OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 26 OCTOBER 1976

My Lords,

Article 31 (1) of the Staff Regulations provides, so far as material to this case, that candidates selected for appointment to vacant posts in Category A shall be appointed to the starting grade of that Category (which is, as Annex I to the Regulations makes clear, A 8). By Article 31 (2), however, the appointing authority is empowered to make exceptions to that rule within certain limits. In respect of grades other than A 1, A 2, A 3 and L/A 3, the limits are:

'— up to one third of the appointments to posts becoming vacant;
— up to half the appointments to newly created posts.'

Article 32 provides:

'An official shall be recruited at the first step in his grade.

However, the appointing authority may, taking account of the training and special experience for the post of the person concerned, allow additional seniority in his grade; this shall not exceed 72 months in Grades A 1, to A 4, L/A 3 and L/A 4 and 48 months in other Grades.'

On 6 June 1973, Mr Borschette, the Member of the Commission who was then the appointing authority for grades A 4 and A 5 (among others) adopted certain 'Criteria' for the exercise of the powers conferred by Articles 31 (2) and 32. These 'Criteria' were never published. The only copy we have of them is in French (Annex 3 to the Defence). Article 1 thereof provided:

'En principe l'autorité investie du pouvoir de nomination nomme tout candidat choisi fonctionnaire stagiaire au grade de base de la carrière de base de sa catégorie ou de son cadre.'

Article 2, which was headed 'Nomination dans des carrières autres que des carrières de base', provided, so far as material:

'Par dérogation à l'article 1er, l'autorité investie du pouvoir de nomination nomme le candidat choisi au grade de base des carrières suivantes: A/5 — A/4... à condition que le candidat justifie avoir une expérience professionnelle d'une durée minimum de:
— 7 années pour le grade A 5
...

L'expérience professionnelle est appréciée au regard de l'emploi à pourvoir et en prenant en considération l'activité que le candidat a éxercée antérieurement à son recrutement.

L'éxpérience professionnelle est décomptée à partir de l'obtention du premier diplôme donnant accès, conformément à l'article 5 du Statut, à la catégorie dans laquelle l'emploi est à pourvoir.'

Article 3 was headed 'Nomination au grade supérieur d'une carrière' and provided, so far as material:

'Par dérogation à l'article 1er, l'autorité investie du pouvoir de nomination peut, à titre exceptionnel, et pour tenir compte des nécessités de recrutement, nommer le candidat choisi au grade supérieur des carrières de base et des carrières intermédiaires, à condition qu'il justifie avoir une expérience professionnelle au sens de l'article 2, d'une durée minimum de:
— 12 ans pour le grade A 4 ...'

Article 5 prescribed in detail, by reference to a table, the manner in which the power conferred by Article 32 of the Staff Regulations (to allow an appointee additional seniority in his grade) was to be exercised.

Lastly (so far as material) Article 6, headed 'Comité de Classement', provided:

'Il sera créé, sous l'autorité du Membre de la Commission chargé des questions du Personnel et de l'Administration, un Comité de classement composé des membres désignés par la Commission ainsi que par les représentants du personnel.'

We also have in evidence (Annex 4 to the Defence) a document dated 15 February 1974 which is the Report of the 'Comité de classement' for the period July—December 1973. This too was never published, and is in French. It shows that the Committee was chaired by a Director-General and that its members included the Director for Personnel, the Head of the Recruiting, Appointments and Promotion Division and, for each case, appropriate representatives of the staff and of the Directorate-General concerned. The Report records that the Committee held 20 meetings during the period in question 'en vue de satisfaire aux exigences du recrutement des ressortissants des nouveaux États membres' and that the Committee 'était chargé d'appliquer aux fonctionnaires et agents temporaires, ressortissants des nouveaux États membres, les critères de classement arrêtés par M. Borschette . . ., étant en outre précisé que cette application devait être assurée de façon stricte.' Under the heading 'Problèmes et difficultés rencontrés' the Report mentions two that are relevant to this case.

The first it discusses in the following terms:

'1. *Différence dans la durée des études universitaires*

Les ressortissants britanniques obtiennent en général leur premier titre universitaire après un cycle de 3 années d'études.

Il est fréquent que, pour certaines disciplines, les ressortissants danois doivent accomplir jusqu'à 8 années d'études.

On peut admettre que pour les ressortissants des 6 États membres originaires, la durée moyenne des études est de l'ordre de 4 à 5 ans.

Pour assurer un décompte comparable de l'expérience professionnelle acquise à l'issue du premier titre universitaire, le Comité a estimé devoir prendre en compte cette 'expérience professionnelle' à partir de la 4e ou 5e année d'études en faisant des ajustements appropriés pour les ressortissants danois et britannique.'

That is not very clearly expressed. It seems that what in fact the Committee did was, in the case of British candidates, to take into account practical experience only from the end of the fourth year after the beginning of their university studies (even though they may have obtained their degree at the end of the third) and, in the case of Danish candidates, to treat as practical experience any period of University study after the end of the fifth year.

The second difficulty was referred to in these terms:

'2. *Période passée sous les drapeaux*

Pour garantir à tous les ressortissants une égalité de traitement et compte tenu de la diversité des législations et régimes d'exemption en ce domaine, le Comité a estimé devoir considérer cette période d'appel sous les drapeaux comme expérience professionnelle — avec un maximum de deux ans — sans que ceci puisse toutefois conduire à recommander un classement au grade supérieur de façon systématique.'

The Report also contains this important passage:

'Au niveau du grade A 4, le Comité a fait preuve d'une particulière prudence en

utilisant la possibilité de classer au grade 4 les candidats disposant d'une expérience professionnelle d'une durée égale ou supérieure à 12 ans à partir de l'obtention du premier titre universitaire. En fait, pour la période d'activités comprise entre 12 et 14 ans, le Comité n'a admis la possibilité d'un classement en A 4, que pour autant qu'il avait la garantie que le candidat à nommer avait une expérience particulièrement en rapport avec l'emploi à pourvoir.'

Among the cases that came before the Committee was that of the applicant in the present action, Mr Asger Petersen.

Mr Petersen is a Dane. He was born on 6 April 1936 and left school in 1955. From November of that year to May 1957 he performed the compulsory military service that the laws of his country required. In September 1957 he went to the University of Copenhagen and read law. In January 1963 he passed the 'Juridisk Embedseksamen', which I understand to be the first law degree examination in Denmark. From 1963 to 1966 he was a junior administrator in the Ministry of Justice in Copenhagen. From 1966 to 1970 he was a 'Politifuldmægtig' (i.e. public prosecutor) at the Kriminalretten of Hillerød. From 1970 until 1973 he was General-Manager and, after a while, Managing Director of a group of companies operating in Cambodia. These companies seem to have been, in the main, a joint Australian-Danish venture and to have been engaged in the manufacture of dairy products and of packaging materials for them. So Mr Petersen had had, after leaving University, about ten years of practical experience in the fields of law and of management. In the meantime he had acquired further academic qualifications. In 1965 he had become a Master of Comparative Law of the University of Illinois and in 1969 he obtained a diploma in Foreign Trade at the Copenhagen School of Commerce.

On 23 October 1972, in anticipation of the accession of the new Member States to the Communities, Mr Petersen sent to the Commission an informal application for a position on its staff 'in the A 3/A 4 category'. This he confirmed by a formal application dated 17 February 1973 (Annex 3 to the application). As a result of subsequent contacts with the Commission he lowered his sights slightly, making it clear that what he sought was an A 4 post (see Annex 4 to the application).

On 5 July 1973 Mr Petersen was interviewed in London by a Selection Board appointed by the Commission to consider applications for posts at the A 5/A 4 level. Following this interview he received from the Directorate for Personnel of the Commission a letter dated 18 July 1973 (Annex 6 to the application) telling him that his name had been placed on a list of candidates considered suitable for appointment to posts with the Commission and saying that, should he be selected for appointment to such a post, or should any department of the Commission wish to invite him for interview he would be informed accordingly.

By telegram dated 21 September 1973 (Annex 7 to the application) Mr Petersen was called to Brussels for interviews to take place on 28 September 1973 'with a view to possible appointment as Principal Administrator' — a description which, Your Lordships remember, covers both the A 4 and the A 5 grades. The interviews, the telegram stated, were to be with the Directorate-General of Competition and Mr Petersen was invited to report to a Mr Junger, whose office number in the Berlaymont Building was given.

Mr Junger, as we now know, but as Mr Petersen did not know at the time, is an official of grade B 1. He was responsible, at the Secretariat of the Directorate General of Competition, for receiving candidates, informing them generally about the work of the Directorate-General and introducing them to the

heads of Directorates where posts were vacant.

It is common ground that on 28 September 1973 Mr Petersen first saw Mr Junger, with whom he had a conversation, that he was then interviewed by a number of Directors and Heads of Division on whose staffs posts were vacant, and that he then went back to see Mr Junger with whom he had a further conversation, before calling at the offices of the Recruitment Division to collect his travelling expenses. There is considerable conflict as to precisely what was said by Mr Junger during those conversations. In particular Mr Petersen alleges that Mr Junger, whilst expressing the view that he (Mr Petersen) might be too young for an appointment in grade A 4, promised him that if it were at all possible under the 'rules of appointment' he would be appointed in that grade. Mr Junger denies making any such promise. He says that, on the contrary, he told Mr Petersen that he had insufficient experience for an A 4 post. Mr Junger asserts indeed that he told Mr Petersen of the '12-year rule' to be found in the 'Criteria'. This Mr Petersen denies, saying that he first heard of the 12-year rule much later, namely in October 1974.

My Lords, I shall have to come back to these issues of fact, but I will say at once that I do not think Mr Junger can have conveyed to Mr Petersen the impression that an appointment in grade A 4 was altogether out of the question in his case, for on 30 September 1973 Mr Petersen wrote to Mr Junger a letter in the following terms (Annex 1 to the defence):

'Referring to our pleasant conversation in Brussels on Friday September 28 I am pleased to confirm that I am interested in either of the two posts, for which I was interviewed by respectively Mr Verges and Mr Carisi and Mr Steinwand.

This, however, is on the condition that the post for which I might be selected, is nominated in the category A 4.

In case it should be nominated in category A 5, I shall reserve my final decision, awaiting your notification, in which salary rate under the A 5 scale, the post has been decided placed.'

To that Mr Junger replied, on 9 October 1973 (Annex 8 to the application):

'I thank you for your letter of September 30 and wish to inform you that the Commission's regulations do not allow your immediate appointment to a grade A 4 position as the number of years of your practical experience does not suffice. In case of an A 5 appointment it would, however, be possible to grant you additional seniority.

If the Commission accepts a proposal by the Directorate-General for Competition for your appointment to an A 5 post, official notification will be sent to you.

I would appreciate your letting me know as soon as possible whether you would generally be prepared to accept appointment to an A 5 position.'

That drew from Mr Petersen a letter, dated 15 October 1973, so far as material in these terms (Annex 1 to the rejoinder):

'Dear Mr Junger,

I acknowledge with thanks reception of your letter of 9 October. Even if it was not without a certain regret that I received your information that in accordance with the Commission's regulations no possibility exists to meet my original application for an A 4 position, I can confirm my to you verbally expressed willingness to accept an A 5 position, provided seniority into the upper 3rd scale of the salary rates of the A 5 positions is granted.'

On 28 November 1973 the Director for Personnel of the Commission wrote to Mr Petersen (Annex 9 to the application) informing him that the appointing authority had decided to appoint him as

an official on probation in grade A 5, step 3, and specifying the Division, 'Inspection – Energy and Steel', to which he would be assigned in the Directorate-General of Competition.

Mr Petersen, having obtained by telegram from the Commission particulars of the remuneration to which he would be entitled in that appointment, wrote to the Director for Personnel on 8 December 1973 accepting the appointment (Annex 2 to the defence). He took up his duties on 3 January 1974.

Nothing more that is relevant happened until October 1974. In that month Mr Petersen was approached by the Private Office of Mr Commissioner Gundelach for certain personal details, in the context of a general review undertaken by that Office of the terms of appointment of Danish officials of the Commission. Mr Petersen understood that this review had been initiated owing to doubts as to whether Danish candidates had not suffered discrimination owing to the fact that University studies generally take longer in Denmark than in the other new Member States.

As a result of that approach Mr Petersen became aware (precisely how is not clear) of the 'Criteria' adopted by Mr Borschette on 6 June 1973 and also of the concession under which Danish candidates had been allowed to count part of their time at university as 'practical experience'. He was not however, it seems, at that stage aware of the Report of the 'Comité de classement' in which the concession in respect of military service was also mentioned.

What he had learned, however, prompted Mr Petersen to embark upon research of his own as to whether Mr Junger had been right, in his letter of 9 October 1973, to say tha the number of his years of practical experience was insufficient to allow his immediate appointment to grade A 4. Mr Petersen says that his enquiries covered a period of about three months and involved approaches both to colleagues and to the authorities. He further says that it was not until early in 1975 that, as a result of what he was told by a particular colleague, Mr Frits Qvist it became clear to him that the concession relating to military service had been granted in certain cases. These facts are not, as I understand it, seriously challenged by the Commission, the only dispute between the parties that bears upon them being as to the readiness of the Commission to supply information to Mr Petersen.

On 19 February 1975 Mr Petersen submitted a formal complaint under Article 90 (2) of the Staff Regulations (Annex 10 to the application). His complaint was against the decision taken by the appointing authority to grade him A 5. He asked that that decision should be reviewed and that he be graded A 4.

The appointing authority did not reply to Mr Petersen's complaint within the four months prescribed by Article 90 (2). In fact it has never done so.

On 23 September 1975 Mr Petersen lodged his application originating this action, in which he claims, in substance, a declaration that the appointing authority's refusal to appoint him, at the time of his entry into the Commission's service, to grade A 4 was unlawful and that his grading should now be revised retrospectively from A 5/3 to A 4/1.

Mr Petersen puts forward two grounds in support of that claim.

The first is, as I understand it, that the appointing authority was in breach of Article 27 of the Staff Regulations and of the principle of equal treatment of staff in misapplying to him the criteria that it had laid down for itself for the grading of officials.

The second ground is that the promise that Mr Petersen alleges was made to him by Mr Junger on 28 September 1973 was

valid and binding on the appointing authority, and that it was broken because, as it turns out, it was possible, according to the criteria in question, for Mr Petersen to be appointed in grade A 4.

The Commission's first defence is that the action is inadmissible because brought out of time. The Commission concedes that the action was brought within the period of three months prescribed by Article 91 (3) of the Staff Regulations from the date of the implied rejection of Mr Petersen's complaint under Article 90 (2). But, says the Commission, that complaint itself was submitted well over a year after the notification to Mr Petersen of the decision against which it was directed, i.e. the decision to appoint him in grade A 5 of which he was informed by the Director for Personnel's letter of 28 November 1973. The complaint was thus time-barred under Article 90 (2).

To this Mr Petersen retorts that it would be unreasonable, in the circumstances, to hold him to the period of three months prescribed by Article 90 (2). For the first month or so of that period he had not yet even taken up his appointment; and he could hardly be expected to challenge its validity soon after having taken it up. Moreover, says Mr Petersen, and this is, I think, more to the point, it was natural, having regard to the antecedent history, that he should accept without questioning it the statement in Mr Junger's letter of 9 October 1973 that 'the Commission's regulations' did not allow his immediate appointment in grade A 4. Only the Commission knew what the relevant criteria were and nothing happened to lead him to suspect that they might not have been correctly applied in his case until Mr Gundelach's Private Office raised the question in September 1974. After that, Mr Petersen claims, he was as diligent as he could be, having regard to the exigencies of the service and to the availability in Brussels of people from whom he needed to make enquiries, in seeking to apprise himself of his rights. He submitted his complaint as soon as he was reasonably apprised of them. On that footing, Mr Petersen relies on 'the general principles of administrative law' and on the rules of equity to be derived from English law.

My Lords, I have done some research into the laws of the Member States on limitation of actions and, in the result, I do not think that there exists any general principle of administrative law such as Mr Petersen seeks to invoke. Nor indeed does Mr Petersen cite any authority for the existence of such a principle. But I think that, in relying on the rules of equity, he is on surer ground.

I should, I think, begin with a word about English law, since Mr Petersen expressly mentions it. As Your Lordships know, the foundation of English equity is the principle that people should not make unconscionable use of their legal rights. In application of that principle, the rule was developed by the Courts that where a plaintiff's right of action had been concealed by the 'fraud' of the defendant or of his agent, any period of limitation prescribed by statute should not begin to run in the defendant's favour until the plaintiff had discovered the 'fraud' or could with reasonable diligence have discovered it. The word 'fraud' is not in that context used in the sense of 'deceit' or 'dishonesty', but in the equitable sense of conduct of which it would be unconscionable for the defendant to take advantage.

That rule of equity is now enshrined, so far as English law is concerned, in section 26 (b) of the *Limitation Act 1939*. There have been a number of decisions of the Courts interpreting that provision, of which the most recent, I think, are those of the Court of Appeal in *Applegate* v *Moss* [1971] 1 Q.B. 406 and *King* v *Victor Parsons & Co.* [1973] 1 W.L.R. 29. All the judgments in those cases are enlightening, but the following passage in the judgment of Lord Denning in the first of them is, I

think, particularly so. He said of section 26 (b) (at p. 413 of the report):

'It has long been settled that "fraud" in this context does not necessarily involve any moral turpitude: see *Beaman* v *A.R.T.S. Ltd.* [1949] 1 K.B. 550. It is sufficient if what was done was unconscionable: see *Kitchen* v *Royal Air Force Association* [1958] 1 W.L.R. 563: a test which was applied in the case of a building contract in *Clark* v *Woor* [1965] 1 W.L.R. 650. Those cases show that "fraud" is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim. Applied to a building contract, it means that if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim. The right of action is concealed by "fraud" in the sense in which "fraud" is used in this section.'

(Earlier authorities on s. 26 (b) are collected in Halsbury's Statutes of England (3rd Ed.) Vol. 19, at p. 87).

My Lords, it is not only in the law of England that that rule applies. A similar rule is enacted in Scotland by section 6 (4) of the *Prescription and Limitation (Scotland) Act 1973* and in Ireland by section 71 (1) (b) of the *Statute of Limitations 1957*. I understand that it is considered unlikely that the approach of the Scots and Irish Courts, in interpreting those provisions, would differ materially from that adopted in England.

In Germany the same result is achieved by a slightly different route. The rules of procedure applicable to the various kinds of Courts and Tribunals empower them to grant relief in an appropriate case to a plaintiff who is out of time. Thus, section 60 (1) of the *Verwaltungsgerichtsordnung* of 21 January 1960 provides that anyone who, through no fault of his own, fails to comply with a legal time limit is to be granted relief upon his applying for it. I understand however that, if the present case fell to be decided by a German Court, no question of a statutory time limit would arise. This is because the appointment of a civil servant is considered to be an administrative decision made with his consent. His consent is vitiated if induced by error. In such a case he is given a reasonable time, after he has discovered the facts on which he wishes to base his action, to contest the decision. What constitutes a reasonable time in such circumstances lies in the discretion of the Court.

The law is otherwise in France. There the Conseil d'Etat has denied to itself the power to prolong a limitation period in a case such as the present. (See Auby et Drago, Traité de Contentieux Administratif, 2e Ed., Tome I, p. 802, and in particular two of the decisions of the Conseil d'État there cited, namely C.E., 25 novembre 1949, *Baldacci*, p. 513 and C.E., 12 février 1958, *Valade*, p. 93). It seems however that the approach of the Conseil d'État to limitation periods has been the subject of some criticism (see per Mrs Advocate-General Dutheillet de Lamothe in a case before this Court, Case 79/70 *Müllers* v *Economic and Social Committee* (Rec. 1971 (2) at p. 702)).

I do not know, my Lords, of any authority directly in point in the laws of any of the other Member States, but there are indications that, in some of them at least, particularly in Belgium, Luxembourg and Italy, the same attitude would be adopted by the Courts as in France.

So far as the decisions of this Court are concerned, the position seems to me fairly clear. The Court has in at least four cases invoked equity to temper what would have been the rigours of a rigid application of Community legislation: see Case 37/72 *Marcato* v *Commission* [1973] 1 ECR at p. 368 (paragraph 15 of the Judgment), Case 64/74 *Reich* v *Hauptzollamt Landau* [1975] ECR at pp. 268-269 (paragraph 3 of the Judgment), Case 31/75 *Costacurta* v *Commission* ibid. at p. 1570 (paragraph 5 of the Judgment) and Case 94/75 *Süddeutscher Zucker* v *Hauptzollamt Mannheim* [1976] ECR at pp. 159-160 (paragraph 5 of the Judgment). The first and third of those cases are particularly in point here because in each of them the Court invoked equity to prolong the period within which an action under the Staff Regulations could be brought. Also very much in point, I think, is an earlier case, Case 23/69 *Fiehn* v *Commission* [1970] 2 ECR 547, where the Court declined to hold time-barred an action against the Commission by one of its officials based on the fact that she had been misled by the Commission as to her rights. The Court held that the limitation period applicable to her action could not begin to run until she had discovered that she had been misled (see paragraph 15 of the Judgment).

In argument the Commission cited a number of decisions of this Court in an endeavour to show that the limitation periods prescribed by Articles 90 and 91 of the Staff Regulations could not be departed from in circumstances such as those of this case. But it seems to me, with all respect to the Commission, that none of those decisions support that proposition. Some of them are to the effect that a defendant before this Court may not waive a limitation point and that, if necessary, the Court will raise it of its own motion. No such question arises in this case, where the Commission has itself pleaded, and indeed vigorously pressed, the limitation point. Others of the decisions cited by the Commission are about the circumstances in which an applicant before the Court may rely on the occurrence of a 'new fact' as re-starting a limitation period. Again no such question arises here, where Mr Petersen does not rely on the occurrence of any new fact, but relies on an allegation that the true facts were hidden from him. There are also decisions of the Court establishing the rule that the running of a limitation period under the Staff Regulations is not halted by a letter from the relevant Institution to the official concerned saying that his case is still under consideration. Yet again, no question of that sort arises here.

In the result I am of the opinion that Mr Petersen is entitled to succeed in his submission that this action is not time-barred. The manner in which the Commission conducted its affairs was such that the facts on which he rests his action were wholly concealed from him until October 1974. It is enough for him to succeed in his submission that he could not with reasonable diligence have discovered them all before 19 November 1974, that being the date three months before he lodged his formal complaint under Article 90 (2).

So I turn to the substance of the case.

As to this I think it convenient to start, as did the parties in their pleading subsequent to the Defence, with Mr Petersen's second ground.

In essence this is, Your Lordships remember, that, although in fact Mr Junger had no authority to make any promise to Mr Petersen, Mr Petersen was not to know this. Ostensibly, so far as he was concerned, Mr Junger was the person appointed by the Commission to 'negotiate' with him as to his grading. Mr Junger promised him that, if it were at all possible under the 'rules of appointment', he would be appointed in grade A 4. That promise was binding on the Commission and should now be kept.

I confess to having some difficulty in understanding the legal basis for that contention. Mr Junger's alleged promise cannot have been contractual, because the relationship between a Community Institution and its staff is not contractual but statutory. Nor, for any number of reasons, can the promise, if it was given, have created an estoppel on which Mr Petersen can rely in these proceedings.

I need not however pursue those questions, for this reason.

Mr Petersen appeared before us under Article 45 (2) (a) of the Rules of Procedure of the Court and Mr Junger testified under Article 45 (2) (c) of those Rules, in order that each of them should give us his account of what was said when they met on 28 September 1973.

I do not, my Lords, propose to review their evidence in detail. Your Lordships heard it, have transcripts of it, and know how conflicting their accounts were.

In assessing their evidence one must, of course, have in mind three things.

The first is that the meetings in question took place three years ago. After such a lapse of time any witness's recollection of what was said at a meeting is inevitably dim.

Secondly, it is notorious that, when a person is to give evidence in legal proceedings about what happened on a particular occasion, he tends to think back about it so intensely that, although he may not really remember, he constructs in his mind something that he thinks must be the truth. Mr Junger, in particular, manifested this tendency. When asked about the events of 28 September 1973 which he had thought about, he answered categorically and confidently. But when asked about other events, some more recent, he repeatedly said that he could not remember.

Thirdly, Mr Petersen, a Dane, and Mr Junger, a Dutchman, conversed in English. As Your Lordships were able to observe, both of them speak that language well, but neither of them speaks it perfectly. So there was room for misunderstanding there.

I think it very possible that, in accordance with Mr Petersen's evidence and contrary to Mr Junger's, Mr Junger did say, towards the end of their second conversation, something like 'I promise you, Mr Petersen, that, if it is possible under the rules of appointment, you shall get your A 4 position': But I am convinced by Mr Petersen's own evidence that, if those words were spoken by Mr Junger, Mr Petersen did not at the time understand them to mean that Mr Junger had authority to commit and intended to commit the Commission to anything. According to Mr Petersen's account of the conversation, Mr Junger, immediately after making that 'promise', said: 'But, Mr Petersen, you have to give me your position if it should prove not to be possible under the Rules of Appointment, I have to get down on the paper what you say if you are offered, if they come back and say it is not possible and you are offered an A 5 position'. (Transcript of Mr Petersen's evidence p. 3). That was a clear indication that it did not lie with Mr Junger to decide what offer should be made to Mr Petersen on behalf of the Commission; that it lay with the persons referred to in that sentence as 'they'. Mr Petersen thus cannot have understood Mr Junger to mean, by the alleged 'promise', more than that, according to his experience of the practice of the Commission in these matters, Mr Petersen would be graded A 4 if 'the rules' permitted it.

I am therefore of the opinion that Mr Petersen cannot succeed on his second ground.

I turn to his first.

In order to understand this it is, I think, necessary to bear in mind the way in which the 'Comité de classement' computed the length of Mr Petersen's practical experience for the purpose of applying the 'Criteria' in his case. There is no dispute about what the Committee did. They applied in Mr Petersen's case the concession under which Danish candidates were able to treat as 'practical experience' any period of university studies after the end of the fifth year. Since Mr Petersen had spent 5 1/2 years at University, this meant that an extra half-year was added to his period of actual practical experience. The resultant total still fell short at the material time (October 1973) of the absolute minimum of 12 years required for an appointment in grade A 4, let alone of the more general minimum of 14 years mentioned in the Committee's Report.

Mr Petersen complains that there were other periods of what I may perhaps call 'deemed practical experience' with which the Committee should have credited him. He puts forward his complaints in this respect under three headings.

The first is military service. Mr Petersen says that the Committee should have taken into account his military service of 18 months. To this the Commission replies, in my opinion rightly, by pointing to the comment in the Committee's Report to the effect that the treatment of military service as practical experience should not lead to the systematic award of a higher grade. It seems indeed, from a letter written by the Head of the Commission's Recruiting, Appointments and Promotion Division to the Head of Mr Gundelach's Private Office on 16 September 1975 (Annex 18 to the application) that the Committee in no case took military service into account to enable an appointment to be made in a higher grade. It took it into account only to enable a candidate to be appointed at a higher step in his appropriate grade. I would observe that, in any case, the addition of 18 months to the period of Mr Petersen's 'practical experience' as computed by the Committee would have enabled him just to satisfy the absolute minimum of 12 years. It would not have rendered his practical experience especially relevant to the duties of the post that he was to fill, so as to justify his appointment in grade A 4 without satisfying the 14-year minimum.

Under a second heading Mr Petersen complains that more than half-a-year of the time he spent at University should have been deemed to constitute 'practical experience'. In this respect he claims to have been discriminated against in two ways.

First he points out that the formula adopted by the Committee resulted in a Danish candidate being credited with more 'practical experience' the longer the time he spent at university. Mr Petersen submits that this was unfair. Having regard to the genesis of the concession in question, I do not see how it can be regarded as unfair. But, in any case, this was a matter lying in the discretion of the appointing authority, advised by the Committee. It is not a matter over which the Court can substitute its own judgment for theirs.

Secondly Mr Petersen points out that the formula adopted by the Committee meant that in general British candidates were deemed to have started to acquire practical experience one year younger that Danish candidates. He submits that a mean should have been taken between the normal length of British University studies and the normal length of Danish University studies, and that all candidates should have been deemed to start to acquire practical experience on reaching that mean. My Lords, I do not think that such a purely arithmetical approach could be right. The differences in the teaching methods and in the examination systems of British and Danish Universities respectively are

alone enough to make it an unrealistic approach. The fact that not only the length of University studies but also their character differs from Member State to Member State creates a problem for appointing authorities in all the Community Institutions. Here again, I am of opinion that it is not a matter over which the Court, acting in its judicial capacity, can impose a solution.

Mr Petersen's third heading of complaint is based on the circumstance that, according to him, he learnt, shortly before lodging his application, from two Danish colleagues that, in their cases, in which Mr Gundelach's Private Office had intervened, they had been expressly asked whether they had not had some practical experience, however short, during their time at university, which would tip the scale and enable them to claim 'practical experience' of sufficient length to qualify for an A 4 appointment. Mr Petersen says that each of those officials was appointed in grade A 4 after he had produced evidence of such experience. He complains that no such enquiry was made of him and he produces evidence (Annexes 5, 6 and 7 to the Reply) to the effect that he did, while he was an undergraduate, have, during his summer vacations, various temporary jobs with the Sparekassen (Savings Bank) in Copenhagen, with the police in Haderslev, and with SAS. The Commission, not unnaturally, says that, without particulars of the two cases in question, which have not been vouchsafed by Mr Petersen, it finds it difficult to comment, but that, so far as its records show, vacation jobs held by candidates while they were at university have never been taken into account by the 'Comité de classement' as relevant 'practical experience'. My Lords, I should have been astonished had it been otherwise.

In the result I am of the opinion that this action should be dismissed with, having regard to Article 70 of the Rules of Procedure, no order as to costs.