

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
8 October 1993 ^{*}

In Case T-507/93 R,

Paulo Branco, an official of the Commission of the European Communities, a former official of the Court of Auditors of the European Communities, residing in Brussels, represented by Dieter Grozinger de Rosnay, of the Luxembourg Bar, and David M. Travessa Mendes, of the Luxembourg Bar, with an address for service in Luxembourg at their Chambers, 6 Avenue du X Septembre,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Steiner and Jan Inghelram, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

APPLICATION for suspension of operation of the decision of 25 March 1993 by which the defendant excluded the applicant from the list of officials eligible for promotion drawn up in connection with the 1993 promotions procedure, for suspension of the publication of the promotion decisions under the same procedure and for immediate suspension of the operation of those two measures until the date of service of the order which is to dispose of the proceedings for interim measures

^{*} Language of the case: Portuguese.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

- 1 By application registered at the Registry of the Court of First Instance on 7 September 1993, the applicant brought an action under Article 91(4) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') for annulment of the defendant's decision of 25 March 1993 excluding him from the list of officials eligible for promotion drawn up in connection with the 1993 promotions procedure at the Court of Auditors.
- 2 By separate document, registered at the Registry of the Court of First Instance on the same day, the applicant also lodged an application for interim measures, requesting suspension of the operation of the contested act, an application for suspension of the publication of the promotions decided on by the Court of Auditors for 1993 and an application for immediate suspension of the operation of those two measures until the date of service of the order which is to dispose of the proceedings for interim measures.
- 3 By application lodged at the Registry on 14 July 1993, the applicant had also brought an action for annulment of the 1992 promotions procedure of the Court of Auditors (Case T-45/93).
- 4 The defendant submitted its written observations on the present application for interim measures on 24 September 1993.

5 Before examining the merits of the application for interim measures, a summary should be given of the facts of the case as set out in the arguments put forward by the parties.

6 The applicant was an official of the Court of Auditors of the European Communities from 1 October 1989 to 1 April 1993, the date on which he was transferred to the Commission of the European Communities.

7 In its Notice to Staff No 21-93 of 25 March 1993, the appointing authority published the list of officials eligible for promotion in the course of the 1993 promotions procedure, in accordance with Article 45 of the Staff Regulations in conjunction with Decision No 90-38 of the Court of Auditors of 12 October 1990 on the stages of the procedure provided for with respect to promotions decided on by the Secretary General. In the top right-hand corner of the first page of that list there appeared a note 'Settled 1 April 1993'. The applicant's name was not included in the list.

8 By letter of 26 March 1993, the applicant submitted a request to the appointing authority, first, for the abovementioned list to be settled as at 25 March 1993 which, he claimed, was the date on which the promotions procedure was initiated and, secondly, for his inclusion on that list as an official eligible for promotion with the additional note 'Transfer to the Commission 1 April 1993'. He maintained that the administration had followed that practice in the 1992 promotions procedure, in which an official was included in the list of officials eligible for promotion both in the first version, settled on 20 April 1992, and in the definitive version of 20 May 1992, with a corresponding note 'Transfer to the Commission 1 September 1992'.

9 By complaint lodged on 25 June 1993 pursuant to Article 90(2) of the Staff Regulations, the applicant, relying on the principle of equal treatment, asked to be included in the definitive list of officials eligible for promotion in 1993 with the note 'Transfer to the Commission 1 April 1993', in accordance with a practice

followed by the Court of Auditors not only in the case already quoted in his letter of 26 March 1993, but also in a case which occurred during the 1991 promotions procedure, in which the list of officials eligible for promotion, published on 13 March 1991, included the name of a candidate with the note 'Transfer to the Commission 1 April 1991'.

- 10 On 14 June 1993, the Court of Auditors adopted Decision No 93-41 on the stages of the procedure provided for with respect to promotions decided on by the Secretary General. Article 1 of that decision provides that the Secretary General of the Court of Auditors is to apply the new procedure 'as from the promotions he proposes awarding for 1993'. Article 2 of that decision expressly annulled Decision No 90-38 of 12 October 1990. The new procedure differs from the old only in that the Directors of the Court of Auditors take part in the stages subsequent to the publication of the list of officials eligible for promotion.
- 11 On 21 July 1993, the appointing authority published Staff Notice No 44-93, containing the updated list of officials eligible for promotion 'having regard to the changes in the organigramme of the Court since publication of Communication to the staff ... No 21-93 of 25 March 1993'. In the top right hand corner is the note 'Settled 15 July 1993'. The applicant's name does not appear on that list.

Law

- 12 By virtue of Articles 185 and 186 of the EEC Treaty in conjunction with Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, that court may, if it considers that circumstances so require, order that application of a contested act be suspended or prescribe any necessary interim measures.

- 13 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications to suspend the operation of any measure adopted by an institution are to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures applied for must be provisional in the sense that they do not prejudice the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Case T-497/93 R II *Hogan v Court of Justice* [1993] ECR II-1005).

Arguments of the parties

- 14 First of all, the applicant claims that since the 1993 promotions procedure began on 25 March 1993 with the publication of the list of officials eligible for promotion, his name should be on that list, since he was still in the service of the Court of Auditors at that time and he satisfied all the conditions for inclusion on the list. He considers that if the Court decides, on the basis of those facts, that the defendant ought to have included him in the 1993 promotions procedure and does so only when that procedure is already concluded and the promotion decisions have been published, there will be a risk of repetition of the irregularity which has, in his view, already flawed the 1992 promotions procedure, namely the fact that the comparison of his merits was incomplete and took place outside the prescribed period in circumstances amounting to unequal treatment in relation to candidates promoted in the meantime.
- 15 In the circumstances, the applicant considers that his interests can be properly protected only by suspension of the operation of the decision excluding him from the list of officials eligible for promotion and, consequently, by his being taken into consideration provisionally and conditionally as an official eligible for promotion in order that his merits may be considered at the same time and under the same conditions as those of the officials on the definitive list of officials eligible for promotion. He further considers it necessary for that purpose that the Court of Auditors should be prohibited from publishing any promotion decision relating to those officials until the Court has given its judgment on the point whether or not the applicant must be regarded as eligible for promotion or, at least, until 16 December 1993, the date on which, in previous years, promotion decisions were published.

- 16 Furthermore, the applicant maintains that the defendant's decision to exclude him from the list of officials eligible for promotion in 1993 has caused him considerable, direct and certain non-material damage by reason of the state of insecurity, uncertainty and anxiety in which he finds himself during the proceedings which he has meanwhile been constrained to initiate and by reason of the damage to his professional reputation as a result of the marginalization forced on him by that decision.
- 17 As a preliminary plea, the Court of Auditors contends that the application for interim measures is inadmissible, inasmuch, first, as it seeks the suspension of operation of the decision to exclude the applicant from the list of officials eligible for promotion, secondly, as it seeks to have the applicant provisionally and conditionally included in the later stages of the promotions procedure in question and, thirdly, as it seeks the suspension of publication of the promotions decided on for 1993. First, the defendant considers that the applicant plainly has no interest in bringing proceedings. It maintains that the applicant has no proper, existing or real interest in obtaining the annulment of that decision, since he was no longer an official of the Court of Auditors when the list in question was drawn up, that is to say, on 1 April 1993. Consequently, the Court of Auditors no longer has the power to take any decision whatsoever regarding the applicant's career. In any event, even if the contested list were to be regarded as having been drawn up on the date of its publication, 25 March 1993, it has lost all importance for the promotions procedure at issue, since it was replaced on 15 July 1993 by a definitive list. Moreover, the defendant points out that the defendant's request to be provisionally included in the disputed list amounts to asking the Court to issue directions to the appointing authority, which, according to settled case-law, it is not entitled to do (see most recently Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others v Commission* [1993] ECR II-841, paragraph 44). According to the defendant, the same holds good for the application for suspension of operation of the promotion decisions, which is intended to achieve, not the suspension of operation of an act which has already been carried out, but rather directions not to carry out a certain act.
- 18 Furthermore the defendant claims that the applicant has not demonstrated the existence of serious and irreparable damage giving rise to urgency in taking the interim measures applied for. The applicant has merely pleaded in vague terms the existence of 'enormous non-material damage', without showing that the damage

could not be made good by compliance with a judgment of the Court annulling the contested decision. According to the defendant, the interim measures applied for are, in any event, clearly disproportionate to the Court of Auditors' interest in carrying out the promotions procedure in the normal way.

Findings of the President of the Court

- 19 It is apparent from the documents before the Court that, although the list of officials eligible for promotion in the 1993 promotions procedure at the Court of Auditors was published on 25 March 1993, it expressly referred to the administrative situation of staff as at 1 April 1993, that is to say several days after its publication. It is also apparent from those documents that the list was replaced by a list dated 15 July 1993, adopted pursuant to Decision No 93-41 on the promotions procedure of the Court of Auditors expressly annulling Decision No 90-38, on the basis of which the first list had been drawn up. Finally, it is apparent from the documents before the Court that the applicant had actually ceased to be an official of the Court of Auditors on 1 April 1993.
- 20 Moreover, it is clear from the terms of his application that the applicant is asking the President of the Court to grant four interim measures: first, suspension of the operation of the appointing authority's decision to exclude him from the list of officials eligible for promotion published on 25 March 1993; secondly, that he should be 'provisionally and conditionally included in the list as a person eligible for promotion and that the Joint Promotions Committee should undertake a comparative examination of his merits and his file'; thirdly, suspension of the final stage of the 1993 promotions procedure, consisting of the publication of the promotion decisions at issue; fourthly, immediate suspension of operation of the decision to exclude him from the list in question, and also suspension of publication of the promotion decisions until the date of service of the order disposing of the proceedings for interim measures.
- 21 The first claim seeks to obtain an interim measure which is manifestly ineffective. Suspension of a negative act such as the decision at issue could not in any event have any consequences of use to the applicant. The applicant has acknowledged as much by formulating his second claim. As regards the latter, its real object is that

the President of the Court should issue directions to the appointing authority to the effect that the applicant should be included in the later stages of the 1993 promotions procedure. According to settled case-law, however, the Community judiciary is not entitled to issue such directions (see, most recently, Joined Cases T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others v Commission*, cited above, paragraph 44). What the third claim seeks to obtain is not suspension of the operation of an act which has already been carried out, but the issue of directions to the appointing authority to the effect that it should not carry out a specific act, which in this case is the act which brings to an end the promotions procedure itself. The adoption of such a measure, in practice by suspending the promotions procedure itself, would clearly be out of proportion to the interest of the Court of Auditors in bringing that procedure to an end (see the order of the President of the Third Chamber of the Court of Justice in Case 176/88 R *Hanning v Parliament* [1988] ECR 3915, paragraph 9). Finally, with respect to the fourth claim, in the light of the above considerations regarding the first and third claims, it is clearly devoid of purpose.

- 22 It should in any event be noted that the urgency of the interim measures applied for must be assessed in relation to the necessity for such measures in order to prevent serious and irreparable damage to the party requesting them, before a decision has been given in the main proceedings.
- 23 The applicant has merely alleged 'enormous non-material damage' as a result of the insecurity, uncertainty and anxiety caused by the decision giving rise to the application for annulment, and damage to his professional reputation as a result of the marginalization forced on him by that decision. A certain amount of uncertainty for the applicant must be regarded as a corollary of the fact that an action of this kind is pending before a court.
- 24 In any event, the applicant has not established that, in the particular circumstances of the case, the absence of interim measures might cause him irreparable damage, even supposing that the disputed act were annulled in the main proceedings. The damage suffered by the applicant could be made good by compliance with a

judgment given in the main proceedings in the applicant's favour, in particular by his inclusion in the promotions procedure at issue or, at least, by an award of damages.

- 25 It follows from the foregoing, without any need to consider whether the main proceedings are *prima facie* well founded, that the pleas in fact and law put forward by the applicant are not such as to justify the adoption of the interim measures applied for and the application must accordingly be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.
2. The costs are reserved.

Luxembourg, 8 October 1993.

H. Jung

Registrar

J. L. Cruz Vilaça

President