Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 7 (2), 25, 29 and 45, and Article 1 of Annex III;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 JUNE 1970[1]

Mr President,
Members of the Court,

The case before us today concerns the right to the differential allowance provided for under Article 7 of the Staff Regulations of Officials and the legality of a promotion decision. The following observations must be made regarding the facts of the case.
The applicant entered the service of the European Atomic Energy Community on 8 February 1960 and since 25 March 1962 has occupied the post of second secretary (classified in Grade C2) in the secretariat of the directorate for 'administration and individual rights' of the Directorate-General for Personnel and Aministration. In the same directorate a post of executive secretary (in Grade C1) became vacant on 18 November 1968. The occupant of this post (of Italian nationality), who had been on holiday since 23 October 1968, obtained

1 — Translated from the French version.

leave on personal grounds, under Article 40 of the Staff Regulations of Officials. It was for this reason that the post was advertised in a vacancy notice in the Staff Courier of 14 November 1968, under reference No COM/450. Applications had to be received before 28 November 1968. The applicant in the present case was one of the candidates for this post. However, it was another candidate (of Italian nationality), who also occupied a post in Grade C2 at the Directorate-General for Personnel and Administration, who was appointed to this post by way of promotion. The decision in question, which took effect from 1 December 1968, was notified to the promoted candidate on 16 January 1969. The applicant was only informed of the outcome of the procedure to fill the post on 23 January 1969. She then learned that it had not been possible to give favourable consideration to her application. However, she did not wish to let the matter rest there. In the meantime, the post to be filled had been transferred on 20 December 1968 to the office of an Italian member of the Commission, with effect from 1 December 1968. The applicant concludes from this that the post filled was not the one opened to competition and that the promotion decision was taken on the basis of duties attaching to a different post. Moreover, she considers that since 23 October 1968 she has performed the duties attaching to the post which was declared vacant. She claims that a knowledge of the French language is quite sufficient in this instance and that the rejection of her application, on the ground that she has no knowledge of Italian, therefore appears to be unjustified. On 16 April 1969, therefore, she submitted a complaint to the Director-General for Personnel and Administration, in accordance with Article 90 of the Staff Regulations of Officials. She sought the annulment of the promotion decision and, in addition, if 23 October 1968 is taken as the reference date, the payment as from 24 January 1969, that is, as from the fourth month of her alleged temporary posting to the post which became vacant, of the differential allowance due under Article 7 of the Staff Regulations of Officials, for having performed on a temporary basis the duties attaching to the post in question. The applicant received no reply to her complaint. It is for this reason that on 4 August 1969 she made an application to the Court of Justice in order to uphold her claim.

Let us therefore consider the applicant's conclusions, which the Commission regards as unjustified.

1. The right to the differential allowance

Under Article 7 of the Staff Regulations of Officials, a differential allowance may only be paid if an official has been called upon to occupy temporarily a post in a career bracket which is higher than his substantive career bracket. In this case, from the fourth month of his temporary posting the official receives a differential allowance equal to the difference 'between the renumeration carried by his substantive grade and step and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracker of his temporary posting'. The applicant considers that in her case these conditions are fulfilled, as in accordance with the instructions of her immediate superior, she has performed the duties of the former exceutive secretary of the directorate for 'administration and individual rights' since 23 October 1968 (when the latter went on leave). According to her provisional calculations, and if 24 January is taken as the reference date, she is therefore entitled to the payment of 25 000 Bfrs. The Commission contests this claim on the basis of different arguments. It points out that the applicant was not called upon by the appointing authority to perform the duties in question. Moreover, the most that might be said is that she performs certain and not all the duties of the previous executive secretary. Further, a change took place in the administrative organization, since with effect from 1 December 1968 the vacant post was transferred to another administrative unit and, therefore, no longer existed at the Directorate-General for Personnel and Administration. In my opinion it is easy to see which of the two points of view put forward in this dispute must be adopted. In my opinion in

Case 24/69, I have already emphasized that in order for Article 7 of the Staff Regulations of Officials to be applicable the official concerned had to be called upon by the appointing authority to occupy temporarily the post in question, and I said that the *de facto* performance of duties attaching to a higher career bracket, even on the instructions of an immediate superior, was not sufficient. I am still of this opinion, as it appears to me to be the only one capable of guaranteeing that the power of organization of the appointing authority is not undermined. As it is indisputable that in this instance the applicant can bring no evidence of such a measure, the right which she claims must be rejected immediately for that reason.

However, if I set aside this principle on the ground, for example, that if an immediate superior entrusts more important duties to an official he is obliged to seek the authority to do so from the appointing authority in accordance with Article 7, and that the failure to perform this obligation and to implement the authoritative provision in question may therefore result in an action for damages being lodged (as the applicant has in fact recalled), I must nevertheless put put forward certain reservations. From what I have learned in the course of the proceedings it appears to be extremely doubtful that all the duties performed by the previous secretary were entrusted to the applicant. This may be deduced from a memorandum which her immediate superior drafted on 9 December 1968 within the context of the promotion procedure and in which he states in relation to the applicant's candidature that, in spite of valuable qualities, her application for the vacant post cannot be given favourable consideration because she has no knowledge of either Italian or shorthand in that language. This is also shown by the applicant's own admission that after the former executive secretary ceased to perform her duties a certain numer of temporary secretaries were appointed to work with her, among whom one at least had a thorough knowledge of Italian. We may therefore suppose that at least a part of the work previously carried out by the executive secretary was entrusted to other people.

However, the fact which finally excludes recourse to Article 7 of the Staff Regulations of Officials, by way also of an action for damages, is that, by a decision taken by the appointing authority on 20 December 1968, the post which became vacant was transferred to another aministrative unit, namely the office of an Italian member of the Commission. The Commission states that, in exchange, the Directorate for 'administration and individual rights' obtained from that office a post in Grade B3. This therefore resulted in a substantial alteration of the administrative organization and on this ground at least I am able to say that it was not possible to make an objective application of Article 7 of the Staff Regulations of Officials as from the date chosen by the applicant as the reference date, namely 24 January 1969.

I must therefore find that the applicant is not entitled to claim the award of the differential allowance, first, because there was no performance of duties in a higher career bracket, which is an essential requirement of the article in question, and also on the other grounds put forward.

2. The application for the annulment of the promotion decision

As regards the decision to fill by way of promotion a post of executive secretary, which became vacant on 18 November 1968, the Commission explains that it was on the basis of the vacancy notice published on 14 November 1968 that this decision was taken and the applicant's condidature rejected. Under the terms of that vacancy notice the essential requirements for the post were a knowledge of French and Italian shorthand and the ability to type texts in those two languages. The applicant admitted that she did not satisfy these requirements as regards Italian. Moreover, she has not claimed that her colleague who was promoted did not possess the abilities in question. Thus, from this point of view the applicant could raise no objection to the promotion decision.

Her arguments are in fact presented from a different angle. She maintains principally

that a knowledge of the French language (which she possessed) was in fact sufficient for the post in question and that it was unnecessary to lay down other conditions. Her criticisms thus concern the requirements laid down in the vacancy notice. Whether she is still entitled to raise this point in the context of her application against the promotion decision which is based on the vacancy notice, when she has lodged no complaint nor brought any appeal against this decision within the period laid down for this purpose, is a question which need not be settled at the moment. In fact, if we consider the situation in more detail, we see that her criticisms of the vacancy notice are unfounded. The fixing of conditions required for appointment to a post takes place within the context of the supreme power of organization of the appointing authority, which is based on the interests of the service and the exercise of which may only be contested by a submission of misuse of powers. I can see no evidence to establish such a misuse of powers. In fact, even though in practice in the Commission French has become the principal working language, when it becomes necessary to recruit a secretary for a senior official it seems reasonable to attach importance to the fact that she have the same mother tongue (in this instance Italian), not only because in this way it is easier to carry out preliminary work or to draft internal memoranda but also because it is sometimes necessary from a departmental point of view to read texts in a certain official language. I can accept quite easily that this is also true for the director of the directorate for 'administration and individual rights', that is, for an official who deals with people and questions from all the countries of the Community. That he requires his secretary to have a knowledge of Italian and Italian shorthand is certainly not an excessive or abnormal requirement. With this and with the earlier finding that the applicant did not fulfil the conditions laid down, I have considered all the points necessary for an assessment of her application for the annulment of the contested promotion decision. If it is clearly established that she was rightly eliminated when the vacant post was filled, she can have no interest in requesting us to consider whether the other points in the promotion decision are in accordance with the provisions of the Staff Regulations of Officials. However, in order to be complete I shall also consider her other objections. I may be quite brief, in so far as the applicant maintains that no reasons were given for the rejection of her application and alleges that, contrary to the provision in Article 25 of the Staff Regulations of Officials, the promotion decision was not at once posted in the premises of her institution. The purpose of the immediate posting of such decisions is to provide information for the other officials concerned, to whom the institution may wish to give the possibility of bringing an action. If, however, the decision is not posted, the legality of the measure in question is not affected. Moreover, as regards the obligation to give reasons for a decision, the Court has already found on several occasions in relation to promotion decisions that reasons need not be given concerning unsuccessful candidates. Thus, these two objections have no relevance to the substance of the application.

In these circumstances, the only remaining submission is that of misuse of powers which the applicant puts forward on the ground that the promotion decision in fact concerned a post other than that declared vacant and was taken on the basis of other requirements. The applicant bases her argument on the view that the transfer of the vacant post to the office of an Italian member of the Commission had been decided before the promotion decision was adopted. I must confess that this was a tenable view, as the promotion decision was only signed on 16 January 1969 while the post had been transferred with effect from 20 December 1968. However, during the proceedings the Commission brought evidence to show that this impression was unjustified. The documents provided by that institution show that with the aid of the various competent departments the promotion procedure came to an end on 20 December 1968 and that the decision of the competent Director-General for Personnel and Administration was taken on that date. The most important point appears to be that the promotion suggestion made by the

Director for 'administration and individual rights', which was adopted by the decision in question, was made after 9 December 1968. We may therefore assume that a decision regarding the occupation of this post was taken before it was transferred to another administrative unit and that it was taken solely in the light of the requirements set out in the vacancy notice.

Moreover, I consider it even unnecessary to settle the last point, that is, the order in which these decisions were taken. In the light of the nature of the post to be filled and the requirements contained in the vacancy notice it is possible to speak simply of the interchangeability of the posts, a principle which was actually applied. Consequently, even though, when it became necessary to fill the post, its transfer to another administrative unit had already been considered, it would not be possible to maintain that the criteria for assessment laid down in the vacancy notice were amended for this reason. In these circumstances, the objection of misuse of powers is also unfounded and it only remains for me to find that the contested promotion decision cannot be annulled on any ground.

3. I must still say a brief word regarding the apportionment of the costs. As the Court is aware, the applicant considers that even if all her applications are dismissed the Commission should be ordered to pay at least a part of the costs which she has incurred during the present proceedings, since having regard to the date on which she received notification of the promotion decision it was possible to believe that it had been adopted after the post in question was transferred to another administrative unit. However, on this point too I cannot follow the applicant. It is impossible to accept that the application for the annulment of the promotion decision was based solely on this point. On the basis of all the arguments put forward by the applicant I must rather consider that she would also have brought her application for annulment even if the chronological order in which these decisions were taken had not caused any problems. In this connexion I shall merely refer again to the objections which she put forward concerning the content of the vacancy notice. Consequently, I can see no reason for applying Article 69 (3) of our Rules of Procedure.

4. In short, it only remains for me to conclude that the application must be dismissed as unfounded, both as regards the right to the payment of a differential allowance and also the application for the annulment of the promotion decision. In accordance with the general provisions of Article 70 of the Rules of Procedure of the Court, both parties shall bear their own costs.