OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 16 MARCH 1978 [1]

Mr President,
Members of the Court,

I — Introduction

The present dispute concerns the appointment of the head of Division C 3, the Technical Aspects of Transport and Traffic Division, by a promotion made by decision of the Commission itself as the appointing authority.

It is to the point briefly to recall the organization of the Directorate General for Transport (which I shall refer to as DG VII). It is divided into three directorates.

The task of the first is to implement the common transport policy referred to in Article 74 *et seq.* of the EEC Treaty and to co-ordinate this policy with the other common policies.

The second is required to organize the market in transport by land, sea and air.

The duties of the third directorate cover everything relating to the finance of transport, to its infrastructure and the general technical problems of its organization.

This latter directorate, known as Directorate C, contains four divisions:

1. Infrastructure and equipment;
2. Infrastructure charging;
3. Technical aspects of transport and traffic;
4. State intervention.

The present case concerns the post of Head of Division C 3. When that post fell vacant in 1976 a vacancy notice (COM 643/76) was published on 4 October 1976.

The said notice set out the nature of the duties of the post as follows:

"To head the administrative unit dealing with the technical aspects of transport and traffic"

and notably to be responsible for the following tasks:

— "harmonization and standardization of transport equipment;
— transport of dangerous substances;
— transport of nuclear materials;
— technical characteristics of transport equipment;
— transport and industrial policy;
— research and development of transort;
— traffic and traffic safety."

It was finally stated that the head of Division C 3 must also "provide the Director General with technical advice on the needs of other departments" of DG VII. It may be said that the head of division was required, throughout the entire field under his control, to be the technical adviser to the Director General.

This is confirmed by the memorandum dated 6 December 1976, drawn up by the Director General concerning the merits of the candidates for the relevant post from which the following points are to be singled out:

"C 3 is the division in which is concentrated the essential experience and knowledge of technical engineering of DG VII. The head of division is required to advise on technical aspects according to the needs of all the services of the Directorate General and furthermore on points expressly concerning the duties of his division.

1 — Translated from the French

Some of the points directly concerning the duties of Division C 3 evince a considerable degree of administrative complexity and extreme political delicacy . . . for example:

— the weight and dimensions of commercial vehicles,

— the Community driving licence, suitability for acquiring it,

— the transport of dangerous substances."

The memorandum later states that the two chief qualities required to perform the duties of head of division are:

"(a) to be a trustworthy representative, enjoying respect in professional circles, of the Commission in contacts with the senior officials in the technical and professional fields heading the relevant transport departments in government ministries, commerce and industry, with whom the major part of the work is carried out. This means that such persons must recognize and respect the engineering ability of the head of division in question: his level of professional skill in this sphere must render him clearly worthy of their confidence and respect;

(b) to render technical and professional problems immediately comprehensible to the general administration and the Commission and to set out in appropriate technical terms guidelines developed from more general principles or from policies.

Such, then, are the tasks assigned to and the qualities required of the head of the division in question.

Let us now consider the terms in which the vacancy notice set out the qualifications required for the post in Grade A 3

1. University education, with degree or diploma, in civil, mechanical or electrical engineering, or equivalent practical experience;

2. Knowledge of international transport organizations and of the common transport policy;

3. Thorough knowledge of technical transport problems;

4. Ability to direct a large administrative unit;

5. Proven experience relevant to the post;

6. A thorough knowledge of one Community language and a satisfactory knowledge of one other Community language.

In order to fill the vacant post the competent institution had a number of procedures from which it could choose. It could hold a competition, internal or open, the latter being a competition for which candidates from outside are also eligible; it could also, under the conditions provided for in Article 45 (1) of the Staff Regulations, make a promotion which is effected by appointing an official to the next higher grade in the category or service to which he belongs. Such a promotion may only be effected by the appointing authority, in this case, the Commission. It "shall be exclusively by selection from officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them". To clarify this latter expression it should be stated that it refers to the periodical report mentioned in Article 43 of the Staff Regulations concerning the ability, efficiency and conduct in the service of each official, with the exception of those in Grades A 1 and A 2.

II — Selection procedure followed

Before the Commission, the appointing authority in respect of a post in Grade A 3, came to a decision, as we shall see later, a preliminary test was organized for the 14 applicants amongst whom were in particular Mr Thomas Mulcahy, the applicant, and Mr L, who was appointed by the Commission.

First of all each of the candidates was interviewed by a group of senior officials from DG VII: Mr Le Goy, the Director General, Mr Wissels, the Deputy Director General, and Mr Dousset, the Director of Directorate C. At this initial stage it was intended to appraise each candidate's suitability to perform the duties of head of division from the point of view of his abilities as an administrator, organizer and representative with qualifications in respect of transport policy. Moreover, this initial interview was intended to check each of the candidates' abilities as an engineer.

However, since DG VII had no professional engineer, it was necessary to call in a group of three officials, from other directorates who were engineers and this group met on 30 November 1976 in the presence of Mr Dousset.

What results did this preliminary procedure produce — or fail to produce?

We are informed on these points by the memorandum dated 6 December 1976 which Mr Le Goy, the Director General, addressed to the Vice President of the Commission with particular responsibility for transport, Mr Scarascia Mugnozza.

As regards the general fitness of the candidates, seven of them, including the applicant, were considered to possess *some* of the necessary attributes for the vacant post; as regards the remaining seven, including Mr L, the group of senior officials from DG VII considered that these were less well qualified.

The candidates were classified in respect of their special ability as engineers in the following three categories:

(1) Qualified engineers who could be further considered;

(2) Qualified engineers who could not be accepted;

(3) Candidates who, since they were not qualified engineers, could not be taken into consideration.

The applicant was in the first group. However, three observations must first of all be made.

(a) The specialist group of engineers was solely required — and indeed was only able — to appraise the qualifications of the candidates on the basis of their degrees or diplomas in civil, mechanical or electrical engineering (to adopt the wording of the vacancy notice).

(b) This group has neither the power nor the means to appraise the criterion of equivalent practical experience. Still less could it appraise the other qualifications laid down in the vacancy notice, particularly that which I consider the most important, namely the ability to head a large administrative unit.

(c) Finally, it is of prime importance to note that, even with regard to the three candidates who were qualified engineers and "suitable for further consideration", the specialist group made express reservations to the effect that each of the candidates fell far short of the requirements of the post be filled.

In any event the whole of this initial selection procedure scarcely permitted positive conclusions to be drawn, and, let me say at once, could in no way bind the appointing authority.

Furthermore the Director General, reporting on the said procedure of the Commission, considered that no

candidate could be considered "particularly well qualified and capable of meeting the requirements of the post".

This is why he suggested that internal and external competitions should be held for the vacant post.

The Commission at its meeting of 20 December 1976 decided to adopt the solution, which it had originally considered, of promotion, in accordance with the first subparagraph of Article 29 (1) of the Staff Regulations.

Minutes of this meeting were taken and are on the file. In order to deal with the submissions put forward by the applicant we must consider whether the conditions under which the institution, on the joint suggestion of Mr Ortoli, the President in office, and Mr Scarascia Mugnozza, finally decided to appoint Mr L to the vacant post meet both the requirements of the relevant provisions of the Staff Regulations and the interpretation placed upon them by the decisions of the Court.

When the candidate accepted was appointed and promoted to Grade A 3 with effect from 1 January 1977 Mr Mulcahy, on 10 February 1977, submitted a complaint in accordance with Article 90 of the Staff Regulations asking for the revocation of the appointment of Mr L as Head of Division C 3 of DG VII.

Since the Commission did not reply to this complaint for over four months the applicant instituted the present court proceedings by an application, made within the prescribed period, for the annulment of the appointment made by the defendant institution.

III — Consideration

Before I consider the submissions put forward by the applicant it appears to me essential to recall how far the Court can review the promotion of officials of the institutions to a higher grade and of the duties in this sphere of the appointing authority.

First, the purpose of the vacancy notice is to give those interested the most precise and accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it (judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council*, [1974] ECR 1099 at p. 1112).

On the other hand it is stated in that judgment that, though the appointing authority has a wide discretion in comparing the candidates' merits and reports and must exercise that discretion in making the appointment to the post to be filled, the authority must exercise it within the self-imposed limits contained in the vacancy notice.

In this context it is in particular for the competent administrative authority to decide, subject to review by the Court, the *special nature of the qualifications* necessary to fill a post (judgment of 29 October 1975 in Joined Cases 81 to 88/74, *Marenco and Others* v *Commission*, [1975] ECR 1247 at p. 1257).

It is further for that authority to evaluate *at its discretion* the capacity of candidates to carry out given duties. It is for the Court to review the ways and means which have led to this evaluation (judgment of 19 July 1955 in Case 1/55 *Kergall* v *Common Assembly of the ECSC*, Rec. 1955-56, at p. 29 and the judgment of 12 December 1956 in Case 10/55 *Mirossevitch* v *High Authority*, Rec. 1955-56, at p. 387). In this connexion reference may also be made to the judgment of 27 June 1973 in Case 35/72 *Kley* v *Commission* [1973] ECR 679, at p. 690.

Finally, it is important to note that the Court cannot review the merits of an assessment of the professional skills shown by an official where this assessment includes complex value-judgments (judgment of 5 December

1963 in Joined Cases 35/62 and 16/63 *Leroy* v *High Authority* [1963] ECR 197, at p. 206).

On the basis of these cases I for my part consider that whilst the appointing authority is bound by the terms of the vacancy notice which it has itself adopted, the Court cannot substitute its own appraisal for that of the competent appointing authority: the function of the Court is furthermore restricted to the review of the regularity of the promotion procedure, of the correctness of the facts upon which the administrative authority has acted and finally the existence of any misuse of powers.

After these preliminary observations I can now go into the discussion of the submissions put forward by the applicant in support of his claims for the annulment of the appointment of Mr L to the post in question.

The first of these submissions is based on infringement of the actual wording of the vacancy notice in that this notice laid down amongst the qualifications required a degree or diploma in civil, mechanical or electrical engineering or equivalent practical experience.

It is not disputed that the applicant held such a degree whilst Mr L who was preferred by the Commission and who held a degree in economics and commerce from the University of Genoa could not claim to hold an engineering degree.

The problem thus comes down to considering whether Mr L had acquired through his work experience equivalent to that of an engineer so that he was capable of dealing with questions of a specifically technical nature relating to engineering aspects of transport as was required by the nature of the duties of head of Division C 3 and of providing at this level all appropriate advice for the various services in DG VII.

In this connexion I shall not be long in considering the grounds of the judgment in Joined Cases 18 and 19/64 *Alvino* v *Commission* [1965] ECR 789 *et seq.)* which are based upon facts differing from those in the present case. However, I should like to point out that the appraisal of practical experience equivalent to a specific university degree is a matter for the appointing authority.

What does the defendant have to say to the Court in this connexion? Mr L has been employed in DG VII since 1962. He has had a number of posts and his experience covers most of the duties of that Directorate General. In particular he worked from 1 July 1973 to 1 June 1975 in Division C 3 and he acted as director on a temporary basis during the frequent and prolonged absences of the head of division. Whilst it is true that the performance of duties on a provisional basis does not confer any right to be appointed to the post in question it may be a factor to be borne in mind in connexion with promotion (judgment of 19 March 1975 in Case 189/73 *Van Reenen* v *Commission* [1975] ECR 445).

The principal spheres in which Mr L worked for this period in fact were those covering the most technical aspects of the duties of Division C 3. I suggest that the Court should in this connexion have regard to the staff report drawn up on 18 December 1975 by Mr Dousset and annexed to the defence.

The practical experience acquired by Mr L in those various spheres was considered by the Commission to be equivalent to the expertise which goes with a degree in engineering. The facts upon which this appraisal is based are not materially inaccurate; there seems to be no manifest error; it has not even been alleged that there has been a misuse of powers.

I accordingly consider that the submission based upon infringement of the vacancy notice is not well founded,

above all since, as we shall see, the Commission in fact considered the comparative merits of each of the 14 candidates who applied in relation to the particular requirements of the post to be filled, taking into consideration the personal files and staff reports of candidates and the opinions of their immediate superiors as required by the decision of the Court of Justice of 7 July 1964 (Case 97/63 *de Pascale* v *Commission* [1964] ECR 515).

No irregularity can be established in the procedure followed by the Commission whose appraisal is, as I have stated, to a large extent a matter for its discretion.

With regard to the submission based *on the one hand* on the infringement of Article 7 (1) of the Staff Regulations in pursuance of which the appointing authority shall, acting *solely in the interests of the service...*, assign each official by appointment or transfer to a post in his category or service and *on the other* the infringement of Article 27, it appears to me that they are irrelevant to the issue since the appointment in question was effected by promotion on the sole basis of Articles 29 and 45 of the Staff Regulations.

In this context I have already stated that the Commission was fully at liberty to select in accordance with Article 29 the means of promotion in order to fill the vacant post without being bound in this respect by the proposals of the Director General of DG VII who suggested holding a competition. In this connexion I suggest that the Court should follow the judgment of 5 December 1974 (Case 176/73 *Van Belle* v *Council* [1974] ECR 1361 at p. 1370).

Furthermore the implementation of Article 45 requires no other measure than that provided for in Article 43, to which Article 45 by implication refers, that is to say consulting and comparing the candidates' periodical reports. In this connexion reference should be made in particular to the judgments of 19 March 1964 (Case 27/63 *Raponi* v *Commission* [1964] ECR 129 at p. 139) and of 9 June 1964 (Joined Cases 94 and 96/63 *Bernusset* v *Commission* [1964] ECR 297 at pp. 308 and 309).

I have already stated that the Commission made its choice on the basis of comparison of the personal files, and in particular of the staff reports, of the candidates. The applicant is accordingly not justified in maintaining that the Commission committed a manifest error by failing to carry out a due examination of the respective merits of himself and Mr L. This submission cannot therefore be upheld.

It remains for me to give my views on the last submission based on the alleged infringement of Article 3 of the Staff Regulations of officials which reads: "The instrument appointing an official shall state the date on which the appointment takes effect; this date shall not be prior to the date on which the official takes up his duties".

The applicant maintains that the Commission failed to observe the requirement laid down in the second subparagraph of Article 45 (1). This is that officials shall have completed a minimum period in their grade before becoming eligible for promotion to the next higher grade; for officials appointed to the starting grade in their service or category and only for them this period shall be six months; for other officials it shall be two years.

First of all it is to be observed that there is no necessary correlation between the provisions of Article 3 which refers to first appointments to a given post and those of Article 45 (1) which deals with promotions.

The applicant maintains that Mr L had only taken up his duties in Grade A 4 on 20 November 1974. Consequently his proposed promotion to a post in Grade A 3, which was brought to the attention of the staff by the vacancy notice of 4 October 1976, must be

considered as null since at that date the person concerned had not actually completed two years in Grade A 4.

It appears to me that this is at once a confusion of thought and a quibble.

First of all the submission appears to me unfounded in fact because the date to be taken into consideration in assessing the minimum period which Mr L had completed in Grade A 4 is not the date of the vacancy notice but the date of his promotion which was only decided at the earliest by the decision of the Commission dated 20 December 1976,

Thus, even supposing that Mr L had only attained Grade 4 on 20 November 1974 he could then point to two years in this grade at the time of his promotion.

That is not all; the person concerned was appointed to Grade A 4 with retroactive effect from 1 January by a decision of 2 December 1974.

Since retroactive *promotion* is not expressly prohibited by the Staff Regulations such promotion is in accordance with the practice generally followed with regard at any rate to promotions within the same career bracket.

The Commission tells us that this practice is to be explained by the fact that, whilst the appropriations necessary for such promotions are in principle available at the beginning of each financial year, their exact amount is only known during the course of the year. It is thus usual that, when the appointing authority makes the promotions in the course of the year which are permitted by the appropriations in the budget, it lays down at the same time that the date when such promotions shall take effect is 1 January of the financial year.

Since this practice is applied without discrimination to all officials eligible for promotion and in fact promoted in the course of the year the principle of equality of treatment has thus been observed.

The submission must thus be rejected.

I am therefore of the opinion that the application should be dismissed and that the parties should bear their own costs.