On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the appointing authority of the Court of Auditors of 21 April 1982 not to pursue the procedure for filling the post declared vacant by Vacancy Notice No CC/LA/3/81 by appointing the applicant thereto;**

2. **Dismisses the application in Case 40/83 as inadmissible;**

3. **Orders the Court of Auditors to pay the costs.**

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 9 February 1984.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 15 DECEMBER 1983 [1]

Mr President,
Members of the Court,

The Court has before it two actions brought by Nelly Kohler against the Court of Auditors of the European Communities, seeking the annulment of a decision adopted by that institution.

The applicant has been employed there as an official in the French language translation section since 1 December

1 — Translated from the French.

1978. Following the publication of three identical notices announcing three vacancies for a "Reviser/Principal translator LA 4/5" in three separate language sections, namely the French, Danish and Italian, she took part in Competition No CC/LA/12/81 for the French post, in which she alone was successful, being the only person entered by the selection board on the list of suitable candidates.

On 21 April 1982, the Italian and Danish entrants who had been declared successful in the other two competitions were appointed by a decision of the appointing authority; on the same day, in the course of an interview with the President of the Court of Auditors to which she had been summoned, Mrs Kohler was told that she would not be appointed to the post in the French section for lack of experience.

It is against that decision that the appointing authority's rejection of the complaint which she submitted to it that the applicant has brought the two actions mentioned above. Since the Court of Auditors, in reply, has raised a twofold objection of inadmissibility, I shall first deal with that question before considering the substantive problems.

I — Admissibility

I shall analyse in turn the objection raised by the appointing authority to the admissibility of the application in Case 316/83 and the one against the application from which the action in Case 40/83 arose.

1. Case 316/82

1.1. Following the interview of 21 April 1982, the applicant lodged a complaint by letter dated 24 May 1982, which the appointing authority, by a decision of the President dated 14 September 1982, rejected as inadmissible or otherwise unfounded. It is against that decision that the action has been brought. It is therefore based on the provisions of Article 90 (2), which entitles "any person to whom these Staff Regulations apply" to "submit to the appointing authority a complaint against *an act adversely affecting him . . .*".

For an appraisal of the admissibility of the application, it seems crucial to define the legal character of the interview of 21 April. According to the case-law of the Court, "Only measures capable of directly affecting a specific legal situation may be considered as having an adverse effect." [1] If that definition is taken into account in conjunction with Article 90 (2), it may be held that such acts are in evidence "either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations". Does the interview therefore reveal in its content either a decision or a failure to adopt a measure such as will directly affect a specific legal situation?

1.2. In the view of the appointing authority, the complaint and hence these proceedings are inadmissible because the former is directed against the interview of 21 April 1982, which cannot be assimilated to an act adversely affecting the applicant. Indeed, no decision was communicated during that interview, the sole object of which was to inform the applicant of the suspension of the procedure under which she had been recruited. In a way, although Mrs Kohler was *personally* affected by that measure, with its *objective* character, she

1 — Judgment of 10 December 1969, Case 32/68, *Grasselli* v *Commission*, paragraph 4, [1969] ECR 505, at p. 511.

was not the *addressee* of a *subjective* measure for the very reason that she was only *indirectly* involved. She consequently had no alternative but to act on the basis of Article 90 (1), by requesting the appointing authority, in writing, to "take a decision relating to" her.

1.3. In its arguments the appointing authority does not deny a legal interest in bringing proceedings on the part of a successful candidate in a competition which has not been proceeded with.[1] On the other hand, it emphasizes the general character of the contested cancellation, of which the applicant was merely informed on 21 April 1982, and this, it claims, explains why no individual decision whatever was communicated in writing pursuant to Article 25 of the Staff Regulations.

1.3.1. I do not share that opinion. In my view, the true purpose of the interview was to communicate to the applicant the decision not to appoint her to the vacancy for which she had applied. It is of little importance, for the purpose of considering the admissibility of the action, to ascertain whether that individual decision is the cause or merely the effect of the cancellation of the recruitment procedure; I shall deal with the question of the appointing authority's real motives when I consider the substantive issue of the legality of the decision. At this stage it is sufficient to observe that the decision manifestly affects the applicant *directly, in her capacity as the only successful candidate in Competition No CC/LA/11/81.*

1 — Judgment of 24 June 1969, Case 26/68, *Fux* v *Commission*, paragraph 4, [1969] ECR 145 at p. 153.

1.3.2. That finding does not completely resolve the problem of admissibility, for the investing authority contends that any individual decision must be communicated in writing as required by Article 25 of the Staff Regulations and that therefore the *absence of writing* obliges the applicant to base her application for annulment on Article 90 (1), that is to say, to obtain an express decision. The very formulation of this reasoning reveals its weaknesses:

(a) The reference to Article 25 is not relevant in the context of a consideration of the admissibility of the action; the article lays down the principle of an essential procedural requirement, in other words, a condition of *external legality, not a condition for the admissibility* of action taken through official channels or before the Court.

(b) The appointing authority appears to confuse the absence of writing with an implied decision; Article 90 requires either an express decision or an implied decision rejecting the request, subject to the time-limit fixed therein. In the circumstances, the *oral* nature of the individual decision communicated to Mrs Kohler does not seem to me capable *a priori* of precluding the admissibility of her action for annulment:

Indeed, the Court in its consistent case-law has always defined the concept of an act adversely affecting a person in terms of its *content*, that is to say, its harmful effect on the applicant, not in terms of its *form*. In the *Goeth* judgment, the Court dismissed an argument as to the absence of expressions such as "decision" or "decided" and analysed instead the actual significance of the act

in question, concluding that it pointed "in clear and unconditional terms" to a measure having an adverse effect. [1] In another instance the Court stated that the act must disclose "an express manifestation of an administrative intention which creates legal effects. . .". [2]

How do matters stand in the present case? The intention of the administration was unambiguously manifested at the interview; the appointing authority has denied neither its *substance* (not to give effect to Mrs Kohler's success in the competition), nor the *reasons* given (insufficient experience), but rather the *construction* placed upon them by the applicant. The notice to the staff confirms in retrospect the purpose of the interview, since it was "in the light of certain results of the procedure for filling the post" that the recruitment procedure was cancelled.

Without prejudice to a substantive consideration of the reasons given, it may be said that the interview of 21 April was indeed designed to notify the applicant of *an express, oral decision not to proceed with her application for the post*, or, to quote the actual words used by the appointing authority, to tell her that the cancellation of the recruitment procedure "unfortunately precluded the application of the list of suitable candidates drawn up by the Selection Board for Competition No CC/LA/12/81" (decision of 14 December 1982).

Since the applicant's complaint dated 24 May 1982 was directed against an act adversely affecting her within the meaning of Article 90 (2) of the Staff Regulations, the action brought in Case 316/82 is admissible.

In the alternative, I shall deal with the second issue of the admissibility of the action brought in Case 40/83.

2. Case 40/83

In the event of her complaint against the oral decision of 21 April proving to be inadmissible, Mrs Kohler has brought a second action in the alternative; describing her letter of 24 May 1982 (the "complaint" in Case 316/82) as a *written request*, and the appointing authority's reply of 14 September 1982 as a *decision* within the meaning of Article 90 (1) of the Staff Regulations, she submits a complaint against the latter decision pursuant to Article 90 (2).

2.1. The appointing authority bases its objection of inadmissibility in this case on the lapse of the periods prescribed for bringing an action. The decision of 14 September 1982 merely served, it contends, to confirm the staff notice of 21 July 1982. Since the measure was a confirmatory one, the prescribed period started to run on the day on which the measure confirmed was published, namely 21 July; however, as the applicant submitted her complaint on 13 December 1982, that is to say, outside the three-month period laid down by the Staff Regulations, her action at law is inadmissible.

2.2. That line of argument does not appear to be acceptable. However general in nature the decision suspending the recruitment procedure may have been, it necessarily led to an individual decision, as is confirmed by the wording quoted above from the letter of 14 September, namely the decision not to apply the list of suitable candidates on which Mrs Kohler's name alone was

1 — Judgment of 8 February 1973, Case 56/72 *Goeth* v *Commission*, paragraphs 9 and 10, [1973] ECR 181 at p. 187.

2 — Judgment of 20 November 1980, Case 806/79 *Gerin* v *Commission* paragraph 5, [1980] ECR 3515, at p. 3524; Opinion of Mr Advocate General Roemer in Case 32/68, mentioned above, [1969] ECR 513.

entered. That individual decision was not, if the interview of 21 April be disregarded, notified to the person concerned *expressis verbis* until 14 September 1982. Yet, according to the case-law of the Court, a general notification may not be substituted for an individual decision without infringing Article 25, mentioned above; [1] in relying on the staff notice to rebut the admissibility of the complaint through official channels against the individual decision which was addressed to her subsequently, the appointing authority sets up against the applicant its own infringement of Article 25 of the Staff Regulations, which requires every individual decision to be communicated in writing.

It was therefore quite proper for the applicant to submit, within the period prescribed by Article 90 (1), a complaint against the letter of 14 September 1982, since that was the first manifestation in writing of the appointing authority's decision in regard to her.

It should none the less be emphasized that the admissibility of this second action cannot be concurrent with that of the previous one: if the Court takes the view, as I suggest it should, that the disputed decision is the one communicated at the interview on 21 April 1982, the letter of 14 September then becomes a decision rejecting a complaint; being a measure in confirmation of a previous decision, it is not open to challenge.[2] Having made that last observation, I can now go on to consider in substance the arguments adduced by Mrs Kohler.

1 — Judgment of 29 October 1981, Case 125/80 *Arning* v *Commission*, paragraph 8, [1981] ECR 2539.

2 — Judgment of 9 December 1982, Case 191/81 *Plug* v *Commission*, paragraph 13, [1982] ECR 4229, at p. 4245.

II — Substance

The issue of the legality of the decision whereby the appointing authority cancelled the recruitment procedure after the applicant had been designated by the selection board as the only successful candidate gives rise to two irreconcilable arguments.

In the applicant's view, the decision at issue had no other purpose than to prevent her appointment to the vacancy in question; although in the form of a general measure terminating a recruitment procedure which was fully completed, it was in fact an individual decision which was adopted, for the annulment of which the applicant sets forth three arguments (infringement of essential procedural requirements, infringement of the Staff Regulations and general legal principles, and misuse of powers).

In the view of the Court of Auditors, on the other hand, the disputed decision is not addressed to the applicant but is a measure adopted by the appointing authority in pursuance of its discretionary power to appraise the needs of the service, the purpose of which is to ensure that recruitment is better suited to the interests of the service as a result of a reappraisal of the conditions laid down as regards experience.

It is unnecessary to examine in detail the submissions thus put forward but it is sufficient to record that the legality of the disputed decision, as has been revealed by the arguments of the parties at the hearing, depends essentially on the question whether it was communicated in accordance with the requirements of Article 25 of the Staff Regulations, and

whether a reference to the interests of the service constitutes an adequate statement of reasons, or one which is to some degree artificial and indicates an actual misuse of powers. No-one, indeed, denies the appointing authority its margin of discretion in determining its internal organization; in fact, the Court has declared that the appointing authority may repeat the entire procedure [1] if it discovers at a later stage that the conditions imposed by the vacancy notice are not suited to the needs of the service. However, the case-law cited [2] does not have the effect of excusing the authority from compliance with the procedural requirements laid down by Article 25, mentioned above, in respect of all measures adversely affecting an official. In more general terms, the appointing authority is required, whatever the scope of its powers may be, to observe the principle that all administrative decisions must be lawful. In this case, it is a matter for the Court to exercise a limited power of review in order to determine whether a misuse of powers has actually occurred.[3]

I shall therefore investigate the submission that essential procedural requirements have been infringed, before going on to consider the allegation of a misuse of powers.

1. Infringement of essential procedural requirements

The infringement alleged consists in failure to comply with the requirement that any decision adversely affecting an official shall at once be communicated *in writing* and shall state *the grounds* on which it is based.

1 — Judgment of 30 October 1974, Case 188/73 *Grassi* v *Council*, paragraph 43, [1974] ECR 1099, at p. 1112.

2 — Jugdment of 24 June 1969, Case 26/68 *Fux* v *Commission* especially paragraph 11, [1969] ECR 145; also *Grassi* v *Council*, mentioned above.

3 — Opinion of Mr Advocate General Warner in the *Grassi* case mentioned above, at pp. 1117 and 1118.

1.1. Lack of immediate notification in writing

The second paragraph of Article 25 of the Staff Regulations states that:

"Any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned."

On this issue, it is common ground that Mrs Kohler became aware of the individual decision, implied by the new recruitment policy adopted by the appointing authority, during her *interview* with the President of the Court of Auditors on 21 April 1982. The staff notice of 21 July, regard being had to its general and impersonal character, was not addressed to the applicant.

In short, it is only the *letter of 14 September 1982* which may be assimilated to a written communication addressed to Mrs Kohler; it should be added however that, in the view of the Court of Auditors, its purpose was merely to confirm the aforesaid staff notice.

Thus, neither the requirement of a *written* notification nor the condition of its being transmitted *at once* has been observed in this case; a mere interview with a superior or an open announcement cannot replace those formalities.[4] Such irregularities seem to me such as to invalidate the disputed decision; as I mentioned when considering the question of admissibility, the appointing authority has relied on the lack of writing in order to declare the actions brought by the applicant to be inadmissible. Had the institution complied with the requirements of Article 25, the applicant would have been spared the need to bring a second action, and would furthermore have been

4 — *Arning* case, mentioned above, paragraph 8.

acquainted at once and more completely with the decision at issue. The failure to communicate the decision in writing and at once therefore placed Mrs Kohler in an unfavourable position, thereby constituting a substantial infringement of the procedural requirements of Article 25.[1] That failure is not, moreover, unconnected with the uncertainties affecting the reasons given for that decision as they have been advanced by the appointing authority.

1.2. Lack of a statement of reasons

The second paragraph of Article 25 of the Staff Regulations provides: "Any decision adversely affecting an official shall state the grounds on which it is based"; that involves the application to the particular circumstances of Community officials of a general legal principle based on the very principle of legality.[2] Its purpose is to guarantee the transparency of individual decisions. Consequently, the statement of reasons must disclose, in clear and unequivocal wording, the essential grounds on which the appointing authority has relied when adopting its decision. The duty to give a statement of reasons must be viewed in context, since the circumstances of the case are liable to reduce its scope.[3]

In the light of those principles to be found in the case-law, thus briefly called to mind, we may go on to consider the statement of reasons supplied by the appointing authority.

.....

According to the Court of Auditors, it was the interests of the service, and nothing else, which underlay its decision of 21 April 1982 not to appoint Mrs Kohler, whilst proceeding with the appointment of the candidates selected for the Danish and Italian sections.

Unlike the latter, the French section, according to the defendant, found itself in a special situation owing to a double vacancy, namely the posts of principal translator (LA 5) and head of section (LA 4). It was therefore clearly necessary to reassess the needs of the service by organizing a single procedure for the recruitment of candidates suitable for *either* of the two posts under consideration. In keeping with the qualifications demanded by those posts, the experience required was raised from 6 to *10 years*. The decision to terminate the procedure which culminated in Mrs Kohler's success is the logical corollary of those considerations. From October 1982, the new recruitment policy took the form of the organization of an open competition to constitute a reserve list in Career Bracket LA 5/LA 4, for filling one of the vacancies in the Dutch section, which was identical in structure to the French section. The latter in turn is the subject of a similar open competition (reference No CC/LA/16/82), which was announced in January 1983.

The file leads me to examine that statement of reasons, which appears not to meet the requirements laid down by the case-law of the Court; despite its apparent consistency, it is the outcome

1 —See the case-law quoted in my Opinion in Case 125/80, mentioned above, at p. 2560.

2 —Judgment of 28 February 1980, Case 89/79 *Bonn* v *Council* [1980] ECR 553, especially the Opinion of Mr Advocate General Reischl, at p. 566.

3 —From the above-mentioned case-law, see my Opinion in the judgment of 14 July 1983, Case 176/82 *Nebe* v *Commission* [1983] ECR 2475, together with the synthesis of those principles in the judgment of 1 December 1983, Case 18/83 *Morina* v *European Parliament*, paragraph 11, [1983] ECR 4051.

of much hesitation and its content lacks clarity.

1.2.1. Deficiency of the original reasons

Like the applicant, I find that the Court of Auditors has relied successively on the following:

(i) the applicant's lack of experience (interview of 21 April 1982);

(ii) the inappropriate nature, in terms of the department's needs, of the conditions laid down by the vacancy notice (staff notice of 21 July 1982 and letter of 14 September 1982);

(iii) the special circumstances of the French section, calling for the recruitment of applicants able to assume the functions of head of section or principal translator (letter of 2 February 1983);

(iv) lastly, during the oral procedure, the need to give priority to filling the vacancies for heads of section.

It may thus be seen from that chronological presentation that the appointing authority progressively built up its statement of reasons, which were finally completed only *ex post facto*, as the applicant's observations gradually forced the institution to enlarge on every ground which it had put forward. Those hesitations over the exact content of the statement of reasons disclose the *inadequacy* of the original grounds, set forth first at the interview and later in the staff notice and the letter of 14 September. Furthermore, they seem to me to be especially unjustified inasmuch as the organization in October of a competition in the Dutch section, which was experiencing the same double vacancy as the French section, suggests that the new recruitment policy was a *rigid* one.

Seeing that the essential reasons on which the appointing authority based its decision were not disclosed to the applicant until the Court proceedings had commenced, and not at the time at which the decision itself was communicated, as is logically implied by the second paragraph of Article 25, or even following the complaint submitted on 24 May, the original statements of reasons must, in the circumstances, be regarded as inadequate because they are incomplete in terms of the requirements of the case-law of the Court.[1]

If, on the other hand, reference is made to the broad statement of reasons finally put forward by the appointing authority, it is the requirement that the content should be clear and unequivocal which appears to have been overlooked.

1.2.2. Obscure and equivocal character of the definitive statement of reasons

The definition of any new recruitment policy is a matter of expediency and thereby falls within the discretionary power which is accorded to the appointing authority for appraising the needs of the service. None the less, there must be a causal relationship between a statement of reasons in such a case and the individual decision which it elucidates; that does not appear to be the case here.

(a) It will be noted in the first place that, according to the wording of Vacancy Notice No CC/LA/3/81 and Competition Notice No CC/LA/12/81, the vacancy for which Mrs Kohler was a candidate was that of reviser and principal translator "LA 4/5 (to be filled

1 — See *Nebe* judgment, mentioned above, and *Morina* judgment, paragraphs 11 and 12.

at Grade LA 5)". It was therefore not impossible that she might perform duties of an equivalent grade to that of head of section; a reading of the description of duties in the above-mentioned competition notice and in Competition Notice No CC/LA/8/82, organized to fill the post of head of the Dutch section, shows that the responsibilities to be discharged were identical. The differences lie in the capacity to manage the section, and in the length of experience required. Is that a sufficient *explanation* of the decision taken by the appointing authority? It seems not, if it is borne in mind that the dual aim which the appointing authority sought to achieve was induced by the competition in which Mrs Kohler took part.

(b) In the second place, the new recruitment policy was said to be concerned to put an end to a double vacancy; it seems to me, however, that such reasoning is inappropriate unless the language section in question is *actually* confronted with such a situation. Is it necessary to point out that, as far as the French section was concerned, one of the posts had a good chance of being filled, since the appointing authority never challenged Mrs Kohler's qualifications *for that post?* In the circumstances of the French section, the reasons put forward strike me as *contrived,* especially as the two posts in question are still vacant to this day.

(c) Lastly, I note that the appointing authority fully appreciated that, as regards Mrs Kohler and the French section, the reasons put forward were dubious, since, at the hearing, it felt obliged to explain the contested decision in terms of the need to *give priority to* filling the vacancies for heads of the various sections concerned. But what do the findings show? First, the priority in no way precluded the applicant's being appointed to the post of *reviser/principal translator;* furthermore, it seems unjustified, since the post of head of the French section is still vacant and some sections are still functioning without the post's having been filled.

In view of those findings, it is my opinion that the appointing authority has not legally discharged its duty to give reasons for any individual decision adversely affecting an official; neither the original nor the definitive reasons given, nor the circumstances of the case itself, disclose clearly and unequivocally the essential reasons which induced the appointing authority not to give effect to Mrs Kohler's application for the post.

Consequently, I take the view that the submission alleging an infringement of essential procedural requirements must be fully endorsed. The applicant perceives it as evidence of a misuse of powers.

2. *Objection on the ground of a misuse of powers*

According to the applicant the appointing authority sought, by cancelling the procedure under which she had been selected, to eliminate the possibility of her being appointed; such was the true purpose of its decision, she argues, the interests of the service representing merely the ostensible aim. An allegation such as that is generally difficult to verify; as Mr Advocate General Maurice Lagrange observed, "Although the

submission of misuse of powers is in essence subjective, the proof of its existence must be objective".[1] In other words, a firm conviction is not enough; tangible evidence is required on which to base so serious a submission.

2.1. As Mrs Kohler has rightly stressed, the original statement of reasons refers to the qualifications required by Vacancy Notice No CC/LA/3/81 for the post of principal translator/reviser (LA 5), which was alleged to be inadequate; on the other hand, the appointing authority subsequently pleads the special circumstances of the French section (namely the existence of a double vacancy). Those are, however, two quite distinct statements of reasons and only the second may be clearly identified with the formulation of a new recruitment policy, whilst the first seems, on the contrary, to be going back on the conditions in the vacancy notice, which were held to be merely inadequate.

That lack of consistency seems to be borne out by the wording of the staff notice of 21 July 1982. By making a reference to certain results of the selection procedure, after mentioning the lack of experience, the ostensible reasons suggest that *there is another set of reasons,* connected with the actual results of the cancelled competition.

2.2. A second series of findings appears to reinforce that impression. They deal with the totality of the factors which constitute the lack of a statement of reasons. As evidence of that I have already mentioned the hesitations on the part of the appointing authority and the crucial importance attached, now to experience, now to the special circumstances of the French section, now to the priority to be given to the appointment of heads of section.

All the above points cannot be explained in terms of awkward phraseology or administrative difficulties; rather, they reveal the growing embarrassment of the appointing authority, which became apparent during the hearing. Their origins must be sought in the *incongruity* — already suggested — between the reasons put forward and the reality of the matter.

It should, however, be pointed out that this accumulation of evidence still does not amount to *tangible* proof of a misuse of powers. The fact remains that the *consistency* of that evidence cannot be explained by a mere reference to the interests of the service but is due, in all probability, to the pursuit of a goal *other than the legal goal,* which the appointing authority attained by cancelling the procedure which had culminated in the selection of Mrs Kohler. For that reason I nevertheless accept the last claim for annulment.

I therefore conclude that the Court should allow the action brought by Nelly Kohler and should annul the decision whereby the Court of Auditors, acting as appointing authority, by a staff notice of 21 July 1982 (No 1137), cancel Vacancy Notice No CC/LA/3/81 of 25 May 1981; the institution should be ordered to pay the costs.

1 — Judgment of 5 December 1963, Joined Cases 35/62 and 16/63 *Leroy* v *High Authority* [1963] ECR 197, at p. 212.