OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 MAY 1972[1]

Mr President,
Members of the Court,

The applicant in the proceedings on which I shall give my opinion today, entered the service of the European Atomic Energy Community on 1 January 1962 and was appointed an established official with effect from 1 July 1962. At that time he was graded in career bracket C4–C1 in Grade C2–3 and was employed as a draughtsman at the Nuclear Research Centre at Ispra.

In view of the fact that in the annual report of 26 August 1965 his duties were described as 'dessinateur – projets de mécanismes divers' (draughtsman – various mechanical designs) and that according to the findings of a 'Commission projeteurs et dessinateurs' (Committee of designers and draughtsmen) of 3 May 1967 he was at the technical level of a 'projeteur débutant' (trainee designer), the applicant reached the view that he should be graded in Category B. Accordingly, on 14 December 1967 he sent an application to this effect to the appointing authority. Nevertheless the Director of the Nuclear Research Centre rejected this request on 24 January 1968. He pointed out that the applicant was still a 'dessinateur' (draughtsman) and not a 'projeteur' (designer); it was therefore impossible to speak of a discrepancy between the grade and the duties performed. When the applicant thereupon observed in a letter of 6 July 1968 that since 1964 he had been carrying out projects and when he repeated his request for an amendment of his grading, referring to the description of his duties in the above-mentioned reports of 26 August 1965 and 25 March 1968, he received no further reply from the administration of the Nuclear Research Centre. At that time he took no further action. By a decision of 3 February 1971 which was communicated to the applicant on 25 February 1971 he was then promoted to Grade B4–4 with effect from 1 December 1970 and appointed to the post of laboratory technician, whilst, so he asserts, retaining the same duties. His seniority in the said grade was to begin to run from 1 December 1970 and his seniority in the step from 1 December 1969. Nevertheless the applicant did not concur with that decision. On 3 March 1971 he accordingly submitted an administrative complaint to the appointing authority which was registered on 18 March 1971 and requested therein amendment of his grading with reference to the fact that he was a 'dessinateur-projeteur' (designer).

Since he received no reply to this complaint, on 2 July 1971 he finally applied to the Court of Justice thereby initiating the proceedings which must at present be decided.

In his application the following requests are made:

1. For a ruling that the applicant must be graded in Grade B3 (in this respect the step must be determined in accordance with Articles 44 to 46 of the Staff Regulations of Officials), a declaration that his seniority in this grade began on 26 August 1965 and an order for payment of corresponding arrears of salary;

2. Alternatively:

   — for annulment of the decision of promotion of 3 February 1971 in so far as it appointed the applicant to the post of laboratory technician and and assigned him to Grade B4;

   — in addition for a ruling that the applicant should be appointed to the post of 'dessinateur-projeteur' (designer) in Grade B3 with seniority in the grade starting from 1 December 1970 and in the step from 1 December 1969 and for a declaration

1 — Translated from the German.

that corresponding arrears of salary must be paid;

3. In any event for the annulment of the implied rejection of his administrative complaint of 3 March 1971.

I shall now consider what view should be taken of these requests.

1. As the Court is aware the Commission considers that the principal application for the amendment of the grading with effect from 26 August 1965 is inadmissible. It points to the fact that the applicant has already endeavoured by means of his request of 14 December 1967 to have his grading altered. This was expressly rejected in January 1968. A further request submitted in June 1968 remained unanswered and accordingly constitutes an implied rejection in accordance with the service regulations of the Communities. Since the applicant failed to apply to the Court of Justice at that time it must be accepted that his grading up to 1 December 1970 (that is to say, until the entry into effect of the decision promoting him) can no longer be contested. Thus an application lodged with this purpose in view must be considered as having been filed out of time and thereby as inadmissible.

Indeed there is no doubt that in accordance with case-law hitherto this view is in principle correct. I recognize that the question of the correct grading of the applicant during the above-mentioned period was the subject of administrative treatment and a decision. Since the applicant failed at that time to appeal against contestable measures he cannot in principle be permitted to recur after several years have elapsed to findings of the administration which have become definitive.

Only on one condition could an exception apply, that is to say, if it were necessary to recognize that new facts had come to light capable of calling into question the correctness of the appraisal previously made regarding the grading of the applicant. The applicant indeed endeavours to justify the admissibility of his principal claim on this ground. As the Court is aware, he refers for this purpose to the decision of 1971 promoting him and asserts that, since no change occurred at that time in the scope of his duties, this in fact amounts to official acknowledgement of the fact that he has always performed the duties of a 'dessinateur-projeteur'.

Indeed, an objective examination as to whether it is possible to concur through this line of argument with the admissibility of the application results after an analysis of the relevant facts in an opinion unfavourable to the applicant. In this connexion, the most important factor is that it cannot be maintained that the decision of promotion retroactively recognizes that the applicant has already previously performed higher duties. This decision instead expressly states that it was only to enter into force from 1 December 1970. Although such decisions are adopted within the framework or 'career brackets' which cover several grades or indeed categories, the particular levels of which with regard to the type of duties conferred do not always present clearly marked distinctions, they do not necessarily mean that the official promoted must change his duties. Instead, often account is merely taken of the fact that experience gained over the years implies *improved* efficiency and enables increased responsibility to be given to him. According to the unequivocal decision of the appointing authority this was the applicant's situation with effect from 1 January 1970. At any rate there are no indications that in the present proceedings an exception to the normal rule with regard to promotion should apply and that therefore with regard to the period before 1 December 1970 the decision of promotion could be considered as a new factor. It is therefore impossible to invoke that decision in order to overcome the objection with regard to admissibility raised by the Commission and to submit at this stage for review by the Court the decision adopted earlier by the Administration regarding the appropriate grading in accordance with the duties of the applicant.

Moreover, as regards the admissibility of the principal claim, reference might also be made to the fact in his administrative complaint of 3 March 1971, the initial reaction of the applicant to the decision of

promotion complained of, there is no mention whatsoever of a retroactive amendment of the grading, but merely of 'classement *après* promotion'. However, since proceedings were not instituted immediately that complaint determined the subject-matter of the subsequent legal action. Thus in an application based on the said complaint an endeavour cannot be made to widen the subject-matter of the dispute as regards time, that is to say, to affect the past. Even viewed in this light, considerable doubts would therefore arise as to the admissibility of the principal claim.

Thus from whatever angle the question of admissibility is looked at and considered the conclusion remains in fact inescapable that in this respect the view of the Commission must be accepted and the application for an amendment of the grading with effect from 26 August 1965 and for corresponding payment of arrears of salary must be dismissed as inadmissible.

2. As I have already said, the applicant also requests in the alternative the partial annulment of the above-mentioned decision of promotion in so far as it describes the post to which the applicant was appointed as that of 'agent technique' and provides for its classification in Grade B4. Following the annulment of that decision the applicant seeks in addition a finding that he in fact holds the post of 'dessinateur-projeteur' and that he must be classified in Grade B3 with effect from 1 December 1970 at least.

In this respect it is immediately clear that problems as to the admissibility of the application do not arise regarding observation of the period for lodging an application as, after notification of the decision of promotion, the applicant submitted an administrative complaint within the period for lodging an application prescribed in Article 91 and set out therein the request, which although perhaps not worded with complete clarity, now forms the subject-matter of his alternative claim.

Nevertheless, the Commission considers that the alternative claim is likewise inadmissible. In this connexion it is of the opinion that the decisive factor is the fact that if the Court were to allow the applicant's claim it would encroach on the scope of the administrative discretion of the Commission. This is because it is necessary with regard to the allocation of a post in B3 for provision to be made for such a post within the framework of the detailed list of posts and for the staff to be notified in accordance with Article 4 of the Staff Regulations of Officials. This is however connected with considerations of expediency with regard to the organization of the services and the limitations of the budget. At the time in question the Commission did not in fact advertise a vacant post in B3 as was necessary in the view of the applicant. Furthermore the name of the applicant was only included in the list of candidates considered eligible for promotion to B4. Comparative consideration of their merits took place on that basis. On the other hand, for a promotion to B3 the list would have had to be of a different nature and to include other candidates. However the Administration has not yet made that choice and it is consequently impossible to anticipate it through a judgment of the Court which assumes the fact that the applicant was also the candidate most deserving promotion to B3.

May I say from the outset that it is also in fact impossible to deny the justification of this argument. This holds good even if it is admitted that *per se* the promotion of a draughtsman from Category C2 to Category B4 appears incorrect. In fact, as we have heard in the proceedings, according to Annex I(B) to the Staff Regulations of Officials in conjunction with the description of posts of the Commission of September 1963, the career bracket of draughtsman only covers Grades C4 to C1 and, if 'dessinateurs-projeteurs' are included, Grades B3 to B1. Grade B4, in itself valid with regard to other duties, was thus introduced by the Commission somewhat illegally (that is to say, it failed to observe the general decision of the Commission of 10 March 1971 regarding grading on promotion) in order to ease the transition from Grade C2 to Category B and, according to the statements of the

Commission, it was envisaged for officials who cannot yet be appointed as 'dessinateurs-projeteurs' but can only be described as entrants (débutants) to this category.
Even if one refuses to acknowledge that such a structure of the career of draughtsman is lawful, that is, if promotion from C2 to B4 is not considered permissible, the outcome sought by the applicant, his classification in Grade B3, is by no means inevitable. In that case, that is to say, if the Commission were obliged to concede that the method adopted by it is impossible to follow it comes first and foremost within the discretionary power of the Administration to take a decision regarding other conceivable arrangements. It could for example make provision for a post in B3 and thereby enable promotion to such a post. As I have already said however, this would presuppose a discretionary decision within the framework of the detailed list of posts and taking account of the limitations of the budget. If the Administration were in fact to decide to take that step it would require an 'appraisal of merits' differing from that which came into consideration with regard to promotion to B4. It would thus be necessary to take into account all candidates who may conceivably be promoted to B3, especially *all* draughtsmen who, like the applicant in 1971, were first promoted to Grade B4. It is however impossible to maintain with certainty that the applicant in particular would have to be considered as the candidate most deserving of promotion in a selection procedure in which seniority in the grade also plays an important part.
The conclusion necessarily follows from the finding that the essential aim of the applicant is not annulment of the decision of promotion as such but classification in Grade B3 and in view of the fact that such a decision involves on the part of the Commission several considerations coming within its discretion and relating to expediency which the Court cannot make in its stead, that the alternative claim too is basically inadmissible.
This conclusion remains unaffected even by the reference by the applicant to judgments in which the Court of Justice has made specific orders with regard to grading. They are all decisions unconnected with the margin of discretion of the Administration. Indeed that applies in particular to all instances concerned exclusively with the determination of a *step* within a grade. Since grading problems of this nature can in fact be settled in accordance with purely objective criteria, their treatment cannot constitute a precedent with regard to the difficulties in the present case which are of quite another aspect. Despite the case-law of the Court (for example, the judgments in Joined Cases 59 and 71/69, [1970] ECR 623) the conclusion reached above remains valid, that the alternative claim of the applicant must be declared inadmissible.

3. Compared to the claims previously examined, the claim for the annulment of the decision rejecting by implication the administrative complaint of the applicant is meaningless in itself. As we have just seen, the alternative claim was in fact based on that administrative complaint. What I have said with regard to it thus necessarily applies also to the third claim. It must be dismissed as inadmissible and therefore does not call for further comment.

4. In view of this conclusion, the accuracy of which in my opinion cannot be doubted, there is no need to embark upon a subsidiary consideration of the substance of the case and in so doing to undertake an appraisal of the duties assigned to the applicant.
At the most the following remarks can be made briefly. According to the description of post drawn up by the Commission it is stated that 'dessinateurs-projeteurs' in Grade B3 have 'expérience de plusieurs années comme dessinateur' and are therefore entrusted 'de faire seul le dessin d'un projet complet'. The Commission does not indeed contest that the applicant has that experience; nevertheless it claims that he is not entrusted with the complete execution of projects or projects *in their entirety* and that he does not constantly perform comparable duties; rather, like all draughtsmen, he did this only occasionally as a preparation for the higher duties of 'dessinateurs-projeteurs'. On the other hand the applicant's assertion that since

1964 he has been executing entire projects and that he should have been considered as a 'débutant dessinateur-projeteur' since 1965 can scarcely be considered sufficient. Thus if this were in fact the important issue one could scarcely be content with the reference by the applicant to brief remarks in the annual reports for 1965 and 1969, to the opinion of the Committee of Draughtsmen and Designers of 3 May 1967 on the ability (that is, not on the *duties* of the applicant in the service) and to the list of projects carried out by him. Before a decision on this point could be reached, it would rather be necessary carefully to determine whether the applicant is a true 'dessinateur-projeteur' within the meaning of the description of posts of the Commission.

In view of the conclusions which I reached earlier it is however unnecessary for me now to suggest that an investigation of this nature be pursued.

5. I must agree finally with the Commission in the view that the application must be dismissed as inadmissible, with regard to both the principal and the alternative claims. The necessary decision on costs follows in these proceedings from Article 70 of the Rules of Procedure.