having regard to the considerations which have influenced the administration in making its assessment, the latter has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Court cannot therefore substitute its assessment of the candidates' suitability or of the interests of the service for that of the appointing authority.

3. A decision of the appointing authority affecting the administrative status and career of an official may not be based on matters concerning his conduct which are not included in his personal file. A decision based on such matters infringes an official's right of defence, which Article 26 of the Staff Regulations concerning personal files, and Article 43, concerning periodical reports, seek to guarantee. It is for that reason contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of an unlawful procedure.

REPORT FOR THE HEARING
delivered in Case 233/85 *

I — Facts

1. On 23 February 1983, the Commission adopted a decision reorganizing its translation departments in Brussels and Luxembourg. That reorganization was to include in particular the setting up of specialized sections in its language divisions under the authority of a head of section to be appointed following an invitation to submit candidatures.

It was decided to make that appointment after a trial period during which various candidates for the post would perform the duties of head of section on a rota basis for a period of six months.

2. Anna Bonino, who had entered the service of the Commission in 1966 and had occupied a post of reviser since 1974, with Grade L/A 4 since 1 January 1979, was placed in charge of the Economics and Finance Section of the Italian Translation Division for the first trial period from 1 June 1983 to 30 November 1983.

For the period from 1 December 1983 to 31 May 1984, Carlo Tutzschky, a translator since 1971 and a reviser in Grade L/A 5 since 1 October 1976, promoted to L/A 4 with effect from 1 November 1982, performed the duties of Head of Section on a trial basis.

A third official who had submitted his candidature for the trial period later withdrew it.

3. In June 1984, the Commission published Vacancy Notice COM/1059/84 for the post of Head of the Economics and Finance Section of the Italian Translation Division

* Language of the Case: French.

(Career Bracket L/A 5-4). The duties were therein described as follows:

'To be responsible, under the authority of the Head of Division and in agreement with him, for the distribution and proper performance of the section's translation work; to carry out the revision or translation of texts assigned to his section; to ensure the further professional training of members of the section.'

The qualifications required for the post were

'1. University education evidenced by a degree or equivalent professional experience;

2. Thorough knowledge of the problems concerning the management of the work of a translation team;

3. Extensive experience in the area of translation and revision, in particular of economic and financial texts.'

Mrs Bonino and Mr Tutzschky submitted their candidatures in response to that vacancy notice.

4. In an internal memorandum of 12 July 1984 addressed to the Head of the Personnel Division, which was not communicated to Mrs Bonino, the Head of the Italian Translation Division, Mr Bellardi-Ricci, proposed the appointment of Mr Tutzschky to the vacant post. The way in which the section had functioned under his control during the trial period was beyond reproach and he had obtained the unanimous consent of his staff at all grades through the quality of his work and through his tact. Mrs Bonino had a solid knowledge of economic and financial matters but did not demonstrate an equally high degree of ability in regard to her capacity to guide and inspire the work of a team of translators, principal translators and revisers. Although the professional qualifications of the two candidates in regard to their ability to translate and revise were at more or less the same level, the two trial periods confirmed Mr Tutzschky's superiority in regard to his managerial abilities concerning both the distribution of work and the supervision which he exercised in a climate of good human relations.

On the basis of that memorandum, the contents of which were confirmed at a meeting between Mr Bellardi-Ricci and the Director of Personnel, a proposal was made by the latter to the Director-General for Personnel and Administration to transfer Mr Tutzschky, an official in Grade L/A 4, to the vacant post. The transfer decision was adopted on 19 October 1984, with effect from 1 October 1984.

On 29 October 1984, Mrs Bonino received a standard letter informing her, without providing any other details, that her candidature had not been accepted.

In a memorandum of 5 November 1984, which came to the notice of Mrs Bonino, the Head of the Italian Translation Division informed the staff that Mr Tutzschky had been appointed Head of the Economics and Finance Translation Section by decision of the appointing authority of 19 October 1984.

5. On 22 January 1985, Mrs Bonino submitted a complaint against the rejection of her candidature and the appointment of Mr Tutzschky to the post of Head of Section. She sent a copy to the President of the Joint Committee on Equal Opportunities, set up by the Commission.

On 12 July 1985, Mrs Bonino was informed that the Joint Committee on Equal Opportunities considered that, at first sight, the existence of covert discrimination against Mrs Bonino did not seem to be impossible and that, in general, it was concerned by the absence of female officials in posts of managerial responsibility in the translation departments, in which the share of posts held by women at the level of head of section and head of division is less than their share of the other posts in Category L/A.

By a letter of 6 August 1985, after the present action had been brought, the Vice-President of the Commission rejected Mrs Bonino's complaint.

II — Written procedure and conclusions

1. By an application lodged at the Court Registry on 24 July 1985, Mrs Bonino brought the present action.

She claims that the Court should:

1. Declare the application admissible and well founded;

2. Annul:

   (i) the decision rejecting her application for the post of Head of the Economics and Finance Translation Section advertised in Vacancy Notice COM/1059/84;

   (ii) the decision of 19 October 1984 to appoint C. Tutzschky;

   (iii) the rejection of her complaint;

3. Order the Commission to pay the costs.

2. The Commission contends that the Court should:

1. Dismiss the application as unfounded;

2. Make the appropriate order as to costs.

3. The principal parties exchanged statements of reply and rejoinder.

4. By order of 21 March 1986, the Court decided to permit the Union Syndicale — Service public européen — Bruxelles to intervene in support of the applicant's conclusions.

In its statement of intervention, the intervener claims that the Court should:

1. Uphold the applicant's conclusions;

2. Order the Commission to pay the costs of the intervention.

5. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

III — Submissions and arguments of the parties submitted to the Court during the written procedure

1. *Submissions and arguments of the applicant*

In support of her action the applicant submits that the appointing authority has exceeded its powers, infringed the Staff Regulations of Officials, in particular Articles 5 (3), 7 (1), 27 and 45 (1) thereof, and failed to respect the principle of equality of treatment for men and women, the obligation to state the reasons on which administrative acts are based and the principle of the protection of legitimate expectation.

She claims first that there was no statement of reasons for the contested decision and argues that, having regard to the circumstances of the case, *a particularly detailed*

statement of reasons was required for two reasons:

(i) The decision of the appointing authority to choose Mr Tutzschky rather than the applicant was very surprising since there was a whole series of arguments in favour of choosing the applicant, namely her greater professional experience, the fact that she had about five years' additional seniority in the service and in her grade, the fact that she had performed *de facto* the duties of a head of section for 10 years, the greater number of languages from which she works, her success in an internal competition for economists and her participation in a management course;

(ii) The implementation of the fundamental principle of equality for men and women should be based on a system of appropriate sanctions and effective judicial protection. Since there is a serious under-representation of female officials in posts of responsibility of the level at issue, covert discrimination should be avoided by requiring the appointing authority to justify the appointment of a man in such a way as to prove that it has not exceeded its discretion.

However, before this action was brought, the applicant had been given no reasons for the appointing authority's choice, whether orally or in writing. In particular, the Head of the Translation Division did not explain to her the reasons for the choice and expressed to her only favourable assessments of her work even after the end of the trial period.

The assessments, contained in the memorandum of 12 July 1984 and relied on by the Commission in these proceedings before the Court, *concerning the applicant's managerial abilities* in the light of the trial period *may not lawfully be relied on against the applicant* and do not constitute an admissible statement of reasons. A report on that trial period should have been presented to the applicant, in the same way as a periodical report or a report at the end of the probationary period, so that she could make observations and should then have been placed on the applicant's personal file in accordance with the first and second paragraphs of Article 26, Article 43 and, by analogy, Article 34 (2) of the Staff Regulations of Officials (see the judgment of the Court of 3 February 1971 in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7). Since those requirements were not complied with, the assessments in question may not lawfully constitute a statement of the reasons on which the contested decision is based.

The *applicant also denies* that the appointing authority's choice, based on an alleged lack of managerial abilities, is *well founded.* That assessment is not based on any specific factor or evidence and is contradicted by the fact, established by the applicant's periodical reports, that she has in fact performed the duties of a head of section in the area concerned for 10 years. Her excellent periodical reports, including that for the period from 1 July 1981 to 30 June 1983, drawn up after the trial period, refer expressly to the duties which she performed in regard to the distribution and coordination of work in the team, those being the essential duties of a head of section, and emphasized her good sense of organization, responsibility, initiative, team-work and good human relations. The applicant has also successfully attended management courses. Finally, after the trial period, she was informed of the possibility of obtaining an equivalent position, since her

professional qualifications were not contested, and she was offered appointment as a head of section in another division.

The applicant also claims that the *contested decision failed to respect the principle of equality between men and women* and is the result of sexist conduct. In that regard, she refers to the surprising nature of the choice, having regard to the duties that she has performed for 10 years and to the opinion expressed by the Joint Committee on Equal Opportunities, and she observes that of the 14 language divisions in the Commission, having a total of 66 sections, there are 50 male heads of section and 14 female heads of section, which represents a proportion of 28%. In regard to the departments based in Luxembourg, that proportion is 10.52% and there are no female heads of section in any language division other than the Danish Division.

Finally, the applicant claims that the *contested decision infringes the rule requiring protection of legitimate expectations.* The applicant could legitimately expect that there would be effective implementation of the principle of equality for men and women by virtue of the various statements and official messages from the Commission announcing in particular that steps would be taken to prevent its departments from deciding against the recruitment of women without giving adequate reasons.

2. *Submissions and arguments of the intervener*

The intervener claims firstly that, all other things being equal between male and female candidates, *preference should be given to the woman* where there is a serious imbalance between men and women in regard to posts at the level at issue. That principle flows from the fundamental importance of the principle of equality of men and women, recognized by the Court's case-law, Council directives and the statements and resolutions of the Council and the Commission. It is necessary to ensure a more balanced representation of women, in the same way as, according to the case-law of the Court, nationality may serve as a criterion permitting one candidate to be preferred to another with equal qualifications in order to maintain or re-establish the geographical balance of the staff. Having regard to the fundamental importance of the principle of the equality of the sexes, that criterion should be compulsory in a situation of serious imbalance. The applicant has shown that the appointing authority wrongly considered that she was not at least equally capable of managing and leading a section and that both she and the candidate appointed thus were equally entitled to be appointed to the post at issue. Having regard to the serious under-representation of women in posts of head of section in the Translation Divisions (28% in Brussels, 10.52% in Luxembourg, as against 46.73%, 43.39%, 58.78% and 61.53% respectively in Grades L/A 5, L/A 6, L/A 7 and L/A 8), the applicant was entitled to be preferred for that appointment.

The intervener also supports the applicant's submission to the effect that *equality between men and women requires a particularly detailed statement of reasons,* which has the effect of reversing the burden of proof. It refers in that regard to the Commission's 1986-90 Community medium-term programme on equality of opportunities for women (Document COM 85/801 of 19 December 1985) and the Interim Report on the application of Directive 79/7/EEC of 19 December 1978

(Document COM 83/793 of 6 January 1984). Where there are a number of factors all pointing to the existence of sex discrimination, it must be accepted that the allegation is proved. In that regard, the intervener cites statistics according to which the representation of women diminishes at the Commission the higher one goes in the grades of Categories B and A and in the Language Service.

Finally, the intervener claims that the *Commission has given rise among its staff to legitimate hopes that the principle of equality for women would be effectively implemented.* It refers in that regard to the Commission's statements before the Parliament, the Economic and Social Committee and public opinion on its role as a pathfinder in that domain, to the establishment of various working groups dealing with the question and to the 'Community action programme for the promotion of equal opportunities for women 1982-85', adopted in 1981. However, the Commission has not adopted the appropriate measures to implement effectively the principle of equality for men and women. The statistics show the absence of a significant change in the representation of women at the higher levels of the administration during the last few years. Thus, the average representation of women in the highest three grades of Category A is 1.95%, but is 10.90% for the other grades in that category. The Commission itself has admitted that it does not regard the results obtained in that matter as satisfactory. To confirm that conclusion, the intervener refers once again to the 'New Community action programme for the promotion of equal opportunities 1982-85', to a statement by the Equal Treatment Committee composed of representatives of the unions and professional organizations and the administration, and to its own claims in that area concerning the attribution of real powers to the Joint Committee on Equal Opportunities.

3. *Submissions and arguments of the Commission*

The Commission emphasizes that, according to the Court's case-law (judgment of 14 July 1983 in Case 9/82 *Ohrgaard and Another* v *Commission* [1983] ECR 2379; judgment of 21 April 1983 in Case 282/81 *Ragusa* v Commission [1983] ECR 1245, and the judgment of 24 March 1983 in Case 298/81 *Colussi* v *Parliament* [1983] ECR at p. 1142), *the appointing authority has a wide discretion in evaluating the interests of the service and the merits to be taken into consideration.* In this case, the comparative evaluation of the merits of the various candidates was carried out on the basis of the results of the trial periods undergone by both candidates, which, in particular, made it possible to determine the managerial capabilities of the two candidates. The applicant's trial period showed that her managerial capabilities were clearly below those of her competitor and of the other heads of section. That evaluation by the appointing authority, for which the Court cannot substitute its own evaluation, is not vitiated by any manifest error or any prejudice against the applicant. The choice of the appointing authority in that regard was in no way surprising since the duties of head of section following the reorganization of the sections were very different from those previously performed by the applicant and the periodical reports on the coordination duties performed by the applicant at an earlier date were not sufficient to establish her suitability for the new post and gave her no right to be appointed thereto. Although taking account of the applicant's seniority, qualifications and knowledge of languages, the appointing authority was

entitled to prefer Mr Tutzschky to her, since he also had excellent qualifications and periodical reports and his section had functioned in a manner which was beyond reproach during the trial period.

The appointing authority has no duty as against unsuccessful candidates *to provide a statement of the reasons* on which promotion decisions are based (see the judgment of 13 July 1972 in Case 90/71 *Bernardi* v *European Parliament* [1972] ECR 603). Such a decision is based, *inter alia*, on the character, conduct and overall personality of the person concerned and cannot therefore give rise to a statement of reasons. That principle, which applies *a fortiori* to decisions transferring an official to another post at the same grade which form part of the appointing authority's discretion to organize freely its departments, is not affected by the fact that there is a woman among the unsuccessful candidates. The administration is free to organize its departments and to evaluate as it sees fit the suitability of the officials being considered for a transfer without being required to state the reasons for its decisions to the candidates, regardless of whether or not they are women.

The Commission also claims that the *reasons for its choice were clearly explained to the applicant during an interview* which she had with her Head of Division and the Director responsible, and the Commission is prepared to prove the content of that explanation by oral evidence. Such an oral statement of the reasons on which a decision is based is sufficient and preferable since the reasons set out in a written statement could be damaging to an unsuccessful candidate. The appointing authority did not therefore wish to confirm to the applicant in writing the abovementioned interview in order to avoid the unfavourable conclusions drawn from her trial period appearing in her personal file since her competence and knowledge in the area of economics and finance were not contested.

The principle of equality for men and women does not prevent the Commission from using the suitability of candidates as a criterion of choice. That criterion is based on a wide diversity of assessments which take account of the duties to be performed and have nothing to do with the sex of the persons concerned. In this case, the choice of Mr Tutzschky was justified in the interests of the service by the results of the trial period from the point of view of tact, the ability to supervise in an atmosphere of good human relations and the flexibility of the future head of section. The appointing authority showed no prejudice as regards the sex of the applicant. The Joint Committee on Equal Opportunities, which was extremely cautious in its comments, was obviously able to take into account only the information submitted to it by the applicant and not the unfavourable result of her trial period and the unfavourable oral comments of her superiors on that subject.

The protection of legitimate expectations presupposes that the administration has led individuals to entertain justified hopes by giving them specific assurances (see the judgment of 19 May 1983 in Case 289/81 *Mavridis* v *European Parliament* [1983] ECR 1731). However, the Commission has never given women an assurance that they would be promoted in preference to men even where the appointing authority, making reasonable use of its discretion, considered that the

promotion of the male candidate was required in the interests of the service. A mere numerical imbalance between men and women in a department does not lead to the conclusion that appointments or promotions have been made in a discriminatory manner. The applicant herself never received a specific assurance that she would be promoted to the post of head of section since the very purpose of the system of trial periods was to identify the most suitable candidate for that post.

U. Everling
Judge-Rapporteur