Having regard to the Staff Regulations of officials of the European Economic Community, especially Articles 5, 25, 27, 43, 45, 90, 91 and 110;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT

hereby:

1. **Annuls the Decision of 13 February 1963 of the Commission of the European Economic Community appointing D. Strasser as Director of Internal Affairs within the Directorate-General for Administration;**

2. **Orders the Commission of the European Economic Community to bear the costs.**

Donner Hammes Trabucchi
Delvaux Rossi Lecourt

Delivered in open court in Luxembourg on 19 March 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 FEBRUARY 1964[1]

Summary

1 — Translated from the German.

Mr President,
Members of the Court,

The applicant in the proceedings with which my opinion is concerned today has been in the service of the Commission of the European Economic Community since 1 June 1959. He tells us that he was in charge of two of the five Internal Affairs Departments in succession, and at the time of commencing this action he was classified under Grade A/3 as Head of Department for Translation, Copying and Distribution of Documents.
In response to a notice of vacancy posted on 30 August 1962 he applied, together with four other Community officials, for the vacant post of Director of Internal Affairs within the Directorate-General for Administration (Grade A/2). However the Commission, by Decision of 13 February 1963, filled the advertised post by promoting another candidate. On various grounds, the applicant considers this Decision to be illegal and seeks to have it annulled by the Court.
He bases his application on the argument that the Commission neglected to supplement the rules governing promotion contained in the Staff Regulations with implementing provisions; moreover, the statement of reasons for the decision making the promotion was defective and the decision was based on a false appreciation of the facts.

I. Before we examine these submissions in detail, two points should be made relating to procedure.
1. The first concerns the right of action and can be stated briefly. We are faced with the question whether an action is admissible when brought by a competitor of the person promoted to contest a decision of promotion.
The Commission has raised no objection on this point, and I think the Court should endorse this attitude. Admittedly all Member States recognize such a right of action, as the representative of the Commission rightly observed. However the right of appeal in Article 91 of the Staff Regulations is framed in terms so general that in Community law we may safely follow the generous practice applied by French law in the interests of the legal protection of officials. I refer in this connexion to Grégoire, La Fonction Publique, 1954, p. 91, where French case-law authorities are quoted; and on that basis I propose to regard a decision on promo-

tion so far as candidates not selected for a vacant post are concerned as an act adversely affecting an official ('beschwerende Maßnahme' or 'acte faisant grief') of the type referred to in Article 91 of the Staff Regulations.

2. Secondly, a few words should be said about the party named as defendant.

The applicant in fact seeks to make the Community a party to the proceedings, not merely as it is represented by the Commission, but as a legal entity in itself, and to make use of the procedural consequences which follow therefrom. I can see no justification for departing from the previous practice of the Court, which has always been to regard the institutions of the Community, and not the Community itself, as parties to the proceedings.

Even though Article 91 of the Staff Regulations mentions 'disputes between the Community and any person to whom these Staff Regulations apply', I do not believe this means that appeals in staff cases are to be made against the Community, which would then — logically — have to be represented as party to the proceedings by the Commission in accordance with the general rule in Article 211 of the EEC Treaty. Article 211 applies, as my colleague Advocate-General Lagrange pertinently remarked in Case 25/60 (Rec. 1962, p. 69 et seq.), to different circumstances, namely the external legal relationships of the Community, what one might call 'civil life' of the Community. To apply it to the law governing staff would place the task of defending the powers under the Staff Regulations in legal proceedings in the hands of the Commission, whilst leaving the exercise of those powers as regards officials to the individual institutions, a result which is unacceptable because it is absurd. That this was not the intention of the authors of the Staff Regulations seems clear to me from Article 91 of the Staff Regulations, which expressly mentions in paragraph 2, in relation to an action for failure to act brought after complaint has been made to the competent authority, an appeal *against this decision*, which can only mean an appeal against the authority which took that decision. One finds support for this view and for the practice hitherto followed by the Court in Article 21 of the Protocol on the Statute of the Court of Justice, which speaks of '*institutions, not being parties* to the case'. I think this proves that in the general scheme of legal protection afforded by the Treaty, the parties to proceedings are in principle the institutions, and not the Community as such.

It is true that what has been said above does not affect procedure (or even costs). The applicant's principal aim in naming both bodies as parties was to gain access to the preparatory documents relating to the Staff Regulations, which are at the disposal of the Council, not the Commission. Since these consist of unpublished material, they could not in any event be considered for use in the interpretation of the Staff Regulations. This question is settled moreover if the Court continues to refer, as it has done previously, in the heading of the judgment, only to the defendant institution, and not to the Economic Community.

II. Let us now turn our attention directly to the individual submissions, considering first those which concern the failure to supplement the Staff Regulations by implementing provisions.

1. In the applicant's opinion the Commission should have taken three steps before issuing the Decision on promotion:

— it should have adopted general provisions for giving effect to the rules on promotion under Article 45;
— it should have laid down the comparative criteria on the basis of which selection was to be made from among the candidates;
— it should have drawn up the 'job

description' for available posts required by Article 5 of the Staff Regulations.

(a) As regards the necessity of issuing provisions giving effect to Article 45, the final provision of the Staff Regulations (Article 110) lays down only in general terms by whom and in what proceedings such provisions are required. Yet there is nothing to indicate which of the Staff Regulations need to be supplemented by implementing provisions.

Article 45 must therefore be examined more closely to find the answer to this question. In that Article — so far as it is relevant — we read the following:

'Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among 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.'

A reading of Article 45 reveals first that it contains no express reference to the adoption of implementing provisions. A comparison with Article 43 in the same Chapter, which does contain such an indication, justifies the conclusion — even if formal arguments of this kind do not carry much weight in themselves — that the aplicant's argument is at least shaken.

This conclusion finds further support in the outcome of an examination of other provisions of the Regulations which clearly stipulate the requirement that they be supplemented by implementing provisions, as, for example, Article 2 on the determination of the appointing authority, Article 5 on the description of posts, Articles 16, 55, 59 etc.

If, however, Article 45 is not so drafted, that is to say, if the intention of the authors of the Staff Regulations that Article 45 must be supplemented by legislative provisions before it can be put into effect, cannot be directly and decisively apparent from a reading of the text of the provision, then the applicant's view can only stand if it is proved that the system of promotion under the Staff Regulations requires implementing provisions both as a matter of logic and because of its nature.

This has not, I think, been satisfactorily proved.

Admittedly, if we turn our attention to national laws we discover that the system governing promotions in individual Member States depends on an extremely detailed body of procedural rules which results in a certain inevitability and considerably enhances the promotion prospects of certain persons. This is so to some degree at least in France, where the law relating to public servants recognizes a 'liste d'aptitude',[1] in Belgium, where 'signalement' and 'notation' play a similar rôle,[2] and in Italy.[3]

But on the other hand we have legal systems where the rules relating to promotion are no more detailed than are the Community Staff Regulations. In the German law relating to public servants, for instance, promotion is based on aptitude, competence and performance, having regard also to various provisions governing length of service and age.[4] In this connexion the

1—Cf. Laws of 19.10.1946 and 28.4.1952, Ordonnances of 4.2.1959 and 4.6.1959; Plantey, Traité Pratique de la Fonction Publique, 1963, Vol. II, pp. 422, 434 et seq.

2—Statute of 2.10.1937, Arrêté Royal of 7.8.1939 in conjunction with Arrêté Royal of 2.10.1937; Vauthier, Précis du Droit Administratif de la Belgique, 1950, Vol. I, pp. 110 et seq.

3—Zanobini, Corso di Diritto Amministrativo, 1955, Vol. III, pp. 332 et seq., Vitta, Diritto Amministrativo, 1955, Vol. II, p. 324.

4—Bundesbeamtengesetz Ed. 1 October 1961, BGBl. I, 1801, §§ 8 and 23; Reichsgrundsätze on installation, appointment and promotion, BGBl. 1951, I, p. 88; Bundeslaufbahnverordnung Ed. 2 August 1961, BGBl. I, 1173, §§ 9, 27, 33.

commentators[1] emphasize that the discretionary powers of the administration are a major factor in the practice of the law relating to promotion and that control of the process of selection is left to the Administration. A similar system — if I am not mistaken — exists under Netherlands law.[2]

Consequently — and this is the essence of these considerations — there can be no inherent necessity for defining and putting into concrete form rules relating to promotion.

However, I do not think that the applicant's claim that the Community system is identical in all, or even the most important of, its technical and procedural aspects with the Italian system, has been proved. The scanty resemblance of a few phrases in Article 45 to some provisions in the Italian law relating to public servants, pointed out in the oral proceedings, is scarcely adequate to reinforce such an argument.

I concur therefore with the Commission's view that Article 45 of the Staff Regulations can be put into effect directly and without first issuing implementing provisions. In the absence of adequate evidence to the contrary we must adopt the view that the intention of the authors of the Staff Regulations was to leave to the Administration, subject to review by the Court of Justice, the task of developing a practical promotion procedure embodying all the requisite legal guarantees for those concerned.

(b) This also refutes, in principle, the second argument according to which the Commission is obliged to determine the comparative criteria for assessing candidates and to indicate the relative importance to be attributed to the various elements.

Article 45 merely provides that selection is to be made after consideration of comparative merits and reports; for this purpose the notice of vacancy indicates the standard required when it gives details concerning the necessary training, practical experience and aptitudes. But it is not necessary to have an exhaustive enumeration of all the elements to be taken into account in making the assessment and a full account of the aspects to be given priority, for an objective selection procedure can be ensured even without defining the selection factors in such detail. Furthermore, the Commission correctly stresses the fact that the applicant's argument would bring about a considerable restriction of its administrative discretionary powers, thereby distorting the system governing promotion contained in Article 45. Only if it is free to take into consideration all the objective aspects so as to weigh them against each other in making its selection, that is to say, including those aspects which only come to light in the applications, can it select candidates properly suited to the requirements of the service. If this is true in a general sense, then the principle must be particularly evident in promotions for A/2 posts, in filling which the appointing authority enjoys a very wide discretion, even in the actual appointment.

(c) Lastly on this point, there remains to be examined the argument that the Commission ought to have drawn up a 'job description' under Article 5 of the Staff Regulations, before proceeding to fill a post by means of promotion. The consideration of the comparative merits of the candidates in accordance with Article 45 can, in the opinion of the applicant, only be objective if there exists some criterion for assessment established in accordance with the rules of the Staff Regulations, that is to say, a 'job description'.

Like the Commission, I am of the opinion that this argument, correctly

1—Kommentar zum Bundesbeamtengesetz by Plog-Wiedow, note 4 to § 25, note 11 to § 8.

2—Article 13 (a) of the Algemeen Rijksambtenarenreglement of 12.6.1931 Ed. 26.7.1963, pub. Jeukens-van der Horst-Roelofs, Ambtenarenrecht, Vol. II.

understood, refers to the notice of vacancy of 30 August 1962, which stated the duties attached to the post advertised and the aptitudes required from candidates. Obviously, the applicant thinks that the criteria stated there do not meet the requirements of the Staff Regulations.

But if that is the case, it must be asked whether this argument can even be heard in the present proceedings. Serious doubts come to mind in this connexion. For contrary to the applicant's contention, a notice of vacancy constitutes not merely a preparatory document, but a binding decision. This can be seen both from the wording of Article 4 of the Staff Regulations and from an examination of the nature of the notice of vacancy by which the appointing authority gives notice that a certain post is to be filled, and it determines in a binding manner the criteria on which a decision to fill the post will be based. But if someone fails to challenge the notice of vacancy although he considers that the notice is illegal and prejudicial to his interests, he cannot later come back to it when contesting a decision on promotion, even by raising an objection on the ground of illegality which, according to the general view, can be used to attack only legislative dispositions.

But this procedural point apart, the applicant's argument cannot succeed. That promotions can only take place on completion of the procedure for describing the various posts provided in Article 5, cannot be true for a number of reasons.

Quite simply, it is impossible to draw up a comprehensive 'job description' within a short time, as has been demonstrated in practice, and as one might have expected from the first in view of the complexity of the task and the other permanent obligations to be fulfilled by institutions under the Treaty. To suspend all promotion until completion of this procedure even where the duties attached to a post are quite beyond dispute, would not only hamper the Administration but would be irreconcilable with Article 108 of the Staff Regulations, which expressly provided for promotions (and under less stringent conditions) from the very first year following the entry into force of the Regulations.

In addition it is difficult to see to what extent the general description of the posts in accordance with Article 5 of the Staff Regulations would reinforce the guarantees to those with hopes of promotion. Even without this, it has always been possible to ensure in particular instances that the vacant post is described correctly and objectively in the notice. If this failed to answer to the requirements which it was necessary to make in the interests of equality of treatment of officials, it could have been contested and its annulment sought in proceedings before the Court.

I would conclude, then, that the third argument of the applicant for the annulment of the contested Decision is also inadequate.

2. This leaves only the submissions relating to the defects inherent in the Decision on promotion, that is to say, the complaint that there was no statement of reasons and the evaluation of the facts was made in the wrong way.

(a) Absence of a statement of reasons

Article 25 of the Staff Regulations provides that any decision taken under the Regulations is to be communicated in writing to the official concerned and that any decision adversely affecting an official is to state the reasons on which it is based. The applicant deduces from this provision, taken in conjunction with the view — rightly held — that decisions on promotion are to be regarded as adversely affecting, within the meaning of Article 91 of the Staff Regulations (right of appeal), the candidates not selected, that the appointing authorities have a duty also to state the

reasons on which decisions on promotion are based.

No-one can deny that this line of reasoning appears at first sight to be attractive. But at the same time one is struck by the doubt whether it is possible that years of administrative practice by Community institutions, corresponding largely to the practice of national administrative authorities, can have been wrong owing to a failure to observe the obligation to state reasons. Before we give a definitive reply, the problem requires closer consideration. First, it can justly be doubted that the concept of 'act adversely affecting' has the same meaning in Article 25 as in Article 91 of the Staff Regulations.

In the one case it is used to help to define the right of appeal, and thus to introduce judicial control over administrative practice, the right of appeal being — as in French practice — extremely wide, since all that is required is that some interest be adversely affected. In the other case (Article 25) it creates an obligation for the administrative authorities to act positively, to give reasons for the act adopted, with the consequence that failure to observe the obligation brings about the annulment of the act without any need to examine its content.

It is therefore quite reasonable to maintain that because of the different ways in which the administration's actions are affected by them, there is justification for defining the phrase 'an act adversely affecting' an official differently in the two instances. On this view, the obligation to state reasons which is not indeed general in the law relating to public servants, but exists in a restricted form, would also have to be limited to acts which prejudice the *rights* of officials, which cannot include decisions on promotion since no *right* to promotion is recognized.

On the other hand, the following line of thought occurs: whatever else it may entail, the obligation to state reasons must include a duty to inform the persons affected by a decision of the legal and factual basis of that decision. Where a decision on promotion is concerned, if one concedes that there is a duty to state the reasons for it for the benefit of unsuccessful applicants, one must at the same time acknowledge that they must be notified of the decision on promotion, since otherwise there would be no certainty that it would come to their knowledge, assuming that one leaves aside the — unthinkable — possibility of publishing the decision in full with all its negative aspects. But this would add an unreasonable burden to the obligations of the appointing authority. It may therefore be assumed that the obligation to notify under Article 25 (1) of the Staff Regulations only applies to persons whose *rights* are affected and not to all those who in some way have an interest in the decision within the context of an application for annulment, that is to say, a relationship must be established between the obligation to notify and the obligation to state reasons, in the sense that the latter appears to be necessary solely for the benefit of the person *to whom the decision is addressed.*

Since in the present case one cannot speak of a measure adversely affecting the person who is necessarily the addressee of the decision, but only of a measure in his favour, the reasons could be omitted without infringing Article 25 of the Staff Regulations.

(b) As regards the consideration of the comparative merits of the various candidates required by Article 45 of the Staff Regulations, the applicant's last complaint is that the Commission based its Decision on promotion on irrelevancies and was not in possession of all the necessary facts to assess when it took its Decision.

This argument, which in its original form was completely unsubstantiated, gained considerable support from a reply given by the Commission on 14 June

1963 to the applicant's questions concerning the comparative criteria which were decisive for the purposes of the Decision, and from the documents produced which the Commission used in drawing up the contested decision. These provide grounds for looking more closely at the promotion procedure.

In the first place, it is clear from the said documents that at the time the Commission took its Decision, written reports of the work of candidates for promotion in the service of the European Economic Community were not at its disposal.

Must one deduce from this, as does the applicant, that the promotion decision is necessarily illegal because according to the Staff Regulations, promotion may only be granted after the procedure for providing reports under Article 43 has been set in motion? Or is the Commission correct in its view that by virtue of Article 108 of the Staff Regulations it was entitled to dispense with reports at the time of the promotion?

As far as the applicant's interpretation of the law is concerned, I feel unable to follow it in view of the opinion I have expressed on Article 5 of the Staff Regulations. The practice applied under the Staff Regulations for ECSC officials makes it possible to state from experience that the establishment of a proper procedure for assessment would be a lengthy process. Merely to exclude promotion during that time would not be in accordance with the requirements of good administration.

Nor, on the other hand, does the Commission's interpretation of the law appear any more correct, since, as is rightly stressed by the applicant, Article 108 merely permits, for a transitional period of precisely defined duration, the *prerequisite for promotion* under Article 45 (minimum length of service completed by the candidates for promotion) to be waived, but it does not permit a proper examination procedure to be dispensed with altogether. Whatever the circumstances, this must include an assessment of the candidates' service records. If it cannot be made on the basis of the reports provided for by Article 43, the Commission has a duty to find some serviceable alternative, and, for example to have *ad hoc* reports on the candidates made which, in view of their objectivity and the care with which they are prepared, can be regarded as acceptable substitutes for the reports provided for in Article 43.

In the present case, since no such reports were made despite the fact that the Commission, as it has admitted, regarded a consideration of the comparative merits of the candidates necessary, I can only conclude that there is a serious defect in the promotion procedure which justifies the annulment of the Decision on promotion.

There is this, too, to be borne in mind: while it may be true that in taking the Decision on promotion, the Administration has discretionary powers which are to a great extent the deciding factors, and in the exercise of which it is not subject to judicial review in all its details, it must be ensured that the appointing authority is in possession of all the essential facts which might enter into account when making a promotion. No decision on promotion can be taken when only some of the documents relevant to the candidatures have been considered.

In this respect the procedure which was followed is open to criticism. Examination of the file reveals that prior to the decisive sitting on 13 February 1963 the members of the Commission received a communication from the President which was intended to familiarize them with the applications received. Admittedly this communication merely lists the names of the candidates together with a résumé of the *curriculum vitae* of each candidate. As regards the applicant, he claimed during the oral procedure, and was not challenged, that the summary of his career did not

correspond to the one submitted by him on entering the service and on making his application for the post. He maintains that not only did it contain inaccuracies but that there were serious omissions from it. For instance, the date of the commencement of his career as a national public servant was incorrectly stated (1947 instead of 1935), there was no mention in the *curriculum vitae* of the distinctions and prizes awarded to him, nor of his publications, whilst it was otherwise in the case of the successful candidate; and the fact that the applicant had assumed the duties of the advertised post for several months by way of temporary replacement was omitted.

It is quite obvious that these facts are such as must have influenced the assessment of his suitability for promotion.

It has not been established that the members of the Commission were nevertheless aware of these facts when they took the Decision on promotion, because neither can we assume that they have always in their possession precise details concerning their officials, even in the highest grades, nor is it established that they obtained for themselves full details of the information required from the personal files of individual candidates before they took the contested Decision.

Consequently the Court has no alternative but to find that the members of the Commission were not sufficiently well-informed before they took the Decision on promotion.

This defect is all the more serious since the *curriculum vitae* of the candidate promoted included far more details, a fact which, bearing in mind the age gap, must necessarily have weighed against the applicant.

Lastly, the applicant is also right as regards the fact that a reading of the documents produced by the Commission does not reveal whether any examination was made of the linguistic requirements stipulated for the advertised posts in the vacancy notice.

Naturally, these facts taken together are not sufficient to support a complaint of misuse of powers in the sense that the contested Decision was knowingly ill-founded; however, they do reveal defects in the assessment procedure so grave that the Decision on promotion itself must appear defective, because one cannot exclude the possibility that the end result might have been different had the assessment been carried out correctly. The Court will therefore have to annul the Decision on promotion; and it is not necessary to go into the applicant's conclusions seeking the production of the minutes in full and of the personal file of the successful candidate.

III. I am therefore of the opinion that the Court should allow the application, annul the contested Decision, order the Commission to bear the costs and refer the matter back to the Commission for fresh consideration.