OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 22 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

1. I shall first recall in brief the essential facts. In 1975 the applicant, Mrs Caro-Fernandez (née Gilbeau), an official of the Commission in Grade B 4, took part in Internal Competition No COM/LA/11, held for the purpose of constituting a reserve to fill vacant posts in career bracket L/A 8-L/A 7 (assistant translator). She obtained a total of 61 marks in the compulsory and optional tests and was thus placed first amongst the successful French language candidates, *ex aequo* with another candidate, Miss F. There was also a third successful candidate, Mr L., who had fewer marks.

Both Mrs Caro-Fernandez and Miss F. were offered by the administration an appointment in the offices of the Commission in Luxembourg but they refused that offer; the third applicant on the other hand accepted the offer and was thus duly appointed. Subsequently, in the course of 1976, two posts for French language translators became vacant in the Brussels offices of the Commission: Miss F. was appointed to one of them while the other was filled by transferring to Brussels an official who was employed in Luxembourg. The list of suitable candidates from the said internal competition which should have remained valid until 31 December 1976 was extended until 28 February 1977. After that date however the list became invalid and thus Mrs Caro-Fernandez is the only one of the three successful candidates who has failed to secure appointment in career bracket L/A 8-L/A 7.

On the basis of those facts the applicant submitted a complaint to the appointing authority on 27 May 1977 based on the contention that "the decision not to appoint [her] to a post of assistant translator in Brussels" constituted discriminatory treatment which had adversely affected her. Mrs Caro-Fernandez asked that that situation be remedied and that she be appointed "to a post of assistant translator in the translation department of the Commission in Brussels". As no reply was received to that complaint the applicant lodged the present application at the Court on 23 December 1977, claiming that the Court should declare the implied rejection by the Commission of the applicant's complaint and the Commission's refusal to appoint her to a post of assistant translator in Category LA null and void or, in the alternative, extend the duration of the validity of the internal competition of 1975.

2. The Commission contended that the application was *inadmissible* in that the complaint lodged by Mrs Caro-Fernandez was not in conformity with Article 90 (2) of the Staff Regulations and that therefore the first condition laid down by Article 91 (2) for the admissibility of the subsequent appeal to the Court was not satisfied. In fact, according to the Commission, the complaint does not refer to any specific *act adversely affecting* the applicant but merely asks the appointing authority to

1 — Translated from the Italian.

remedy a situation which the applicant considers unjust. Furthermore, even if it is held that the complaint in question is directed against a measure required by the Staff Regulations but which has not been adopted by the Commission, the fact none the less remains that the complaint should have been preceded by a request by the person concerned within the meaning of Article 90 (1); in the absence of such a request the complaint is therefore in any event irregular.

In my opinion the arguments put forward by the Commission are not sufficient to show that the appeal is inadmissible.

It should first be stated that the compulsory complaint introduced with the amendments made to the Staff Regulations in 1972 is intended to reduce the volume of litigation, constituting a first filtering of disputes at the administrative level and thus providing the possibility of their amicable settlement. For that reason it is necessary to interpret the provisions concerning it without having too great a regard to formalities and thus to avoid the risk that excessive procedural complications may prejudice the possibility of judicial protection if it is not possible to achieve a settlement of the dispute at the administrative level. This approach which is flexible and which takes account of the various interests involved is confirmed in the recent decided cases of the Court: see the judgment of 12 March 1975 in Case 23/74 *Küster* v *European Parliament* [1975] 1 ECR 353, in which it was stated that "whilst the request or the complaint ... must set out ... the purpose of the complaint and all the grounds underlying it, it is not necessary that they should already ... set out the grounds of possible illegality"; see also the judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] 2 ECR 1099 and the judgment of 1 July 1976 in Case 58/75 *Sergy* v *Commission* [1976] 2 ECR 1139, in which, with regard to the question whether the subject-matter of the complaint corresponds to that of the appeal to the Court, it was stated that it is not the purpose of Article 90 of the Staff Regulations to bind strictly and absolutely the contentious stage of the proceedings.

In the present instance the applicant took the view that the failure to appoint her as assistant translator in Brussels before the expiry of the period of validity of the reserve list from the competition in which she was successful constitutes a measure which not only adversely affects her but which is illegal and discriminatory in view of the appointment of the other candidate who was placed first *ex aequo* in the same competition. Against that measure she lodged a complaint "within the meaning of Article 90 of the Staff Regulations" in which she claimed that she should be appointed to a post of assistant translator; she did so within three months from the day on which the validity of the reserve list expired. It would seem therefore that she acted on the assumption that the administration, in view of the results of the competition (the applicant was placed first on the reserve list) and of the existing vacancies, was under an obligation to appoint her to a post for which she had been found suitable during the period of validity of the reserve list.

As the Court is aware, for the purposes of Article 90 (2) the act adversely affecting an official which is the subject-matter of a complaint may also take the form of inaction on the part of the appointing authority if it "failed to adopt a measure prescribed by the Staff Regulations". The applicant's appointment — which did not take place — therefore constitutes in the present case the measure which the administration unlawfully failed to adopt. It appears to me therefore that taking that into account the condition laid down by Article 91 (2) may be held to be satisfied. Nor is it possible to state to the contrary that the applicant should first have requested the administration to adopt a measure within the meaning of the third indent of Article 90 (2) and that only

after that condition had been satisfied could she lodge a complaint; in the present case it must in fact be held that the request or serving of notice was not necessary in so far as the notice of competition laid down the period of validity of the reserve list, on the expiry of which the absence of action on the part of the administration became definitive. Of course, as regards the substance, it is still necessary to ascertain whether in this instance the administration's obligation to act, which the applicant alleged was breached, is in fact laid down by the Staff Regulations and thus whether the administration's conduct is to be described as unlawful or not. However, that subsequent examination concerns the substance of the case; as to the preliminary examination of the objection that the application is inadmissible, the way in which the applicant has formulated her appeal appears to me to be such as to enable us to pass on to an examination of the substance.

3. In her application the applicant alleges that the implied decision of the Commission rejecting the complaint was null and void for lack of a statement of the reasons on which it was based; subsequently, however, no mention was made of that objection either in the reply or in the course of the oral argument.

In fact it is sufficient to recall the final sentence of Article 90 (2), according to which after four months from the date on which the complaint was lodged the fact that no reply to the complaint has been received "shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged" to the Court. In accordance with the relevant principles applicable in the internal laws of many Member States, therefore, it is expressly provided that the silence of the administration is equivalent to a decision without a statement of reasons. On the other hand, it should be noted that whilst the appeal to the Court seeks to render the decision rejecting the complaint absolutely void it is in effect directed against the actions or failures to act on the part of the administration which have produced direct legal consequences for the official and have thus given rise to the complaint.

4. In support of the argument that the Commission acted unlawfully by failing to appoint Mrs Caro-Fernandez to the post of assistant translator and by refusing subsequently to prolong the period of validity of the list of suitable candidates the applicant alleges that the Community's obligation to ensure that officials' careers develop normally and, in more general terms, the obligations set out in Article 24 of the Staff Regulations have been breached and also that there has been a misuse of powers which has been made evident by the discriminatory treatment of her.

As the applicant stated in the course of the oral procedure the alleged right of the official to a normal career is merely one example of an official's right to be assisted by the Community (first paragraph of Article 24); the aspect of that "assistance" on which the applicant in fact laid most stress, however, is that of further training and instruction for officials. It is therefore necessary to refer to the third and fourth paragraphs of Article 24, by virtue of which the Community is to "facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests"; "such training and instruction shall be taken into account for purposes of promotion in their careers".

I would observe first that the reference to the third paragraph of Article 24 does not appear to me to be relevant: although it is in fact true that the applicant has made great efforts to improve here professional qualifications there is nothing to show that the Commission obstructed or even that it

merely failed to assist her further training and instruction. It should not be forgotten that the applicant was able to take part in the competition for the post in which she was interested, that she benefited from the "accelerated preparation" organized by the Commission, that her aptitude was recognized in the classification of candidates and that she was offered a post as assistant translator, albeit in a place she found unacceptable.

With regard to the provisions contained in the last paragraph of Article 24 I would observe that the position with respect to career development within the category or the service to which the official was appointed, which takes the form of promotion decided on the basis of the criterion of comparative merit, differs from that with respect to transfer from one service to another or promotion from one category to another, which can occur only on the basis of a competition (Article 45 (2) of the Staff Regulations). Having regard to the clear distinction between the two forms of advancement I take the view that the institutions are obliged by Article 24 to take account of the professional skills acquired by officials (courses of study completed and the like) essentially on the occasion of promotion on the basis of comparative merits. On the other hand, in the case of a move from one category or service to another it is within the context of the competition (and thus in accordance with the general rules governing competitions and the specific provisions set out in the notice of competition) that account may possibly be taken of the qualifications of the candidates and normally a direct check is made on their professional training (Article 29 of the Staff Regulations). The Commission has stated in its defence, correctly, in my view, that in the case of promotion to another category the appointing authority satisfies the obligations set out in the last paragraph of Article 24 by announcing internal competitions for its own staff and by thus offering them the possibility of furthering their careers.

5. Quite apart from that, and even if the argument that the last paragraph of Article 24 is applicable to promotion to another category on the basis of a competition is accepted, the applicant's complaints do not appear to be well-founded in fact.

As regards the possibility of using the list from the time of completion of the competition to February 1977, the evidence heard by the Court (from Mr Ciancio, Director of the Commission's Translation, Documentation, Reproduction and Library Directorate, and Mr Baxter, Director of the Commission's Personnel Directorate) has shown that in that time only two posts for French language translators fell vacant in Brussels, to one of which was appointed the other candidate, Miss F., who was also placed first, whilst the other was filled by the transfer of an official from Luxembourg. As regards the subsequent period from the expiry of the period of validity of the list to the lodging of the appeal to the Court, the same witnesses stated that two other posts which fell vacant in Brussels during those months were filled, one by means of the transfer of an official who was working in another institution and the second by means of a transfer from Luxembourg to Brussels.

Mrs Caro-Fernandez does not challenge the lawfulness of the appointment and the posting to the Brussels offices of the other candidate, Miss F.; she complains, apparently, of the fact that instead of according the same treatment to her, the appointing authority preferred to fill the posts which subsequently fell vacant in Brussels by other means, both before and after the expiry of the period of validity of the list.

As regards the conduct of the administration before the expiry of the period of validity of the list, it appears to me that the nub of the question lies in determining whether an appointing authority, when a vacancy arises and when it is possible to fill the post either by transferring an official within the institution or by appointing a successful candidate appearing on the list of suitable candidates following a competition, should give preference to the first or the second solution. The applicant argued in the course of her oral submissions that where a vacancy arises the successful candidate has absolute priority; but there is no support for that argument in Article 29 of the Staff Regulations which, on the contrary, seems to me to incline, to a certain extent, towards transfer within an institution (cf. in this respect the judgment of 5 December 1974 in Case 176/73 *Van Belle* v *Council* [1974] 2 ECR 1361). Furthermore, in the present instance the preference for transfer did not adversely affect the interests of the applicant in respect of appointment to a higher category (which was refused by Mrs Caro-Fernandez only because it entailed posting to Luxembourg), but merely temporarily precluded her appointment to a post in Brussels. On the other hand, the fact that the Commission chose an official with greater seniority, preferring that official to one who had not yet been placed in the higher category, seems to me to show a correct appreciation both of administrative requirements, which are ensured by the presumed greater experience of an official who is already serving in that capacity, and of the wishes of the official who aspires to appointment to a higher post and who already has certain expectations in that regard by virtue of seniority.

It does not therefore appear to me that the conduct of the administration in failing, while the list was still valid, to nominate Mrs Caro-Fernàndez to a post as assistant translator in Brussels represents a breach of Articles 24 or 29 of the Staff Regulations.

In my view the conclusion should be the same with regard to the conduct of the administration once the list had ceased to be valid. In this respect I must first observe that once the argument is excluded — as I think it must be — that the administration was obliged to appoint Mrs Caro-Fernandez before the list ceased to be valid and that it was obliged to extend the period of validity of the list itself (I shall shortly return to this question), what happened in relation to the posts of French language translators which fell vacant in Brussels after 28 February 1977 does not appear to be relevant to the present dispute. I would however point out that according to the statement of the witness, Mr Baxter, the two officials appointed to posts in Brussels in the second half of 1977 were both in a higher grade (L/A 6) than that which the applicant would have occupied on her appointment. It is also unnecessary for me to repeat the considerations set out above both regarding the right of the administration to rely on transfers rather than to appoint a successful candidate in a competition to establish a reserve list and as regards the offer of a post in Luxembourg which Mrs Caro-Fernandez refused.

It seems to me, therefore, that the conclusion may be drawn from the above that, with regard to the period after February 1977 as well, the conduct of the administration is not open to criticism from the point of view of a breach of Article 24 or Article 29 of the Staff Regulations.

6. With regard next to the failure to extend the period of validity of the list of suitable candidates (a criticism raised by

the applicant in her application but which she did not subsequently elaborate in her arguments) I shall merely observe that the conduct of the Commission was logical and in accordance with the interests of the administration. Having first extended the period of the validity of the list for two months the Commission allowed it to lapse because it intended to hold another competition, which was subsequently in fact announced (cf. Official Journal of 22 March 1977); on the other hand, I do not believe that it can be held to be good practice to extend the duration of validity of such lists of suitable candidates overmuch. It is further clear that at the time (in February 1977) no vacancies were foreseen for French language translators who did not also have a good knowledge of German, which was the case with Mrs Caro-Fernandez, who obtained marks of 4.5 out of 20 in the optional German test in the competition in question.

7. The final objection raised by the applicant against the failure to appoint her and against the failure to extend the period of validity of the list is that both those steps were void for misuse of powers in that the administration's conduct was based on factors which were extraneous to the interests of the institution and were in conflict with them.

The applicant's submissions referred to a series of facts which, taken together, she claims, show that the appointing authority acted with the intention of adversely affecting Mrs Caro-Fernandez by preventing her from obtaining promotion to the higher category. In particular, according to the applicant's submissions, a number of officials had alleged that Mrs Caro-Fernandez was too ambitious and wished to advance too rapidly, having begun only in Category C and being a woman. In my view these are vague allegations, unconfirmed by the evidence, and in any event they are insufficient to support the argument that the appointing authority was guilty of acting *ultra vires*.

The fact that of the three successful candidates in the internal competition only Mrs Caro-Fernandez has failed to obtain appointment to Category LA may, at first sight, be perplexing; the fact should, however, be taken into account that the lowest-placed candidate accepted a posting to Luxembourg and that if Mrs Caro-Fernandez had done the same she would now be in the category she aspires to. There remains the fact that the other candidate placed first with the same marks obtained not only an appointment but also a posting to the Brussels offices; the question is whether that can constitute discriminatory treatment in relation to Mrs Caro-Fernandez. In this respect it is sufficient to observe that discrimination may be said to exist only if the divergent treatment of two persons in analogous or comparable circumstances lacks any objective justification. In the present instance, however, the letter of 27 April 1976 from the Director-General for Personnel and Administration, Mr Baichère, (Annex V to the Commission's defence) justifies the choice on the basis of "a comparative examination of the merits of the two candidates and in particular of their staff reports, their present grades, their respective ages and their seniority". It does not therefore appear to me that the choice was arbitrary or unfounded. Furthermore, the evidence of the witnesses, as I have already stated, shows that all the posts (four altogether) of French language translators which fell vacant in Brussels both before and after the expiry

of the period of validity of the list of suitable candidates were filled by officials who were chosen in preference to the applicant for objective reasons.

8. In conclusion, and on the basis of the facts outlined above, I propose that the Court should reject the appeal lodged by Mrs Caro-Fernandez by application of 23 December 1977. As regards the costs, I suggest that those incurred by the Commission should be borne by it in accordance with Article 70 of the Rules of Procedure.