Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

25 June 2020*

(Civil service — Officials — Promotion — 2017 promotion exercise — Decision not to promote — Clarity and precision of a plea in law in the application — Rule requiring correspondence — Challenge of definitive acts — Admissibility — Article 45 of the Staff Regulations — Interim probation report — End-of-probation report — Appraisal report — Factors taken into account for the consideration of the comparative merits — Regularity of the procedure — Liability — Non-material damage)

In Case T-511/18,

XH, represented by E. Auleytner, lawyer,

applicant,

v

European Commission, represented by L. Radu Bouyon and L. Vernier, acting as Agents,

defendant,

APPLICATION under Article 270 TFEU, seeking (i) annulment of the decision, published in *Administrative Notices* No 25-2017 of 13 November 2017, not to include the applicant's name in the list of officials promoted in the 2017 promotion exercise and annulment of Decision R/96/18 of 7 June 2018 rejecting the applicant's complaint of 10 February 2018 and (ii) compensation for the damage allegedly suffered as a result of those decisions,

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos (Rapporteur), President, L. Truchot and M. Sampol Pucurull, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 19 December 2019,

gives the following

* Language of the case: English.

Judgment [1]

I. Background to the dispute

1 The applicant, XH, is an official in the European Anti-Fraud Office (OLAF). She was appointed after passing competition EPSO/2009/169 (Law) and recruited at grade AD 5 in a first OLAF unit, with effect from 1 July 2014. Her recruitment was subject to a probationary period, which ended on 31 March 2015 ('the probationary period').

2 On 22 October 2014, the applicant was seen by Dr A, a psychiatrist at the European Commission's Medical Service ('the Medical Service'), in connection with a medical examination. That examination was organised following internal difficulties that the applicant encountered with other members of the first OLAF unit to which she had been posted.

3 With effect from 1 November 2014, the applicant was transferred to a second OLAF unit.

4 On 5 December 2014, the applicant received an interim probation report ('the interim probation report'). By email of 15 December 2014, the applicant stated that she did not agree with the comments contained in that report.

5 In January 2015, the applicant requested access to her medical file from the Medical Service. On 3 February 2015, the Medical Service informed the applicant that her medical file could be consulted only by an external practitioner. On 1 March 2015 and 4 April 2016, the applicant designated, in turn, Dr B and Dr C to that end.

6 On 20 March 2015, the applicant was established in her post, with effect from 1 April 2015.

7 On 26 March 2015, the applicant received her end-of-probation report. That report was signed, in his capacity as reporting officer, by the head of the second unit to which she had been posted, and countersigned, in his capacity as countersigning officer, by the interim director of OLAF's Directorate B.

8 In the procedure for seeking access to her medical file, the applicant was informed of the existence of a medical note prepared by Dr A, dated 31 March 2015 ('the note of Dr A').That note was drawn up after the medical examination of 22 October 2014 referred to in paragraph 2 above. On 2 October 2015, Dr B provided the applicant with extracts from the note of Dr A. In April 2016, the Commission invited Dr C to the Medical Service's premises so that he could inspect the note of Dr A in full. That visit took place on 11 May 2016.

9 On 11 April 2015, the applicant made an initial request for assistance to the competent appointing authority, in respect of the head of the first unit to which she had been posted. On 6 July 2015, the applicant submitted a second request for assistance to the competent appointing authority, in respect of her mentor in that unit. In those requests, the applicant claimed, in essence, that the defamatory content of the interim probation report referred to in paragraph 4 above was evidence of psychological harassment, to which she had been subjected by her hierarchical superiors. By Decision D/306/15 of 24 July 2015 and Decision D/512/15 of 19 October 2015, the competent appointing authority rejected the two requests for assistance. On 23 October 2015 and 19 January 2016, the applicant lodged a complaint against Decision D/306/15 and Decision D/512/15, respectively. In the first of those complaints, she requested, inter alia, that her interim probation report be withdrawn from her personal file. By Decision R/730/15 of 9 February 2016 and Decision R/43/16 of 27 April 2016, the competent appointing authority rejected the two complaints.

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

10 On 21 July 2016, the applicant requested compensation for the damage and costs, including legal costs, which had been incurred in the procedure for seeking access to her medical file. On 30 August 2016, the Medical Service rejected that request.

11 On 30 September 2016, the applicant requested that the medical opinion of Professor D, an external psychologist whom she had consulted in August 2016, be included in her medical file.

12 On 10 October 2016, the applicant lodged a complaint with the European Data Protection Supervisor ('the EDPS'). That complaint concerned, first, the length of the procedure for processing her request for access to her medical file and, secondly, the failure to include the note of Professor D in her medical file.

13 On 27 November 2016, the applicant lodged a complaint against the Medical Service's decision, referred to in paragraph 10 above, rejecting her request for compensation for the damage and costs incurred in the procedure for seeking access to her medical file. By Decision R/579/16 of 9 March 2017, the competent appointing authority rejected that complaint.

14 In the course of the same period, in January 2016 and April 2017, the applicant's annual appraisal reports ('the appraisal reports') were drawn up in respect of the 2015 and 2016 exercises.

15 On 3 April 2017, by a notice published in *Administrative Notices* No 13-2017, the Commission announced the opening of the 2017 promotion procedure ('the 2017 promotion procedure'). That announcement was followed, on 19 June 2017, by the publication of the list of officials proposed for promotion by the Director-General of OLAF. That list did not include the applicant's name.

16 On 11 April 2017, the applicant repeated her request of 30 September 2016 that the note of Professor D be included in her medical file (see paragraph 11 above).

17 In June 2017, the applicant lodged a complaint with the European Ombudsman relating to the presence of the interim probation report in her personal file.

18 On 26 June 2017, the applicant challenged, before the Joint Promotion Committee ('the JPC'), the decision of the Director-General of OLAF not to include her in the list of officials proposed for promotion.

19 On 25 August 2017, the applicant requested that the Medical Service withdraw the note of Dr A from her medical file. On 28 August 2017, the Medical Service informed her that that note was not in her medical file.

20 On 27 August 2017, a member of the JPC accessed the applicant's interim probation report.

21 On 21 September 2017, a joint working group ('the JWG') issued a draft opinion, stating that the applicant should not be recommended for promotion. That draft opinion was followed by an opinion of the JPC of 27 October 2017, in which the JPC, with 26 votes in favour and 4 abstentions, did not recommend the applicant for promotion to the competent appointing authority.

22 On 13 November 2017, the Commission published a notice in *Administrative Notices* No 25-2017. That notice contained the list of officials promoted in the 2017 promotion exercise. The applicant's name was not on that list ('the decision not to promote the applicant'/'the decision not to promote her').

23 On 14 December 2017, the EDPS gave its decision on the applicant's complaint of 10 October 2016 referred to in paragraph 12 above. In that decision, the EDPS rejected the first ground of the applicant's complaint, concerning the length of the procedure for processing the applicant's request

for access to her medical file. On the other hand, as regards the second ground of the complaint, concerning the failure to include the note of Professor D in the applicant's medical file, the EDPS concluded that, by failing to grant, without delay, the applicant's request for the rectification of her medical file, the Commission infringed the rules on the protection of personal data. In addition, the EDPS stated that the information which had been submitted to it in that complaint procedure suggested that the note of Dr A had been removed from the applicant's medical file.

24 On 18 December 2017, the applicant requested that the Director-General of OLAF withdraw the interim probation report from her personal file. In support of that request, the applicant relied on the decision of the EDPS referred to in paragraph 23 above.

25 By email of 18 January 2018, the Commission's Directorate-General for Human Resources and Security informed the applicant that the interim probation report and her comments on that report had been removed from her personal file.

26 On 10 February 2018, the applicant lodged a complaint against the decision not to promote her published on 13 November 2017. By Decision R/96/18 of 7 June 2018, the competent appointing authority rejected that complaint ('the decision rejecting the complaint'). On 17 June 2018, the applicant acknowledged receipt of the decision rejecting her complaint.

27 On 13 November 2018, the applicant was promoted to grade AD 6 in the 2018 promotion exercise, with effect from 1 January 2018.

II. Procedure and forms of order sought

…

34 The applicant claims that the Court should:

– order the Commission to present the appraisal reports of all the officials who were eligible for promotion and promoted from grade AD 5 to AD 6 in the 2017 promotion exercise and the lists of officials proposed for promotion;

– order the Commission to present evidence for and the results of the consideration of the comparative merits, copies of the records of the JWG and the JPC, and the most recent statistics concerning the average speed of promotion and corresponding salary increase of officials;

– order the relevant participants in the appraisal and promotion procedures and the persons having knowledge of the interim probation report to be heard as witnesses, following disclosure of the relevant documents referred to in the second head of claim;

– annul the decision not to promote the applicant;

– annul the decision rejecting the complaint;

– order the Commission to compensate the applicant for the damages and loss suffered;

– order the Commission to pay the costs.

35 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

36 By her fourth and fifth heads of claim, the applicant seeks the annulment of the decision not to promote her and the decision rejecting the complaint.

37 It is settled case-law that claims directed against the rejection of a complaint have the effect of bringing before the Court the act against which the complaint was submitted and as such lack any independent content (judgments of 17 January 1989, *Vainker* v *Parliament*, 293/87, EU:C:1989:8, paragraph 8, and of 20 November 2007, *Ianniello* v *Commission*, T-205/04, EU:T:2007:346, paragraph 27). It must therefore be concluded that the sole purpose of the claim for annulment directed against the decision rejecting the complaint against the decision not to promote the applicant is to obtain the annulment of the decision not to promote her (see, to that effect, judgment of 6 April 2006, *Camós Grau* v *Commission*, T-309/03, EU:T:2006:110, paragraph 43).

38 Even though the decision rejecting the complaint is confirmatory of the decision not to promote the applicant and it is therefore not appropriate to rule specifically on the claim seeking annulment of the decision rejecting the complaint, the statement of reasons given in the latter decision discloses the grounds for the decision not to promote her. Accordingly, in view of the evolving nature of the pre-litigation procedure, the statement of reasons must also be taken into account in the review of the legality of the decision not to promote the applicant, since that statement of reasons is deemed to coincide with the latter decision (see, to that effect, judgment of 21 May 2014, *Mocová* v *Commission*, T-347/12 P, EU:T:2014:268, paragraphs 31 and 33 and the case-law cited; see also, to that effect, judgment of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraph 59).

39 By her sixth head of claim, the applicant claims compensation from the Commission for the damages allegedly suffered.

40 It is appropriate to examine, first, the claim for annulment, and, secondly, the claim for damages.

A. The claim for annulment

41 In support of her application, the applicant puts forward two pleas in law. The first plea alleges that the 2017 promotion procedure was irregular. The second plea alleges that the competent appointing authority made a manifest error of assessment in the consideration of the comparative merits.

42 The Commission raises several pleas of inadmissibility.

1. Admissibility

…

(c) The plea of inadmissibility alleging that the applicant is challenging acts that have become definitive

…

84 It follows from all the foregoing that the plea of inadmissibility alleging that the first plea in law is not clear and precise and the plea of inadmissibility alleging non-compliance with the rule requiring correspondence must be rejected. On the other hand, the applicant's arguments directed, first, against

the presence of the interim probation report in her personal file within the meaning of Article 26 of the Staff Regulations, and, secondly, against the appraisal reports drawn up in the 2015 and 2016 exercises, are inadmissible.

2. Substance

85 By her first plea, the applicant asserts, in essence, that the 2017 promotion procedure is irregular on the ground that it infringes Article 45 of the Staff Regulations and misinterprets Commission Decision C(2013) 8968 final of 16 December 2013 laying down general provisions for implementing Article 45 of the Staff Regulations, published in *Administrative Notices* No 55-2013 of 19 December 2013 ('the GIP'). In that regard, the applicant submits, inter alia, that the irregularity of the 2017 promotion procedure is linked to, first, the influence of the note of Dr A and, secondly, the influence of the interim probation report and the end-of-probation report. The applicant adds that the procedural irregularities that she raises may have had an impact on the outcome of the 2017 promotion procedure, namely, the refusal to promote her.

…

(b) The alleged influence of the interim probation report and the end-of-probation report on the 2017 promotion procedure

108 The applicant asserts, inter alia, that her personal file, which was examined in the 2017 promotion procedure, contained information which ought not to have been included in it and which ought not to have been taken into account for the purpose of assessing her merits in the consideration of the comparative merits. In particular, the applicant considers that the presence of the interim probation report in her personal file was irregular.

109 The applicant further takes issue with the presence of the interim probation report in her 'promotion file', that is, in essence, with the influence and account allegedly taken of the interim probation report during the 2017 promotion exercise. In that regard, in the application and at the hearing, the applicant stated that the end-of-probation report directly referred to the interim probation report and indicated the difficulties that she had encountered at the start of her probationary period, namely difficulties of an interpersonal nature and in relation to teamwork.

110 The applicant is of the view that the information in the interim probation report clearly influenced the content of the end-of-probation report and her appraisal reports drawn up in the 2015 and 2016 exercises, namely the documents which were taken into account in the consideration of the comparative merits during the 2017 promotion exercise. Furthermore, she states that a member of the JPC directly accessed the interim probation report in the 2017 promotion procedure. In addition, at the hearing, the applicant asserted that the taking into account, on the part of the competent appointing authority, of that report was not necessary for the purposes of the 2017 promotion exercise.

111 Finally, in the part of the application dedicated to the consideration of the comparative merits, the applicant submits that the information in the end-of-probation report and the interim probation report clearly influenced her appraisal and the decision not to propose her for promotion.

112 Thus, in essence, the applicant alleges, first, an irregularity linked to the presence of the interim probation report in her personal file within the meaning of Article 26 of the Staff Regulations. Secondly, she argues that Article 45 of the Staff Regulations was infringed on the ground that the interim probation report and the end-of-probation report were taken into account in the 2017 promotion procedure.

113 The Commission disputes the applicant's arguments.

114 In the first place, the Commission submits that the withdrawal of the interim probation report from the applicant's personal file is not the direct consequence of duties resulting from the EDPS decision (see paragraphs 23 to 25 above). In its decision, the EDPS did not conclude that the presence of the interim probation report in the personal file was irregular.

115 In the second place, the Commission asserts in its written pleadings that, under Article 45 of the Staff Regulations and Article 4(1)(a) of the GIP, the taking into account of the interim probation report in the 2017 promotion exercise is not an irregularity but, on the contrary, an obligation on the part of the competent appointing authority. Furthermore, the Commission submits that the access, in the present case, by members of the JPC to an official's personal file, via the Human Resource Management information system ('Sysper 2'), is a procedural requirement stemming from the need to examine the reports, as provided for in Article 45 of the Staff Regulations. Therefore, according to the Commission, such access does not constitute an irregularity.

116 Questioned on this point at the hearing, the Commission stated that, contrary to what it had stated in the defence, the appointing authority was not under an obligation to take the interim probation report into account. Furthermore, it indicated that the purpose of a probation report is not to assess the merits of an official for the purposes of promotion and that such a report is drawn up only for the purposes of appointing the person concerned as an established official. From that it inferred that, when consideration is being given to the comparative merits in a promotion procedure, only the appraisal reports are, in principle, taken into account. However, the Commission took the view that the reporting officers always, de facto, have the possibility of taking into account the documents available in Sysper 2.

117 In the third place, in the defence and at the hearing, the Commission disputed the impact of the interim probation report on the 2017 promotion procedure and, in particular, the influence of that document on the reports taken into account in that promotion exercise.

118 First of all, the Commission contends that the content of the interim probation report did not prevent the applicant from becoming an established official at the end of the probationary period. At the hearing, it stated that hierarchical superiors are entitled to include negative appraisals in an interim probation report and an end-of-probation report. It conceded that the end-of-probation report in question mentioned the difficulties encountered by the applicant at the start of the probationary period. Nevertheless, it submitted that the applicant's end-of-probation report included assessments which deliberately minimised the negative assessments found in the interim probation report.

119 Next, the Commission contends that the applicant had no interest in challenging the 'satisfactory' conclusions of the appraisal reports drawn up in the 2015 and 2016 exercises. At the hearing, the Commission submitted that the alleged negative impact of the assessments contained in the interim probation report had been counterbalanced by the positive assessments contained in the end-of-probation report and the appraisal reports drawn up in the 2015 and 2016 exercises.

120 Finally, also at the hearing, the Commission stated that the decision rejecting the complaint did not contain any reference to the interim probation report. In that regard, it claimed that, in the course of the promotion procedure, the competent appointing authority had made use only, or primarily, of the appraisal reports drawn up in the 2015 and 2016 exercises.

121 Consequently, according to the Commission, the applicant overestimates the impact of the interim probation report on the 2017 promotion procedure and ignores the importance of the account taken of the other reports concerning her, which were included in her personal file.

122 In the present case, it must be noted that it is not open to the applicant to challenge the presence of the interim probation report in her personal file within the meaning of Article 26 of the Staff Regulations (see paragraph 84 above).

123 Therefore, only those arguments of the applicant alleging that the interim probation report and the end-of-probation report were taken into account in the 2017 promotion procedure, in breach of Article 45 of the Staff Regulations, need to be examined.

(1) Preliminary observations

124 Article 45(1) of the Staff Regulations provides that, when considering comparative merits, the appointing authority is to, in particular, take account of the reports on the officials. Furthermore, Article 4(1)(a) of the GIP provides, inter alia, that, for the purposes of the examination of the comparative merits of the officials eligible for promotion, the appointing authority is to take into account, in particular, 'reports on the officials drawn up since their last promotion or, failing that, since their recruitment, and in particular staff reports drawn up in accordance with the general provisions for implementing Article 43 of the Staff Regulations'.

125 In the first place, it should be noted that the reports referred to in Article 45 of the Staff Regulations are those mentioned in Article 43 thereof, namely the appraisal reports (see, to that effect, judgment of 5 October 2000, *Rappe* v *Commission*, T-202/99, EU:T:2000:227, paragraph 37 and the case-law cited).

126 The appraisal reports constitute an indispensable criterion of assessment each time the official's career is taken into consideration for the purpose of adopting a decision concerning his or her promotion (see judgments of 8 March 2006, *Lantzoni* v *Court of Justice*, T-289/04, EU:T:2006:70, paragraph 61 and the case-law cited, and of 16 March 2009, R v *Commission*, T-156/08 P, EU:T:2009:69, paragraph 53 and the case-law cited). Thus, a decision not to promote an official is tainted with irregularity where the appointing authority did not consider the comparative merits of officials eligible for promotion because one or more appraisal reports were not available owing to an error on the part of the administration (judgment of 28 June 2016, *Kotula* v *Commission*, F-118/15, EU:F:2016:138, paragraph 38; see also, to that effect, judgments of 3 March 1993, *Vela Palacios* v *ESC*, T-25/92, EU:T:1993:17, paragraph 43, and of 11 July 2007, *Konidaris* v *Commission*, T-93/03, EU:T:2007:209, paragraph 88).

127 In the second place, it is true that the appointing authority has the possibility of taking into account other information concerning the administrative and personal situation of the candidates for promotion. Nevertheless, in order for the appointing authority to be able to refer to that information, there must be exceptional circumstances (see, to that effect, judgment of 5 October 2000, *Rappe* v *Commission*, T-202/99, EU:T:2000:227, paragraphs 40 and 54). That is particularly the case when there is no appraisal report (see, to that effect, judgment of 13 July 1995, *Rasmussen* v *Commission*, T-557/93, EU:T:1995:138, paragraph 32).

128 Furthermore, such information cannot remedy the lack of an appraisal report unless it meets certain conditions, and it is for the defendant institution to show that they have been satisfied. It must, first, be sufficiently objective to allow judicial review, secondly, contain an assessment of the official's merits by the persons responsible for drawing up his or her appraisal report, thirdly, have been disclosed to the official in such a way as to guarantee his or her rights of defence, and fourthly, be known to the promotions committee when it considers the comparative merits of all the candidates. It follows that the information capable of compensating for the lack of an appraisal report must be broadly comparable to that report, as regards its provenance, the procedure for drawing it up and its purpose (judgment of 5 October 2000, *Rappe* v *Commission*, T-202/99, EU:T:2000:227, paragraphs 56 and 57).

129 In the third place, first, according to settled case-law, the primary function of an appraisal report is to provide the administration with periodic information, which is as complete as possible, on the performance of their duties by officials (judgments of 15 May 1996, *Dimitriadis* v *Court of Auditors*, T-326/94, EU:T:1996:62, paragraph 84; of 10 September 2003, *McAuley* v *Council*, T-165/01,

EU:T:2003:225, paragraph 51; and of 16 April 2008, *Doktor* v *Council*, F-73/07, EU:F:2008:42, paragraph 86). By contrast, an end-of-probation report is principally intended to evaluate the probationary official's fitness to carry out the work corresponding to his or her post and to become an established official (see, to that effect, judgment of 24 February 2000, *Jacobs* v *Commission*, T-82/98, EU:T:2000:53, paragraph 45 and the case-law cited).

130 Nevertheless, an appraisal report and an end-of-probation report on an official cannot be subject to an automatic and absolute comparison, since the two types of reports have different assessment headings and grading systems (see, to that effect, judgment of 15 May 1996, *Dimitriadis* v *Court of Auditors*, T-326/94, EU:T:1996:62, paragraphs 83 and 85).

131 Next, the importance, with a view to an official's career development, of the hierarchical superior setting objectives, at the start of the annual exercise, must be emphasised. The annual appraisal relates in particular to the manner in which the official has achieved his or her objectives. It is in the light of those objectives that the official's ability, efficiency and conduct in the service are assessed. However, those objectives are not the same as those expected from a probationary official in the course of the probationary period, with a view to becoming an established official. Bearing in mind their specific nature, the assessments contained in an appraisal report, targeted on performance, differ from the assessments contained in an end-of-probation report.

132 In that regard, it has been held that the appraisal of an applicant in the first six months of his contract, contained in a probation report, cannot be equated to, substitute or compensate for the appraisal carried out in his or her annual appraisal report, which is intended to assess whether, in the light of the objectives set in agreement with the applicant, the latter met the expectations, and thus establish the level of his performance (see, to that effect, judgment of 13 December 2018, *Wahlström* v *Frontex*, T-591/16, not published, EU:T:2018:938, paragraph 65).

133 Finally, since they are capable of having an influence over the entire course of an official's career, appraisal reports are acts adversely affecting that official. The case-law according to which an appraisal report is an act which may be subject to an action for annulment satisfies the need for sound administrative management, since, if that were not the case, the person concerned would have no opportunity to expose any defects of such a report other than in actions brought against an act for whose adoption the report in question played a role. Such a situation would be capable of delaying the adoption of important decisions concerning officials (judgment of 16 March 2009, R v *Commission*, T-156/08 P, EU:T:2009:69, paragraphs 53 and 54).

134 Such a solution, adopted in the case-law as regards appraisal reports, cannot be extended to cover documents which have as their sole purpose the preparation of a particular decision on the part of the administration, to which they are therefore closely linked. This is precisely the case with the probation reports, the purpose of which is to prepare the decision of the administration whether to appoint the person concerned as an established official at the end of his or her probationary period or to dismiss that person (judgment of 16 March 2009, R v *Commission*, T-156/08 P, EU:T:2009:69, paragraph 55).

135 This is also the case as regards measures relating to the progress of the official's probationary period, adopted on the basis of Article 34 of the Staff Regulations, including the decision to reassign that official to another service with a view to continuing the probationary period as well as the decision to extend the probationary period by six months. Those measures are clearly intended to enable the administration better to assess the probationary official's qualities and to prepare the decision on his or her establishment or dismissal, which must be adopted at the end of the probationary period, and they therefore cannot be contested independently by an action for annulment (judgment of 16 March 2009, R v *Commission*, T-156/08 P, EU:T:2009:69, paragraph 56).

136 In addition, a probation report in the personal file of an official cannot, in principle, still produce effects of any kind following the decision to appoint him or her adopted at the end of the probationary period, by which he or she was established and which had as its sole purpose the preparation of that decision (see, to that effect, order of 19 February 2008, R v *Commission*, F-49/07, EU:F:2008:18, paragraph 56).

137 Therefore, the appraisal reports and the reports drawn up in the course of the probationary period have separate purposes and functions. In addition, those reports are subject to different sets of legal rules. Thus, an end-of-probation report, even if it contains a certain number of observations on the official's or other staff member's fitness for work, cannot, in principle, be taken into account by a promotion committee.

138 It is in the light of those considerations that the applicant's arguments concerning the taking into account, in the 2017 promotion exercise, of the reports relating to her probationary period must be examined.

(2) The taking into account of the reports relating to the applicant's probationary period

139 In the first place, in the decision rejecting the complaint, the competent appointing authority took the view that, in order for the consideration of the comparative merits, within the meaning of Article 45 of the Staff Regulations, to be regular, both the applicant's end-of-probation report and the appraisal reports drawn up in the 2015 and 2016 exercises had to be taken into account. The competent appointing authority stated there was nothing in the case file to suggest that, during the 2017 promotion exercise, there had been an irregularity in that regard. It added that the mere fact that the interim probation report had been accessed by a member of the JPC did not allow for the conclusion to be reached that the comparative merits had not been considered on the basis of the relevant reports, namely the end-of-probation report and the appraisal reports drawn up in the 2015 and 2016 exercises.

140 In that regard, first, it must be noted, as confirmed by the Commission at the hearing, that the applicant's interim probation report was included, in Sysper 2, as an annex to her end-of-probation report.

141 In addition, it must be noted that the existence and substance of the interim probation report are mentioned in the final part of the end-of-probation report. In the end-of-probation report, the countersigning officer stated that it was 'a matter of some concern that the initial period in [the first unit to which the applicant had been posted] did not go so well, as recorded in the interim report …, which suggests difficulties of an interpersonal nature and questions about working in teams'. The countersigning officer added that those assessments related to a combination of particular circumstances in the first unit. Those references therefore supported the consultation of both the end-of-probation report and interim probation report. Furthermore, the documents produced by the applicant before the Court establish that, prior to the adoption of the decision not to promote her, a member of the JPC had directly accessed, in Sysper 2, the interim probation report, which was included as an annex to her end-of-probation report.

142 It must therefore be concluded that the applicant's end-of-probation report was taken into account in the consideration of the comparative merits. In addition, the applicant's interim probation report was also taken into account, directly or indirectly, in the comparative assessment.

143 Secondly, it follows from the case-law referred to in paragraphs 125 to 137 above, that, in principle, an end-of-probation report cannot be taken into account in a promotion procedure and that it is only in certain exceptional circumstances that the appointing authority can take into account other information, provided that information meets certain conditions, and it is for the institution concerned to prove that they are satisfied.

144 It must be noted that, in the present case, two appraisal reports were drawn up in respect of the applicant, in the 2015 and 2016 exercises, and that the assessments contained in the appraisal reports constituted a proper basis for the consideration of the comparative merits provided for in Article 45(1) of the Staff Regulations.

145 Therefore, there were no exceptional circumstances justifying the taking into account of the end-of-probation report and the interim probation report, which was included as an annex to that end-of-probation report, in the consideration of the comparative merits.

146 In the second place, and in any event, it should be noted that, unlike appraisal reports, the applicant's interim probation report was not drawn up either in order to allow for an objective appraisal of the applicant or in order to assist in assessing her career development. The interim probation report was drawn up in the course of the applicant's probationary period, against a background marked by conflict between her and the other members of the first unit to which she had been posted (see paragraph 2 above). The content of that interim report thus stems from particular circumstances at the start of the applicant's career, so as to reflect the difficulties that she had encountered in the first unit and to justify an administrative measure reassigning her to another unit with a view to continuing her probationary period. In addition, the applicant could not challenge that report by bringing an action against the decision to establish her as an official, given that that decision did not adversely affect her.

147 Moreover, it is true that, when a hierarchical superior assesses an official's qualities, that person has a broad margin of discretion and must, in order to fulfil his or her responsibilities, make comments on and, as the case may be, express reservations about the quality of the official's work. Nevertheless, it must be noted that, in the present case, the interim probation report contains harsh criticisms regarding the efficiency, ability, performance and conduct of the applicant in the first unit to which she had been posted. The language of those criticisms targets in particular the applicant's personality, not her professional competences. Such criticisms go beyond those objectively necessary for the purposes of assessing whether there are difficulties in the service and justifying an administrative decision to transfer her to another unit.

148 Thus, in the light of the unusual wording of the criticisms made in the interim probation report, the assessments in that report cannot be equated to, or at least compared with, those contained in the subsequent positive appraisal reports drawn up in the 2015 and 2016 exercises.

149 Therefore, the circumstances mentioned in paragraphs 146 to 148 above provide a further reason, in addition to the reasons referred to in paragraphs 143 and 144 above, for precluding the reports relating to the applicant's probationary period being taken into account in the consideration of the comparative merits.

150 Therefore, it must be found that the taking into account, on the part of the competent appointing authority, of the reports relating to the applicant's probationary period, namely the end-of-probation report and the interim probation report, constitutes an irregularity capable of vitiating the 2017 promotion procedure in so far as it concerns the applicant.

(c) The impact of the procedural irregularity

151 The applicant submits that the 2017 promotion procedure would necessarily have been different in the absence of the irregularities mentioned in paragraphs 108 to 112 above.

152 The Commission contends that, even if it were accepted that there had been a procedural irregularity, the applicant has failed to establish the impact of that alleged irregularity on the content of the decision not to promote her. First, it notes that the applicant merely asserts, in general terms, that the presence of the interim probation report in her personal file 'inevitably influenced the assessment' of her file. Secondly, it submits that the applicant does not identify any part of the appraisal reports drawn up in the 2015 and 2016 exercises or of the decision rejecting the complaint which was influenced by the content of the interim probation report.

153 As regards the infringement of Article 45 of the Staff Regulations and the irregularity of a promotion procedure, it is settled case-law that it is not sufficient, in order for a decision not to promote the person concerned to be annulled, for the personal file of a candidate to be irregular and incomplete; it must also be established that that circumstance could have had a decisive impact on the promotion procedure (see, to that effect, judgments of 30 January 2008, *Strack* v *Commission*, T-394/04, EU:T:2008:20, paragraph 39, and of 14 November 2017, *Vincenti* v *EUIPO*, T-586/16, EU:T:2017:803, paragraph 36).

154 In more general terms, it is settled case-law that, for the annulment of an act to be justified due to a procedural irregularity, it must be demonstrated that, had it not been for that irregularity, the outcome of the procedure might have been different (judgment of 18 September 2015, *Wahlström* v *Frontex*, T-653/13 P, EU:T:2015:652, paragraph 21; see also, to that effect, order of 1 December 2015, *Georgias and Others* v *Council and Commission*, C-545/14 P, not published, EU:C:2015:791, paragraph 51).

155 In the present case, first, as submitted by the Commission, it is not apparent from a reading of the decision rejecting the complaint that the applicant's merits were superior to those of her promoted colleagues. Secondly, no mention was made of the content of the interim probation report at the stage when the comparative merits were being considered by the appointing authority in the decision rejecting the complaint. Thirdly, the appraisal reports taken into account contain positive, 'satisfactory' assessments, whereas the end-of-probation report, equally positive, allowed for the applicant to become an established official.

156 However, first of all, in the decision rejecting the complaint, the competent appointing authority refers explicitly to the content of the end-of-probation report in the section headed 'Efficiency, ability and conduct in the service'. In that regard, the competent appointing authority states that the end-of-probation report mentions 'room for improvement' and that the applicant should 'consult the management when necessary', 'keep her hierarchy informed' or '[coordinate] her work with … other colleagues', 'in order to perform the work expected of her'. Furthermore, it must be noted that the end-of-probation report contained as an annex thereto the interim probation report and referred to that report. Thus, the end-of-probation report, to which the interim probation report was annexed, could have had a negative impact on the assessment of the applicant's 'efficiency, ability and conduct in the service' in the analysis of her merits.

157 Next, bearing in mind, first, the particular circumstances which surrounded the drawing up of the interim probation report annexed to the end-of-probation report in the applicant's personal file, secondly, the extremely critical and subjective assessments that that interim report contained, and thirdly, the access to that report on the part of a member of the JPC before the final list of promoted officials was drawn up, the applicant's interim probation report could have had a negative impact on the consideration of the comparative merits carried out in the 2017 promotion procedure.

158 Finally, it should be noted that an end-of-probation report is prepared for all probationary officials. Nevertheless, not all probationary officials are subject to an interim probation report. In so far as it is drawn up in specific cases, an interim probation report differs from an end-of-probation report and, a fortiori, from the appraisal reports referred to in Article 4 of the GIP. Thus, the taking into account, directly or indirectly, of the interim probation report could have affected the objective and fair assessment of the applicant's merits in the 2017 promotion procedure.

159 It follows that the procedural irregularity found in paragraph 150 above could have had, as regards the applicant, a decisive impact on the conduct of that procedure and the decision not to promote her. In other words, it is established that, had it not been for that procedural irregularity, the decision not to promote the applicant might have been substantively different (see paragraphs 153 and 154 above).

160 In the light of the foregoing, the first plea in law must be upheld and the decision not to promote the applicant must be annulled, without there being any need to examine the other parts of the applicant's first plea or the second plea in law. In addition, since the decision not to promote the applicant is annulled, there is no need to examine the requests for measures of organisation of procedure and measures of inquiry made by the applicant in her first three heads of claim.

B. The claim for damages

161 According to settled case-law regarding claims for compensation in staff cases, the European Union may incur non-contractual liability only if a number of conditions are fulfilled, namely: (i) the institution's conduct must be unlawful, (ii) actual damage must have been suffered, and (iii) there must be a causal link between the conduct and the damage alleged (see judgment of 15 September 2005, *Casini* v *Commission*, T-132/03, EU:T:2005:324, paragraph 94 and the case-law cited; judgments of 4 July 2006, *Tzirani* v *Commission*, T-88/04, EU:T:2006:186, paragraph 100, and of 26 October 2017, *Paraskevaidis* v *Cedefop*, T-601/16, EU:T:2017:757, paragraph 78). Those three conditions are cumulative, which means that if one of them is not satisfied, the European Union cannot be held liable (see judgment of 29 November 2018, *WL* v *ERCEA*, T-493/17, not published, EU:T:2018:852, paragraph 207 and the case-law cited).

162 In the present case, the applicant claims, first, compensation for alleged material damage, which she assesses at EUR 45 000 and secondly, compensation for alleged non-material damage, which she assesses at EUR 20 000.

…

2. The claim for compensation for the alleged non-material damage

…

179 In the second place, the applicant submits that she suffered non-material damage linked to the defamatory statements relating to her psychological state, which are included in the interim probation report. In that regard, she claims that the possible access to the interim probation report on the part of all her hierarchical superiors and the other Directors-General of the Commission seriously undermined her professional reputation within OLAF and the Commission. According to the applicant, that harm to her reputation had the consequence of increasing her concerns about the uncertainty of her career development and, in essence, about being promoted in the 2017 promotion procedure. She adds that that situation had the effect of giving rise to an erroneous perception on her part of her own situation, thus causing her suffering and distress, which had negative consequences for her private life

and her physical and mental health. Thus, in essence, the applicant claims compensation for the non-material damage caused by the influence of the interim probation report on the 2017 promotion procedure.

180 In that regard, first of all, it is apparent from an examination of the application for annulment and, more precisely, paragraphs 124 to 160 above, that the argument relied on by the applicant to demonstrate that the taking into account of the interim probation report annexed to the end-of-probation report in the 2017 promotion exercise was irregular was upheld and that the competent appointing authority infringed Article 45 of the Staff Regulations by adopting the decision not to promote the applicant. It follows that the condition relating to the unlawfulness of the Commission's alleged conduct is met.

181 Next, it must be held that the applicant was placed in a state of anxiety and uncertainty as to her reputation and professional future and that that state follows directly from the unlawfulness found in paragraph 180 above.

182 Furthermore, the failure on the part of the competent appointing authority to comply with its obligations under Article 45 of the Staff Regulations in the 2017 promotion exercise caused the applicant to suffer particular non-material damage, which cannot be adequately compensated for by the mere annulment of the decision not to promote her.

183 In addition, at the hearing, the Commission acknowledged that state of anxiety and uncertainty experienced by the applicant. In that regard, the Commission stated that the applicant's concerns as regards the interim probation report had been one of the factors it had taken into account when it had decided, on grounds of expediency, to withdraw that report from the applicant's personal file.

184 Finally, it is important to note that the non-material damage suffered by the applicant is limited by the fact that she was promoted to grade AD 6 in the first promotion exercise following the 2017 promotion exercise, namely that of 2018 (see, to that effect, judgment of 18 November 2015, *Diamantopoulos* v *EEAS*, F-30/15, EU:F:2015:138, paragraph 48).

185 In those circumstances, it must be decided *ex æquo et bono* that an award of compensation of EUR 2 000 constitutes appropriate compensation for the non-material harm resulting from the unlawful act found in paragraph 180 above.

186 In those circumstances, the applicant's claim for damages must be upheld in part.

187 In the light of all the foregoing, first, the decision not to promote the applicant must be annulled and secondly, the Commission must be ordered to pay the applicant the sum of EUR 2 000 as compensation for the non-material damage that she has suffered.

IV. Costs

188 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

189 Since the Commission has, in the main, been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Annuls the decision not to promote XH to grade AD 6 in the 2017 promotion exercise, which is apparent from the publication, in *Administrative Notices* No 25-2017 of 13 November 2017, of the list of officials promoted to that grade;**

2. **Orders the European Commission to pay to XH the sum of EUR 2 000 as compensation for the non-material damage that she has suffered;**

3. **Dismisses the action as to the remainder.**

4. **Orders the Commission to pay the costs.**

da Silva Passos Truchot Sampol Pucurull

Delivered in open court in Luxembourg on 25 June 2020.

E. Coulon
Registrar

S. Papasavvas
President