OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 15 June 1989 *

Mr President,
Members of the Court,

1. You have before you today a case which constitutes the third element of a long series of actions which members of the staff of the European Association for Cooperation ('the Association') have brought, mainly against the Commission, and which all relate, in one way or another, to their transfer to the staff of the Commission.

2. Joined Cases 87, 130/77, 22/83 and 9 and 10/84 *Salerno and Others* v *Commission and Council*, concerned the Association's headquarters staff. Joined Cases 66 to 68 and 136 to 140/83 *Hattet and Others* v *Commission*, concerned staff recruited by the Association under special contracts and seconded to the Commission. Case 119/83 *Appelbaum* v *Commission*, constitutes a special instance of the second category of cases.

3. In all the abovementioned cases the Court gave judgment on 11 July 1985 ([1985] ECR 2423, 2459, 2523).

4. In these proceedings, which concern a third category of the Association's staff, namely its overseas staff, 182 members of the Association's staff who performed the duties of delegates, advisers or members of Commission delegations in developing countries, or who performed duties of technical assistance or cooperation in such countries, asked the Court, when they bought the action, to recognize their status as officials, or alternatively as members of the temporary staff, of the Commission with effect from the date on which they were engaged by the Association, which they consider to be a fictitious entity.

5. They also wished, however, to retain the rights they had under the old scheme in so far as those rights should prove more advantageous than the rights arising from the application of the Staff Regulations, which they were claiming.

6. Since the Commission has in the meantime appointed the applicants as officials under Council Regulation No 3018/87 of 5 October 1987, [1] the case now concerns only the last-mentioned issue and the issue of the retroactive effect of their appointment.

7. Let me point out straight away that the Commission's objection that the action is inadmissible on the grounds that the applicants do not have the capacity to bring proceedings and that therefore the Court has no jurisdiction has already been rejected in Joined Cases 87 and 130/77 where the Court confirmed:

* Original language: French.

1 — Council Regulation (Euratom, ECSC, EEC) No 3018/87 of 5 October 1987introducing special transitional measures for the recruitment of overseas staff of the European Association for Cooperation as officials of the European Communities (OJ L 286, 9.10.1987, p. 1).

'that it is not only persons who have the status of officials or of employees other than local staff who may bring an action before the Court to contest a decision adversely affecting them but also persons claiming that status' ([1985] ECR 2534, at paragraph 24).

In any event, since the appointment of the applicants as officials the admissibility of their action can no longer be challenged.

8. The applicants' basic argument is that the Association is merely a fictitious entity or at least is only their *apparent employer*. Their real employer is the Commission, of which the Association is merely an administrative unit. In support of their argument they list a whole series of factors based on the relationships of all kinds which the Association maintained with the Commission and on the situation of the Association's staff members which in many regards is identical to that of the Commission's officials or temporary staff.

9. There is no doubt, as the Court has already stated in paragraph 4 of the judgment in *Appelbaum* and paragraph 5 of the judgment in *Hattet and Others*, that the Association operated primarily on the instructions and under the control of the Commission.

10. Nevertheless, in its judgment in *Salerno* the Court stated that the Association was set up under Belgian legislation as an international non-profit-making association and that it was for the Belgian courts alone to decide whether its formation and functioning complied with the criteria laid down in that legislation (paragraph 41). Moreover, the Court expressly stated 'that it was [the Association] and not the Commission which was the applicants' employer' (paragraph 50). The Court therefore rejected the argument that the Association must be regarded as an administrative unit of the Commission or as a legal fiction (see in particular paragraph 47).

11. The applicants' own attitude confirms the correctness of the Court's reasoning.

12. While maintaining that they have never been anything other than officials of the Commission, they claim entitlement 'to continue to enjoy the rights they had under the rules which formerly applied to them in so far as those rights should prove more advantageous than those arising from the application of the Staff Regulations of the European Communities or alternatively from the conditions of employment governing members of the temporary staff of the European Communities'.

13. If their rights were more advantageous than those of officials and other employees of the European Communities in so far as they were in receipt of an expatriation allowance, an overseas allowance, a rent allowance, and so forth, it is because they did not have the status of such officials or employees. Before the adoption of Council Regulation (Euratom, ECSC, EEC) No 3019/87 of 5 October 1987 laying down special and exceptional provisions applicable to officials of the European Communities serving in a third country,[2] officials were not in fact entitled to those allowances.

2 — OJ L 286, 9.10.1987, p. 3.

14. It remains for me to say a word regarding the submission based on the alleged discrimination suffered by the applicants in comparison with members of the Association's special contract staff and headquarters staff, all of whom were established well before the applicants.

15. It is true that in the judgments in *Hattet and Others* v *Commission* and *Appelbaum* v *Commission*, the Court found that there had been an infringement of the principle of equal treatment at the time when the Association's special contract staff and headquarters staff had been recruited. In particular the Court rejected the Commission's defence that at the material time the Council had adopted measures derogating from the Staff Regulations permitting their recruitment only in respect of the headquarters staff (see in particular paragraphs 26 to 30 of the judgment in *Appelbaum*, at p. 2454).

16. However, the Court annulled the Commission's decisions appointing the applicants as probationary officials and officials only in so far as they determined the applicants' grade and step. In a later judgment the Court again stated that the observations made by the Court in those judgments

'with regard to the different treatment received by the special contract staff compared with that received by the staff of the headquarters of the [Association] related only to the determination of the applicants' grade and step by the decisions appointing them as probationary officials and not to the date from which those decisions took effect' (judgment of 5 October 1988 in Joined Cases 314 and 315/86 *De Szy-Tarisse and Feyaerts* v *Commission* [1988] ECR 6013 at p. 6033, paragraph 17).

17. However, in the present case, following their recruitment under Regulation No 3018/87, the applicants now challenge only the date on which their recruitment took effect, so that no breach of the principle of equal treatment can be found in the context of these proceedings.

18. For all the above reasons, I propose that the Court should dismiss these applications as unfounded and order each party to pay its own costs in accordance with Article 69(2) and Article 70 of the Rules of Procedure.