THE COURT (First Chamber)

hereby:

1. **Declares that Application 15/64 no longer has any purpose;**

2. **Dismisses Application 60/65 as unfounded;**

3. **Orders the defendant to pay the costs incurred in Application 15/64 up to the date of notification of the decision of the Commission of 13 January 1965 and orders the applicant to bear the costs incurred by him after that date.**

4. **Orders the parties to bear their own costs in Application 60/65.**

Trabucchi Delvaux Lecourt

Delivered in open court in Luxembourg on 15 December 1966.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 OCTOBER 1966[1]

Mr President,
Members of the Court,

The applicant in the two joined cases upon which I give my opinion today is an official of the European Atomic Energy Community. His duties with the Commission of the EAEC commenced on 1 September 1960 at a salary which, according to the statements of the Commission during the proceedings, corresponded to a classification in Grade 4, Step 4, of the Staff Regulations of the European Coal and Steel Community. After the entry into force of the Staff Regulations of Officials of the European Atomic Energy Community he was, in accordance with Article 102 of those Regulations, by a decision of 28 February 1963 integrated from 1 January 1962 in Grade A 4, Step 4, his seniority dating from 1 September 1960. As a result of the regular biennial advancement to the next incremental step he attained Step 5 of Grade A 4 on 1 September 1962.

As the applicant at the time of his integration—as the Commission also acknowledges—was head of division in the Joint Press and Information Department of the European Communities, he made a complaint in this capacity through official channels to the President of the Commission of the EAEC on 21 February 1964 to be classified in Grade A 3 with effect from 1 January 1962. As his request was not granted within a period of two months (a reply contained in a letter from the President of the Board of Administration of the Joint Press and Information Department categorically refusing the application because of the absence of a corresponding post in the detailed list of posts only reached the applicant on 27 April 1964) the applicant lodged

1 — Translated from the German.

his first application (Case 15/64). It contains the following claims:

1. Annulment of the decision of refusal, which is implied as two months have elapsed since the date when the complaint through official channels was made;
2. Annulment of the decision of 28 February 1963, to the extent to which it classifies the applicant in Grade A 4. (This claim was withdrawn in the reply);
3. A ruling that the Commission must assign to the applicant with effect from 1 January 1962 Grade A 3 and the step to which he is legally entitled;
4. An order for the Commission to pay arrears of salary;
5. An order for the Commission to pay the applicant the sum of one Belgian franc by way of damages for non-material damage. (The applicant withdrew this claim during the oral procedure).

When the Commission (after a first and unsuccessful attempt in the financial year 1964) succeeded during the same year in arranging for the applicant's post to be reclassified in Grade A 3 (cf. the decision of the Council of Ministers of 13 October 1964), it was able to comply with the applicant's request to be classified in Grade A 3. This occurred when the applicant was accorded Grade A 3 in a decision of 13 January 1965, with effect from 1 January 1962. However, since other proceedings having a similar object were pending, the decision in fact stated that he was only classified in Step 2 of this grade on a provisional basis and in application of Article 46 of the Staff Regulations.

However, as the Court did not decide the main issue of these proceedings (the applications which had been lodged being inadmissible as the period within which they had to be brought had expired) the Commission eventually decided on 14 September 1965 to allow the applicant to retain permanently Step 2 of Grade A 3 accorded him pursuant to Article 46 of the Staff Regulations (with seniority, moreover, from 1 October 1961).

The second application (Case 60/65) lodged by the applicant is directed against this decision. Its principal conclusion is for the annulment of the decision of 14 September 1965 in so far as it determines the applicant's step. The applicant's other conclusions are for a ruling that the Commission must assign him Grade A 3, Step 4, with effect from 1 January 1962 (or the step which he has reached at the present time after taking into consideration the biennial advancement to the next incremental step) and also an order for the Commission to pay the applicant arrears of salary.

The facts and statements presented in the oral procedure show that the only issue which now remains to be decided is what step in Grade A 3 should be assigned to the applicant. Therefore Application 15/64 must be regarded as no longer having any purpose. With regard to Application 60/65, the Commission's main defence is that if is unfounded and that conclusions first put forward by the applicant in his reply are inadmissible.

The subject-matter of the examination of the allegations of the parties, which I am about to make, is therefore correspondingly limited.

Legal Consideration

The main issue in these proceedings can be stated as follows: has the applicant, by reason of the fact that the position which he occupies, according to the provisions of the new Staff Regulations, falls within Grade A 3, and not within Grade A 4, the right to be classified in Grade A 3 and at the same time to retain the step in Grade A 4, which he had under his contract of service before the entry into force of the Staff Regulations, or must—as the Commission maintains—such a case be dealt with under Article 46 of the Staff Regulations, that is to say, in accordance with the provision which, in the case mainly of promotions, determines the step to be accorded in the higher grade? The answer to this question will decide whether the grade to be accorded the applicant on 1 January 1962 was Step 2 or 4, of Grade A 3; it is also possible that an intermediate solution might be justified—and the applicant has put forward such a proposal in the alternative—but if the Court were to make such a decision it could hardly or only with great difficulty determine with accuracy the step to be claimed by the applicant.

1. Was the applicant 'impliedly' assigned Grade A 3 before the entry into force of the Staff Regulations?

In his pleadings the applicant relies, in order to establish his claim, in the first instance on Article 102 of the Staff Regulations which reads: 'A servant of the Communities who is occupying a permanent post in one of the institutions of the Communities when these Staff Regulations enter into force may, by decision of the appointing authority, be established in the grade and at the step and in the scale of remuneration laid down by these Staff Regulations corresponding to the grade and step ... impliedly accorded him before the Staff Regulations were applied to him'. Grade A 3 was accorded him when he was assigned certain duties, because the tasks he carried out corresponded to those of a head of division.

This view however does not seem to me to be tenable, as I have emphasized in my earlier opinions (in Joined Cases 79 and 82/63) and as is shown by several judgments of the Court.

In particular the Court stressed in its judgment in Case 20/63 that a distinction must necessarily be made between the integration of a contractual servant in a specific grade and at a specific step and his classification according to the duties which he performs, which might have to be based on facts different from those applied in the decision by which he is integrated in the former case. It is only the first-mentioned method of integrating a constractual servant which is governed by the provisions of Article 102 of the Staff Regulations, whilst the last-mentioned method of determining his grade and step, which the applicant in the present case asks the Court in fact to adopt, has to be effected without reference to the provisions of Article 102 of the Staff Regulations and according to principles which remain to be defined. This becomes clear if the wording of Article 102 is examined. According to this Article, a grade must also be '*impliedly accorded*' an official *before* the Staff Regulations are applied to him, which can only mean that to solve this question reference cannot be made to the evaluation of certain duties under the *new* Staff Regulations. It is also necessary to bear in mind (as the Court emphasized in its judgment in Case 70/63 ([1964] ECR 457) that it is only logical that different grades cannot be accorded a contractual servant expressly and by implication at one and the same time. If therefore in the present case a note from the administration of 7 September 1960 intended for the applicant mentions classification in Grade A 4, Step 4, that is to say, if a grade laid down in the Staff Regulations of Officials of the European Coal and Steel Community were expressly mentioned (and there could not be a more express way of according a contractual servant a grade), this note at the same time proves that another grade cannot also be '*impliedly*' accorded such a servant within the meaning of Article 102 (namely by reason of the specific duties which he had to perform).

Therefore it does not appear possible to base the applicant's complaint as to his classification on Article 102 of the Staff Regulations.

2. Can the applicant rely on the procedure for classification applied in Case 70/63?

In the second place the applicant submits that the necessity to accord him the same step in Grade A 3 which he had in Grade A 4 under his contract of service derives from the considerations which the judgment in Case 70/63 stated must be taken into account in such cases. In fact the First Chamber of the Court laid down in that case that, in the event of a post's being revalued by the new Staff Regulations, the *ratio legis* requires that the official concerned when appointed to a higher grade shall keep the step which he had reached in his former grade ([1964] ECR 458).

It is however necessary to examine whether this procedure can simply be applied to this case or whether there is a different set of facts which calls in this case for a departure from this procedure. The defendant, the Commission, places great emphasis on the lastmentioned view that the circumstances are different by referring to the fact that in Case 70/63 the Court had to decide as to the reclassification of a former *official* of the

European Coal and Steel Community, whilst in this case the Court has to consider the integration under the Staff Regulations of a former *contractual* servant. I should like on this point to refer to the considerations which my colleague Mr Advocate-General Gand put forward in Case 43/64.

In fact the Commission's view would appear to be correct. A crucial fact in the applicant's argument in Case 70/63 is that he had been an *official* for many years when the new Staff Regulations entered into force and occupied a post which was exactly defined and assessed under the Staff Regulations. The fact stressed by the applicant in the present case that officials of the language service were classified under the Staff Regulations of the European Coal and Steel Community in a special administrative unit and that the applicant in Case 70/63 was described as a head of 'department', whereas the definition of posts of the Court of Justice provided only one post of 'head of department', does not alter the situation. The applicant in Case 70/63 had reached a particular *step* in his grade in that post and furthermore that was on the basis of a precise set of legislative rules, even though differing in certain details from those now in force. If the introduction of new Staff Regulations produced a change in the legal evaluation of the post in such a case, the view can be taken (as it was in the said judgment) that the step cannot be adversely affected by the new system but on the contrary must remain unchanged in the recently revalued post.

The position of contractual servants was quite different. It depended upon Article 214 (3) of the Treaty establishing the European Atomic Energy Community, under the terms of which 'Until the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Community provided for in Article 186 have been laid down, each institution shall recruit the staff it needs and to this end conclude contracts of limited duration'. There is no doubt that for the period immediately after the entry into force of the Treaty the Community institutions had to be granted a certain freedom in drawing up the conditions of employment, which was *inter alia* justified because at the beginning the posts had not been planned in detail or accurately assessed. At a later date the Council issued a directive that in drawing up conditions of service the Staff Regulations of the Coal and Steel Community were to be applied by analogy. However in doing so the Council did no more than lay down a guiding principle for the settlement of individual cases. On the other hand it cannot be said that the drawing up of the conditions of employment of contractual servants in this way created a situation which placed them on the same footing as officials subject to the Staff Regulations. There were, in particular, differences in the calculation of the commencing salary of contractual servants, which, in view of the situation described, was determined by taking into account not only the importance of the tasks to be performed by them but also other considerations (age, experience, previous remuneration, the servant's domestic situation). In the case of the applicant there was the additional factor that his career bracket under the provisions of the Staff Regulations of the Coal and Steel Community covered *two* grades. In these circumstances and in the event of the appointment at the same time of several servants in this career bracket (for example, if there were not a sufficient number of posts in the higher grade) it might very well happen that a servant classified in the lower of the two grades was accorded a higher step by way of compensation. If all these facts are taken into consideration, it has to be conceded that assigning *contractual* servants a particular step has by no means the same significance as the assignment of a step in accordance with the Staff Regulations of the Coal and Steel Community. If however, when posts are revalued under the new Staff Regulations in accordance with the judgment in Case 70/63, the step in the lower grade accorded in the way which has been described is simply transferred to the higher grade, such a procedure could, as the Commission has shown, frequently produce inappropriate results. This would be the case for example if two servants were appointed at the same time in the same career bracket, and one of them was immediately classified in the higher grade having regard to his greater merits and experience, or on the

promotion of a servant on merit to the next higher grade just before the entry into force of the new Staff Regulations. In both cases the servant who remained in the lower grade would, although the services which he performed were of lesser importance, obtain a higher step than the more deserving officials, simply because his post was revalued under the Staff Regulations. I am unable to believe that this result, as the applicant assumes, could have been foreseen and avoided by the Commission when the Staff Regulations were drafted. First it is quite likely that when the Staff Regulations were drawn up the full extent of the problems such as those with which we are now concerned had not been recognized. Secondly the Commission for budgetary reasons (absence of posts in the higher grade) might not have been in a position to avoid the consequences arising out of the application of the considerations in Case 70/63 by classifying in a uniform way at the right time all servants in the same career brackets.

All these considerations lead me to the conclusion that fundamental differences in the actual facts make it impossible to apply the reasoning of the Court in Case 70/63 to our case, even though the printed summary of the said judgment contains wording of general application. The applicant's claims with regard to his step cannot therefore be justified by relying on Case 70/63.

3. Has the Commission applied Article 46 of the Staff Regulations correctly?

After the conclusions which we have reached so far comes the question whether in fact the only way of achieving the necessary correspondence between the duties performed and the classification in the salary scale is the method, which it is clear the Commission consistently adopted, of making appointments to a higher grade in accordance with Article 46, that is to say, under a provision applying first and foremost to promotions. As we know the main effect of this Article is to grant an official who is promoted an advancement in the step in his former grade and on this basis to determine the corresponding step in the next higher grade. Contrary to the method which the applicant advocates, the application of this Article to this case leads to a loss of two steps.

However I certainly hesitate to regard this result as conclusive. Article 46 appears in Chapter 3 of the Staff Regulations under the heading 'Reports, Advancement to a Higher Step and Promotion'. It deals mainly with the promotion of officials and similar cases (cf. for example Article 45 (2), the third paragraph of Article 98, Article 108 and Article 8 of the Staff Regulations), that is to say, the reclassification, on the basis of a comparative assessment of his merits, of an official who *under the Staff Regulations* is already in a particular grade and step. Based on a classification effected in accordance with the regulations laid down the Article is intended to ensure uninterrupted advancement in a career bracket within the framework of the Staff Regulations. In my opinion this procedure is completely different from the one adopted to rectify a classification in the salary scale, which is necessary by reason of the entry into force of new Staff Regulations and by the fact that the classifications effected before they were in force did not have to comply with the criteria of any Staff Regulations. This conclusion is not disturbed by the fact that logically it is possible to distinguish between the provisions for integration carried out under Article 102 of the Staff Regulations and the provisions which follow dealing with the rectification of a classification having regard to the duties performed. In fact, even if it is conceded on the basis of this argument that this rectification of classifications is applied to officials who have already been integrated, it must nevertheless not be overlooked that in such a case the mistakes in classification arising in the period before the Staff Regulations came into force persist for the time being in the decision integrating the official, with the result that the procedures for the integration of officials, whose classification did not have to be rectified before they were promoted, proceeds on a different basis. The applicant has given us examples to show that the application of Article 46 to cases where a post is revalued can lead to inappropriate results but I will not now go into the details of these examples.

As, however, no provisions of the Staff Regulations other than Article 46 have to be considered in dealing with cases such as the one arising in the present proceedings, it only remains to acknowledge—and on this point the corresponding finding in Case 70/63 must be adopted—that with regard to the revaluation of posts there is a lacuna in the Staff Regulations, which must be made good in an appropriate manner according to their spirit, as long as the legislature has not provided a remedy. One appropriate way of filling the gap might be the method applied, as we know, by the Commission of the 'restructuring of classifications', to which the applicant referred in his reply. Unlike the defendant, the Commission, I am unwilling to regard this reference as inadmissible (perhaps by stating that it amounts to a fresh issue or fresh claim by the applicant), first because—as the Court found in Case 70/63—we are concerned in proceedings where the Court has 'unlimited jurisdiction', in which it is not strictly confined to the conclusions of the parties, and secondly because the method adopted by the Commission of the EEC does not necessarily preclude the achievement of the primary object of the application (classification in Grade A 3, Step 4), so that it does not automatically follow that the reference made by the applicant amounts to an amendment of his *conclusions*. Finally, moreover, such an amendment to the application should not be regarded as improper, because it represents at the most a retreat from the principal conclusions of the application and because, moreover, conclusions having a more limited aim are still also covered by those which are more comprehensive.

With regard to the actual restructuring of classifications, I am unable to understand why it should prove to be impossible for the Commission of the EAEC to carry this out when it was done by the Commission of the EEC, even when a large number of cases were concerned. The correct way for the Commission to set about this task is simply to consider which step in a grade it would have assigned to a servant if at the time of his employment the criteria laid down in the Staff Regulations (Article 32) had been binding. In accordance with these criteria it can only assign to a candidate a step in a grade higher than the first step in his grade, if this is justified by his training and experience. In other words, it had to exclude retroactively from its assessment all those facts, which, at the time the candidate's contract of service was finalized having regard to his age, his domestic situation, previous remuneration, etc., led to his being assigned a step higher than the first step in his grade. At any rate such a restructuring of classifications—and reference must be made to this point having regard to certain arguments put forward by the applicant—cannot achieve the result that the classification of officials of the EAEC working in the general departments corresponds exactly to that of the EEC officials working there, who were clearly accorded a step in accordance with the Staff Regulations. For the aim of equality of treatment of all officials cannot be attained by the application of the Staff Regulations in force, but perhaps only by implementing the harmonization measures laid down in the Staff Regulations in the form of a programme. Contrary to the applicant's assumption, it cannot be expected that the principle of equality of treatment will be followed in the decision of the Council of Ministers approving posts in Grade A 3, because this decision cannot refer to the problem of *steps* in a grade within the framework of the budgetary measures which have been taken.

The only question which now has to be answered is whether the contested decision classifying the applicant is in very respect illegal and whether a declaration that it is null and void is therefore justified simply because the Commission applied Article 46, that is to say, because it failed to make use of the opportunity which it had of a 'restructuring of classifications'. I must admit that this inference does not appear to me to be conclusive. We have seen in this case that in finalizing the terms of the contract of employment the calculation of the *remuneration* was the most important factor. If, on this basis, the Commission had had to go again through the process of according the applicant a step in Grade A 3 (which it did in its pleadings), then after his age and experience had been taken into account he could have been considered for classifica-

tion in Grade A 3, Step 2, because the basic salary in that step (30 300 BF) on a favourable view of his case was nearest to the remuneration in his contract of employment (29 250 BF). On the other hand, it is quite impossible for the Commission to have accorded him Grade A 3, Step 4, which would have corresponded to a basic salary of 33100 BF, in particular as it has clearly adopted in general a cautious policy in according grades and in addition is still of the opinion that the division of the Press and Information Department run by the applicant did not have such an important function as the other divisions in this department. However, as the applicant was in fact accorded Grade A 3, Step 2, on 1 January 1962 in the contested decision, there can be no justification for the *annulment* of this decision, having regard to all the considerations put forward.

The final result is that the conclusions requesting annulment must be rejected as unfounded as well as those based thereon for the determination of a higher classification and payment of arrears of salary.

4. Costs

I still have a few observations to make on the question of the Court's decision as to costs so far as Case 15/64 is concerned. We must remember that in this case the applicant's objective was to be classified in Grade A 3, without going specially into the question of his step. The application therefore ceased to have any purpose as a result of the decision of the Commission of 15 January 1965 which accorded the applicant Grade A 3. The Court must therefore make a decision as to costs in this case in accordance with Article 69 (5) of the Rules of Procedure, that is to say, the costs are in the discretion of the Court. As the applicant has succeeded in his claim, an order that the costs incurred by him in this case be borne by the Commission might be justified. In particular there is in my opinion no cause to take into consideration the Commission's objection relating to the budget to the effect that before the issue of a favourable decision of the Council of Ministers it was impossible to comply with the applicant's request. In any case it was the business of the Community institutions to help in satisfying the applicant's claim based on the Staff Regulations, so that it is only fair and reasonable that the costs should be borne by the Community. There is no cause to take into account the fact that in Case 15/64 some claims were withdrawn in coming to a decision as to costs, because the applicant has been substantially successful in his claims.

5. Opinion

In conclusion, without its being necessary for me to examine the request put forward by the applicant that evidence be obtained from the Commission of the EEC and that documents be produced by the Council of Ministers (minutes of the 144th sitting of 13 October 1964), I am in a position to give the following opinion: the Court should declare in Case 15/64 that the main claim no longer has any purpose. The Commission must bear the costs of these proceedings in accordance with Article 69(5). The conclusions put forward in Case 60/65 must be rejected as unfounded. In this case both parties must bear their own costs.