trative complaint or put forward heads of claim based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint, but must be closely linked to it. It follows that although Articles 90 and 91 of the Staff Regulations are designed, through the lodging of the prior administrative complaint, to permit the amicable settlement of disputes which have arisen between officials and the administration, it is not the purpose of those provisions to bind strictly and absolutely the contentious stage of the proceedings, provided that the claims submitted at that stage change neither the legal basis nor the subject-matter of the complaint.

In particular, a claim for compensation made for the first time before the Court, whereas the administrative complaint sought only the annulment of the decision by which the applicant claimed to have been adversely affected, is admissible since such a request for annulment may imply a request for compensation for damage which may have been caused to the applicant by that decision.

REPORT FOR THE HEARING
delivered in Case 126/87 *

I — Facts and procedure

Mr Del Plato was recruited by the Commission in 1967 to carry out duties at the Joint Research Centre at Ispra. He is an official in Grade B 3 in the scientific and technical service, at present employed in the Infrastructure Division.

On 29 April 1986, Mr Del Plato submitted his candidature in response to a vacancy notice for post COM/536/86, which is the post of head of the department in which he works. His candidature met with an oral refusal, and he submitted it again on the following day, 30 April 1986, by registered letter with acknowledgment of receipt.

In August 1986 Mr Del Plato learned that Mr Timm had been appointed to the post and on 9 September 1986 he submitted a complaint in which he requested the annulment of the refusal to allow him to take part in the procedure for filling the post in question, the annulment of Mr Timm's appointment to that post and the recommencement of the entire procedure by transfer or promotion.

* Language of the case: French.

By an application registered at the Court Registry on 10 April 1987, Mr Del Plato seeks the annulment of the implied decision rejecting his complaint, inferred from the Commission's failure to respond to that complaint for a period of more than four months.

II — Conclusions of the parties

Mr Del Plato claims that the Court should:

(i) annul and in any event withdraw the implied rejection of his application of 30 April 1986 to take part in the internal competition to fill post COM/536/86;

(ii) annul or in any event withdraw the appointment of Mr Timm to the post in question;

(iii) order the recommencement of the internal procedure by transfer or promotion, taking the applicant's candidature into consideration;

(iv) order the Commission to pay ECU 20 000 in damages.

The Commission contends that the Court should:

(i) dismiss the application as unfounded;

(ii) rule on costs in accordance with the law.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

III — Summary of the submissions and arguments of the parties

A — *Admissibility of the application*

The Commission has raised a number of objections of inadmissibility to Mr Del Plato's application.

(a) The Commission claims, first of all, that Mr Del Plato's application is inadmissible in so far as it relates to the refusal to allow him to take part in the procedure for the purpose of filling the vacant post.

1. It argues, first, that Mr Del Plato is explicitly contesting the rejection of his application of 30 April 1986 to take part in the 'internal competition' to fill the post concerned. The post in question, however, was not filled by an internal competition and, moreover, the applicant himself initially requested a 'promotion-transfer'.

In response to that argument, Mr Del Plato replies that he is seeking only the annulment of the decision rejecting his candidature for the post in question, and that the Commission has already accepted that basis in its reply made on 9 April 1987 to his complaint.

2. The Commission then contends that, even if Mr Del Plato's claim can be interpreted as seeking the annulment of the refusal to promote him to the post in question, it is inadmissible inasmuch as it is out of time. It maintains that the applicant submitted his candidature on 29 April 1986, and it was immediately rejected. No complaint was made against that decision to reject his candidature within the three-month period prescribed in Article 91 of the Staff Regulations, so the application is out of time. The Commission adds that it is impossible to consider that the applicant is contesting an implied decision inferred from the failure to respond to his application submitted on the following day, 30 April 1986, as that would make it possible to circumvent all the rules relating to the periods prescribed for the bringing of an action.

Mr Del Plato, for his part, argues that the decision of 29 April 1986 rejecting his application was merely the material act of an official and that his application was really submitted on 30 April 1986. He duly appealed against the rejection inferred from the failure to respond to that second application by following the procedure prescribed in Article 91 of the Staff Regulations.

(b) Secondly, the Commission claims that Mr Del Plato has no interest in contesting the appointment of Mr Timm to the post in question because Mr Timm was appointed as a member of the temporary staff as a result of a recruitment procedure initiated in July 1985, for which Mr Del Plato did not apply. Furthermore, the applicant's name did not appear on the Commission's list of staff in Category B suitable for promotion to Category A and he could not, therefore, be concerned by the appointment in question.

In that regard, Mr Del Plato argues that the question is whether or not he was entitled to promotion to Category A, which calls into question the validity of the list to which the Commission refers, and the admissibility of the application is dependent on the decision on that question.

(c) The Commission claims that, according to the Court's previous decisions, Mr Del Plato's application is inadmissible inasmuch as it contests the implied decision rejecting his complaint because the nature of that decision was such as merely to confirm the act against which the complaint was made.

Mr Del Plato defers to the Court's judgment on this point.

(d) The Commission contends that the claim for damages was not preceded by a complaint; that it is inadmissible in so far as the claim for annulment is itself inadmissible; that the applicant does not even allege any fault on the part of the administration; and, finally, that the claim does not adequately state the grounds on which it is based.

In reply to those various points, Mr Del Plato states, first of all, that the Court does not refuse to order the administration to pay compensation of its own motion, even if no such compensation has been applied for, if it is necessary to make good the non-material damage caused to an official by the wrongful attitude of the administration, secondly that the claim for damages was presented only in the alternative and, finally, with regard to the statement of the grounds on which the claim is based, that the objection is inadmissible since the

Commission submitted a defence on the substance of the claim before objecting to its admissibility.

B — *Substance of the application*

(a) Mr Del Plato directs his first argument to the fact that his candidature was not considered for the vacant post even though, in accordance with Article 92, the second paragraph of Article 98 and Article 45(2) of the Staff Regulations, read together, a competition is not necessary when promoting officials in the scientific and technical services from one category to another, and the duties described in the vacancy notice corresponded very closely to those which he already carried out, since he was, in fact, occupying the post in question.

While it is true that the Commission, in a decision of 3 June 1983, established 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services' (*Administrative Notices* No 409 of 24 June 1983), on the basis of which a list was drawn up of persons suitable for promotion to Category A, on which the applicant's name did not appear, it was perfectly possible for the administration to depart from the list if it was justified in so doing for objective reasons. Such an objective reason is to be found, in the present case, in the perfect match between the applicant's background and the duties described in the vacancy notice.

The Commission contends that Mr Del Plato, as an official in Category B, could not be transferred to a post in Category A. It would have been necessary for him to be transferred from Category B to Category A, which could not be considered a promotion since the concept of promotion does not include transfers from one category to another. Mr Del Plato's name was not on the list of persons suitable for appointment in Category A drawn up in accordance with the 'Procedures' laid down in 1983. Appointment to the post in question, which is in Category A, was therefore impossible.

In reply to Mr Del Plato's argument that his career background matched the requirements of the vacancy notice, the Commission states that such a background, which is attested by the applicant's superiors, was also attested in the case of other officials by their superiors. Had the Commission chosen Mr Del Plato for the post in question, it would have been guilty of a breach of the principle of equal treatment for officials placed in the same position.

(b) Mr Del Plato bases his next argument on the irregular manner in which the competition to fill the post in question was organized by the Commission. He stresses that the Commission was wrong in considering that, as an official, he was not entitled to take part in the competition in question.

He points out first of all that the internal competition procedure required a decision to be taken by the appointing authority after consultation of the Joint Committee, which did not take place.

Secondly, there were two procedural irregularities in the external competition held by

the Commission for the purpose of constituting a reserve for future recruitment. First of all, Article 29 of the Staff Regulations requires the appointing authority, before holding an external competition, to consider whether the post can be filled by promotion or transfer within the institution, whether to hold competitions internal to the institution and what applications for transfer have been made by officials of other institutions, which it did not do in this case. Secondly, it is possible to follow the procedure for constituting a reserve for future recruitment only as an alternative when an internal competition would not suffice to fill the vacant posts and, finally, the procedure for holding an external competition for the purpose of constituting a reserve for future recruitment is possible only in the exceptional cases referred to in Article 29(2).

In that regard, the Commission argues, first, that posts in the scientific and technical services are filled essentially by recruiting temporary staff. The administration applies Article 29(1) of the Staff Regulations only by analogy, and it is therefore under no obligation to adhere strictly to its provisions.

The Commission maintains that Article 29 of the Staff Regulations concerns only the recruitment of new officials. In no event does it prevent the administrative authority from recruiting temporary staff, and this is precisely what the Commission did. It did not in any way organize a competition but merely a selection procedure with a view to being able to recruit temporary staff. In those circumstances, there was never any question of a competition for the purpose of constituting a reserve for future recruitment.

The Commission adds that, in any event, the administration has a discretionary power, in accordance with the Court's consistent decisions, to decide whether or not it is appropriate to hold an internal competition.

(c) Mr Del Plato seeks an order requiring the Commission to pay him ECU 20 000 in damages if the contested decisions are not annulled, on the ground that he suffered material damage consisting of the difference between the salary he receives and the salary he could have received in Category A and non-material damage consisting of the injury caused by the contested decisions to his reputation as an official.

The Commission contends that Mr Del Plato had no entitlement to a transfer to the higher category, since such a transfer does not form part of the normal course of an official's career. His career as an official was therefore unaffected by the decisions in question. Nor is he entitled to damages, since the whole recruitment procedure was lawfully carried out. It also claims that the sum claimed in damages has no serious basis with regard to any difference in salary between the category to which he belongs and the next higher category. Nor did Mr Del Plato suffer any non-material damage.

F. Grévisse
Judge-Rapporteur