

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 Treaty establishing the European Economic Community;

Having regard to the Protocol on the Statute of the Court of Justice;

Having regard to the Staff Regulations of Officials of the European Economic Community;

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

THE COURT (First Chamber)

hereby :

1. Dismisses the application.
2. Orders the parties to bear their own costs.

Mertens de Wilmars

Donner

Monaco

Delivered in open court in Luxembourg on 6 May 1969.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER
DELIVERED ON 13 MARCH 1969¹

*Mr President,
Members of the Court,*

The applicant in the case with which my opinion is concerned today entered the service of the Commission of the European Economic Community on 16 June 1958 after working for five years in the Belgian Ministry for African Affairs. His salary was at first that of Grade A 5, but was raised to that of A 4 with effect from 1 March 1960.

From the first, the applicant was employed in Directorate-General VIII, originally entitled the Directorate of Overseas Countries and Territories and now known as that of Development Aid. He was in charge of the geographical section for Central Africa in the Directorate of Development Studies; from 1960 onwards he was in charge of the geographical section for Algeria and Overseas Departments and from June 1963, of the section for 'Studies'. When a

¹ — Translated from the German.

Special Department of Development Studies was created within that directorate in the autumn of 1965 the Commission appointed him head of that administrative unit with the title of Head of Special Department. Following the re-organization of the administration which took place on the merging of the executives the Directorate for Development Studies (since known as Development Policy and Studies) was modified. At that time the Development Studies Division, the top post in which was in Grade A 3, was created from the Special Department of Development Studies. The post was advertised in a vacancy notice published in the Staff Courier of 13 June 1968. At the same time the Directorate-General for Personnel and Administration informed the applicant by letter of 12 June 1968 that the Commission had given him a post as Principal Administrator (Grade A 4) in the newly created division.

The applicant was dissatisfied with this, however, believing that the alteration in the administrative structure of the Directorate for Development Policy and Studies merely involved a re-assessment of the post he occupied, making it that of Head of Division; consequently it was the duty of the Commission to upgrade him and there was no need to advertise the post. He accordingly submitted an administrative complaint to the Commission on 24 June 1968, requesting it to place him in Grade A 3, alter his title, withdraw the advertisement for the post of 13 June and also withdraw the decision of 12 June altering his appointment. At the same time he made an alternative application for the advertised post.

The applicant received no reply to his complaint. In fact he learned that a decision of 17 July 1968 had promoted another A 4 official from Directorate-General VIII to be Head of Division, placing him in the advertised post. This the applicant saw as an implied rejection of his request enabling him to ap-

peal to the Court of Justice on 7 September 1968.

The conclusions in his application contain a number of principal requests, relating to the implied decision rejecting his complaint, which can be stated as follows:

1. for the annulment of the decision of 17 July 1968 appointing another official Head of the Division of Development Studies;
2. for the annulment of the decision appointing the applicant to a new post;
3. for a declaration that the applicant shall be placed in Grade A 3, that he shall bear the title of Head of Division, that he shall carry out the duties of the Division of Development Studies.

Secondarily the applicant directly challenges the decision of 17 July and—so far as necessary to this case—the decision of 12 June, and further asks for a declaration that he is or should be promoted to Grade A 3, and that he is or should be appointed Head of Division. Finally in a further subsidiary request he asks for an order that the procedure for filling the abovementioned A 3 post should be re-opened.

In support of these claims, which the Commission rejects in their entirety as being unfounded, he has put forward a number of submissions, the legal validity of which I shall now consider.

Legal consideration

I—The principal requests in the conclusions

1. *Had the Commission a duty to re-classify the applicant?*

As grounds for his principal claim, which he considers to have been rejected by the decision of 17 July 1968, the applicant relies on the principle which requires grades to correspond with official duties, a principle repeatedly recognized

in previous judgments of the Court on the authority of Annex I to the Staff Regulations in conjunction with the definition of basic posts drawn up under Article 5 of the Staff Regulations. He points out that in 1965 there was, in the Directorate of Development Studies, a *Division* of Development Studies and an embryonic division ('division en voie de formation') for Development Policy. At the end of 1965 the administrative unit for Development Policy was made into a fully-fledged division, whilst the administrative unit for Development Studies remained without a Head of Division, there being no Grade A 3 post available. It was designated a Special Department and the applicant was made responsible for it as an official in Grade A 4. In fact, however, the applicant exercised the duties of a Head of Division, particularly in relation to the staff for which he was responsible. When a second Grade A 3 post became available to the Commission for the Directorate of Development Policy and Studies, enabling it to convert the Special Department of Development Studies into a division, it was its duty to leave the applicant in the re-graded post, which did not entail new duties, and simply adjust his grading.

One has to admit that this is a powerful argument. Let us not be content, however, with first impressions. We must examine the facts in more detail.

The first question which arises is whether or not there is any real distinction between a division and a special department, that is to say, whether 'Head of Division' and 'Head of Special Department' entail duties of equal weight and should accordingly be placed in the same grade. It should not be difficult to answer this question. It is in fact both conceivable and no surprise that there should exist considerable *objective* differences between the administrative units

known as divisions and special departments, frequently encountered in the practice of the Commission, as regards the composition of staff and the importance and scope of the duties (as is stated in an answer to a parliamentary question); it is therefore not only the budget which dictates these differences. In judging these differences with reference to the official definition of basic posts of 29 July 1963 the Commission may exercise its discretion, as part of its organizing powers, and this discretion is not subject to review by the Court unless there are clear indications of a misjudgment. (I refer the Court to its judgment of 24 February 1965¹). Here, however, it is quite clearly not the case that the applicant desires that kind of review, that is to say, he is not claiming that he should already have been classified in Grade A 3 as head of a special department. At least, it should be said that his reference to the fact that he exercised certain powers of a superior *vis-à-vis* subordinate staff in connexion with periodic reports and dealing with requests for leave would not be sufficient; for these powers are no more representative of the level at which an official functions than the fact that the head of a special department is directly under the authority of the director (this was definitively laid down by the Court of Justice in its judgment of 7 April 1965² and to 16 June 1965³).

Besides that one must be struck by the fact that the applicant did not protest earlier against the assessment of his post and seek an improvement in his grading. Undoubtedly the reason he did not do so is not only because he would otherwise have had to make clear at the time that his appointment in 1966 as head of a special department was not in accordance with the provisions relating to promotion, that is to say, that it was illegal. In fact the main reason behind

1 — Case 10/64, [1965] E.C.R. 69.

2 — Case 28/64, [1965] E.C.R. 237.

3 — Joined Cases 48/64 and 1/65, [1965] E.C.R. 351.

his failure to put in a claim for a better grading before was because the applicant was well aware that the principle of correspondence between duty and grade 'cannot be applied in such a manner as to oblige the appointing authority to accord its officials a grade other than that which . . . corresponds to the basic post' to which he was expressly appointed (as was stated in the judgment of 17 December 1964¹).

The heart of the problem in our case lies elsewhere, in fact. It has to do with the fact that in the year 1968 the Special Department of Development Studies was *converted* into a division. It is on this organizational measure that the applicant rests his claim to a higher grade, on the ground that its effect was simply to re-assess *his* post.

If we consider whether there is any justification for re-adjusting his grade in this way, it cannot be objected—as is done by the Commission—that this would only be possible after the entry into force of the new Staff Regulations and in connexion with the establishment of servants as officials. In any event no such limitations are to be found in the case-law of the Court² even though they might be thought to be desirable on the ground that without them the provisions laid down with regard to promotion, which are designed to protect the interests of other officials, would be easily circumvented by means of the re-assessment of posts. Similarly the Commission's reference to the necessity for a complete re-organization of its posts in the context of the merger of the executives and on the basis of a new detailed list of posts is not decisive one way or the other in judging the applicant's claim. Obviously this re-organization had no influence on Directorate-General VIII, which was and remains competent as regards matters concerning the EEC Treaty.

No, our case falls to be decided on the basis of other considerations. On the one hand, as has been pointed out in the proceedings, one cannot exclude the possibility that the conversion of the Special Department for Development Studies into a division came about as a result of the Commission's intention to give this administrative unit in the future greater political weight and more important functions. There is evidence for this in the fact that the conversion coincided with a *reduction* in the total number of Grade A 3 posts available to the Commission. On the other hand, it cannot be said that the alteration of the administrative unit of Development Studies was accomplished solely by upgrading *one* post. We see from the detailed list of posts submitted to the Court that this administrative unit was *increased* by one post, a not inconsiderable alteration of its organization. Even though its staff structure might have remained unchanged, the increase in the number of 'A' posts in it, giving the person responsible for the department *additional* responsibility for an A 4 official, excludes any justification for talk of a mere re-assessment of the post of head of department.

However, I think that the most important prerequisite for the applicant's claim is missing. One must realize that the Commission has rightly refrained from transferring him automatically into the newly created post, and that one cannot object if instead of that it advertised the post in accordance with Article 29 of the Staff Regulations.

2. *Has the applicant's legal status been adversely affected?*

Secondly the applicant claims that the Commission has impermissibly altered his rights under the Staff Regulations by making him a Principal Administrator

1 — Case 102/63, [1964] E.C.R. 708.

2 — Cf. judgments of 8 July 1965 — Case 49/64, [1965] E.C.R. 526 and 14 July 1965, Case 46/64, [1965] E.C.R. 811.

in the Development Studies division. Of course it cannot be denied that the decision referred to entails certain disadvantages for the applicant, in particular as regards his place in the staff hierarchy. Whereas previously he was directly responsible to a director, now he sees a head of division above him, and whereas previously he was accorded certain powers of a superior in rank over the staff—whose composition remained unchanged—of the department, now those powers are exercised by the head of division.

However, that does not necessarily mean that this is a case of infringement of legal rights, which the Court can censure. As we have seen, there was a restructuring of the administration structure, or re-organization, in the Directorate of Development Policy and Studies, that is to say, a process in respect of which the administration enjoys a discretion, according to the judgments of the Court, which must be exercised primarily in the interests of the service. In this connexion it was perfectly possible for the positions of officials employed in the administrative unit concerned to be affected in a way that involved an alteration of their powers and a modification in the scope of their duties, for in such a case no official has a legal right to retain his position and the career prospects it offers. The real deciding factor is whether in such a case there is a detraction from the *status* of an official. That is not the case if he is given activities (that is to say, a post) which correspond to his grade in the service; this is all he can claim under the Staff Regulations, Articles 5 and 7.

However, since the applicant was given a post of Principal Administrator, that is to say, duties which are of a level equal to that of a head of a special department according to the Commission's description of basic posts, and since the applicant has not shown that he was in reality performing duties of a lower level, there is no question of his legal position

being prejudiced and of his being downgraded. Consequently there can be no annulment of the decision of 12 June 1968.

This leaves us with the conclusion that the principal claims have no hope of success.

II—The secondary conclusions

Assuming—rightly, as we have seen—that after the conversion of the Special Department of Development Studies into a division the applicant had no claim to the newly created post of head of division, but that this had to be filled in accordance with Article 29 of the Staff Regulations, he has the following alternative claims to make.

1. *The procedure for filling the post was not correctly carried out*

We have been told in the course of the oral proceedings that another official in Grade A 4 in Directorate-General VIII was appointed, that is, *promoted*, by the Commission to the post of Head of the Division of Development Studies. Such a promotion requires according to Article 45 of the Staff Regulations 'consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. The applicant doubts, however, that the Commission obtained full and reliable information prior to adopting the promotion decision in such a way as to meet the requirement of comparable criteria of assessment. In any case he considers that they did not complete the necessary comparative examination of the personal files, annual reports and general character of the candidates.

The Commission has described to us the manner in which the disputed promotion was made. According to its explanation ten applications were received for the advertised post on printed forms,

and forwarded to members of the Commission after verification by the Directorate-General for Administration. Besides these the annual reports and personal files of the applicants were made available to members of the Commission. The decision was made after consideration of the reports and on the basis of a proposal made by the Head of Directorate-General VIII and after hearing reports from two members of the Commission on the various candidates. This agrees with the text of the minutes of the Commission's meeting of 17 July 1968.

I am sure that this should satisfy the requirements of Article 45 of the Staff Regulations and of the case-law developed by the Court with regard to promotion procedures. One cannot of course be certain whether the members of the Commission were in fact fully acquainted with all these factors, on which their decision had to be based, for in the abovementioned minutes of the meeting it is stated simply that the reports and personal files were *made available* to the members of the Commission. However, since it is also stated that two members of the Commission supplied the necessary oral information about the various candidates it seems reasonable to assume that the information obtained was comprehensive and correct, at least in so far as there is no indication to the contrary. In the circumstances I think it unnecessary, in particular, to undertake the investigation desired by the applicant into the content of the information provided, for the purpose of being absolutely sure that it contained no errors. Similarly I do not think it necessary to insist on production of the personal file of the promoted candidate as the applicant asks, in order to see whether it contains a detailed *curriculum vitae*. It is enough for the purposes of the judgment in this case to know that the *applicant's* personal file contains a very detailed account of his *curriculum vitae*, so that it is certain

that the Commission members knew all that was necessary about him.

There is therefore no ground for declaring the promotion decision of 17 July 1968 void on account of an inadequate comparative examination of the candidates for promotion.

2. *Misuse of powers*

The second point made by the applicant with regard to his secondary conclusions is that the decision to appoint to the post of Head of the Division of Development Studies another official constitutes a misuse of powers. He puts forward a number of factors to support this complaint. He refers the Court to his previous activities in the service, his university qualifications, the fact that he had already been responsible for three years for the administrative unit of Development Studies, that, as was shown by the increasingly favourable reports on him by his superiors, he had all the necessary qualities for the post, and to the fact that he is older and has a greater length of service (in Step 4 and in Directorate-General VIII) behind him. In addition to that it has been established that the appointment of the other official was already a *fait accompli* before the post was advertised, that is to say, the advertisement for the post and selection procedure were carried out merely as a matter of form.

My first comment on this argument is that it would in fact seem natural on re-assessing an administrative unit to entrust the new department to the person who has already successfully headed it as the applicant had done, according to the various reports on him by his superiors. (I refer to the reports to the effect that the applicant is capable of deputizing for the head of division or taking charge of larger administrative units). Apparently this corresponds to administrative practice in other similar cases, as has been pointed out in the oral proceedings. It should be empha-

sized at once, however, that there is no *legal right* to have such measures adopted: on the contrary, they are the result of the discretionary judgment of the appointing authority, the exercise of which depends mainly on the abilities of the various candidates. Also to be considered are character, conduct in the service and other factors involving value judgments. As has been repeatedly stated in your judgments, we cannot ourselves undertake this assessment, that is to say, answer the question who was the best candidate, because the Court cannot put itself in the position of the administration. The most that it can say is that a consideration of the factors on which the decision was based reveals that there was a *manifest* error of judgment. But that certainly cannot be said in the present case. The Commission has produced for the Court on the applicant's request a number of reports on the successful candidate. These give the impression that the official in question is outstanding, that, moreover, he joined the service of the Commission before the applicant, and—after being four years assistant to the Head of Directorate-General VIII—is certainly no less suitable for the post of head of the newly created Division of Development Studies than the applicant. There can therefore be no justification, having regard to the aspects so far considered, for alleging a misuse of powers.

However, it may be otherwise with the applicant's claim that the appointment of the other official was *decided* prior to the advertising of the post. Promises to that effect are said to have been made by the Head of Directorate-General VIII and by the member of the Commission who reported to the Commission on the applications which had been received. The conclusion could also be justified by the fact that the applicant had already been named for leadership of the Division of Development Studies in a working document of 7 February 1968 addressed to the chefs de cabinet. It is

also known by experience in other cases that the Commission generally adopts the recommendations of the chefs de cabinet. Lastly, the applicant says his view is borne out by the haste with which the procedure for filling the new post was completed: in fact it was over before the applicant received a reply to his complaint concerning his grading.

On closer inspection, however, these arguments are of little consequence.

As regards, first, the alleged promise of appointment of which the representative of the Commission has said in the proceedings he knew nothing and must therefore contest its existence, one might well obtain the impression that the Head of Directorate-General VIII made statements to some such effect. It could be gained from the abovementioned working document of 7 February 1968 addressed to the chefs de cabinet, in which the future organization of the Commission was proposed on the basis of the proposals of the Directors-General regarding the posts to be filled. But the Commission rightly points out that the name of the official later promoted was also mentioned in relation to other positions and that in any case it could have represented no more than a hopeful prospect held out by the Director-General because at the time in question the budget for 1968 had not yet been decided upon, and thus the number of posts approved by the Council was not yet known; and in the second place because the Director-General had no power of decision in the matter. Moreover, the applicant merely alleges that promises were made by a member of the Commission and does not adduce any facts which might give reason for a closer examination. Even were there any such promises they would in any case have no real significance because they could not bind the competent appointing authority for officials in Category A, that is, all the members of the Commission, who were bound in every case to make their decisions on the

basis of an evaluation of all the factors put before them. Lastly, the fact that the newly created post was filled relatively quickly is no indication that criticism is well founded. Of course one can share the opinion of the General Staff Committee and the administration of the Commission that the advertisement of vacant posts in the summer of 1968 was difficult to reconcile with the necessity of considering complaints by officials appointed to other posts in the course of the administrative re-organization. I do not see this as a misuse of powers, first, because according to the Commission that was what happened in a whole series of cases (seven other posts of Head of Division were filled in this manner) and secondly, because in any case until 17 July 1968 (the day on which the Head of the Division of Development Studies was appointed) there was sufficient time to examine the applicant's complaint of 24 June 1968. In the absence of any adequate evidence the complaint of a misuse of powers must likewise be rejected as unfounded.

3. *Absence of statement of reasons*

In a third submission—argued for the first time in the reply—the applicant finally claims that the Commission gave no reasons for the decision in question. Since the applicant accepts the consistent case-law of the Court that promotion decisions do not require a statement of reasons, he does not mean his complaint to be taken as meaning that the decision lacks a formal statement of reasons, but rather that when it adopted

the decision the Commission failed to state its reasons in the *minutes of its meeting*, and thus rendered any review by the Court impossible.

If one accepts the admissibility of this complaint, for example in view of the fact that the Commission produced extracts from the minutes of its meeting only in its statement of defence, the following observations should nevertheless be made on their content: we have repeatedly said that promotion decisions are taken by the appointing authority after consideration of numerous viewpoints and after the formulation of various value judgments. The examination of a candidate's suitability for a particular post involves a complex procedure which cannot be performed by the Court of Justice itself and the details of which are not subject to its review. But because this is the case one cannot reasonably require the appointing authority to render a detailed account of that examination in the minutes of its meetings or in proceedings before the Court. Consequently the lack of a detailed analysis of the merits of the candidates for promotion in the minutes of the Commission does not justify the conclusion that it did not have reasons for making its decision. Such a conclusion could only be justified if the applicant had shown that no objective grounds were apparent for the decision. The applicant made no attempt to do this, and in the light of the circumstances of the decision already known to us it would have been difficult for him to succeed in such an attempt. Accordingly the contested decision must be upheld.

III — Summary

I think no further examination of the facts of the case is necessary for me to be able to express the following opinion:

The application should be dismissed in its entirety as unfounded, that is to say, both as regards the principal claims concerning the applicant's grading

and his appointment to a different post, and as regards the secondary claims concerning the promotion decision of 17 July 1968.

In accordance with Articles 69 and 70 of the Rules of Procedure the applicant must therefore pay his own costs.