

Costs

- 9 The applicant has failed in his application.

Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

Nevertheless under Article 70 of the Rules of Procedure, in actions by servants of the Communities the institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Staff Regulations of Officials of the European Communities, especially Article 91;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

1. Dismisses the application as inadmissible;

2. Orders the parties to bear their own costs.

Delivered in open court in Luxembourg on 14 April 1970.

Monaco

Donner

Mertens de Wilmars

A. Van Houtte

R. Monaco

Registrar

President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER
DELIVERED ON 4 FEBRUARY 1970

*Mr President,
Members of the Court,*

In the proceedings with which I shall deal today we are concerned with the promotion

of an official of the Commission of the European Economic Community. This promotion is not however being contested, as in other cases, by candidates who were passed over but by the person actually promoted,

1 — Translated from the German.

who feels aggrieved at not being promoted with retroactive effect. He further complains that in respect of the period prior to the coming into effect of the decision to promote him, the Commission did not make a decision under Article 7 (2) of the Staff Regulations, in that it did not call on him temporarily to occupy the post to which he was promoted. As regards the details of the case the following facts are relevant.

On 1 September 1962 the applicant entered the service of the Commission of the European Economic Community. At first his status was that of a member of the auxiliary staff. Having completed a probationary period commencing on 1 November 1962 he was by decision of 11 December 1963 and with effect from 1 May 1963 established as an official in Grade A 6/1 of career bracket A 7/A 6. As a dairy expert he was from the outset employed in the Directorate General for Agriculture, Directorate of Market Organization for Animal Products, Milk Products Division. It would appear that he was in particular concerned with the preparatory work and the application of the common organization of the market for milk and milk products and he continues to work in this field. In matters of detail however there seems to be a dispute between the parties as to the actual duties performed by the applicant and as to the date of their commencement. For the present purposes I need only say that there was an announcement on 4 March 1965 of a vacancy for an A 5 post in career bracket A 5/A 4 within the administrative unit to which the applicant belongs, and that this post involved in essence responsibility for the implementation of Regulation No 13/64 on the gradual establishment of a common organization of the market for milk and milk products. This announcement became possible after the Council of Ministers on 14 November 1964, by way of a supplementary budget for the year 1964, granted the Commission a number of A 5 posts and after the Commission had allocated these to its departments. On 9 March 1965 the applicant submitted his candidature for the post advertised. After proceedings that took up considerable time, the Commission decided on 6 April 1966 by way of written procedure to promote the

applicant to the position of principal administrator in Grade A 5/1 as from 1 May 1966 and to assign him to the advertised post. An appropriate certificate of appointment was prepared on 23 May 1966 and the applicant was duly notified through official channels; he acknowledged receipt of the certificate of appointment by way of a statement of 1 July 1966. However, even at that time he was convinced that the Commission had not fixed the date when the promotion was to take effect in the correct manner. For that reason he endorsed the acknowledgement of receipt signed by him with an appropriate reservation. Going further, he submitted a formal complaint to the Commission on 3 August 1966. In that document he argues that the duties of the new post had already been his since the beginning of 1964. For that reason he requested that his appointment to Grade A 5 take effect as from 1 November 1964, bearing in mind the fact that he had on that date completed the minimum period required by Article 45 of the Staff Regulations in Grade A 6. He further applied for a decision under Article 7 (2) of the Staff Regulations taking effect from 1 May 1964, the date on which the post was made available in the budget, this decision to remain effective until the coming into force of the appointment to Grade A 5. The receipt of the complaint was notified to the applicant by a letter of 24 August 1966. This informed him that his case, which gave rise to fundamental and complex issues was receiving careful consideration; once a final conclusion had been reached he could expect to receive an answer. Since this answer took a long time in coming, the applicant by letter of 20 October 1968 reminded the President of the Single Commission which had in the meantime been constituted of the existence of his complaint. That complaint was finally dealt with by a decision of the appointing authority, notified to the applicant by letter of 14 March 1969. As regards fixing the date of the promotion, the appointing authority rejected the complaint, on the basis of the provisions of a decision of the Commission of 26 May 1965 on the coming into force of appointments and promotions. As regards his application for a decision under Article 7 of the Staff Regulations, the applicant was in-

formed that this could not be granted since the Commission had never had any proposal put to it that it should employ the applicant temporarily in Grade A 5.

Upon receipt of this decision on 10 April 1969, the applicant decided to appeal to the Court. In his application, registered at the Court on 5 June 1969, he claims that:

1. the decision of the Commission of 14 March 1969 rejecting his complaint, be declared null and void.
2. the decision of the Commission of 23 May 1966 on the applicant's promotion be declared null and void, in so far as it sets 1 May 1966 as the date for its coming into force.
3. a declaration should be made that his appointment to Grade A 5 was to take effect as from 1 November 1964 and further, that there ought to have been a decision of the appointing authority under Article 7 (2) of the Staff Regulations, taking effect as from 1 May 1964 and remaining in force until his appointment to Grade A 5 took effect.

It is now my task to subject these issues to a legal assessment.

1 — Questions of admissibility

As regards admissibility of the application, the Commission has expressly stated that it has no objections. This does not however absolve the Court from raising any relevant issues of its own motion where the facts of the case warrant this. These might in fact arise in the present case as to the dates of the relevant documents. As I have just demonstrated, the applicant is above all concerned with the effect in point of time of the decision promoting him which was adopted on 6 April 1966 and was notified to him on 1 July 1966. He did not immediately appeal against the decision but at first contented himself with making an appeal through official channels on 3 August 1966 (within the time-limit for making an appeal) under Article 90 of the Staff Regulations. No criticism can be levelled against him on this score, for after all the Court has repeatedly stated that it is desirable that administrative measures under the Staff Regulations be contested in the first place by way of an

appeal through official channels rather than by way of a direct application to the Court. However no decision having been made within a period of two months from the receipt of the complaint, the normal continuation of the proceedings ought to have been by an appeal to the Court within a further two months against the *implied* decision rejecting the application. The applicant did not however proceed in this way; instead he did not appeal to the Court, against the *express* decision of 14 March 1969 rejecting his application until 5 June 1969 but this was in time bearing in mind the date on which the appeal was lodged. One may well doubt the admissibility of this procedure for, basically, the express decision rejecting the application which must be deemed to have been made by implication two months after the receipt of the applicant's complaint. There can be no doubt however, that confirmatory measures cannot revive a right of appeal once it has become barred. Yet, I would hesitate, as the Commission has done, to suggest this answer to the question of admissibility. For militating against this being right is the fact that on receipt of the applicant's complaint the Commission in its acknowledgement of receipt of 24 August 1966 emphatically pointed to the necessity of *detailed investigations* and expressly assured the applicant of a reply as soon as a definite conclusion had been reached. In the light of this situation one assumes that after the expiry of two months from the receipt of his complaint the examination of the applicant's case had not yet been concluded and that before the express decision taken after the examination had been concluded cannot be merely a confirmation of an earlier implied decision rejecting the application. In particular one has to concede that in situations such as this, having regard to the notification of an express decision, it cannot be expected of the complainant that in order to avoid being out of time he should involve the Commission in proceedings even before the decision announced had been made. In this respect the present proceedings remind me in many respects of those in Case 4/67 [1967] E.C.R. 376-377, though with this difference that in that case the High Authority *opposed* the relevant

submission on the part of the applicant. Despite some hesitation, I therefore think that the admissibility of the appeal should not be denied and that in particular an examination of the application which relates to the effects of the decision on promotion should not be precluded.

In my view it is obvious that similar considerations also apply to an application which relates to a decision under Article 7 of the Staff Regulations and the admissibility of which surprisingly was doubted by the Commission in its rejoinder. In this respect just a few words will suffice. On the one hand there is no doubt that the first time an application based on Article 7 of the Staff Regulations was made by the applicant was by his complaint, made more than two years after the occurrence of the event which in his view justified this step. On the other hand one can argue that there never has been a decision in relation to this matter capable of being contested and that furthermore Article 7 of the Staff Regulations does not lay down any time-limits. It would therefore appear that in relation to this part of the problem also no difficulties arise on admissibility.

Thus nothing stands in the way of a comprehensive examination of the main issue.

2 — On the substance

Looking at the substance we are in the main concerned with two problems. The first is whether the Commission had correctly fixed the date for the coming into force of the decision to promote or whether—as the applicant submits—it was to make the promotion retroactive to 1 November 1964, or at any rate to 1 April 1965. There is the further question whether the applicant is entitled to a decision under Article 7 of the Staff Regulations.

(a) Dealing first with the effects of the decision to promote, the applicant above all relies on the fact that since February 1964 he has performed the duties of the post to which he was promoted. In such cases the Commission has always applied the rule that promotions were to take effect retroactively. The principle of equality of treatment of officials accordingly demands that

the applicant's case shall also be dealt with in accordance with this established practice. The Commission counters this by contesting that the applicant has performed the duties of the higher post from February 1964 and that there has been a general practice of retroactive promotion. Even apart from this the Commission argues that in making the decision in dispute it was bound by its rules of 26 May 1965 relating to the date of coming into force of promotions and appointments and that these rules allow for retroactive effect under special circumstances which do not apply in the case of the applicant.

To resolve this argument it must be said at once that nothing can be gleaned from the Staff Regulations themselves, in particular the provisions therein as to promotion. From the Staff Regulations all that is clear is that there is no actual entitlement to promotion. On the other hand it admittedly does not in principle exclude retroactive promotions. Looked at in this way it really does appear that the applicant's case could most easily be advanced by referring to the relevant administrative practice of the Commission, that is to say the application of the principle of equality of treatment. Meanwhile—and I have already pointed this out—there are two difficulties in this respect. First, the fact that the Commission has emphatically disputed that there ever was an administrative practice of the kind described by the applicant. In fact, the Commission argues, retroactive appointments and promotions have only taken place in certain exceptional circumstances. If we wanted to be clear on this point, then we should have to fall back on the proof tendered by the applicant. The second difficulty is connected with the question whether the applicant can rely at all on an administrative practice which may possibly have existed in the past, or whether in his case all depends on the rules made in May 1965 which have replaced the previous procedure. In pursuing this question—at the same time this will save us going into the proof before referred to—then, to give you the result of my inquiry at the outset, one does indeed get the impression that the Commission's view is correct. In the first place one is forced to agree that the Com-

mission's attempt by means of its rules of 26 May 1965 to create binding directives for appointment and promotion procedures is to be welcomed from the point of view of legal certainty. Disputes in which one might have to prove a more or less consistent administrative practice will thus probably be avoided in future. Moreover—and this is more important for arriving at a decision—one will be able to assume that the rules mentioned became applicable as from their coming into force and thus also applied to appointments procedures which, as in the case of the applicant, had already got under way by notice of competition and the handing in of applications. What is decisive in this respect is that one is not dealing here with a true retroactive effect which is of course out of the question where one is dealing with an infringement of acquired rights. After all—and I have already said this—no one is automatically entitled to promotion; at the most one can think in terms of a claim, unimportant for the present purposes to be considered, which is asserted by means of the application. In the case of the applicant there is the added fact that a proposal of appointment in his favour on the part of the Directorate General for Agriculture, which increased his prospects of promotion, was only made in January 1966, that is to say after the promotion rule had been laid down. Thus one can in fact say that the Commission's previous administrative practice has no relevance to the present proceedings and that the solution of the matter depends solely on principles of the new rules concerning appointments.

Now if we try to clarify these then in the present case involving a promotion coupled with change of career bracket we immediately come up against the principle enunciated under II, 2, first paragraph, whereby the promotion becomes effective on the first day of the month following upon the month in which the appointing authority made its decision to promote. As we have already seen, the Commission adhered to this. On the basis of the following paragraphs *retroactive* promotion is furthermore possible 'where the official already previously performed the duties corresponding to his new post'. It is provided that in such case the

promotion can already become effective on the first day of the month next after the month when the official was entrusted with the relevant duties. To come within the exception therefore, two factors are important: the duties corresponding to the new post must already have been *performed* and the official must have been *entrusted* with those duties. On the first point we must remember that this is in dispute between the parties, that it is not certain whether the applicant has since February 1964 performed the duties attaching to the post to which he was promoted (as he claims he has). If this were crucial, then proof would probably have to be provided, although it would appear even now that the correctness of the applicant's argument is confirmed by a statement by his director dated 1 December 1965, according to which the plaintiff had been carrying out for two years the duties which were later officially entrusted to him. In fact this question can remain open because in this context also, it is possible to reach a conclusion on the second point and once again following the line of the Commission. As you know it is the Commission's case that what matters is that the official who is to be promoted retroactively should be entrusted by the *appointing authority itself* with carrying out the duties attaching to the post to which he is promoted; that on the other hand a simple instruction on the part of a superior without formal consent on the part of the appointing authority does not suffice. This seems to me to be the correct view of the matter for only thus is it possible to ensure that the organizational powers which are reserved to the appointing authority, including the exercise of the right to promote, are not prejudiced and in the last resort eroded by individual acts on the part of divisional heads. Since however in the present case there is no doubt that no *formal* instruction on the part of the appointing authority to carry out the duties of the post which was advertised in March 1965 was addressed to the applicant and since it cannot be assumed that there was an *implied* instruction—assuming this were permissible—in the absence of appropriate instruction on the part of the applicant's superiors which would have induced the appointing authority to consider its

position, we can only find that the applicant is not entitled to retroactive promotion and that the Commission has correctly fixed the date for the coming into effect of the promotion on the basis of the only provision that is applicable to this case.

Finally this result cannot be altered by the applicant's remark that in a similar case, decided at an even later date, there had been a retroactive promotion contrary to what is laid down by the decision of the Commission of 26 May 1965. As regards this point we have heard in the course of the oral proceedings that it had not proved possible to ascertain the grounds for this procedure. It probably amounted to an error on the part of the administration. In fact this point can be left open for a single or even several inadmissible breaches of the Commission's rules for the date for coming into force of appointments and promotions can clearly not establish a practice that would confer on others a claim to similar inadmissible treatment.

The ground of appeal referring to retroactive promotion must therefore be rejected as unfounded.

(b) As regards the applicant's further claim relating to a decision under Article 7 of the Staff Regulations, I can be rather shorter in my comments. On this point I would remind the Court that the applicant claims that since February 1964, since the coming into force of the common organization of the market for milk products, he had actually performed the duties which were later on officially entrusted to him by the promotion decision. Accordingly he considers that the Commission ought to make a decision temporarily entrusting him with the newly created post. This decision ought to take effect from the date when the post was made available in the budget of the Community, that is to say from 1 May 1964, and it ought to remain in force until the date when the promotion decision retroactively takes effect.

This claim, which is of course intended to ensure the applicant of compensation pursuant to Article 7 of the Staff Regulations is open to objections, if only as regards the date just mentioned. In fact, the making available of the relevant post in the budget

can in no circumstances be the crucial factor since it only constitutes an authorization to the Commission (and in any event it only occurred in November 1964). For the purpose of the crucial date, one ought rather to look to the date when the relevant post appeared in the Commission's detailed list of posts and this is an event which occurred in March 1965 at the earliest. It is only from that point of time onwards that a decision pursuant to Article 7 of the Staff Regulations would have been possible.

However, even more important than this objection is the fact that for the purposes of Article 7 also, the *actual* performance of official duties, on the instructions of immediate superiors to carry them out cannot be relevant. Again—as in the case of the first head of claim—one must remember the need to protect the appointing authority's organizational powers against being undermined. Looked at in this way an act on the part of the appointing authority is indispensable for the purposes of Article 7, if only because in the creation of new posts solutions other than their interim occupancy can be considered, for example the temporary re-distribution of the functions which they involve among other branches. Now, as regards the all-important act of the appointing authority, it is particularly significant for the purposes of Article 7 that we are here dealing with a discretionary provision. It is therefore within the appointing authority's discretion to make use of it and in principle, no official has an actual entitlement to have it applied. Accordingly, the application can only succeed if it can be shown that there was an error in exercising the discretionary power, for example if the Commission—and one might think of this in the present case—has disregarded an established administrative practice. However, nothing like this has been alleged by the applicant; indeed he cannot so much as deny that there was never a proposal by his superiors for Article 7 to be applied.

In the light of this state of affairs I see no possibility of arriving at the finding that the Commission was obliged to apply Article 7 to the applicant's case. Therefore, the second head of claim must also be rejected as unfounded.

3 — Summary

This really completes my examination of the legal issues. There were no other claims, for example for damages. Beyond this, one can say that also as regards a grant of *ex officio* compensation such as was made in another case, there are no sufficient indications in the present case such as administrative errors on the part of the applicant's superiors. This conclusion may be regrettable, having regard to the applicant's undoubted capabilities, to the fact that for a considerable period before the coming into force of the decision to promote him he had, in all probability, already been performing the duties connected with the higher post and bearing in mind the fact that the promotion procedure has been rather long drawn out. However the Court is left with no alternative but to reject the appeal.

As regards costs one might having regard to the complexity of the situation at any rate consider that there were exceptional circumstances within the meaning of Article 69 (3) of the Rules of Procedure. Thus it would be possible to order the Commission, notwithstanding its having succeeded, to bear at least part of the applicant's costs. Since this appears to be the appropriate course in the circumstances I hereby formally suggest that it be adopted.