OPINION OF ADVOCATE GENERAL JACOBS

delivered on 25 November 1999 *

1. This is an appeal brought by the Commission against a judgment of the Court of First Instance annulling certain decisions taken in the course of a procedure for filling a staff vacancy, on the ground that they pursued an objective other than that of complying in good faith with a previous judgment of that Court annulling similar decisions taken in the course of an earlier procedure to fill the same vacancy.

The judgment under appeal

2. The factual and procedural background to the case, as it appears from the judgment under appeal, [1] may be summarised as follows.

3. In 1994, the Commission sought to fill the vacant post of Head of Unit 1 (Negotiation and management of textile agreements; footwear and other industries) of Directorate D (Sectoral commercial questions) in Directorate-General I (External economic relations). To that end it published a vacancy notice on 15 December 1994, for which the minimum requirements were:

'— being in the same category/service/career-bracket as the COM [2] (internal transfer);

— being in the career-bracket below that of the COM (promotion, in accordance with Article 45 of the Staff Regulations);

— knowledge and experience/abilities appropriate to the tasks to be carried out;

— for posts requiring particular qualifications: thorough knowledge and experi-

* Original language: English.

1 — Joined Cases T-282/97 and T-57/98 *Giannini* v *Commission* [1999] ECR-SC II-151.

2 — Namely, it would appear, the post advertised in the vacancy notice.

ence of/connected with the relevant sector'.

4. Mr Giannini applied for the post but was unsuccessful. He challenged the decisions rejecting his candidature and appointing the successful candidate, Mr X, in a procedure which led to a judgment of the Court of First Instance ('the first judgment') [3] annulling those decisions on 19 March 1997.

5. The Court held that the appointing authority had imposed a legal framework on itself by the terms of the vacancy notice and was required to reject any candidate not meeting the requirements thereof. It found that Mr X had, at the time of his application, no experience in the fields of textiles, footwear or even the common commercial policy, whereas Mr Giannini possessed considerable relevant experience; the decisions not to appoint Mr Giannini and to appoint Mr X despite his failure to meet one of the minimum requirements for the post thus constituted a manifestly incorrect use of the Commission's powers and disregarded the interest of the service.

6. The Commission did not seek to appeal against that judgment but, on 10 April 1997, withdrew the previous vacancy notice and readvertised the vacancy in a notice covered by the same minimum requirements, with the addition that preference would be given to candidates with proven experience in international negotiation and in the management of a unit. Mr X was again appointed, on 30 May 1997. Mr Giannini challenged the withdrawal of the first vacancy notice, the publication of the second and the appointment of Mr X, in procedures culminating in the judgment under appeal.

7. In that judgment, the Court of First Instance granted Mr Giannini's applications for annulment on the ground that the contested measures had been adopted in pursuance of an objective other than that of complying in good faith with the first judgment and had even compromised its proper implementation. It found that the Commission had failed to fulfil its obligations under Article 176 of the EC Treaty (now Article 233 EC), which requires an institution whose act has been declared void to 'take the necessary measures to comply with the judgment of the Court', and had misused its powers.

The appeal

8. In a single ground of appeal, the Commission claims that the Court of First Instance erred in law in holding that its

3 — In Case T-21/96 *Giannini* v *Commission* [1997] ECR-SC II-211.

withdrawal of the original vacancy notice and initiation of a new procedure following the first judgment was contrary to its obligations under Article 176 of the EC Treaty and constituted a misuse of its powers.

9. On the contrary, the Commission considers, it was fully entitled to take those steps following the partial annulment of the initial appointment procedure, the decision to do so being a proper exercise of its discretion, as is clear from the case-law of the Court of First Instance itself. It is for the appointing authority to determine the qualifications necessary for each post in the interest of the service and, if the requirements initially expressed are discovered to be inappropriate, an uncompleted appointment procedure may be cancelled and a new one initiated with new requirements, even after partial annulment of the first procedure by a Court judgment. The fact that the additional preference expressed in the new vacancy notice corresponded to qualities found in the first judgment to be possessed by Mr X did not constitute conclusive evidence of a misuse of powers aimed at circumventing the effects of that judgment; for that, it would have been necessary to find that the additional preference was not relevant to the post to be filled. Finally, it cannot be considered that the first judgment comprised any instruction to the Commission as to the conduct it was to adopt following the annulment of the decisions in question; any such instruction would have been contrary to the allocation of powers under Article 176 of the Treaty.

General

10. Before examining the Commission's arguments in this case and the reasoning of the Court of First Instance in the judgment under appeal, it may be helpful to set out certain general considerations.

11. First, with regard to the duty of institutions to comply with judgments annulling their acts, whilst it is clear that the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions, even as to the manner in which its judgments are to be complied with,[4] the Court has none the less consistently held that:

'[I]n order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must

4 — See, for example, the order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24.

take into account when replacing the annulled measure. The procedure for replacing such a measure may thus be resumed at the very point at which the illegality occurred.' [5]

12. Thus, the first judgment could not impose the adoption of any specific measure or measures to cure the illegality found to have vitiated the original appointment procedure. The Commission was, however, obliged to take full account of the grounds of that judgment when choosing the course of action necessary to comply with it, and one such course of action could have been to resume the procedure at the stage of the examination of the original candidatures.

13. Second, two competing considerations should be borne in mind with regard to procedures for appointments to vacant posts.

14. The Staff Regulations [6] contain a series of provisions with the thoroughly desirable aim of guarding against nepotism, favouritism, string-pulling and subjective preferences of all kinds in the recruitment, appointment, transfer and promotion of Community officials and ensuring that all decisions in such matters are taken objectively and impartially, with sole regard to the interest of the service and the merits of the individuals concerned.

15. For example, Article 7(1) provides: 'The appointing authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade.' Under Article 27, recruitment is to be directed to 'securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis' among Community nationals, without reference to race, creed, sex or nationality. Article 29(1) lays down a series of steps to be taken in mandatory order when filling a vacant post, [7] and Article 45 specifies that promotion is to take place only 'after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. All those provisions have consistently been interpreted and applied by the Court in such a way as to emphasise the duty of impartiality incumbent on the

5 — See Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 31 of the judgment, and the precedents cited there.

6 — Staff Regulations of Officials of the European Communities, introduced by Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to Officials of the Commission, OJ, English Special Edition 1968(I), p. 30, since amended on numerous occasions.

7 — The appointing authority must first consider (a) whether the post can be filled by promotion or transfer within the institution, then (b) whether to hold an internal competition and (c) what applications for transfer have been made by officials of other Community institutions, before it may finally hold an open competition.

appointing authority. In particular, it is clear that procedures must not be distorted in order to secure the appointment of a candidate who has in fact been selected in advance. [8]

16. However, there is also an important public interest in giving the institutions sufficient flexibility to appoint the right person; accordingly, the Court has consistently recognised that the institutions have a broad discretion to organise their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks. [9]

17. Both before the Court of First Instance and in its submissions on appeal, the Commission has laid considerable emphasis on the discretion which it enjoys. However, that discretion is not absolute; in particular, it presupposes a careful and impartial examination of each case and a meticulous regard to the requirements laid down in the vacancy notice. [10] And whilst review by the Court of decisions taken in the course of an appointment procedure may normally be confined, as the Commission argues, to verifying whether they remained within proper or reasonable bounds, in the present case the appointing authority's discretion is further circumscribed by the duty to have regard to the grounds on which the decisions to appoint Mr X and not Mr Giannini were annulled in the first judgment.

18. Third, this case concerns a situation in which an initial appointment procedure has been annulled as illegal and the subsequent procedure has led to the appointment of the same candidate as the first. It is obviously easy, particularly for unsuccessful candidates, to suspect foul play in the light of such an outcome and, if foul play has occurred, the institution in question must be censured and any illegal measures annulled. [11] However, it would be unacceptable if annulment of an official's appointment on the ground of illegality in one procedure were to preclude his reappointment to the same post even as a result of a subsequent scrupulously lawful procedure. Such cases therefore require a particularly thorough verification of the facts in order to avoid injustice.

19. Finally, it is a feature — albeit a regrettable one — of the procedure in such cases that any judgment annulling an appointment on grounds of illegality is likely to be given some appreciable time

8 — With reference to candidates selected in advance on the basis of their nationality, see for example Case T-58/91 *Booss and Fischer* v *Commission* [1993] ECR II-147.

9 — See, for example, Case C-294/95 P *Opba* v *Commission* [1996] ECR I-5863, paragraph 40 of the judgment.

10 — See, for example, Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 15 of the judgment.

11 — Instances of such cases have been found — see, for example, Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *Van der Stijl and Another* v *Commission* [1989] ECR 511.

after the appointment took effect. Any measures required to comply with the judgment — apart from the annulment itself, which is an automatic effect — will be taken in a factual and administrative context possibly very different from that in which the initial appointment was made. An important issue underlying the present case is whether it is appropriate to 'turn the clock back' in order to cure the irregularity in the original context or, on the contrary, start afresh taking only the new context into account — in other words, must the institution reconstitute after annulment the situation as it would have existed had there been no irregularity or is it enough to accept the annulment and proceed anew on a scrupulously legal basis?

The present case

20. The Commission's contention is essentially that the facts found by the Court of First Instance in the judgment under appeal did not entitle it to conclude that there had been a failure to comply with the first judgment or a misuse of powers.

21. Although the Commission relies on a single ground of appeal, two separate points arise: first, whether the Court of First Instance correctly found a misuse of powers, and secondly whether it correctly found that the Commission had infringed Article 176 of the Treaty. That is so, even though the Court of First Instance does not wholly separate the two issues in its judgment.

22. In its assessment of the issues, the Court of First Instance deals first with the question of misuse of powers (paragraphs 28 to 32 of the judgment). It states that a misuse of powers can be found to exist only where there is evidence that the measures in issue were taken for an improper purpose; and it identifies the question as being whether the Commission's decisions showed a deliberate intention to favour one candidate to the disadvantage of the others. Its conclusion on that question was based on the following findings: the first judgment did not criticise the original vacancy notice but found that Mr X did not meet the requirements of that notice whereas Mr Giannini did; following annulment of the decisions to exclude Mr Giannini and to appoint Mr X, the Commission withdrew the original notice and thus avoided re-examining the initial applications in its light; when asked, at the hearing, why it had replaced the initial vacancy notice, the Commission relied essentially on invoking its broad discretion.

23. Moreover, the sole essential difference between the new and the original vacancy notice was the addition, in the new notice of vacancy, of the preference for candidates

with proven experience in international negotiation and in the management of a unit: those two preferences correspond precisely to the qualifications which the first judgment had found Mr X to possess.

24. Those two elements — the failure to resume the initial examination of the candidates and the addition of the two preferences favourable to Mr X — were regarded by the Court of First Instance as sufficient evidence of the Commission's intention and as constituting a misuse of powers, which was corroborated by the fact that the Commission's acts led again to the appointment of Mr X: see paragraphs 29 to 32 of the judgment.

25. It is not open to the Commission, in my view, to challenge the findings of the Court of First Instance on that issue. Appeals to the Court of Justice are limited to points of law, and the Commission has not, in respect of this part of the judgment, sought to rely on any question of law.

26. It is true that the Court of First Instance seems to have attached undue weight to the fact that the Commission, instead of resuming the original procedure, embarked on a new procedure, and in that respect the findings may have been influenced by a misunderstanding of what was required to comply with the first judgment — a misunderstanding which I discuss below. But the Court of First Instance did not consider that the Commission was bound to resume the original procedure: it was influenced, as the judgment makes clear, by the Commission's failure to explain why it embarked on a new procedure. Moreover, the Court of First Instance rightly, in my view, attached weight to the new preferences added to the vacancy notice which appeared designed to favour Mr X.

27. Accordingly, in respect of the finding by the Court of First Instance of a misuse of powers the appeal of the Commission must be rejected as inadmissible.

28. In the second part of its analysis (paragraphs 33 and 34 of the judgment) the Court of First Instance deals with the alleged breach of Article 176 of the Treaty. It finds that the Commission had also failed to give effect to the essential reasoning of its first judgment: it was that reasoning which, according to the case-law, should have guided the Commission in determining the measures to be taken. In this case the decisions challenged, far from constituting proper compliance with the judgment, had compromised its implementation.

29. This aspect of the judgment is in my view less satisfactory, and the Commission's arguments on this issue have some weight. Moreover, the issue is of consider-

able importance for the management of the Community civil service. I shall therefore seek to separate out, and to consider in turn, the various factors to which the Court of First Instance referred.

— The initiation of a new procedure

30. The first question to be addressed is whether, in the light of the first judgment, the Commission was entitled to terminate the initial procedure without making an appointment and simultaneously to initiate a new procedure for appointment to the same post.

31. It is settled law that in general an appointing authority may terminate an appointment procedure before it is completed. [12] That entitlement has been recognised by the Court of First Instance in two cases in which — as here — the original procedure had been partially annulled by a Court judgment. In both *Hochbaum* [13] and *Moat*, [14] the illegality giving rise to the annulment had been essentially that relevant staff reports were not available to the appropriate advisory committee when it was consulted. [15]

32. In the judgment under appeal, the Court of First Instance referred to *Hochbaum* — though not to *Moat* — but distinguished it on the ground that it had involved a procedural defect. In drawing that distinction, the Court stated that the Commission was clearly entitled to reappoint the same person once that procedural defect had been cured. [16] Implicit in that statement would appear to be the assumption that a substantive defect, such as the fact that the candidate appointed did not meet the requirements of the vacancy notice, either cannot be cured or acts as an absolute bar to subsequent reappointment.

33. Such an assumption cannot be valid in such general terms, as I have stated above. It is, on the other hand, perfectly valid in the context of a given appointment procedure. In the present case, for as long as the procedure was implemented on the basis of the original vacancy notice, it was not

12 — See Case 26/68 *Fux* v *Commission* [1969] ECR 145, paragraph 11 of the judgment, and Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, paragraph 24.

13 — Case T-38/89 *Hochbaum* v *Commission* [1990] ECR II-43 (see paragraphs 15 and 16 of the judgment).

14 — Case T-41/95 *Moat* v *Commission* [1996] ECR-SC I-A-3/9 and II-939 (see paragraphs 38 and 39 of the judgment).

15 — See, respectively, Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259, paragraphs 17 to 20 of the judgment, and Case T-58/92 *Moat* v *Commission* [1993] ECR II-1443, paragraphs 56 to 67.

16 — See paragraph 34 of the judgment under appeal.

possible for Mr X's candidature, which had been found by the Court of First Instance not to meet the requirements of that notice, to be taken into consideration and thus for Mr X to be appointed.

34. However, what is in issue here is not Mr X's reappointment on the basis of the original vacancy notice but the withdrawal of that notice — the termination of the first appointment procedure before it had been completed — and the initiation of a new procedure on the basis of a new notice. That was the context in which the Commission invoked *Hochbaum*, [17] and it is a context in which I find it more difficult to distinguish that judgment.

35. In *Hochbaum*, the Court of First Instance did not explicitly base its conclusion on the fact that the original appointment had been annulled as a result of a procedural, rather than a substantive, defect. It considered simply [18] that, although the validity of the original vacancy notice had been neither challenged nor affected, the Commission's duty to comply with the previous judgment by remedying the flaws which had vitiated the procedure leading to the annulled appointment in no way affected its discretionary power to extend its field of choice in the interest of the service or obliged it to carry through the original procedure to its conclusion and that *a fortiori* it was entitled to initiate a new one. [19] In *Moat*, [20] the Court of First Instance added that, in such a situation, the appointing authority was not obliged to reconsider the applications received in response to the original vacancy notice.

36. Those considerations appear equally applicable in the present case. It seems consistent with the interest of sound administration, when an appointment has been annulled some considerable time (in this case about two years) after the original procedure, to 'wipe the slate clean' and commence afresh. Circumstances will have changed; if nothing else, some of the original candidates may no longer be interested or available and new potential candidates may have become so. In some cases, the annulment may leave only one or two valid candidatures in the original procedure, whereas a wider field of choice would be preferable. With regard to such considerations, the appointing authority must enjoy a discretion to choose, in the interest of the service, between resuming the original procedure as from the point at which it was annulled or terminating it and commencing a new one.

37. I should like to add here a parenthesis concerning the authority of the ruling in

17 — See paragraph 23 of the judgment under appeal.

18 — See paragraphs 13 to 16 of the judgment.

19 — This approach has recently been confirmed, *obiter*, by the Court of First Instance in Case T-48/97 *Frederiksen* v *Parliament*, judgment of 28 September 1999, paragraph 104.

20 — At paragraph 39 of the judgment.

Hochbaum and *Moat* that the appointing authority's right to terminate a procedure at any point extends to cases where that procedure has been partially annulled by a Court judgment. Although there was an appeal in *Hochbaum*,[21] this issue was not raised there, and the ruling has not yet been endorsed by the Court of Justice. The authority cited by the Court of First Instance in *Hochbaum*[22] is that of paragraphs 23 to 25 of the judgment in *Vlachou*.[23] In fact, it is not clear that a new procedure was engaged *ab initio* in *Vlachou*; it may be that the appointing authority was repeating a stage, or passing on to a new stage, in the sequence laid down by Article 29(1) of the Staff Regulations.[24] I none the less consider that the ruling in *Hochbaum* and *Moat* is correct, for the reasons stated in the preceding paragraph, and that the Court of Justice should take this opportunity of confirming it.

38. Returning to my main line of reasoning, I therefore take the view that the Commission was not automatically precluded from withdrawing the original vacancy notice and commencing a new procedure on the basis of a new notice, as long as that step did not in itself perpetuate or reproduce the unlawful advantage accorded to Mr X over Mr Giannini (or any other candidate) in the course of the original procedure.

— The amendment of the terms of the vacancy notice

39. The next issue is whether the appointing authority was entitled to amend the terms of the notice.

40. At first sight, it might appear obvious that it was. If the appointing authority may commence a new procedure, it must surely be free to decide the terms on which that procedure is to be conducted.[25] The requirements of the relevant administrative unit may well have evolved. It may also have become apparent, with hindsight, that the terms of the original vacancy notice were inadequate. If the appointing authority may take such a course where there is no irregularity in the original procedure,[26] then surely it need not remain automatically saddled with the terms of a vacancy notice which are no longer — or have proved never to have been — appropriate, and have to carry the procedure through to a conclusion, simply because there has been

21 — Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157.

22 — At paragraph 15 of the judgment.

23 — Cited in note 12.

24 — See above, note 7.

25 — The situation here, where a new procedure is started afresh, is to be distinguished from that in cases such as *Van der Stijl*, cited in note 11, or Case C-304/97 P *Carbajo Ferrero* v *Parliament* [1999] ECR I-1749, paragraph 33, in which it has been held that the conditions may not be modified from one stage to the next in the sequence laid down in Article 29(1) of the Staff Regulations, in the context of a single, continuing procedure.

26 — As was the case, for example, in *Fux*, cited in note 12.

an irregularity — extraneous to the choice of the criteria set out in the vacancy notice — on the basis of which the procedure has been partially annulled.

41. I thus take the view that the Commission was entitled, in a situation such as that in the present case, to adapt the terms of the vacancy notice in response to new developments or circumstances. However, in doing so, it could not disregard the grounds of the judgment partially annulling the original procedure.

— The inclusion of a new preference

42. The appointing authority may lawfully terminate an uncompleted appointment procedure. It may also withdraw a vacancy notice and replace it with another if it transpires that the original conditions were unnecessarily exacting in view of the needs of the service. [27]

43. But was the Commission entitled, having regard to the grounds of the first judgment, to add a new preference? Clearly, it is not acceptable for the appointing authority to determine in advance the candidate whom it wishes to appoint and then to draw up a vacancy notice tailor-made for that purpose. This is true in any circumstances, but it is particularly important where the person in question is one whom the appointing authority has already been found to have unlawfully appointed. Where such a person is likely to apply again for the same post, I consider that the duty to comply with the judgment annulling the first appointment requires the institution to take particular care to ensure that the vacancy notice is drawn up solely in the interest of the service and not to favour the appointment of any one candidate.

44. It is noteworthy in that context that whilst the Court has held that an appointing authority may always cancel an appointment procedure and commence a new one in order to *extend* its field of choice in the interests of the service, there has been no ruling as to whether it may do so in order to *limit* its field of choice. This apparent lacuna may be due simply to the fact that in practice the aim will usually be to extend the field of choice where none of the original candidates seems appropriate for the job; there is generally no need to limit the field of choice, because less suitable candidates will be eliminated during the selection process. It may, however, be desirable to affirm the distinction here — where a procedure has been partially annulled on the ground that one candidate was improperly selected in preference to another — because a move to limit the field of choice might represent an attempt to favour the former or exclude the latter from consideration.

27 — See Case 188/73 *Grassi* v *Council* [1974] ECR 1099, paragraph 43 of the judgment, and *Carbajo Ferrero*, cited in note 25.

45. I have reviewed the elements referred to by the Court of First Instance at some length because they raise issues of general importance. The conclusions to be drawn in the present case can however be stated shortly.

46. The elements referred to by the Court of First Instance in that part of its judgment dealing with Article 176 of the Treaty do not in themselves support the conclusion that the Commission infringed that article. If, however, they are taken together with the findings as to the Commission's purpose then they do support that conclusion: Article 176 must be understood as prohibiting not only conduct which openly contradicts a judgment but also conduct which has the purpose of circumventing the judgment. It follows that the Commission's appeal should fail also in respect of the finding of the Court of First Instance on Article 176 of the Treaty.

47. However, even if the judgment were to be set aside on that issue, the decision of the Court of First Instance to annul the contested measures must in any event be upheld on the basis of a misuse of powers. The Court of First Instance correctly identified as the relevant question whether the Commission had an improper purpose. It found that such a purpose existed, for reasons independent of its views on Article 176, and in particular on the basis of the re-writing of the vacancy notice to include preferences favourable to Mr X. Moreover, as already stated, those findings cannot be challenged in this appeal.

Conclusion

48. I accordingly consider that the Court should:

(1) dismiss the appeal;

(2) order the Commission to pay the costs.