JUDGMENT OF THE COURT (Third Chamber)
20 February 1992 *

In Case C-345/90 P,

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter, Head of Division, acting as Agents, assisted by Alex Bonn, of the Luxembourg Bar, with an address for service at the General Secretariat of the European Parliament, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities in Case T-37/89 of 20 September 1990 *Hanning* v *Parliament* [1990] ECR II-463, seeking to have that judgment set aside,

the other party to the proceedings being:

Jack Hanning, an official of the Council of Europe, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume, who contends that the appeal should be dismissed,

THE COURT (Third Chamber),

composed of: F. Grévisse, President of the Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: French.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 November 1990 the European Parliament appealed, pursuant to Article 49 of the EEC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes of the Court, against the judgment of the Court of First Instance of 20 September 1990 in Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463 in so far as, first, it annulled the decision of the European Parliament to disregard the results of Competition No PE/41/A and to commence a new competition, and the implied decision of the European Parliament rejecting Mr Hanning's complaint of 17 June 1988 against that decision, and, secondly, it ordered the European Parliament to pay the costs of the proceedings before the Court of First Instance.

2 According to the judgment of the Court of First Instance (paragraphs 1 to 12) the Parliament published on 5 December 1986 a notice of Open Competition No PE/41/A (Official Journal, English Edition 1986 C 311, p. 13) based on qualifications and tests intended to fill a post of English-language Head of Division in Grade A 3 to manage the London Information Office.

3 Two candidates, Mr Spence and Mr Waters, officials of the Parliament who had been refused admission to the competition for failing to submit the supporting

documents required by the notice of competition, were, following their complaint, ultimately admitted to the competition on the ground that the missing documents were in their personal files held by the appointing authority.

4 At the end of the tests for the competition, Mr Hanning, with 72 points, was placed first on the list of suitable candidates in the competition. The three other candidates included were as follows: Mrs Beck (69 points), Mr Spence and Mr Waters (each with 63 points). According to the table of marks, a fifth candidate, Mr Tate, obtained 58 points, the minimum necessary to be included in the list. Since that list was to include at most four candidates, his name was not placed on it.

5 After having been informed of his inclusion on the list of suitable candidates and after having undergone, at the Parliament's request, the medical examination prior to recruitment, Mr Hanning was informed by letter of 6 April 1988, signed by the Head of the Personnel Division that, since the President of the European Parliament had 'noted irregularities in the competition procedure', he 'deemed it appropriate not to make an appointment and instead to open a fresh recruitment procedure based on qualifications and tests'.

6 On 17 June 1988 the applicant submitted to the President of the Parliament a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter referred to as the 'Staff Regulations') against that decision.

7 On 30 March 1988 the Parliament published a notice of a new competition, Open Competition No PE/41a/A, intended to fill the same post (Official Journal, English Edition 1988 C 82, p. 17). Mr Hanning took part in that competition. The list of suitable candidates drawn up following that competition was composed of the following four candidates: Mr Bond with 80.5 points, Mr Hanning with 73

points, Mr Holdsworth with 72 points and Mr Wood with 70.5 points. With 66 points, Mr Tate was once again in fifth position. Mr Bond was appointed as a result of the competition.

8 By an application lodged at the Registry of the Court of Justice on 29 June 1988, which was referred to the Court of First Instance by order of the Court of Justice of 15 November 1989 under Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, Mr Hanning asked the Court to annul the decision of the President of the European Parliament contained in his letter of 6 April 1988, to declare that he was entitled to be appointed as a result of Competition No PE/41/A, to order the Parliament to pay him BFR 1 as compensation for non-material damage and to reimburse him the whole of his material loss.

9 The Court of First Instance stated that the applicant relied on five submissions in support of his application: in the first place, the Parliament had infringed Article 33 of the Staff Regulations; secondly, it had infringed the principle of the protection of legitimate expectations; thirdly, it had infringed the conditions for revoking administrative measures and, fourthly, it had misused its powers. Finally, he claimed that the statement of the reasons on which the decision was based was insufficient and incorrect.

10 After having rejected the Parliament's objection that Mr Hanning's application was inadmissible (paragraph 23 of the contested judgment), the Court of First Instance considered the arguments of the parties concerning the first four submissions and decided to examine the submission concerning the statement of the reasons on which the contested decision was based (paragraphs 37 and 38).

11 The Court of First Instance held that the contested decision was vitiated on the ground that it did not contain an adequate statement of the reasons on which it was based (paragraph 40). However, it then considered whether the explanations given by the Parliament during the proceedings could remedy that formal lack of reasons and could give a legal basis to the contested decision (paragraphs 41 to 44).

12 It first of all dismissed the submission relied on by the Parliament in its defence that the appointing authority was free to terminate the recruitment procedure, stating that the Court of Justice had held (judgment in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641) that although the appointing authority was not obliged to fill a vacant post, it could not terminate a recruitment procedure except for sound reasons, justifying its decision clearly and fully (paragraphs 45 to 48).

13 It then considered the arguments contained in the opinion of the Parliament's Legal Service of 9 February 1988 concerning the complaints submitted regarding the procedure in Competition No PE/41/A and which the Parliament had put forward in its rejoinder as being those of the contested decision.

14 First, the Court of First Instance stated that the opinion rightly came to the conclusion that the admission of Mr Spence and Mr Waters to the competition was unlawful because they had not submitted all the supporting documents required by the notice of competition (paragraphs 50 to 55).

15 Secondly, the Court of First Instance considered that, contrary to the conclusion in the opinion, none of the complaints submitted against Competition No PE/41/A was liable to succeed and consequently be of such a nature as to justify in law the annulment of the competition by the Parliament (paragraphs 56 to 67).

16 Thirdly, the Court of First Instance stated that the Parliament had considered, in the light of the judgments in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199 and in Joined Cases 322/85 and 323/85 *Hoyer* v *Court of Auditors* [1986] ECR 3215, the effect on the competition of the fact that Mr Tate had not been included in the list of suitable candidates because of the unlawful inclusion of two candidates, and that the Parliament had concluded from that that it could annul the competition (paragraph 68 and 69).

17 At paragraphs 70 et seq. of its judgment the Court of First Instance then stated that:

'70. It should be noted that the facts of this case are different from those in *Schwiering* and *Hoyer*, cited above. In those two cases, the competition procedure was irregular because the Selection Board had wrongly refused to admit candidates to the competition whereas in this case, the irregularity in the procedure in Competition No PE/41/A stems from the wrongful admission of two candidates who should have been excluded. Although it is true that, in principle, all steps in a competition are necessarily vitiated by an unlawful refusal to admit a candidate, the position is not the same where one or more candidates have been wrongly admitted. In those circumstances, the appointing authority is faced with a competition procedure and a list of suitable candidates of which the parts which are irregular may be severed from those which are not. In this case, only the participation of Mr Spence and Mr Waters in the competition and their inclusion in the list of suitable candidates were illegal. The other candidates validly took part in the competition and their placing at the end of it was not influenced by the unlawful participation of two candidates wrongfully admitted.

71. If the approach adopted by the Court of Justice in its judgments in Case 321/85 *Schwiering*, and in Joined Cases 322 and 323/85, *Hoyer*, cited above, is applied to this case, in which the competition procedure is partly vitiated, it must be concluded that the appointing authority is not bound by the Board's decisions to the extent that they are illegal. However, that does not mean that, for that reason, it was impossible to appoint a candidate on the basis of the competition. Its duty not to adopt illegal decisions merely prohibits it from appointing Mr Spence or Mr Waters who, because of the irregularities in the competition, should not have been on the list of suitable candidates. On the other hand, the appointing authority had to take account of the possibility of appointing the applicant, who had been validly included in the list. It should be added that the appointing authority had also to envisage the possible appointment of Mrs Beck, whose inclusion in the list was also not vitiated by any illegality.

72. Faced with such a situation, the appointing authority was required to comply with the decision of the Court of Justice in Joined Cases 316/82 and 40/83 *Kohler*, cited above. According to that decision, before deciding to disregard the

results of a competition, the appointing authority must consider the possibility of filling the vacant post by appointing one of the persons properly included in the list of suitable candidates. In the first place, it had therefore to consider the possibility of appointing the applicant, who had been placed first on the list of suitable candidates (see the judgments in Case 62/65 *Serio* v *Commission of the EAEC* [1966] ECR 561, at p. 571, and in Case 246/84 *Kotsonis* v *Council* [1986] ECR 3989, at p. 4005 et seq.). Although those judgments accept that the appointing authority is entitled to ignore the precise order of merit resulting from the competition for reasons which it is incumbent on it to evaluate and justify before the Court, it should be pointed out that it must have reasons connected with the interest of the service for appointing a candidate other than the one placed first. Even if the appointing authority was aware that there were reasons connected with the interest of the service other than the irregularities in the competition which suggested that the applicant should not be appointed, it should then, according to the same case-law, have considered the possibility of appointing Mrs Beck.

73. The Parliament should have included in its consideration of the possibility of appointing the applicant or Mrs Beck a consideration of the merits of Mr Tate, who had been wrongly excluded from the list of suitable candidates solely because of the irregularities in the competition. Article 30 of the Staff Regulations, which permits the appointment only of candidates whose names appear on the list of suitable candidates, does not prevent the appointment of Mr Tate after such a consideration. The appointing authority could thus validly compare Mr Tate, the fifth candidate having obtained the minimum number of points, to the applicant and Mrs Beck in the context of the consideration of the reasons connected with the interest of the service which might lead to the two candidates at the top of the list not being appointed. Since the appointing authority did not carry out such a consideration, it did not exercise its discretion in accordance with law.

74. It is only if the Parliament had validly decided that reasons connected with the interest of the service justified the appointment of Mr Tate that Article 30 would have prevented such a decision. If the Parliament, after adopting a decision not to appoint the applicant or Mrs Beck, the reasons for which were duly stated, had wanted to appoint Mr Tate, the irregularities in the competition procedure would have prevented it. In those circumstances, a decision not to take account of the results of the competition would have been justified by sound reasons. Since no consideration was given to the appointment of the applicant or Mrs Beck, the contested decision is vitiated by an error of law.'

18 The Court of First Instance concluded by stating that, since the Parliament could not put forward any sound reason to justify terminating the competition procedure, it had failed to give sufficient reasons for the contested decision and accordingly, that decision had to be annulled (paragraph 75).

19 The Parliament's application to have that judgment set aside is based on the single plea that the Court of First Instance failed to have regard to the rights and obligations of the appointing authority with regard to competitions. It claims, first, that the Court of First Instance failed to have regard to the principle that the appointing authority may not make appointments based on a list of suitable candidates which has been drawn up improperly. In the case in point, the list of suitable candidates, which included two candidates whose admission to the competition the Court of First Instance had held to be unlawful, was in the Parliament's view seriously defective and could not serve as a basis for appointing Mr Hanning. Secondly, the Parliament claims that, by requiring the appointing authority to choose a candidate from a list of suitable candidates containing less than the number of candidates decided on by the Selection Board, in order to take account of the defects of the list, the Court of First Instance failed to take full account of the appointing authority's discretionary power in choosing the candidate to be appointed and merely substituted its own appraisal for that of the appointing authority.

20 Mr Hanning, who states that the Court of First Instance censured by implication the misuse of powers vitiating the disputed decision, contends that the contested judgment is perfectly in accordance with the Staff Regulations and with the case-law of the Court of Justice. He contends, first, that the irregularities found did not make the list of suitable candidates sufficiently defective to justify the annulment of the competition. He contends, secondly, that when it stated that the Parliament was required to consider first the possibility of appointing the candidates properly included on the list and then the merits of the first candidate not included before deciding to disregard the results of the competition, the Court of First Instance was merely indicating to the Parliament the rules to be followed in order to draw all the conclusions from its judgment, but did not encroach on its discretionary power.

21 Reference is made to the Report for the Hearing for a fuller account of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

22 In the judgments in *Schwiering* v *Court of Auditors*, cited above, at paragraphs 11 and 12, and *Hoyer* v *Court of Auditors*, cited above, at paragraphs 12 and 13, the Court held that although the appointing authority had no power to annul or amend a decision taken by a selection board, it was required, in exercising its own powers, to take decisions free of irregularities. It could not therefore be bound by decisions of the selection board where the illegality of those decisions was liable to vitiate its own decisions.

23 It is apparent from what has been stated above that, in the contested judgment, the Court of First Instance held, first, that the admission of Mr Spence and Mr Waters to the competition had been unlawful and that consequently their inclusion in the list of suitable candidates had been unlawful, and secondly that Mr Tate, a candidate who had obtained the minimum number of points required by the notice of competition, could not be included in the list, which already contained four candidates, the maximum number authorized by the notice of competition, of which two candidates had been wrongly included. The Court of First Instance considered, however, that before it could annul the competition the Parliament ought first to consider whether it could choose one of the two candidates properly included in the list and compare the merits of Mr Tate to theirs.

24 The Parliament is justified in stating that, with that reasoning, the Court of First Instance has not justified its judgment in law.

25 First, the inclusion in the list of suitable candidates, limited to a maximum of four names, of two candidates who, having been wrongfully admitted to the competition, ought not have been in it, unlawfully deprived Mr Tate, who had obtained the number of points necessary for him to be entitled to appear on it, of the possibility of being included by the Selection Board in that list and the possibility of being chosen by the Parliament to occupy the post to be filled.

26 Contrary to the findings of the Court of First Instance, at paragraph 73 of its judgment, the Parliament should not and could not have taken into consideration

Mr Tate's candidacy without unlawfully substituting its powers for those of the Selection Board, because he did not appear on the list of suitable candidates and, consequently, could not have been appointed.

27 Secondly, it follows from Articles 27 to 30 of the Staff Regulations that the list of suitable candidates drawn up by the Selection Board is intended to enable the appointing authority to choose the candidate who appears to it to be best able to perform the duties relating to the post to be filled.

28 The appointing authority may, for that purpose, depart from the order of merit in the list of suitable candidates drawn up by the selection board for reasons which it is incumbent upon it to determine and, if appropriate, to justify before the Community judicature, provided, however, that it does not destroy the very essence of the competition by departing substantially from the results of the competition without serious reasons (judgment in Case 246/84 *Kotsonis* v *Council* [1986] ECR 3989).

29 Moreover, it is in order to facilitate the appointing authority's decision that the fifth paragraph of Article 5 of Annex III to the Staff Regulations provides that the selection board is to draw up, wherever possible, a list containing at least twice as many names as the number of posts to be filled. In the case in point, it must be stated that the notice of competition even expressly provided that the list of suitable candidates could contain up to four candidates.

30 When candidates are unlawfully included in the list of suitable candidates, in particular because they have been unlawfully admitted to the competition, the appointing authority may not appoint them and the choice available to it is reduced accordingly. The appointing authority's discretionary power is thus unlawfully restricted.

1 The choice available to the appointing authority was reduced by half since two candidates out of the four included by the Selection Board on the list of suitable candidates could not be appointed.

2 It follows from the above that the competition procedure was unlawful and that the Parliament could lawfully annul it.

3 Thus, by holding, on the grounds stated at paragraph 17 above and summarized at paragraph 23, that the Parliament's decision was not justified in law, the Court of First Instance committed an error of law.

4 Paragraph 1 of the operative part of the contested judgment must therefore be set aside.

5 The first paragraph of Article 54 of the Statute of the Court of Justice of the EEC states: 'if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.'

16 As stated at paragraph 32, above, the whole of the procedure of the disputed competition was irregular and the Parliament could lawfully annul it.

17 As the Parliament was entitled to annul the competition, the submissions made to the Court of First Instance by Mr Hanning for the annulment of that decision must be rejected.

38 Accordingly, it is appropriate to give final judgment in the matter, applying the provisions of the first paragraph of Article 54 of the Statute of the Court of Justice of the EEC, and to reject the submissions in Mr Hanning's application that the Court should, first, annul the decision of the President of the Parliament of 19 February 1988 to disregard the results of Competition No PE/41/A and to commence a new competition, and, secondly, annul the implied decision of the Parliament rejecting his complaint of 17 June 1988 against that decision.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

40 It should be stated, first, that Mr Hanning's submissions to the Court of First Instance for annulment must be rejected, as stated at paragraph 38 above, and, secondly, that paragraph 2 of the operative part of the judgment of the Court of First Instance dismissing the remainder of Mr Hanning's application has not been the subject of an appeal. Accordingly, Mr Hanning must be considered to have failed in his submissions.

41 However, it follows from Article 122 in conjunction with Article 70 of those rules that the institutions are to bear their own costs when the appeal is brought by them.

42 Accordingly, each party must be ordered to bear its own costs of the proceedings before this Court and of those before the Court of First Instance and paragraph 3 of the operative part of the judgment of the Court of First Instance must be set aside.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Annuls paragraphs 1 and 3 of the operative part of the judgment of the Court of First Instance of 20 September 1990 in Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463;**

2. **Rejects the submissions in Mr Hanning's application for the annulment of, first, the decision of the President of the European Parliament dated 19 February 1988 to disregard the results of Competition No PE/41/A and to organize a new competition and, secondly, the implied decision of the European Parliament to reject Mr Hanning's complaint of 17 June 1988 against that decision;**

3. **Orders each of the parties to bear their own costs of the present proceedings and of those before the Court of First Instance.**

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 20 February 1992.

J.-G. Giraud
Registrar

F. Grévisse
President