none the less that, in filling a post declared vacant, the appointing authority must proceed with the appointment of successful candidates in accordance with the competition results and cannot deviate from that rule except for weighty reasons, justifying its decision clearly and fully.

In Joined Cases 316/82 and 40/83

NELLY KOHLER, an official at the Court of Auditors of the European Communities, residing at 34 Rue J.-B. Fresez, Luxembourg, represented and assisted by Francis Herbert of the Brussels Bar, 116 Avenue de Broqueville, 1200 Brussels, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

applicant,

v

COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES, represented by Jean-Aimé Stoll, Secretary of the Court of Auditors, assisted by Alex Bonn of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Alex Bonn, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the appointing authority's decisions not to appoint the applicant to the post declared vacant, when she was the only successful candidate in the competition organized for the purpose,

THE COURT (Third Chamber),

composed of: Y. Galmot, President of Chamber, U. Everling and C. Kakouris, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

1. The applicant has been an official in the French-language translation section of the Court of Auditors since 1 December 1978. At present she is classified in Grade LA 6, Step 2, but at the material time she was in Grade LA 7, Step 3. She was promoted on 20 December 1982.

2. Following the posting on 7 May 1981 of Vacancy Notice No CC/LA/3/81 for the post of reviser and principal translator in Career Bracket LA 5/4 in the French section, notice of an internal competition, No CC/LA/12/81, was published on 1 September 1982, and the applicant successfully took part in that competition, being the only person entered on the list of suitable candidates.

3. At the same time selection procedures were in progress for the posts of reviser and principal translator in the Danish and Italian sections, for which the relevant vacancy and competition notices were identically worded. The successful candidates were, at the outcome of both those competitions, appointed by decision of the appointing authority on 21 April 1982.

4. On the same day, however, the applicant was summoned to see the President of the Court of Auditors in his capacity as the appointing authority, and he notified her orally of his decision not to appoint her to the post in the French section, in view of her lack of experience.

5. On 24 May 1982 the applicant referred to the appointing authority a complaint against the decision not to appoint her to the post in question in spite of her success in Competition No CC/LA/12/81. The complaint was rejected by a decision of the President dated 14 September 1982, as being inadmissible on the grounds that it was preceded neither by a request nor by the rejection of such request, or alternatively was unfounded.

6. In the meantime, on 21 July 1982, a memorandum to the staff of the Court of Auditors, amended by a corrective memorandum of 23 July 1982, was posted up. It stated that the vacancy which had been the subject of Vacancy Notice No CC/LA/3/81 was cancelled because the conditions laid down by the vacancy notice were not in keeping with the needs of the department.

7. In response to the rejection of her complaint, the applicant, in an application dated 7 December 1982 which was lodged at the Registry of the Court of Justice on 13 December 1982, brought the proceedings in Case 316/82.

8. On the same day, 13 December 1982, the applicant made a fresh complaint in the alternative, in case the Court might concur with the reasoning of the appointing authority, which regarded the first complaint, of 24 May

1982, as inadmissible on the ground that it had not been preceded by a request. If that were the case, the first complaint should be treated as a written request under Article 90 of the Staff Regulations, rejected as such by the appointing authority's decision, mentioned above, of 14 September 1982. The latter decision was challenged by the (second) complaint, of 13 December 1982.

9. By a decision of 2 February 1983, the appointing authority rejected the fresh complaint as having been brought out of time, arguing in particular that its decision of 14 September 1982 served merely to confirm its decision of 21 July 1982, which must be regarded as the decision adversely affecting the applicant. The period permitted by Article 90 (2) therefore started to run from 21 July 1982, the date on which all members of staff were informed by the posting of the memorandum on the notice board.

10. By an application of 14 March 1983, lodged at the Registry of the Court of Justice on 15 March 1983, the applicant brought the proceedings in Case 40/83 against the appointing authority's decision of 14 December 1982.

II — Written procedure

1. In Case 316/82 the written procedure followed the normal course. As regards Case 40/83 the applicant, on 17 May 1983, waived her right to lodge a reply.

2. It was decided by an order of the Court (Third Chamber) of 27 October 1983 that the two cases should be joined for the purposes of the oral procedure and judgment.

3. 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. However, it called upon the parties to reply to certain questions; the parties complied within the permitted period.

III — Conclusions of the parties

In Case 316/82, he applicant claims that the Court should:

1. Declare the application admissible;

2. Order the personal appearance of the successive appointing authorities in office during the recruitment procedure which was commenced by Vacancy Notice No CC/LA/3/81;

3. Declare the application well-founded and consequently annul the decision, notified to the applicant on 21 April 1982, not to appoint her to the post declared vacant by Vacancy Notice No CC/LA/3/81;

4. Order the defendant to take the necessary measures to comply with the judgment to be given;

5. Order the defendant to pay the costs.

In Case 40/83, the conclusions of the applicant are identical to those in Case 316/82, except the third claim whereby the applicant requests the Court to "Declare the application well-founded and accordingly annul the decision communicated to the applicant on 14 September 1982 not to apply the list of suitable candidates drawn up by the Selection Board for Competition No CC/LA/12/81".

The *Court of Auditors* contends that the Court should:

(a) *In Case 316/82*

Declare the action inadmissible;

Failing that, hold it to be unfounded;

Dismiss it;

Award costs in accordance with the applicable provisions of the Staff Regulations.

(b) *In Case 40/83*

Make such order as it thinks fit as to the admissibility of the action;

Hold the action to be unfounded;

Dismiss the action;

Award costs in accordance with the applicable provisions of the Staff Regulations.

In both cases the defendant takes the view that the preparatory inquiry sought by the applicant is pointless, since the facts of the case are not in doubt and are sufficiently clear in law.

IV — Submissions and arguments of the parties

1. Case 316/82

Admissibility

The *defendant* pleads the inadmissibility of the action on two counts; the absence of a negative decision with regard to the person concerned, and the absence of any act adversely affecting her.

The defendant argues in particular that, under Article 25 of the Staff Regulations, any decision relating to a specific individual which is taken under the regulations is to be communicated at once in writing, and any decision adversely affecting an official is required to state the grounds on which it is based. Consequently, the absence of any written notification addressed to Mrs Kohler means that no decision was taken in her regard. The interview on 21 April 1982 between the President of the Court of Auditors and the applicant cannot be construed as dispensing with the requirement that a decision adversely affecting an official must be in writing.

Furthermore, the appointing authority contends that it cannot be accused of omitting to take a decision with regard to the applicant, because there is no obligation under the regulations to take such a decision. The appointing authority is under no obligation to pursue the competition procedure or to fill the vacancy with a candidate whose name is on the list of suitable candidates, which the defendant alleges to have been demonstrated by the Court's judgment of 24 June 1969 in Case 26/68 (*Fux* v *Commission* [1969] ECR 145). In cancelling the original vacancy notice and abandoning the competition procedure, the appointing authority acted in the interests of the service without taking any decision with regard to the applicant or any other step which might be regarded by her as affecting her adversely.

Admittedly, the applicant could have induced the appointing authority to take a decision with regard to her — even a negative one — by submitting to it a request under Article 90 of the Staff Regulations. However, since she had failed to do so, the procedure laid down by the regulations was not, in the defendant's view, set in motion; hence the applicant could not postulate the existence of a written decision stating the grounds on which it was based, rejecting her request. The appointing authority was therefore fully entitled to reject her complaint as inadmissible.

Lastly the defendant contends that, whilst it is not essential under the regulations for a complaint to have been preceded by a request where the complaint is directed against an act, in

the form of a written decision, adversely affecting an official, such an act is lacking in the applicant's case.

The *applicant* claims that the defendant's objection on the grounds of inadmissibility is unfounded and rests on an erroneous conception of the administrative procedure laid down by the regulations.

She argues that the admissibility of a complaint is not subject to the prior submission of a request. A prior request, being designed solely to enable the person concerned to induce the appointing authority to take a decision, is indeed superfluous, since the official in question has had notice of an act on the part of the appointing authority adversely affecting him, and such an act is present in this case.

Indeed, under Article 90 (2) of the Staff Regulations, an official is enabled to lodge a complaint "against an act adversely affecting him". In the applicant's view, the condition involved is a substantive one and not one of form. The complaint was therefore admissible, as it is established that it was made, within the period permitted under the regulations, against "an act adversely affecting" her.

In this instance, the oral notification to the applicant at the interview of 21 April 1982 that she was not to be appointed to the post declared vacant amounts to an act adversely affecting her, since it is capable of directly affecting her legal position in a clear and unconditional way, within the meaning of the case-law of the Court in Cases 32/68 (judgment of 10 December 1969, *Grasselli* v *Commission* [1969] ECR 505) and 42/72 (judgment of 8 February 1973, *Goeth* v *Commission* [1973] ECR 181). The legal significance of the oral communication in question, as an act adversely affecting her, was confirmed subsequently by the staff memorandum of 21 July 1982 and by the letter rejecting the complaint.

The applicant further states that if she had not lodged the complaint she would still to this day have not received the communication in writing of the individual decision informing her that no action was to be taken to give effect to the results of Competition No CC/LA/12/81. The defendant cannot therefore plead in its favour, by way of denying that there was any act which prejudiced the applicant, the fact of its own non-compliance with a mandatory provision of the Staff Regulations (Article 25), by analogy with the principle *nemo auditur suam propriam turpitudinem allegans.*

Furthermore, the defendant's allegation that there is no act adversely affecting an official in the absence of any written decision is viewed by the applicant as causing the existence of an adverse act to be assimilated to, not to say fused with, the validity thereof, which latter, in the case of an individual decision, is subject to compliance with Article 25 of the Staff Regulations.

The reasoning expounded by the defendant would lead to an absurd result inasmuch as the very fact of the objections capable of causing the contested act to be annulled would automatically make any legal action based on those objections inadmissible for lack of any decision.

In reply to that last argument of the applicant, the defendant contends in its *rejoinder* that the probelm lies in the classification of the act adversely affecting an official. If that act were constituted by an express individual decision it would have to be in written form. If it consisted in an implied decision it would have to be preceded by a request. Alternatively, an act adversely

affecting an official might arise from an omission on the part of the authority, which might have "failed to adopt a measure prescribed by the Staff Regulations" (Article 90 (2) of the Staff Regulations). But the applicant refused to submit her request in that latter connection, precisely because the appointing authority is not required by the Staff Regulations to proceed with an appointment after the termination of a competition procedure. The drawing-up of a list of suitable candidates does not oblige the appointing authority to proceed with an appointment to the declared vacancy. The authority might have reasons of internal organization dictating the postponement of any appointment, and even the halting of the entire procedure. The decision relating thereto would be a general decision and could not be regarded as an individual decision, even if it had repercussions on the candidate or candidates interested in an appointment.

Substance

Infringement of an essential procedural requirement

The *applicant* argues that the defendant's conduct towards her infringes Article 25 of the Staff Regulations inasmuch as she did not at any time receive written notification of the decision which was intimated to her orally at the interview on 21 April 1982. Even the reasons for that decision, subsequently communicated to all members of staff, were not addressed to her by individual decision. In that connection she refers to the Court's judgment of 29 October 1981 in Case 125/80 *(Arning* v *Commission* [1981] ECR 2539), in which the Court stated that the communication in writing of an individual decision could not be replaced either by mere publication or by any interview between the applicant and his superiors. The present instance differs from that case inasmuch as the infringement of Article 25 of the Staff Regulations must entail the annulment of the contested decision, since the communication at issue here was not out of time but absent altogether. Moreover, in the applicant's opinion, the defendant's reference to the memorandum of 21 July 1982 confirms that the objection is well founded since, as the memorandum in question was addressed to all members of staff, it could not be an individual, reasoned communication regarding the official concerned.

The defence of the *Court of Auditors* to the above argument is linked to its submissions on the admissibility of the action and basically consists in asserting that no decision prejudicial to the applicant was taken, nor did the applicant refer any request whatever to the appointing authority, so that there was no decision rejecting any such request. Consequently, there was no decision adversely affecting Mrs Kohler and hence no occasion to plead for its annulment on the grounds of infringement of Article 25 of the Staff Regulations.

Breach of the principle prohibiting the appointing authority from overturning the decision of the selection board

The *applicant* maintains that the defendant is in breach of the principle upheld by the case-law of the Court, according to which the appointing authority may not reverse the selection board's decisions as regards the fulfilment of the conditions set out in the vacancy notice. By admitting the applicant to the competition the selection board had already come to a decision on her level of experience, which was

consistent with the requirements stipulated by Vacancy Notice No CC/LA/12/81, of at least six years' experience in the field of translation or revision. The appointing authority was thereby precluded from justifying its subsequent refusal to appoint the candidate merely in terms of insufficient experience, and yet that was what it did during the interview on 21 April 1982.

The *defendant* argues in reply to that submission that it in no way intended to ignore the decisions of the selection board, which remain valid. The defendant merely reconsidered its internal organization, and found that the qualifications required by the vacancy notice were inadequate, and ill-suited to the needs of the department. Largely on account of the great difference between the Italian and Danish sections on the one hand and the French section on the other, the defendant maintains that it was obliged to review the conditions for filling the new post and to advertise it as the post of head of section and reviser, calling for experience of at least 10 years.

In her *reply* the applicant points out the alleged inconsistency of the reasons cited to her, which are no more than attempted justifications made *ex post facto* and adapted to match the arguments put forward by the applicant. In particular, whereas the refusal to appoint the applicant was justified at the interview on 21 April 1982 by reference to the inadequacy of her experience and whereas the memorandum of 21 July 1982 uses the wording "in the light of certain results of the procedure for filling the said post" — words which, incidentally, point clearly to a misuse of powers — the decision of 14 September 1982 used the phrase "the conditions laid down by the vacancy notice were not in keeping with the needs of the department". Furthermore, the decision of 2 February 1983, subsequent to the commencement of legal proceedings, referred for the first time to the urgent need for the French section to appoint a head of section and reviser. The applicant takes the view that there is a second contradiction, inasmuch as the decision of 14 September 1982 recites that it was "in the light of the results of the appointment procedure" that the conditions laid down were revealed as inadequate in terms of the needs of the department, whilst the decision of 2 February 1983 states that it was "in the course of the appointment procedure" that the urgent priority became apparent.

If the reasons cited are truly consistent, the applicant inquires why so much time had to elapse between the various stages in the communication of the decision, namely 21 April 1982, 14 September 1982 and 2 February 1983.

In any case, the defendant's conduct was illegal since it wished either to overturn the conditions set out in the vacancy notice or else to modify the post to be filled, which similarly amounts to altering the vacancy notice without notifying the applicant, as required under Article 25 of the Staff Regulations.

The *defendant* observes that there was no inconsistency in the reasons given for its decisions, because the interests of the service which alone dictated the decision not to pursue the competition procedure were unchanged. It is therefore not a

matter of giving a succession of different reasons but, at most, of elaborating and explaining the reasons given to Mrs Kohler as far back as the interview of 21 April 1982, and succinctly set out in the staff memorandum of 21 July 1982. Thus the supposed difference between the "earlier reasons" and those which followed is nonexistent. The inadequacy of the qualifications required by the vacancy notice, amongst which the length of experience was vitally important to the appointing authority, was precisely what had led to the cancellation of the vacancy notice and the drafting of a new one for a higher post. In the circumstances, the new vacancy notice, published on 25 January 1983 under the reference CC/LA/2/83 and calling for at least 10 years' experience, was dictated by the same interests of the service which had led the appointing authority to abandon the previous procedure for filling the post and the previous vacancy notice.

Failure to comply with the terms of the vacancy notice

Inasmuch as the appointing authority wished to depart from the conditions regarding experience set out in the vacancy notice, the *applicant* asserts that there was an infringement of the duty to remain within the framework of procedures and qualifications — a duty which the appointing authority had imposed on itself by virtue of the vacancy notice. According to the Court (judgments of 30 October 1974, Case 188/73 *Grassi* v *Council* [1974] ECR 1099, and of 17 December 1981, Case 151/80 *De Hoe* v *Commission* [1981] ECR 3161), the basic function of a vacancy notice is to give those interested the most accurate information possible about the conditions of eligibility for the post in question, to enable them to judge properly whether they are in a position to apply for it.

The *defendant* takes the view that this submission should also be dismissed as lacking any factual basis. Once the appointing authority had decided, for reasons connected with its internal organization, to abandon the recruitment procedure which was in progress, in order to resume it *ab initio* on different terms, the vacancy notice marking the commencement of the recruitment procedure subsequently abandoned was obsolete and invalid.

Breach of the principle of equality

The *applicant* adduces the argument of discrimination which contravenes the principle of equality embodied in Article 5 (3) of the Staff Regulations, in the form of the refusal to appoint her, when, by contrast, the successful candidates in the two other, parallel competitions for the Danish and Italian sections were appointed to the posts declared vacant. The applicant claims in this connection that Vacancy Notice No CC/LA/3/81 formed part of a wider recruitment procedure. The comprehensive nature of that procedure was demonstrated by the identical wording of the vacancy and competition notices, by the identical membership of the selection board and by the fact that the appointing authority's decisions at every stage were taken on the same date. This confirms that, as far as the appointing authority was concerned, recruitment needs were, throughout the recruitment procedure, identical in the three translation sections involved.

The applicant further adds that the infringement of Article 5 (3) is all the more self-evident inasmuch as, by the date on which the contested decision was notified to her, she had for more than a year been performing duties which matched the description of the post of reviser and principal translator.

In the *defendant*'s opinion, the different treatment of the sections is explained by a different method of organizing the French section, which the administration proposed to improve by annulling a recruitment procedure which did not sufficiently take account of the position. The defendant contends that the applicant even admitted the difference in structure between the sections concerned, by writing that the French section differed from the Danish and Italian sections in having neither a reviser nor a head of section available to it.

Moreover, the similarity of the procedures followed is unimportant. The posts were not connected, the defendant contends; they were declared vacant in separate notices and were the subject of separate competitions. The appointing authority is not required to fill those vacancies at all, let alone do so simultaneously. On the contrary, it remained at liberty to decide on the action to be taken on each competition, in the light of the requirements and interests of the department and its decision on any one post cannot be dependent on its decision with regard to the others.

The *applicant* dismisses the justification put forward by the defendant, emphasizing that it is making its appearance for the first time in order to counter her arguments.

Misuse of powers

The *applicant* states that the contested decision is vitiated by a misuse of powers, inasmuch as the appointing authority, when taking the decision, was not guided by considerations relating to the interests of the service, as Article 7 of the Staff Regulations demands that it should be, but by considerations of the respective personalities of the applicant and her colleague, Mr B, a translator in Grade LA 6, Step 1, belonging to the same French translation department, who was also a candidate in Internal Competition No CC/LA/12/81 but who was not entered on the list of suitable candidates.

By adopting the disputed measure, therefore, the appointing authority pursued a goal other than the legal one.

In support of that submission the applicant argues that the defendant has not established the circumstances justifying its change of mind on 21 April 1982, when it abandoned the procedure which it had followed until then. She claims that the reference in the staff memorandum on 21 July 1982 to the results of the procedure for filling the post amounts to an express confirmation of the objective of the contested decision, namely the elimination of her candidature.

The factors which, in the applicant's view, indisputably played a part in the appointing authority's change of mind is that her colleague, Mr B, stood in high favour with the private office of the French Member of the Court of Auditors, who assumed the Presidency on 1 October 1981 and thereby became the appointing authority. That was the reason for which the appointing authority changed its mind. The applicant therefore asserts that is was for the purpose of preserving "his candidate's" chances of promotion that the President of the Court of Auditors, acting as appointing authority, adopted the contested decision. The interests of the

service were pleaded only as a last resort, when it became clear, following the complaint from the applicant, that she was not deluded or unaware that the decision of the selection board regarding her experience were unchallengeable and could not be called in question by the appointing authority.

It is in that context that an appraisal must be made of the appointing authority's organization of a further competition, stipulating conditions which are clearly designed to exclude the applicant whilst admitting her colleague. The preference for Mr B was further borne out in so far as, from 21 April 1983 onwards, he had enjoyed *de facto* recognition as reviser and head of the French section, taking part in revisers' meetings and even sitting as a member of a selection board. The applicant adduces in evidence, annexed to her reply, a memorandum dated 21 February 1983 from the head of the language department of the Court of Auditors, assigning the duties in question to Mr B.

The *defendant* strongly denies the admissibility and basis of that submission and protests against the charges brought against it by the applicant. It contends that, in taking its decision, it was genuinely guided by the interests of the service aimed at a better organization of the administration, appraisal of which is a matter for the appointing authority alone and not for an official protecting her own interests.

The supposed preference on the part of the appointing authority for Mr B is, moreover, belied by the fact that the fresh vacancy notice for the post to be filled calls for 10 years' experience, which is a condition which Mr B cannot satisfy any more than can Mrs Kohler.

On the last point the applicant, in her *reply,* claims that the above factor is not relevant since what it shows is, at the most, that the appointing authority ceased overtly favouring its preferred candidate after the commencement of proceedings, but such was not its aim at the outset. She further remarks that the defendant does not dispute her description of Mr B's duties.

None the less, according to the defendant's explanations in the *rejoinder,* the memorandum referred to by the applicant in her reply constitutes an internal organizational measure, adopted pending the outcome of the competition for filling the post of head of the French section, Mr B being the official with the greatest seniority in his grade.

Preparatory inquiry

The *applicant* requests that, should the Court of Justice take the view that the arguments for annulment set out above are not sufficiently substantiated, it should summon the successive appointing authorities who acted during the recruitment procedure initiated by Vacancy Notice No CC/LA/3/81, namely William Murphy and Pierre Lelong, to appear in person before it. The applicant asks that Mr Murphy should be questioned on the conditions set forth in that vacancy notice and on their compatibility with the interests of the service, and that Mr Lelong should be questioned on the terms of, and reasons given for, the decision notified to the applicant during the interview of 21 April 1982.

The *defendant* claims that there are no grounds for ordering the proposed preparatory inquiry, since the facts of the case are not in dispute.

2. Case 40/83

The *applicant* brings her action against the rejection, by the appointing auth-

ority's decision of 14 September 1982, of her request of 24 May 1982.

Admissibility

The *defendant* raises a question regarding the admissibility of the application, but leaves the matter in the last resort to the Court; it briefly recalls its view already expressed in the decision of 2 February 1983 rejecting the applicant's complaint, namely that the disputed decision which caused the period for lodging a complaint to start to run was the decision of 21 July 1982, not that of 14 September 1982, which merely served to confirm the earlier decision of which the applicant was fully informed on the same day, 21 July 1982.

In the *applicant*'s opinion, the measure under challenge is the decision of 14 September 1982 rejecting her request of 24 May 1982, not the staff memorandum of 21 July 1982, which does not amount to an individual measure. Thus, the commencement of the period for lodging a complaint was 14 September 1982, the date on which the reasoned individual decision on her case was communicated. In that connection she recalls that the Court, in its judgment in the *Arning* case (cited above), emphasized that the communication in writing of an individual decision cannot be replaced either by mere publication or by any interview with the applicant's superiors. If the decision of 14 September 1982 was "a confirmatory measure", as the defendant contends, it could serve only to confirm an earlier individual decision of 21 July 1982, which the defendant denies. In this instance, the fact — pointed out by the defendant institution — that the staff memorandum of 21 July 1982 was circulated to all members of staff at the Court of Auditors confirms that it cannot be an individual decision equivalent to a reply to the request of 24 May 1982.

Substance

Infringement of essential procedural requirements

(a) Incorrect, or at least inadequate, statement of reasons

The *applicant* points out the contradiction between the reasons supplied by the appointing authority, variously during the interview of 21 April 1982, in the decision of 14 September 1982 and in the letter of 2 February 1983. Employing a line of argument already summarized above, she claims, in essence, that the defendant altered the successive statements of reasons provided to explain its conduct, and that that attitude raises doubts as to the correctness of the reasons given in the decision of 14 September 1982.

Even if it were true, as the defendant asserts, that the reasons given were actually consistent, the applicant maintains that the reasons stated by the disputed decision do not satisfy the requirements of Article 25 of the Staff Regulations, because the general wording employed in the decision of 14 September 1982 did not give the applicant "an opportunity of commenting on the factors which in the final analysis seem decisive", as is demanded by the case-law of the Court (judgment of 30 June 1971, Case 19/70 *Almini* v *Commission* [1971] ECR 623).

The *defendant* repeats its view expressed above in Case 316/82, that there has been no change in the reasons stated, because the interests of the service which alone dictated the decision not to pursue the competition procedure were un-

changed. It is, indeed, a matter of elaborating and explaining the reasons already intimated to Mrs Kohler at the interview of 21 April 1982 with the appointing authority.

(b) Communication made out of time

The *applicant* claims that, whatever the true reasons for the contested decision, they were communicated out of time, that is, six months after the interview of 21 April 1982. The defendant, on the other hand, contends that that was the time at which the conditions in the vacancy notice began to reveal themselves as unsuitable, and that it was nearly ten months after the interview that the overriding urgency of the need to appoint a head of section and reviser in the French section became apparent.

The *defendant* considers that the explanations of the approach adopted, summarized above, are equally valid to demonstrate that there can be no question of its having communicated the reasons out of time. Furthermore, the discrepancy in dates pointed out by the applicant is explained by the course of events and, in particular, by the appointing authority's concern to study the arguments put forward by the applicant and to ascertain whether, and if so to what extent, the path followed by the administration might have proved to be wrong.

Discrimination

The *applicant* adduces the argument referred to earlier in Case 316/82, that there was discrimination, inasmuch as the decision not to appoint her to the post declared vacant in the French section, whereas the successful candidates from the two other identical competitions for the Italian and Danish sections were duly appointed, amounts to discriminatory treatment of her by comparison with her Italian and Danish colleagues who are mentioned by name.

Misuse of power

In making her submission, the applicant employs the same arguments as those set forth in Case 316/82, namely that the disputed decision was designed to eliminate her as a candidate in favour of her colleague, Mr B.

The *defendant*, too, refers to its arguments set forth in Case 316/82, whereby it stated that the decision at issue was not taken against the applicant and was not aimed at her as a candidate.

Preparatory inquiries

As in Case 316/82, the *applicant* proposes that the successive appointing authorities, namely William Murphy and Pierre Lelong, be examined in person. The applicant asks that Mr Murphy should give evidence on the conditions set forth in Vacancy Notice No CC/LA/3/81 and on their compatibility with the interests of the service, and that Mr Lelong should give evidence on the wording and reasoning of the decision notified to the applicant by the letter of 14 September 1982.

The *defendant* is of the opinion that it is pointless to seek the preparatory inquiry requested.

V — Oral procedure

At the sitting on 17 November 1983 the applicant, represented by Francis Herbert, and the Court of Auditors, represented by its Secretary General, Jean-Aimé Stoll, and by its Agent, Alex Bonn, presented oral argument.

The Advocate General delivered her opinion at the sitting on 15 December 1983.

Decision

1 By two separate applications, lodged at the Court Registry on 13 December 1982 and 15 March 1983, Nelly Kohler, an official at the Court of Auditors at present in Grade LA 6, Step 2, brought actions the first of which sought the annulment of the decision of the appointing authority, which was orally communicated to the applicant on 21 April 1982, not to appoint her to the post of reviser and principal translator in the French translation section of the Court of Auditors, declared vacant by Vacancy Notice No CC/LA/3/81, and the second of which sought the annulment of the appointing authority's decision of 14 September 1982, refusing to apply the list of suitable candidates drawn up by the Selection Board in Competition No CC/LA/12/81 relating to that vacancy. The second action is brought in the alternative, in case the Court should declare the first action to be inadmissible.

2 Simultaneously with the procedure for that competition, two further procedures were commenced for the posts of "reviser/principal translator" in the Danish and Italian sections. The vacancy and competition notices for all three were worded in identical terms. The successful candidates in the competitions for the Danish and Italian sections were appointed by decision of the appointing authority on 21 April 1982. On the same day, however, at an interview with the President of the Court of Auditors, the applicant was refused appointment to the post of "reviser/principal translator" in the French section, which was the subject of Vacancy Notice No CC/LA/3/81 and of Internal Competition No CC/LA/12/81, in which she had successfully taken part, becoming the only person to be entered on the list of suitable candidates.

3 Her complaint of 24 May 1982 under Article 90 (2) of the Staff Regulations was rejected by a decision dated 14 September 1982 of the President of the Court of Auditors, acting as the appointing authority. The complaint was held to be inadmissible on the grounds that it was not preceded either by a request or by a rejection thereof, and was in any case unfounded.

4 In the meantime, by a staff memorandum of 21 July 1982, corrected on 23 July 1982, the vacancy referred to by Notice No CC/LA/3/81 was cancelled by the administration, on the grounds that "it has become apparent, especially in the light of certain results of the procedure for filling the said post, that the conditions laid down by the vacancy notice were not in keeping with the needs of the department".

5 Following the rejection on 14 September 1982 of her complaint, the applicant brought her first action (Case 316/82) on 13 December 1982.

6 On the same date, 13 December 1982, the applicant lodged a second, alternative complaint in case the Court of Justice should approve the reasoning of the appointing authority and regard the earlier complaint of 24 May 1982 as inadmissible on the ground that it had not been preceded by a request within the meaning of Article 90 (1) of the Staff Regulations. In that eventuality, the first complaint was to be treated as such a request and deemed to have been rejected by the above-mentioned decision of the appointing authority of 14 September 1982. It was against that decision that the second complaint was directed.

7 By decision of 2 February 1983 the appointing authority rejected that second complaint as being brought out of time, arguing *inter alia* that the decision of 14 September 1982 served merely as a confirmation of its decision of 21 July 1982 contained in the staff memorandum, which must be regarded as the decision adversely affecting the applicant and as causing the period prescribed by Article 90 (2) of the Staff Regulations to start to run. That period consequently lapsed on 21 October 1982.

A — Case 316/82

Admissibility

8 In its defence the Court of Auditors claims that the action is inadmissible on the ground that it is directed at an oral decision of 21 April 1982, which never existed since it was never communicated in writing as required by Article 25 of the Staff Regulations.

9 The possibility that a legally actionable decision may have oral form is not in principle precluded either by a provision of general scope or by any special provisions in the Staff Regulations.

10 In particular, Article 90 (2) of the Staff Regulations, which provides that officials "may submit to the appointing authority a complaint against an act . . .", does not prevent such an act from being expressed orally.

11 Furthermore, the possibility that an act may have oral form is not precluded by Article 25 of the Staff Regulations, which provides that: "Any decision relating to a specific individual . . . shall at once be communicated in writing to the official concerned." The communication is, indeed, an act subsequent to the decision (judgment of 29 October 1981, Case 125/80 *Arning* [1981] ECR 2539), that decision having been already adopted and having prior existence. The defendant is therefore wrong in interpreting Article 25 of the Staff Regulations as meaning that it calls for writing as a prerequisite for the existence of the act to be communicated.

12 It is common ground that, at the interview on 21 April 1982, the appointing authority expressly intimated its intention not to pursue the procedure by appointing the applicant to the post declared vacant. That oral decision constitutes an act for the purposes of Article 90 of the Staff Regulations.

13 It follows that the defendant's argument as to the absence of any written form for the disputed act is unfounded quite apart from the fact that to accept the arguments of the Court of Auditors would be tantamount to allowing it to take advantage of an infringement, which it has itself committed, of Article 25 of the Staff Regulations so as to deprive the applicant of her right of action.

14 The Court of Auditors further contends that, in any event, there is no act adversely affecting the applicant because no individual decision detrimental to her was ever taken, since the halting of the procedure for filling the vacancy constituted a general measure, pursued in the interests of the service.

15 That argument of the defendant must be dismissed. A decision not to give effect to a completed selection procedure, even in cases in which it is clear that the decision was taken on general grounds connected with the organization of the service, cannot but be aimed, directly and individually, at the only successful candidate in a competition which has progressed normally until that moment. The need which the appointing authority felt to inform the applicant at the interview on 21 April 1982 moreover shows clearly that even the appointing authority regarded Mrs Kohler as the object of its decision.

16 It follows that the objection that the application in Case 316/82 is inadmissible must be dismissed.

Substance

17 The applicant bases her action on four arguments, namely the infringement of essential procedural requirements laid down by Article 25 of the Staff Regulations; infringement of the provisions of the Staff Regulations and breach of general legal principles, on the grounds that the appointing authority overturned the selection board's decision and disregarded the wording of the vacancy notice; discrimination in comparison with the successful candidates in two other parallel competitions, who were appointed on 21 April 1981; and, lastly, misuse of powers inasmuch as the decision not to appoint her sought to attain a goal other than the legal one, namely to give preference to another candidate who was unsuccessful in the competition.

18 The Court takes the view that, in the first instance, it should consider the argument concerning the inadequacy of the statement of the reasons on which the contested decision was based.

Statement of reasons

19 In this submission, the applicant basically asserts that in spite of the various statements of reasons to which the Court of Auditors has pointed, one after the other, none may be considered to afford a valid basis for the disputed decision.

20 Indeed, she states that, at the interview on 21 April 1982, the reason given by the appointing authority was the applicant's lack of experience, whereas in the staff memorandum of 21 July 1982 and in the decision of 14 September 1982 rejecting her complaint — and by the authority's own admission "in the light of certain results of the procedure for filling the post" — reference is made to the failure of the conditions in the vacancy notice to reflect the needs of the service. Moreover, it was not until the Court hearing that the appointing authority adduced new reasons, based on the need to give priority to filling the vacancy for a head of the French section. The successive statements of reasons further prove, she claims, that the appointing authority aimed to eliminate the applicant as candidate in favour of the candidate preferred by the appointing authority, who had, however, been unsuccessful in the competition.

21 On the other hand, the Court of Auditors contends that the reasoning based on the needs of the service alone is unchanged, and that any variation is due to an elaboration and explanation of the reasons already stated to the applicant at the interview on 21 April 1982. It argues in particular that the appointing authority is not compelled to give effect to a selection procedure by appointing the successful candidates.

22 It is to be noted that whilst, as the Court has previously held, the Staff Regulations do not place the appointing authority under an obligation to pursue a recruitment procedure once it has begun, by filling the vacancy concerned, the rule is none the less that, in filling a post declared vacant, the appointing authority must proceed with the appointment of successful candidates in accordance with the competition results and cannot deviate from that rule except for weighty reasons, justifying its decision clearly and fully.

23 In the present instance there was a special need for such justification, because the Court of Auditors had, simultaneously with the competition at issue, opened two further competitions for filling the posts of "reviser/principal translator" in the Danish and Italian sections, and had had no difficulty, on 21 April 1982, in appointing the successful candidates in those competitions. It was thus appropriate, in order to preclude any accusation of discrimination, to explain why the same step could not have been taken in

regard to Mrs Kohler, as the successful candidate in Competition No CC/LA/12/81.

24 In that regard, the Court observes that the defendant, at the various stages in the dispute, in the administrative phase and later before the Court, adduced reasons which are hard to reconcile with one another and which, moreover, are not borne out by the documents on the file.

25 Although the reason cited at the interview of 21 April 1982 was the applicant's lack of experience, it should be pointed out that the selection board, which had entered Mrs Kohler on its list of suitable candidates for performing the tasks of reviser and principal translator in the French translation section, had just made an assessment to the contrary, which the administration was not entitled to challenge.

26 Whilst the staff memorandum of 21 July 1982 and the decision dated 14 September 1982 rejecting the applicant's complaint both record the inappropriate nature, in terms of the needs of the service, of the conditions laid down by the vacancy notice, it is apparent from the documents on the file that their inappropriate nature was cited "in the light of certain results" of the competition. The inference must be drawn that the administration, in using that formula, still intended to contest Mrs Kohler's ability to perform the duties for which she had recently competed and, acting *ultra vires*, to challenge the selection board's appraisal of her merits.

27 Finally, although the defendant, in the course of the oral procedure before the Court, referred to the need to give priority to filling the vacancy for a head of the French translation section, it was unable to explain why the pursuit of that objective demanded the interruption of the procedure already in progress for filling the post of reviser and principal translator in the same section, for which the applicant was a candidate.

28 It is apparent from these findings that none of the successive statements of reasons put forward by the defendant is capable of justifying in law the decision not to pursue the procedure for filling the post of reviser and principal translator in the French translation section of the Court of Auditors

by appointing the successful candidate in Competition No CC/LA/12/81. The contested decision should therefore be annulled.

29 In those circumstances there is no need to consider the other arguments put forward by the applicant.

30 Pursuant to the first paragraph of Article 176 of the EEC Treaty, it is for the administration to take the necessary measures to comply with the judgment of the Court.

B — Case 40/83

Admissibility

31 The action in this case, brought in the alternative to Case 316/82, is directed against the decision of 14 September 1982 rejecting the applicant's complaint.

32 As has already been demonstrated in the examination of Case 316/82, the decision adversely affecting the applicant is the oral decision communicated to her at the interview on 21 April 1982.

33 Consequently, the decision of 14 September 1982 can be no more than a confirmation of the earlier oral decision.

34 However, being a confirmatory act it cannot be the subject of proceedings before the Court.

35 It follows that the application in Case 40/83 must be dismissed as inadmissible.

Costs

36 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions, it must be ordered to pay the costs, including those relating to the action in Case 40/83, brought in the alternative as a result of the erroneous arguments of the Court of Auditors in its reply to the applicant's first complaint.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the appointing authority of the Court of Auditors of 21 April 1982 not to pursue the procedure for filling the post declared vacant by Vacancy Notice No CC/LA/3/81 by appointing the applicant thereto;**

2. **Dismisses the application in Case 40/83 as inadmissible;**

3. **Orders the Court of Auditors to pay the costs.**

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 9 February 1984.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 15 DECEMBER 1983 [1]

Mr President,
Members of the Court,

The Court has before it two actions brought by Nelly Kohler against the Court of Auditors of the European Communities, seeking the annulment of a decision adopted by that institution.

The applicant has been employed there as an official in the French language translation section since 1 December

1 — Translated from the French.