Having regard to the Protocol on the Statute of the Court of Justice of the EAEC;
Having regard to the Staff Regulations of Officials of the EAEC, especially Articles 7, 27 to 30, 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Annuls the appointment of Mr Eugenio Petrucco as administrator in the Personnel Department of the Karlsruhe establishment of the Joint Research Centre;**

2. **Orders the defendant to pay to the applicant the sum of one hundred and fifty thousand Belgian francs by way of damages;**

3. **Orders the defendant to pay the costs of the proceedings, with the exception of those incurred by the applicant in Application 62/65 R for the adoption of an interim measure.**

Trabucchi Delvaux Lecourt

Delivered in open court in Luxembourg on 15 December 1966.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 22 NOVEMBER 1966[1]

Mr President,
Members of the Court,

At the time when the application was lodged, the applicant in this case, an Italian national, was working in the Translation Department of the European Parliament as a temporary official. He took part in a general competition organized by the Euratom Commission, notice of which appeared in the Official Journal of 22 June 1964 under EURATOM/AD/A/47/64. This competition on the basis of qualifications and oral tests was held in order to constitute a reserve list for filling posts of administrator, becoming vacant or newly created, corresponding to career bracket A 7 – A 6 in eight different branches of the general administration of the Commission. The reserve list was to remain valid until 31 December 1965 or some other subsequent date in the event of extension. In the competition in which originally 442 candidates took part, 85 of whom reached the final oral tests, the Selection Board awarded the applicant 73.4 points and placed him first

1 — Translated from the French version.

on the list of the 46 candidates designated (see the memorandum of the Directorate-General of Administration of 23 March 1965). The applicant's name also appears on the reserve list drawn up in alphabetical order on 8 April 1965 by the appointing authority.

On 12 May 1965, the applicant was summoned to Brussels to be interviewed for a post on the staff of the Director of Administration of Personnel at the Commission and to undergo a medical examination. It seems that following this interview the Director of Administration of Personnel suggested to the Commission that the applicant should be appointed. However, in its capacity as appointing authority, the Commission did not follow this proposal and appointed another candidate (of Belgian nationality) who had been placed thirty-fifth on the Selection Board's list with 50.6 points. According to the Commission's statement, the appointment took place at Grade A 6, Step 3, with effect from 1 February 1966.

Then again in 1965 there was a post of administrator to be filled at the Nuclear Research Centre at Karlsruhe. So on 24 September the applicant and four other candidates were invited to Karlsruhe for an interview with the Head of Administration of that institution. But in the end the Commission appointed to this post also another candidate (of Italian nationality like the applicant) who had been placed twelfth on the Selection Board's list with 66 points. The appointment took effect from 1 February 1966 in Grade A 6, Step 2.

According to the applicant, he became aware of these decisions during the second half of December 1965. As he had not been engaged by the Commission up to that time, he decided to make an application to the Court, which was lodged at the Registry on 31 December 1965. He claims that the Court should:

— annul the appointments made by the Commission on the basis of Competition EURATOM/AD/A/47/64;
— annul any other appointments made by an institution of the Commission in its capacity as appointing authority;
— rule that the appointing authority of the Commission is obliged to appoint the applicant with retroactive effect to one of the vacant posts under the conditions indicated by the Director of Personnel and Administration (Category A 6);
— order the Commission to pay the sum of 26 000 Belgian francs per month by way of damages for the applicant's loss of income, together with any other allowance or sum to be fixed equitable by the Court on the basis of the Staff Regulations.

The Commission claims in the first place that the application is inadmissible because the requirements of Article 38 of the Rules of Procedure have not been satisfied. Alternatively, it contends that the application should be dismissed as unfounded.

With regard to the procedure, I would again remark that on 19 August 1966 the applicant requested the President of the Court, by means of an application for the adoption of an interim measure, to order the Commission to stay the final appointment of the candidates who had been engaged as probationary officials for the posts in question at Brussels and Karlsruhe. When the Commission subsequently made it known that it had already made the appointments by decisions of 19 July 1966 which entered into force on 1 August 1966, the applicated stated on 30 September 1966 that he was withdrawing his request for their suspension. Consequently the application on a procedural issue, Case 62/65R, was removed from the Court register by order of 5 October 1966 and only the decision on costs was reserved until final judgment in the main action. Furthermore, on 1 September 1966 the applicant had presented a written request for the production by the Commission of a number of documents. As we know, this request had been preceded by a decision of the Court of 3 June 1966 on a request for evidence presented by the applicant which led to the Commission's producing certain documents on 23 June 1966. Nevertheless the applicant considers that the Commission has not conformed in every respect with the Court's request. This request must also be dealt with in the context of the main action.

With regard to the subject-matter of the dispute which I have just defined, I would make the following observations.

Legal discussion

I — Questions of admissibility

The admissibility of the application is not disputed either from the point of view of observance of the prescribed time-limit or with regard to the fact that the applicant is not an official of the Community. Nor is it possible for the Court to raise any objection of its own motion in respect of these two points, particularly the second, because Article 91 of the Staff Regulations refers quite generally to *any person to whom these Staff Regulations apply*, which on a correct interpretation also includes those taking part in a competition held to fill a post.

The question must rather be asked whether the admissibility of the application should be contested having regard to the requirements of Article 38 of the Rules of Procedure, according to which the application must contain *inter alia* 'the subject-matter of the dispute and a brief statement of the grounds on which the application is based'. It is this point of view which the Commission supports, on the ground that the applicant has not defined his complaints in law, that is to say, he has failed to indicate precisely the grounds on which the application is based and has not specified the provisions of the Staff Regulations or the principles of law which the Commission is alleged to have infringed.

However, it seems to me that the Commission is thereby adopting too strict an interpretation of our Rules of Procedure. Certainly it must be admitted that with regard to the complaints alleged the application does not represent a shining example of clarity or precision. In fact it does not reveal in a perfectly clear manner whether the applicant criticizes the *relevance* of the reasons relied upon by the Commission or simply the fact that such reasons were not communicated to him at the proper time (it is only in the reply that it can be established that the applicant did not intend to put forward the complaint of insufficiency of the reasons). However, I will admit that the application read as a whole indicates with sufficient clarity the principles of law which, according to the applicant, have been infringed by the Commission. This follows from the fact that the applicant relies on Article 27 of the Staff Regulations, which refers to the necessity of securing for the institutions of the Community the services of officials of the highest standard of ability, efficiency and integrity. Clearly the applicant concludes from this that the fact of his appearing first in the results of the examination entitled him to be appointed in preference to all the other candidates. It follows also from the fact that the applicant cites with decision of the Court in Case 15/63, which deals with the rôle to be played by the nationality of an official in the filling of a post. I must even allow that the applicant has advanced with sufficient clarity the complaint of misuse of powers.

It would be inappropriate, as the Court has held on many occasions in its case-law, at least with regard to actions by officials, to require in addition that the applicant should set out the issues clearly when referring to their classification in the Treaty (infringement of the Treaty, misuse of powers, etc.) and that he should indicate exactly the provisions of law which have been infringed. Consequently, having regard to the requirements of form laid down in Article 38 of the Rules of Procedure, the application should not be declared inadmissible.

II — The merits

1. *Conclusions for annulment*

The substance of the dispute turns on whether it was proper for the applicant to be passed over when the Commission filled certain posts on the basis of the competition in question or whether the applicant, as the candidate placed first on the Selection Board's list of suitable candidates, was eligible for appointment so that the appointment of candicates placed lower should be considered illegal. In examining this question, it should be understood that I shall only deal with the two posts at issue in this case, having regard to the fact that, contrary to his conclusions which are couched in general terms, the applicant has not made mention of any other appointments likely to be of interest to him and also as we have not been made aware, even of

our own motion, of other appointments. Let me recall the two theories with which we are faced: the applicant gives a decisive importance to the list of candidates drawn up by the Selection Board, that is to say that it should *bind* the appointing authority to the extent to which that authority is obliged to appoint the candidate with the best results, whereas the Commission places the emphasis on the choice left to it by Article 30 of the Staff Regulations, with the result that all the candidates considered suitable by the Selection Board are equally eligible for appointment.

Before examining these theories and the arguments on which they are based in greater detail, it seems to me to be appropriate briefly to recall the essential characteristics of the competition procedure, as laid down in the Staff Regulations. According to Article 1 of Annex III thereto, the procedure is initiated by a notice of competition drawn up by the appointing authority and containing certain information (the nature of the competition; the type of duties involved in the posts to be filled; the diplomas and other evidence of formal qualifications or the degree of experience required for the posts to be filled; the nature of the tests and how they will be marked; knowledge of languages; age, etc.). After receiving the applications, the appointing authority draws up a list of candidates fulfilling the mandatory conditions laid down in paragraphs (a), (b) and (c) of Article 28 of the Staff Regulations (nationality, military service, character references). This list is sent to the Selection Board made up in accordance with Article 3 of Annex III, together with the candidates' files. The Selection Board's task is first to draw up a list of candicates who meet the requirements set out in the notice of competition. Then written or oral tests are held, preceded, where necessary, by a screening on the basis of the qualifications presented, the object of which is to draw up the list of candidates considered suitable, as provided for by Article 30 of the Staff Regulations, the number of candidates selected being at least double the number of posts competed for. Finally, on the basis of this list, to which a reasoned report is annexed, the relevant appointing authority makes the necessary appointments or, as in this case, decides to draw up a reserve list for future recruitment.

When one studies this procedure and considers in addition that the proceedings of the Selection Board, in which examiners serving in an advisory capacity may participate (that is, experts), shall be secret according to the Staff Regulations, there is no doubt that the Community law with regard to public office attaches great importance to reports as to the ability and efficiency of the candidates. This also emerges from Article 27 of the Staff Regulations, according to which 'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity'. Properly understood, this Article is not limited to expressing a directive or a general objective, namely that all candidates selected and appearing on the list of suitable candidates must meet the prescribed requirements. The place which it occupies at the beginning of the chapter on the recruitment of officials, as well as its categorical wording, compels the interpretation that the *differences* in the reports must be taken into account when selecting the candidate to be engaged. A Selection Board can therefore only bring sound judgment to bear in carrying out its duties, even in the absence of an express provision, by allowing such differences in merit to appear in its reasoned report. Consequently, contrary to what the Commission asserts, it is not possible to say that all the candidates appearing on the list of suitable candidates are equally eligible for appointment and are thereby in an identical legal position without the Selection Board's report's being taken into account.

However, we can see straight away that the foregoing conclusions do not yet enable us finally to resolve the problem with which we are faced. It is evident from the very wording of the Staff Regulations that the list of candidates selected by the Selection Board cannot, for *all categories* of competition, bind the appointing authority *absolutely*—to the exclusion of other factors—, that is to say that the first or the first three or four candidates should not take *absolute* preference over the others, as the applicant

considers. If this were so, Article 30, which speaks of the appointing authority's *deciding* which of such candidates to appoint, would be meaningless and one would be unable to understand why the fifth paragraph of Article 5 of Annex III to the Staff Regulations obliges the Selection Board to state the number of candidates admitted to the tests, such number being at least double the number of the posts to be filled. On the other hand, it is clear that the Commission must enjoy a certain area of discretion to allow it to take into account other considerations in addition to the tests. In this respect the Staff Regulations mention for all cases of recruitment the integrity of the candidates and the condition that they be physically fit to perform their duties. Further, Article 27 lays down that recruitment shall be carried out 'on the broadest possible geographical basis from among nationals of Member States of the Communities'. Neither must one forget that the Selection Board arrives at its findings solely on the results of the tests but that the total mark which it awards does not take into account qualifications, training or experience. Finally the general interests of the service play a part, as also the specific requirements for the post to be filled in each particular case.

Thus in all categories of competition the appointing authority enjoys a considerable area of discretion, by virtue of which, on a correct interpretation, it is obliged only to reconcile and take into consideration all the points of view stated at the same time as the different reports on the candidates resulting from the competition. Thus, according to the circumstances, even the differences in the results of the tests can be relegated to second place (particularly when the differences are only slight). In this way the particular features of our problem further increase the Commission's area of discretion, on the one hand, and the risks run by the candidates taking part in the competition, on the other.

We must not lose sight of the fact that in this case the Commission was not attempting to fill one or more existing posts, the duties of which were well defined in the notice of competition. On the contrary, as appears from the notice of competition published in the Official Journal of 1964, page 1561 et seq., the Commission availed itself ot the opportunity under Article 29(1) of the Staff Regulations of holding a competition for the purpose of constituting a reserve for future recruitment for a certain number of posts, some of which are yet to be created, that is to say, which have yet to be authorized by the Council of Ministers, and of which it is known only that they concern eight different branches: (1) legal and administrative, legislative and institutional matters – research contracts; (2) social problems, insurance and pensions; (3) industrial property, legal and commercial problems, patent licences; (4) records – documentation; (5) checking of the movement of fissionable material, stocks, transport, stock accounting; (6) personnel management; (7) press; (8) security. Consequently, each candidate was entitled to give a summary of his particular abilities (see the minutes of the Selection Board's proceedings appearing in its report of 23 March 1965). This factor is sufficient by itself to make the idea absolutely untenable that the Selection Board wished to compare that which was incapable of comparison and that it was possible for all the candidates examined to appear on a single list of suitable candidates, only the first one or more of which should have been appointed whatever the particular post to be filled.

Moreover, we must remember the manner in which the tests were carried out and marked in order to show their relative importance. On the basis of the documents produced by the Commission, we know that each of the eighty-five candidates admitted to the examination had to give a quarter of an hour's talk on the subject of his choice and to prove his knowledge of languages in an interview. The talk and knowledge of languages were both marked from 1 to 20 points and for each candidate the total mark was obtained by applying the coefficient 1 to the knowledge of languages and 3 to the talk. By adding the points obtained one then arrives at the mark which we have noted in connexion with the three persons of interest to us. On the other hand, the Selection Board's marking did not take into account the

different qualifications of the candidates, their training, experience or other personal merits.

In my opinion it is clear that the value of such marking must not be overestimated. In particular, the total mark thus obtained cannot indicate the personal fitness of a candidate to perform certain duties, for which it is perfectly possible that the qualities which the Selection Board did not mark and was not in a position to mark, or to which only the coefficient 1 was applied in the total mark, have some importance. Consequently, and I make mention of it once again, within the Community in all recruitment procedures on the basis of a competition we are faced with a considerable area of discretion on the part of the appointing authority, which shows, in other words, that this part of the Staff Regulations of the Community is obviously no more than a compromise between the national systems, which do not recognize the right of a candidate in a competition to appeal, and other systems in which the results of a competition bind an appointing authority more closely; it follows not only that all the applicant's references to Italian law are without importance but also that the Court's task, which is to review appointments made within the framework of the Community, is certainly not easy. On a correct interpretation, the Court cannot restrict itself to finding in a given case that the appointing authority has not followed the order of merit in the Selection Board's list of suitable candidates and, on the basis of this alone, conclude that the decision taken is illegal. On the contrary, the Court may only proceed by examining all the reasons relied on by the Commission in order to establish whether its decision seems vitiated by a misuse of powers or even whether it is of an arbitrary nature because the reasons relied on are not relevant or because certain points are obviously given too much emphasis.

Let us, therefore, in the light of these considerations, examine the facts of the case and the decision resulting from them with regard to the two appointments contested by the applicant.

(a) The post in Brussels

The Commission had a post to be filled in Brussels on the staff of the Director of Administration and Personnel. Despite his excellent report, the applicant was passed over for this post on the ground that two of the four posts of head of department in the directorate and the post of director were already held by Italians (whilst the other two posts of head of department were held by a German and a Frenchman). According to the principles laid down in the Staff Regulations, it would have been indefensible to accord another A post in the directorate to an Italian. In fact, in the end the Commission appointed a *Belgian* candidate.

Faced with this line of argument, the applicant first cites the judgment in Case 15/63, *Lassalle*, from which he attempts to elicit the principle that geographical distribution should only be a decisive factor in the selection of candidates when several of them have shown themselves to be of *equal* merit. But it must be said that the example chosen is of little value in the case in question because in the Lassalle case the question to be settled was one of *promotion*; all the same, a particular post had been *reserved* in that case for the nationals of a particular Member State. One may submit, as does the Commission, that for the *recruitment* of officials one must admit of other principles concerning the rôle to be played by the nationality of candidates; in fact, the recruitment procedure is particularly designed to implement the principles laid down by Article 27. It was precisely by taking this factor into account that the Court was able in the *Lassalle* case to declare that the nationality of candidates should not play a decisive rôle in the case of *promotions*. The judgment in the *Lassalle* case cannot therefore serve as a precedent in the present case.

Secondly, the applicant observes that nationality can at the most only enter into consideration in the context of the entire staff of an institution, that is to say, all the officials in its service, but not for an *isolated department*. In my opinion, this objection is not relevant either and the practice adopted in this matter by other institutions, to which

the applicant referred during the oral procedure, is of little importance. As one can readily see, certain important considerations of an objective and non-political nature lean towards the broadest possible geographical distribution, even within each department. Thus the differences in training and in the knowledge of languages and a thorough knowledge of the particular situation in a Member State from economic, legal and other points of view favour as fine a balance as possible in the composition of certain administrative departments from the viewpoint of the origin of officials. There is no need to emphasize that this holds particularly true for a department such as administration and personnel which deals with the entire staff. It is precisely in this area that the assessment of qualifications and national diplomas and a knowledge of the social situation in each country play a special part. It is also possible that in this case, in view of the considerable number of local employees, it was very much in the general interest to appoint to the Administration and Personnel Department an official who was familiar with the particular situation in the State in which the institution was situated.

In view of what we know regarding the composition of the Directorate of Personnel and as the applicant has not proved his theory that the reference to nationality was merely a *pretext* for the Commission, it cannot be doubted that that institution was correct in this case to accord decisive importance to nationality and that consequently it refrained from appointing the applicant to the vacant post.

This finding justifies our rejection of the conclusions relating to the post in Brussels. In particular, there is no need, in my opinion, to ask ourselves whether the contested decision may be vitiated *for other reasons*, because, for example, the Commission did not appoint the best-placed *Belgian* candidate. It is not possible to accord to the applicant a legitimate interest in elucidating such questions because, as an Italian national, he could in no way legitimately have hoped to be appointed to the post in question and because, in any event, the list of suitable candidates drawn up by the Selection Board also included four other candidates who had been placed above the applicant in that part of the test which consisted of a talk by the candidates.

(b) The post at Karlsruhe

It is not so simple to rule on the decision which led to the appointment of another candidate on the reserve list to the post at Karlsruhe. In that case also an official of Grade A 6 was sought for the Department of Administration and Personnel at the Research Centre. As we know, the choice finally fell on a candidate who appeared in twelfth place after the applicant, with 66 points, on the Selection Board's list of suitable candidates. As this candidate is an Italian, like the applicant, considerations of nationality played no part in the Commission's reasoning.

On the other hand, the applicant observes that the Commission unjustly passed him over, on the ground that his training was of too scientific a nature for the post competed for. It was actually said: 'However, his vocational experience equips him rather for a post in which his legal knowledge and experience can be better utilized. The management of the staff of a small research centre would divert him from a career corresponding better to his qualifications' (see the report of the official who made a value judgment on the applicant at Karlsruhe). Although the Commission was effectively guided by these reasons, one should perhaps express serious doubts as to their relevance in the context of the area of discretion which it enjoys. And this holds true even if one admits that in certain cases objective reasons may make it appear desirable that a too highly-qualified candidate be passed over, for example for fear that the duties attached to a specific post will not satisfy the candidate in the long term. I should say, however, that the file contains no evidence in support of the assertion that in its decision the Commission was guided by the reasons quoted and coming from an official.

On the other hand, the Commission relies on a consideration the relevance and decisiveness of which one must certainly allow in the context of the decision of appointment. It make the observation

(which also appears in its Official General Report for 1966) that the administration at Karlsruhe consists merely of junior officials who have usually only to take decisions of minor importance, whereas all the major decisions are taken by the central administration at Brussels. It was necessary to select for a post in this administration an official with practical administrative experience who was capable of performing the current routine work without a long period of adjustment. It is apparently this which the applicant is lacking. Although it is true that he claims to have acquired a certain administrative experience during his military service, one cannot thereby admit that, in respect of its length (the applicant was only in the services from 10 September 1962 to 8 February 1964) and its nature, the experience in question is sufficient having regard to the particular requirements of the administration of an international scientific research centre in a country foreign to the applicant. Furthermore, we know from the personal file of the candidate ultimately appointed on the suggestion of the administration at Karlsruhe, which the Commission produced during the oral part of the proceedings, that that candidate satisfied in a real way the requirements of the post in question and that he had acquired practical experience over a number of years in an apparently important position in a large insurance company. In addition, as there was only a slight difference in points between that candidate and the applicant (5.4 points for the talk) on the Selection Board's list of suitable candidates, we cannot conclude, within the limits to which our review is restricted, that the second contested decision is vitiated by a misuse of powers.

Taking them as a whole, the applicant's conclusions for annulment should therefore be rejected under all heads as being unfounded.

2. *The other conclusions of the application*

I can be brief in my remarks on the other principal conclusions.

As one can readily see, the request for a ruling on the applicant's position suffers the same fate as the requests for annulment. To the extent to which it refers to the Commission's obligation to appoint the applicant to one of the two posts mentioned, it can only be well founded if the contested appointments were illegal. In so far as it seeks in addition, which is not absolutely clear, a ruling that the Commission shall be obliged to appoint the applicant to *any* one of the posts to be filled from the reserve for future recruitment, I consider that it should also be rejected. Although it might be admitted that the applicant has a legitimate interest in obtaining such a ruling, it must nevertheless be asserted that the fact of having been placed first on a Selection Board's list gives at most a right to be included on the reserve list—which is what happened in this case—but not an absolute right *to be recruited* as an official. Independently of the limited validity of the reserve list, of whether the new posts will be authorized by the Council of Ministers and of the mandatory provisions of Article 29 of the Staff Regulations, recruitment is subject to a whole series of other essential considerations which allow the Commission a considerable area of discretion, as we have seen. The Court may in no way encroach upon this power of assessment.

Finally, it is evident from the foregoing that the applicant's request concerning the payment of damages for loss of income cannot be well founded, for it also presupposes that the contested appointments should be declared illegal.

In my opinion, all these findings are possible on the basis of the present state of the file, particularly after the production of the personal file of the official appointed at Karlsruhe. It does not seem to me that the documents listed by the applicant in his interlocutory application of 1 September 1966, which have not been produced, contrary to the Court's decision of 3 June 1966, would lead to any other finding. They certainly have no purpose in the case to the extent to which they contain the statement of acceptance of offers of employment from the Commission. In so far as they concern the post at Brussels, they can lead to no conclusion other than that just indicated, having regard to the fact that, for this appointment, the question of *origin* alone, which was absolutely uncontested, was

decisive. Nor, in addition, do they lead to a different solution in the case of the post at Karlsruhe, considering that the Court must restrict itself to ruling that the reasons relied on by the Commission are *relevant*. On the other hand, it is not for the Court to put itself in the place of the Commission in assessing the ability of different candidates on the basis of reports drawn up by the competent departments and in arriving at a discretionary judgment. This leads me to conclude that the interlocutory requests of the applicant cannot be accepted either.

3. *Decision as to costs*

I shall now say a few words on the decision as to costs, in so far as it is not governed by the order of the Court for the removal from the register of the application for suspension. With regard to this, I might restrict myself to finding that an applicant who withdraws must bear his own costs, in accordance with Article 70 of the Rules of Procedure. But in addition such a decision seems to me to be not unfair, having regard to the fact that, because of the belated lodging of his application for suspension, the applicant is himself responsible, as it was without purpose from the outset.

III — Conclusion

In view of the foregoing, I am of the opinion:

— that the application is admissible but that it must be dismissed as unfounded‘

— that it is not possible to accede to the interlocutory requests made by the applicant; and

— that the costs of the entire proceedings, including the application for suspension; should be settled in accordance with Article 70 of the Rules of Procedure.