OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 22 January 1987 *

Mr President,
Members of the Court,

1. By four applications lodged between February and October 1985, Ingfried Hochbaum (Cases 44 and 294/85) and Edward Rawes (Cases 77 and 295/85), officials in Grade A 4 in the Commission Directorate-General for Competition (DG IV) seek annulment by the Court of the measure appointing the Head of the State Monopolies and Public Enterprises Division.

The facts of the case are as follows. On 30 May 1984, after considering the applications submitted under Article 29 (1) (a) of the Staff Regulations, the Commission decided to fill the post in question by promoting Paul Waterschoot, an official in Grade A 4 in the Directorate-General for the Internal Market and Industrial Affairs (DG III). Mr Hochbaum lodged a complaint against that measure on 17 July, maintaining that, in assessing promotion possibilities, the appointing authority did not carry out a proper examination of the merits of the officials eligible for promotion as required by Article 45 of the Staff Regulations, in so far as the staff reports for a number of candidates (including the applicant and Mr Waterschoot) for the years 1979 to 1983 had not yet been compiled. Moreover, Mr Waterschoot's name appeared in an 'unofficial table of posts' for Directorate-General IV which was circulating in the Commission building in Brussels three months before the post was declared vacant. The decision was therefore adopted on the basis of considerations other than the interests of the service and in any event without account being taken of the relevant experience and merits of the other candidates.

On 30 August 1984 Mr Rawes also lodged a complaint against the appointment of Mr Waterschoot, relying upon the arguments already put forward by his colleague and complaining in addition that the conditions laid down in the vacancy notice had not been complied with.

By notes of 20 December 1984 and 21 January 1985 addressed to Mr Hochbaum and Mr Rawes respectively, the Director of Personnel acknowledged that when the contested decision was adopted the files of a number of candidates were incomplete and he added that the administration had already invited the Directors concerned to compile the required reports 'afin que la Commission puisse procéder à un nouvel examen comparatif des mérites de l'ensemble des candidats'. After receiving the relevant documents, the Members of the Commission re-examined the applications and on 30 January 1985 confirmed the promotion and appointment of Mr Waterschoot.

Mr Hochbaum and Mr Rawes did not concede defeat and each submitted a further complaint. However, the four internal procedures to which the complaints gave rise did not produce favourable results. That is why the actions to which I referred at the outset have been brought.

* Translated from the Italian.

2. By order of 12 June 1986, the Second Chamber of the Court joined the four cases for the purposes of the oral procedure and judgment. During the procedure the defendant claimed that the actions against the first decision (Cases 44 and 77/85) should be regarded as being devoid of purpose. That decision, which was unlawful in view of the absence of the necessary documentation, had been superseded by a new appointment, in making which the Commission complied fully with the Staff Regulations. Accordingly, an action could be brought only against the second decision because the candidates for the post of Head of the Monopolies Division could have been adversely affected only by that decision.

However, the applicants contend that the decision of 30 January 1985 has no independent legal status, being a measure intended to 'confirm' (that word was used by the appointing authority itself) a previous decision which was invalid. They could not therefore challenge it in isolation, and brought actions 294 and 295/85 merely by way of precaution; the confirmatory measure would automatically become void upon annulment of the measure to which it related and which it confirmed.

That view cannot be upheld. By virtue of a principle of good management and a rule which is common to the laws of the Member States, an authority which has adopted a measure which is vitiated and is therefore voidable is entitled to revoke it or — which is better — to rectify it retroactively, thus ensuring that any prejudicial effects arising from the irregularity are not protracted (judgments of 12 July 1957 in Joined Cases 7/56 and 3 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 39 and of 22 March 1961 in Joined Cases 42 and 49/59 *Snupat* v *High Authority* [1961] ECR 53). The unlawful measure must however be rectified before it becomes final and thus before the period within which it can be challenged has expired or, if an action has already been brought, before the Court has given judgment.

In the present case, there is no doubt that the decision of 30 January 1985, which was expressly adopted by the appointing authority to rectify a defect in the previous decision, was adopted long before an action was brought against the latter. The confirmation of Mr Waterschoot's appointment is therefore in a technical sense a 'legalization', that is to say a new measure making an appointment which entails withdrawal of the first measure; and since, in those circumstances, the applicants have no interest in obtaining the annulment of a measure which has been withdrawn, the applications in Cases 44 and 77/85 must be declared inadmissible.

3. In support of their claims in Cases 294 and 295/85, Mr Hochbaum and Mr Rawes rely in particular on three submissions: (a) infringement of Articles 45, 25 and the third paragraph of Article 27 of the Staff Regulations; (b) failure to comply with the requirements laid down in the vacancy notice; and (c) misuse of powers. I shall deal only with the first submission, which is, without any doubt, well founded.

Let us consider why. Dismissing the complaints submitted against the decision of 30 January 1985, Mr Christophersen, the Member of the Commission concerned, stated that, in confirming the first measure, the appointing authority did not consider it necessary to 'saisir une deuxième fois' the Committee for Promotions and Appointments to Grades A 2 and A 3 since

that body 'dont le rôle est consultatif [avait déja] ... émis son avis le 25 mai 1984'. But — and this is the crux of the matter — was that course of action proper?

I would point out that the committee to which Mr Christophersen refers was provided for in the Commission decision of 23 July 1980. Known as the 'Groupe Noël' and comprising four members (the Secretary-General of the Commission, the Director-General for Personnel, a Director nominated by the President and a representative of the Member of the Commission responsible for personnel matters), the committee examines the applications and the files of the applicants and, having assessed the candidates' abilities and their suitability for the tasks involved in the post concerned, issues a non-binding opinion indicating which official or officials best fulfil the prescribed requirements. That opinion, together with the applications and files, is then forwarded to the Members of the Commission for the final decision (as regards the procedure involved here, see judgment of 23 October 1986 in Case 26/85 *Vaysse* v *Commission* [1986] ECR 3131).

In the committee's opinion of 25 May 1984 it is stated that 'parmi les [16] candidats qui se sont présentés, MM. Argyris, Hochbaum, Van Ginderachter et Waterschoot, cités dans l'ordre alphabétique, devraient être pris particulièrement en considération'. As we know, however, when that proposal was submitted there had been no consideration of the relevant experience and qualifications acquired by a number of candidates during the the previous five years' service; and that fact invalidates the opinion not only with respect to the appointment made on 30 May 1984 but also for the purposes of the confirmatory decision. Before adopting the latter decision, the appointing authority should have initiated a new procedure by sending all the documentation — which was then complete — back to the committee.

The objection will be raised that, as stated in the judgment of 18 December 1980 in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943, paragraph 24, the lack of a staff report 'is not sufficient to render the promotions granted void unless it is established that that fact [had] a decisive effect on the promotion procedure'. In the present case, however, what was missing was not just the report of a *single* candidate but those of *several* candidates, including that of the official who was promoted. Moreover, it is apparent from the files in question that during the five years which should have been covered by those reports, a number of officials — and in particular Mr Hochbaum — had acquired experience and qualifications which were particularly relevant to the duties of Head of the Monopolies Division. The committee's verdict as to the capabilities and skills of the candidates was, in short, so inadequate that a complete review by it was unquestionably *essential.*

Nor may it be said that the examination was correctly carried out by the appointing authority and that, therefore, the failure to consult the 'Groupe Noël' did not amount to an irregularity so grave as to justify cancellation of the second decision. In that connection, the Court has held that 'when, by a decision of an internal nature, the appointing authority voluntarily institutes a

compulsory consultative procedure which is not prescribed by the Staff Regulations, it is obliged to abide by such a procedure, which cannot be regarded as lacking any legal validity' (judgment of 21 April 1983 in Case 282/81 *Salvatore Ragusa* v *Commission* [1983] ECR 1245, paragraph 18). Since the 'Groupe Noël' was set up specifically to ensure that Article 45 of the Staff Regulations was correctly applied, it is clear that a promotion awarded without valid consultation of that body infringes that provision. The decision of 30 January 1985 is therefore unlawful.

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

(a) declare the actions brought by Mr Ingfried Hochbaum and Mr Edward Rawes against the Commission of the European Communities in Cases 44 and 77/85 inadmissible; and

(b) uphold the applications submitted by the same officials in Cases 294 and 295/85 and annul the decision of 30 January 1985.

The defendant should be ordered to pay the costs of the proceedings in accordance with Article 69 (2) of the Rules of Procedure.