3. Reserves the costs.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 18 December 1980.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 30 OCTOBER 1980 [1]

Mr President,
Members of the Court,

In the action which is Case 156/79 Pierre Gratreau asks the Court to annul:

1. the list of officials in Category A, paid from research appropriations, judged to be the most deserving of promotion to Grade A 4 for the financial year 1978 (published in "Administrative Notices" No 214 of 20 November 1978);

2. the list of officials promoted to Grade A 4 for the financial year 1978 (published in "Administrative Notices" No 220 of 20 December 1978);

drawn up by the appointing authority.

I — (a) Mr Gratreau, who was born in 1929, is an engineer and a doctor of physical science. He entered the service of the Commission in July 1967 as a scientific officer in Grade A 5. Since then, he has carried out his duties in the framework of the Euratom-CNEN ("Comitato Nazionale Energia Nucleare") Association Contract at the "Laboratorio Gas Ionizzati", which is based in Frascati (Italy). He is assigned to the fusion programme run by Directorate-General XII (Research, Science and Education) of the Commission. In 1978, for the fourth consecutive year, he was proposed for promotion from his starting grade to Grade A 4. However, his name was not included in the lists which the Court is asked to declare void.

In support of his application he advances a single plea: infringement of Article 45

1 — Translated from the French.

of the Staff Regulations. According to him, that infringement arises from the fact that "consideration of the comparative merits of the officials eligible for promotion and of the reports on them", which is prescribed by Article 45, could not be properly carried out. Mr Gratreau explains that the lack of diligence shown by the reporting officer, first in compiling the periodic report on him and thereafter in replying to his comments, has led to mounting delay for which he is not responsible. He adds that in those circumstances the Joint Promotion Committees charged with drawing up the first of the contested lists — to which the appointing authority may not add any name — did not have available his report for the 1975 to 1977 period and had to proceed as regards the 1973 to 1975 period on a report the tenor of which he disputed and which, that notwithstanding, was included, contrary to the provisions of the Guide to Staff Reports, in his personal file.

The Commission does not deny either that the disputed reports were drawn up late or that the report dealing with the 1975 to 1977 period was not available to the various bodies (the Instance Zero, the Promotion Committee of First Instance and the Promotion Committee of Second Instance) which take part in the promotion procedure for staff remunerated out of research appropriations. On the other hand, the Commission disputes that the 1973 to 1975 report was improperly put in the file and, in particular, that the failure to observe the provisions relating to periodic reports, including the absence of the 1975 to 1977 report, are sufficient to make the promotions in dispute irregular.

(b) The applicant's periodic report for 1973 to 1975 was only sent to him on 24 May 1977. In the analytical assessment it showed "average" for ability and efficiency and "above average" for conduct in the service. Mr Gratreau returned the report to the reporting officer on 6 June with his comments and asked to be heard by him in the event of disagreement. In the comments he stated that he was regretfully unable to accept the assessment relating to his ability.

Despite two letters of reminder on Mr Gratreau's part, the interview requested, which is mandatory under Article 6 of the General Provisions for Implementing Article 43 of the Staff Regulations (to which reference is made in paragraph B 7.3.1. of the Guide to Staff Reports), did not take place until 16 November 1977.

Following that discussion the reporting officer ought, pursuant to paragraph B 7.3.2. of the Guide to Staff Reports, either to have simply confirmed the original report or to have amended all or part of it. But in either event, he ought to have informed the applicant officially by means of a confidential and urgent note drawn up in conformity with the specimen provided. That procedure was not followed and the report in question was simply filed in Mr Gratreau's personal file. In view of this further failure to reply, Mr Gratreau turned to the Commission's mediator who got in touch with the reporting officer by two notes of June and September 1978. In answer, the reporting officer indicated to the mediator that he had taken account of the applicant's observations "disputing the analytical assessment relating to ability" in his periodic report for 1975 to 1977 which "was drafted shortly

afterwards but has only just been sent". He had awarded "S" (above average) for efficiency but not for ability since he considered that the applicant's main argument for an improvement in the assessment (the number of his publications and internal reports) fell more under the head of efficiency than ability. A copy of that note was sent by the mediator to the applicant who thus had knowledge of it.

From that, the Commission reasons that, as from his receipt of that copy, the applicant knew that the reporting officer was not minded to alter the report and that, if he insisted on challenging the report, it was for him to appeal to the appeal assessor. That, moreover, is what he did. By telex message of 6 March 1979 Mr Gratreau asked the appeal assessor to regard the request for a revised report, which he had meantime presented in regard to the 1975 to 1977 report, as referring also to the preceding report. However, on 21 June 1979 the appeal assessor intimated to the applicant his refusal to examine that report on the ground that the applicant had not expressly asked him to do so in his comments. That refusal appears to be based on the applicant's failure to observe paragraph B 7.4 of the Guide to Staff Reports which provides in the first place that "after his dialogue with the assessor, and regardless of its outcome, the official has 15 days in which to sign his report and to make comments thereon".

That reasoning appears to me to be mistaken. This last error merely comes on top of the infringements of the Guide to Staff Reports which I have already mentioned and it appears to me that it ill becomes the defendant to accuse the applicant of not having observed a text which is binding as much on it as on its officials. In my view, there is no doubt but that Mr Gratreau's 1973 to 1975 report was wrongly put in his file.

I consider on the other hand that that irregularity was disadvantageous to the applicant when the appropriate promotion bodies considered his merits and compared them with those of other officials eligible for promotion. It is quite possible that his prospects would have been better if the reporting officer had given him an "S" for efficiency in the report in question and not, as he in fact did, in the subsequent report or if the appeal assessor had been able to effect that alteration. But the "Instance Zero" constituted at the level of the fusion programme and entrusted with carrying out a preliminary examination of the merits of all officials eligible for promotion met on 19 June 1978, that is to say, at a time when the mediator was endeavouring to make the reporting officer break his silence. Likewise, when the Promotion Committee of First Instance — which has power to deal with staff paid from research appropriations and assigned to duties not coming under the Joint Research Centre — and the Promotion Committee of Second Instance — which has power in relation to the entire staff remunerated out of research appropriations — met on 28 September and 10 October 1978

respectively, it is clear that, as subsequent events demonstrated, the applicant did not consider that his report was duly compiled, final and beyond challenge.

(c) My remarks relating to the 1975 to 1977 periodic report may be more brief because the fact that it was not taken into account by the various promotion bodies is not disputed. This document was in fact sent to the applicant on 14 September 1978 and returned with his comments on 20 September, the reporting officer's response to those comments being dated 10 October. According to the Commission, that failure does not, however, constitute a circumstance which is sufficient to make irregular the promotion procedure which was followed. In the Commission's view, that omission may be made good by having available, when the comparative examination of the merits of the various officials eligible for promotion is carried out, all other relevant items of information. The defendant states that in the present case the Promotion Committees and the appointing authority had available to them, in particular, a complete list of the publications and the internal notes and reports prepared by Mr Gratreau since 1972 and a proposal for his promotion from his Directorate-General which spoke especially highly of him.

My first observation in this regard is that that argument does not appear to me to take full account of practice. The analytical assessment in the periodic reports has the merit of simplicity. Further, it would not surprise me if, as was stated — without contradiction — by Counsel for the applicant at the hearing, an official with an "average" assessment for ability and efficiency had no prospect of promotion, whatever might be the content of the documents made available to the committees and *a fortiori* to the appointing authority.

In this context, the Conseil d'État of Belgium was called upon to decide a similar case involving a candidate who had brought a complaint against his having been given the classification "good". However, a decision on that complaint had not been delivered at the time of the comparative examination of the merits of the officials eligible for promotion. The Belgian court found that, since all the other candidates had been classified as "very good", the application by the disappointed candidate had been neither considered nor, consequently, proposed for one of the vacant posts and, on those grounds, it declared the promotion thus effected to be void (Conseil d'État, 26 September 1973, Arrêts et Avis du Conseil d'État 1973, p. 719).

In regard, secondly, to the applicant's publications, it is one thing to be able to look at the list in his personal file, which appears to be the most that might be expected of the Promotion Committees, but it is another matter to take them into account for the periodic report, which would normally assume an assessment of their quality through a perusal of them, even a rapid one.

Above all, this argument raises the issue of the effect of the periodic report on promotion.

II — Does the irregularity in the compilation of Mr Gratreau's periodic reports entail the irregularity of the promotion for which he was a candidate?

In other words, does observance of Article 45 of the Staff Regulations, which relates to promotion, assume observance of Article 43, which relates to periodic reports?

As the Court is aware, Article 45, so far as relevant for present purposes, is worded thus: "Promotion shall be exclusively by selection from among officials ... after consideration of the comparative merits of the officials eligible for promotion and of the reports on them".

One point is settled. It appears clearly from the judgments of the Court of 19 March 1964 in Case 27/63 *Raponi* v *Commission of the EEC* [1964] ECR 129 (at p. 136 "Article 43, to which Article 45 refers indirectly") and the judgments of the Second Chamber of 9 June 1964 in Joined Cases 94 and 96/63 *Bernusset* v *Commission of the EEC* [1964] ECR 297 and of the First Chamber of 7 July 1964 in Case 97/63 *De Pascale* v *Commission of the EEC* [1964] ECR 515 (p. 306 and pp. 526 to 527, "Article 43, to which Article 45 refers by implication") that the reports referred to in Article 45 are those mentioned in Article 43.

(a) The answer given to the precise question which I pose by the case-law of this Court was initially, and over a fairly long period thereafter, conclusively an affirmative one (the full Court in the aforementioned judgment in the case of *Raponi* [1964] ECR 129, in harmony with the opinion of Mr Advocate General Roemer especially at pp. 147 and 148; the Second Chamber in the aforementioned judgment in the case of *Bernusset* [1964] ECR 297, in harmony with the opinion of Mr Advocate General Roemer, especially at pp. 316 and 317; the First Chamber in the aforementioned judgment in the case of *De Pascale* [1964] ECR 515, in harmony with the opinion of Mr Advocate General Roemer at p. 531; the judgment of the First Chamber of 19 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099, in harmony with the opinion of Mr Advocate General Warner, especially at pp. 1117 and 1118; and the judgment of the First Chamber of 23 January 1975 in Case 29/74 *de Dapper* v *Parliament* [1975] ECR 35, in harmony with the opinion of Mr Advocate General Warner, especially at pp. 44 and 45).

I should like to cite as particularly significant in this respect the following extract from two of the 1964 judgments: "The application of this provision [Article 45] pre-supposes that reports have been made on the ability, efficiency and conduct in the service of officials, these reports being one of the factors in the consideration of the comparative merits of the officials eligible for promotion" *(Bernusset* [1964] ECR at pp. 306 and 307 and *De Pascale* [1964] ECR at p. 527 substantially to the like effect). In answer to the Commission's argument in the *de Dapper* case to the effect that Article 45 did not require account to be taken of reports covering any particular period (it is to be observed that in the present case the defendant's argument goes further since it is to the effect that, in certain circumstances, Article 45 does not require any account to be taken of periodic periods), Mr Advocate General Warner stated: "It seems to me, my Lords, that that submission has only to be stated to be rejected. Article 43 requires the reports to be 'made at least every two years' and Article 45 requires the reports so made to be taken into consideration" ([1975] ECR at p. 45).

(b) The succeeding case, Case 62/75 *de Wind* v *Commission* [1976] ECR 1167, a

judgment of the First Chamber of 1 July 1976, marks the start of a new period in which, in order to understand the changing direction of the Court's decisions, it appears to me to be necessary to dwell on each of the cases which have been before the Court.

Admittedly, it appears from paragraph 17 of the Decision (p. 1176) in the judgment in *de Wind* that periodic reports are always a factor which it is mandatory to take into account for promotion but the opinion of Mr Advocate General Reischl heralds the case-law which is to come. When the applicant accused the Commission of having failed to consider the periodic reports, Mr Reischl was content to rely upon all the documents available to the Promotion Committee and the appointing authority and the fact that, when it came to be checked by the Commission, further names were added to the list suggested by the Committee, in order to reach the conclusion that there was no ground for believing that Article 45 had been disregarded (p. 1183).

The first judgment in which the Court declined to annul a promotion notwithstanding the absence of a periodic report on an official eligible for promotion is the judgment given by the First Chamber on 11 May 1978 in Case 25/77 *De Roubaix* v *Commission* [1978] ECR 1081. That judgment was given following an opinion to the same effect by Mr Advocate General Warner who thus went back on the position which he had adopted in the *Grassi* and *de Dapper* cases. Mr Advocate General Warner relied on certain judgments of this Court in terms of which "an official cannot, in challenging the validity of an administrative decision, rely on an irregularity in the procedure leading to that decision, unless he can show that, but for that irregularity, he might have been in a better position" (pp. 1095 and 1096).

That reasoning was adopted by the First Chamber which held that the applicant had not shown in what way the absence of her latest periodic report could have been prejudicial to her, since it could not have added anything to the excellent assessments made in the earlier reports (paragraph 22 of the decision, p. 1090). It is clear that that reasoning cannot be adopted in the case of Mr Gratreau, who requested precisely that the assessments in his reports be improved and who complains that those alterations were not duly effected in proper time.

The next stage of this trend of case-law is marked by the judgment of the First Chamber of 12 October 1978 in Case 86/77 *Ditterich* v *Commission* [1978] ECR 1855. That judgment holds that, having regard to the procedure selected and all the information available to the various promotion committees, "the fact relied on by the applicant, namely that his personal file was incomplete in that it did not contain the periodic reports relating to the periods 1971 to 1973 and 1973 to 1975, cannot be held to support a finding that the promotion list in question was irregular in relation to Article 45 of the Staff Regulations" (paragraph 18 of the decision at p. 1864).

Finally, the latest judgment dealing with promotion, that delivered by the first Chamber on 5 June 1980 in Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743 may be distinguished from the two

preceding judgments by the fact that the Court (First Chamber) considered that the promotion procedure was irregular. It added, however, that the absence of a periodic report did not in itself suffice to reach that conclusion. From paragraphs 10 and 11 of the decision in that judgment, it appears that the absence of a periodic report may be compensated for by other factors capable of informing the Promotion Committee and the appointing authority of the merits of the official involved where circumstances are such that the official is not in fact in a worse position than the other officials eligible for promotion. In such a case the requirements of Article 45 are, it appears, satisfied.

Admittedly, that judgment also recognizes (paragraph 8) the great value which should be accorded to periodic reports and their influence on promotion. But it appears to me that in the conclusion to the effect that the absence of a periodic report may be compensated for in certain circumstances the reasoning embarked upon has not been wholly thought through.

No doubt the First Chamber was influenced by the solution adopted in the *Ditterich* judgment; the *Oberthür* judgment thus appears to me to amount to a compromise between the case-law which culminated in the *de Dapper* judgment and the subsequent judgments.

(c) The legal reasoning which led Mr Advocate General Warner to alter his views in the *De Roubaix* case and the Court to adopt that solution does not appear to me to take into account one factor which I consider to be decisive. In my view, there is an essential difference between the cases which were the subject of the precedents cited by Mr Advocate General Warner and the topic of promotion. Promotion is governed by a provision which clearly and precisely requires consideration of periodic reports. The wording of Article 45 is that promotion should be effected "after consideration of the comparative merits of the officials eligible for promotion and of the reports on them" and not "and of the reports on them, or in their absence, any evidence capable of replacing them".

It is impossible to see why that provision, which expresses the intention of the authors of the Staff Regulations, should yield before a principle of case-law which was laid down, moreover, in the neighbouring but distinct field of staff competitions (see the authorities cited by Mr Advocate General Warner in his opinion in the *De Roubaix* case [1975] ECR at p. 1096). It appears to me that by erasing, as it were, from the text of Article 45 the condition that account should be taken of periodic reports, that article is given an import which is in contradiction to the very meaning of its terms.

With Mr Advocate General Dutheillet de Lamothe (opinion in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7 at pp. 21 and 22), I consider that Article 43 of the Staff Regulations constitutes a guarantee which is essential if officials' careers are to follow a regular course.

The reference in Article 45 to Article 43 is rendered void of content and Article

43 is in danger of becoming pointless if it is accepted that other items of information may come to compensate for the absence of periodic reports. Moreover, it would not only be in Article 45 that the reference to the periodic report would be in danger of becoming a dead letter, but also the General Provisions for Implementing Promotion Procedures which repeat its terms. Such is the case with Article 4 of the Provisions concerning Staff paid from Research Appropriations.

Finally, there would be some contradiction between so putting part of Article 45 "in parentheses" and the effort made by the institutions, in particular the Commission, to enhance the value of periodic reports. Thus, in his introduction to the Guide to Staff Reports for one of the periods with which we are concerned, that of 1 July 1973 to 30 June 1975, the member of the Commission then responsible for staff matters, Mr Borschette, emphasized the need for scrupulous observance of the instructions set out in the guide to Staff Reports. Thus also, after the amendment of 27 July 1979, the reporting officer must make his report and transmit it to the official under assessment before the 30 November following the reference period (Article 6 of the General Provisions for Implementing Article 43, as revised). Looking beyond the precise context of the Gratreau case, enhancing the value of Article 45 goes along with the defendant's own deeply and properly held wishes.

(d) However, the absence of, or any irregularity in, any periodic report on an official eligible for promotion cannot lead automatically, I would even say blindly, to the annulment of the promotion procedure for which it was not possible to take that report into consideration. To accept such an automatic result would, in my view, amount to depriving the Court of the discretion which its task entails. I have in mind two cases in which an irregularity in a periodic report ought not to be visited with any adverse consequences.

It seems to me, first, that, applying the principle of good faith or, if one wishes, the common law rule of estoppel, such an absence or irregularity may not be relied upon where it is due to the fault or negligence of the official under assessment. Nor do I think that a promotion procedure may be vitiated by the absence or irregularity of a report which covers a period too far back in time to be able to have any influence on that procedure.

However, in the applicant's case, I consider that the irregular filing of his periodic report for 1973 to 1975 and the complete absence of his report for 1975 to 1977 render irregular the promotion procedure in which he took part.

III — What consequences must follow from that finding of irregularity?

In its judgment in the *Oberthür* case the Court (First Chamber) considered "that annulment of the promotions of the 40 officials who have in fact been promoted to Grade B 2 would constitute an excessive penalty for the irregularity committed and it would be arbitrary to annul the promotion of the only official

from Directorate-General VII who was in fact promoted to Grade B 2" (paragraph 13). Having regard to the fact that "the applicant will be able to take part in the next promotion procedure, which the Commission will take care to conduct in accordance with the rules", the Court (First Chamber) ordered the defendant insitution to pay to the applicant the sum of BFR 20 000 (paragraph 15).

As I said in my opinion in the Oberthür case, I, for my part, consider that an award of damages is not the appropriate remedy to attach by way of sanction to irregularities committed in a promotion procedure.

It is not so from a juridical point of view. It also appears to me to be somewhat cavalier to award damages to an applicant who does not seek them whilst yet refusing to declare void — which is what he is claiming — a promotion procedure the irregularity of which has been recognized.

It may be observed in this regard that the Italian Consiglio di Stato and the Belgian Conseil d'État have power to annul acts concerning the promotion of one or more officials and commonly do so in cases including those close to the present case (Conseil d'État Belge, 26 September 1973, Arrêts et Avis du Conseil d'État, p. 719; Consiglio di Stato, Sez. IV, 15 January 1960, No 14, Rass. Cons. Stato 1960, I, p. 30) but they do not, on the other hand, have jurisdiction to entertain applications for compensation founded on a wrongful act or omission on the part of the authority.

As for the French administrative courts, which are called upon in both actions for compensation and in actions for annulment to attach sanctions to the illegality of promotions effected on the basis of a promotion table drawn up following an irregular procedure (for a case approximating to the present case see the judgment of the French Conseil d'État of 12 June 1970 in *de Malafosse, Serre et Demoiselle Lainé*, Rec. Lebon, p. 397), in a choice between these two types of action and the solutions resulting therefrom, they are bound by the plaintiff's conclusions. If hearing a claim of *ultra vires* which it considers well-founded, the only decision which the court may give is one of annulment; in disputes concerned with liability to pay compensation it may only order the administration to pay damages (Auby and Drago, Traité de Contentieux Administratif, 1975, Nos 1222 and 1278).

The award of damages does not appear to me to be any more justified as a matter of expedience. "It is not all necessarily a question of money and the best means of improving the conduct of administrative procedures is not to quantify the damages" (Opinion in the *Oberthür* case). I do not think that making a Community institution liable to pay a sum of money to one of its officials is truly in the nature of a deterrent. Moreover, I believe that — as Mr Advocate General Warner considered in his opinion in the *De Roubaix* case ([1978] ECR at p. 1095) — if, in some cases, an applicant challenging a promotion does not ask for damages it is "very possibly because he feels hurt not so much financially as in his pride".

IV — It is true that, as the most recent decisions show, it is above all fear for the consequences of annulment which has led the Court to abstain from annulment and to replace it with an award of damages, but, at a practical level, those consequences appear to me to be far from insurmountable.

(a) First, in this case there are, as I see it, only a small number of persons affected by the annulment of the lists in dispute. The first list which the applicant asks the Court to declare void, that of officials in Category A remunerated out of research appropriations judged to be the most deserving of promotion to Grade A 4, for the financial year 1978, contains a total of 15 names of which five come within the indirect actions. The second list which is the subject of the applicant's conclusions, that of officials promoted to Grade A 4 for the financial year 1978, contains 14 names of which four are for the indirect actions.

I consider that it would be possible to distinguish with propriety between the officials who form part of the Joint Research Centre and those who, like the applicant, do not. In the first place, the latter in fact benefited from a promotion quota independent of that of the Joint Research Centre (see the minutes of the Instance Zero). In the second place, they were the subject of a special Instance Zero and a special Promotion Committee of First Instance. Thirdly, the Promotion Committee of Second Instance considered their case separately from that of the staff of the Joint Research Centre. Finally, the Commission decisions of 9 November 1978 (list of officials judged to be the most deserving of promotion) and of 20 December 1978 (decision on promotions in the scientific and technical field for the 1978 financial year) concern only staff not belonging to the Centre.

No doubt it would have been better if the applicant had directed his complaint, and thereafter his action, against the decisions which I have just mentioned. However, I do not consider that this may be held against him. It is no doubt because he did not know of them that he did not impugn those decisions.

(b) On the other hand, the consequences of the annulment which I shall propose do not apparently constitute an insurmountable difficulty for the legal systems in which solutions of this kind are known (see the Belgian Conseil d'État, for example, in its decisions of 22 October 1973, Pasicrisie 1974, 1, p. 196, and of 4 November 1977, Arrêts et Avis du Conseil d'État, 1977, p. 1202; the Italian Consiglio di Stato in its decision of 23 February 1979 (IV Sezione), No 113, Rassegna Cons. Stato, 1979, 1, p. 153; and the French Conseil d'État in, for example, its decisions of 26 December 1925, *Rodière*, Rec. Lebon, p. 1065, and of 5 June 1970, *Puisoye*, Actualité Jur. 1970, II, p. 505).

Although it is plain that the annulment of the aforementioned promotions for the 1978 financial year carries with it the annulment of promotions which have taken place subsequently in so far as they have been arrived at as a result of the irregularity vitiating the promotion in dispute (which might be described, as it is by Italian lawyers, "derived invalidity"), it is also clear that the declaration of nullity which I propose has, apart from the quashing of the acts in dispute, no other legal effect than that

of preventing a fresh act having identical scope from being arrived at in the same manner. Such a judgment does not prevent the appropriate bodies from adopting the same measure in a different and lawful manner.

In addition, the career reconstruction system which was fully explained by the French Conseil d'État in 1925 in its leading judgment in the *Rodière* case constitutes, in my opinion, a good way of resolving the consequences, both for the applicant and the other officials concerned, of such a declaration of nullity. It is based on "l'idée que tout fonctionnaire a droit au développement normal de sa carrière et qu'une mesure ultérieurement annulé ne doit pas compromettre ce droit" [the idea that every official is entitled to have his career progress normally and that a measure subsequently annulled must not jeopardize that right] (Long, Weil and Braibant, Les Grands Arrêts de la Jurisprudence Administrative, 6th edition, 1974, p. 189).

In the present case, it will be for the Commission to undertake anew the promotion procedure for scientific officials remunerated out of research appropriations assigned to indirect actions and eligible for promotion to Grade A 4 for 1978. The defendant will see to it that the revised report on appeal for 1973 to 1975 will be prepared in accordance with the conditions prescribed by the Guide to Staff Reports then in force, since that report was improperly filed instead of being submitted to the appeal assessor. Due account will also have to be taken of the 1975 to 1977 report to which it was not possible to have regard at the appropriate time.

V — It remains for me to state my opinion on the second action brought by Mr Gratreau, which was registered as Case 51/80.

That action is directed against the express rejection of his complaint. I may state at the outset that to my mind the action is manifestly inadmissible. As the applicant himself admits, the rejection decision does not add any new factors to the discussion of either the substance or matters of form. A purely confirmatory act is thus involved, just as in other similar cases (judgment of 14 April 1970 in Case 24/69 *Nebe* v *Commission*, [1970] ECR 145 at paragraph 8 of the decision; judgment of 7 July 1971 in Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689 at paragraph 20 of the decision and the judgment of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677 at paragraph 9 of the decision). Proof of this may be furnished by noting that the only submission made against the original decision is also that made against the express decision of rejection.

It is true that the originating application in Case 51/80 contains a further submission based on the Commission's disregard of the period within which the appointing authority must reply to a complaint which, as the applicant has stressed, was a matter of public policy and binding on the institutions as well as their officials. Admittedly, as the Court observed in its aforementioned judgment in the *Kuhner* case, the Commission's practice is deplorable, but I do not think that, as a strict matter of law, the absence of a reply affects officials

adversely. On the expiry of the period of four months laid down by Article 90 (2), officials know that the administration's failure to reply is equivalent to an implied rejection of their complaint and that that rejection is deemed to be based on the same grounds as the original decision.

An appeal brought against the express decision rejecting a complaint could only be admissible, in my view, subject to a twofold condition: the original decision must have been substantially amended by the express decision (see judgment of 9 March 1978 in Case 54/77 *Herpels* v *Commission* [1978] ECR 585 at paragraphs 9 to 15 of the decision) and the express decision must have been intimated *after* the expiry of the period for making an application to the Court, which began to run from the date of the implied decision since, "where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired, the period for lodging the appeal shall start to run afresh" (Article 91 (3) *in fine).* In my view, and as the *Herpels* case illustrates, the amendment capable of rendering a fresh action admissible can only be the according to the applicant of some, necessarily partial, satisfaction of his request, which he nevertheless still considers unacceptable.

For all these reasons I conclude by suggesting that the aforementioned Commission decisions of 9 November and 20 December 1978 be annulled and that, pursuant to Article 69 (2) of the Rules of Procedure, the Commission be found liable for the costs.