3. In Cases 182, 184 und 185/82,

(i) annuls the decision contained in the letter of 24 September 1981 in so far as the applicants' fields of competence and classification in one of the "priority" groups in the original list of suitable candidates were not stated;

(ii) for the rest, dismisses the applications;

4. Orders the Commission to pay the costs of all the actions.

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 9 October 1984.

For the Registrar

H. A. Rühl

Principal Administrator

C. Kakouris

President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 5 JULY 1984

My Lords,

The provision in Article 45 (2) of the Staff Regulations that an official may be promoted from one category to another only on the basis of a competition does not, by virtue of Article 98 (2) of those regulations, apply to certain officials occupying posts in the field of nuclear science calling for scientific or technical qualifications. For such officials, at the time relevant to the present cases, the Commission issued in *Administrative Notices* No 220 of 20 December 1978 "Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials in the scientific and technical services" ("the notice").

The notice invited such officials of the grade, seniority and experience stipulated in Section II of the notice, to apply for transfer in accordance with those procedures, the purpose of which was said to be "to provide a means of assessing the abilities of category B officials in the scientific and technical services to perform Category A duties ... with a view to their transfer to this category". It was stressed that the procedures had been designed "to ensure that any transfer decisions are well founded".

An *ad hoc* Committee was constituted to draw up the list of Category B officials eligible for transfer. That Committee was required to examine the dossier of application of each candidate. Graduates with appropriate experience were to be recognized as eligible for transfer following verification of their diplomas and "an interview with the Committee to assess their areas of competence" (III, (2) (d)); non-graduates who passed a first investigation were required to submit a dissertation on which they were to be examined to assess their level of competence, and to enable the Committee to evaluate whether the candidates were competent to exercise Category A functions (III, (2) (a) and (c)).

Following its deliberations "the Committee will submit a reasoned report to the appointing authority with a list of candidates considered capable of performing category A duties. The report will indicate the areas in which each candidate is regarded as being competent" (III, (2) (e)).

Not every candidate with the right qualifications could hope for immediate transfer since transfer decisions remained to be taken by the appointing authority in the light of service requirements and the budgetary situation.

The four applicants in these cases were, at the time the notice was published, Category B officials of Belgian nationality working at Ispra. Each of them has a Belgian degree in technical engineering which according to Belgian law is equivalent to a university degree. Despite this they were apparently required to produce written material to the Committee.

After considering the applications, the Committee drew up two lists of successful candidates which were published in *Administrative Notices* No 281 of 10 June 1980. In the first list, described as "1st priority", the names of the officials were set out in alphabetical order, whereas in the second list, described as "2nd priority", they were set out in descending order of merit. Both lists specified the field of competence of each official. None of the four applicants figured in either list. They were told by letter, apparently sent on 9 June 1980, and in one case undated, that the Committee "charged to assess the aptitude of Category B officials to

exercise Category A functions" had not been able to include them on the list, and that they should improve their qualifications with a view to participating in a subsequent procedure.

Accordingly in Joined Cases 80 to 83/81 they contested the validity of the decision of the *ad hoc* Committee refusing to place them on the list of eligible candidates; they sought the annulment of that decision. Before the defence was lodged in those cases, the applicants were told by letter from the Director-General of Personnel dated 24 September 1981 that, following a reconsideration, the Committee had decided that they were eligible for a change of category, though the Committee in the course of the interview with the candidates had not been able to determine the areas of competence in which they could currently exercise Category A functions at the level of competence required by the Commission services. In *Administrative Notices* No 339 of 16 October 1981 an addendum containing a further list of officials eligible for transfer, including all the applicants, was published by the Commission. The list did not state any areas of competence and stated that they were "added to the list of officials ... considered suitable for a transfer from Category B to Category A (*Administrative Notices* No 281 of 10. 6. 1980)". In the circumstances it seems to me unnecessary for any order to be made in the first group of applications save that in my view the Commission should pay the costs of those proceedings, which in the light of what followed, were clearly justified.

The applicants, however, were not satisfied with the procedures followed in regard to this second decision of the Committe in two major respects. The addendum did not specify their field of competence, nor did it stipulate whether the candidates were to be regarded as falling in the first or the second list. Following a rejection of their complaint made under Article 90 of the Staff Regulations, they brought further proceedings by the applications in Cases 182 to 185/82 dated 19 July 1982.

On 1 January 1984 Mr De Blust, the applicant in Case 183/82 was in fact promoted to Category A and he has, therefore, applied to withdraw his case save as to costs.

The first two grounds of the remaining three applications relate to the failure to state an area of competence. It is sought to annul both the decision of the committee not to state an area of competence, and the decision of the appointing authority to adopt it by the letter of 24 September 1981. The applicants contend that it was the duty of the Committee to make such a finding, and of the authority to ensure that one was made and not to publish a list without such a finding, and that the failure to do so prejudices the applicants. The Commission's answer, in summary, is that the Committee had a margin of appreciation as to whether it found an area of competence, and that if it was not able to do so, it need not specify one. Indeed if it was not satisfied that the candidates were competent in any field to exercise Category A functions (as appears now to be suggested as a possibility) then none could ever be

specified. Moreover, it is said that the power of appointment remains with the appointing authority which will have the full dossier of the candidate. It is that dossier which enables a decision to be taken in respect of a candidate's application for a particular post, so that merely to indicate in what area the candidate has worked is of no assistance. The appointing authority could not in any event correct what the Committee had failed to do.

These procedures are binding on the candidates; in my view, although issued as an internal administrative measure, they also bind the authority. They cannot be regarded as lacking legal validity and the candidates are entitled to expect that they will be complied with (Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245 at para. 18).

In my view the duty of the Committee is clearly spelled out in Section III, (2) (d) of the notice. If the Committee considers that a candidate is capable of performing Category A duties, it must go on to indicate the areas in which he is considered competent. It is required to interview the candidate for the very purpose of assessing his areas of competence (III (2) (d). Only if it does this does it achieve the aims of the procedure to provide a means of assessing the ability of Category B officials to perform Category A duties. The fact that it finds a candidate competent for Category A functions must mean that it was satisfied that he could carry out such functions in some fields; it is not its task to find him capable of carrying out Category A functions *in abstracto*. Nor does it have, once it finds him capable of carrying out Category A functions, a discretion as to whether it determines his field of competence at all.

To the extent that it failed to make such a finding it was in error; the appointing authority should have required it to do so and not published the list without any such finding.

Then it is said that the Committee and the appointing authority erred in that they failed to specify whether candidates were in the first group or in the second group in the original list contained in *Administrative Notices* No 281.

I am prepared to assume, without deciding, that it was open to the Committee to put the candidates initially successful, in two lists, one alphabetical (and it may be containing the better of the candidates who were all about equal) and one in order of merit, although I consider that it should have indicated the basis of distinction between the two lists. But if the Committee does so, and the appointing authority adopts those two lists, then, if further candidates are said to be "added to the list" in the original notice No 281, it is necessary to specify in which of the two parts of the list the extra candidates fall, at any rate so long as both lists are still in existence. Otherwise the additional list gives the impression of being a third, perhaps, inferior list and injustice may be done to

candidates in it who should have been in the first of the original lists. If candidates in the second list are listed in order of merit, candidates "added to" that second list are entitled to be put in order of merit also. In the present case one name remained on the first list (not having been transferred) as at 24 September (or 16 October) 1981, and no transfer had been made from the second list. There were thus still two lists in existence and the Committee should have made it clear as to which list, and if the second list, at what point, each candidate appeared.

I accept the Commission's arguments that, in the last resort, it is for the appointing authority to decide how many transfers can be made in the light of vacancies and budgetary considerations: and that the appointing authority has a discretion to choose the best candidate for any vacancy. It is also clear that candidates were not appointed in fact in the order of merit found in the second list, and that one candidate in the second list and one in the addendum were transferred before one candidate in the first list.

None the less it seems to me that since the procedures were not properly complied with in two respects, the inference is that candidates are likely to be at a disadvantage (a) if no field of competence is shown (since a finding of the committee as to his field of competence was clearly intended to be relied on for the purposes of deciding on transfer) and (b) if the extra candidates are merely listed alphabetically as between themselves, with no reference to their relationship to candidates in the original list.

It is to be noted that all 15 officials in the first group have been transferred; seven out of eight have been transferred in the second group. Of these 22 officials, eight were transferred after the addendum was issued, whereas only two of the candidates in the addendum, including Mr De Blust, have been transferred.

Once it is shown that the procedures have not been properly carried out, these facts are in my view enough to put the burden of showing that there was no disadvantage to the candidates in the addendum on the Commission. Even accepting that transfers depend on vacancies in particular fields and on budgetary considerations, I am not satisfied on the facts that the Commission has discharged this burden.

In their fourth and final submission the applicants challenge the decision of the appointing authority not to withdraw all the promotions based on the lists published in *Administrative Notices* No 281 of 10 June 1980. They therefore request that all those promotions be annulled. This request seems disproportionate to the legitimate interests of the applicants. They will be sufficiently

protected if the decision of the *ad hoc* Committee and the appointing authority is declared, to the extent that it is defective, to have been erroneous in law in so far as it concerns the applicants. I find support for this view in paragraph 35 of the judgment in Cases 4, 19 and 28/78 *Salerno* v *Commission* [1978] ECR 2403. There the decision of the selection board refusing to admit the applicants to a competition was annulled, but the Court declined to set aside the results of that competition or to annul appointments made in consequence of it.

So far as Mr De Blust is concerned, it seems to me that no order is required to be made on his application save that in my view his costs of the proceedings should be paid by the Commission.

As to the applications 182, 184 and 185/82, it seems to me that there should be a declaration that the decisions of the *ad hoc* Committee and the appointing authority regarding the applicants were vitiated by substantive errors in that they failed to specify the areas of competence of the candidates and they failed to indicate within which list and if in the second list, at what place in that list, each of the applicants fell to be placed.

The applicants are in my opinion entitled to their costs, not only in Cases 80 to 83/81 but also in Cases 182 to 185/82.