OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 20 September 2001 [1]

I — Introduction

1. The appellant in the present case, Pascual Juan Cubero Vermurie, is appealing against the judgment of the Court of First Instance delivered on 3 October 2000 in Case T-187/98, which dismissed his application.

2. At first instance the appellant had sought, *inter alia*, the annulment of the Commission's decision of 6 April 1998 not to promote him to Grade A 5 in the 1998 promotion year.

3. This case raises the question of the extent to which an official's mobility may adversely affect his career in so far as the prospects of promotion are reduced in his new post.

1 — Original language: German.

II — The facts, proceedings before the Court of First Instance and the contested decision

4. The facts giving rise to the contested decision are described as follows in the judgment appealed against:

'1 The annual promotions exercise with respect to Commission officials takes place according to a procedure set out in the *Guide pratique de la procédure de promotions des fonctionnaires à la Commission européenne de la catégorie A et du cadre linguistique*, as produced by the parties in this case ("the promotions guide"). That procedure is divided into five stages.

2 The first stage is the publication by the administration of the list of officials eligible for promotion, including all those officials who meet the requirement of a minimum period in their grade as prescribed by Article 45 of the Regulations and Rules applicable to Officials and other Servants of the European Communities ("the Staff Regulations"). That publication enables the officials concerned to point

out possible errors or omissions to the administration.

3 In the second stage, each Director-General carries out a preliminary examination of the comparative merits of the officials eligible for promotion in his directorate-general and notifies the proposals, ranked in order of priority, to the Promotions Committee.

4 In the third stage, the committee draws up a list of the most deserving officials by comparing the merits of the officials eligible for promotion according to a method of assessment adapted to the grade in question. In the applicant's case, the Promotions Committee used the method of assessment applicable to A 6 officials for promotion to Grade A 5. That method is based on the award of a certain number of points to the candidates according to the order of priority, drawn up by each Director-General, the staff reports, seniority in grade and service and age. In particular, the order of priority drawn up by each Director-General enables the candidates for promotion to be awarded a certain number of points (70, 45, 20 or 0), according to their ranking, which are allocated to each directorate-general on the basis of the number of candidates eligible for promotion in that directorate-general.

5 During that stage, the case of those officials, such as the applicant, who have, *inter alia*, moved to a different post, is first considered by a select joint working party which reports to the Committee on the cases referred to it.

6 In the fourth stage, the appointing authority adopts or amends the Committee's draft list and publishes the list of the most deserving candidates. The fifth and final stage is a matter for the member of the Commission responsible for personnel who adopts a promotion decision on the basis of that list, and then signs the individual decisions.

7 There are two types of promotion: promotion within a career bracket and promotion from one career bracket to the next. The present case concerns a promotion falling within the latter situation, namely from Grade A 6 to Grade A 5, that is to say, from administrator to principal administrator.

8 The applicant, Mr Cubero Vermurie, was assigned to the Directorate-General of Financial Control (DG XX) during the period from 16 September 1986 to 31 August 1996. From 1 January 1989 to 31 December 1990 he was on secondment, in the interests of the service, to the Court of Justice of the European Communities. [With

effect from 1] September 1996 he was assigned to the Directorate-General of Consumer Policy (DG XXIV) as assistant to the Director-General. Since 1 April 1997 he has been assigned to the Directorate-General for Audiovisual Media, Information, Communication and Culture (DG X).

9 The applicant, an official in Grade A 6 since 1 January 1993, was proposed for promotion to Grade A 5 by DG XX and was ranked sixth for the 1996 promotions exercise and fourth for the 1997 exercise without any priority points.

10 DG XXIV placed him third on its list for the 1998 promotions exercise.

11 By letter dated 13 January 1998, the applicant brought the matter before the President of the Promotions Committee in the following terms:

"In the context of the procedure, under the 1998 exercise, for promotion from one career bracket, my name does not appear in a 'promising' position in the list drawn by DG XXIV. I came from DG XX to DG XXIV in the interests of the service (given the nature of the duties to be fulfilled) to carry out important tasks assisting the Director-General. If I had not been so transferred, I would have been promoted to Grade A 5 in the course of the current promotions procedure by remaining on the list of DG XX (2nd reserve from the previous year).

Unless something is done to remedy this situation, it is clear that mobility will have seriously prejudiced my career development (even though the Commission is consistently in favour of a policy of mobility)...."

12 By letter of 2 April 1998, the President of the Promotions Committee wrote to the applicant as follows:

"[Further to] your request of 13 January 1998, the select joint working party responsible for examining applications and problems connected with mobility has considered your case.

Having considered your file, the select joint working party is not in a position to recommend a favourable assessment to the Promotions Committee.

At its plenary meeting on 5 March 1998 the Promotions Committee adopted the position taken by the select joint working party with regard to your application".

13 The applicant's name did not appear in the list of the most deserving officials or in the list of promoted officials published in the *Administrative Notices* No 1033 of 16 March 1998 and No 1036 of 6 April 1998 respectively.

14 The applicant then lodged a complaint on 21 April 1998 in which he stated, *inter alia*:

"It is clear from the facts [set out in the complaint] that mobility, even though the Commission is consistently in favour of a policy of mobility, has seriously prejudiced my career development because [the appointing authority], in its decision of 6 April 1998 on the 1998 promotions, did not promote me to Grade A 5 as would have been the case if I had not been transferred in the interests of the service from DG XX to DG XXIV."

15 By letter of 12 May 1998, the Director-General of DG × (the directorate to which the applicant is currently assigned) intervened in support of the applicant's complaint. In that letter, addressed to the Director-General of the Personnel and Administration Directorate (DG IX), he explained, *inter alia*, that the applicant was moved in the interests of the service, that he fulfilled his duties as assistant to the Director-General very efficiently, and that he would have been promoted to Grade A 5 if he had remained in DG XX, pursuant to the rules governing the award of promotions within the Commission. In conclusion, he was of the view that the applicant had suffered injury not only to his career, but also of a non-material nature.

16 The applicant's former Director-General in DG XX also intervened in support of the complaint in a letter of 15 May 1998 to the Director-General of DG IX, which states, *inter alia*:

"Without wishing to interfere with the decision on the merits of the case, I can confirm that, [if] Mr Cubero Vermurie had not left DG XX, he would have been promoted — unless he had become less deserving — to Grade A 5 under the present 1998 exercise.

Since the 1996 round, Mr Cubero Vermurie has appeared in DG XX's list of candidates for promotion to Grade A 5, being placed just behind [M.H.] in the order of priority, and, in 1998, DG XX obtained two promotions to Grade A 5, including [M.H.] (the sole reserve from 1997) plus an official ranked after the latter in our order of priority (that is, in the place made vacant by Mr Cubero Vermurie's departure)."

17 The applicant's complaint was dismissed by a decision of 9 October 1998 which stated, *inter alia*:

"In the light of the foregoing, [the appointing authority] considers that it cannot be criticised as having used its power of assessment in a manifestly erroneous way or for an improper purpose. The Promotions Committee considered the comparative merits of the officials in strict application of the rules published in the *Administrative Notices* No 309 of 26 February 1981, that is by having regard to the proposals of the Directorates-General and the career profile of the candidates for promotion. Furthermore, the specific case of Mr Cubero Vermurie was taken into consideration by the Promotions Committee, which nevertheless considered that, on [the] basis of the information available to it, notwithstanding Mr Cubero Vermurie's obvious merits, which moreover enabled him to be proposed by DG XXIV and which are acknowledged in [a] note [drawn up for attention of the select joint working party], he did not meet the conditions which would justify the award to him of the additional points enabling his name to be included in the list of the most deserving candidates and, possibly, to be promoted".'

5. Mr Cubero's application was dismissed, partly as inadmissible and partly as unfounded.

6. The Court of First Instance first declared inadmissible a plea alleging infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations on the ground that it had not been put forward in the complaint of 21 April 1998. The Court also rejected as inadmissible pleas alleging breach of the principles of legality, proportionality and the protection of legitimate expectations on the ground that the reasoning was insufficient.

7. With regard to the merits, the Court of First Instance rejected as unfounded the plea alleging infringement of Article 45 of the Staff Regulations on the ground that both the select joint working party and the Promotions Committee had in fact specifically considered the appellant's case and had not confined themselves to a strict application of the mobility rules in the promotions guide.

8. The Court also rejected an allegation of breach of the principles of equal treatment and fairness on the ground that the select joint working party and the Promotions Committee had taken account, in their assessment of the appellant's merits, of his particular situation and had also contemplated awarding him additional priority points.

9. In addition, the appellant had contended that Mr G., an official in his former Directorate-General, who had been ranked behind him before he was moved to a different post, had been promoted in the year in question. The Court of First Instance rejected that argument also on the ground that there was no manifest error of assessment on the part of the Commission in the method by which the respective merits of the candidates were assessed.

III — The form of order sought by the appellant

10. In this appeal the appellant claims that the Court should:

1. declare the appeal admissible and well founded;

2. consequently:

(a) annul the contested decision;

(b) determine the case itself and, granting the appellant's original application:

— annul the decision of the appointing authority of 6 April 1998 not to promote him to Grade A 5 in the context of the 1998 promotion year;

— annul the decision of 9 October 1998 rejecting the complaint against the contested decision, lodged by the appellant on 27 April 1998 and registered in the Secretariat-General on 6 May 1998 under number R/436/98;

— order the Commission of the European Communities to pay the appellant compensation for material and non-material damage, fixed on an equitable basis in the sum of BEF 250 000;

— in any event, order the Commission of the European Communities to pay the costs incurred in respect of the proceedings at first instance and in connection with the present appeal.

IV — Arguments in support of the appeal and assessment

11. The appellant puts forward a single plea in law, alleging errors of law and contradictions in the grounds of the contested judgment. That plea is divided into four parts which it is appropriate to examine separately.

First part of the plea: admissibility of the plea alleging infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations

Arguments

12. Under the first part of the plea the appellant challenges the decision of the Court of First Instance to reject the plea of infringement of the third and fourth paragraphs of Article 24 of the Staff Regulation as inadmissible. Those provisions concern the 'further training and instruction' of officials and provide, in particular, that this must be taken into account for purposes of promotion in their careers. In that respect, the appellant cites various passages from his complaint and from his letter of 13 January 1998. In doing so, he claims, *inter alia*, that mobility is an important element in an official's career development since it increases his or her knowledge and skills. According to the appellant, this shows that he raised this issue in his complaint. As the Court of First Instance wrongly denied that he did so, the judgment is mistaken in law on that point.

13. The Commission contends that this part of the plea is inadmissible in so far as it contests an assessment of the facts. Alternatively, it contends that the complaint and the letter of 13 January 1998 related to the appellant's mobility, whereas the third and fourth paragraphs of Article 24 of the Staff Regulations concerned further training measures such as language courses and shorthand tests. Consequently, the mobility of officials is not the subject of the provisions he had cited and the first part of the plea is therefore unfounded.

Assessment

14. By virtue of Article 225 EC and Article 51(1) of the EC Statute of the Court of

Justice, an appeal is to be confined to questions of law. An appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. [2] However, in so far as the Court of First Instance categorised in law the findings of fact, and drew legal conclusions from them, the Court of Justice has jurisdiction to review them under Article 225 EC. [3]

15. The distinction between questions of fact and of law is particularly problematical where the facts in question consist of the contents of a document. This difficulty may well arise in the present case: whether the plea in question is admissible depends mainly on whether it was raised in the pre-litigation procedure in accordance with Article 90(2) of the Staff Regulations. [4] The question of admissibility therefore depends on whether the plea was actually stated in the complaint under Article 90(2) of the Staff Regulations.

16. On this point the Court of First Instance found that the appellant had not relied on the third and fourth paragraphs of Article 24 of the Staff Regulations in his complaint. This is most probably a factual finding which is not open to review by the Court of Justice, with the exception of review for misrepresentation of the facts. However, the Court of First Instance also found that, even though the Commission had considered the complaint 'with an open mind', the complaint gave no indication at all of an intention on the appellant's part to rely on that plea. Whether this finding should also be regarded as a factual finding seems open to debate in so far as it appears only after an interpretation of the complaint in question.

17. The Court of Justice has already had occasion to give a ruling on similar distinctions in relation to the admissibility of a ground of appeal. In the *SFEI* judgment [5] the Court, when considering the admissibility of an appeal, found, contrary to the view of the Advocate General, that the legal nature of a letter rejecting a complaint was a question of law, not of fact. Likewise, in the *Vidrányi* judgment [6] the Court accepted that assessment of the facts — which was open to review by the Court of Justice — included the question whether a particular document was of a medical or other nature. In that case, of course, whether the official concerned had a right to examine the document depended on its nature.

2 — See order in Case C-55/97 P *AIUFFASS and AKT* v *Commission* [1997] ECR I-5383, paragraph 13.

3 — See order in Case C-252/97 P *N* v *Commission* [1998] ECR I-4871, paragraph 15 and the judgments cited therein.

4 — The so-called rule of harmony between complaint and application: see, for example, judgment in Case T-4/96 *S* v *Court of Justice* [1997] ECR II-1125, ECR-SC I-A-179 and II-533, paragraph 98.

5 — Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681.

6 — Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339.

18. In another judgment the Court of Justice clearly started from the principle that the contents of a document are a question of fact which, as such, is not open to review by the Court on an appeal. In the case of *F.* v *Commission*[7] the Court found that the question whether a particular letter constituted a clarification or a complaint was a factual finding, criticism of which could not be the subject of an appeal.

19. The case-law thus provides no clear distinguishing criterion where the contents of a document are involved. Accordingly it is conceivable that it would be necessary to decide whether the Court of First Instance submitted the contents of the document (as established by interpretation, if necessary) directly to a particular legal assessment or whether the Court merely made a finding as to its contents. However, in certain cases such a distinction is of little assistance. In the case of *F.* v *Commission*, cited above,[8] the inadmissibility of the plea regarding the legal nature of the letter was debatable in so far as the letter could also have been interpreted as meaning that the Court had misconstrued the legal concept of the complaint. However, the decision of the Court of Justice on this point must have been based on the fact that the appellant's arguments evidently ultimately sought to circumvent the mandatory time-limit for bringing an action. In that context, the last-mentioned judgment may have been a special case.

7 — Case C-346/90 P [1992] ECR I-2691.

8 — Cited in footnote 7.

20. In the present case the interpretation of the complaint in question serves to show that a ground of complaint was raised in the pre-litigation procedure. Therefore one might be tempted, like the Commission, to think that this part of the plea is directed against a factual finding of the Court of First Instance and must therefore be rejected as inadmissible.

21. In this particular case, the close connection between questions of fact and of law argues against such a conclusion. As it is manifest that the complaint did not expressly refer to an infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations, the Court of First Instance had to consider ('with an open mind') whether the complaint referred, *inter alia*, to those provisions. However, as Article 24 in turn does not mention mobility, but only 'further training and instruction', consideration of that point also required interpretation of the third and fourth paragraphs of Article 24 of the Staff Regulations.

22. It is true that, at that stage, the Court of First Instance did not have to decide conclusively whether Article 24 was to be construed as meaning that the 'further training and instruction of officials' to which it refers encompasses the development of knowledge which goes with mobility, which the appellant undoubtedly put forward. On the contrary, the Court of First Instance should have determined whether the connection between Article 24 and the arguments put forward in the

complaint was sufficiently clear. The Court found that that was not the case, but this necessarily entails a preliminary decision on the relevance of Article 24 in mobility cases.

23. For this reason it seems appropriate to submit this finding of the Court of First Instance to review by the Court of Justice in the legal respect. Having regard to the situation underlying the case of *F.* v *Commission*, [9] it should be observed that, in the present case, what was obviously the main reason for making this distinction, namely the risk of circumventing a time-limit, does not exist.

24. In those circumstances, and as there are no clear means of distinguishing questions of fact and those of law, I propose that the Court declare this part of the plea admissible.

25. It is therefore now necessary to determine whether the reasoning of the Court of First Instance in paragraph 37 of the contested judgment is erroneous in law and contradictory. The particular question arising is whether the connection between the submissions in the complaint and the third and fourth paragraphs of Article 24 of the Staff Regulation was sufficiently clear.

9 — Cited in footnote 7.

26. According to the factual findings of the Court of First Instance, this is supported by the fact that the complaint refers to 'déroulement de la carrière', in conformity with the French version of the fourth paragraph of Article 24 of the Staff Regulations. [10] Furthermore, in his complaint, Mr Cubero obviously referred to the development of skills and knowledge which supposedly goes with mobility.

27. However, it is also undeniable that mobility is an objective of the Commission's personnel policy which has never been expressly formulated in the Staff Regulations. During the oral procedure the Commission correctly pointed out that further training in the form of further training courses and seminars was connected with mobility in so far as both could serve to increase knowledge and skills. Whether, conversely, mobility can be subsumed under the concept of further training seems at least debatable.

28. On this point nothing can be gleaned from the text or the legislative history of the provision in question. [11] This is shown by the reference to 'its own interests' and to

10 — 'Il est tenu compte également de ce perfectionnement pour le déroulement de la carrière'.

11 — See the Commission's proposal of 28 March 1969 (JO 1969 C 83, p. 4) and the opinion of the European Parliament on the Commission's proposal (JO 1969 C 97, p. 10). The then version of the text goes back to Regulation (Euratom, ECSC, EEC) No 1473/72 of the Council of 30 June 1972 amending Regulation (EEC, Euratom, ECSC) No 259/68 laying down the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities (OJ, English Special Edition 1972 (III), p. 703).

the requirement for further training and instruction to be compatible 'with the proper functioning of the service' in the third paragraph of Article 24 of the Staff Regulations. These restrictions on access to further training cannot, prima facie, be applied to mobility cases.

29. A comparison of the different language versions of the fourth paragraph of Article 24 also gives rise to doubt as to whether that provision is applicable to the present case at all. According to the findings of the Court of First Instance, the case involves promotion to Grade A 5, that is to say, promotion *outside* the career bracket. However, the German version of the fourth paragraph of Article 24 states that further training is to be taken into account 'für das Aufsteigen innerhalb der Laufbahn' ('for promotion within their career bracket'). Consequently, according to the German version the provision may be inapplicable.

30. However, the French version does not permit of this conclusion, [12] while the English version at least does not rule it out. [13]

31. It must also be noted that, according to settled case-law, complaints under Article 90(2) of the Staff Regulations must be considered 'with an open mind'. [14] In this connection, however, it must be observed that the appellant has a legal training and that, according to the findings of the Court of First Instance, in his complaint he gave many specific details concerning the aims of the Commission's mobility policy. Therefore, if he had wished to rely on Article 24 of the Staff Regulations, it seems likely that he would have referred to it in such a way as to leave no doubt. Looked at in this way, even the need for an open mind cannot mean disregarding altogether the overall impression of the complaint.

32. In those circumstances the Court of First Instance was not bound to establish a connection between the appellant's submissions in his complaint and the third and fourth paragraphs of Article 24 of the Staff Regulations.

33. Consequently the first part of the plea must be rejected as unfounded.

12 — 'Il est tenu compte également de ce perfectionnement pour le déroulement de la carrière.'

13 — 'Such training and instruction shall be taken into account for purposes of promotion in their careers.' It should be noted here that 'training and instruction' by definition exclude mobility.

14 — See the judgment in Case T-4/96, cited in footnote 4, paragraph 99, with reference to the judgment in Case 133/88 *Del Amo Martinez* v *Parliament* [1989] ECR 689, paragraphs 9 and 10.

Second part of the plea: assessment of the appellant's merits

Arguments

34. Under the second part of the plea, the appellant complains that the Court of First Instance did not discover an obvious mistake in the Commission's assessment of his merits. First, he refers to an alleged contradiction in the grounds of the judgment. According to paragraph 75, the Commission recognised his 'manifest merits' whereas, according to paragraph 76, he was not awarded additional priority points because, according to the Commission, his merits were less than those of other officials in that connection. However, the non-award of priority points was the reason why the appellant was not included on the list of the most deserving officials and, ultimately, why he was not promoted. Secondly, the appellant observes that, in those circumstances, the conclusion of the Court of First Instance, in paragraph 77 of the judgment, that the select joint working party and then the Promotions Committee specifically examined his case is contradictory because his merits were manifestly wrongly assessed.

35. The Commission considers this argument inadmissible. It takes the view that paragraph 87 of the contested judgment, which states that 'the applicant has not proved that there was a manifest error of assessment on the Commission's part', must be understood as meaning that he had not discharged his obligation to assert facts in support of his case and stresses that the absence of proof cannot be the subject of an appeal. Alternatively, the Commission denies that there is any contradiction. It observes that it is possible for an official to have manifest and recognised merits, but a comparison with the merits of other officials eligible for promotion may lead to the conclusion that their merits are greater for the purpose of the award of points. Moreover, the 'obvious merits' of the official in question are not inconsistent with the absence of additional merits which, as the case may be, would justify an award of additional priority points.

Assessment

36. Under this second part of the plea the appellant criticises the observations in the contested judgment concerning the assessment of his merits. He objects that the Court of First Instance failed to discover a manifest error of assessment on the Commission's part in that, while recognising his merits, at the same time it considered them insufficient for an award of priority points. He contends that this is contradictory and therefore mistaken in law.

37. This part of the plea also appears to be admissible but unfounded.

38. Taking account of the distinction between questions of fact and of law, which was discussed above, [15] the appellant's criticism is aimed not so much at the result of the appraisal of his merits as at the — legal — conclusions drawn from it.

39. The Commission is, admittedly, correct in observing that the assessment of the evidence used by the Court of First Instance to corroborate the facts is not in principle a question of law. [16] However, contrary to the Commission's opinion, the appeal does not make an issue of the failure to produce evidence, but of the failure to find a manifest error of assessment.

40. That, however, is a question of law. In the judgment in Case C-265/97 P, [17] the Court of Justice stated that a manifest error of assessment 'goes to the substantive legality of the contested decision' and is consequently 'concerned with infringement of a rule of law relating to the application of the Treaty within the meaning of Article 173 itself'.

41. It follows that the question of a manifest error of assessment can be examined by the Court of Justice. [18]

42. With regard to the substantive issue, reference must be made first of all to the principles of case-law concerning the appraisal of the merits of officials.

43. It has consistently been held that 'when considering the comparative merits to be taken into account in deciding on promotion pursuant to Article 45 of the Staff Regulations, the appointing authority possesses a wide discretion and in that regard review by the Community Court must be confined to the question whether, having regard to the methods and procedures used by the administration to make its assessment, the latter has remained within reasonable bounds and has not manifestly

15 — See paragraph 14.

16 — See judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66; also the recent order of 16 July 1998 in Case C-252/97 P, cited in footnote 3, paragraph 16.

17 — *VBA* [2000] ECR I-2061, paragraph 114.

18 — For an example, see the judgment in Case C-265/97 P, cited in footnote 17, paragraph 115; see also the order in Case C-252/97 P, cited in footnote 3, paragraph 63.

misused its power. The Court cannot therefore substitute its assessment of the qualifications and merits of candidates for that of the appointing authority'. [19] That case-law was originally laid down by the Court of Justice. [20]

44. The Court's case-law also states that although, in the context of a promotion procedure, the appointing authority must make its selection after comparing the staff reports and merits of eligible officials in accordance with the first subparagraph of Article 45(1) of the Staff Regulations, it nevertheless has power 'to undertake such consideration using the procedure or method it regards as most appropriate'. [21]

45. However, the discretion of the administration is not unlimited: it is 'subject to the need to undertake a comparative consideration of candidatures with care and impartiality, in the interests of the service and in accordance with the principle of equal treatment. In practice, such consideration must be undertaken on a basis of equality, using comparable sources of information.... Moreover, the appointing authority may take candidates' age and seniority in grade or service into consideration only as a subsidiary factor'. [22]

46. The Court of First Instance has also decided that preliminary examination of the candidatures of the officials eligible for promotion within each directorate does not preclude a proper appraisal of their merits, but conforms with the principle of sound administration. [23] Furthermore, 'an official who is eligible for promotion is entitled to have the Promotions Committee compare his merits with those of the other eligible officials in the grade in question'. [24] 'In particular, if the appraisal by the Promotions Committee of the merits of all the officials eligible for promotion to the grade concerned is to have any meaning, the appointing authority must not confine itself to considering the merits of those who are best placed on the lists drawn up by the different directorates-general.' [25]

47. In the relevant part of the contested judgment the Court of First Instance applied that case-law, which was originally laid down by the Court of Justice and developed by the Court of First Instance.

19 — See the judgment in Case T-182/99 *Caravelis* v *Parliament* [2001] ECR II-1313, paragraph 30, referring to Case T-283/97 *Thinus* v *Commission* [1999] ECR-SC I-A-69 and II-353, paragraph 42.

20 — See the judgments in Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, paragraphs 9 and 13, and Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529.

21 — See the judgments in Case T-182/99, cited in footnote 19, paragraph 31, and Case T-22/99 *Rose* v *Commission* [2000] ECR-SC I-A-27 and II-115, paragraph 55. See also the judgment in Case 62/75 *De Wind* v *Commission* [1976] ECR 1167, paragraph 17.

22 — See the judgment cited in footnote 19, paragraph 32, and the judgments cited there.

23 — See the judgments in Case T-130/95 *X* v *Commission* [1996] ECR-SC I-A-603 and II-1609, paragraph 67, and Case T-557/93 *Rasmussen* v *Commission* [1995] ECR-SC I-A-199 and II-603, paragraph 21. See also the recent judgments in Case T-22/99, cited in footnote 21, paragraph 56, and Case T-182/99, cited in footnote 19, paragraph 32.

24 — See the judgment in Case T-22/99, cited in footnote 21, paragraph 57.

25 — See the judgment in Case T-22/99, cited in footnote 21, paragraph 59.

48. In that connection, the Court of First Instance had to determine whether the evaluation of the merits of all the officials eligible for promotion, as required by the case-law relating to Article 45 of the Staff Regulations, could be carried out in view of the strict rules concerning the award of priority points in the promotions guide.

49. The Court of First Instance began by observing that the issue was the appraisal of the appellant's merits by comparison with those of other officials of other directorates-general, not by comparison with those of officials of the same directorate-general. [26] Accordingly the Court went on to consider whether 'the Commission carried out an appraisal of the [appellant's] merits by comparison with all the officials eligible for promotion' [27] and whether there were any manifest errors of assessment in that appraisal.

50. In that connection, the Court of First Instance examined in detail the appellant's argument that his non-promotion was attributable to the fact that he had not been awarded priority points because of his transfer to another post and strict application of the mobility rules in the promotions guide. [28]

51. The Court of First Instance took the position that strict application of the rules could have an adverse effect in so far as the total number of priority points depended on the number of officials eligible for promotion in the directorate-general in point, so that if the official concerned was assigned to a directorate with a different number of eligible officials, there might be no possibility of awarding priority points. [29] According to the promotions guide, an official has no acquired rights if, before transfer to another post, he is proposed for promotion without priority points. [30]

52. As a logical consequence, in addition to strict application of the promotions guide to cases of mobility, the Court of First Instance requires that potential negative consequences be taken into account. [31] This seems appropriate as the appellant has shown prima facie that strict application may lead to unfair results. In addition, the distinction between officials with 'acquired rights' [32] to priority points and other officials seems unfortunate in the light of Article 45(1) of the Staff Regulations.

53. The Court of First Instance goes on to find that the special nature of the appel-

26 — Paragraph 62 of the contested judgment.

27 — Paragraph 63 of the contested judgment.

28 — Paragraph 67 of the contested judgment.

29 — Paragraph 68 of the contested judgment.

30 — Paragraph 67 of the contested judgment. See, in particular, subparagraph A of the provision cited.

31 — Paragraph 69 of the contested judgment.

32 — 'Droits acquis' in the original French text.

lant's situation was taken into account by the select joint working party and the Promotions Committee. [33]

54. The contradictions of which the appellant complains evidently arise in this connection. He considers that his special situation could not have been taken into account in the final analysis because the appraisal of his merits was contradictory and manifestly erroneous.

55. The response to this is that the supposed contradictions do not exist. Merits can be assessed in this connection only relatively. Accordingly individual merits may be 'obvious', but may still be less than those of other officials and therefore not sufficient for inclusion on the list of the most deserving officials. In addition to the appellant's merits, the Commission could only be required to take account of his special situation in relation to the award of priority points, as he had been proposed for promotion in his previous directorate-general without priority points and had been assigned to another directorate-general with a different number of points. The appellant had no entitlement to an award of points and no entitlement to promotion. The Court of First Instance rightly refrained from substituting its own assessment concerning the award of priority points for that of the Commission.

33 — See the conclusion in paragraph 77 of the contested judgment.

56. Consequently there was no manifest error of assessment in that respect in the contested judgment. However, this does not mean that it is beyond reproach in that respect. Thus the reason for the non-award of priority points by the Promotions Committee was obviously that the appellant's mobility was not disadvantageous. It is regrettable that the logic of this opinion, in so far as it influenced the appointing authority's decision, was not discussed before the Court of First Instance.

57. Accordingly, the first point of the second part of the plea must be rejected.

58. With regard to the second point of the criticism of paragraph 77 of the contested judgment, it must be observed that consideration of the appellant's special situation discloses a connection with his merits only in so far as the award of priority points depends on the merits of the official concerned. However, as there is no manifest error of assessment in the appraisal of his merits, it was open to the Court of First Instance to find that due account was taken of his special situation. Consequently this second point must also be rejected.

59. In addition, it must be observed that a decision in the terms sought by the appellant would in the final analysis mean that

the Court of Justice would have had to review the substantive appraisal of the merits of eligible officials who had undergone initial selection.

60. For the reasons already given, the second part of the plea also appears to be unfounded.

Third part of the plea: comparison of the appellant's merits with those of other officials

Arguments

61. The appellant considers the reasoning of the judgment contradictory and mistaken in law also because the Court of First Instance found that he had not proved a manifest error of assessment in the comparison of his merits with those of other officials, in this case Mr G.

62. His first submission is that the finding in paragraph 85 of the judgment that he had been unable to point to any manifest error in the comparison of his merits with those of Mr G. is wrong. Secondly, he argues that paragraph 84 of the judgment is contradictory and therefore mistaken in law because, on the one hand, it finds that the appellant did not allege that his merits were superior to those of Mr G. but, on the other, it finds that he stated that in the previous promotion year he was ranked ahead of Mr G., and that his merits had increased since his transfer to Directorate-General XXIV.

63. Regarding the first argument, the Commission contends that paragraph 85 of the judgment, which finds that the appellant had not proved a manifest error of assessment in the Commission's rejoinder, is a factual finding or, at least, a factual assessment which cannot be appealed against. The second argument is also inadmissible because the first sentence of paragraph 84, which finds that the appellant did not allege that his merits were superior to those of Mr G., is a factual finding. According to the Commission, the second sentence, which observes that the appellant had merely alleged that in the previous promotion year he was ranked ahead of Mr G. and that his merits had increased since his transfer to the new directorate-general, is also a factual finding or factual assessment. Alternatively, the Commission regards this third part of the plea as unfounded.

Assessment

64. With regard to the admissibility of the first submission, reference may be made to the observations made above. [34] So far as the second is concerned, it must be observed that, here again, the appellant seeks to infer an error in law from an alleged contradiction. The Commission correctly points out that both the statements which are compared in relation to the alleged contradiction are factual findings. The Commission is also correct in observing that the question whether the appellant asserted anything or not is also a factual finding.

65. However, it does not follow that this part of the plea is inadmissible. It would be inadmissible only if it had confined itself to repeating the arguments previously submitted to the Court of First Instance. [35]

66. However, this possibility does not arise for the following reasons. In this case the Court of First Instance drew a legal conclusion from the two parts the appellant's argument. According to his own submissions, the appellant himself claimed that in the previous promotion year he was ranked ahead of another official and that his merits had increased since his transfer to Directorate-General XXIV. The Court concluded from this that the appellant had not asserted that his merits, in relation to his duties in Directorate-General XXIV, were greater than those of the other official in his previous directorate.

67. The result, namely that the appellant was unable to prove a manifest error of assessment, [36] is based on the above conclusion of the Court of First Instance. As the question of a manifest error of assessment is subject to review by the Court of Justice, I propose that the entire third part of the plea be deemed admissible.

68. It is, however, certainly unfounded. First, it must be observed that the ranking of an official in a particular promotion year is not a protected legal position in so far as it does not render it unnecessary to appraise the merits of the official in question in the following year. [37] In those circumstances, the respective ranking of the appellant and Mr G. in a past promotion year is not decisive. The appellant's claim that his merits increased since his transfer to Directorate-General XXIV is likewise irrelevant

34 — Point 41.

35 — See, *inter alia*, the order of 26 September 1994 in Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraph 13.

36 — Paragraph 85 of the contested judgment.

37 — See the particularly clear statement in the judgment in Case T-22/99, cited in footnote 21, paragraph 36, to the effect that the practice of automatically promoting officials (unless they show themselves to be unsuitable) who were included on the list of most deserving officials in the previous promotion year, but not promoted, is manifestly contrary to Article 45(1) of the Staff Regulations.

because the sole criterion is a comparison of the (present) merits of the appellant and those of the other eligible officials in the promotion year in point. Furthermore, the idea that mobility, in the form of a transfer to other duties, is a merit in itself must be dismissed as it has no foundation whatever.

69. Consequently, the Court of First Instance correctly found that the appellant had not proved a manifest error of assessment with regard to his arguments concerning Mr G. either.

70. For the foregoing reasons the third part of the plea must be rejected as unfounded.

Fourth part of the plea: the principles of equal treatment and fairness

Arguments

71. Under the fourth part of the plea, the appellant contends that the contested judgment is mistaken in law and contradictory in so far as it finds that the principles of equal treatment and fairness were not breached. In particular, he claims that, contrary to what is said in paragraph 79 of the contested judgment, his merits were not taken into account by the select joint working party or the Promotions Committee. If they had been, he would have been promoted in view of his merits, 'acknowledged' by the Commission. In paragraph 79 it was found that there was no discrimination or unfair decision, on the sole ground that the abovementioned working party and committee contemplated awarding additional priority points to the appellant. However, the Court of First Instance had previously observed, in paragraph 67, that the objective under the Staff Regulations was that mobility should not have a penalising effect. In the present case, however, that objective had not been attained because the appellant had been refused the promotion which he would have received had he not shown mobility by obtaining an assignment to a different post. The existing system gave rise to discrimination in that an official who moved from one post to another was in a worse position, without justification, than a less deserving official who had not moved.

72. The Commission considers that this part of the plea is likewise inadmissible. The consideration of the appellant's merits by the competent bodies was a factual finding. Furthermore, the appellant is challenging an implicit finding, in paragraph 82 of the judgment, that he would not have been automatically promoted even if he had not shown mobility by obtaining an assignment to a different post.

Assessment

73. This final part of the plea appears to be partly inadmissible and partly manifestly unfounded.

74. The question whether the appellant's merits were duly taken into account by the competent bodies is a factual issue which is not open to review by the Court of Justice. Consequently the appellant's submissions on this point are inadmissible.

75. With regard to the claim of discrimination, the appellant's arguments appear manifestly unfounded. Contrary to his contention, the personnel policy objective of ensuring that mobility does not have a penalising effect is not breached simply because the appellant in this particular case was not promoted in spite of having shown mobility.

76. The appellant is wrong in assuming that he would have been promoted in any case if he had not shown mobility. On the contrary, it would have been necessary to compare his merits in the promotion year in question with those of other officials eligible for promotion. It may have been found that the merits of other officials who had also shown mobility outweighed those of the appellant. At no time did he have a right to be promoted, even allowing for his previous placing on the list of eligible officials.

77. The letter from the Director-General of Directorate-General XX, mentioned in paragraph 16 of the judgment, must have given the appellant false hopes in that connection. If the official in the appellant's former directorate-general who ranked just after him in the previous promotion year was 'automatically' promoted in the year in question merely because the appellant was transferred to another directorate-general, as alleged in paragraph 8.4 of the appeal, it must be observed that such a practice would have been contrary to the Staff Regulations [38] and, in accordance with settled case-law, the appellant could not have derived any rights from it. [39]

78. The appellant is also mistaken in thinking that because of the present system an official is worse off, without justification, after an assignment to another post than one who has not been transferred and is less deserving. It cannot be concluded that the

38 — See footnote 35.

39 — See the judgments in Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraph 15; Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-30/90 *Zoder* v *Parliament* [1991] ECR II-207, paragraph 26, and Case T-22/99, cited in footnote 21, paragraph 39.

other official is less deserving in the current promotion year because he was ranked lower than the appellant in the previous year. On the contrary, the merits of both officials must be appraised in the year in point.

79. Accordingly the fourth part of the plea is manifestly unfounded in so far as it is admissible.

V — Costs

80. Under Article 69(2) of the Rules of Procedure, which, pursuant to Article 118, applies to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs. If the appeal is dismissed in its entirety, as I propose, on the ground that all the parts thereof are unfounded or inadmissible, the appellant must be ordered to pay the costs.

VI — Conclusion

81. For the reasons set out above, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs.