OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 16 DECEMBER 1970[1]

Mr President,
Members of the Court,

The Court is aware of the provisions of the Staff Regulations of Officials of the Communities concerning the method by which vacant posts are filled.

Article 4 of the Staff Regulations that:

1. Vacant posts in an institution shall be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled.
2. If the vacancy cannot be filled by transfer, promotion or an internal competition, it shall be notified to the staff of the three European Communities.
3. Finally, where necessary an external competition may be organized.

Furthermore, Article 29 provides that the appointing authority must consider successively

(a) whether the post can be filled by promotion or transfer within the institutions;
(b) whether to hold competitions internal to the institution;
(c) what applications for transfer have been made by officials of other institutions of the three European Communities;
(d) lastly, possibly, the holding of an external competition.

In addition these provisions were explained in greater detail, as regards the officials of the Commission, by a decision of that institution dated 14 February 1968 to which I shall return shortly.

In March 1969 this procedure was put into operation to fill a post of reviser in German which was vacant in a department of the Commission.

Five officials put forward their candidature including Miss Rittweger, a translator in a department of the Commission and the holder of Grade L/A 5, as well as another translator in the same department, Mr Lenoch, the holder of Grade L/A 6.

As the appointing authority was in this case the Commission, it applied the rules established by the decision of 14 February 1968 of which I have just spoken, Article 11 of which provides that 'where the Commission is competent to take the decision, it is furnished with a proposal coming from the Member of the Commission responsible for the department in which there is the vacant post. That proposal is put forward in agreement with the Member of the Commission responsible for administrative matters . . . In case of disagreement between the two Members of the Commission, the matter shall be put before the Commission on the initiative of one of them'.

Nevertheless before the proposal of the Commissioners took effect, the period for submitting candidatures was reopened to make it possible for supernumerary officials paid out of the research budget to become candidates if they fulfilled the conditions for so doing. But that reopening of the period brought no new candidate.

It was thus that on 3 July 1969 the two competent Commissioners, Mr Coppé and Mr Bodson, after making an assessment of the comparative merits of the candidates and of the reports appearing in their files, gave instructions to the Secretariat-General of the Commission to inform the other Members of a joint proposal for the appointment of Mr Lenoch.

That proposal was sent to all the Members of the Commission and in accordance with a standing practice had to be regarded as approved if none of

1 — Translated from the French.

them put forward any reservations before noon on 11 July 1969.

The matter thus appeared to be settled and so it appeared to the Personnel Department in Luxembourg which in error notified Miss Rittweger before 11 July that her candidature had not been accepted.

In fact that mistaken notification was very premature, because, suddenly on 6 or 7 July 1969, Mr Bodson had doubts and opposed the adoption of the proposal which he himself had made several days before.

An exchange of correspondence, to which I shall return at greater length shortly, then took place between Mr Bodson and the Personnel Department of the Commission.

Finally Mr Bodson withdrew his opposition and Mr Lenoch was appointed on 1 October 1969.

It is that appointment which Miss Rittweger asks the Court by the present application to annul.

The Court must, I believe, accede to that application.

In fact although the Court is not competent to substitute its own value-judgment for the assessment made by the competent authority on the suitability of the various candidates for the same post, it has already decided that the Court would emphasize *'all the more strongly* that the guarantees ensuring a full consideration of candidates' personal files must always and in every respect be observed' *(Raponi* v *Commission* [1964] ECR 129).

In the present case the documents produced in view of the additional information for which you asked show that these guarantees have not been observed.

In fact when Mr Bodson had the doubts which I mentioned to you just now, he asked for some additional information from the Personnel Department of the Commission on the precise duties which Mr Lenoch had carried out until then and also on the seniority of each of the candidates.

Instead of confining itself to providing the information which was asked of it, the Personnel Department at Brussels sent to Mr Bodson fresh reports on the five candidates drawn up on 25 July by the Personnel Department at Luxembourg and concerning, furthermore, not only these five candidates but also a sixth official who was not a candidate.

The preparation and the sending of those reports constitutes in my opinion a very grave irregularity.

Article 43 of the Staff Regulations in fact requires the administration to communicate to the official assessments made of the manner in which he works and the official is entitled to make any comments thereon which he considers relevant.

The assessments made on the work of the five officials applying for the post of reviser and prepared on 25 July 1969 by the Personnel Department at Luxembourg were *never* communicated to the persons concerned.

The use of the assessments in connexion with a promotion thus in my opinion vitiated the procedure.

If in fact for a promotion or a transfer it is not the reports which have properly been credited to officials and of which they are aware which are taken into account, but different and secret assessments, the guarantee which the authors of the Staff Regulations wished to afford to servants by Article 43 completely disappears.

The annual or biennial report and its communication are, if you will excuse the expression, no more than a farce, if it is not the report which is taken into account in considering the qualifications of the servant.

Moreover, the comparison between the reports communicated to Miss Rittweger and those which were not communicated to her before the decision of the Commission is very instructive in this respect.

Whilst the reports which were communicated to her amount to unreserved praise of the applicant, and the head of

her department even mentions that, if he did not in every case apply the description 'very good', this was just to conform to the orders given by the Director of Personnel only to use that description in exceptional cases, the uncommunicated reports are a far less appreciative assessment of the abilities of the applicant and make numerous reservations as to the feasibility of her occupying a higher post.

To accept that the reports which were not communicated may be taken into account for a promotion is practically, in my opinion, to render Article 43 of the Staff Regulations devoid of any content.

It should furthermore be mentioned that in all the countries where the staff regulations in public service include an obligation on the administration to communicate all their reports to the officials, the taking into account for promotion of reports not communicated makes the work of promotion illegal. Thus, for example, the French Conseil d'État by the *Juste* judgment of 5 May 1961 annulled all the appointments of administrators of the special grade of the Ministry for Finance for the year 1958 because the reports containing marks concerning an administrator who was not promoted had not been communicated to the person concerned.

I wondered, however, whether in the present case the irregularity committed could have influenced the decision which was ultimately to be taken and one might, I believe, legitimately do so since the final decision was in fact the same as that envisaged previously and before the irregularity occurred.

But in my opinion the documents in the file allow a reply to be made to that question without hesitation.

One reads in the memorandum from the Secretariat-General of the Commission dated 2 October 1969, which resulted in the appointment of Mr Lenoch, that the suspension, on the request of Mr Bodson, of the procedure commenced in July was able to be lifted following additional information received by Mr Bodson.

This additional information is precisely the irregularly produced assessment sent to him on 28 July 1969.

I think therefore that this irregularity in procedure was of such a nature as to influence the final choice made by the Commission and thus vitiated the appointment of Mr Lenoch by illegality by reason of a procedural defect.

In these circumstances I will consider very briefly the other submissions put forward by the applicant, none of which appear to me to be well founded.

The applicant maintains in the first place that it is not possible to accept a candidate of Grade L/A 6 for which the appointment to Grade L/A 5 would constitute a *promotion* whilst other candidates already holding Grade L/A 5 could have acceded to the vacant post by mere *transfer*.

But no provision of the Staff Regulations and no general principle of law limits the power of the appointing authority to fill the post either by means of promotion or by means of transfer.

Lastly Miss Rittweger maintains that Mr Lenoch who was concerned above all with duties of terminology had not the necessary experience to be a reviser.

But, as I have said, the Court is not competent on this point to substitute its own value-judgment for the assessment of the candidates made by the competent authority.

Therefore only the procedural defect of which I spoke a moment ago appears to be of such a nature as to vitiate the disputed decision by illegality and it is because of that defect that I am of the opinion that the Court should:

— annul the appointment of Mr Lenoch owing to a procedural defect;
— order the Commission to bear the costs.