given for the rejection are deemed to be the same as those for the decision which was the subject of the complaint.

2. Although the appointing authority, when promoting officials, has wide discretion in comparing the candidates' merits and reports, especially with a view to the post to be filled, it must exercise it within the self-imposed limits contained in the notice of vacancy.

3. The annulment of an administrative act challenged by an official constitutes appropriate reparation for any non-material harm which he may have suffered.

Nevertheless, the annulment of the decisions appointing another candidate and rejecting the applicant's candidature cannot in itself constitute appropriate reparation for the non-material harm which he suffered where an unfavourable but incorrect assessment of his abilities contained in the decision rejecting his complaint, which was offensive *per se* and was widely disseminated within the institution, caused him clear non-material harm independently of the decision rejecting his candidature.

REPORT FOR THE HEARING
delivered in Case C-343/87 *

I — Facts

1. Mr Annibale Culin entered the service of the Commission on 7 September 1959; he was assigned to the Directorate-General for Competition (hereinafter: 'DG IV'), where he continues to perform his duties today. Since 1 January 1972 Mr Culin has been graded in Grade A 4.

2. As part of a reorganization of DG IV which the Commission decided to carry out, Mr Culin was assigned with effect from 1 October 1984 to the Textiles, Clothing, Leather and Other Manufacturing Industries Division of Directorate B, 'Restrictive practices and abuse of dominant positions I' (hereinafter: 'IV/B-2').

3. With effect from 12 November 1985 Mr Culin served as deputy Head of that division, the Head having died.

4. On 26 September 1986 the Commission published Vacancy Notice COM/1607/86, for the post of Head of Division IV/B-2. Mr Culin, who was still deputy Head of the

* Language of the case: French.

Division at that time, together with 17 other officials, applied for the post.

5. On 24 November 1986 the Commission decided to fill the post in question by way of transfer. It appointed as Head of Division IV/B-2 Mr Nicholas Argyris, a British national working outside DG IV at the time, who was promoted to Grade A 3 with effect from 1 November 1986.

6. By decision of 28 November 1986, subsequent to the decision to appoint Mr Argyris, the Commission appointed Mr Culin, with retroactive effect, acting Head of the Division 'as from 12 November 1985 until the post is finally filled or until 11 November 1986 at the latest'.

7. On 16 February 1987 Mr Culin lodged a complaint under Article 90(2) of the Staff Regulations against the decision rejecting his application for the post and against the decision appointing Mr Argyris.

8. On 20 July 1987 the Commission adopted a decision rejecting the complaint, which was notified to Mr Culin by memorandum dated 3 August 1987. The decision included the following statement: 'The appointing authority took account . . . , in particular, of the functions as acting Head taken up by [Mr Culin] from 12 November 1985, and it was this aspect which was not considered satisfactory. Consequently, the Commission decided, on the expiry of his term as acting Head, to fill the post by appointing another official . . . Having thus answered the main argument, the Commission takes the view that the other arguments put forward by [Mr Culin] concerning the appointment of Mr Argyris become quite irrelevant'.

9. As a result of the Commission's stated views, Mr Culin brought the present action on 5 November 1987.

II — Conclusions of the parties

10. The applicant claims that the Court should annul:

(i) the Commission's decision of 3 August 1987 expressly rejecting the complaint of 16 February 1987;

(ii) the Commission's decision of 24 November 1986 appointing Mr Nicolas Argyris to the post of Head of Division IV/B-2;

(iii) the decision rejecting the applicant's candidature for the post,

and that it should order the Commission:

(i) to pay one franc by way of compensation for the non-material damage suffered by the applicant as a result of the arguments put forward in the aforesaid decision of 3 August 1987 and for material and non-material damage suffered by the applicant as a result of the unlawful rejection of his candidature;

(ii) to pay the costs.

11. The Commission contends that the Court should dismiss the application as unfounded and order the applicant to pay the costs.

III — Submissions and arguments of the parties

First submission: infringement of Article 45 of the Staff Regulations

12. Article 45 of the Staff Regulations provides that promotion takes place '... after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'.

13. In the case of the promotion of officials from Grade A 4 to Grade A 3, as in the present proceedings, the comparative merits of the candidates and their reports must, in accordance with the Commission's internal rules, be considered by the 'Advisory Committee on Appointments to Grades A 2 and A 3'.

14. The applicant claims that it is common knowledge that the Advisory Committee on Appointments to Grades A 2 and A 3 very rarely meets, and that it did not do so in this case. He asserts that, even if the committee did meet, the consideration of the candidates' comparative merits for the post of Head of Division is vitiated by an obviously defective assessment.

15. The applicant refers to the passage in the Commission's abovementioned decision of 3 August 1987 expressly rejecting his complaint, in which the appointing authority, when examining his candidature for the post, turns specifically to his term as acting Head '... and it was this aspect which was not considered satisfactory'; he points out that there is no document on his personal file to bear out such a conclusion.

16. On the contrary, the applicant claims that the staff reports on him from 1969 until July 1987, which cover his term as acting Head, were full of praise; furthermore, the internal memoranda of 23 and 31 January 1986, included on his personal file, clearly show that his immediate superior (Mr Ferry, the Director) was totally satisfied with the manner in which the applicant had served as acting Head. The above memorandum of 23 January 1986 contains the statement: 'he has been acting as interim head very successfully'.

17. That assessment was confirmed to the applicant by Mr Overbury, who succeeded Mr Ferry as Director. Indeed, the Director-General for Competition himself suggested to the Commission that it should allow the applicant to be acting Head, which it did, in the full knowledge of the circumstances, on the expiry of the period during which he had served as deputy Head of Division IV/B-2.

18. The applicant further argues that, following the decision rejecting his complaint, he requested the intervention of the mediator. The mediator took the matter up with the competent members of the appointing authority, who told him that the contested assessment came from DG IV. DG IV, however, denied that claim.

19. Furthermore, the passage in the Commission's decision of 3 August 1987 which reads: 'Having thus answered the main argument, the Commission takes the view that the other arguments put forward ... become quite irrelevant' demonstrates that the contested assessment constituted the only determining factor in the rejection of the applicant's candidature.

The decision rejecting his candidature was therefore based on a manifestly mistaken appraisal of his merits, contrary to Article 45 of the Staff Regulations.

20. The Commission contends that the dispute concerns the 'inaccuracy of a phrase' in the reply to the applicant's complaint. It describes the contested assessment as a 'mistake' and a 'misunderstanding', which slipped into the reply to the applicant's complaint and which it wished to rectify by adopting an addendum to the reply, containing a formal retraction of the phrase and serving as an amended text. The addendum, drawn up along the same lines as the original reply, was indeed an appropriate way of making good any non-material damage suffered by the applicant.

21. In any case, the Commission goes on, the 'misunderstanding' could not have caused the applicant any harm since it had no effect on the decision as to how the post was to be filled.

22. The procedure for filling the post had followed its proper course. The Advisory Committee on Appointments to Grades A 2 and A 3, mentioned above, was convened and gave its opinion on 27 October 1986. The Commission attached the summarized Minutes of the 101st meeting of the Committee and the opinion it gave.

23. It is apparent from those documents that the Advisory Committee had considered the comparative merits of the 18 candidatures and reached the conclusion that five candidates, amongst whom the applicant was not included, deserved special consideration. As the opinion of the Advisory Committee is 'one of the factors on which the Commission bases its own assessment of the candidates' (judgment of 9 July 1987 in Joined Cases 44, 77, 294 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259), the Commission chose from the five candidates the one proposed by the Director-General of Competition.

24. Since the procedure for filling the post at issue was thus properly conducted, its validity cannot be affected by the misunderstanding which manifested itself in the reply to the applicant's complaint. The rejection of a complaint is merely a confirmation, and does not create a further opportunity for challenging the contested decision (see, for example, the judgment of 24 June 1971 in Case 53/70 *Vinck* v *Commission* [1971] ECR 601).

25. The Commission contends that the misunderstanding in question is, at most, a procedural defect having no effect on the validity of the decision at issue. In any case, the Court has already held that an applicant can have no legitimate interest in obtaining the annulment, on the ground of the absence or inadequacy of the reasons on which it is based, of a decision which could certainly be confirmed in substance, in the absence of a mistake of law or of fact, in the event of annulment (judgment of 29 September 1976 in Case 9/76 *Morello* v *Commission* [1976] ECR 1415).

Second submission: infringement of the terms of Vacancy Notice COM/1607/86

26. The applicant argues that one of the qualifications required for the post, in point 3 of Vacancy Notice COM/1607/86, is a 'knowledge of one or more of the sectors involved'. Those sectors are the ones covered by Division IV/B-2, namely restrictive practices and abuse of dominant

positions in textiles, clothing, leather and other manufacturing industries.

27. That condition, which is a minimum condition, is, according to established case-law, binding upon the Commission and is not open to interpretation.

28. However, the candidate ultimately chosen had never been engaged in any of the sectors concerned and had no knowledge of the problems connected with them, as indeed is clear from the memorandum which the Director-General for Competition sent to the administration on 28 October 1986, expressing his preference for the candidate in question.

29. The applicant concludes that the candidature selected should therefore have been rejected. Both the opinion of the Advisory Committee on Appointments to Grades A 2 and A 3 and the decision appointing the candidate in question were vitiated by a manifest error of appraisal, and the decision was adopted contrary to the terms of the vacancy notice.

30. The Commission contends that the conditions set out in point 3 of the vacancy notice cannot be interpreted as restrictively as the applicant suggests. Where an appointment is to be made to a responsible post such as the present one, the candidates are assessed by reference to their abilities and qualities as a whole and must, most importantly, have a general overview of the problems involved.

31. There is no doubt that the candidate selected fulfilled all the other conditions in the vacancy notice, such as a thorough knowledge of competition law, an ability to conduct negotiations, the ability to manage a division, etc.

32. The defendant then refers to the abovementioned memorandum of the Director-General for Competition of 28 October 1986, and particularly to the following passage: 'it is not any specific knowledge but rather the individual's open-mindedness and organizing ability which must be regarded as the decisive criteria in the choice of candidate to fill the post in question'.

33. The author of the memorandum also emphasized, as favouring the candidate appointed to the post, 'his broad knowledge of industrial matters in general' and 'his open-mindedness and his adaptability to a variety of tasks', which are, in the Commision's view, more decisive factors than the conditions set out in point 3 of Vacancy Notice COM/1607/86.

34. The Commission concludes that the applicant's argument is that only officials whose duties have been performed within the division can fulfil the conditions of the vacancy notice. Such an argument would clearly defeat any mobility within the institutions.

Third submission: infringement of the third paragraph of Article 27 of the Staff Regulations

35. This provision provides: 'No posts shall be reserved for nationals of any specific Member State'.

36. The applicant maintains that it is 'common knowledge' in DG IV that the

vacancy announced by Notice COM/1607/86 was reserved for a British official, since the number of officials of British nationality in Grade A 3 in DG IV was below the 'planned' quota. Previously, too, the post had been occupied by a British official.

37. The applicant refers to the *Hochbaum* cases, mentioned above (Joined Cases 294 and 295/85), in which the applicants had claimed that an A 3 post in DG IV was reserved for a candidate by virtue of his nationality. In those cases a member of the cabinet of one of the Commissioners had told another official that the post then vacant was reserved for a candidate of a given nationality. The official in question had been prepared to give a report of those facts under oath before the Court.

38. That claim strengthened the general impression that the higher Grade A posts in DG IV were assigned according to the candidate's nationality, in disregard of the principle of equality of treatment between officials. That impression was, in the event, borne out by the fact that the table of posts for DG IV was published very shortly after the appointment of Mr Argyris.

39. The Commission takes the view that it need neither confirm nor deny 'grape-vine' rumours, and contends that the applicant has not adduced the slightest evidence to substantiate its allegations. Concern to achieve an even geographical distribution of the available posts does not mean that any given post must be reserved for a specific nationality. The fact that, in the event, one Briton succeeded another cannot serve as proof, especially as the second Briton was succeeded by a German.

40. The table of posts for DG IV had been in preparation for a long time, and its publication shortly after the appointment of Mr Argyris was sheer coincidence.

41. As for the statements made by a member of a Commissioner's cabinet, even if substantiated, they were made more than four years ago, in relation to a different post from the one at issue in the present case. The Commission asks how they are supposed to demonstrate that the post in dispute in these proceedings was reserved for a specific nationality.

Fourth submission: misuse of powers

42. The applicant claims that the candidate chosen was not intended actually to serve in the post of Head of Division IV/B-2, as was commonly known in his department. Indeed, a few weeks after his appointment Mr Argyris was transferred to the post of another Head of Division, while the resultant vacancy was filled by transferring the Head of another division. That was known in the department in advance and was anticipated in the table of posts for DG IV, mentioned above.

43. The contested decision regarding the appointment of Mr Argyris was therefore vitiated by a misuse of powers and an abuse of procedure, because it was adopted in order to facilitate the access of a specific candidate to a post declared vacant, whereas that candidate was in fact intended to occupy a different post.

44. The Commission replies that the applicant has not produced the slightest proof of his allegations. The fact that Mr Argyris later chose, quite freely, to present his candidature for another post cannot be

viewed as proof of a misuse of powers on the part of the appointing authority. Had Mr Argyris really been intended to occupy a post other than the contested one, he would not initially have been appointed to that first post.

45. In that connection the Commission recalls that: 'A misuse of powers is not deemed to exist unless it is proved that the appointing authority in taking the measure in question has followed an objective other than the legal one' (judgment of 25 November 1976 in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701).

C. N. Kakouris
Judge-Rapporteur