accept that during the years 1964 and 1965 the Commission only filled some *isolated posts* in Grade A 3, a measure which has no significance as regards the right of application of officials who are not concerned thereby, even if the legal positions of the various officials are shown to be analogous. Moreover, and this I consider to be more important, we have seen that the classification procedures for posts in Grade A 3 were not only adopted in 1965 but also to a like extent in 1964 and 1963. Were it possible to regard these actions as new factors within the meaning of the Rules of Procedure, it would logically have to be accepted that from 1964 the applicant was justified in raising the question of his classification. In fact, as we know, in 1964 the applicant merely submitted to the Head of the Directorate-General for Industry and Economy a request for *promotion* to Grade A 4. Consequently, it is quite impossible on this footing to accept the admissibility of the application. I am therefore compelled to declare that the applicant's conclusions should be dismissed.

As, however, there is no doubt that we are dealing with extremely difficult problems of admissibility and as, moreover, the Chamber has ordered witnesses to be heard on questions touching the substance of the action, I think I should not break off my examination at this point but rather, as a subsidiary matter, look at the substance of the case.

II — Substance

As regards the substance the applicant refers to Annex I to the Staff Regulations, together with the definition of duties and powers drawn up by the Commission and the case-law of the Court of Justice, in order to maintain that in the light of the scope and importance of the duties assigned to him he should be classified in Grade A 3. However, on examining more closely the definition of duties and powers attaching to posts in Grade A 3, as notified to the staff of the Commission in 1963, it at once appears that the criteria and definitions therein provide only rather vague criteria on which to base a request for classification. The activities of a Head of Division ('chef de division') are described therein as follows: 'Directs on administrative unit under the authority of a Director in a specialized field', (Dirige une unité administrative sous l'autorité d'un directeur dans un domaine spécialisé'). Similarily, a comparison with the definition of duties and powers in career bracket A 5 – A 4 immediately below and any attempt to make a distinction between these two career brackets, afford no clear assistance in interpretation. In fact, a Principal Administrator ('administrateur principal') in career bracket A 5 – A 4 is the 'Head of one particular sector of activity in a Division' or 'Head of a specialized department', ('Chef d'un secteur d'activité d'une division' or 'Chef d'un service spécialisé'). We must therefore acknowl-

edge at once that the task of considering the classification of an official on the basis of the definition of the duties and powers attaching to posts drawn up by the Commission places us in considerable difficulty. As the Court has found in other cases (10/64, 48/64 and 1/65) the appointing authority has in this respect a certain discretionary power. This power forbids the Court to remake a decision of the administration in any way and to substitute its own judgment for the discretionary judgment of the appointing authority. On the contrary, without trespassing unwarrantably on the powers of the administration, the Court can only carry out its task in such cases by limiting itself to a consideration of the factors which appear to establish the defective nature of the administrative decision.

In the light of these preliminary observations and the evidence of the witnesses given on 5 October 1966, let us now consider whether it is possible to reply to the numerous arguments put forward by the applicant concerning the classification of his post. We shall then see whether these arguments, perhaps not considered in isolation but rather looked at as a whole, justify his request.

I shall first examine the arguments which, let me emphasize at once, are in my opinion either of only limited importance or of no importance at all.

For example, I regard as of no importance to the action the references made by the applicant to the classification of other officials of the Commission of Euratom and of the Commission of the EEC who, by virtue of the judgments of the Court of Justice in Joined Cases 20 and 21/63 and 79 and 82/63, rightly claimed classification in career bracket A 3. The salient argument in these cases was that the appointing authority itself *acknowledged* the classification requested to be correct and merely put forward objections of a budgetary nature. There can be no such question in this instance. Consequently, the applicant's references to these cases could only be of value if they were intended to compare the *level* of the applicant's work with the level of work of the other officials in question. Unless I am mistaken this is not the case and, in the light of the difference in the duties involved, a comparison is hardly possible.

The applicant's argument that his superior or other senior officials of the Commission and occasionally even the press have *described* him as Head of Division and that he has to the knowledge of members of the Commission used this title himself is just as unconvincing. It is clear that such a description could be of significance only if it owed its origin to the *appointing authority*. However, since the Commission itself never expressly conferred on the applicant the title of Head of Division and on a correct interpretation duties cannot be assessed by the mere *tolerance* of a description of a post, all the applicant's arguments on this point must be dismissed.

This also applies to his observation that, from 1960 at the latest, his predecessor had constantly used the title of Head of Division with the knowledge of at least two members of the Commission. It is clearly irrelevant that the applicant performed largely the same duties as his predecessor; this fact is, moreover, not disputed. It is established that during the period before the entry into force of the Staff Regulations his predecessor was not expressly classified in the career bracket of a Principal Administrator (career bracket A 4 – A 3) within the Staff Regulations of the European Coal and Steal Community, but that after being classified first in career bracket A 5 and, following subsequent promotion, in career bracket A 4, he was established without demur on his part in the career bracket of a Principal Administrator, that is, A 5 – A 4. However, if as the applicant claims, his predecessor actually received certain promises of future promotion to Grade A 3, they would not influence the outcome of the action, since they were clearly given by *a single* Commissioner rather than by the whole body of Commissioners which constitutes the competent appointing authority in this type of case.

The question of the *number* of officials who have worked or are still working under the applicant is also of small importance; it does not matter, therefore, whether as the applicant claims other Divisions within the Directorate or even within the Commission

of the EEC have a smaller staff. On the other hand, what is decisive is the *level* of the duties performed by that staff. In this respect the evidence of the Head of the Directorate-General for Industry and Economy has provided us with useful information. Apart from the fact that after submitting his application the applicant lost an assistant in Grade A 5 who had at first been assigned to him on a part-time basis, the abovementioned evidence shows that at present the applicant has under him an official in Grade A 6 and one in Grade C 2 as well as a local employee, a probationer, an expert employed as a temporary servant and an external legal expert in insurance matters. It is impossible to obtain from these facts a clear picture of the level of the duties and powers of the applicant.

It is also impossible to draw definite conclusions from the applicant's uncontested statement that the performs his duties under the direct authority of a Director of the Commission. According to the statements made by the Director-General, Mr Funck, and certain of the applicant's observations this is an accepted practice in certain of the Directorates of the Commission (no doubt in comparable situations), without the official concerned being necessarily regarded as Head of Division. At the most this fact could constitute *evidence* to justify the applicant's complaint, if the definition of his duties and powers allowed other criteria justifying classification in Grade A 3 to be inferred.

Let us therefore consider in more detail the applicant's duties and powers as shown by the evidence taken and let us try, in particular by a comparison with the other administrative units of the Economy Directorate, to obtain a picture of their importance. Clearly we need not be detained by all the details set out, for example, in the memorandum of 27 March 1963 from the Head of the Economy Directorate concerning the duties and powers of the applicant's assistants and in the application itself, nor concern ourselves with the question whether one or other of the special duties (such as the consideration of legal problems resulting from the supply of nuclear fuels) had been withdrawn from the applicant in the meantime. Let us rather base our consideration on the statement of the Head of the Directorate-General for Industry and Economy which provides a comprehensive assessment and résumé of the applicant's powers and duties. According to this statement, the applicant has been responsible regularly since 1964, for three specific areas: insurance in the nuclear field and legislation in that field concerning civil liability for damage resulting from the use of nuclear energy, legal questions concerning joint undertakings and legal questions concerning the economic and industrial problems of the Directorate-General for Industry and Economy (transport of radioactive materials, nuclear-powered ships, etc.). This evidence demonstrates the particular importance within the Community of questions of *insurance*, as is shown by a statement made by Mr Margulies, the Commissioner, to a symposium organized in Berlin in 1965 with insurers in the nuclear field. It appears that in his work in this field the applicant has a certain measure of independence and enjoys a certain freedom (as regards, for example, priority between different tasks). Similarily it may be accepted that both within the Community (as regards the Permanent Representatives, the Council's Study Group on atomic questions, other Directorates-General and the members of the Commission), and outside it in negotiations with Parliamentary Committees, Government officials or associations and companies, he is to a large extent answerable for his own area of activity. One could therefore justifiably conclude that through their scope and importance the applicant's duties are those of a Head of Division and that, as the Head of the Directorate-General for Industry and Economy stated in the memoranda of 14 March 1963 and 28 January 1965, the applicant's administrative unit is regarded as a Division on a par with the other Divisions of the Directorate-General.

The accuracy of this conclusion is, however, challenged by a basic objection put forward by the Agent of the Commission. He pointed out in the course of proceedings that the real powers of the Directorate-General for Industry and Economy lie in the economic and technical sector and that

the Heads of Division working within that sector of the Directorate-General each bear a heavy responsibility. Compared with these, the applicant's responsibility must be rated lower as his duties involve only the *legal* problems of the Directorate-General and moreover, on all the Commission's legal matters, its Legal Department is always brought in. The Director-General of the Legal Department states that it comes in independently of the applicant's right of access to the Commission through his own Director and the Director-General, with the result that the Commission considers no legal question without having the opinion of the Legal Department before it. Although strictly speaking it cannot be claimed that the applicant is *subordinate* to the Legal Department, nevertheless the level of his work is not to be considered equal to that of the other Heads of Division who work under the sole supervision of a Director and of the responsible Director-General without the intervention of any other Directorate-General.

This objection appears to be relevant. It is true that in the past it might not have appeared justified in that, when the administration was being set up, it was not clear how the powers were to be shared between the various Directorates-General. There are no longer any doubts on this point; at the very least this is shown by the manner in which the Commission, which is alone competent, reacted to the various recommendations made by the Head of the Directorate-General for Industry and Economy concerning the assessment of the applicant's post (cf. his memoranda of 14 March 1963 and 28 January 1965).

Once it is established that the applicant, who deals only with *legal* questions, has less responsibility than the Heads of the other Divisions of the Directorate-General for Industry and Economy, I consider that the decision of the Commission putting the administrative unit directed by the applicant on a lower level than the others, cannot be criticized in law. In these circumstances and in the light of the vague criteria laid down in the definition of duties and powers, there appears anyhow to be no justification for alleging a wrongful assessment requiring the annulment of the contested decision. The conclusions claiming the annulment of the decision of 3 March 1965 and a declaration that the Commission must classify the applicant in Grade A 3 must, therefore, fail.

Clearly this does not preclude the Commission from reconsidering the applicant's earlier request for promotion and, having regard to his undeniable merits, using its discretionary power on which we have no wish to trespass to classify him in Grade A 4. It would in any case be unfortunate to create the impression that a candidate who is really worthy of promotion should be deprived of it merely because he has decided to avail himself of the legal means of protection provided for in the Staff Regulations to clarify his position within the administration.

III — Conclusion

In the light of the above, I am of the opinion that:

— the application is inadmissible and, at all events, unfounded;

— in accordance with Article 70 of the Rules of Procedure each party must bear its own costs, whether they were incurred in the main action or in proceedings for the adoption of the interim measure.