# JUDGMENT OF THE COURT (Second Chamber)
28 February 1989 *

In Joined Cases 341/85, 251, 258, 259, 262 and 266/86, 222 and 232/87,

**Erik van der Stijl,** a former official of the Commission of the European Communities, represented by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 avenue Marie-Thérèse,

and

**Geoffrey Cullington,** an official of the Commission of the European Communities, represented by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

v

**Commission of the European Communities,** represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

**Bernard Math,** an official of the Commission of the European Communities, represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at Mr Math's private address, 2 rue Mameranus,

intervener,

* Language of the case: French.

APPLICATIONS for the annullment of the Commission's decision to maintain Mr Math in his post as Head of Division F 1 (Inspection) of the Euratom Safeguards Directorate within the Directorate-General for Energy after 7 October 1985, the implied decision rejecting Mr van der Stijl's request for a decision to be taken on his candidature for that post, the decision of 16 October 1985 to engage Mr Math as a member of the temporary staff to occupy the post of head of the abovementioned division for a period of two years from 28 September 1983, extended until 31 December 1985, the decision of 18 December 1985 to extend the period of that engagement to 31 June 1986, Notice of Open Competition COM/A/477, the decisions of the selection board admitting Mr Math to the competition and including him on the list of suitable candidates and the decision not to include Mr van der Stijl on that list and, finally, the Commission's decision appointing Mr Math to the abovementioned post of Head of Division,

THE COURT (Second Chamber)

composed of: T. F. O'Higgins, President of Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: F. G. Jacobs
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 30 November 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 January 1989,

gives the following

## Judgment

1 By applications lodged at the Court Registry on 15 November 1985 (Case 341/85), 29 September 1986 (Case 251/86), 15 October 1986 (Case 258/86), 20 October 1986 (Case 262/86), 29 October 1986 (Case 266/86) and 30 July 1987

(Case 232/87), Mr Erik van der Stijl, a former official of the Commission of the European Communities brought six actions for:

(a) in Case 341/85, the annulment of the decision of the 16 October 1985 to engage Mr Math as a member of the temporary staff in Grade A 3 to occupy the post of Head of Division F 1 (Inspection) within the Directorate-General for Energy for a period of two years from 28 September 1983, extended until 31 December 1985, as well as an order requiring the Commission to pay Mr van der Stijl compensation of ECU 2 000 or, in the alternative, compensation to be fixed *ex aequo et bono* for the non-material damage suffered;

(b) in Case 251/86, the annulment of the decision to maintain Mr Math in the aforesaid post after 7 October 1985 and the decision of 18 December 1985 to extend Mr Math's contract as a member of the temporary staff until 30 June 1986, as well as an order requiring the Commission to pay Mr van der Stijl compensation to be fixed *ex aequo et bono* for the non-material damage suffered;

(c) in Case 266/86, the annulment of the Notice of Open Competition COM/A/477 to fill the post of Head of Division F 1 in Grade A 3 (Official Journal 1986, C 67, p. 8) and the implied rejection of the request of 21 October 1985 by which Mr van der Stijl had asked the Commission to adopt a decision on the candidature he had submitted pursuant to Notice of Vacancy COM/963/83;

(d) in Case 258/86, the annulment of the decision of the selection board in Competition COM/A/477 to allow Mr Math to take the tests in the aforementioned competition and of the decision to include him on the list of suitable candidates;

(e) in Case 262/86, the annulment of the decision of the same selection board not to include Mr van der Stijl on the list of suitable candidates and an order requiring the Commission to pay Mr van der Stijl compensation to be fixed *ex aequo et bono* for the non-material damage suffered;

(f) in Case 232/87, the annulment of the decision to appoint Mr Math to the post of head of the abovementioned division and an order requiring the Commission to pay Mr van der Stijl compensation to be fixed *ex aequo et bono* for the non-material damage suffered.

2 By applications lodged at the Court Registry on 15 October 1986 (Case 259/86) and 16 July 1987 (Case 222/87), Mr Geoffrey Cullington, an official in Grade A 4 of the Commission of the European Communities also brought two actions for:

(a) in Case 259/86, the annulment of the decision of the selection board in Competition COM/A/477 to allow Mr Math to take the tests in the aforementioned competition and of the decision to include Mr Math on the list of suitable candidates;

(b) in Case 222/87, the annulment of the decision to appoint Mr Math to the post of head of the abovementioned division and of the resulting rejection of Mr Cullington's candidature, as well as an order requiring the Commission to pay Mr Cullington compensation to be fixed *ex aequo et bono* for the non-material damage suffered.

3 Between 1971 and 1986 Mr van der Stijl held an A 4 post in the Safeguards Directorate where, between 1982 and 1983, he was temporarily head of Division F 1 (Inspection). Mr Cullington, an official in Grade A 4, assigned to the same division, is in charge of the second of the two sections which make up the division. Mr Math, the intervener in the eight cases, was an official of the Commissariat français à l'énergie atomique (French Atomic Energy Commission) between 1968 and 1983. On 28 September 1983 he was appointed Head of Division F 1 in Grade A 3.

4 By judgment of 7 October 1985 in Case 128/84 *van der Stijl* v *Commission* [1985] ECR 3281, the Court annulled the decision of the President of the Commission of 3 November 1983 appointing Mr Math to the post of Head of Division F 1 and the decision of the appointing authority rejecting Mr van der Stijl's candidature for the post in question, on the grounds that the Commission was not justified in the case at issue in having recourse to the extraordinary procedure laid down in Article 29 (2) of the Staff Regulations.

5 Following that judgment, on 16 October 1985, the Commission decided to engage Mr Math as a member of the temporary staff in Grade A 3 to act as Head of Division F 1 for a period of two years with effect from 28 September 1983, the date on which he took up his appointment, extended until 31 December 1985.

6 On 18 December 1985 the Commission decided to extend Mr Math's engagement until 30 June 1986 and also to organize Open Competition COM/A/477 on the basis of qualifications and tests to fill the post in question. At the end of the competition Mr Cullington and Mr Math were included on the list of suitable candidates and Mr Math was then appointed to the post at issue; Mr van der Stijl, who was also a candidate in the competition, was not included in the list of suitable candidates on the grounds that he was not suited to the 'profil très particulier du poste vacant' (very specific requirements for the vacant post).

7 The Commission rejected all the complaints lodged by Mr van der Stijl and Mr Cullington against the decisions which are the subject-matter of the present applications.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the arguments of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

**The decision to maintain Mr Math in post after 7 October 1985 (Case 251/86)**

9 The applicant, Mr van der Stijl, contends that the fact that Mr Math was *de facto* maintained in post between 7 October 1985, the date of the Court's judgment, and 16 October 1985, the date of the decision to engage Mr Math as a member of the temporary staff, constitutes an infringement of Article 176 of the EEC Treaty, which requires the institution whose act has been declared void to take the necessary measures to comply with the judgment of the Court. He also contends that the fact that Mr Math was maintained in post was also contrary to the basic principles of the Staff Regulations of Officials, according to which only an official or a member of staff who has been duly appointed may act in the capacity of a European civil servant.

10 The Commission replies that the means used to ensure continuity in the service are at its discretion and the limits of that discretionary power have not been exceeded in the present case. It considers that, since Mr Math acted as head of the division in question for more than two years, it was entitled to regard him as the person most suitable to perform those duties temporarily.

11 It must be recognized that the institutions have a wide discretion in their choice of the most appropriate means for meeting their personnel requirements. However, without its being necessary to inquire whether in other circumstances the institutions could take different courses, it must be pointed out that in the case of posts involving the exercise of a power to take decisions the institutions must follow one of the legal procedures which are laid down limitatively in the Staff Regulations or in the Conditions of Employment of Other Servants of the European Communities.

12 It would be contrary to the principle of good administration for a person who does not stand in any relationship with the Communities under the Staff Regulations to be entrusted with duties entailing such important responsibilities. In particuar, such a person would not be subject to the obligations of officials and other servants of the Communities and in the event that they failed to fulfil those obligations the disciplinary measures provided for could not be imposed in their case.

13 It follows that if it is not possible to engage someone as an official or servant, the Community institutions may not fill, even temporarily, a vacant post involving a power to take decisions, except with a deputy or by appointing an official to fill the post *ad interim*. That principle may only be derogated from for compelling reasons related, in particular, to the urgency of filling a vacant post. The Commission has not shown that such reasons exist in the present case.

14 Consequently, the decision to maintain Mr Math *de facto* in the post of Head of Division F 1 during the period between 7 October 1985, the date of the judgment annulling his appointment, and 16 October 1985, the date on which he was engaged as a member of the temporary staff, must be annulled.

**The decision of 16 October 1985 to engage Mr Math as a member of the temporary staff from 28 September 1983 until 31 December 1985 (Case 341/85)**

A — *Admissibility*

15 The Commission contends that this application is inadmissible inasmuch as it is directed against a decision which ceased to produce effects on 31 December 1985.

After that date it could no longer be annulled by the Court and the application is thus devoid of purpose.

16 Mr Math points out that, in so far as the Commission decided on 18 December 1985 to organize an open competition to fill the post which he held, the contested decision of 16 October 1985 could not adversely affect the applicant.

17 The applicant maintains that, in view of the time-limits laid down in the Staff Regulations for the pre-litigation stage of the proceedings and for the proceedings before the Court, the defendant's argument is tantamount to precluding an action against any decision whose effects are limited in time. He considers, moreover, that the contested decision affects his legal position even after 31 December 1985.

18 Those arguments need not be addressed. As the Court held in its judgment of 25 November 1976 in Case 30/76 *Küster* v *Parliament* [1976] ECR 1719, paragraph 8, those to whom a judgment of the Court annulling an act of an institution is addressed are directly concerned by the way in which the institution seeks to comply with the judgment. Since the action is directed against an act which was adopted as a result of the judgment of 7 October 1985, cited above, it must be held to be admissible, even if the contested act has in the mean time exhausted its effects.

B — *The substance*

19 The first submission is that the decision to engage Mr Math retroactively as a member of the temporary staff infringed Article 176 of the EEC Treaty inasmuch as it re-created the state of affairs which the Court had already held to be unlawful. The only correct way of complying with the judgment of 7 October 1985 was to organize an open competition and to ensure continuity in the service with a deputy or by appointing a temporary replacement.

20 The Commission claims that the Court annulled Mr Math's appointment only because the procedure used was unlawful. Therefore, there was nothing to stop it

from placing at the head of the division, as a temporary member of staff, the person who had already been in charge of the division for more than two years.

21 Mr Math observes that Article 176 would have been infringed only if the Commission had confined itself to reproducing the annulled decision. However, he considers that the contested decision has a different subject-matter from the annulled decision since it relates to a contract of a temporary member of staff and not to the appointment of an official.

22 In this regard it must be stated that in its judgment of 7 October 1985 the Court did not rule on the question whether Mr Math had the necessary qualifications for the contested post. It cannot, therefore, be disputed that the Commission was entitled to engage him as a member of the temporary staff in order to fill that post.

23 Consequently, the submission that Article 176 of the EEC Treaty was infringed must be rejected.

24 The second submission is that the contested decision constitutes a misuse of procedure and a misuse of powers.

25 In support of that submission the applicant contends that by making its decision retroactive the Commission attempted to regularize in Mr Math's favour the administrative situation which the Court had annulled. According to the applicant, the interests of the service cannot justify such a regularization. It is also unnecessary since, according to the *fonctionnaire de fait* theory, neither the administrative acts adopted by Mr Math nor his financial rights could be called into question. In the applicant's opinion, the Commission's only purpose was to ensure that Mr Math acquired seniority and experience which could be taken into consideration in a new recruitment procedure and to keep him in post until he could be appointed permanently.

26 The Commission denies that it sought to accord Mr Math favourable treatment. The applicant is, in its view, indulging in pure conjecture, which is disproved by the fact that an open competition was organized.

27 Mr Math maintains that the Commission took its decision in the interests of the service. The applicant has not shown that the motive for the contested decision was extraneous to the interests of the service and has not even tried to define such a motive.

28 This submission must be upheld. A member of the temporary staff may be engaged only in order to meet the needs of the service and not in order to 'regularize' a state of affairs. Moreover, as the applicant rightly pointed out, the Commission was in no way bound to make Mr Math's appointment retroactive; the annulment of his appointment as an official did not *per se* nullify the various acts which he adopted when acting as Head of Division, since ostensibly that status had been duly conferred upon him. Since, moreover, his good faith is not in question, the sums received and the rights acquired by Mr Math in return for his service with the Commission could not be called into question.

29 Without its being necessary to inquire into the reasons which may have caused the Commission to appoint Mr Math retroactively, it must be stated that the decision to do so is vitiated by a misuse of powers inasmuch as it was intended to 'regularize' a state of affairs retroactively. Consequently, it must be annulled in respect of the period between 28 September 1983 and 15 October 1985. It is therefore unnecessary to consider the other submissions relied on by the applicant in so far as they relate to that period.

30 However, it is necessary to consider the submissions alleging the illegality of the contested decision with regard to the period between 16 October and 31 December 1985.

31 As an alternative submission, the applicant contends that the procedure used to appoint Mr Math as a member of the temporary staff was unlawful in so far as it disregarded the priority given to internal recruitment laid down in Article 29(1) of the Staff Regulations. The vacant post was filled without Mr van der Stijl's candidature being reconsidered.

32 The Commission considers that Article 2 (b) of the Conditions of Employment of Other Servants allows it to engage staff temporarily in order to fill a vacant permanent post instead of immediately appointing an official.

33 The Commission's argument must be upheld. The provisions of the Staff Regulations give the appointing authority a wide discretion in filling permanent posts; consequently, it may engage a temporary member of staff before appointing an official permanently. It does not appear that the limits of that power were exceeded in the present case, except as regards the decision to make Mr Math's engagement retroactive.

34 By a second alternative submission, the applicant alleges that the contested decision infringes the provisions of Article 12 (1) and (2) (e) of the Conditions of Employment of Other Servants in so far as Mr Math did not have the knowledge of languages necessary to be appointed a member of the temporary staff of the Communities, he did not have the knowledge of languages and the specific abilities required by the notice of vacancy previously published and, finally, his recruitment was not on a sufficiently broad geographical basis.

35 The Commission and the intervener contend that those allegations are unfounded. Mr Math's knowledge of languages and his specific abilities satisfied in full the requirements of the post to be filled.

36 Despite the doubts which exist concerning Mr Math's knowledge of languages at the time when he was engaged, the applicant has not satisfactorily demonstrated that it was inadequate. Moreover, there is no evidence to suggest that Mr Math's specific abilities did not meet the requirements of the vacant post. It must also be emphasized that at the time of his engagement as a member of the temporary staff,

Mr Math had already been acting as Head of Division F 1 for more than two years and that therefore his superiors had had ample opportunity to assess his abilities. Finally, despite the strong conjecture, it has not been proven that Mr Math's nationality was the only reason why he was appointed.

37 It follows from the aforegoing that the two alternative submissions are not well founded.

**The decision to extend Mr Math's engagement from 31 December 1985 to 30 June 1986 (Case 251/86)**

38 The applicant maintains that the decision of 18 December 1985 to extend Mr Math's engagement until 30 June 1986, besides reinforcing the illegality of the original decision to engage him, constitutes a manifest infringement of the second paragraph of Article 8 of the Conditions of Employment of Other Servants, according to which temporary staff engaged to fill a permanent post temporarily are not to be engaged for more than two years and their contracts may be renewed not more than once for a maximum period of one year. The original decision to engage Mr Math had already renewed his contract until 31 December 1985 so a further extension was not possible.

39 The Commission maintains that the renewal of Mr Math's contract did not exceed the maximum period allowed, namely three years. The applicant's interpretation of the provisions of the Conditions of Employment of Other Servants is too restrictive.

40 The Commission's argument cannot be upheld. The second paragraph of Article 8 of the Conditions of Employment of Other Servants imposes three clear limits on the engagement of temporary staff to fill a permanent post temporarily, namely that initially they may not be engaged for more than two years, that the initial period may be extended not more than once and that that extension may not be for more than one year.

41 It must be stated that in the present case the Commission's decision was in breach of the second limit; since the decision of 16 October 1985 had already led to Mr Math's engagement for a period of two years (from 28 September 1983 to 28

September 1985), extended until 31 December 1985, any subsequent extension was unlawful; consequently, the decision of 18 December 1985 must be annulled.

## The legality of Notice of Competition COM/A/477 (Case 251/86)

42 The first submission is that the decision to organize an open competition infringed Article 29 (1) of the Staff Regulations since the Commission did not consider internal applications beforehand, and in particular that of the applicant, the rejection of which had been annulled by the judgment of 7 October 1985.

43 In support of that submission the applicant contests the Commission's statements to the effect that during its meeting of 18 December 1985 the Commission considered 'the candidatures'. He maintains that there could have been only one candidature, his own, since no notice of vacancy had been published and all the decisions to reject candidatures submitted during the first recruitment procedure had become final, with the exception of the one which related to him and which had been annulled by the judgment of 7 October 1985. He emphasizes that, despite his express request, he was formally notified of the rejection of his candidature only by the letter sent to him on 25 July 1986 in reply to the complaint which he had lodged in the mean time.

44 The Commission maintains that it complied with the procedures laid down in the Staff Regulations. At its meeting of 18 December 1985 the Commission reconsidered the possibilities of a promotion or a transfer within the institution and decided not to fill the post in question by promotion and not to organize an internal competition pursuant to Article 29 (1) (b). In the absence of applications for transfers from officials of other institutions, it decided to organize an open competition.

45 In this regard, it must be stated that the Minutes of the aforementioned meeting, which have been made available at the Court's request, show clearly that the Commission complied with the procedure laid down in Article 29 (1) of the Staff Regulations.

46 Although the Commission's conduct, which consisted in observing a long silence on the applicant's candidature, in spite of his express request, was not consistent with the principles of good administration and evinces a less than scrupulous attitude towards its officials, it cannot have any bearing on the legality of the procedure followed. The same goes for the ambiguity which the applicant points out in the Commission's explanations. Consequently, the first submission must be rejected.

47 The second submission is that the Notice of Competition was unlawful on the grounds that its requirements were different from those laid down in the Notice of Vacancy. The requirement for 'thorough knowledge relevant to the post' which appeared in the Notice of Vacancy was replaced by 'experience since leaving university, at least several years of which must be relevant to the duties' to be performed.

48 The applicant considers that the second formulation is both less strict and substantially different from the first. He maintains that, since Mr Math's professional experience did not satisfy the requirements of the Notice of Vacancy, the changes were made in order to match the conditions for participation with Mr Math's experience.

49 The Commission states that only slight differences of wording are involved which were necessary to make the notice of competition more comprehensible to people outside the institution.

50 The Commission's argument cannot be upheld. The changes made do constitute a relaxation of the conditions for participation in the recruitment procedure.

51 The Court held in its judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099, paragraph 38 that, though the appointing authority has wide discretion in comparing the candidates' merits, it must exercise it within the self-imposed limits contained in the Notice of Vacancy. In paragraph 43 of the

same judgment the Court held that if, after the event, the appointing authority found that the conditions of eligibility in the Notice of Vacancy were more exacting than the needs of the service demanded, it was entitled to reopen the procedure after withdrawing the original Notice of Vacancy and putting an amended one in its place.

52 Even though those principles were enunciated with regard to an internal promotion procedure, they are to be applied all the more strictly where the correspondence between a notice of vacancy and a notice of competition is concerned. Any other interpretation would deprive Article 29 of the Staff Regulations of its effect, that provision requiring the institutions to consider whether a post can be filled internally before they organize an open competition. If it were open to the institutions to change the conditions of participation from one stage of the procedure to the next, in particular by making them less strict, they would be at liberty to organize external recruitment procedures without having to consider internal candidates.

53 Therefore, the second submission must be upheld and Notice of Open Competition COM/A/477 annulled.

54 As a result of that annulment, the applications in Cases 258, 259 and 262/86, 222 and 232/87 are devoid of purpose and there is no need to give a ruling on them.

**The claims for compensation for non-material damage**

55 In support of their claims for damages submitted in Cases 341/85, 251 and 266/86, 222 and 232/87, the applicants refer essentially to the seriousness of the wrongful acts committed, the provocative nature of the decisions adopted in their regard, the breaches of the Commission's duty to have regard for the interests of officials and of the principle of good administration which must govern relations between it and its officials and, as far as Mr van der Stijl is concerned, the resultant increase in psychological stress upon himself and his family.

56 Although the manner in which the Commission complied with the judgment of 7 October 1985 cannot fail to arouse grave concern, it must be considered, in view of the grounds relied on by the applicants in their claims for damages, that this

judgment is in itself adequate compensation for any non-material damage which they may have suffered in the present case. Since no reparable damage subsists, the claims for damages are unfounded.

## Costs

57 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has essentially failed in its submissions, it must be ordered to pay the costs, including the costs of the application for interim measures, which gave rise to the order of the President of the Second Chamber of 5 December 1985 (Case 341/85) and those incurred in connection with the objections of inadmissibility which led to the four orders of the President of the Second Chamber of 25 June 1987 (Cases 251, 258, 262 and 266/86). The intervener must bear his own costs and those which his intervention caused the applicants to incur.

On those grounds,

THE COURT (Second Chamber)

hereby:

**(1) Annuls the decision to maintain Mr Math in post as Head of Division F 1 in the Directorate-General of Energy from 7 October 1985 until 16 October 1985;**

**(2) Annuls the decision to engage Mr Math as a member of the temporary staff for the period between 28 September 1983 and 15 October 1986;**

**(3) Annuls the decision to extend Mr Math's engagement from 31 December 1985 to 30 June 1986;**

**(4) Annuls Notice of Competition COM/A/477;**

**(5) Dismisses the claims for damages;**

**(6) Orders the Commission to pay the costs, except for those arising from the intervention;**

**(7) Orders the intervener to bear his own costs and those which his intervention caused the applicants to incur.**

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 28 February 1989.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber