On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the defendant to pay all the costs.**

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 1 December 1983.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 20 OCTOBER 1983 [1]

Mr President,
Members of the Court,

The applicant in the proceedings which are the subject of this opinion has been in the service of the Commission since 16 April 1980 as a Greek-language translator. He was initially engaged as a member of the temporary staff in Grade L/A 7, Step 3. He then took part in an internal competition on the basis of qualifications and was appointed a probationary official in the same grade with effect from 1 January 1981.

Subsequently, in particular after studying the "Criteria applicable to grade and step classification upon recruitment" (herein referred to as "the decision of 6 June 1973"), which was brought to the notice of officials by the Directorate-General for Personnel and Administration in

1 — Translated from the German.

March 1981, the applicant began to entertain doubts about the correctness of his classification. On 9 June 1981 he requested that his classification should be re-examined in the light of his university degrees and his previous experience. By a memorandum of 3 November 1981, the Grading Committee informed him that it was unable to revise its original opinion regarding his classification.

The applicant then addressed a letter dated 4 February 1982 to the Director-General for Personnel and Administration, in which he requested a further review of his case in the light of the abovementioned decision of 6 June 1973. By memorandum dated 27 May 1982 the Director-General informed the applicant that in his view the Grading Committee was correct in considering that he lacked sufficient relevant experience to justify appointment in the upper grade of the career bracket L/A 7-L/A 6. Appointment to the upper grade was reserved for those candidates who could provide evidence of experience as full-time translators. The Grading Committee did not take into account his post-graduate studies and concluded on that basis that his peripheral experience or experience treated as such was to be assessed at five years and eight months.

The applicant lodged a complaint pursuant to Article 90 of the Staff Regulations against that refusal. That complaint was expressly rejected by the appointing authority in a letter dated 1 October 1982, which was notified to the applicant on 4 October 1982.

As a result, on 28 December 1982, the applicant brought an action before the Court of Justice, whereby he asked the Court to annul that decision and to order the Commission to reclassify him in accordance with the criteria contained in the decision of 6 June 1973.

My views on that application are as follows:

1. Admissibility of the action

Although the Commission has not expressly challenged the admissibility of the action, there are in my view certain doubts regarding admissibility, which the Court must consider of its own motion. In any event, the action is inadmissible if the decision contested by the applicant is regarded purely as confirmation of earlier decisions which may not be challenged.

In that connection it is significant that in seeking reclassification with retroactive effect, the applicant is really attempting to obtain the annulment of his original classification in Grade L/A 7, which may not be challenged because the prescribed periods for lodging a complaint and bringing an action have expired. The contested decision whereby the Commission rejected the applicant's complaint may therefore be said to be a measure confirming the original decision. The Court has always held that such a measure may be challenged in itself only if in the meantime new circumstances, such as an alteration of the factual or legal position, have come to light. Only in such a case would the administration have cause to review on application the earlier contested decision and a decision resulting from that review could not be regarded as a mere confirmatory measure.

Thus has the Court emphasized, in particular in the *Williams* [1] case, that the implementation of a general decision introducing new criteria for the classification of newly recruited staff, which entails inequalities of treatment for officials appointed at an earlier stage, entitles those officials to call for a review of their administrative status with a view to their obtaining an appropriate alteration of their classification on the ground that the emergence of that new development is such as to affect them adversely.

In this case it is common ground that the criteria for classification relied on by the applicant, which were adopted in 1973, have been applied since that date but were not made generally known to the staff until March 1981. Moreover, the applicant does not claim that the Commission's practice in applying the criteria, which is summarized in Annex II to the notice publishing the decision, has changed since the adoption of the decision. He suggests merely that the publication of the decision, which occurred after his original classification, should be regarded as a new development which causes the limitation period to run afresh.

As appears *inter alia* from the judgments in *Petersen* [2] and *Blasig* [3], the discovery of the existence and applicability of purely internal administrative directives by individual officials and the publication of those directives by the administration does not in principle constitute a new development which causes the limitation period to run afresh. The Court of Justice based its decisions, in particular, in *Blasig*,[3] on the principle that even where internal measures are communicated to individuals or published to the staff as a whole, their purpose remains merely to give information to the officials concerned with the matter; they are not intended to accord the staff any right. Consequently, as there was no change in the factual and legal position in that respect, the Court considered the actions inadmissible.

In my view, the emergence of an important new fact could not however be denied if in this case the notification of the decision of 6 June 1973 to the staff had led to a change in the legal nature of that decision so that a purely internal measure — as it was referred to by the Court in the judgment in *Petersen* of 2 December 1976 [2] — had been converted into *legal rules giving rise to rights.* Furthermore, it is clear that the action must also be admissible if the applicant claims that he only became aware of the criteria for classification after his classification and at the same time discovered that those criteria had been disregarded inasmuch as other candidates had been placed in a better position in a way which constituted an abuse of power.

As those questions are closely linked to the substance of the action — it is an established principle that a *prima facie* case must be deemed sufficient for admissibility — I consider that it is appropriate to consider immediately the substance of the case.

2. Substance of the action

The applicant relies in the first place on the infringement of the Commission's decision of 6 June 1973 on the criteria for classification, in particular Article 3 thereof. Article 3 provides that, by way

1 — Judgment of 6. 10. 1982 in Case 9/81, *Williams* v *Court of Auditors*, [1982] ECR 3301.

2 — Judgment of 2. 12. 1976 in Case 102/75, *Petersen* v *Commission*, [1976] ECR 1777.

3 — Judgment of 18. 6. 1981 in Case 173/80, *Blasig* v *Commission*, [1981] ECR 1649.

of derogation from the principle that all officials are to be appointed in the starting grade of the starting career bracket, the appointing authority may appoint successful candidates with at least five years experience in Grade L/A 6. According to the applicant, it is clear from paragraph 3 (c) of Annex II, which concerns the practical application of the criteria, that, with regard to Career Bracket L/A 7 - L/A 6, no specific full-time experience as a translator is required. He therefore had a total of at least five years relevant experience, even if he was not entitled to claim total relevant experience of 11 years and six months. Thus, in his view, the contested decision rejecting his complaint is based on incorrect grounds.

Finally he claims in a third submission that, in view of his qualifications and experience, he was discriminated against in relation to those colleagues who were also classified in Grade L/A 7, although they could not provide evidence of similar qualifications.

Since those submissions are closely connected, I consider it appropriate to deal with them together.

(a) In the Commission's view, the action is unfounded because, instead of pleading the breach of a purely internal decision, the applicant should have based his action on the alleged infringement of Articles 31 and 32 of the Staff Regulations. It is clear even from the preamble to the decision of 6 June 1973 that the criteria were intended merely as a guide for the exercise of the discretionary power provided for in those articles as regards the classification of officials; they were not, however, intended to constitute legal provisions giving rise to rights. Moreover, Article 3 of the decision provides for a margin of discretion, so that it is not possible in any case to derive any right to a specific classification therefrom.

In my opinion, a number of considerations support the conclusion that the criteria are purely internal administrative instructions. In the first place, the criteria are drawn up in the form of a "decision" of the Commission, the preamble to which cites a number of provisions of the Staff Regulations but not Article 110 of those regulations, which governs the procedure for the adoption of general provisions for giving effect to the Staff Regulations.

As the Court stated in the judgment in *Willame*[1] the expression "the general provisions for giving effect to the Staff Regulations" in Article 110 refers in the first place to the implementing measures expressly provided for by certain special provisions of the Staff Regulations. As Articles 31 and 32 of the Staff Regulations are not among those special provisions, it follows that the criteria for classification are not to be regarded as implementing measures provided for in the Staff Regulations; they may however in principle be regarded as internal administrative rules which lay down guidelines governing the appointing authority's exercise of its discretion, thereby excluding any arbitrariness.

Support for that conclusion is to be found in the Court's judgment in *Petersen*,[2] in which it stated that the criteria for classification "were exclusively intended to help the appointing authority in making the selections which it was called upon to make on the recommendation of the [Grading] Committee". It stressed further that "these criteria and the setting-up of the

1 — Judgment of 8. 7. 1965 in Case 110/63, *Willame* v *Commission of the European Atomic Energy Community*, [1965] ECR 649.

2 — Judgment of 2. 12. 1976 in Case 102/75, *Petersen* v *Commission*, [1976] ECR 1777.

Grading Committee constituted purely internal measures the purpose of which was to facilitate the many selections and decisions which had to be made during a comparatively short period but which were not intended to confer rights or expectations of any kind whatsoever on those concerned".

(b) Consequently, it remains merely to consider whether the legal nature of those purely internal measures, which were brought to the notice of the staff in 1981 in the form of an annex to a notice signed by the Director-General for Personnel and Administration, underwent any alteration as a result of publication. However, the very fact that the procedure provided for in Article 110 of the Staff Regulations was not complied with militates against such a conclusion. As may be seen from the notice in question, the purpose of the publication was on the contrary to bring to the attention of the staff information about the guidelines for classification and their practical application and about the membership of the Grading Committee. It was intended to ensure that "whatever a new recruit's nationality, uniform rules will apply to his grading and to the subsequent progress of his career".

Finally, the Court of Justice has also repeatedly held that the publication of internal rules does not automatically convert them into legal provisions. Thus for example in the *Geeraerd*[1] case, in which the applicant relied on an infringement of a Commission decision — published in the Administrative Notices — on general implementing provisions relating to the procedure for promoting officials within a career bracket, the Court stated that the decision in question "does not constitute an implementing provision prescribed by the Staff Regulations but an internal measure, introduced by the Commission of its own accord, which cannot therefore be regarded as having the character of strict law". In *Blasig*[2] the Court held that a "Guide to Staff Reports" was intended to provide guidelines for senior officials responsible for preparing periodic reports. It was published in order to inform the officials concerned of the criteria applicable under that procedure. However, it did not entitle the staff to demand, after appointment in a given grade, a higher grade outside the normal promotion procedure.

Consequently, in the light of those decisions, it must be concluded in this case that the decision, after its notification to the staff in March 1981, remained a purely internal directive which was intended merely to define more precisely the discretion granted to the appointing authority under Articles 31 and 32 of the Staff Regulations *inter alia* and to lay down certain guidelines governing the exercise of that discretion. As the Court of Justice has stressed, for example in the *Louwage*[3] case, even if such an internal directive does not have the character of a rule of law, which the administration is always bound to observe, it nevertheless sets forth a rule

1 — Judgment of 4. 12. 1980 in Case 782/79, *Geeraerd* v *Commission*, [1980] ECR 3651.

2 — Judgment of 18. 6. 1981 in Case 173/80, *Blasig* v *Commission*, [1981] ECR 1649.

3 — Judgment of 30. 1. 1974 in Case 148/73, *Louwage* v *Commission*, [1974] ECR 81.

of conduct indicating the practice to be followed, from which the administration may not depart without good reason, since otherwise the principle of equality would be infringed. The persons concerned are entitled to expect that the discretionary power is properly exercised.

Since however the Court of Justice may review only *legality* of administrative acts but not their merits, the only question which requires to be considered is whether in the original classification of the applicant, or in the refusal to reclassify him in a higher grade, the appointing authority exercised its discretionary power improperly.

(c) According to Article 31 (1) of the Staff Regulations, officials in Category A are to be appointed in the starting grade of their category. By way of derogation from that rule, Article 31 (2) gives the appointing authority the power within certain limits set out in that provision, which are not however relevant to this case, to make appointments in grades higher than the starting grade of the category. Moreover, as the Court emphasized in the *Kurrer*[1] case, the appointing authority must reconcile use of the power reserved to it by that provision with the requirements which result from the concept of a career bracket within the meaning of Article 5 and Annex I to the Staff Regulations. The Court further stated in that judgment that the concept of a career bracket would in fact lose all legal significance if the appointing authority were entitled to the same degree of freedom in that respect as it has with regard to the other grades. The Court therefore held that it is permissible to make appointments by way of open competition to the higher grade of a career bracket only "in exceptional cases where recourse to the provisions of Article 31 (2) is justified by the specific needs of the service, which call for the recruitment of a specially qualified official".

In the light of those considerations there can be no cause for complaint that in Article 3 of the decision of 6 June 1973, which concerns appointment to the higher grade of career bracket, the Commission made the possibility that an official might exceptionally be appointed to the higher grade conditional on the length of professional experience. Finally, it also follows from the above comments — to deal with a further argument put forward by the applicant — that the different drafting of Article 2 of the decision, concerning appointment to career brackets other than the starting career bracket, provides no help in the interpretation of Article 3.

(d) The applicant complains that in his case the appointing authority failed to apply the decision, and in particular Article 3 of the decision, correctly, inasmuch as he was not classified in Grade L/A 6 despite the fact that he was expressly acknowledged to have professional experience of five years and eight months. In that respect it must be borne in mind in the first place that under Article 3 the appointing authority retains an element of discretion even where the requirements as to professional experience laid down in that article are satisfied. Thus it provides that the appointing authority "*may* exceptionally and in order to meet recruitment requirements" derogate from the normal rules on classification. Contrary to the view put forward by the

1 — Judgment of 28. 3. 1968 in Case 33/67, *Kurrer* v *Council*, [1968] ECR 127.

applicant in the alternative, it is not a question of whether recruitment requirements militated against his classification in a higher grade; on the contrary it was for the Commission to assess whether special recruitment requirements justified a departure from the normal rules.

If my understanding is correct, the applicant does not claim that the Commission exercised its discretion improperly; rather he is concerned with the assessment of his professional experience, which constitutes the basis for the exercise of the discretion provided for in Article 3. As regards the criterion for assessing that experience, Article 3 refers expressly to Article 2, which in that respect provides that:

"Professional experience with regard to the post to be filled shall be assessed on the basis of all the activities in which the candidate has engaged before recruitment."

With regard to the career bracket L/A 7 - L/A 6 it is further stated in point 3 (c) of Annex II that:

"100% credit is given for relevant experience at a level equivalent to Category A work (as translator, economist, lawyer, etc.)".

The applicant considers that, in accordance with those provisions, his studies abroad and his work in the fields of economics, administration and sociology, which involved the use of foreign languages, must be regarded as professional experience of at least five years within the meaning of Article 3.

The Commission points out, on the other hand, that its standard practice has always been to apply those provisions so that only *full-time work as a translator* is regarded as relevant experience for translators who, like the applicant, are recruited for general translation.

The first point to be borne in mind in that respect is that the question whether an authority has exercised its discretion lawfully depends not so much on the different conceivable interpretations of internal rules but rather on the manner in which the discretion was actually exercised. In the light of the general principles of equal treatment, legal certainty and the protection of legitimate expectations, there is however some doubt whether in its standard practice the administration may depart from published internal administrative directives which, as was the case in *Louwage*, [1] are clear and unequivocal and leave no room for any other interpretation. In this case, however, that question may remain open, since, in relation to the assessment of professional experience, the text of the decision is by no means clear and unequivocal and in any case allows the administration a margin of discretion. In establishing whether professional experience may be taken into account, the activities engaged in prior to recruitment are to be assessed with regard to the post to be filled. It is thus for the appointing authority to decide, having regard to the candidate's future duties, the extent to which it considers his previous experience relevant and therefore capable of being taken into account. The fact that classification in the higher grade of the starting career bracket is permitted only exceptionally, where specific departmen-

1 — Judgment of 30. 1. 1974 in Case 148/73, *Louwage* v *Commission*, [1974] ECR 81.

tal requirements make it necessary to appoint a specially qualified official, justifies the application of a strict standard. The criterion governing classification in grade also differs in principle from the criterion governing recruitment inasmuch as, in the recruitment of candidates for general translation work, the widest possible range of experience is sought, whereas, with regard to classification, it is possible by way of exception to take into account the need for specially qualified officials.

Finally, it also follows from those considerations that the fact in another competition for the recruitment of principal administrators in Grade A 5 the applicant's professional experience was calculated at seven years does not mean that the appointing authority in this case must recognize that he has at least five years' professional experience.

Even if it is conceded to the applicant that neither Article 31 of the Staff Regulations nor the decision of 6 June 1973 refers expressly to particular or specific professional experience, consideration of those provisions as a whole from a teleological point of view shows in any event that the Commission did not exceed the power entrusted to it in adopting as its standard practice the principle that only full-time work as a translator was to be considered sufficient relevant experience for general translation over a period of five years. In that respect it must be remembered that the second paragraph of Article 32 of the Staff Regulations provides that the appointing authority may grant an official additional seniority in his grade, taking account of his training and specific experience. That is all the more reason why it must be regarded as permissible if also in the context of Article 31 (2) of the Staff Regulations, which governs exceptions to the principle of recruitment in the starting grade, importance is attached to specific experience.

Another consideration which suggests that the restrictive administrative practice applied by the Commission is lawful is the fact that, according to Article 3 of the decision of 6 June 1973, for Grade L/A 6 a minimum of five years' professional experience is required, whilst for Grade A 6 evidence must be furnished of at least eight years' professional experience. That distinction is objectively justified only if translation, for which the special category L/A was created, is regarded as a special activity which, for the most part, is different to other areas of the administration. If that assumption is accepted, it is at least not illogical if for the work of a general translator, who in principle may be called upon to work in various different fields, only full-time experience as a translator is regarded as relevant professional experience such as to justify a departure from the normal rules on classification. Setting aside the question, which we need not consider here, whether such a practice is appropriate, it does, at any event, as the Commission rightly states, have the advantage of establishing workable and objective standards for the equal treatment of all general translators.

(e) Finally, contrary to the applicant's view, it cannot be inferred from Annex II to the notice publishing the decision that

the appointing authority is under a duty to regard any activity involving foreign languages, and equivalent to Category A work, as relevant experience for a general translator. In that annex, which merely summarizes the previous practice of the Grading Committee, paragraph 1 repeats the principle that experience is to be assessed on the basis of the definition contained in Article 2 of relevant experience. In the light of that definition, point 3 (c), which is in my view somewhat unhappily phrased, is intended only to state, without derogating from the basic rule, that relevant experience as an economist or lawyer and so on may be taken into consideration within the context of Career Bracket L/A 7 - L/A 6 as professional experience, if the translator's post to be filled is closely connected with such an activity and requires specialist knowledge. As we have heard, the Commission has so far made provision for such specialization only in respect of translators of legal texts.

(f) If no objection may be made to the appointing authority's practice, it follows equally that the further claim advanced by the applicant, namely that the rejection of his request for reclassification was based on irrelevant considerations, is unfounded.

(g) Since the applicant cannot provide evidence of any relevant experience as a translator within the meaning of the requirement applied by the Commission in its previous administrative practice, it remains for us to state, in connection with the third submission, which alleges a breach of the prohibition of discrimination, that the Commission did not breach the principle of equal treatment in refusing to classify the applicant in a higher step than his colleagues who were similarly unable to provide evidence of any relevant professional experience,

(h) Thus the applicant's further claim that the Court should order the Commission to reclassify him in the light of the decision of 6 June 1973 — which it would have been obliged to do in any case if the action had been successful — becomes irrelevant.

3. I therefore propose that the action should be dismissed, if not as inadmissible — the fact that the appointing authority re-examined the matter following the applicant's complaint militates against inadmissibility — then in any case as unfounded; in accordance with Article 70 of the Rules of Procedure the parties should be ordered to bear their own costs.