REPORT FOR THE HEARING (Third Chamber) delivered in Joined Cases 181 to 184/86 *

I — Facts and procedure

A — *The facts*

1. The four applicants are officials in the scientific and technical service and are employed at the Ispra Joint Research Centre. Mr Del Plato, who was born in 1939, has a degree in architecture from the University of Milan; he joined the employ of the Commission in 1966 and is at present an official in Grade B 3/7.

Giovanni Ferrari, who was born in 1943, entered the employ of the Commission in 1964; he has a degree in natural sciences from the University of Milan and is at present an official in Grade B 3/5.

Massimo Paruccini, who was born in 1940, entered the employ of the Commission in 1961; he read philosophy at university and is at present an official in Grade B 2/6.

Enrico Rodari, who was born in 1943, entered the employ of the Commission in 1964; he has a degree in biology from the University of Milan and is at present an official in Grade B 4/7.

2. Articles 92 to 101 of the Staff Regulations of officials of the European Communities, which make up Title VIII of those regulations, set out particular provisions for officials in the scientific or technical services of the Communities. In particular, whereas under Article 45 (2) of the Staff Regulations 'an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition', the second paragraph of Article 98 provides that 'Article 45 (2) shall not apply to officials covered by Article 92'. Article 92 'lays down the special provisions applicable to officials of the Communities who occupy posts in the field of nuclear science calling for scientific or technical qualifications and who are paid from appropriations in the research and investment budget'.

The combined effect of those provisions is that officials in the scientific or technical services are not subject to the rule that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition.

None the less, for some time the Commission has considered it necessary to provide for a selection procedure for persons wishing to transfer from one service to another. It therefore laid down, as it had already done several times, 'procedures for transfer from Category B to Category A' for 'officials and temporary staff in the scientific and technical services' which

* Language of the Case: French.

appeared in *Administrative notices* No 409 of 24 June 1983, at p. 36.

The purpose of those arrangements 'is to provide a means of assessing the ability of Category B officials and temporary staff in the scientific and technical services to perform Category A duties'. They lay down certain conditions of admission and set up an *ad hoc* committee whose task is to 'draw up a list of Category B officials and temporary staff eligible for transfer'.

3. The essential rules contained in those provisions are as follows:

(a) Officials and temporary staff may apply for a transfer from Category B to Category A only if the following conditions are met: they must be in the scientific and technical services, they must be in grade B 1, B 2 or have at least four years seniority in Grade B 3 or six years seniority in grade B 4 and they must not have been considered unsuitable in three consecutive procedures. However, those three conditions are not required in the case of officials and temporary staff 'who hold a degree or diploma from a university or comparable scientific or technical establishment, provided that they can show that they have at least six years professional experience in the scientific or technical field and that they have served as officials or temporary staff in the scientific or technical services for a total of four years'.

(b) The *ad hoc* committee whose task it is to draw up a list of Category B officials and temporary staff eligible for transfer comprises a Category A chairman and three Category A members designated by the appointing authority and three members designated by the Central Staff Committee, at least two of whom must be in Category A and one of whom may be in either Grade B 1 or Grade B 2, provided that the latter is not himself a potential candidate for transfer.

The text specifies that decisions will be taken on the basis of a majority vote.

(c) The role of the committee is defined in Section III (2) of the 'Procedures'. The committee is to scrutinize each candidate's application. Following that scrutiny and, where appropriate, a personal interview with the candidate, the committee is to draw up a list of candidates who will be required to present a dissertation, which indicates that they have been admitted to the second stage of the procedure.

(d) The committee is to select the subject of the dissertation in the light of subjects proposed by the candidates. The dissertation 'should be either scientific or technical and the result of the candidate's own work'.

(e) However, candidates 'holding a degree or diploma from a university or comparable scientific or technical establishment will not be required to present a dissertation provided that they can show that they have the professional experience and seniority specified in Section II (2) [in other words if they can show that they have at least six years professional experience in the scientific or technical field and that they

have served as officials or temporary staff in the scientific or technical services for a total of four years]. They will be recognized as eligible for transfer following verification of their diplomas and an interview with the committee to assess their areas of competence'.

(f) Following its deliberations, the committee must submit a reasoned report to the appointing authority with a list of candidates considered capable of performing Category A duties, indicating the area or areas in which each candidate is regarded as being competent. The notice states that 'a transfer decision will then be taken by the appointing authority in the light of service requirements and the budgetary situation'. It is also stated that 'the list of successful candidates will remain valid until a new list has been drawn up'.

Of the 76 officials and members of the temporary staff who applied, 36 held a degree or diploma from a university or comparable scientific or technical establishment. On 16 September 1985 the four applicants were informed by the president of the *ad hoc* committee and the Director-General for Personnel and Administration that they had been considered unsuitable, in other words that their names had not been entered on the list of persons considered by the committee to be suitable for transfer from Category B to Category A.

The four applicants challenge those decisions.

B — *Procedure*

Pursuant to Articles 90 and 91 of the Staff Regulations the four applicants submitted complaints against the decisions taken by the *ad hoc* committee not to enter their names on the list of persons considered suitable for transfer from category B to category A.

Those complaints were rejected by four decisions of 4 April 1986 of the Vice-President of the Commission. The applicants then brought the matter before the Court of Justice, which, by order of the Third Chamber of 23 October 1986, ordered the four applications to be joined.

II — Summary of the submissions and arguments of the parties

The submissions made are essentially the same in each of the four applications. However, the objection of inadmissiblity raised by the Commission should be examined first of all.

A — *The Commission's objection of inadmissibility*

Most of the submissions made by the applicants concern the legality of the 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services' (hereinafter referred to as the 'Procedures') which were published in *Administrative notices* No 409 of 24 June 1983.

As will be set out at greater length below, the applicants submit that that document sets up an authority (the *ad hoc* committee) which has no power in the matter, in reality organizes a competition without observing the rules concerning competitions laid down

in the Staff Regulations and contains several omissions as regards the arrangements for selecting persons eligible for transfer from Category B to Category A.

However, the Commission points out that in its judgment of 11 March 1986 in Case 294/84 *Adams and Others* v *Commission* [1986] ECR 977, the Court held that it was necessary to draw a distinction between the admissibility of an action properly so-called and the admissibility of the submissions on which it was based, since the one did not entail the other. In that particular case the Court held that a notice of competition which was not challenged in good time became final and that it was not subsequently possible to challenge it 'after it had been published and after most or all of the operation carried out in connection with the competition had already taken place [since] that would be contrary to the principles of legal certainty, legitimate expectation and sound administration'.

The Commission submits that the Procedures drawn up in 1983 and published on 24 June 1983 in *Administrative notices* were not challenged by any applications; consequently they have become final and hence all the arguments concerning their alleged irregularity must be dismissed as inadmissible.

The Commission therefore replies to those submissions only in the alternative.

For their part, the applicants submit that Article 184 of the EEC Treaty and Article 156 of the EAEC Treaty, which concern the raising of an objection of illegality, express a general principle whereby it is always possible, in support of an action against an individual decision, to plead the illegality of the regulation on the basis of which that decision was adopted.

B — *Analysis of the submissions*

(a) *The lack of competence of the* ad hoc *committee*

The *applicants* submit that the *ad hoc* committee established by the procedures could not be given the power to draw up a list of personnel eligible for transfer from one category to another since only the appointing authority had power to decide on such a transfer.

The applicants maintain in particular that although the second paragraph of Article 98 of the Staff Regulations derogates from the provisions of Article 45 (2), which provides that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition, it does not derogate in any way from Article 45 (1) which provides that 'promotion shall be by decision of the appointing authority'.

The applicants claim that a transfer from Category B to Category A is necessarily a promotion decision.

Under such conditions the Commission could not delegate to the *ad hoc* committee the power to draw up a list of persons eligible to be transferred from one category to another.

The Commission points out first that, as the Court held in its judgment of 20 October 1977 in Case 5/76 *Jänsch* v *Commission* [1977] ECR 1817, in order to compensate for the insecurity caused to certain officials by the fact that a term is fixed for research programmes and in order to encourage them to take part in such programmes, the

Staff Regulations provide certain advantages for those officials, in particular with regard to salary but also inasmuch as Article 98 allows them to be transferred from one category to another without a competition.

However, in order to avoid arbitrary decisions the Commission deemed it necessary to institute a selection procedure. This procedure is valid in so far as Article 98 of the Staff Regulations derogates from the whole of Article 45 and not simply from Article 45 (2). In fact Article 45 of the Staff Regulations concerns promotions, whereas the present case concerns a change of category, which is clearly completely different.

(b) *Breach of the rules concerning competitions*

The *applicants* submit that in reality the Commission has reintroduced a competition system without observing the rules concerning competitions which are set out in Annex III to the Staff Regulations. Accordingly, all the rules set out in Annex III should have been observed; in particular, the list of suitable candidates should have contained at least twice as many names as the number of posts to be filled, as provided in the penultimate paragraph of Article 5 of that annex.

The *Commission* replies that Article 45 (2) of the Staff Regulations is not applicable to the transfer from one category to another of officials in the scientific and technical services and that the derogation from the rule requiring a competition under Article 45 (2) gives the appointing authority the widest discretion as regards the transfer from Category B to Category A of officials and members of temporary staff in the scientific or technical services.

However, the appointing authority is not thereby precluded from establishing procedures providing for the most objective possible assessment of the merits of each candidate.

Hence, in the Commission's view, nothing prevented it from basing itself broadly on the provisions of Annex III of the Staff Regulations but without being bound by those provisions.

The Commission adds that if the applicants in fact enjoyed all the necessary safeguards they have no interest in raising a legal challenge to the procedures laid down in 1983.

The applicants reply that the Commission arranged what amounted to a competition on the basis of qualifications and tests but with safeguards in no way equivalent to those provided for in Annex III of the Staff Regulations; the procedures are bad and do not make possible a correct assessment of the merits of the different candidates.

(c) *Breach of the principle of equal treatment to the detriment of candidates who hold a degree or diploma from a university or comparable establishment*

The *applicants* consider that the fact that officials or temporary staff holding a degree or diploma from a university or comparable scientific or technical establishment are exempted by the procedures from presenting a dissertation in fact works to their detriment in relation to the other candidates. It is submitted that in the case of candidates who were required to submit a

dissertation the *ad hoc* committee was obliged to examine those dissertations carefully and the interview with the candidate could relate to a subject with which both the candidate and the committee were familiar. The interview could thus be much more fruitful, whereas candidates who were graduates had to give a talk lasting a quarter of an hour on their speciality, which might often be very far removed from the knowledge and concerns of the *ad hoc* committee.

Under those conditions graduate candidates were in a less favourable situation, especially since some of those candidates had specialities with which the committee was not remotely familiar.

The applicants consider that this is particularly the case as regards Mr Del Plato, whose speciality is architecture, and Mr Paruccini, whose speciality is mathematical logic.

The *Commission* considers that the applicants' argument is based on an inaccurate presentation of the second interview which the candidates had with the members of the *ad hoc* committee.

That second interview, which lasted 45 minutes, included either a 15-minute talk by the candidate on the content of his dissertation or, in the case of candidates who had not submitted a dissertation, a 15-minute talk on a scientific or technical theme which fell within their speciality. In every case that talk would be followed by a discussion, also lasting a quarter of an hour, with the members of the committee. Finally, the last quarter of an hour was devoted to questions on science, technology and general knowledge.

Under those conditions, the graduate candidates, whose objectively different situation justified exempting them from submitting a dissertation, were in no way prejudiced by the selection procedure.

Furthermore, the Commission points out that of the 47 candidates submitted to the second interview 32 were graduates and 15 non-graduates, and that 11 of those 32 graduates appear on one of the two lists of successful candidates drawn up by the committee whereas only four of the 15 non-graduates feature on one of those two lists. The success rate for graduates is thus 34.4% whereas that of non-graduates is only 26.7%.

(d) *Complaints concerning the interview*

The *applicants* submit that the interview, and in particular its last part, which only lasted a quarter of an hour, concerned questions of scientific history (said to be questions of general knowledge) which bore no relation to the applicants' specialities and were so general that candidates could reply only in general terms.

For its part the *Commission* points out that the second interview lasted on average 45 minutes, 30 of which were devoted to a talk by the candidate and a discussion on the field falling directly within the candidate's speciality while only the last quarter of an hour was devoted to general questions of a scientific nature.

The Commission considers that it was perfectly justifiable to have a part of the interview deal with the general questions in

the field of science and technology in order to enable the committee to assess the candidates' general knowledge.

The Commission adds that, as regards the format of the interview and the selection of candidates, the committee enjoyed a wide discretion.

(e) The *applicants* point out that *no record was kept of the interviews* and there was therefore no means of checking whether the interviews in fact made it possible to verify the level and area of competence of the persons concerned.

The *Commission* submits that it was not necessary to draw up a record and that in any case this was not required by the detailed Rules of Procedures. The Commission produces in evidence the record of the deliberations of the *ad hoc* committee and the documents showing how the *ad hoc* committee arrived at the marks of the various candidates.

The Commission maintains that those documents effectively demonstrate how seriously the *ad hoc* committee took its tasks.

(f) *The failure to abide by the timetable provided for in the 'Notice to officials and temporary staff in the scientific and technical services — Category B' which appeared in* Administrative notices *of 24 June 1983*

The applicants point out that the time-limits provided for in the notice to the officials and temporary staff affected by the selection procedure set out in *Administrative notices* of 24 June 1983 were not observed. It was envisaged that the *ad hoc* committee would meet towards the end of October or beginning of November 1983 and would complete its work by December 1984. However, as the applicants point out, the *ad hoc* committee completed its work later than June 1985.

The *Commission* replies that those dates were only for guidance and were in no way mandatory.

(g) *The failure by the* ad hoc *committee to disclose its marking methods*

The *applicants* submit that the record of the deliberations of the *ad hoc* committee does not indicate how the marks awarded to the different applicants were calculated and that it is therefore impossible for the Court (and for them) to review the manner in which these marks were determined and then classified.

The *Commission* produced various documents which in its view indicate how the committee awarded marks and submits that so long as the committee discharged its task impartially and diligently the asssessment which it made cannot be challenged.

(h) *The improper use of a standard-form questionnaire sent to candidates' superiors*

The *applicants* point out that the committee sent a questionnaire to the candidates' superiors whereas the procedures provide only for an interview with those superiors. They therefore take the view that there has been an infringement of the procedures.

In their view, that infringement was significant inasmuch as an interview with the superiors of each of the candidates would have revealed more relevant and more detailed information.

The *Commission* replies that the committee is in no way obliged by the Procedures to hold an interview with the candidates' superiors. Furthermore, it considers that the

committee was perfectly entitled to send a questionnaire to candidates' superiors in order to obtain additional information.

(i) *Breach of the* audi alterem partem *principle*

The *applicants* consider that once a questionnaire had been sent to their superiors the candidates should have been informed of the content of the assessments given by their superiors. In particular, the applicants refer to the judgment of the Court in *Adams* (Case 294/84, *supra*), in which the Court held that where the Selection Board bases itself on factors such as information or opinions about candidates supplied by their superiors, the candidates must be allowed to state their views on those factors in order for the Selection Board validly to take account of them.

The *Commission* considers that the *Adams* judgment is not applicable since the purpose of the questionnaire was simply to provide additional information on the candidate and was not the subject of a separate mark. Consequently, since the marks were based solely on the two interviews the committee was not obliged to show the candidates the questionnaires sent to their superiors.

(j) *Submissions made solely by Mr Paruccini*

Mr Paruccini points out that in view of his specialization he was requested to submit a dissertation, although under the procedures he was not obliged to do so since he held a university qualification. Nevertheless, he agreed to submit a dissertation. However, he considers that his dissertation was not examined by the Selection Board and that in any event, given the particular character of the subject-matter, the *ad hoc* committee should have called on the assistance of an expert in order to make a proper assessment of the content of the dissertation, as it was entitled to do under Section III (2) (c) of the Procedures.

Mr Paruccini's dissertation concerned the assessment of the economic impact of technological choices within the particular field of the energy sector.

The *Commission* states that under the Procedures it is for the committee to assess whether or not it needs the assistance of an expert. In the present case the committee considered that the assistance of an expert was not necessary, and as in the case of other candidates the chairman of the *ad hoc* committee combined the functions of dissertation examiner and expert.

However, the Commission produces the report drawn up by the chairman of the committee. It adds that Mr Paruccini did not make any objection to the procedure followed before he brought his action.

Y. Galmot
Judge-Rapporteur