OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 30 November 1988 *

Mr President,
Members of the Court,

1. On 30 October 1986 the Secretary-General of the European Parliament, acting as the appointing authority, adopted three decisions promoting nine officials to Grade A 4. François Vainker, a Parliament official in Grade A 5, seeks the annulment of those decisions on the ground that they were adopted in breach of the Staff Regulations of Officials of the European Communities, in particular Article 45. That article provides as follows:

'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.'

2. In its rejoinder the Parliament submitted that the applicant no longer had any interest in challenging the decisions of 30 October 1986 since he had been promoted to Grade A 4 with effect from 1 January 1987 by a decision of 10 December 1987.

3. In my view the applicant retains an interest in pursuing the case since, if the decisions of 30 October 1986 were annulled, there is a chance that his promotion might take effect from 1 October 1985, the date on which the promotion of two of the persons promoted under the contested decisions took effect. Such a decision would confer upon him not only entitlement to the payment of salary arrears but also greater seniority with a view to future promotion to A 3.

4. Let us therefore examine the applicant's complaints. Mr Vainker claims (a claim which is not challenged — see page 5 of the defence) that the appointing authority did not undertake a comparative examination of the merits of the officials eligible for promotion as it ought to have done,[1] but merely promoted the officials appearing on a list of nine names drawn up by the Advisory Committee on Promotions.

5. Nor is it disputed that the Promotions Committee for its part drew up that list on the basis of the rules appearing in an agreement concluded, it appears, at the beginning of 1986 between the Director-General for Personnel, Budget and Finance and the representatives of the Staff Committee. That agreement lays down numerical criteria which must be applied in drawing up the list of officials to be promoted.

6. According to those criteria marks are awarded to each official for seniority in grade, seniority in category and age; these can amount to a maximum of 35. In addition, account is taken of the merit of

* Original language: French.

1 — See judgment of 12 October 1978 in Case 86/77 *Ditterich* v *Commission* [1978] ECR 1855, paragraph 17 at p. 1864; judgment of 27 January 1983 in Case 263/81 *List* v *Commission* [1983] ECR 103, paragraph 26 at p. 117; judgment of 21 April 1983 in Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, paragraph 11 at p. 1257.

candidates, for which they may receive a maximum of 12 marks.

7. The applicant considers that that method of selection infringes Article 45 by giving priority to seniority when that provision clearly gives precedence to merit as a criterion for promotion. According to the applicant, proof that the promotion decisions adopted on the basis of that method constitute an unreasonable and improper exercise of the appointing authority's powers is provided in particular by the fact that the applicant, who obtained 11 marks for merit, and another official who obtained 12, were not promoted, whereas, for example, an official who had only received 8 marks for merit was promoted.

8. The European Parliament, on the other hand, considers that the promotion method in question takes due account of the merit of candidates and that the requirements of the Staff Regulations are satisfied where their case has been given attentive and impartial treatment and there has been no manifest error.

9. In my view, a method according to which the number of marks which can be awarded for merit (12) is scarcely more than one quarter of the total number of marks (47) that a candidate may obtain is not compatible with Article 45 of the Staff Regulations.

10. Moreover, whereas Article 44 of the Staff Regulations provides that 'an official who has been at one step in his grade for two years shall automatically advance to the next step in that grade', Article 45 provides, on the contrary, that promotion 'shall be exclusively by selection'. Although that certainly does not mean that an advisory committee cannot take into account numerical criteria in order to establish a provisional ranking, the appointing authority must none the less not put itself in a position where it must automatically promote officials whose names are submitted to it on the basis of such a method.

11. The Court's case-law is moreover perfectly clear on this matter. It is true that the Court acknowledged that:

'in order to evaluate the interests of the service together with the merits which must be taken into account in the context of the decision provided for by Article 45 of the Staff Regulations, the appointing authority has a wide margin of discretion and that, in that sphere, the Court must restrict itself to the question whether, regard being had to the methods and means which may have led to the assessment made by the administration, the latter remained within bounds which are not open to criticism and did not use its power in a manifestly incorrect manner' (judgment of 24 March 1983 in Case 298/81 *Colussi* v *Parliament* [1983] 1131, paragraph 20 at p. 1142).

12. However, the Court also specified those limits by stating that for the purposes of promotion

'seniority is merely one of a number of criteria of assessment and can never take precedence over the merits of candidates' (judgment of 14 July 1983 in Case 9/82 *Øhrgaard and Delvaux* v *Commission* [1983] ECR 2379, paragraph 19 at p. 2390).

13. According to the method in force in the Parliament it is clearly seniority which takes precedence. The applicant correctly points out that 'a candidate of no merit but with

five years' eligibility for promotion will, on that account alone, receive 15 points and thereby take priority over a candidate newly eligible for promotion but with maximum points for merit'.

14. The Parliament's argument that the applicant's case has been the subject of attentive and impartial treatment is not such as to call in question that conclusion. A method which is incompatible with the Staff Regulations does not become lawful merely because it is applied in an attentive and impartial manner to each candidate's case.

15. There is moreover a contradiction in the Parliament's argument. It argues that under the method adopted due importance is attached to merit. However, at the same time the Parliament states that marks from 8 to 11, even 12, that is to say covering one-third of the available marks, may be considered not to be significantly different! The applicant is certainly correct in his claim that, if of a total of 47 marks only 12 can be awarded for merit, a difference of 1 mark is of considerable importance.

16. The Parliament also contends that the Directors-General carry out a prior selection of candidates and propose for promotion only those whom they consider to be of sufficient merit. However, that did not happen in this case. Moreover, although such a prior selection may perhaps allow the rejection of candidates who are clearly not of sufficient merit, it does not guarantee that the promotion of the other candidates will be made on the basis of their merit and not, essentially, on the basis of their seniority.

17. It follows from the foregoing that the decisions of the Secretary-General of the European Parliament of 30 October 1986 were adopted without a comparative examination on his part of the merits of all the officials and on the basis of an 'automatic' method under which the seniority of candidates takes precedence over their merit. Those decisions were therefore adopted in breach of Article 45 of the Staff Regulations and must be annulled.

18. The applicant has also requested the annulment of the implied decision rejecting the complaint which he submitted on 9 March 1987 against the three decisions of 30 October 1986. The defendant contends that that request is not admissible because in its view 'the rejection of a complaint submitted pursuant to Article 90(2) of the Staff Regulations is not in itself a new "act adversely affecting the official" but a necessary procedural step within the general framework of the appeals procedure of Articles 90 and 91 of the Staff Regulations' (defence, point II.1).

19. I have, it is true, found a decision in which the Court annulled not only the contested act, namely a staff report, but also the Commission's express decision rejecting the applicant's complaint concerning that report (judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, at p. 527). However, in the case of *Razzouk* v *Commission* (judgment of 20 March 1984 in Joined Cases 75 and 117/82 [1984] ECR 1509, at pp. 1527 and 1531), in which the applicant had brought an action solely against the decision rejecting his complaint, the Court stated as follows:

'While it is true that the rejection of the complaint, because of its purely confirmatory nature, is not of itself an act capable of being contested, it must also be recognized that the application, which was lodged within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, is clearly seeking the annulment of the refusal to grant a pension under Article 79 of the Staff Regulations. There is thus no doubt about the real subject-matter of the dispute and, hence, about the admissibility of the application in this regard.'

The Court found that the application was well founded and, in the operative part of the judgment, annulled the decision refusing the pension without mentioning the decision rejecting the complaint.

20. On the basis of the *Razzouk* judgment I therefore consider the Parliament's observation to be apposite. However, it seems to me that the request for annulment of the decision rejecting the complaint is devoid of purpose rather than inadmissible. It is subsumed within the principal claim, which is the true subject-matter of the dispute, and its treatment depends entirely on the treatment accorded to that claim. I therefore consider that there is no need to rule on this request.

21. Thirdly, the applicant asks the Court to order the defendant to produce certain documents. As those documents were produced as an annex to the defence there is no need to rule on this claim either.

22. I propose that the defendant be ordered to pay the costs.

23. Having thus taken a clear position on the particular promotion method adopted by the Parliament, I am none the less aware that there remains the problem of defining suitable promotion criteria to be followed by the advisory committees on promotion. In that regard the question arises in particular whether the qualifications of candidates must really be strictly identical before the seniority or age of the candidates can be taken into account.[2] In view of the fact that each year there is only a limited number of posts to be filled, is an institution compelled to promote only those candidates who have obtained for merit marks closest to the maximum, even if that entails that those who year after year are assessed only as 'good' instead of 'very good' or 'excellent' are destined never to be promoted?

24. Such a situation does not seem to me to be satisfactory. Officials who have performed good and loyal service for many years should also be able one day to gain promotion just as much as officials who have performed their duties in a particularly brilliant manner for a small number of years.

25. The institutions must therefore seek a method which allows that concern to be reconciled with the terms of Article 45. It is significant that Article 45 of the Staff Regulations mentions two distinct criteria, namely the 'merits' of officials and the 'reports on them'. That seems to indicate that the findings made in the reports and the marks awarded do not necessarily constitute the only factors in the assessment of the merits of a candidate. The question therefore arises whether services performed

2 — See paragraph 22 of the *Colussi* judgment, cited above.

in an entirely satisfactory manner for a relatively long period of time might not be taken into account by way of merits.

26. Alternatively, one might also ask whether it should not be acknowledged that the ranking resulting from the marks obtained by officials on the basis of their merits may be modified slightly by the marks obtained by those officials for seniority, provided that only small differences are offset in this manner. In order to prevent seniority from generally taking precedence over merit, the marks which can be awarded for seniority should represent only a small percentage of the total marks provided for by the system (between one fifth and one quarter for example). Final discretion should of course always be retained by the appointing authority, since according to Article 45 promotion is to be 'exclusively by selection'.

27. It seems in any event that the question of the importance to be attached to seniority for the purposes of promotion within a career bracket merits more detailed examination by the institutions and that the wording of Article 45 might, if necessary, be made clearer.