REPORT FOR THE HEARING
in Case C-68/91 P *

I — Facts and Procedure before the Court of First Instance

It appears from the judgment of the Court of First Instance of 13 December 1990 in Case T-20/89 *Moritz* v *Commission* [1990] ECR II-769 that:

'1 Until January 1990, when he entered retirement, the applicant was an official in Grade A 3 at the Commission of the European Communities where he occupied a post of head of division in Directorate-General XVIII (Credit and Investments). The applicant applied for the Grade A 2 post of Director of Investments and Loans in Directorate-General XVIII (Notice of Vacancy COM/24/86).

2 In Notice 17/86 of 22 April 1986 the Consultative Committee on Appointments to Grades A 2 and A 3 at the Commission (hereinafter "the Consultative Committee"), before which lay applications from the applicant and another Commission official, decided that neither of the candidates possessed all the required qualifications.

3 At its meeting on 30 April 1986 the defendant, having regard to Article 29(1)(a) of the Staff Regulations of Officials of the European Communities (hereinafter "the Staff Regulations"), which concerns the filling of vacant posts by promotion or transfer within the institution, examined the two applications together and decided not to fill the vacant post.

4 The defendant then decided to have recourse to Article 29(2) of the Staff Regulations, according to which a procedure other than that provided for in Article 29(1) may be adopted by the appointing authority for the recruitment of Grade A 1 and A 2 officials.

5 At its meeting held on 27 June 1986 the Consultative Committee decided that the application submitted pursuant to Article 29(2) of the Staff Regulations by Mr Dieter Engel, who at that time was not an official of the European Communities, had to be considered. On 2 July 1986, the defendant appointed Mr Engel, who at that time possessed Canadian nationality, to the post in question after a comparative examination of the merits of the three applicants. On 14 July 1986, Mr Matutes, the member of the Commission responsible for appointments within DG XVIII, informed the applicant of that decision.

6 By letter of 13 October 1986 the applicant lodged a complaint seeking the annulment of

* Language of the case: German.

the decision appointing Mr Engel to the post in question. That complaint was dismissed by a decision of the defendant of 7 May 1987.'

In those circumstances, *Mr Moritz*, on 12 August 1987, brought an action before the Court of Justice, which was remitted to the Court of First Instance by order of 15 November 1989 pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, by which he claimed that the Court should:

immediately order certain documents to be lodged;

declare the application admissible;

declare it well founded;

annul the decision on the complaint;

annul Mr Engel's appointment as irregular;

order the defendant to pay the costs;

order the defendant to pay compensation for both material and non-material damage.

The *Commission* claimed that the Court should:

dismiss the application;

order the applicant to pay the costs.

The Court of First Instance started by rejecting as inadmissible the applicant's claim that the Commission's decision of 2 July 1986 appointing Mr Engel to the post of Head of Division of Directorate-General XVIII (Credit and Investments) — hereinafter 'the contested decision' — and the Commission decision of 7 May 1987 rejecting Mr Moritz's complaint against that decision should be declared void (paragraphs 13 to 17 of the judgment).

The Court of First Instance held as follows:

'15 It is indeed established case-law that in order for an official or a former official to be able to bring an action under Articles 90 and 91 of the Staff Regulations for the annulment of a decision of the appointing authority making an appointment, the official or former official concerned must have a personal interest in the annulment of the contested decision (see the judgment of the Court in Joined Cases 81/74 to 88/74 *Marenco and Others* v *Commission* [1975] ECR 1247, in Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323 and in Case 126/87 *Del Plato* v *Commission* [1989] ECR 643).

16 Since the applicant acknowledged at the hearing that he recently retired after reaching the age-limit of 65 years, which also emerges from his personal file forwarded to the

Court in accordance with the last paragraph of Article 26 of the Staff Regulations, he may no longer effectively lay claim to the post in question because he no longer belongs to the institution within which the post filled by the contested decision was vacant. It follows that he no longer has any legitimate interest in having the appointment of the candidate appointed to that post annulled.'

The Court of First Instance went on to reject the applicant's claims that the Commission should make good the material damage which he had allegedly sustained as a result of the contested decision.

As regards the service-related fault which in the applicant's view resulted from an error of assessment on the part of the Consultative Committee or from an abuse of power on the part of the Commission, the Court of First Instance found (paragraphs 20 to 24) that Mr Moritz argued that:

the vacancy notice matched his qualifications and field of work 'perfectly' and it was 'incomprehensible' that the Consultative Committee could have come to the conclusion that he did not possess 'all the required qualifications';

his qualifications were much higher than Mr Engel's; Mr Engel's appointment was the result either of an error of assessment on the part of the Consultative Committee or of a misuse of power on the part of the Commission; the error of assessment arose from the absence of certain periodic reports from the applicant's personal file and from the Consultative Committee's failure to hear the applicant; the misuse of power stemmed from the fact that Mr Engel had been deliberately favoured in the course of the procedure;

the Commission should be ordered to produce several documents, in particular Mr Engel's candidature and personal file in order to establish what the Director-General of Directorate-General XVIII had said about the applicant before the Consultative Committee in order to ascertain the reasons for that committee's opinion and for the Commission's decision, and to establish whether or not Mr Engel had been favoured; in his view, the refusal to disclose those documents to him constituted a breach of the principle of the transparency of administrative decisions and the duties of loyalty and good faith owed by the Commission;

and that the Commission argued that:

the appointing authority had a wide discretion when making appointments and its decision could not be called in question save in the case of manifest error. The applicant was simply claiming that Mr Engel had less practical experience than he had; it was for the appointing authority to decide on the weight to attach to the candidates' theoretical knowledge and practical experience;

it was not established that there had been an error of assessment tantamount to discriminatory treatment or that the disputed appointment had been made out of prejudice against the applicant;

the candidate appointed was particularly suited for the post in question and there was

nothing to support the view that the appointing authority had used its power of discretion in a manifestly wrong way;

the appointing authority did not have to disclose personal files or to state the reasons for its appointment decisions; the claim for the production of Mr Engel's personal file and candidature had been made for the first time in the reply and was therefore out of time.

The Court of First Instance then held that:

'29 ... the post in question was a Grade A 2 post (director). As the defendant rightly points out, the appointing authority has a wide discretion when comparing the merits of candidates for such a post which entails great responsibility and in assessing the interests of the service. The review to be undertaken by the Court must accordingly be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the administration has remained within reasonable bounds and has not used its power in a manifestly incorrect way or for purposes other than those for which it was conferred upon it (see in particular the judgment of the Court in Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529 and in Case 140/87 *Bevan* v *Commission* [1989] ECR 701).

30 As is apparent from the documents before the Court, after the vacancy notice for the post in question had been published, the applicant and another official applied for that post. Under the procedure provided for in Article 29(1)(a) of the Staff Regulations, the Consultative Committee for appointments to Grades A 2 and A 3 of the Commission examined the applications and individual files of the candidates. After hearing the views of the Director-General of the Directorate-General for Credit and Investments, who on the basis of the vacancy notice specified the qualifications required of the occupant of the post to be filled, that committee came to the view that the candidates did not possess all the qualifications required. After the Commission had also examined the applications, it decided not to fill the vacant post and to proceed according to the procedure laid down in Article 29(2) of the Staff Regulations by inviting applications from external candidates. After again hearing the views of the Director-General, the Consultative Committee came to the conclusion that Mr Engel's application should be taken into consideration. After carrying out a comparative examination of the three applications submitted, the Commission decided to fill the vacant post by appointing Mr Engel on the basis of Article 29(2) of the Staff Regulations.

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

Mr Cioffi confined himself to explaining, on the basis of the vacancy notice, the qualifications required of the occupant of the post and, secondly, that the applicant has not brought forward any factor to support his assertion that the Director-General may have expressed unfavourable views about him which may have influenced the Consultative Committee.

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

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

As regards the maladministration which the applicant maintains results from an infringement of Articles 27 and 28 of the Staff Regulations, the Court of First Instance found (in paragraphs 34 and 35) that:

Mr Moritz claimed that at the time of his appointment the candidate chosen did not have the nationality of a Member State, contrary to Article 27 in conjunction with Arti

the Commission maintained that Mr Engel, who originally possessed German nationality but had become a naturalized Canadian, had re-acquired his German nationality before taking up his duties, as the defendant had itself required, and that this complaint did not concern the applicant personally.

It went on to hold as follows:

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

As regards the maladministration resulting, according to the applicant, from the infringement of the duty to have regard to officials' interests and the duty of loyalty, the Court of First Instance found (in paragraphs 38 and 37) that:

the applicant pointed out that, by preferring a person from outside the Community institutions and much younger than himself, the Commission acted in breach of its duty to have regard to the interests of officials and to show loyalty;

the Commission observed that the duty to have regard to officials' interests cannot confer on officials a right to promotion, since any decision concerning a promotion must take account above all of the interests of the service.

The contested judgment goes on to state as follows:

'39 It must be pointed out in this regard that the filling of each post must be based primarily on the interests of the service (see the judgment of the Court in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701). The administration's duty to have regard to the interests of its staff reflects the balance of reciprocal rights and obligations established by the Staff Regulations in relations between the public authority and civil service employees. That duty requires the authority to take account not only of the interests of the service but also of those of the officials concerned (see the judgment of the Court of Justice in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199). In evaluating the interests of the service and of the candidates concerned, the appointing authority has a wide discretion and the review undertaken by the Court must be confined to the question whether the appointing authority remained within the bounds of that discretion and did not use it in a manifestly wrong way.

40 In the present case, it is apparent from the documents before the Court that the appointing authority undertook an objective comparative assessment of the merits and qualifications of the candidates for the post to be filled. The fact referred to by the applicant that a candidate from outside the Community institutions was preferred to him and that that candidate was much younger than himself cannot constitute *per se* a breach of the duty to have regard to his interests and to show loyalty towards him.'

As regards the maladministration resulting in the applicant's view from the delay which the appointing authority took in preparing his periodic report, the Court of First Instance held as follows:

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

42 It follows from all the foregoing considerations that none of the complaints advanced by the applicant in order to demonstrate the existence of a wrongful act committed by the Commission can be upheld. The claim for compensation for material damage must therefore be dismissed.'

The Court of First Instance also dismissed the applicant's claims for compensation for the non-material damage allegedly resulting from the contested decision. It held as follows:

'43 As the applicant has submitted without being contradicted and as appears from his personal file, his periodic report for the period from 1 July 1983 to 30 June 1985 — against which he later appealed and sought a revised report — was drawn up on 10 February 1987. On 31 July 1986, that is to say after the expiry of the time-limit laid down in the first paragraph of Article 6 of the General Provisions for the Implementation of Article 43 of the Staff Regulations, which in this case was 30 November 1985, the applicant's immediate superior proposed that his report for the period 1981-1983 should be extended to cover the abovementioned period; that proposal was expressly rejected by the applicant on 26 November 1986, that is to say nearly four months after the proposal had been made to him.

44 The Commission points out that in order to determine whether such delay constitutes maladministration, it must be ascertained in particular whether the delay is attributable, if only partially, to the conduct of the official concerned. Furthermore, any maladministration can give rise to an obligation to pay compensation only in so far as the applicant shows that he has suffered damage (judgment of the Court of Justice in Case 1/87 *Picciolo* v *Commission*, cited above). However, such damage has not been proved in this case, nor has the applicant shown that he has suffered damage owing to the fact of his personal file being incomplete. The Commission argues alternatively that the calculation of damages proposed by the applicant, according to which he must be put in a position as if he had been appointed Director, amounts to an inadmissible fetter on the Commission's discretion in filling vacant posts.

45 In its judgment delivered today in Case T-29/89 (*Moritz* v *Commission* [1990] ECR II-787), the Court of First Instance pointed out that Article 43 of the Staff Regulations provides for a periodic report to be drawn up at least once every two years on the ability, efficiency and conduct in the service of each official. The periodic report must compulsorily be drawn up for the good administration and rationalization of the services of the Community and in order to safeguard the interests of officials. One of the bounden duties of the administration is therefore to ensure that reports are drawn up periodically on the dates laid down by the Staff Regulations and that they are drawn up in proper form (judgment of the Court of Justice in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943). The administration has a reasonable period at its disposal in which to do this and any failure to act within that period must be justified by the existence of special circumstances (judgment of the Court of Justice in Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359).

46 Furthermore, all officials owe a general duty of loyalty and cooperation to the authority to which they belong, in particular in the procedure for drawing up the periodic report (judgment of the Court of Justice in Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437). An official cannot therefore complain of delay in the drawing up of his periodic report when that delay is attributable to him, if only partially, or where he contributed considerably to the delay.

47 Finally, the Court of Justice has consistently held that delay in the drawing up of staff reports may in itself be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions affecting them are taken (judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497).

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

49 As the Court also held, the applicant was bound under the aforementioned duty of loyalty and cooperation to respond within reasonable time to his immediate superior's proposal to extend his periodic report; he was in breach of that duty by waiting nearly four months before replying to that proposal. Consequently, the alleged delay cannot, in the circumstances of this case, constitute non-material damage, although the period of eight months taken by the applicant's immediate superior to propose the extension of his periodic report is in itself at the limit of what may be considered to be a reasonable period.

50 As far as the absence of periodic reports for the periods 1973-1975 and 1975-1977 is concerned, it is to be noted that the applicant raised this argument for the first time in support of the claim for damages, that is to say more than nine years after the last-mentioned periodic report. It is quite clear from the documents before the Court that the absence of those periodic reports for periods in the distant past did not cause the applicant any non-material damage on which he could effectively base any claim in the present action.

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

The Court of First Instance ordered as follows with regard to the costs:

'53 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, according to Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by officials or other servants of the Communities are to be borne by institutions. Each party must therefore be ordered to pay its own costs.'

Consequently, the Court of First Instance dismissed Mr Moritz's application and ordered each party to pay its own costs.

II — Subject-matter of and form of order sought in the appeal

By application lodged at the Court Registry on 15 February 1991, Mr Moritz, who was notified of the aforementioned judgment of the Court of First Instance on 17 December 1990, brought an appeal against that judgment.

Mr Moritz claims that the Court should:

set aside the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 13 December 1990 (T-20/89);

make an order in respect of the Commission in accordance with the form of order sought at first instance, with the exception of the claim that Mr Engel's appointment should be annulled as irregular;

in the alternative, remit the case to the Court of First Instance with a view to the production and assessment of Mr Engel's personal file, to obtaining information about Director-General Cioffi's statement to the Consultative Committee, to the production and assessment of the notes which, albeit not contained in the appellant's personal file, nevertheless relate to him and, where appropriate, for other reasons;

in the further alternative and in so far as the Court of Justice of the European Communities has to make an order as to costs in these appeal proceedings, order the Commission to pay at least the costs sustained by the appellant at first instance.

The Commission claims that the Court should:

dismiss the appeal, including the claim for costs, as unfounded;

order the appellant to pay the costs.

Pursuant to Article 95(2) of the Rules of Procedure, the Court, having regard to the Report of the Judge-Rapporteur and after hearing the Opinion of the Advocate General, referred the case to the Third Chamber by decision of 3 June 1992.

III — Summary of the pleas and arguments of the parties

(1) *Mr Moritz* states *in limine* that his appeal does not relate to the part of the judgment of the Court of First Instance dismissing his claim for the annulment of the contested decision. He observes, however, that at the date on which the written procedure closed, namely 21 March 1988, he was still a Commission official, and that therefore his claims with regard to that point were admissible. In his view, the Court of First Instance should have dismissed those claims with regard to the substance or, at least, have asked during the oral procedure whether they should not have been withdrawn.

Mr Moritz goes on to argue that his appeal, which was brought within the time-limits and in accordance with the formal requirements laid down by Article 110 et seq. of the Rules of Procedure, is admissible.

With regard to the substance, the appellant develops his arguments in the order adopted by the Court of First Instance in the grounds of its judgment.

(a) *Maladministration committed by the Commission on account of an error of assessment or a misuse of power*

In the first place, the appellant argues that the Court of First Instance should effect a very critical review of the legality of the procedure followed by the Commission, contrary to that which is indicated in paragraph 29 of the contested judgment. In his opinion, whilst the Court effects only a restricted review of the assessment made of the appointing authority as to candidates' merits, it should, on the contrary, accurately supervise the procedure followed by the appointing authority in taking its decision.

Secondly, the appellant argues that the Court of First Instance based itself on incorrect facts.

According to Mr Moritz, the Court of Justice has to ensure that the findings of fact made by the Court of First Instance is lawful and does not manifestly contradict the parties' affirmations. In his opinion, whilst the legislation provides that appeals are to be confined to questions of law, the Court of Justice should be able to find against manifest factual errors made by the Court of First Instance in the same way as courts of cassation and courts dealing with appeals on points of law do in the Member States (for instance, the Bundesgerichtshof in the case of serious criminal offences) where the system of courts is, as here, simply a two-tier system and there is no possibility of a second discussion of the facts.

With regard to the substance, Mr Moritz argues that, contrary to that which is stated in paragraph 31 of the contested judgment, the Director-General of DG XVIII was not heard in the context of the procedure provided for in Article 29(2) of the Staff Regulations, since that procedure did not begin until 30 April 1986. He did not merely describe to the Consultative Committee the qualifications required to fill the vacant post, but also stated his views on the appellant's competence, efficiency and conduct (Commission's defence submitted to the Court of First Instance, section 12). Consequently, the Court of First Instance deviated from the parties' uncontested written statements, as the Commission admits (reply, section 11).

Thirdly, Mr Moritz argues that the Court of First Instance wrongly considered that the procedure followed by the Consultative Committee, albeit both sides were not heard, was lawful. He submits that this could not be so in the absence of any hearing at which both sides were heard, since three periodical reports were missing from his personal file, the Consultative Committee was unaware of the reasons for that omission, he could not regard as sufficient the explanations given by the Director-General, who was not the appointing authority, and, lastly, the Director-General had probably spoken unfavourably of him.

Fourthly, Mr Moritz claims that the Court of First Instance considered, in paragraph 31 of the contested judgment, that there was no evidence supporting the allegation that the Director-General might have expressed unfavourable assessments of him, such as to influence the opinion of the Consultative Committee.

The appellant maintains that it appears from the case-file that, before the Consultative Committee, the Director-General, Mr Cioffi, gave his opinion of Mr Moritz's candidature. That opinion was probably unfavourable to the appellant and, in any event, the Consultative Committee should not have ruled out the possibility that Mr Cioffi had a certain animus against him. Mr Moritz also argues that he cannot be accused of failing to make his allegations more specific, since the Commission refuses to produce the documents necessary to that end.

Fifthly, the appellant complains that the Court of First Instance failed to find the following irregularities in the procedure followed by the Consultative Committee:

no mention in the minutes of the Consultative Committee's meeting of 22 April 1986 of the points on which the Director-General was heard;

insufficient statement of reasons for the Consultative Committee's opinion, which should not merely have stated that Mr Moritz did not satisfy 'all' the requirements set out in the vacancy notice, which were impossible to fulfil in practice, but should have stated that Mr Moritz satisfied all the requirements bar one only;

failure by the Consultative Committee to check Mr Engel's qualifications, which constituted a failure to treat candidates equally;

the appellant underwent a recruitment interview with the Member of the Commission, Mr Matutes, after the appointment decision had been taken by the meeting of Members of the Commission. Mr Moritz argues that that argument is admissible before the Court of Justice, contrary to that which the Commission contends, especially since the facts were described to the Court of First Instance, which did not set them out in its judgment. He adds that, contrary to the Commission's contention, a refusal to make an appointment to a very high-ranking post is an act having adverse effect and that, consequently, before such a decision is taken, each candidate ought to be heard.

in general, the procedure was deliberately slanted so as to favour Mr Engel's candidature.

In the appellant's view, those irregularities constitute service-related faults carrying entitlement to compensation.

Sixthly, Mr Moritz accuses the Court of First Instance of having given an inadequate response, in paragraphs 32 and 33 of the contested judgment, to the argument concerning the Commission's error of assessment in relation to Mr Engel's professional suitability.

In the appellant's view, it is for the Court of First Instance, and subsequently for the Court of Justice, to check that the qualifications of the candidate appointed by the appointing authority correspond to those set out in the vacancy notice.

Mr Moritz observes, in the first place, that the Court of First Instance did not expressly rule on his claim that the Commission should produce Mr Engel's personal file and application, which was the only way of knowing which diplomas he possessed and the rank of the posts which he had held in various banks.

Mr Moritz further maintains that Mr Engel did not have any qualification in the law relating to finance and long-term loans and fulfilled only two of the eight requirements relating to the nature of the tasks. Consequently, those qualifications were manifestly insufficient to justify his appointment.

(b) *Maladministration arising from the infringement of Articles 27 and 28 of the Staff Regulations in conjunction with Article 1(i) of Annex III to the Staff Regulations*

The appellant argues that the Court of First Instance, which omitted to refer to Article 1(i) of Annex III to the Staff Regulations, did not justify the derogation in this case from the — albeit clear and precise — provisions of Articles 27 and 28 of the Staff Regulations.

In Mr Moritz's view, the nationality requirement must be fulfilled at the time of recruitment (Article 27 of the Staff Regulations) or of appointment (Article 28 of the Staff Regulations). It cannot be fulfilled later. The only exception provided for (Article 28(a) of the Staff Regulations) must be interpreted strictly.

Mr Moritz argues that, contrary to Article 1(i) of Annex III to the Staff Regulations, the derogation from the nationality requirement was not mentioned in the vacancy notice, and the Commission, according to its own declarations, merely required Mr Engel to have acquired the nationality of one of the Member States before he took up his post. In his view, the Commission cannot rely on Article 29(2) of the Staff Regulations, which cannot derogate from Article 1(1)(e) of Annex III, in order to argue that it was not obliged to mention the derogation when it initiated the procedure. In addition, even if the second clause of Article 28(a) is applicable in this case, the Commission did not show, by clear and detailed reasons, why it was imperative in this case to derogate from the nationality requirement.

Consequently, Mr Engel's appointment, which was made contrary to Articles 27 and 28 of the Staff Regulations, was unlawful.

(c) *Maladministration resulting from a breach of the duty to have regard to the interests of officials and of loyalty*

Mr Moritz argues that it follows from the foregoing that, by not making an objective assessment of the candidates' merits, the Commission exercised its power in a manifestly wrong way.

By failing to take account of the appellant's qualifications and greater seniority, which should have been taken into account (see the judgment in Case 298/81 *Colussi* v *Parliament* [1983] ECR 1131, paragraph 22), the Commission failed to fulfil its duty to have regard to official's interests, contrary to that which the Court of First Instance held in paragraph 40 of the contested judgment.

(d) *The claims for the compensation of the material damage suffered*

Mr Moritz claims that, on account of the service-related faults committed by the Commission, he is entitled to be compensated for the material loss he suffered, that is to say, to be put in the situation which he would have been in (including the situation as regards pension rights) had he been appointed director on 2 July 1986.

The appellant states that, if such compensation were awarded to him, he would forgo any claim to additional compensation for non-material damage.

(e) *The claims for compensation for non-material damage*

Mr Moritz submits in the first place that the fact that the judgment of the Court of First Instance of 13 December 1990 in Case T-29/89 *Moritz* v *Commission* [1990] ECR II-787 also ruled in parallel proceedings on the non-material damage which he suffered on account of the delay in drawing up his periodic report and has become *res judicata* does not preclude the Court of Justice from ruling on this point in these proceedings because the Court of First Instance itself has ruled on those claims.

Mr Moritz goes on to argue that, according to the case-law of both the Court of Justice and the Court of First Instance (see in particular the judgment in Case T-63/89 *Latham* v *Commission* [1991] ECR II-19), delay in drawing up periodic reports may, in itself, prejudice the official concerned, simply because his career may be affected. In the appellant's view, it is not contested that the Commission took four decisions affecting his career (decision of the Consultative Committee of 22 April 1986; decision of the meeting of Members of the Commission of 30 April 1986; committee decision of 27 June 1986; appointment of Mr Engel on 2 July 1986) before presenting him with a proposal for a periodic report for 1983-1985 on 31 July 1986. Consequently, at the date of the contested decision (2 July 1986), the damage was established. It follows that the Court of First Instance wrongly took account of facts subsequent to that date.

In the alternative, Mr Moritz argues that the delay with which he responded to the proposal, which was due to the absence of the reporting officer during the summer holiday period and the burden of work after the holidays, was half as long as the reporting officer's delay in submitting the proposal for a periodic report (four months as against eight). In actual fact, the delay was even shorter, as the proposal was amended after 31 July 1986. In his view, this would have warranted only a reduction of one-half in the compensation due.

Consequently, by holding in paragraph 50 of the contested judgment that it was clear that the absence of periodic reports manifestly did not cause the appellant to suffer any non-material damage, the Court of First Instance did not give sufficient reasons for its decision on that point and disregarded the case-law of the Court of Justice.

Lastly, Mr Moritz states that, if the Court were to award him compensation for this damage, the amount of it should be fixed *ex aequo et bono*.

(f) *Costs*

Mr Moritz argues that, although his application was dismissed, the Court of First Instance, in accordance with its case-law (judgment in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, paragraphs 52 and 53), should have applied the provisions of the second subparagraph of Article 69(3) of its Rules of Procedure. The action had been prompted by incorrect statements on the part of the Commission — which, moreover, it later denied — concerning the appellant's participation in the procedure provided for in Article 29(2) of the Staff Regulations and by the Commission's refusal to make good the non-material damage he suffered, contrary to the judgment in Joined Cases 173/82, 157/83 and 86/84 *Castille* v *Commission* [1986] ECR 497.

(2) The *Commission* notes that Mr Moritz's appeal relates only to the part of the judgment relating to compensation for the alleged damage.

It observes that the appeal can be upheld only if the claims for damages were rejected on the basis of an error of law within the meaning of the first sentence of Article 168a(1) of the EEC Treaty and Article 51 of the Statute of the Court of Justice of the EEC.

(a) *Compensation for the material damage allegedly sustained*

The Commission considers in the first place that the Court of First Instance did not apply a wrong criterion in reviewing the lawfulness of the contested decision. It points out that the appointing authority has a wide discretion, in the interests of the service, as regards appointments, especially where an important post is involved, and that the Court must restrict its review to consideration of the question whether the appointing authority has remained within reasonable limits following a procedure free of irregularities and has not used its power in a manifestly incorrect way or for purposes other than those for which the power was conferred on it (judgment in Case 104/88 *Brus* v *Commission* [1989] ECR 1873). It goes on to argue that the appellant cannot effectively rely on the second sentence of Article 91(1) of the Staff Regulations, which relates to pecuniary disputes, which do not include proceedings relating to liability.

In the second place, the Commission submits that the appellant cannot effectively argue that the Court of First Instance based itself on incorrect facts.

It claims primarily that such a plea is not admissible before the Court. In its view, the similarity between an appeal under Community law, which is confined to questions of law and intended to secure the uniform interpretation of the law, and appeals on a point of law or in cassation in the Member States suggests that the Statute of the Court of Justice of the EEC and the Rules of Procedure have to be interpreted as meaning that, as a general rule, the Court of Justice is bound by findings of fact made by the Court of First Instance. It adds that the law of the Member States provides for only limited exceptions to the rule according to which the court hearing appeals in cassation or on points of law does not review the facts (disregard of laws or of general principles of

logic and experience in appeals on a point of law in Germany; review of key findings under French law). In that regard, the Commission responds to the appellant by stating that it is not possible to transpose solutions adopted under a judicial system which only exceptionally has a two-tier system of courts and not a three-tier system (as in Germany), since the Community system intrinsically only has a two-tier system.

In the alternative, the Commission argues that, supposing that the findings made by the Court of First Instance in paragraphs 30 and 31 of the contested judgment were wrong, they were not for all that manifest errors, in particular not logical errors, since the facts found in the judgment are not conflicting. The Commission claims that it is, in contrast, the arguments of the parties which, by comparison with the grounds of the judgment, show that Mr Cioffi also gave his views on the appellant's qualifications before the Consultative Committee. It admits, however, that since the error made by the Court of First Instance in this respect was not due to the parties, it might, in some respects, be possible to equate it with a manifest error. The Commission considers that there was also no manifest error as regards the Consultative Committee's knowledge of the Commission's recourse to Article 29(2) of the Staff Regulations, since it appears from the contested judgment (paragraphs 4, 5 and 30) that the Consultative Committee was aware of the Commission's decision on that point and conducted a re-examination on 27 June 1986. Lastly, the conclusion reached in paragraph 31 of the contested judgment is not open to criticism, since the appellant could have asserted his right to be heard by the Consultative Committee.

Thirdly, the Commission submits that the complaint to the effect that the Court of First Instance did not rule on the claim for the production of Mr Engel's individual file and application is unfounded.

In its view, it follows from Article 21 of the Statute of the Court of Justice of the EEC and from Article 45(1) and (3) of the Rules of Procedure, which are applicable *mutatis mutandis* to the Court of First Instance, that the procedure before the Court of First Instance is inquisitorial and the Court of First Instance is not bound by parties' claims relating to measures of inquiry. It also follows from those provisions that the appellant was not entitled to have access to his competitors' individual files and applications. Consequently, the Court of First Instance was not bound to rule on the claim or to state more precise reasons for its rejection of the claim.

Fourthly, the Commission argues that the complaint that Mr Engel's appointment was unlawful is unfounded.

In its view, it appears from paragraph 29 of the contested judgment that the Court of First Instance has carried out a review in accordance with the case-law of the Court of Justice.

As regards the dispute concerning Mr Engel's merits, the Commission considers that the Court of First Instance was right in law to hold that, in view of Mr Engels's university studies, his professional experience in Canadian banks and his command of four Community languages, the appointing

authority was not guilty of any manifest error of assessment when it appointed him Director of DG XVIII.

It argues that the appellant cannot effectively accuse the Court of First Instance of having failed itself to assess the professional experience and qualifications of Mr Engel and his competitors, since such assessment is a matter for the appointing authority and is not subject to review by the Court.

As regards the reasoning of the Consultative Committee's opinion, the Commission maintains that the procedure followed before the Consultative Committee is purely internal and preparatory, and that consequently the Consultative Committee does not have to state reasons for its proposal, in particular with regard to those candidates who are not accepted (see the judgment in *Brus* v *Commission*, cited above, but *a fortiori*).

As far as the hearing of the appellant by Mr Matutes is concerned, the Commission argues that, assuming that the Court is entitled to consider this point even though it does not emerge from the facts as found by the Court of First Instance, neither the Staff Regulations (Article 45, unlike other provisions, does not lay down any such obligation) nor the case-law of the Court of Justice, according to which a prior hearing has to be held only in the case of measures that seriously damage the official's interests, such as withdrawal of employment (judgments in Case 34/77 *Oslizlok* v *Commission* [1978] ECR 1099, paragraphs 31 to 35, in Case 19/70 *Almini* v *Commission* [1971] ECR 623, paragraphs 8 to 11, and in Case 319/85 *Misset* v *Council* [1988] ECR 1861, paragraph 7), require the Commission to hear the person concerned before any decision is taken with regard to recruitment.

As regards the absence of the periodic report for 1983 to 1985, the Commission argues that, since the Court of First Instance considered that the minor changes made to the initial draft had no bearing on the appellant's chances of being promoted, that court was right in law not to have considered whether the appellant had to be heard in person by the Consultative Committee, since, according to the case-law of the Court of Justice (judgment in Case 7/86 *Vincent* v *Parliament* [1987] ECR 2473), the fact that the file was incomplete is relevant only when that factor was liable to have had a decisive influence on the promotion procedure.

Fifthly, the Commission submits that Mr Engel's appointment was not contrary to Articles 27 and 28 of the Staff Regulations.

The Commission argues in the first place that, since the appointing authority is entitled to appoint a person who is not a national of a Member State [Article 28(a) of the Staff Regulations], it may, *a fortiori*, appoint a person who acquired the nationality of a Member State before he took up employment, as the Court of First Instance held.

It goes on to argue that, by confining itself to the finding that Mr Engel had regained German nationality before he took up his post and that as a result Article 28 of the Staff Regulations had been complied with, the Court of First Instance, which was not bound to mention all legally material points of view, provided sufficient reasons for its decision on this point.

Sixthly, the Commission submits that it did not fail to fulfil its duty to have regard to the interests of officials or its duty of loyalty.

In its contention, age is only one criterion among others (judgment in Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 16) and in no case takes precedence over the candidates' merits (judgment in Case 9/82 *Ohrgaard and Delvaux* v *Commission* [1983] ECR 2379). Consequently, the Commission had not acted *ultra vires* or used its powers for purposes other than those for which they were conferred on it in so far as it did not take into account of the appellant's age in the way in which he wished it to be taken into account. It adds that it follows that it was not for the Court of First Instance to review that assessment.

The Commission submits that it merely exercised its powers under Article 29(2) of the Staff Regulations and did not fail to fulfil its duty to have regard to official's interests.

(b) *The claim for compensation for the material and non-material damage allegedly suffered by the appellant*

The Commission considers principally that the appellant's claims in this respect fall foul of the authority *qua res judicata* of the judgment of the Court of First Instance of 13 December 1990 in Case T-29/98 *Moritz* v *Commission*, cited above, which rejected the appellant's claim for compensation for the damage caused by his periodic report for 1983-1985 having been drawn up late.

In the alternative, the Commission argues that the appellant's plea is unfounded. In its view, the Court of First Instance was right in law to reject this plea. The appellant's fault precludes any reparation without its being necessary to consider whether or not it occurred after the contested decision.

It adds that there is no need to consider the explanations put forward by the appellant before the Court of Justice in order to justify his delay, since they cannot attenuate his fault.

(c) *The costs at first instance*

The Commission argues that, neither by the statements contained in the decision rejecting the appellant's complaint, even if they were wrong, nor otherwise, did it encourage the appellant to bring an action in the Court of First Instance. The judgment in *Latham* v *Commission*, cited by the appellant, is irrelevant as it relates to a service-related fault on the part of the Commission.

F. Grévisse
Judge-Rapporteur