OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 10 November 1992 *

Mr President,
Members of the Court,

1. On 15 February 1992 an appeal was brought before the Court by Mr Moritz (hereinafter 'the appellant') under Article 49 of the Statute on the Court of Justice against the judgment of the Court of First Instance (Fifth Chamber) of 13 December 1990 on Case T-20/89 *Moritz* v *Commission* (hereinafter 'the contested judgment'). [1]

On 12 August 1987 the appellant brought an action in the Court of Justice for the annulment of the Commission's decision of 2 July 1986 appointing an official to an A 2 post and for compensation for the material and non-material damage which he had allegedly suffered. By decision of 15 November 1989, the Court of Justice referred the case to the Court of First Instance. In the contested judgment, the Court of First Instance declared the application for annulment inadmissible, rejected the claims for compensation and ordered the parties to bear their own costs. The appeal is directed solely against the last two parts of the judgment of the Court of First Instance. Consequently, it is not directed against the passage in the contested judgment which declares the application for annulment inadmissible.

For a fuller account of the facts and the procedure, reference is made to the Report for the Hearing.

2. The plan of this Opinion is the same as that of the contested judgment and the appeal. I shall consider all the appellant's grounds of appeal at least in so far as they do not overlap or repeat themselves.

Maladministration allegedly arising from a manifest error of assessment or a misuse of power

3. The appellant has put forward six grounds of appeal against this part of the contested judgment. He maintains that the Court of First Instance wrongly held that it is bound to review only those aspects of the procedure which were manifestly irregular (see section 4 below). He also claims that the Court of First Instance incorrectly described the manner in which events unfolded before the Consultative Committee (see section 5 below), wrongly refused the appellant's request for the production of certain documents (see section 6 below) and did not respond to some of his arguments relating to whether the candidate selected (Mr Engel) was suited to the post to be filled (see section 7 below). Lastly, he maintains that the Court of First Instance should have held that the appointment decision was vitiated by maladministration. The Consultative Committee never informed the Commission that the appellant satisfied all the appointment criteria with the exception of only one and it never ascertained whether Mr Engel also

* Original language: Dutch.

1 — Judgment in Case T-20/89 *Moritz* v *Commission* [1990] ECR II-769.

satisfied them (see section 8 below). In addition, the appellant was not heard until after the appointment decision was taken (see section 9 below).

4. In paragraph 29 of the contested judgment, the Court of First Instance stated as follows:

'The Court would observe that the post in question was a Grade A 2 post (director). As the defendant rightly points out, the appointing authority has a wide discretion when comparing the merits of candidates for such a post which entails great responsibility and in assessing the interests of the service. The review to be undertaken by the Court must accordingly be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the administration has remained within reasonable bounds and has not used its power in a manifestly incorrect way or for purposes other than those for which it was conferred upon it'.

The appellant contests that passage in the following terms:

'The extent of the review of the Court of First Instance is not limited to the extent that only a "manifestly incorrect" procedure could justify a decision in the applicant's favour'. [2]

Mere comparison of the two passages which I have just quoted shows that the appellant summarizes the point of view of the Court of First Instance completely incorrectly. At no point in paragraph 29 of the contested judgment did the Court of First Instance state that it reviewed only manifestly irregular procedures. On the contrary, it merely referred to the established case-law of the Court of First Instance and the Court of Justice on judicial review of decisions adopted by public authorities in the exercise of their wide discretion. [3]

5. As regards the allegedly incorrect manner in which the Court of First Instance described the procedure before the Consultative Committee, I would refer to that which that court stated in paragraph 31 of the contested judgment:

'As far as the regularity of the procedure followed in this case before the Consultative Committee is concerned, the following points are to be made: where high-level posts are to be filled and the appointing authority has decided to fill them according to the procedure laid down in Article 29(2) of the Staff Regulations, which leaves it a very wide margin of discretion, the mere fact that the Director-General, Mr Cioffi, was heard by the Consultative Committee in the absence of the applicant, cannot constitute, in the circumstances of this case, a breach of the principle of the right to a fair hearing; firstly, it is clear from the minutes of the Consultative Committee's meeting of 22 April 1986 that Mr Cioffi confined himself to explaining, on the basis of the vacancy notice, the qualifications required of the occupant of the post

2 — See section 7 of the appeal.

3 — See, for example, the judgments in Case 280/80 *Bakke-D'Aloya* v *Council* [1981] ECR 2887, paragraph 10, in Case 298/81 *Colussi* v *Parliament* [1983] ECR 1131, paragraph 20, in Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, paragraph 9, in Case 9/82 *Ohrgaard and Delvaux* v *Commission* [1983] ECR 2379, paragraph 14, in Case 26/85 *Vaysse* v *Commission* [1986] ECR 3131, paragraph 26, in Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529, paragraph 6, in Case 306/85 *Huybrechts* v *Commission* [1987] ECR 629, paragraph 9, in Case 52/86 *Banner* v *Parliament* [1987] ECR 979, paragraph 9, in Case 111/86 *Delauche* v *Commission* [1987] ECR 5345, paragraph 18, in Case T-169/89 *Frederiksen* v *Parliament* [1991] ECR II-1403, paragraph 69, in Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157, paragraph 8, and in Case T-25/90 *Schönherr* v *ESC* [1992] ECR II-63, paragraph 20.

and, secondly, that the applicant has not brought forward any factor to support his assertion that the Director-General may have expressed unfavourable views about him which may have influenced the Consultative Committee.'

The appellant claims that that passage of the judgment misrepresents the facts. It is alleged, in particular, that the Court of First Instance wrongly started out from the idea that the procedure provided for in Article 29(2) of the Staff Regulations had already commenced when the Consultative Committee met on 22 April 1986. It is further claimed that the Court of First Instance wrongly accepted that the Director-General, Mr Cioffi, gave his views to the Consultative Committee only on the qualifications required to carry out the duties attaching to the post to be filled. In fact, Mr Cioffi expressed an adverse opinion of Mr Moritz. Had the Court of First Instance based itself on a correct version of the facts, it would have had to decide that, in so far the Consultative Committee did not give Mr Moritz a hearing, it manifestly acted incorrectly.

The appellant's allegations lack any factual basis. It appears from paragraph 30 of the contested judgment that the Court of First Instance was perfectly aware that the Consultative Committee met on 22 April 1986 pursuant to Article 29(1) of the Staff Regulations and not on the basis of Article 29(2). [4] As regards Mr Cioffi's intervention, the Court of First Instance based itself on the minutes of the meeting, in which it found no evidence of the appellant's allegation, and held that no other evidence had been adduced thereof. Moreover, the appellant admitted to the Court of Justice that he was entitled merely to presume that Mr Cioffi expressed negative views about him. [5]

6. The applicant further complains that, in the contested judgment, the Court of First Instance did not consider his request for the production of Mr Engel's personal file and applications. In this connection, it must be pointed out that it is in the discretion of the Court of First Instance to decide whether or not a case necessitates measures of inquiry. [6] The parties cannot make demands, only suggestions. It is for the Court of First Instance to decide whether or not it needs supplementary information that the measures of inquiry would afford and it is not under a duty to give reasons for its decision on this point.

7. The appellant goes on to complain that the Court of First Instance did not consider certain arguments relating to Mr Engel's aptitude, thereby failing to fulfil its obligation to state reasons.

In the judgment in *Vidrányi* v *Commission*, the Court held that the Court of First

4 — According to paragraph 30 of the judgment: 'Under the procedure provided for in Article 29(1)(a) of the Staff Regulations, the Consultative Committee ... examined the applications and individual files of the candidates' (my emphasis).

5 — See section 16 of the appeal, from which it also appears that, unlike the appellant maintains (in section 15 of the appeal), the Court of First Instance correctly stated in paragraph 31 of the contested judgment that 'the applicant has not brought forward any factor to support his assertion that the Director-General may have expressed unfavourable views about him which may have influenced the Consultative Committee'.

6 — See Article 21 et seq. of the Statute of the Court of Justice, which, according to Article 46 of that statute, is also applicable to the Court of First Instance. See also Article 66 et seq. of the Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 (OJ 1991 L 136, p. 13 et seq.).

Instance is bound to comply with 'a general principle which places on every court the obligation to state the reasons on which its decisions are based, by indicating in particular the reasons which led it not to uphold a complaint formally raised before it'. [7] However, the Court distinguished in that connection between a 'distinct plea' and 'additional arguments'. On the one hand, the Court of First Instance has fulfilled its obligation to state reasons only if it has responded to all the pleas in law raised before it. On the other hand, it is not bound to set out expressly the arguments put forward in support of the pleas. [8]

As regards Mr Engel's aptitude to carry out the duties attaching to the post to be filled, the Court of First Instance stated as follows in paragraphs 32 and 33 of the contested judgment:

'As regards the manifest error allegedly committed by the appointing authority in proceeding to appoint Mr Engel, it must be noted that the defendant has pointed out, without being contradicted on this point by the applicant, that Mr Engel has studied finance and economic sciences at the University of Montreal, that he has worked in high positions in various Canadian and European banks and that he has command of four Community languages.

Moreover, it does not emerge from the documents placed on the file nor has the applicant satisfactorily demonstrated to the Court that the defendant in appointing Mr Engel to the post to be filled committed a manifest error of assessment, exceeded the limits of its own competence or used its powers for purposes other than those for which they were granted.'

By stating this and also, as has been pointed out already, that the appointing authority has a wide discretion in comparing candidates' merits (see section 4 above), the Court of First Instance gave sufficient reasons for its decision that the defendant did not commit a manifest error of assessment in appointing Mr Engel. The Court of First Instance was not bound to make express mention of each argument raised by the appellant, who based himself on a presumption that Mr Engel did not have the aptitude to carry out the duties attaching to the post to be filled. It may be considered in particular that the Court of First Instance rejected certain of the appellant's suggestions on the ground that they were unproven or irrelevant:

the suggestion that Mr Engel could not have sat examinations at the end of his studies in Montreal; [9]

the suggestion that the positions occupied by Mr Engel before he was appointed ranked too low compared with the management duties which he is now carrying out; [10]

the suggestion that Mr Engel did not have all the qualifications required by the vacancy notice or, in any event, was not as well qualified as the appellant. [11]

7 — Judgment in Case C-283/90 P *Vadrányi* v *Commission* [1991] ECR I-4339.

8 — Judgment in Case C-283/90 P *Vadrányi* v *Commission* [1991] ECR I-4339, paragraph 31.

9 — See section 21 of the appeal.

10 — See section 22 of the appeal.

11 — See paragraphs 27 and 28 of the appeal.

8. According to the appellant, the Court of First Instance should have held in the contested judgment that the Consultative Committee's opinion was doubly vitiated by two instances of maladministration, namely the opinion did not state that the appellant satisfied all the criteria for appointment with the exception of one and it also did not show that the Committee had checked that Mr Engel also satisfied those criteria. In each case, the Court of First Instance should have examined the appellant's arguments.

The appellant does not put forward any provision requiring the Consultative Committee to mention in its opinions the precise number of appointment criteria which a particular candidate satisfies or to compare that number with the number of criteria satisfied by another candidate. Such an individual comparison would scarcely have any point: the criteria for appointment to a particular post are not all of the same importance and their relative importance is not quantifiable. The appointing authority's discretion consists, *inter alia*, in weighing up the relative importance of the criteria. Neither is there any provision requiring the Consultative Committee to make express mention in its opinion that it has checked whether a given candidate satisfies each of the appointment criteria. The fact that no mention is made that such a check has been carried out cannot be treated as if that check had not been carried out.

As regards the manner in which the Court of First Instance justified its rejection of the appellant's arguments, it can only be considered that it rejected them as unfounded in paragraphs 29 and 33 of the contested judgment (see sections 4 and 7 above).

9. Lastly, the appellant argues, without being contradicted by the defendant, that he was not given a hearing until after the appointment decision had been taken. In his view, such an interview should have been held before any appointment decision was taken, *a fortiori* in a situation in which the personal file of one of the interested parties was incomplete because it lacked one or more periodic reports.

In the judgment in *Kuhner* v *Commission*, the Court held that there was 'a general principle of good administration to the effect that an administration which has to take decisions, even legally, which cause serious detriment to the persons concerned, must allow the latter to make known their point of view, unless there is a serious reason for not doing so'. [12] As to the specific cases in which an official has the right to be heard, [13] they are defined by the Staff Regulations (see, for example, Article 87 of the Staff Regulations and Annex IX thereto concerning disciplinary proceedings [14]) or, in the absence of express provisions, by the Court (see, for example, the judgments in *Almini* v *Commission* [15] and in *Oslizlok* v *Commission* [16] delivered by the Court in cases involving the official's being retired and not assigned to another post).

The Staff Regulations do not give officials the right to be heard in the course of a

12 — Judgment in Joined Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 25.

13 — Contrary to that which the appellant seems to think (see section 3 of the reply), compliance with the right to be heard does not mean that there has to be an oral interview. This appears from the judgments cited in the next three footnotes. On the other hand, the official concerned must be enabled to defend his interests properly before any decision is taken and must also be given reasonable notice for him to prepare his defence.

14 — See the judgments in Case 228/83 *F.* v *Commission* [1985] ECR 275, paragraph 23, and in Case 319/85 *Misset* v *Council* [1988] ECR 1861.

15 — Judgment in Case 19/70 *Almini* v *Commission* [1971] ECR 623, paragraph 11.

16 — Judgment in Case 34/77 *Oslizlok* v *Commission* [1978] ECR 1099, paragraph 30.

promotion procedure. Article 45 of the Staff Regulations provides for 'consideration of the comparative merits of the officials eligible for promotion and of the reports on them', but does not require interested persons to be heard.

Neither has the Court of Justice ever held that an official is entitled to be heard in the course of a promotion procedure. In the judgment in *Kuhner* v *Commission*, cited above, which was concerned with a decision to reassign an official to a post of the same level, the Court held as follows:

'The contested decision, under which the applicant retains all the advantages of his grade and basic post, is not of such a kind as to make it necessary to comply with formal requirements other than those provided by Article 90 of the Staff Regulations ... to which is to be added, if need be, judicial review by the Court'.

In my view, that reasoning holds good *a fortiori* where a decision is taken not to promote the official concerned. In the case of such a decision, the official who is not promoted retains not only the advantages of his post, but also the post itself.

10. On that ground, I have reached the conclusion that none of the grounds of appeal raised by the appellant against that part of the contested judgment are well founded.

Maladministration allegedly arising from an infringement of Article 27 and Article 28 of the Staff Regulations

11. The appellant raises two grounds of appeal against the decision of the Court of First Instance that Mr Engel's appointment involved no infringement of Articles 27 and 28 of the Staff Regulations. He states, in the first place, that those articles were in fact infringed (see section 12 below) and, secondly, that the contested judgment is insufficiently reasoned (see section 13 below).

12. The Court of First Instance found — and this is not contested by the parties — that Mr Engel, 'originally a German national but who assumed Canadian nationality, had re-acquired his German nationality before taking up his duties, as the Commission had required of him' (paragraph 36 of the contested judgment).

The appellant argues that this state of affairs infringes Articles 27 and 28 of the Staff Regulations and likewise Article 1(i) of Annex III to the Staff Regulations. Article 27 of the Staff Regulations provides, *inter alia*, that:

'Recruitment shall 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 basis from among nationals of Member States of the Communities. ...'

That principle is elaborated on in practical terms in Article 28, which provides as follows:

'An official may be appointed only on condition that:

(a) he is a national of one of the Member States of the Communities, *unless an exception is authorized by the appointing authority*, and enjoys his full rights as a citizen ...' (my emphasis).

The appellant does not deny that the latter provision enables the appointing authority to derogate from the principle that only nationals of the Member States may be recruited. However, this is not where the alleged infringement lies. The appellant considers that such derogation should be *mentioned* in the notice of a competition organized under Article 29(1) of the Staff Regulations. Article 1(1) of Annex III 'Competitions', to which Article 29(1) refers, provides that:

'[The notice of competition] must specify:

...

(i) any exceptions pursuant to Article 28(a) of the Staff Regulations'.

However, Mr Engel was appointed on the basis of Article 29(2) of the Staff Regulations, which reads as follows:

'*A procedure other than the competition procedure may be adopted by the appointing authority* for the recruitment of Grade A 1 or A 2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications' (my emphasis).

Since the appointing authority was entitled to derogate from the competition procedure in this case, it was not bound to comply with the provisions of an annex to the Staff Regulations which — as its title clearly indicates — deals solely with the procedure for competitions. [17]

13. The appellant further argues that the Court of First Instance did not give sufficient reasons for the passage of its judgment in which it declares that Articles 27 and 28 of the Staff Regulations have not been infringed. That passage is, he claims, too brief and, furthermore, does not mention Annex III to the Staff Regulations, to which I referred above.

After summarizing the parties' views, the Court of First Instance holds as follows in paragraph 36 of the contested judgment:

'It is to be noted that Mr Engel, originally a German national but who assumed Canadian nationality, had re-acquired his German nationality before taking up his duties, as the Commission had required of him. In those circumstances, Mr Engel's appointment did not take place in contravention of Articles 27 and 28 of Staff Regulations.'

Admittedly that statement is a summary one and does not mention Annex III to the Staff Regulations. On the other hand, the appellant did not formulate his argument clearly at first instance. Thus, for example, at first instance he did not make out a link between Annex III to the Staff Regulations — which he mentioned only in the reply submitted to the Court of First Instance — and Article 29(1) of the Staff Regulations. Nevertheless, Annex III was adopted on the basis of Article 29 of the Staff Regulations and not on the basis of Articles 27 and 28. In those

17 — The appellant denies that the appointing authority is not bound by Annex III where it organizes a procedure on the basis of Article 29(2), on the ground that '[I] n a democratic community, the State derives its authority from the people, and the people are unquestionably the *subjects of the State* and not foreign nationals who may happen to be on its territory' (see section 42 of the appeal). I do not find that argument at all convincing.

circumstances, I can understand that the Court of First Instance did not mention Annex III and confined itself in its grounds to considering whether or not Articles 27 and 28 had been infringed.

14. Consequently, I conclude that those grounds of appeal must also be rejected as unfounded.

Maladministration allegedly arising from an infringement of the duty to have regard to the interests of officials and to show loyalty

15. Most of the appellant's arguments under this head are mere repetitions of grounds of appeal set out elsewhere. Thus, he argues once again that the merits of the various candidates were not subjected to an objective comparison, that the Commission committed a manifest error of assessment, that he was not heard until after the appointment decision was taken, that he was nevertheless better qualified for the post to be filled, etc. I have already considered those arguments.

16. In the alternative, the appellant adds as follows:

'Even if the Court of Justice should consider that all the grounds of appeal raised in Chapter II do not suffice to show that there was maladministration, the great number of "singular features" the existence of which should *at least* have been noted should prompt the Court to declare that there was a breach of the duty to have regard to the interests of officials' (section 46 of the appeal).

In view of the duty to have regard to officials' interests and the principle of sound administration, every administrative authority which takes a decision concerning the situation of an official should take into consideration all the factors which may affect its decision and, when so doing, it should take account not only of the interests of the service, but also of those of the official concerned. [18] However, that does not mean that the filling of any post whatsoever, should not be based, in accordance with the first paragraph of Article 27 of the Staff Regulations, in the first place on the interests of the service. [19] Moreover, according to the Court of Justice, the duty to have regard to the interests of officials cannot prevent the competent authority from adopting the measures it believes necessary in the interests of the service. [20]

Be that as it may, contrary to that which the appellant maintains, an infringement of the duty to have regard to the interests of officials cannot be inferred from the existence of 'singular features' in the course of an administrative procedure. On the contrary, it could be inferred from the finding that an administrative authority did not take into account all relevant factors when it adopted its decision and/or did not take account of the interests of the official concerned. However, there is nothing to warrant drawing an inference from the facts as found by the Court of First Instance that when Mr Engel was appointed

18 — Judgments in *Kuhner* v *Commission*, cited above, paragraph 22, in Case 191/81 *Plug* v *Commission* [1982] ECR 4229, paragraph 21, in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199, paragraph 18, in Case 417/85 *Maurissen* v *Court of Auditors* [1987] ECR 551, paragraph 12, in Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245, paragraph 2 of the summary, and in Case C-255/90 P *Burban* v *Parliament* [1992] ECR I-2253, paragraph 7; order of the Court of First Instance in Case T-14/91 *Weyrich* v *Commission* [1991] ECR II-235, paragraph 8 of the summary; judgment in Case T-26/91 *Kupka-Floridi* v *ESC* [1992] ECR II-1615, paragraph 44.

19 — Judgment in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701, paragraph 10.

20 — Judgments in Case 125/80 *Arning* v *Commission* [1981] ECR 2539, paragraphs 18 and 19, and in *Delauche* v *Commission*, cited above, paragraph 26.

the Commission failed to take account of the appellant's interests in this way.

17. For this the reason, I consider that that ground of appeal should be rejected as unfounded.

Maladministration allegedly arising from the delay with which the appellant's periodic report was drawn up

18. The following is stated in the contested judgment under the heading 'The maladministration allegedly consisting in the late preparation by the appointing authority of the applicant's periodic report':

'(paragraph 41) In this regard it is sufficient to note, without there being any need to examine whether the delay alleged by the applicant actually took place, how long it lasted and who was responsible for it, that it does not emerge from the documents and the applicant has not shown that he would have had a greater chance of being appointed to the post ... if during the procedure to fill that post his personal file had contained his periodic report for the period 1983-1985, in its finalized version (see the judgment of the Court of Justice in Case 1/87 *Picciolo* v *Commission* [1988] ECR 711 and in Case 346/87 *Bossi* v *Commission* [1989] ECR 303). It is clear from an examination of that final periodic report, as produced to the Court, that it contains only quite minor changes compared with the initial draft report submitted to the applicant and that those changes, which do not affect the general tenor of the periodic report, could not have any effect whatsoever on the applicant's chances of being promoted to the post in question.

(paragraph 42) It follows from all the foregoing considerations that none of the complaints advanced by the applicant in order to demonstrate the existence of a wrongful act committed by the Commission can be upheld. ...'

Whilst the appellant puts forward no specific ground of appeal against paragraph 41 of the contested judgment, it is nevertheless sufficiently clear from the whole of the text of the appeal that he accuses the Court of First Instance of failing to regard as maladministration the delay in drawing up his periodic report for 1983-1985. [21] I agree with him that the Court of First Instance has infringed Community law in this respect.

19. The contested judgment states that the fact that the appellant's periodic report was drawn up late does not constitute maladministration *because* it was not proved that that factor affected the candidate's chances of promotion. In other words, the judgment holds that there was no maladministration because no causal link was shown between the fault and the damage.

This is clearly not possible. The fact that the Community can be held liable only after fault has been found, together with damage and a causal link between the two, [22] does not mean that the presence or absence of one of those three elements can be inferred from the presence or absence of one of the two others. The question whether the belated drawing up of a periodic report has or

21 — See, in particular, section 61 of the appeal.

22 — See the judgment in *Delauche* v *Commission*, paragraph 30.

does not have a decisive effect on the non-appointment of an official must therefore remain entirely separate from the question whether the fact that the report was drawn up late constitutes in itself maladministration, as the judgments in *Picciolo* and *Bossi*, to which the Court of First of Instance refers, only confirm.

Of course, it is permissible for the Court of First Instance to consider in the first place, as it did in the judgment in *Latham* v *Commission*, [23] whether there is a causal link between alleged maladministration and the damage allegedly suffered and, where proof of such a causal link is not adduced, to consider that there is no need to look for possible maladministration (which, in *Latham*'s case, would likewise have consisted in the absence of a periodic report at the time when a promotion decision was adopted). Nevertheless, the contested report suffers from a defect in its statement of reasons, which, as I have already stated, consists in the fact that the Court of First Instance concluded from the absence of a causal link that there had been no maladministration.

It might be objected that that defect is purely formal and that the Court of First Instance effectively rejected the appellant's arguments on the ground that there was no causal link. I do not consider that such an objection can be upheld. A finding of maladministration and a finding of a causal link both assume a factual assessment that the Court of Justice cannot carry out itself in an appeal. [24] This means, in my view, that the Court of Justice cannot now infer that there was no causal link from an assessment of the facts from which the Court of First Instance (wrongly) inferred that no maladministration had been committed. Even that would constitute a (re)assessment of the facts carried out in the light of a concept different from the one employed by the Court of First Instance. In such a case, the Court of Justice can merely declare that there was a defect in the statement of reasons.

20. I therefore conclude that the Court should set aside the part of the contested judgment in which the Court of First Instance held that the fact that the periodic report for 1983-1985 was drawn up late was not capable of having any effect on the appellant's chances of being promoted to the post in question, and that, as a result, did not constitute maladministration on the part of the Commission.

The claim for compensation for the material and non-material damage allegedly suffered

21. In paragraph 42 of the contested judgment, the Court of First Instance holds that 'none of the complaints advanced by the applicant in order to demonstrate the existence of a wrongful act committed by the Commission can be upheld' and concludes that the claim made in the application for compensation for *material* damage must be rejected. As I have already mentioned, the Court of First Instance gave defective reasons for its finding that the late drawing up of the appellant's periodic report for 1983-1985 was not maladministration.

23 — Judgment in Case T-63/89 *Latham* v *Commission* [1991] ECR II-19, paragraphs 32 and 33. See also the judgments in Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359, paragraph 28, and in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, paragraphs 43 and 44. As regards non-material damage, see the judgment in *Bossi* v *Commission*, paragraph 38.

24 — See Article 168a of the EEC Treaty and Article 51 of the Protocol on the Statute of the Court of Justice of the EEC.

Consequently, I consider that the rejection in the contested judgment of the appellant's claims for compensation of material damage must also be set aside as lacking sufficient grounds.

22. Apart from compensation for the material damage which he allegedly suffered as a result of Mr Engel's appointment, the appellant asked the Court of First Instance also to hold that he was entitled to compensation for *non-material* damage because, during the procedure which culminated in Mr Engel's appointment, the Commission took a decision on his career in the absence of the relevant periodic reports. After referring to the consistent case-law of the Court and of the Court of First Instance, the Court of First Instance dealt with that claim for non-material damage separately in paragraphs 43 to 51.

The Court has consistently held that the periodic report, which, under Article 43 of the Staff Regulations, has to be drawn up every two years for each official, constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration. [25] The administration has a reasonable period at its disposal in which to draw up the report and any failure to act within that period must be justified by the existence of special circumstances. [26] Nevertheless, the official is not entitled to compensation for non-material damage if he himself contributed significantly to the delay complained of. [27]

It was by virtue of that rule that the Court of First Instance then rejected the claim for compensation for non-material damage. It refers to that end to the judgment of the same date in Case T-29/89 *Moritz* v *Commission*: [28]

(paragraph 48) 'In the aforesaid judgment delivered on the same day, the Court found that the delay in the procedure for drawing up a periodic report for the period 1983-1985 was due not only to the lateness with which the applicant's immediate superior proposed to him, on 31 July 1986, that his periodic report for the period 1981-1983 should be extended to cover the period 1983-1985 but also to the dilatory response of the applicant who waited until 26 November 1986 before replying to that proposal. The applicant thus contributed considerably to the delay of which he complains. ...'

(paragraph 51) 'In those circumstances, the claim for compensation for non-material damage must be dismissed.'

23. The appellant objects [29] — rightly, in my view — that that part of the contested

25 — Judgments in Case 61/76 *Geist* v *Commission* [1977] ECR 1419, paragraph 44, in Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743, paragraph 8, in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943, paragraph 22, in Case 263/81 *List* v *Commission* [1983] ECR 103, paragraph 25, in *Ditterich* v *Commission*, cited above, paragraph 24, and in Case 7/86 *Vincent* v *Parliament* [1987] ECR 2473, paragraph 16.

26 — Judgment in *Ditterich* v *Commission*, paragraph 25. In exceptional circumstances, the absence of periodic reports may be compensated for by the existence of other information on the official's merits (judgment in *Gratreau* v *Commission*, paragraph 22).

27 — Judgments in T-63/89 *Latham* v *Commission*, cited above, paragraph 37, and in T-27/90 *Latham* v *Commission*, cited above, paragraph 49.

28 — Judgment in Case T-29/89 *Moritz* v *Commission* [1990] ECR II-787.

29 — See sections 58 and 59 of the appeal and section B of the reply.

judgment is vitiated by defective grounds. In the two judgments, which, by reason of their subject-matter, relate to two different cases, the Court of First Instance wrongly applied in an identical manner the rule that an official who has contributed considerably to the delay of which he complains in the drawing up of his periodic report is not entitled to compensation for the non-material damage which he alleges he suffered.

In Case T-29/89, the appellant maintained that he was entitled to compensation for non-material damage on the ground that his final periodic report for 1983-1985 was not sent to him until 7 April 1987. The delay of which he complained related therefore to the period from 30 November 1985 to 7 April 1987, since 30 November 1985 was the date on which, under Article 6(1) of the General Provisions for the Implementation of Article 43 of the Staff Regulations, the periodic report should have been drawn up. The Court of First Instance rightly held that the appellant contributed considerably to that delay because he did not respond to a proposal made to him on 31 July 1986 until 26 November 1986.

The position is different in this case. The appellant seeks compensation on the ground that his periodic report was not available at the time of the procedure which culminated in the appointment of Mr Engel. Since Mr Engel was appointed on 2 July 1986, the delay complained of by the appellant relates to the period 30 November 1985 until 2 July 1986 at the latest. The applicant did not contribute to that delay, since a proposal relating to his periodic report for 1983-1985 was not made to him until 31 July 1986.

24. I therefore conclude that the rejection by the contested judgment of the appellant's claim for compensation for non-material damage is also vitiated by defective grounds and should therefore be set aside.

The further resolution of the case

25. It appears from the factors which I have just described that the contested judgment should, in my view, be set aside because it has defective grounds in two respects: on the one hand, the conclusion that the fact that the appellant's periodic report for 1983-1985 was drawn up late does not constitute maladministration and that therefore the appellant's claim for compensation for non-material damage should be rejected is based on considerations relating solely to the absence of a causal connection (see sections 19 and 21 above); on the other hand, the judgment dismissed the appellant's claim for non-material damage on account of the fact that his periodic report was drawn up late on the basis of a consideration which has nothing to do with the period at issue in this case (see section 23 above).

Those two points necessitate a fresh assessment of the facts, which the Court of Justice is not entitled to carry out in an appeal which is to be confined to questions of

law. [30] The Court of Justice is not entitled to decide whether or not the fact that the appellant's periodic report for 1983-1985 was drawn up late constitutes maladministration on the part of the Commission. Such a decision would necessarily entail an assessment of the facts: whilst it is true that, on several occasions in the past, both the Court of First Instance and the Court of Justice have described a delay in drawing up a periodic report as 'maladministration' [31] or 'improper' [32] or held that it was 'not compatible with the principle of sound administration', [33] nevertheless both the Court of First Instance and the Court of Justice invariably based themselves on the actual circumstances of the case. As I have already stated (in section 19), the Court of Justice itself cannot hold that there was no causal link, since that would entail a re-assessment of the facts on which the Court of First Instance based itself in holding that there was no maladministration. Lastly, when the question as to any maladministration and/or as to the existence of a causal connection has been decided, it will still be necessary to determine whether and to what extent non-material damage was inflicted upon the appellant.

26. I therefore conclude that, in accordance with Article 54 of the Protocol on the Statute of the Court of Justice, this case should be referred back to the Court of First Instance for judgment.

Costs

27. The appellant considers that the decision of the Court of First Instance ordering the parties to bear their own costs is 'invalid'. [34] He claims that, in making that order, the Court of First Instance did not take account of the requirements of the second subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, which, at the time when the contested judgment was delivered, was applicable *mutatis mutandis* to proceedings before the Court of First Instance. [35] That provision reads as follows:

'The Court may order any party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur'.

Since I reached the conclusion above that the Court of First Instance should re-examine the Commission's case in two respects and since for that reason alone the decision

30 — See footnote 25.

31 — See, for example, the judgments in *Oberthür* v *Commission*, cited above, paragraph 11, in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, paragraph 34, in Case T-73/89 *Barbi* v *Commission* [1990] ECR II-619, paragraph 35, and in Case T-68/91 *Barbi* v *Commission* [1992] ECR II-2127, paragraph 45.

32 — Judgment in Case 1/87 *Picciolo* v *Commission* [1988] ECR 711, paragraph 44.

33 — Judgments in *Castille* v *Commission*, paragraph 34, and in Case T-73/89 *Barbi* v *Commission*, paragraph 35.

34 — Section 72 of the appeal.

35 — Under the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities. In the meantime, the second subparagraph of Article 87(3) of the Rules of Procedure of the Court of First Instance, which is applicable in this case, has entered into force.

of that court with regard to the costs should be set aside, it is not necessary for me to consider that argument.

28. Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, it is to make a decision as to costs 'where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case'. Since neither of those eventualities arises in this case in my view, I propose that the Court should reserve the costs.

Conclusion

29. Having regard to the foregoing considerations, I propose that the Court should decide as follows:

(1) The judgment of the Court of First Instance of 13 December 1990 in Case T-90/89 *Moritz* v *Commission* is set aside on account of defective grounds in so far as, in that judgment, the Court of First Instance:

Declared that the fact that Mr Moritz's periodic report for 1983-1985 was drawn up late does not constitute maladministration on the part of the Commission;

Rejected the pleas raised before it by Mr Moritz with a view to his being compensated for the material and non-material damage which he suffered as a result of the Commission's decision of 2 July 1986 appointing an official to a post of grade A 2;

Ordered the parties to bear their own costs.

(2) The case is referred back to the Court of First Instance, which is to decide on Mr Moritz's claim for compensation for the material and non-material damage which he allegedly suffered as a result of the Commission's decision of 2 July 1986 appointing an official to a post of grade A 2, and is also to make an order as to the costs.

(3) The costs are reserved.