OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 4 March 2010 [1]

I – Introduction

1. This dispute is one of the last staff cases which the Court of Justice will decide as court of appeal. It raises fundamental questions of considerable importance to future case-law not only in the field of European civil service legislation but also beyond that area of law. In particular, the Court of Justice must shed further light on the unlimited jurisdiction of the Courts of the Union.

2. The background to this case can be summarised as follows: Mr Gogos, an official of the European Commission, took part in an internal competition for promotion from the then Category B to the then Category A. As a result of a procedural error, his oral examination was repeated twice, with the result that Mr Gogos did not pass the examination until the third attempt and was included in the list of suitable candidates some five years later than the other successful candidates. On account of this delay, Mr Gogos lost the opportunity to be appointed to a Category A post and to be promoted within his new career bracket considerably earlier than was actually the case. To compensate him for this delay, Mr Gogos is of the opinion that the Commission should have classified him directly in grade A 6. However, the Commission actually classified him only in the lower starting grade, A 7.

3. The action by which Mr Gogos challenged the appointing authority's decision to classify him in grade A 7 was dismissed by the Court of First Instance (now 'the General Court') by judgment of 15 October 2008 [2] ('the judgment under appeal'). By his appeal, Mr Gogos now alleges that the General Court erred in law and complains that it did not award him financial compensation of its own motion. In addition, he seeks separate compensation on account of the – in his view undue – length of the proceedings at first instance.

4. It is true that this case is covered by the 'old' rules which were applicable until 30 April 2004, that is to say, before the 'major reform' of European civil service law carried out by Regulation (EC) No 723/2004. [3] However, the questions of law to be clarified by the Court of Justice in connection with unlimited

1 — Original language: German.

2 — Case T-66/04 *Gogos* v *Commission* [2008] ECR-SC I-A-2-69 and II-A-2-451.

3 — Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1).

jurisdiction and compensation for lost opportunities are no less relevant to the new rules applicable since 1 May 2004.

II – Legal context

5. The legal context of this case is determined by the Staff Regulations of officials of the European Communities ('the Staff Regulations') in the version of those regulations applicable until 30 April 2004. [4] At that time, the career structure for the European civil service was governed by Article 5(1) of the Staff Regulations as follows:

'The posts covered by these Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in four categories A, B, C and D in descending order of rank.

Category A shall comprise eight grades, divided into career brackets ordinarily containing two grades each for staff engaged in administrative and advisory duties which require university education or equivalent professional experience.

Category B shall comprise five grades, divided into career brackets ordinarily containing two grades each for staff engaged in executive duties which require an advanced level of secondary education or equivalent professional experience…'

6. In addition, Article 45(2) of the Staff Regulations provided:

'An official may be transferred from one service to another and promoted from one category to another only on the basis of competition.'

7. Article 31 of the Staff Regulations contained the following provision:

'(1) Candidates … shall be appointed as follows: officials in Category A …:

— to the starting grade of their category …;

4 — Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, applicable from 5 March 1968, as laid down by Articles 2 and 3 of Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 (OJ English Special Edition 1968(I), p. 30), as amended by Council Regulation (Euratom, ECSC, EEC) No 1473/72 of 30 June 1972 (OJ English Special Edition 1972(III), p. 703).

— …

(2) However, the appointing authority may make exceptions to the foregoing provisions within the following limits:

(a) in respect of grades A 1, A 2, A 3 and LA 3:

…

(b) in respect of other grades:

— up to one third of the appointments to posts becoming vacant;

— up to half the appointments to newly created posts.

Save in respect of grade LA 3, this provision shall be applied by groups of six posts to be filled in each grade for the purpose of this provision.'

8. Furthermore, regard must be had to Article 91(1) of the Staff Regulations, which – both in the version applicable until 30 April 2004 and that applicable from 1 May 2004 – reads as follows:

'The Court of Justice of the European Communities shall have jurisdiction in any dispute between the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting such person … In disputes of a financial character the Court of Justice shall have unlimited jurisdiction.'

III – Facts and procedure

9. Mr Christos Gogos has been employed by the European Communities (now: the European Union) since 1981 and, on 1 October 1986, was appointed by the Commission as an official in grade B 5.

10. In 1997, Mr Gogos took part in internal competition COM/A/17/96, which was intended to enable officials in the then Category B to advance to the then Category A, more specifically to career bracket A 7/A 6. One of the conditions of participation in that competition was a minimum length of service in Category B of seven years. The competition notice also stated that successful candidates would generally be appointed at the starting grade of the A 7/A 6 career bracket.

11. Mr Gogos did not achieve the required number of points in the competition's oral examination and was therefore not included on the list of suitable candidates. The selection board informed him of this fact by letter of 15 December 1997.

12. Following an action brought by Mr Gogos, the General Court annulled that decision of the selection board by judgment of 23 March 2000, [5] in particular on the ground that the selection board had not been able to guarantee equal treatment for all candidates in the oral examination.

13. The Commission subsequently invited Mr Gogos to a second oral examination on 25 September 2000, which, however, he again failed.

14. Mr Gogos also challenged the selection board's second decision before the General Court. An amicable settlement was reached between Mr Gogos and the Commission in the proceedings before the General Court. Under that settlement, Mr Gogos withdrew his claim for the annulment of the selection board's decision and for the compensation which he had sought; in return, the Commission undertook to hold a third oral examination for Mr Gogos and to cover his reimbursable costs. [6]

15. Mr Gogos was eventually successful in the third oral examination which took place on 8 November 2002. The Commission subsequently informed him by letter of 15 November 2002 that his name had now been included on the list of suitable candidates for competition COM/A/17/96.

16. With effect from 1 April 2003, Mr Gogos was then appointed as a Category A official. On 31 March 2003, he was informed of the decision of the appointing authority to classify him in grade A 7, Step 3 ('the classification decision').

17. Pursuant to Article 90(2) of the Staff Regulations, on 30 June 2003 Mr Gogos lodged an administrative complaint against the classification decision in which he alleged infringement of Articles 31 and 45 of the Staff Regulations, of Article 233 EC and of the amicable settlement reached in the previous court proceedings. [7] He claimed, in essence, that he should be put in the position in which he would have been if he had passed the competition in December 1997. Most of the successful candidates in that competition had already been promoted to the grade above, that is to say grade A 6. In order to make up for the gap between him and those colleagues, Mr Gogos took the view that the appointing authority should classify him directly in grade A 6 – and not grade A 7.

5 — Case T-95/98 *Gogos* v *Commission* [2000] ECR-SC I-A-51 and II-219.

6 — See the order of 21 October 2002 in Case T-97/01 *Gogos* v *Commission* (not published in the ECR).

7 — Case T-97/01 *Gogos* v *Commission*.

18. Mr Gogos 'complaint was rejected by decision of the appointing authority of 24 November 2003 ('the decision on the complaint'). As a result, Mr Gogos brought an action before the General Court on 18 February 2004. More than four years later, on 15 October 2008, the General Court dismissed that action by the judgment under appeal, but ordered the Commission to bear all the costs pursuant to Article 87(3) in conjunction with Article 88 of the Rules of Procedure of the General Court.

19. By his appeal, brought on 22 December 2008, [8] Mr Gogos now claims that the Court of Justice should:

— set aside the judgment of the General Court;

— annul the decision classifying him in grade A 7 and the decision of 24 November 2003 rejecting his administrative complaint;

— exercise its unlimited jurisdiction and award him financial compensation totalling EUR 538 121,79 for the economic damage caused to him by the Commission's unlawful conduct in adopting the unlawful decision at issue, which, on account of the administrative reform, will affect him for the remainder of his life;

— award him compensation of EUR 50 000 for the long delay in delivery of the judgment at first instance; and

— order the respondent to pay the costs incurred by him as applicant at first instance and appellant in these proceedings.

20. For its part, the Commission contends that the Court should:

— dismiss the appeal in its entirety;

— reject the appellant's claim for compensation in relation to the duration of the proceedings; and

— order the appellant to pay all the costs.

8 — The original of the appeal, initially sent by fax, was received at the Registry of the Court of Justice on 24 December 2008.

21. Before the Court of Justice, first written submissions and then, on 28 January 2010, oral argument were presented.

IV – Assessment

22. Mr Gogos raises two pleas in law against the judgment under appeal (see Section A). In addition, by a separate claim, he seeks compensation on account of the duration of the proceedings at first instance (see Section B).

A – *The two pleas in law*

23. I shall turn first to the two pleas in law advanced by Mr Gogos, by which he seeks the setting aside of the judgment under appeal.

1. The alleged failure to examine a number of pleas in law in the judgment under appeal (first plea in law)

24. The first plea in law is concerned with those passages from the grounds of the judgment which discuss whether Mr Gogos was rightly classified in only the lower starting grade, A 7, or whether he should, rather, have been placed directly in the higher grade, A 6. Mr Gogos alleges that the General Court failed to examine five of his six pleas in law, and therefore failed to give adequate reasons for dismissing his action against the classification decision and the decision on the complaint.

25. The background to this plea in law is the fact that, in the proceedings at first instance, Mr Gogos claimed that the following provisions and legal principles had been infringed: Article 31(2) of the Staff Regulations, Article 233 EC, the principle of equal treatment, the principle of equity, the principle of sound administration and the principle that officials should have reasonable career prospects. [9] However, in the judgment under appeal, the Court gave detailed consideration only to Article 31(2) of the Staff Regulations, [10] whereas it devoted only three short paragraphs to Article 233 EC and the other principles mentioned by the applicant. [11]

9 — See the summary in paragraph 18 of the judgment under appeal.

10 — Paragraphs 27 to 43 of the judgment under appeal.

11 — Paragraphs 44 to 46 of the judgment under appeal.

(a) Admissibility

26. The admissibility of this first plea in law does not appear to pose any problems.

27. It is recognised that a claim that the General Court failed to consider a plea in law may be viewed as an allegation of failure to state reasons. [12] The duty on the General Court to state the reasons on which its judgments are based is clear from Article 36 in conjunction with Article 53(1) of the Statute of the Court of Justice. In accordance with settled case-law, the question of whether the grounds of a judgment of the General Court are inadequate is a question of law which is amenable, as such, to review on appeal. [13]

28. Nevertheless, the Commission vehemently disputes the admissibility of the first plea in law. It takes the view that Mr Gogos advanced only one plea in support of annulment, by which he alleged infringement of only Article 31(2) of the Staff Regulations. His references to the other provisions and legal principles were of a purely supplementary nature. If Mr Gogos is now attempting, *ex post facto*, to reclassify those supplementary arguments at first instance as independent pleas in support of annulment, he is contradicting his own conduct in the proceedings at first instance and, in reality, putting forward new pleas in law, which is not permitted on appeal.

29. This objection is unconvincing.

30. Unlike the Commission, I can see nothing in the documents in the case to indicate that the applicant's submissions before the General Court must necessarily be regarded as having been the expression of a single plea in law. For example, it is clear from the application submitted by Mr Gogos at first instance that separate sections of that document are devoted to Article 233 EC, to the principle of equal treatment and to the principles of equity, sound administration and reasonable career prospects for officials. This argues for rather than against the existence of independent pleas in law.

31. There is nothing which points to the contrary in the Report for the Hearing at first instance or in the judgment under appeal, on both of which the Commission attempts to rely. The Report for the Hearing simply summarises the arguments advanced by the

12 — Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29, and Case C-197/99 P *Belgium* v *Commission* ('*Forges de Clabecq*') [2003] ECR I-8461, paragraphs 80 to 83; see, to the same effect, judgment of 8 June 2009 in Case T-498/07 P *Krcova* v *Court of Justice,* not yet published in the ECR-SC, paragraph 34; see also the Opinion of Advocate General Lenz in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, point 36.

13 — Case C-185/95 P *Baustahlgewebe* v *Commission* ('*Baustahlgewebe*') [1998] ECR I-8417, paragraph 25; Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53; Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9761, paragraph 76; and Case C-385/07 P *Der Grüne Punkt — Duales System Deutschland* v *Commission ('Der Grüne Punkt')* [2009] ECR I-6155, paragraph 71.

applicant; it does not expressly classify those arguments either as a single plea in support of annulment or as several different pleas. [14] The judgment under appeal merely states that the applicant claims 'first and foremost' infringement of Article 31(2) of the Staff Regulations and 'in addition', 'as a result' of that infringement, breach of the other provisions and legal principles mentioned by him; [15] this too does not necessarily constitute evidence of the existence of a single plea in law.

32. Quite apart from the foregoing, it would also be excessively formalistic, and the role of the Court of Justice as court of appeal would be unduly curtailed, if the mere fact that arguments are designated as 'ακυρωτικοί λόγοι' [16] for the first time in the appeal were to be regarded as evidence that the subject-matter of the proceedings has been extended by comparison with the proceedings at first instance.

33. It is true that, under Article 42(2) in conjunction with Article 118 of the Rules of Procedure of the Court of Justice, new pleas in law may not be put forward on appeal. It is, however, settled case-law that the purpose of those provisions is merely to ensure that the subject-matter of the proceedings is not extended beyond the pleas argued at first instance. [17] This is not the case here.

34. What Mr Gogos actually alleges is that the judgment under appeal did not adequately assess fundamental parts of his arguments at first instance. [18] The appellant is therefore not putting forward a substantively new plea before the Court of Justice, but is simply seeking a review of whether the General Court examined the arguments and evidence exchanged at first instance in a manner which satisfies the legal requirements governing the statement of reasons in a judgment. Providing an answer to this question is one of the most fundamental tasks of the Court of Justice in its appellate jurisdiction.

35. The first plea in law is therefore admissible.

(b) Merits

36. The first plea in law would succeed if, in the judgment under appeal, the General Court had failed to fulfil its duty to state reasons pursuant to Article 36 in conjunction with Article 53(1) of the Rules of Procedure of the Court of Justice.

14 — Paragraphs 25 to 31 of the Report for the Hearing in the proceedings at first instance.

15 — Paragraph 18 of the judgment under appeal.

16 — In English: 'pleas of annulment'.

17 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 57 to 59; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 165; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 66; and Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 60.

18 — It is clear from his application to the General Court (see paragraphs 27 to 41 thereof) that Mr Gogos devoted around half of his written submissions at first instance to his arguments concerning Article 233 EC and to the principles of equal treatment, equity, sound administration and reasonable career prospects for officials.

37. It is settled case-law that the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review. [19]

38. However, the requirement that the General Court give reasons for its decisions cannot be interpreted as meaning that it was obliged to respond in detail to every single argument advanced at first instance, particularly if the argument in question was not sufficiently clear and precise. [20] In fact, the reasoning for the judgment may even be implicit, on the condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review. [21] It must, however, be clear from the grounds of the judgment, taken in their entirety, that the General Court has examined all the infringements of law alleged at first instance. [22]

39. The judgment under appeal satisfies these requirements. After dismissing the claim of infringement of Article 31(2) of the Staff Regulations, [23] the General Court states that, 'consequently', the other irregularities alleged by Mr Gogos in relation to Article 223 EC, the principle of equal treatment, the principle of equity, the principle of sound administration and the principle of reasonable career prospects for officials likewise 'were not capable of affecting the legality of the classification decision'. [24]

40. Consequently, the General Court did not disregard the other provisions and legal principles referred to by Mr Gogos; it considered them, albeit only extremely briefly. It is readily apparent from the aforementioned passage of the judgment that the General Court dismissed the allegations in question on the same grounds as those on which it dismissed the allegation based on Article 31(2) of the Staff Regulations.

41. Mr Gogos claims that the General Court should have made a separate assessment of the principle of equal treatment in particular and should not have included it in its examination of Article 31(2) of the Staff Regulations.

42. It must be pointed out in this regard that two separate paragraphs in the judgment under appeal were devoted to the principle of equal treatment. [25] In those paragraphs, the General Court – albeit, once again, extremely briefly – set out its opinion as to why reliance on the principle of equal treatment in particular was not capable in this case of supporting Mr Gogos' classification in the higher grade. On the one hand, the General Court takes the view that reliance on the principle

19 — Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33, and *France Télécom* v *Commission* (cited in footnote 17, paragraph 29).

20 — Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121; Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission ('FIAMM')* [2008] ECR I-6513, paragraph 91; and *France Télécom* v *Commission* (cited in footnote 17, paragraph 30).

21 — Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 42, and Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 135.

22 — Judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others* v *Commission*, paragraph 22, not published in the ECR.

23 — Paragraphs 27 to 43 of the judgment under appeal.

24 — Paragraph 44 of the judgment under appeal.

25 — Paragraphs 45 and 46 of the judgment under appeal.

of equal treatment is precluded because each post requires an individual decision based on an assessment of the qualifications of the official to be recruited. On the other hand, specific professional experience will have already been taken into account in relation to the promotion of the official concerned to the higher category.

43. It may be that Mr Gogos does not concur with the substance of these findings by the General Court. However, that in no way alters the fact that the General Court did examine the allegations made by him. The fact that the General Court, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgment for failure to state reasons. [26]

44. For all these reasons, the first plea in law must therefore be dismissed.

2. The circumstances in which the Court may award compensation of its own motion (second plea in law)

45. The second plea in law concerns whether the General Court could, and if so should, have awarded financial compensation to Mr Gogos of its own motion. Mr Gogos complains that the General Court failed to recognise its unlimited jurisdiction in disputes of a financial character. In Mr Gogos' view, that jurisdiction would have permitted the judges at first instance to award him financial compensation of their own motion.

46. By this plea in law, the appellant objects in particular to paragraph 47 of the judgment under appeal, in which the General Court finds, in essence, as follows: it is true that Mr Gogos may have lost the opportunity of promotion to Category A at an earlier date, and therefore of being promoted to his new career bracket at an earlier date, because of the need to hold another oral examination. [27] However, Mr Gogos made no claim for financial compensation in this regard before the General Court.

(a) Admissibility

47. The Commission regards this second plea in law as inadmissible. It argues that, throughout the entire court proceedings to date, Mr Gogos has sought nothing more than the annulment of the classification decision and the decision on the complaint. He has never made a claim for compensation and may not properly do so for the first time on appeal.

26 — Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 80.

27 — I would point out merely in passing that the General Court incorrectly refers to an oral examination 'in September 2002', which came about 'as a consequence of the judgment in *Gogos* v *Commission*'. As Mr Gogos himself rightly points out, the oral examination in question did not take place in September 2002 but in November 2002, and was prompted not by an earlier judgment in *Gogos* v *Commission* but by the settlement reached between the parties in Case T-97/01.

48. It is true that, by his own admission, Mr Gogos did not make a formal claim for compensation in the proceedings before the General Court.

49. However, the Commission's plea of inadmissibility is unfounded. The Commission fails to understand what Mr Gogos is actually seeking by way of the second plea in law. The question is whether the General Court could and should have awarded compensation to the applicant *of its own motion* – that is to say *in the absence of* a claim to that effect.

50. The question whether the General Court was entitled and, if so, even obliged to award financial compensation to Mr Gogos of its own motion is a question of law amenable to review on appeal. The discussion of that question cannot be made subject to the condition that the person concerned must have made a separate claim for compensation at first instance. In fact, by its very nature, this question arises specifically in cases where the applicant did not make a claim to that effect in the proceedings at first instance.

51. By raising this issue on appeal, Mr Gogos is therefore not extending the subject-matter of the proceedings, but is asking the Court of Justice to examine whether the General Court considered the arguments and evidence exchanged in the proceedings at first instance in accordance with the relevant legal requirements and, in this regard, took all the steps permitted and necessary.

52. Legal protection in relation to this matter would be rendered meaningless if the existence of a claim for compensation at first instance were to be made a mandatory condition of admissibility on appeal. This would be incompatible with the principle of effective judicial protection.

53. The second plea in law is therefore admissible.

(b) Merits

54. In order for the second plea in law to be successful in this case, the General Court would have to have had jurisdiction to award compensation to Mr Gogos of its own motion and would have to have failed to recognise that jurisdiction. [28]

28 — See also to this effect Case C-135/06 P *Weißenfels* v *Parliament* [2007] ECR I-12041, paragraph 69.

(i) Unlimited jurisdiction under the Staff Regulations in disputes of a financial character

55. The second sentence of Article 91(1) of the Staff Regulations confers on the Court of Justice of the European Union unlimited jurisdiction in disputes of a financial character between officials of the European Union and their employers.

56. The term 'dispute of a financial character' must not be interpreted narrowly.

57. It is true that a dispute of a financial character exists primarily where the official concerned brings an action for monetary payment under Article 270 TFEU, for example for payment of compensation or sums which he considers due to him under the Staff Regulations or other measure governing his working relations; [29] such sums may include, for example, remuneration, specific allowances and benefits under the Staff Regulations or default interest. [30]

58. However, a dispute of a financial character may also be concealed behind an action by which an official seeks the annulment of a decision affecting his administrative status. [31] It is of particular interest to this case that an action by which an official seeks a judicial review of his classification likewise gives rise to a dispute of a financial character. [32] The logic behind this is that the decision of the appointing authority on the classification of an official not only has an impact on the career of the person concerned and his personal position within the hierarchy of the authority, but also has direct effects on his pecuniary rights, in particular the level of his remuneration under the Staff Regulations.

59. Against that background, this case also concerned a dispute of a financial character in which the General Court enjoyed unlimited jurisdiction under the second sentence of Article 91(1) of the Staff Regulations.

60. The unlimited jurisdiction under the second sentence of Article 91(1) of the Staff Regulations entrusts the Courts of the Union with the task of providing a complete solution to the disputes brought before them. [33] The Courts of the Union do not therefore have to confine themselves – in so far as the purely pecuniary aspects of the particular dispute are concerned – to a review merely of the legality of the conduct of the institutions, bodies, offices and agencies of the European

29 — *Weißenfels* v *Parliament* (cited in footnote 28, paragraph 65).

30 — *Weißenfels* v *Parliament* (cited in footnote 28, in particular paragraphs 62 and 66), and Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 45.

31 — Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743, paragraph 14, and Joined Cases 176/86 and 177/86 *Houyoux and Guery* v *Commission* [1987] ECR 4333, paragraph 16 in conjunction with paragraph 1; see also Case T-159/96 *Wenk* v *Commission* [1998] ECR-SC I-A-193 and II-593, paragraph 122; Case T-10/02 *Girardot* v *Commission* [2004] ECR-SC I-A-109 and II-483, paragraph 89; and T-404/06 P *ETF* v *Landgren* [2009] ECR II-2841, paragraph 233.

32 — Case 83/63 *Krawczynski* v *Commission* [1965] ECR 623.

33 — *Weißenfels* v *Parliament* (cited in footnote 28, paragraph 67), and Case C-197/09 RX-II *M* v *EMEA* [2009] ECR I-12033, paragraph 56.

Union, but have jurisdiction also to examine their appropriateness. With regard to the purely pecuniary aspects of the dispute in question, the Courts of the Union may therefore substitute their own assessment for the assessment made by the appointing authority and not only annul the latter's decisions but also alter their substance.

61. In accordance with case-law, unlimited jurisdiction includes the right to order the defendant, if need be, *of its own motion* – that is to say where no formal claim to that effect has been made – to pay compensation for the damage caused by its wrongful act and, taking account of all of the circumstances of the case, to assess the damage suffered *ex aequo et bono*. [34]

62. In the case of legal disputes concerning classification decisions, this means that, while the Courts of the Union may examine the classification of an official as such only with regard to its legality and may not themselves decide or alter that classification, they do have jurisdiction to award compensation to the official concerned – if need be, of their own motion – for any wrongful act committed by the appointing authority when deciding upon that official's classification.

34 — *Oberthür* v *Commission* (cited in footnote 31, paragraph 14); *Houyoux and Guery* v *Commission* (cited in footnote 31, paragraph 16); Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 58; *M* v *EMEA* (cited in footnote 33, paragraph 56); and *Wenk* v *Commission* (cited in footnote 31, paragraph 122); the same approach was taken in Case 44/59 *Fiddelaar* v *Commission* [1960] ECR 535.

(ii) Spirit and purpose of the award of compensation by the Court of its own motion under its unlimited jurisdiction

63. In this case, the General Court failed to consider even in passing the question whether it might be appropriate to order the Commission to pay compensation of its own motion. Rather it confined itself to the brief statement that Mr Gogos had not sought financial compensation. [35]

64. This could indicate that the General Court failed to recognise the financial character of the dispute for the purposes of the second sentence of Article 91(1) of the Staff Regulations. The Court may have been unaware that it had unlimited jurisdiction in relation to the purely pecuniary aspects of this case, which includes not least the right to award compensation of its own motion. [36]

65. The question whether the General Court did in fact misinterpret the scope of its jurisdiction and thus committed an error in law may be left unanswered here, since the conditions necessary to enable the Court to order the Commission to pay compensation of its own motion were not met in this case.

35 — Paragraph 47 of the judgment under appeal.

36 — See also in this regard points 60 and 61 of this Opinion.

66. The jurisdiction to award compensation of their own motion to officials is primarily intended to enable the Courts of the Union to guarantee the effectiveness of the judgments by which they annul decisions in staff cases. [37] Consequently, if the annulment (in whole or in part) of a decision of the appointing authority which contains errors of law is not sufficient to assist the official concerned in enforcing his rights or to protect his interests effectively, the Courts of the Union may award compensation of their own motion.

67. However, in this case, the General Court came to the conclusion that the classification decision and the decision on the complaint were not vitiated by errors of law. As it therefore did not annul the two decisions, the General Court likewise had no occasion to guarantee the effectiveness of its judgment by awarding compensation of its own motion. From a legal perspective, this approach cannot be criticised.

68. It should also be pointed out merely in passing that the award of compensation to Mr Gogos for the consequences of *lawful* administrative conduct was ruled out from the outset in this case. Leaving aside the fact that it has not yet been definitively clarified in the law of the European Union whether and under which circumstances such compensation should be awarded, [38] the disadvantages suffered by Mr Gogos in connection with his remuneration and his career in the new Category A have been caused not by the classification decision or the decision on the complaint, but by the errors of law committed by the Commission in the course of the competition. [39]

69. The second plea in law is therefore unfounded.

3. Final remarks

70. For the sake of completeness, I would also point out that a decision on the classification of an official is not the appropriate framework for providing compensation for any disadvantages which that official has suffered as a result of errors made in the conduct of a competition preceding that decision.

71. It is highly doubtful that the General Court is correct in its assumption that Article 31(2) of the Staff Regulations is automatically inapplicable in the case of an internal competition. [40] After all, the purpose of that provision is to enable an institution, in

37 — *Girardot* v *Commission*, cited in footnote 31, paragraph 26.

38 — Following the judgment in *FIAMM* , cited in footnote 20, in particular paragraphs 174 to 179, as EU law currently stands, compensation for the consequences of lawful *legislative* acts of the institutions of the European Union is, as a rule, precluded. By contrast, the question of compensation for the consequences of lawful *administrative* acts remains open.

39 — See also in this regard points 70 to 79 of this Opinion.

40 — Paragraphs 30 to 35 of the judgment under appeal.

its capacity as employer, to acquire the services of a person whom it might otherwise lose because that person is sought after on the labour market and may be made numerous offers by other potential employers. [41] Contrary to what appears to be the General Court's view, such competition between the European institutions and private employers is by no means precluded as far as internal candidates are concerned. Indeed, a person who already works for an institution of the European Union may also be tempted to leave that institution and move to the private sector or to another international institution if the offers made by external employers appear to him to be more attractive than his classification and prospects of advancement within the European civil service. This may be true in particular of certain university graduates who occupy Category B or C posts.

72. Ultimately, however, the question of the applicability of Article 31(2) of the Staff Regulations may be left unanswered for the purposes of this case. This is because, under Article 31(2), a higher classification, in derogation from the principle laid down in the first paragraph of classification in the starting grade, is permitted only in exceptional circumstances, [42] namely where such higher classification meets the specific needs of the service or is in fact justified in view of the particular qualifications or professional experience of the person concerned; [43] in other words, the candidate must be exceptional. [44] It would be an abuse of the rule laid down in Article 31(2) of the Staff Regulations if that provision were relied on, despite the absence of the abovementioned conditions, to compensate for specific disadvantages in an official's career.

73. Nor can Mr Gogos derive a right to classification in the higher grade from the general principle of equal treatment. That principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [45] The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the relevant act. [46]

74. The subject-matter and purpose of a classification decision on the basis of Article 31 of the Staff Regulations is simply to place the official in question in a grade within his career bracket in the interests of the service and according to his qualifications. There is no evidence before the Court of Justice that, from the point of view of those criteria, Mr Gogos was in a different position from that of other successful candidates in the internal competition. Nor, then, can the fact that he was classified in the same grade, A 7, as other successful candidates be criticised from the point of view of the principle of equal treatment. Any irregularities in the conduct of the

41 — Case C-155/98 P *Alexopoulou* v *Commission* [1999] ECR I-4069, paragraphs 34 to 36.

42 — Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723, paragraph 9; *Alexopoulou* v *Commission* (cited in footnote 41, paragraphs 32, 33 and 36); Case T-133/02 *Chawdhry* v *Commission* [2003] ECR-SC I-A-329 and II-1617, paragraph 36; and judgment of 11 December 2009 in Case T-436/07 P *Giannopoulos* v *Council,* not yet published in the ECR-SC, paragraphs 34 and 52.

43 — *De Santis* v *Court of Auditors* (cited in footnote 42, paragraph 9).

44 — *Alexopoulou* v *Commission* (cited in footnote 41, paragraphs 31, 34 and 36).

45 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* ('*Arcelor*') [2008] ECR I-9895, paragraph 23; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 74.

46 — *Arcelor* (cited in footnote 45, paragraph 26).

competition and the resultant delay in the appointment of an official to a post, however, are irrelevant as points of comparison in relation to the classification decision.

75. It is certainly beyond doubt that, as a result of having to repeat his oral examination twice and the consequent delays in the competition procedure, Mr Gogos lost the opportunity of advancement to Category A at an earlier date and therefore of being promoted within his new career bracket at an earlier date. [47] However, the material and non-material damage associated with that was not caused by the classification decision and the decision on the complaint at issue in this case. Even if those two decisions had been unlawful, the General Court would not therefore have been able to take account of that damage of its own motion without infringing the principle of '*ne ultra petita*'.

76. Rather, as previously stated, [48] that damage is the result of errors of law committed in the conduct of the competition. Mr Gogos could have exhausted all the remedies available to him and claimed compensation for that damage in the two previous cases before the General Court. [49]

77. In relation to the first of those cases, it must be pointed out that, in addition to his application for the annulment of the selection board's decision, Mr Gogos claimed compensation only for the *non-material* damage he had suffered. This claim was, however, rejected by the Court on the ground that the annulment of the selection board's decision represented adequate satisfaction for the damage suffered by the applicant. [50] That judgment is now final.

78. As far as the second case before the General Court is concerned, under his amicable settlement with the Commission, Mr Gogos waived all claims for compensation made by him at that time. [51] Since there is nothing to indicate that the out-of-court settlement between Mr Gogos and the Commission is ineffective or open to challenge, the appellant can now no longer seek compensation for the damage covered by that settlement.

79. Only if it were to become apparent that further significant damage exists for which Mr Gogos has not already effectively waived the right to compensation, would there now be any prospect at all of reparation for the loss of the opportunity of advancement at an earlier date. In so far as the other conditions for claiming damages against public officials are met [52] and his action is not yet time-barred, Mr Gogos is still at liberty to claim compensation for any such damage separately.

47 — Nor does the General Court indicate otherwise in paragraph 47 of the judgment under appeal. On the loss of an opportunity as recoverable damage generally, see *Commission* v *Girardot* (cited in footnote 34, paragraphs 54 and 55); see also Case T-91/95 *De Nil and Impens* v *Council* [1996] ECR-SC I-A-327 and II-959, paragraph 38, which the Court of Justice did not call in question in this regard in *Council* v *de Nil and Impens* (cited in footnote 19).

48 — See above, point 68 of this Opinion.

49 — Cases T-95/98 and T-97/01 (in this regard, see points 11 to 14 of this Opinion, above).

50 — Case T-95/08 *Gogos* v *Commission* (cited in footnote 5, paragraphs 60 to 62).

51 — Order in Case T-97/01 *Gogos* v *Commission* (cited in footnote 6, paragraph 2).

52 — See, inter alia, *Commission* v *Girardot* (cited in footnote 34, paragraph 52).

4. Interim conclusion

80. Since neither of the two pleas in law raised by Mr Gogos is successful, his appeal must be dismissed in its entirety.

81. As a result, his claims seeking annulment of the classification decision and the decision on the complaint and for the award of compensation in the amount of EUR 538 121.79 are redundant, since both those claims would require that the judgment under appeal be set aside beforehand.

B – *The separate claim for compensation on account of the duration of the proceedings at first instance*

82. Finally, Mr Gogos claims that the Court of Justice should award him appropriate compensation on account of the – in his view undue – length of the proceedings before the General Court. Relying on *Baustahlgewebe*, [53] he estimates that compensation at EUR 50 000.

83. However, as the Court of Justice held in *FIAMM*, [54] a separate claim for compensation of this kind is inadmissible on appeal. Under Article 113(1) of the Rules of Procedure of the Court of Justice, an appeal may seek only to set aside, in whole or in part, the judgment of the General Court and, as the case may be, to seek the same form of order, in whole or in part, as that sought at first instance; a different form of order may not be sought.

84. The undue length of the proceedings at first instance may be relied on in an appeal only if, in the opinion of one of the parties to the proceedings, this affected the substance of the judgment at first instance and, therefore, represents a ground for setting aside that judgment. [55] However, Mr Gogos has not made any such submission in this case.

85. His claim for compensation must therefore be rejected.

86. I would point out merely for the sake of completeness that Mr Gogos is of course at liberty to bring an action for damages on account of the length of the proceedings, under

53 — *Baustahlgewebe* (cited in footnote 13, paragraph 141).

54 — *FIAMM* (cited in footnote 20, in particular paragraphs 205 and 211).

55 — *Baustahlgewebe* (cited in footnote 13, paragraph 49); *FIAMM* (cited in footnote 20, paragraph 203); and *Der Grüne Punkt*, paragraphs 190 to 193.

Article 268 TFEU in conjunction with the second paragraph of Article 340 TFEU, [56] against the European Union. [57] However, the Court of Justice of the European Union, not the European Commission, would be the institution which would have to assume responsibility for any compensation.

87. In such an action, consideration would have to be given *inter alia* to whether the duration of the proceedings at first instance in this case was excessive, with the result that the right to a fair hearing within a reasonable time has been infringed. [58] This is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties. [59]

88. The total length of the proceedings before the General Court in this case was approximately four years and eight months. [60] It is particularly worthy of note that more than three years elapsed between the end of the written procedure and the hearing at first instance. [61] The duration of the proceedings appears, without prejudice to a closer examination in the course of any action for damages, to be justified neither by any particular complexity of the subject-matter or the questions of fact and of law raised nor by the conduct of the parties. It goes without saying that issues relating to the internal organisation of the General Court, for example those connected with the regular partial replacement of judges, must not operate to the detriment of the individuals concerned. The Commission points out that, at the material time, the General Court had a considerably heavier case-load than at the time when judgment was given in *Baustahlgewebe*; however, it fails to mention that the General Court now has considerably more members and personnel at its disposal than at that time.

V – Costs

89. Pursuant to the first paragraph of Article 122 of the Rules of Procedure, the Court of Justice is to make a decision as to costs when the appeal is dismissed. The decision as to costs is particularly significant in this case since the Commission, as the other party to the proceedings, is represented by counsel.

90. In accordance with Article 69(2) in conjunction with Article 118 of the Rules of Procedure, the unsuccessful party is in principle to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, under the first indent of the second paragraph of Article 122 of the Rules of Procedure, that rule also applies to appeals brought by officials or other servants of the institutions of the European

56 — Formerly Article 235 EC in conjunction with the second paragraph of Article 288 EC.

57 — *Der Grüne Punkt* (cited in footnote 13, paragraph 195).

58 — *Baustahlgewebe* (cited in footnote 13, paragraph 21) and *Der Grüne Punkt* (cited in footnote 13, paragraphs 177 to 179).

59 — *Der Grüne Punkt* (cited in footnote 13, paragraph 181).

60 — The application at first instance was lodged on 18 February 2004; the judgment under appeal was given on 15 October 2008.

61 — The written procedure at first instance ended with the service of the rejoinder on 17 November 2004; the hearing took place on 15 February 2008.

Union in staff cases. Accordingly, Mr Gogos, who has been unsuccessful in all of his submissions, should be ordered to bear his own costs and the costs of the Commission, as applied for by the Commission in this case.

91. However, in the case of appeals brought by officials or other servants of an institution, the Court of Justice may, pursuant to the second indent of Article 122(2) of the Rules of Procedure, depart from the general rule on costs, as laid down in Article 69(2) of the Rules of Procedure, and share the costs between the parties where equity so requires.

92. On the one hand, account must undoubtedly be taken in this case of the fact that the pleas in law put forward and the claims raised by Mr Gogos were unsuccessful because they were based on incorrect legal assumptions.

93. On the other hand, however, consideration must also be given to the fact that, by its conduct, the Commission played a significant role in the emergence of this dispute. If, when conducting the internal competition, the Commission had not taken three attempts to organise a proper oral examination for Mr Gogos, this dispute could have been avoided. [62]

94. In addition, the appellant had a legitimate interest in receiving appropriate compensation for the fact that he lost the opportunity of advancing to Category A earlier than he actually did. In view of the less than settled case-law in this area, Mr Gogos can be criticised only to a limited degree for the fact that he attempted to obtain such compensation in these appeal proceedings by relying on the possibility available to the General Court of awarding financial compensation of its own motion.

95. For all the foregoing reasons, I therefore consider that equity requires the Court to avail itself of the exception provided for in the second indent of Article 122(2) of the Rules of Procedure and, in derogation from the general rule on costs laid down in Article 69(2) of the Rules of Procedure, to share the costs of this appeal between the parties. It would in my view be appropriate for each party to be ordered to bear its own costs.

62 — See, in this regard, the findings of the General Court in paragraph 51 of the judgment under appeal.

VI – Conclusion

96. In the light of the foregoing, I propose that the Court should:

'(1) dismiss the appeal;

(2) reject Mr Gogos' claim for the award of compensation on account of the duration of the proceedings at first instance;

(3) order each party to bear its own costs.'