REPORT FOR THE HEARING
delivered in Case 346/87 *

I — The facts

1. Giancarlo Bossi was recruited by the Commission on 1 July 1962 as a member of the temporary staff to a post as a laboratory technician in Grade B 5. He was appointed a probationary official in the same category and grade from 1 December 1963 and established with effect from 1 June 1964.

2. He was promoted to Grade B 4 with effect from 1 June 1966, to Grade B 3 with effect from 1 January 1972 and finally to Grade B 2 with effect from 1 January 1977.

3. After having worked in Directorate-General XII (Research, Science and Education), Mr Bossi was assigned to a post in Directorate-General IX (Personnel and Administration) on 1 January 1981.

4. During the 1987 promotion procedure, Mr Bossi, together with 74 other officials from DG IX, appeared on the list of officials eligible for promotion to Grade B 1 in 1987, since they had completed a minimum of two years in their present grade, as required pursuant to Article 45 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as the 'Staff Regulations').

5. However, Mr Bossi was not among the 15 officials of DG IX whose names appeared on the list of officials proposed by the Directorates-General for promotion in 1987 which was published in *Administrative Notices* of 15 December 1986.

6. Mr Bossi has not challenged that list either at the stage of the complaint through official channels or during his action before the Court.

7. Furthermore, Mr Bossi did not appear in the list of officials considered most worthy of promotion to Grade B 1, which was drawn up by the appointing authority following the recommendation of the Promotion Committee and published in the *Administrative Notices* of 2 March 1987. As regards DG IX, the first 10 officials on the list drawn up by the Directorates-General appeared on this list. Finally, the first eight officials of DG IX who appeared in the abovementioned list obtained their promotion to Grade B 1 in 1987.

8. On 14 April 1987 Mr Bossi submitted a complaint through official channels, which was registered with the Secretariat-General of the Commission on 16 April, seeking the annulment of the appointing authority's decision not to enter his name on the list of officials considered to be most worthy of promotion.

9. Following the implicit rejection of his complaint, Mr Bossi brought this action on 11 November 1987.

* Language of the case French

10. It is common ground that Mr Bossi's last periodic report, dated 28 February 1982, related to the 1979-81 period.

11. On 27 May 1987, Mr de Hoe, the superior responsible for drawing up Mr Bossi's reports for the periods in question, communicated to him the periodic reports for the 1981-83 and 1983-85 periods. Those reports, which maintain the marks for 1979-81, were confirmed by the superior on 23 October 1987 and by the appeal assessor on 3 February 1988. However, the two reports are not yet definitive since Mr Bossi has brought the matter before the Joint Committee on Reports which has not yet given a ruling.

12. The periodic report relating to the 1979-81 period was the last to appear in Mr Bossi's personal file at the time of the 1987 promotion procedure.

II — Written procedure and conclusions of the parties

1. Mr Bossi's application was received at the Court Registry on 11 November 1987.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

3. Giancarlo Bossi, the applicant, claims that the Court should:

(a) declare his application admissible and well founded;

(b) in consequence, annul:

(1) the decision of the Promotion Committee drawing up the list of officials found to be most worthy of promotion to Grade B 1 for the 1987 financial year published in *Administrative Notices* No 520 of 2 March 1987;

(2) the decision of the appointing authority drawing up the list of officials actually promoted in the 1987 financial year published in *Administrative Notices* No 545 of 14 December 1987;

(3) the Commission's implied decision rejecting the applicant's complaint through official channels which sought the annulment of the appointing authority's decision not to enter his name on the abovementioned list of officials found to be most worthy of promotion;

and order the defendant to pay the following damages (subject to any later modifications):

(4) the sum of BFR 100 000 as compensation for material damage

suffered in 1987, representing the annual difference in salary and other benefits between Grades B 2 and B 1 and the loss of seniority in Grade B 1 for the subsequent steps therein;

(5) an additional sum, to be calculated on a similar basis, as compensation for the material damage suffered in 1988 and during the subsequent years as long as he is not promoted to Grade B 1;

(6) the sum of BFR 100 000 fixed *ex aequo et bono* as compensation for the non-material damage suffered;

(c) order the applicant in any event to pay all the costs in the light of its attitude in not replying to the applicant's complaints through official channels.

4. The Commission, the defendant, contends that the Court should:

(i) dismiss heads of claim 2-6 of the application as inadmissible;

(ii) in any event dismiss the whole of the application as unfounded;

(iii) make an appropriate order as to costs.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission submits that heads of claim 2, 4, 5 and 6 of the application are inadmissible in so far as the Court has consistently held that conclusions presented to the Court which did not appear in the complaint through official channels are inadmissible (see most recently the judgment of 20 May 1987 in Case 242/85 *Geist* v *Commission* [1987] ECR 2181).

In the Commission's view, head of claim 2 is also inadmissible as being premature since, at the time when the action was commenced, the list of officials actually promoted in 1987 had not yet been published. Furthermore, even when it was published, the list did not constitute an act adversely affecting the applicant because of its purely informative nature.

The Commission also considers that head of claim 4 is inadmissible because the applicant has failed to show the existence of a direct and essential causal link between the alleged fault and the harm which he claims to have suffered. Furthermore, this head of claim and head of claim 6 also appear to be inadmissible inasmuch as the applicant is seeking both the annulment of the acts challenged in the application and compensation for damage suffered by reason of the allegedly defective adoption of those acts, whereas claims for compensation may only be made

in the alternative for the eventuality of the claims for the annulment of those acts being dismissed.

Furthermore, the Commission contends that head of claim 5 is inadmissible because of a lack of interest on the part of the applicant since the alleged damage is not certain, real and existing.

As regards head of claim 3, the Commission argues that it is also inadmissible since the Court has consistently held that purely confirmatory acts may not be the subject of an action (see most recently the judgment of 9 December 1982 in Case 191/81 *Plug* v *Commission* [1982] ECR 4229).

The applicant has not adopted any position regarding these submissions of inadmissibility.

In its rejoinder the Commission also points out that if the Court were to dismiss the second head of claim as inadmissible it would also be permissible to question the applicant's interest in challenging the decision which is the subject of the first head since the applicant would have no automatic entitlement to promotion even if the Court were to give judgment annulling the list of officials found to be most worthy and he were retroactively entered on that list. In fact, the applicant could only be promoted within the limits of the available budgetary resources and his promotion would therefore presuppose the annulment of the promotion of one of the officials actually promoted whereas those promotions have become definitive *vis-à-vis* the applicant since he has not challenged them within the prescribed periods.

B — *Substance*

1. In support of his application, the applicant alleges the infringement of Article 43 and Article 45 (1) of the Staff Regulations and Article 6 of the general implementing provisions of 27 July 1979 concerning staff reports, breach of the principles of sound administration and equal treatment of officials and maladministration on the part of the Commission.

The applicant states that the provisions of the Staff Regulations require the institutions to draw up a periodic report at least once every two years regarding the ability, efficiency and conduct in the service of each official, with the exception of those in Grades A 1 and A 2.

In the applicant's view, this periodic report is an essential element for the purposes of the comparative examination of the merits of officials eligible for promotion.

(a) In support of his application for annulment the applicant argues that at the time of the 1987 promotion procedure the decisions challenged were adopted without his reports for the periods 1981-83 and 1983-85 appearing in his personal file.

In the applicant's view the incomplete and irregular state of his personal file made it impossible for those responsible for deciding on his promotion and for the appointing authority to engage in a comparative examination of the merits of the officials eligible for promotion.

The bodies involved in the promotion procedure had taken their decision without being informed of the specialized knowledge of the adaptation of premises for computers acquired by the applicant since the 1979-81 periodic report which appears in his personal file, or of the English course in which the applicant had participated in the mean time.

Nor had they been in possession of the assessments by Mr Delhez, the applicant's immediate superior for the 1981-83 and 1983-85 periods.

The applicant also argues that the absence of reports for 1981-83 and 1983-85 had a decisive influence on his not being promoted.

On the one hand, the applicant argues that the Commission has failed in this case to prove that this decisive influence did not exist. In that respect the Commission relies on the letter of 22 May 1987 from Mr Volpi, Director of General Administration of DG IX, from which it appears that DG IX's list of promotion proposals was drawn up after consultation with the present and former superiors of the applicant, taking into account the age, the seniority and the comparative performances of the officials eligible for promotion. However, that letter is not material since during the 1981-83 and 1983-85 periods the applicant did not work under Mr Volpi who, when drafting the letter, must therefore have relied on documents not to be found in the applicant's personal file. The applicant considers that this letter must be entirely disregarded since it was subsequent both to the acts challenged and the complaint through official channels.

On the other hand, in order to show that the absence of the reports in question had a decisive influence on his not being promoted, the applicant relies on the letter of 8 February 1988 in which Mr Gibbels, Head of his division for the first 13 months of the 1981-83 period, stressed the applicant's particular merits and the draft reports drawn up for the first time on 15 June and 1 July 1987 by Mr Delhez, his immediate superior for the 1981-83 and 1983-85 periods, which represent a considerable improvement in relation to the 1979-81 marks.

The applicant also relies on paragraph 27 of the judgment of 18 December 1980 in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943, and requests the Court to ask the Commission to supply the information concerning the applicant which was available to those responsible for promotion decisions and the appointing authority during the 1987 promotion procedure in so far as that information is necessary to enable the Court to judge whether the irregularity in the applicant's personal file was capable of having an effect upon the disputed decisions.

Finally, the applicant argues that the principle of equal treatment was breached, by reason of the fact that a comparision of his situation with that of the other officials eligible for promotion was impossible.

(b) In support of his claim for compensation, the applicant maintains, on the one hand, that the Court has held that a delay in the drawing up of periodic reports such as that in this case is not compatible with the principle of sound administration. Such a delay constitutes maladministration, the consequences of which must be borne by the

Commission, since such delay is inherently such as to cause material and non-material harm to the applicant (judgment of 6 February 1986 in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497).

On the other hand, the harm suffered by the applicant by reason of his failure to be promoted, consisting of both material harm (loss of salary and seniority in Grade B 1) and non-material harm (loss of self-respect in seeing other officials progress more rapidly although the failure to promote the applicant was not based on legally admissible grounds, and fear of remaining blocked in his career), is a sufficient basis for his being awarded the damages requested.

(c) Finally, the applicant claims that the Commission should be ordered to pay all the costs since it failed to respond to his complaint and, by its own fault, rendered it impossible to engage in a comparative examination of the merits of the officials eligible for promotion.

2. (a) The Commission does not dispute that the reports for the 1981-83 and the 1983-85 periods were drawn up with such tardiness as to prevent them from appearing in the applicant's personal file at the time of the 1987 promotion procedure but states that according to the Court's consistent case-law an irregularity in a promotion procedure caused by the absence of one or more periodic reports does not entail the annulment of that procedure unless it is shown that that factor was decisive in the applicant's failure to secure promotion (see most recently the judgment of 10 June 1987 in Case 7/86 *Vincent* v *Parliament* [1987] ECR 2473).

The Commission considers that in this case there is no evidence to suggest that the applicant could have been promoted even if his file had included the two periodic reports for 1981-83 and 1983-85.

First, the absence of the reports in question is made up for by other information at the disposal of those deciding on promotions and the appointing authority.

Thus, it is apparent from Mr Volpi's letter of 22 May 1987 that before DG IX drew up the list of officials proposed for promotion, which the applicant has not challenged, the applicant's present and former superiors were consulted and a comparative assessment of the age, seniority in grade and merits of the eligible officials was made. In the Commission's view, this letter could not be suspected of lacking objectivity since it was written prior to the dispute.

Secondly, the Commission argues that an examination of the periodic reports is not the only criterion for promotion and that a comparison with the officials from DG IX who were finally promoted to Grade B 1 reveals that the applicant was the youngest (47) and had the least seniority in his grade (10 years). With the exception of two officials considered particularly brilliant and therefore given rapid promotion, pursuant to the provisions in force, the eight officials from DG IX finally promoted to Grade B 1 were better placed than the applicant as regards both age and seniority in grade (with the exception of one official who had only seven years' seniority but was 53 years

old). During the procedure, seven officials proposed on the list of most worthy officials, who are all older than the applicant (with the exception of one official of the same age considered particularly brilliant) of whom four were considered particularly brilliant and three had 11 years' seniority in grade, were eliminated.

Furthermore, the Commission argues that the specialized knowledge gained and the language course followed by the applicant since the 1979-81 report play a less decisive role as regards promotion than the age and seniority in grade of the relevant official.

Finally, the Commission states that the assessment contained in the letter from Mr Gibbels of 8 February 1988 is not fundamentally different from that supplied by him in the 1979-81 report.

As for the draft reports of 15 June and 1 July 1987 prepared by Mr Delhez, those are only documents preparatory to the drawing-up of the applicant's periodic reports and are not required to appear in the personal file.

Furthermore, the assessor, who must implement uniform assessment criteria to ensure equal treatment of all officials in a particular division, which entails the adjustment of the assessments supplied by the direct superiors of the persons involved, is not strictly bound by those assessments.

Furthermore, the letter of 15 June 1987 sent by Mr Delhez to Mr de Hoe, the applicant's superior and assessor, indicates that Mr Delhez had already been consulted in 1986 with regard to the applicant's reports.

The Commission also points out that neither the assessment by his superiors before DG IX's proposals for promotion were drawn up, the consultations with Mr Delhez in 1986 and 1987, nor the intervention of the appeal assessor had the consequence of altering the applicant's marks; the 1979-81 marks remained entirely the same.

Moreover, according to the Court's consistent case-law, the appointing authority enjoys a wide discretion as regards the qualifications and merits of the candidates (judgment of 4 February 1987 in Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529).

Furthermore, promotions can be given within the limits of the available budgetary resources. However, promotions for the 1987 financial year have already become definitive *vis-à-vis* the applicant who has not challenged them within the prescribed period.

As regards the measure of inquiry which the applicant requests in reliance on the abovementioned *Gratreau* judgment of 18 December 1980, the Commission leaves the point to the wisdom of the Court and declares itself ready and willing to produce the 1981-83 and the 1983-85 reports as soon as they have become definitive.

(b) The Commission also contends that the applicant's claim for compensation should be dismissed in so far as it is declared admissible.

As regards the material damage allegedly suffered by the applicant by reason of his failure to secure promotion, the Commission points out that the harm is not definitive and quantifiable since the applicant would have no automatic entitlement to be promoted to Grade B 1, even if his name were entered in the list of those most worthy of promotion.

On the other hand, the Commission argues that the applicant may not rely on material damage allegedly flowing from the delay in drawing up his periodic reports since the absence of those reports from his personal file was not a factor in his failure to secure promotion. On the contrary assumption, if the applicant's name were entered on the list of most deserving candidates following a judgment of the Court annulling the list at issue, that fact would of itself constitute complete redress for the alleged harm.

The claim for compensation for non-material damage should also be dismissed on analogous grounds.

F. Schockweiler
Judge-Rapporteur