OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 16 February 1989 *

Mr President,
Members of the Court,

1. Mr Casto Del Amo Martinez, an official of the European Parliament, lodged an official complaint on 17 December 1987 against the decision whereby the selection board for Internal Competition No LA/104, held to constitute a reserve of Principal Translators of Spanish and Portuguese, had not included him in the list of suitable candidates.

In his complaint Mr Del Amo Martinez sought the annulment of the decision for infringement of the provisions of the Staff Regulations governing the procedure for competitions, arguing in particular that the duty of secrecy incumbent on the members of the selection board had been infringed, that those members were not sufficiently qualified and that the principle of equality of treatment had been breached.

In his application to the Court, lodged on 10 May 1988 after the Secretary-General of the Parliament had expressly rejected the complaint, Mr Del Amo Martinez seeks the annulment of that decision, claiming solely that his particular experience has been incorrectly assessed.

2. By memorandum of 16 August 1988 the European Parliament pleaded the inadmissibility of the application, contending that the single ground set out in the application itself differed from the grounds relied on in the complaint.

3. The simplicity of this case cannot conceal the importance of the principles which the Court is asked to affirm, concerning the relationship between a complaint through official channels under Article 90(2) of the Staff Regulations and an application to the Court, and hence ultimately the whole conception of the system for safeguarding the rights of Community officials. There is no doubt that the case-law of the Court on this matter discloses, besides certain clear and consolidated principles, some uncertainties and contradictions which need to be resolved.

4. One point has been clarified on several occasions, and I do not consider that it should be called in question. Ever since the *Sergy* judgment of 1 July 1976 in Case 58/75 [1976] ECR 1139, the Court has affirmed that the procedure commenced by a complaint through administrative channels is intended 'to enable and encourage an amicable settlement of difference [sic] which has arisen between officials or servants and the administration'. Similarly, in the *Herpels* judgment of 9 March 1978 in Case 54/77 [1978] ECR 585, the Court stated that the administrative stage anticipates an 'exchange' ('débat', 'debattito') between the official and the administration and that the official acts for himself, that is to say, without the technical assistance of a lawyer, but added the logical and significant rider that during that phase the administration is under an obligation to interpret and evaluate the substance of the complaint with all the care that a large and well-equipped organization owes to those having dealings with it, including members of its staff.

* Original language: Italian.

It is now, therefore, generally accepted that the administrative procedure is conciliatory in its aims and non-legalistic — that is, informal — in character; 'No form is prescribed for complaints' (*Herpels* judgment).

5. A further point confirmed by the Court on several occasions, and fundamentally consistent with the non-litigious nature and conciliatory purpose of the procedure, is that the official must set out his criticisms and wishes in the complaint to the administration so that there is a real attempt to reach a settlement and must, as far as possible, ensure that whatever is sought in any subsequent action before the Court will already have been the subject of the previous 'exchange' with the administration.

In this respect, however, the case-law of the Court, apart from making that general point, reveals some hesitation and several contradictions regarding the approach laid down in the judgments cited on the nature of an official complaint, particularly in respect of the relationship between the content of the complaint and that of the application to the Court.

6. In the *Razzouk* judgment of 20 March 1984 in Joined Cases 75 and 117/82 [1984] ECR 1509, for example, the Court held an alternative claim not included in the complaint to be admissible, regarding it as a consequence of the Commission's refusal to accede to the main claim. In the *Rasmussen* judgment of 23 January 1986 in Case 173/84 [1986] ECR 197, the Court declared a claim admissible which had not appeared either in the official complaint or even the earlier requests, the rejection of which had been challenged in the complaint.

In particular, the Court, after citing the passage from the *Sergy* judgment quoted above, upheld the admissibility of the claim in the following terms:

'Although the applicant does not expressly ask in his complaint to be reinstated in his former post, such a request is implicit in the general request for his administrative situation to be regularized. As no formal administrative measure provided for by the Staff Regulations has been adopted to transfer the applicant in accordance with the prescribed procedure to another department, and in the light of his previous representations, the Commission could not have been unaware that, by asking for his "administrative situation to be regularized", the applicant meant that a post should be found corresponding to his category and grade, in the first instance in the administrative unit to which officially he has always been assigned.'

In the *Rihoux* judgment of 7 May 1986 in Case 52/85 [1986] ECR 1555 and the *Geist* judgment of 20 May 1987 in Case 242/85 [1987] ECR 2181, on the other hand, the Court, although citing the *Sergy*, *Razzouk* and *Rasmussen* judgments, declared inadmissible those submissions in the application that had no connection with the criticisms contained in the complaint, even though the claims before the Court did not differ from those which had been the subject-matter of the complaint. In the *Schwiering* judgment of 23 October 1986 in Case 142/85 [1986] ECR 3177, the (main) conclusions previously contained in the complaint were held to be admissible, whereas an alternative claim included for the first time in the application to the Court was declared inadmissible. Substantially the same approach was adopted in the *Aldinger* judgment of 14 July 1988 in Case 23/87 [1988] ECR 4395.

In the most recent judgments of 26 January and 14 February 1989 in the *Koutchoumoff* and *Bossi* cases (Cases 224/87 [1989] ECR 99 and 346/87 [1989] ECR 303), the Court declared claims to be admissible which had not appeared in the official complaint but were related to the claims which it set out.

7. In the face of such discrepant judgments, I consider it first necessary finally to draw a clear distinction between *petitum* and *causa petendi*, in other words, between the claim (for example, the annulment of an act or competition procedure, the cancellation of a transfer, a promotion or the award of an allowance) and the factual and legal basis for the claim (infringement of a provision, misuse of powers, infringement of essential procedural requirements, such as the unlawful composition of a selection board, errors in awarding marks, and so on). The principle is valid whatever terminology may be used ('subject matter — grounds', 'conclusions — moyens', 'Streitgegenstand — Klagegründe'), although the traditional distinction in Latin seems to me the most correct and comprehensible.

8. Having said that, I think that the following solutions are possible:

(a) both the *petitum* and the *causa petendi* must be the same in the official complaint and the application to the Court, which implies the total inadmissibility before the Court of any new claim or any submission which has not been explicitly set out in the complaint (*Rihoux* and *Geist* judgments);

(b) the *petitum* and the *causa petendi* must be the same, except that the application may contain new claims and new arguments if they relate to those set out in the complaint (*Razzouk* and *Herpels* judgments);

(c) the *petitum* must be the same, except that the application may contain new claims related to those set out in the complaint, with a considerable degree of freedom existing as regards the *causa petendi* (*Rasmussen*, *Koutchoumoff* and *Bossi* judgments).

9. I believe that the first hypothesis should be ruled out altogether, inasmuch as it manifestly runs counter to the conciliatory aims and informal nature of the administrative procedure. In particular, the requirement that the legal basis for the claim be set out in full in the complaint, on pain of loss of rights, strikes me as being unreasonable — if only because at this stage there is no technical assistance from a lawyer such as is expressly required for the application to the Court (Article 37(1) of the Rules of Procedure). Moreover, such a solution would conflict with Article 90(2) of the Staff Regulations, which requires reasons to be stated only for the reply given by the institution concerned, not for the official's complaint as well, whereas Article 38(1)(c) of the Rules of Procedure requires the application to the Court to state 'the subject-matter of the dispute and the grounds on which [it] is based'. A further difference of treatment would result, to the detriment of the official, since the institution is in no way bound to provide any explanations at all during the administrative procedure but may ultimately reveal its legal position only in the judicial proceedings. Lastly, it should be borne in mind that the process commenced by the complaint is not

the first step in judicial proceedings as is the case in some national legal systems; that process is, on the contrary, intended precisely to obviate subsequent judicial proceedings, by means of an 'exchange' free of any formalism.[1] In conclusion, the adoption of the solution examined above does not appear to be consistent with those aims; the situation regarding the relationship between an application to the Court of First Instance and an appeal to the Court of Justice will be different.

10. For all those reasons I favour the third solution, which seems to me the clearest and least likely to lead to variations when applied in the future. Above all, however, it is the third solution which largely meets the requirement of full and effective protection for Community officials' rights, which in my view is paramount.

11. In this particular case, moreover, the application is admissible whether one adopts the third solution universally, as I propose, or the second one instead. In the present case, the *petitum* is the same in the complaint — 'annulment of the proceedings of the selection board for Internal Competition No LA/104' (together with a review of whether the procedure followed by the selection board was correct) — and in the application — 'annulment of the decision whereby the selection board for Internal Competition No LA/104 refused ... etc.'.

12. As far as the *causa petendi* is concerned, whilst it is true that the grounds set out in the application consist in a legal argument (namely the incorrect award of points for experience) not contained in the complaint, it is equally true that they are not only connected with, and form the basis of, the same *petitum* (the annulment of the competition) but are also linked, inasmuch as they are a particular aspect of it, to the *causa petendi* (infringement of the provisions of the Staff Regulations governing the conduct of competitions) already expressed in the complaint: indent (a) of p. 3 of Annex 5 to the application.

13. I therefore propose that the application should be declared admissible and that the Court should proceed to consider the substantive issues.

1 — Incidentally, as regards the moment at which the subject-matter of the dispute is definitively fixed, I consider it necessary to exclude any parallel between the administrative procedure envisaged by Article 90 of the Staff Regulations and the pre-litigation procedure under Article 169 of the EEC Treaty relating to the failure of a Member State to fulfil its obligations.
The duty to define the *petitum* and the *causa petendi* at the pre-litigation stage of such actions against a Member State flows from the very wording of Article 169, which expressly requires the Commission to 'deliver a reasoned opinion' (emphasis added). This is reflected in successive judgments of the Court, according to which the scope of the dispute, in actions brought against Member States for failure to fulfil an obligation, is definitively fixed by the reasoned opinion — that is, during the pre-litigation procedure (see for example the judgment of 23 February 1988 in Case 353/85 *Commission* v *United Kingdom* [1988] ECR 817).
None of the above is to be found in Article 90 of the Staff Regulations concerning the conditions governing a complaint lodged by an official.