JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
27 June 1991 *

Contents

* Language of the case: Spanish.

In Case T-156/89,

Iñigo Valverde Mordt, a former official of the Court of Justice of the European Communities, now an official of the European Parliament, represented by María Luisa González García-Pando, of the Madrid Bar, with an address for service in Luxembourg at the applicant's address, 75 Avenue Pasteur,

applicant,

v

Court of Justice of the European Communities, represented by Francis Hubeau, Head of Division, acting as Agent, assisted by Santiago Muñoz Machado, of the Madrid Bar, with an address for service in Luxembourg at the Court of Justice, Kirchberg,

defendant,

APPLICATION for the annulment of the implied decision refusing to promote the applicant to a post of reviser, for an order that the Court of Justice promote him to such a post, for the annulment of Competition No CJ 32/88 and of a number of decisions taken in connection therewith, and for compensation for the material and non-material damage which the applicant claims to have suffered,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: C. P. Briët, President of the Chamber, H. Kirschner and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 December 1990,

gives the following

Judgment

A — Facts

1 In order to establish a Spanish translation division at the time of Spain's accession to the European Communities, the Court of Justice of the European Communities organized two open competitions on the basis of qualifications and tests. Competition No CJ 12/85 was for the recruitment of lawyer-linguists in Grade LA 6 and Competition No CJ 11/85 was held for the purpose of constituting a reserve list of revisers in career bracket LA 5/4.

2 The applicant took part in both competitions. He passed the tests in Competition No CJ 12/85 but failed the written tests in Competition No CJ 11/85. During the oral test in Competition No CJ 12/85, which was held in May 1986, the Chairman of the Selection Board, Mr Kögler, who at that time was the Director of the Translation Directorate, told the applicant that it would be possible for him to be promoted rapidly to the next higher carrier bracket (LA 5) if he was engaged without delay. On 16 September 1986, the applicant entered into service as a probationer lawyer-linguist. The decision by which he was appointed classified him in Step 3 in Grade LA 6 and fixed 1 September 1988 as the date of his next advancement to a higher step. The applicant received a particularly favourable report at the end of his probationary period and was established as from 16 June 1987.

3 Competition No CJ 11/85 did not produce enough successful candidates to fill all the vacant posts for revisers in the Spanish Translation Division. A selection procedure was therefore commenced with the aim of drawing up a list of names to be submitted to the appointing authority and used to call upon three lawyer-linguists to occupy revisers posts temporarily, pursuant to Article 7(2) of the Staff Regulations. That informal procedure was initiated, on the instructions of the Director of Translation, by Mr Elizalde, the Head of the Spanish Translation Division.

4 Firstly, the merits of the candidates were assessed by applying a number of criteria based both on the qualifications and previous experience of the candidates and on

an assessment of their work by the established revisers and the acting Head of Division. Those criteria were notified to the persons concerned in a document dated 11 November 1986, which the acting Head of Division sent to the Division's lawyer-linguists in order to solicit their applications to become temporary revisers. According to that note, the temporary appointment procedure would 'result in a promotion at the end of the two-year period provided for by the Staff Regulations'. On 29 January 1987, the acting Head of Division sent to the Director of Translation a memorandum in which he submitted the names of the persons selected on the basis of the abovementioned criteria, the applicant's name being first on the list. However, no further action was taken on that memorandum.

5 Secondly, however, a subsequent stage was instituted in which some working time was devoted to revision by the candidates chosen by the acting Head of Division for that purpose. For a period of approximately four months their work as revisers was monitored and assessed by the established revisers and the acting Head of Division. At the end of that process, the name of the applicant was again placed first on the list of the candidates whom the acting Head of Division proposed as temporary revisers. By decision of the appointing authority of 7 August 1987, the applicant was called on to occupy a post of reviser temporarily with effect from 1 July 1987.

6 In the meantime the Court of Justice had published a third notice of competition on 27 May 1987, which related to Internal Competition No CJ 24/86, based on qualifications, for the recruitment of a Head of Division for the Spanish Translation Division. In September 1987, the applicant was included on the reserve list drawn up following that competition. According to the notice of competition, that list was to be valid for one year from the date on which it was drawn up and could be extended.

7 Also published during that same period was Vacancy Notice No CJ 66/87 announcing three vacant posts for Spanish-language revisers. On 2 September 1987, the applicant applied for one of those posts.

8 On the 18 March 1988, the applicant had an interview with the new Head of the Spanish Translation Division, Mr Cervera, in the course of which the applicant

stressed that it was necessary to adopt a decision on those vacant posts before the end of the duration of the revisers' temporary postings, which, pursuant to Article 7(2) of the Staff Regulations, was 1 July 1988. Some days later the applicant was told that a competition would be held to fill the vacant posts; however, no mention was made of whether the competition was to be on the basis of qualifications or of qualifications and tests. No notice of competition was published before the end of the duration of the temporary postings. Nevertheless, the applicant continued to perform the duties of a reviser and accordingly to receive the differential allowance provided for in Article 7 of the Staff Regulations

9 On 17 June 1988, the applicant sent a note to the new Director of Translation, Mr Fell, asking him to intercede with the appointing authority to secure a successful outcome for his application. On 4 July 1988, the Director of Translation replied that he was unable to propose the applicant's appointment as a reviser firstly because the applicant had not completed the period in his grade necessary, under Article 45(1) of the Staff Regulations, for promotion and, secondly, because his success in the competition held for the purpose of recruiting a Head of Division in Grade LA 3 did not exempt him from taking part in a competition before he could be promoted to reviser.

10 On 1 September 1988, the applicant advanced to Step 4 in Grade LA 6. Shortly afterwards, Vacancy Notice No CJ 41/88 was published concerning a fourth post for a Spanish-language reviser. Point IV of that notice invited officials who were eligible for transfer or promotion and who were interested in the post in question to submit their applications. According to point V of the notice, other officials and members of staff of the Court could register their interest in the post. On 28 October 1988, the applicant sent a note to the Head of the Personnel Division of the Court, which was received by the Personnel Division on 3 November 1988 and which stated:

'In accordance with the abovementioned vacancy notice, I am pleased to inform you that I hereby apply for the post of Spanish-language reviser'.

11 Before commencing a competition for the recruitment of Spanish-language revisers, the Court consulted the Joint Committee, pursuant to Article 1(1) of

Annex III to the Staff Regulations. In its opinion of 3 August 1988, the Joint Committee expressed its opposition to the holding of a competition based on qualifications and tests and asked the appointing authority to look into the possibility of filling the revisers' posts by promotions. However, on 25 October 1988 the Court published Notice of Internal Competition No CJ 32/88 on the basis of qualifications and tests. The notice of competition provided that 'legal texts' were to be translated in the written tests.

12 The members of the Selection Board in the competition were: Mr Fell, the Director of the Translation Directorate, of German mother tongue; Mr Cervera, Head of the Spanish Translation Division, and Mr Dastis, a legal secretary in the Chambers of a member of the Court, of Spanish mother tongue, who was designated by the Staff Committee.

13 The applicant submitted his application for the competition on 24 November 1988. By a note of 29 November 1988, the Personnel Division of the Court sent the list of candidates in the Competition to the Chairman of the Selection Board. On 7 December 1988 the Selection Board admitted all the candidates to the written tests, which were held on 14 December 1988. The compulsory tests included the translation into Spanish of a text in French concerning a particular form of lien and its effects.

14 On 16 December 1988, the administration sent the candidates' papers to the Chairman of the Selection Board. The papers did not bear the names of the candidates, who were identified only by a number. The Selection Board awarded the applicant, whose number was 50, a mark of 12 out of 20 for the translation from French and, by applying the weightings provided for in the notice of competition, a overall mark of 95 for all the written tests. Thus the applicant obtained the pass mark and was admitted to the oral test, following which the marks awarded to him for all the compulsory tests came to 124, or 62%. According to the notice of competition, only those candidates who had obtained at least 65% of the marks in all the compulsory tests were to be included on the reserve list. By a note of the Personnel Division of the defendant institution dated 2 February 1989, the applicant was informed 'that, having regard to the marks you obtained in all the tests, the Selection Board is unable to include you on the reserve list'. Three successful candidates were on that list.

15 On 28 February 1989, the applicant lodged a complaint against, inter alia, the decision of the Selection Board not to include him on the list of suitable candidates. He first of all emphasized the merits of the procedure for the selection of temporary revisers and observed that the appointing authority had on a number of occasions approved his work as a reviser, in particular by continuing to pay him the temporary posting allowance even after the expiry the one-year period laid down in the Staff Regulations for the duration of a temporary posting. Relying on the principle *non bis in idem* and the argument that *in eo quod plus sit, semper inest et minus*, the applicant maintained that he had a right to be appointed reviser without having to pass a new competition because he had been included on the reserve list drawn up following Competition No CJ 24/86 (Head of Spanish Translation Division). He also claimed that no express reasons had been given for the appraisal made of the abilities that he had proved in other ways.

16 In addition, he criticized the very principle of holding a competition based on qualifications and tests on the ground that the use of such a procedure meant that his suitability for the duties of a reviser had been judged on the basis of an assessment not of all the work he had done over approximately two years but of about ten pages of work at most. He pointed out that in the present case the Joint Committee had been in favour of holding a competition based on qualifications. The applicant also claimed that the principle of the protection of legitimate expectations had been infringed in his regard. Moreover, he criticized the composition of the Selection Board in Competition No CJ 32/88 and the choice of the texts set in the written tests in that competition. Finally, the applicant maintained that the decision of the Selection Board was vitiated by a misuse of powers.

17 The applicant asked the appointing authority both to admit that it was inappropriate to make him participate in Competition No CJ 32/88 and to appoint him as a reviser. He asked it, alternatively, to annul the abovementioned competition and hold a new competition based on qualifications alone, with the same objective, or to annul the abovementioned competition and hold a new competition based on qualifications and tests, but with a Selection Board composed of officials from the language services of other institutions who would be neutral and objective and give an authoritative assessment of the 'perfect knowledge of the Spanish language' required of the candidates.

18 On 16 March 1989, the applicant was informed that the appointing authority had decided to appoint the three successful candidates, who were officials in the

Spanish Translation Division, to three of the four vacant posts for revisers and to bring to an end his temporary posting as a reviser with effect from 28 February 1989. On 17 March 1989, the applicant submitted a second complaint, which was against those three appointments. He claimed that they were based on a list of suitable candidates which was drawn up following an irregular competition so that they were vitiated by nullity just as the competition itself was. He then claimed that he was himself a candidate for promotion with a longer period of service than two of the appointees and objective merits at least equal to those of all of them. He requested principally that he should be appointed as a reviser under the same conditions and in accordance with the same procedures as the three successful candidates or, alternatively, that their appointments should be annulled.

19 By a letter of 18 August 1989, the President of the Court of Justice informed the applicant that the Administrative Committee of the Court had decided at its meeting of 16 June 1989 to reject his complaints. According to that letter, while the Committee understood the applicant's disappointment, it had rejected the claim that his legitimate expectations had not been protected. It had done so on the ground that, since the duration of the temporary posting was in principle limited to one year, it was only by holding a competition that the appointing authority could, in good time, structure the Spanish Translation Division, in which the appointing authority had decided, in the interests of the service, to declare a certain number of reviser posts vacant. With regard to the other objections, the letter stated that they too had been rejected by the Administrative Committee, which considered that the Selection Board in the competition had been properly composed and had not exceeded the limits of its discretion in choosing the texts set in the tests.

20 With effect from 1 January 1990, the applicant was transferred to the European Parliament. His personal file shows that he retained his classification in grade and step.

B — Procedure

21 Mr Valverde's application was received at the Registry of the Court of First Instance on 17 November 1989. The written procedure followed the normal course.

22 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. At the request of the Court, the defendant lodged the file on Competition No CJ 32/88, except for the candidates' papers, the text of Notice of Competition No CJ 41/88 and a copy of the note of 2 February 1989 informing the applicant that he had not been included on the list of suitable candidates. The applicant's representative in the oral procedure, Figueroa Cuenca, of the Madrid Bar, consulted those documents at the Registry.

23 The parties presented oral argument at the hearing on 5 December 1990. During the hearing the Court acquainted itself with the marks obtained by the applicant in the tests in Competition No CJ 32/88, as given above, and the applicant's representative submitted his observations on that matter. In reply to a question put by the Court, the parties stated their views regarding the reasoning of the Selection Board's decision not to include the applicant in the list of suitable candidates in Competition No CJ 32/88, as communicated to him by the abovementioned note of 2 February 1989. At the end of the hearing the President declared the oral procedure closed.

24 The applicant claims that the Court of First Instance should:

— declare the application admissible;

— annul the decision of the appointing authority of the Court of Justice dated 19 July 1989, notified to the applicant on 18 August 1989, rejecting his complaint of 28 February 1989, supplemented by the complaint of 17 March 1989, and consequently;

— order the appointing authority to admit that it was inappropriate to make the applicant take part in an internal competition based on qualifications and tests, Competition No CJ 32/88 ('Revisers'), and accordingly order it to appoint him as a reviser, with retroactive effect from 1 September 1988;

— annul all the steps taken in Competition No CJ 32/88, and also the appointments of officials made pursuant thereto;

— order the Court of Justice of the European Communities to pay the difference in salary withheld from the applicant since the time when he was deprived of the status of interim reviser until his definitive appointment as permanent reviser takes effect;

— order the Court of Justice of the European Communities to pay the token sum of ECU 1 as compensation for the non-material damage suffered by the applicant;

— order the Court of Justice to pay the costs.

25 The Court of Justice contends that the Court of First Instance should:

— dismiss the application as inadmissible, with the exception of the heads of claim seeking orders requiring the payment of compensation for damage;

— in any event, reject as inadmissible:

  — the request that the appointing authority be ordered to admit that it was inappropriate to make the applicant take part in an internal competition based on qualifications and tests, Competition No CJ 32/88 ('Revisers');

  — the request that the appointing authority be ordered to appoint the applicant as a reviser with retroactive effect from 1 September 1988;

  — and the request for the annulment of all the steps taken in Competition No CJ/88, based on qualifications and tests, and also the appointments of officials made pursuant thereto;

— dismiss the remainder of the application as unfounded;

— award costs as provided for by the applicable provisions.

C — The applicant's claims for annulment

26 Two of the applicant's seven heads of claim, namely the second and the fourth, comprise claims for annulment. With regard to the claim for the annulment of the decision rejecting the applicant's complaints of 28 February and 17 March 1989, it is established case-law of the Court of Justice that the action before the Court, even if formally directed against the rejection of the official's complaint, has the effect of bringing before the Court the act adversely affecting the applicant against which the complaint was submitted (see, for example, the judgment of the Court of Justice in Joined Cases C-41/88 and C-178/88 *Becker and Starquit* v *Parliament* [1989] ECR 3807). By asking, in his two complaints, to be appointed as a reviser, the applicant contested the rejection of his application for the post declared vacant by Vacancy Notice No CJ 41/88. The present action therefore concerns primarily that decision. The fourth head of claim comprises two claims for annulment, which also appear in the applicant's complaints and which concern, respectively, the steps taken in Competition No CJ 32/88 and the appointments made pursuant thereto.

27 The applicant bases those three claims for annulment on eight pleas in law: firstly, breach of the principle of proper administration and infringement of Articles 7 and 29 of the Staff Regulations; secondly, breach of the principle of the protection of legitimate expectations; thirdly and fourthly, infringement of Article 45(1) and (2) of the Staff Regulations; fifthly, infringement of Council Regulation (EAEC, EEC, Euratom) No 3517/85 of 12 December 1985; sixthly, infringement of the third paragraph of Article 3 of Annex III to the Staff Regulations; seventhly, misuse of powers, and eighthly and finally, a 'serious error' on the part of the Selection Board regarding the texts chosen for two of the written tests. In addition, it falls to the Court of First Instance to consider of its own motion the statement of the reasons for the Selection Board's decision to refuse to include the applicant on the list of suitable candidates drawn up following Competition No CJ 32/88.

1. *The claim for the annulment of the implied decision rejecting the applicant's application for the post referred to by Vacancy Notice No CJ 41/88*

(a) *The admissibility of the claim*

(aa) The course of the pre-litigation procedure

28 It should be pointed out that, by applying for the post referred to by Vacancy Notice No CJ 41/88, the applicant requested the appointing authority to adopt a decision in his regard. The note by which the applicant submitted his application therefore amounts to a request within the meaning of Article 90(1) of the Staff Regulations without its being necessary for the note to refer expressly to that provision (see the judgment of the Court of Justice in Case 178/80 *Bellardi-Ricci* v *Commission* [1981] ECR 3187, paragraph 9).

29 The abovementioned request by the applicant, which was received by the Personnel Division of the Court on 3 November 1988, was not rejected by the decision to hold Competition No CJ 32/88 since that decision made no mention of any applications for promotion. Consequently, the rejection was only implied and came into effect on expiry of the period of four months provided for under Article 90(1) of the Staff Regulations, that is to say on 3 March 1989. It follows that the complaint submitted by the applicant on 28 February 1989 against, inter alia, the implied decision rejecting his request for promotion, was premature.

30 However, on 17 March 1989 the applicant submitted a second complaint in which he claimed that he was a 'candidate for promotion' and by which he requested, in substance, that the appointing authority reverse its implied decision not to promote him. Although that second complaint was principally against the appointments of other officials following Competition No CJ 32/88, it expressly referred to the first complaint and therefore also concerned the implied decision rejecting the applicant's application for the post of reviser. The second complaint was expressly rejected by the decision of the Administrative Committee of the Court of Justice which was communicated to the applicant on 18 August 1988.

31 It follows that the present claim for annulment was in fact preceded by a pre-litigation procedure in compliance with Article 90 of the Staff Regulations.

(bb) The interest of the applicant in bringing an action

32 The defendant institution is of the opinion that the applicant's interest in bringing an action was 'considerably weakened' by his transfer to the Parliament. It admits that, according to the case-law of the Court of Justice (judgment in Case 155/78 *Miss M.* v *Commission* [1980] ECR 1797), being appointed as an official in another institution after bringing an action does not in itself preclude the existence of such an interest. It contends, however, that the situation of the applicant can be distinguished from that of the applicant in Case 155/78 by reason of the fact that in his case the moral element present in that case, namely the interest in the removal of all trace of a declaration of psychological unfitness, is absent. The defendant also contends that if the applicant's application is granted, it is difficult to see how he could be appointed, in his present situation outside the Court of Justice, to a post within the Court of Justice to which he wished to gain access by means of an internal competition. According to the defendant institution, the applicant therefore has an interest only in claiming compensation for the damage which he considers he has suffered.

33 The applicant replies that it is not possible to speak of a greater or lesser legitimate interest of an individual in relation to the bringing of an action. According to the applicant, such an interest either exists or it does not, and he points out that the defendant institution, for its part, acknowledges the existence of such an interest. The applicant adds that he was not seeking to obtain a promotion by means of an internal competition which, according to him, was unlawful, but to be promoted 'in the same way as the vast majority of earlier generations of revisers . . . , that is to say by means of an impartial promotion on the basis of impartial observation and an assessment of their daily work'.

34 It must be pointed out that it is not possible to infer from the judgment in Case 155/78, cited above, that a moral element must be present in order for the applicant to retain, after his transfer to the European Parliament, an interest in requesting the annulment of the decision of the appointing authority of the Court of Justice rejecting his application. In the abovementioned case, the Court of Justice was also called upon to rule on the argument that if a candidate rejected by the defendant institution was appointed to a post in another institution, he would be deprived of his interest in bringing an action because the appointment would open up the possibility of a transfer and thus permit him to obtain the same position that he would have had if his candidature had been successful. The Court of Justice considered that the hypothetical nature of that prospect was not sufficient to preclude an interest in bringing an action. That reasoning is all the

more applicable in the present case as the applicant's transfer to the Parliament with maintenance of his classification in Grade LA 6 cannot be considered to have placed him in a position equivalent to the one in which he would have been if he had been appointed as a reviser in Grade LA 5 at the Court of Justice. Moreover, that would also be the case if he had been promoted in the meantime to LA 5 at the Parliament (see the judgment of the Court of Justice in Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 12).

35 With regard to the argument that the applicant has no interest in bringing an action because after he had been transferred to the Parliament it was no longer possible for the necessary measures to be taken to comply with any judgment declaring void an act of the institution, pursuant to Article 176 of the EEC Treaty, it has been consistently held that an official may contest a decision of the appointing authority under Articles 90 and 91 of the Staff Regulations only if he has a personal interest in the annulment of the contested measure (see, for example, the judgment of the Court of Justice in Joined Cases 81 to 88/74 *Marenco* v *Commission* [1975] ECR 1247, paragraph 6). In particular, it has been held that an official has no such interest when the proceedings are brought against a decision to appoint another candidate to a post to which the applicant himself cannot be appointed (see, for example, the judgments of the Court of Justice in Case 126/87 *Del Plato* v *Commission* [1989] ECR 643, paragraph 20 and Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323, paragraph 29).

36 In the present case, however, account must taken of the fact that the applicant, who remains an official of the Communities, could still be appointed to a post in the Court of Justice by means of a transfer pursuant to Article 29(1)(c) of the Staff Regulations. Accordingly, the Court considers that to hold that the applicant's transfer to the Parliament has now made it impossible to take the necessary measures to comply with any judgment declaring void an act of the institution would be to interpret Article 176 of the EEC Treaty too restrictively. Consequently, the applicant's interest in bringing an action was not affected by his transfer to the Parliament. The Court therefore finds that, at this stage of the argument, no objection precludes the admissibility of this claim.

(b) *The pleas in law put forward in support of the claim*

37 Four of the eight pleas in law adduced by the applicant concern only the regularity of the procedure in Competition No CJ 32/88 and therefore have no bearing on the question whether the present claim for the annulment of the decision refusing to promote the applicant to a post of reviser without his having to pass a compe-

tition organized for that purpose, is well founded. The four pleas relating to this claim must be considered in the following logical order: firstly, the plea based on infringement of Article 45(1) of the Staff Regulations and on breach of the principle of equal treatment; secondly, the plea based on infringement of Article 45(2) of the Staff Regulations; thirdly, the plea based on infringement of the principle of proper administration and of Articles 7 and 29 of the Staff Regulations; fourthly, the plea based on breach of the principle of the protection of legitimate expectations.

(aa) The plea based on infringement of Article 45(1) of the Staff Regulations and on breach of the principle of equal treatment

38 The applicant considers that he should have been promoted, pursuant to the abovementioned provision, two years after his appointment as a probationary official, in other words with effect from 1 September 1988. The applicant expresses his disagreement with the case-law of the Court of Justice (judgment in Joined Cases 20 and 21/83 *Vlachos* v *Court of Justice* [1984] ECR 4149, paragraph 18 and the order in Case 248/86 *Brüggemann* v *ESC* [1987] ECR 3963, paragraph 7), according to which the period of two years provided for in Article 45(1) of the Staff Regulations starts to run from the establishment of an official. The applicant seeks to show that his argument is well founded, first of all, by means of a grammatical and linguistic analysis of the five language versions of Article 45(1). He deduces from the position of the phrase 'a partir de su nombramiento definitivo' (from the date of their establishment), in the Spanish version, and from its equivalent in the Italian text, that that clause concerns only officials appointed to the starting grade in their category or service. He considers that that meaning emerges especially clearly from the German and English versions of Article 45(1).

39 On the basis, secondly, of a teleological analysis of Article 45(1) the applicant argues that the aforementioned provision is designed to bestow a privilege on an official who enters a Community institution at the starting grade in the category to which he belongs by giving him an exceptional advantage of several months. He observes that an official recruited at Grades A 7 or LA 7 must wait only six months after the end of his nine-month probationary period before he is eligible for promotion, which represents a period of service of 15 months in total. In contrast, according to the interpretation that the Court of Justice gave to that provision in its judgment in *Vlachos*, cited above, an official recruited at a higher grade must wait 33 months, in other words 18 months longer. That imbalance does not appear logical to the applicant, who also claims that an appointment at

Grade 6 or LA 6 is made only if there is genuine evidence that the official in question possesses special experience or knowledge. Consequently, his arguments cannot be refuted by the assertion that by starting his career in Grade LA 6 he had already received a sufficient advantage.

40 The applicant then claims that in the system established by Chapter 3 of Title III to the Staff Regulations, Article 45 immediately follows Article 44, according to which every two years an official's career progresses automatically, that is to say he advances to the next step in his grade. The applicant infers from the foregoing that that two-year period is the standard period for advancement. In his view, there is no justification for delaying by an additional nine months the promotion of an official who, because he is older and more experienced, was recruited at a higher grade than the starting grade while another official who is younger and less experienced is accorded an advantage of nine months in relation to the abovementioned standard period for advancement.

41 Finally, the applicant claims that the interpretation of Article 45(1) of the Staff Regulations which was relied on as against him constitutes a breach of the principle of equal treatment in relation to the officials of certain institutions since the Commission and the Parliament consider that the period of two years provided for by Article 45(1) starts to run from the start of the official's probationary period. He asked the Court to request the administrations of those two institutions to provide information on their practices as regards the implementation of Article 45(1) of the Staff Regulations. In the same context, he asked the Court to order the Personnel Division of the Court of Justice to produce the original version of the minutes of a meeting of the Heads of Administration on that matter, an extract from which appears, in the form of a copy, in an annex to his application.

42 The defendant institution relies on the case-law of the Court of Justice in support of its contention that, in order to be promoted, an official must have spent a minimum period of two years in his grade after establishment.

43 In its rejoinder the defendant institution also contends that the plea was submitted out of time. The applicant, by making that plea, is accusing the appointing

authority of not having promoted him in response to the request to be promoted that he made on 28 October 1988 by submitting his application for the post declared vacant by Notice No CJ 41/88. A simple comparison of the dates shows, according to the defendant institution, that the plea was made out of time.

44 With regard to the admissibility of that plea, the Court found above (paragraph 30) that the applicant submitted, within the time allowed, a complaint against the refusal to promote him to the post declared vacant by Notice No CJ 41/88. It is true that in the aforementioned complaint of 17 March 1989 the applicant did not expressly claim that Article 45(1) of the Staff Regulations had been infringed. However, it is established case-law that, in staff cases, the forms of order sought cannot have a subject-matter other than that of the claims raised in the complaint or put forward heads of claim based on matters other than those relied on in the complaint. Those heads of claim may be developed however by the submission of pleas in law and arguments which need not necessarily appear in the complaint but which are closely linked to it (see, for example, the judgment of the Court of Justice in Case 242/85 *Geist* v *Commission* [1987] ECR 2181, paragraph 9). The applicant claimed in his complaint that he was a 'candidate for promotion' and in that regard emphasizes the time that he has spent in his grade. Thus he relies in his complaint on an interpretation of Article 45(1) of the Staff Regulation which is identical to the one which he subsequently advanced in the application. Consequently, the present plea is admissible.

45 On the question whether that plea is well founded, the Court has closely analysed the wording of Article 45(1) of the Staff Regulations. That analysis, however, has revealed no factor of such a kind as to suggest that the interpretation given to that provision by the Court of Justice in its case-law is inconsistent with the wording of the provision. That interpretation, according to which the minimum period in a grade required under the Staff Regulations in order to be eligible for promotion is calculated from the establishment of the official, whether recruited at the starting grade in the service to which he belongs or at another grade (see the judgment of the Court of Justice in Joined Cases 20 and 21/83, cited above, and the order in Case 248/85, cited above), corresponds in fact more closely to the text of Article 45(1) of the Staff Regulations than the contrary interpretation of the applicant. The juxtaposition in the same sentence of a six-month and a twelve-month period in a grade which must have been completed by officials appointed to the starting

grade and other officials, respectively, proves that the two periods start to run from the same event, namely from the establishment of the official. That conclusion is in no way contradicted by a comparative analysis of the provision at issue in the different language versions relied on by the applicant.

46 With regard to the purpose of Article 45(1) of the Staff Regulations, the aforementioned juxtaposition also shows that the provision in question seeks to grant to officials appointed to the starting grade in their service or category an advantage of 18 months over other officials with regard to eligibility for a first promotion. It should be added that Article 44 concerns only the period in a grade required for advancement to the next step in a grade. Contrary to the assertions of the applicant, that provision does not contain a standard period for promotion which could change the rules of Article 45 on the minimum period which an official must complete in a grade in order to be eligible for promotion. It does not preclude the Staff Regulations from requiring an official appointed to a higher grade than the starting grade to complete two years in that grade after establishment before he becomes eligible for promotion.

47 It follows that the applicant, who was appointed as a probationary official with effect from 16 September 1986 and as an established official with effect from 16 June 1987, did not become eligible for promotion either on 1 September 1988 — the date to which he refers and on which he advanced to the next step in his grade — or on 16 September 1988, but on 16 June 1989 when the two-year period from the date of his establishment expired.

48 The applicant cannot rely on the principle of equal treatment to challenge that method of applying Article 45(1) of the Staff Regulations in his case. Even if other institutions interpreted that provision in such a way that they regarded as eligible for promotion officials who have completed only two years in their grade from the date of their appointments as probationary officials, it follows from the foregoing considerations that such a practice is contrary to the Staff Regulations. Moreover, the applicant cannot rely, in support of his claim, on an unlawful act committed in favour of another (see the judgment of the Court of Justice in Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14).

49 Consequently, and without there being any need to order the measures of inquiry requested by the applicant with regard to the practices adopted by the other institutions, the Court finds that the plea in law based on an infringement of Article 45(1) of the Staff Regulations is unfounded.

(bb) The plea based on infringement of Article 45(2) of the Staff Regulations

50 The applicant claims that the Court of Justice should have appointed him as a reviser pursuant to Article 45(2) of the Staff Regulations by reason of his inclusion on the reserve list drawn up following Competition No CJ 24/86 (Head of Division of Spanish Translation). He considers that it follows from a teleological interpretation of Article 45(2) of the Staff Regulations — the purpose of which is clearly, in his view, to ensure that candidates are qualified to fill vacant posts — that it is illogical to argue that a person who, in the context of a competition, has been declared qualified to fill an LA 3 post, is not qualified to fill an LA 5 post, which involves the same duties, less those of management. In support of that argument the applicant relies on the principles *in eo quod plus sit, semper inest et minus* and *non bis in idem*. He claims that by adopting an implied decision to reject his application for one of the posts declared vacant by Notice No CJ 66/87, the appointing authority infringed Article 45(2) of the Staff Regulations.

51 In his reply the applicant also argues that it is nowhere written that the effects of a competition are limited to the posts which the competition was organized to fill. He considers that an explanation is called for, in the light of the opinion advanced by the defendant institution in this regard, as to why there was a reserve list in Competition No CJ 24/86 when the competition was organized to fill a single post for which a list of suitable candidates would have more than sufficed. The applicant maintains, moreover, that the fact that Competition No CJ 24/86, in which he was a successful candidate, was a competition based on qualifications, whereas Competition No CJ 32/88 was a competition based on qualifications and tests, is irrelevant since there is no legal provision or case-law on which it is possible to base a claim that a competition based on qualifications and tests is superior to a competition based on qualifications. Finally, he points out that the judgment of the Court of Justice in Case 143/82 (*Lipman* v *Commission* [1983] ECR 1301, paragraph 10) — according to which a candidate in a competition cannot usefully rely, in order to contest the decision of the Selection Board not to admit him to the tests, upon conditions of admission to another Commission competition which was organized by the same institution for the purpose of filling posts in the same career bracket, but according to different procedures — has

nothing at all in common with the present case. According to the applicant, the only link between the competitions referred to in the judgment in Case 143/82 was that they concerned Category A[1a] posts, but in different specialist areas, each requiring different qualifications. He points out that the competitions at issue in the present case are, in contrast, very closely linked.

52 The defendant institution contends that the effects of a competition are limited to the posts which they have been organized to fill. It considers that that is a general principle which is fundamental to the functioning of the entire system of competitions for filling posts of officials and it contends that such a system would become chaotic if the results of one competition continued to produce effects indefinitely, thereby affecting and predetermining the results of subsequent, distinct competitions.

53 The defendant institution also points out that Competition No CJ 32/88 was a competition based on qualifications and tests and the applicant failed the tests part, whereas Competition No CJ 24/86 was a 'mere competition on the basis of qualifications'. It considers that that difference between the two competitions explains why the applicant passed one of them but not the other. In its rejoinder, it states that it did not intend to maintain that a competition based on qualifications and tests is superior to a competition based on qualifications, but simply that they are two different selection procedures and that accordingly it is impossible to transpose the results in Competition No CJ 24/86 into the context of Competition No CJ 32/88, a competition based on qualifications and tests. It added that the inclusion of the applicant on the reserve list in Competition No CJ 24/86 could be 'seen in its proper perspective if it is borne in mind that all the candidates who took part in the competition were included on the list, a decision which was easy to adopt since it displeased no-one and had no effect on the functioning of the service'. Finally, it contended that that plea was submitted out of time since the failure to comply with Article 45(2) of the Staff Regulation relied on by the applicant was due, according to him, to the implied rejection of his application for one of the posts declared vacant by Notice No CJ 66/87.

54 With regard to the question whether the plea is out of time, it should be pointed out that, although the applicant refers to Vacancy Notice No CJ 66/87 when submitting the plea, the present proceedings were brought against the decision not to promote him to the post referred to in Vacancy Notice No CJ 41/88. However, the fact that the applicant did not challenge the decision to reject his

application for one of the posts declared vacant by the earlier notice — a decision which, according to the applicant, was vitiated by the same irregularity as the acts contested by the present proceedings — does not prevent him, in the context of those proceedings, from relying on that plea.

55 With regard to the question of whether the plea is well founded, it must be stated that Article 45(2) of the Staff Regulations merely makes transfer from one service to another or promotion from one category to another conditional on passing a competition. However, Article 45(2) does not mention the problem of promotion from one grade to another within the same category where the official has not been in the grade long enough to be eligible for promotion, which is the matter at issue in the present case. Article 45(2) therefore has no bearing on that matter.

56 The Court considers that by the present plea the applicant claims in substance that the appointing authority ignored the possibility of appointing him to the vacant post of reviser, pursuant to Article 29(1)(b) of the Staff Regulations, on the basis of his having passed Competition No CJ 24/86 for the post of Head of Division. That plea must be considered together with the next plea by which the applicant alleges, inter alia, that Article 29 of the Staff Regulation was infringed.

(cc) The plea based on breach of the principle of proper administration and on infringement of Articles 7 and 29 of the Staff Regulations

57 In support of this plea, the applicant claims that, rather than filling vacant reviser posts permanently, pursuant to Article 29 of the Staff Regulations, the defendant institution settled for a procedure for the selection of temporary revisers, which, while it possessed the substantive characteristics of a competition, was not a competition from a procedural point of view. Moreover, he accuses the appointing authority of having maintained the temporary postings for more than a year, in breach of the second paragraph of Article 7(2) of the Staff Regulations, on the false pretext that the officials who were capable of filling the revisers posts were not eligible for promotion since they had not been in their posts the necessary two years since establishment. The applicant considers that the fact that he himself benefited from this extension does not prevent him from challenging it in view of the fact that an official cannot depart from the organization of work decided on by the appointing authority. In addition, he also claims that he asked the Director of Spanish Translation on a number of occasions to resolve the matter in

accordance with the rules laid down in the Staff Regulation but that not the slightest attention was paid to his requests. The applicant points out that the appointing authority could have held a regular competition from the beginning of 1987, after having published three vacancy notices for revisers posts. In his reply, the applicant added that, while it was true that the appointing authority did hold Competition No CJ 11/85 for revisers, it was not until three years later that it held Competition CJ 32/88. He asked the Court to order the administration of the defendant institution to produce the originals of all the documents in its files relating to the procedure for the selection of temporary revisers held during 1987 in the Spanish Translation Division.

58 In response, the defendant institution makes the preliminary observation that the applicant greatly exaggerates the virtues of the procedure for the selection of temporary revisers and asks the Court to examine Mr Cervera, Head of the Court's Spanish Translation Division, as to the nature of that procedure. At the hearing it added that it could not give preference to such a procedure over a procedure which was held according to the rules laid down in the Staff Regulations, even if the selection made was genuine and rigorous. The defendant institution also points out that it held Competition No CJ 11/85 for the purpose of drawing up a reserve list of revisers. In reply to the applicant's criticism that it was not until three years after that competition that a second competition was held, the Court of Justice states that the decision concerning the date on which it is appropriate to commence a competition lies within its discretion in matters relating to the organization of its services. It adds that, in view of the fact that an insufficient number of suitable candidates emerged from Competition No CJ 11/85 it was reasonable to wait for a relatively long time so that candidates who were capable of filling posts of reviser could be trained and be in a position to submit applications.

59 The defendant considers that the extension of the duration of the temporary postings beyond the limits laid down by Article 7(2) of the Staff Regulations has no bearing on the outcome of the present proceedings and that the applicant, who profited from the extension, cannot now criticize it. The defendant observes that the fact that it was impossible for the applicant and his colleagues to be promoted to a higher grade because they had not been in their grades long enough to be eligible for promotion cannot be described as a fallacious pretext for maintaining the temporary postings.

60 It must be considered whether the evidence adduced by the applicant is such as to establish the existence of a defect in the decision not to promote him to the post of reviser which was the subject-matter of Vacancy Notice No CJ 41/88.

61 First of all, it should be pointed out that the procedure for choosing temporary revisers in which the applicant successfully participated was not held in accordance with the procedures on competitions laid down in the Staff Regulations. The Staff Regulations do not prescribe how the appointing authority is to choose the officials called upon to occupy temporarily posts in a higher career bracket. Nor, on the other hand, do they contain any provision according to which a selection procedure held for that purpose is capable of producing legal effects in relation to the promotion of the officials in question. Consequently, the effects of such a procedure cannot be deemed to be the same as those of a competition with regard to the possibility of promoting officials who have not completed the minimum period in their grade required under Article 45(1) of the Staff Regulations. That finding is not affected in any way by the fact that the temporary postings were maintained beyond the limits laid down in the Staff Regulations. Such an extension, which is incompatible with the provisions of Article 7(2) of the Staff Regulations, cannot produce legal effects which exceed those of a regular temporary posting. Since Article 7 of the Staff Regulations did not make it possible for the appointing authority to promote the applicant, it follows that the Court need not examine the merits of the procedure for selecting revisers or order the measures of inquiry requested by the parties in that regard.

62 With regard to the infringement of Article 29 of the Staff Regulations and of the principle of proper administration, the applicant does not appreciate the legal consequences flowing from his inclusion on the reserve list drawn up following Competition No CJ 24/86. It is true that when the appointing authority adopts a decision concerning the filling of posts for which a competition has been held, it is required to take into account the results of that competition (see, for example, the judgment of the Court of First Instance in Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 48). However, those results do not permit the appointing authority to appoint an official on the reserve list to a post which the competition was not held to fill (see, for example, the judgment of the Court of Justice in Joined Cases 112, 144 and 145/73 *Campogrande and Others* v *Commission* [1974] ECR 957, at p. 977). If there were no officials eligible for promotion and the appointing authority consequently appointed the successful candidates in an internal competition held to fill a specific post, to other posts, no one else would have an opportunity of proving in a new competition that he had the qualifications necessary to fill one of those posts. The appointing authority

would thus exclude from the field of candidates the officials who did not participate in the first competition, either because they had not yet been recruited or because they expressed no interest in the post then vacant. Such considerations have absolutely no bearing on whether or not those persons are qualified to fill a different post whose specific nature could not have been taken into account in the earlier competition procedure. The exclusion of potentially competent candidates in that way, on the basis of a criterion which is essentially contingent and extraneous to the merits of those candidates, might exclude persons whose qualifications for the post to be filled are equal or even superior to those of the successful candidates of an earlier competition. Such a result would be manifestly contrary to the purpose of the first paragraph of Article 27 and Article 29(1) of the Staff Regulations, namely the recruitment of officials of the highest standards of ability (see the judgment of the Court of First Instance in Case T-56/89 *Bataille and Others* v *Parliament* [1990] ECR II-597, paragraph 48).

63 Consistent with that purpose, moreover, is the common practice of limiting the duration of the validity of reserve lists drawn up following competitions in order to give new candidates the opportunity of making an attempt after a certain period of time has elapsed. It should be added that the duration of the validity of the reserve list on which the applicant was included and which was drawn up in September 1987 following Competition No CJ 24/86 was thus limited to one year, subject, however, to the possibility of extension. So if a reserve list cannot be used, after the duration of its validity has expired, even in order to appoint a successful candidate to the particular post which the competition was held to fill, the foregoing considerations preclude *a fortiori* the use of such a list for the purpose of filling other posts, regardless of the duration of its validity.

64 The fact that, as the applicant claims, the duties attaching to the post of Head of Division, for which he passed a competition, are similar to those attaching to the post of reviser, is irrelevant in that regard since the posts are different and call for qualifications which are at least partly different. Consequently, regardless of the merits of the procedure in Competition No CJ 24/86, neither the alleged principle of *non bis in idem* nor the argument according to which *in eo quod plus sit, semper inest et minus* can be relied on to as grounds for the applicant's promotion on the basis of the aforementioned competition to a post of reviser.

65 That being so, the defendant institution was right to consider that the applicant could not be appointed as a reviser without his having taken part in a new competition held for that purpose.

66 With regard to the other criticism made by the applicant in the context of that plea, the appointing authority cannot be criticized in the circumstances of the present case for having waited a relatively long time before holding a competition for the purpose of appointing revisers so as to increase the number of sufficiently experienced candidates. The appointing authority has a wide discretion for the purpose of finding the candidate with the highest standard of abilities (see the judgment of the Court of Justice in Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, paragraph 23). For the same reason, the fact that, before it held the competition, the appointing authority called upon certain officials to perform the duties of reviser temporarily and thereby gave them the opportunity of acquiring some experience in that field, does not justify the conclusion that Article 29 of the Staff Regulations or the principle of proper administration were infringed.

67 It follows that the plea in law based on breach of the principle of proper administration and on infringement of Articles 7 and 29 of the Staff Regulations must be rejected.

(dd) The plea based on breach of the principle of the protection of legitimate expectations

68 In support of this plea the applicant claims that during the oral tests in Competition No CJ 12/85 Mr Kögler, the Director of the Translation Directorate at that time, had promised him that he would be rapidly promoted and that that promise was confirmed in writing in the abovementioned memorandum of 11 November 1986 in which Mr Elizalde, the acting Head of Division, stated that the temporary reviser posting would 'result in a promotion at the end of the two years provided for by the Staff Regulations'. The applicant claims that it has long been customary practice at the Court of Justice to promote lawyer-linguists to the next highest career bracket using the method promised by Mr Kögler, without using a selection procedure as elaborate as the one applied in the present case. The applicant admits that Mr Elizalde's memorandum was a circular that was not addressed to him personally, but he points out that he was one of the addressees and that he took part in the selection procedure in question, fulfilling all the conditions for participation laid down in the memorandum.

69 The applicant relies, in addition, on five acts of various institutions of the administration which he claims attest to his abilities as a reviser. The five acts in question are: firstly and secondly, two memoranda from the acting Head of Division proposing him as a temporary reviser; thirdly, the resulting decision of the appointing authority; fourthly, his inclusion, by the Selection Board in the competition held for the purpose of filling the post of Head of the Spanish Translation Division, on the reserve list in that competition; fifthly and finally, the appointing authority's implied decision to extend his temporary posting, regardless of whether it was illegal, on the expiry of the time-limit prescribed in the Staff Regulations. He considers that those acts indicated that the appointing authority had accepted that he should perform the duties of reviser and that they were sufficient to create a legitimate expectation on his part. At the hearing, he also claimed that the opinion in which, on 3 August 1988, the Joint Committee expressed its opposition to the holding of a competition based on qualifications and tests confirms that there was, on his part, a justified expectation of promotion.

70 The applicant charges the defendant with not having kept the promises which it made to him and which were confirmed by the abovementioned subsequent acts and, instead, of having held Competition No CJ 32/88 'at the end of which the Selection Board took great care to exclude the applicant by placing him in a worthless fourth position and accepting only three candidates', thus attributing more importance to 'an alleged objectivity concerning no more than 12 or so pages of translation/revision' than to the work carried out by the applicant over three years, work which concerned several thousand pages and which had been expressly approved by his superiors at all levels.

71 The applicant offered to adduce proof of his allegations concerning the promises which were made to him by evidence, as witnesses, from Mr Kögler, a former Director of Translation, Mr Keeling, an official of the Court of Justice and a member of the Selection Board in Competition No CJ 12/85, and Mr Elizalde, a Commission official and former Head of the Court's Spanish Translation Division.

72 In reply to those arguments, the defendant institution contends, firstly, that the statements that the applicant characterizes as promises were merely a description, for information purposes, of the possibilities opened up by the career of lawyer-linguist to which the applicant had acceded following Competition No CJ 12/85. That interpretation is borne out, according to the institution, inter alia, by the use

of the conditional mood in the note of Mr Elizalde relied on by the applicant and by the fact that that note was not addressed to the applicant personally and was merely a circular in which he could not have found special guarantees concerning his subsequent promotion. The defendant institution states that the other circumstances listed by the applicant only constitute normal variations in the work he performs in the Spanish Translation Division and that he knew, or should have known, that his promotion was dependent on a selection procedure governed by the Staff Regulations in which neither the duties which he performed previously as an official nor anything said by anyone could ensure his success. At the hearing, the defendant institution added that the applicant could not rely on the (irregular) extension of his temporary posting in order to take advantage of the principle of the protection of legitimate expectations.

73 The defendant institution cites the case-law relating to the application of the abovementioned principle in staff cases, according to which promises which do not take account of the provisions of the Staff Regulations under which a competition is necessary for appointment to any post cannot give rise to a legitimate expectation on the part of the persons concerned (judgments of the Court of Justice in Case 162/84 *Vlachou* v *Court of Auditors* [1986] ECR 481, paragraph 6, and Case 228/84 *Pauvert* v *Court of Auditors* [1985] ECR 1969, paragraph 12). It considers that that is all the more applicable in the present case as it was not an actual promise that was given but mere information, which, what is more, did not emanate from the appointing authority, as it did, in contrast, in *Pauvert*, cited above.

74 In its rejoinder, the defendant institution also contends that the plea in law was made out of time since the applicant does not claim that the breach of the principle of the protection of legitimate expectations was the result of the decision adopted in his regard by the Selection Board in Competition No CJ 32/88 but that it was the result of the failure to appoint him as an established reviser in September 1988.

75 With regard to the admissibility of that plea, it should be pointed out that that plea was raised by the applicant against the implied decision to reject his application for the post referred to by Vacancy Notice No CJ 41/88 and that he contested that notice within the prescribed time-limit. Consequently, the mere fact that in his statement of the plea the applicant charges the defendant institution with not having promoted him in September 1988 cannot mean that the plea as a whole was submitted out of time.

76 As regards the question whether the plea in law is well founded, it is clear from the examination of the three preceding pleas that the applicant was not eligible for promotion to a post in Grade LA 5 at the date on which the implied decision to reject his application was adopted. Consequently, any promise to appoint him, even though he was not eligible, to a post of reviser would have been contrary to Article 45 of the Staff Regulations. The Court of Justice has consistently held that promises which do not take account of the provisions of the Staff Regulations cannot give rise to a legitimate expectation on the part of an official (see the judgments of the Court of Justice in *Vlachou* and *Pauvert*, cited above, and the judgment of the Court of First Instance in Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131).

77 Moreover, it also follows from the allegations made by the applicant himself that none of the statements on which he relies contemplated the possibility of a promotion without completion of the minimum period in a grade necessary for promotion under Article 45(1) of the Staff Regulations. Mr Elizalde's circular, on which the applicant bases his arguments, even stated expressly that the 'consolidation' of the temporary postings into promotions was contingent on the expiry of the period laid down in the Staff Regulations.

78 It follows that neither the statements of the former Director of Translation nor the circular of the acting Head of Division nor the various acts of the administration relied on by the applicant were such as to give rise on his part to a legitimate expectation that he would be promoted without his having fulfilled the relevant conditions laid down in the Staff Regulations.

79 Consequently, and without its being necessary to examine witnesses as to the content of the statements allegedly made to the applicant, it must be held that the defendant institution did not infringe the principle of the protection of legitimate expectations in adopting an implied decision rejecting the applicant's application for the post of reviser.

80 It follows from the foregoing considerations that the applicant's claim for the annulment of the implied decision rejecting his application for the post referred to in Vacancy Notice No CJ 41/88, is unfounded.

2. *The claim for the annulment of all the steps in Competition No CJ 32/88*

(a) *The admissibility of the claim*

81 The defendant institution is of the opinion that the claim that the Court should 'annul all the steps taken in Competition No CJ 32/88 based on qualifications and tests' is inadmissible. It considers that the purpose of the present proceedings is confined to determine whether or not the decision adopted vis-à-vis the applicant in the context of that competition is valid. According to the defendant institution, the applicant has no legitimate interest in seeking anything other than the annulment of the decision concerning him. It contends that the applicant may no longer contest the holding of the competition in question. According to the case-law of the Court of Justice (judgments in Cases 294/84 *Adams* v *Commission* [1986] ECR 977, paragraph 17 and Joined Cases 64, 71 to 73 and 78/86 *Sergio* v *Commission* [1988] ECR 1399, paragraph 15), he ought to have made any challenge within three months of publication of the competition notice by submitting a complaint under Article 90(2) of the Staff Regulations.

82 The applicant claims that the competition at issue is automatically void because it was held in breach of Council Regulation (ECSC, EEC, Euratom) No 3517/85 of 12 December 1985 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985 L 335, p. 55). He considers, moreover, that the judgments cited by the defendant institution in relation to the lateness of his application are not pertinent since, when he was taking part in the competition, he could not have known whether or not it would be held in a regular manner.

83 The applicant maintains that the annulment of the decision adopted in his regard by the Selection Board is not the only objective of his application; since the competition is void because it is intrinsically unlawful owing to the composition of the Selection Board and the misuse of powers committed by the only member of the Selection Board qualified to serve on it, all the acts based on the competition, including the list of suitable candidates, must be annulled.

84 It is necessary to examine, firstly, the applicant's argument that Competition No CJ 32/88 is automatically void. That argument corresponds in substance to the rule, recognized in the case-law of the Court of Justice, according to which, in

exceptional circumstances, a measure may be deemed to be non-existent if it exhibits particularly serious and manifest defects (see, for example, the judgments of the Court of Justice in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10 et seq. and Joined Cases 1 and 14/57 *Usines à Tubes de la Sarre* v *High Authority* [1957] ECR 105, at p. 113). For an act to be thus deprived of the presumption of validity which the Treaties attach, for obvious reasons of legal certainty, even to irregular acts of the institutions, the irregularity must be so gross and so obvious that it goes far beyond a 'normal' irregularity resulting from an erroneous assessment of the facts or from a breach of the law (see the judgment of the Court of Justice in *Consorzio Cooperative d'Abruzzo*, cited above, and the Opinion of Mr Advocate General Mischo in the same case, p. 1014, at p. 1019).

85 The alleged unlawfulness of Competition No CJ 32/88 flows, according to the applicant, from the breach of a rule contained in secondary legislation, namely Regulation No 3517/85. In response to the special situation brought about by the accession of Spain and Portugal to the Communities, that regulation introduced a temporary recruitment system derogating from certain mandatory provisions of the Staff Regulations, for example, those which provide that account must not be taken of the nationality of candidates and that internal recruitment procedures must be given priority. An infringement of a such regulation, whose scope is limited both with regard to time and to subject-matter and which establishes exceptions to certain fundamental principles of the Staff Regulations, is not one of the exceptional cases which permit an irregularity to be described as so serious and so flagrant that it renders the act affected by it non-existent. Moreover, any irregularities concerning the composition of the Selection Board or the manner in which it performed its tasks are also not such as to render all the steps in a competition non-existent.

86 Furthermore, if the applicant had wished to contest the decision to commence the competition or the content of the competition notice, he should have submitted a complaint within three months of the publication of the competition notice (see the judgments of the Court of Justice in Case 294/84, cited above, paragraph 17 and Joined Cases 64, 71 to 73 and 78/86, cited above, paragraph 11 et seq.). He was not prevented from doing so by the fact that he submitted an application for the competition in question and that he was admitted to it. It is true that an applicant who has passed the first stages in a competition, which he does not contest in principle, cannot be adversely affected by all the steps in the competition (see the

judgement of the Court of Justice in Case 164/87 *Simonella* v *Commission* [1988] ECR 3807, paragraph 12). However, the particular situation of the applicant, who claims that the competition at issue should not have been held before he was promoted, is different. In those particular circumstances, the applicant had a legitimate interest in challenging the notice of competition while at the same time taking part in the steps in the competition in order to protect his rights in the event that his complaint was rejected. He was therefore entitled to submit a complaint against Notice of Competition No CJ 32/88.

87 The competition notice in question was published on 25 October 1988 and the applicant submitted his application on 24 November 1988. The complaint that the applicant submitted on 28 February 1989 in which be requested the annulment of the competition procedure is therefore out of time.

88 The argument that it was impossible for the applicant to have known in good time whether or not the competition would take place in a regular manner cannot justify the delay, since it refers to the possible occurrence of irregularities in the subsequent steps in the competition. Such irregularities would not, in any event, have had any bearing on the question whether or not the very decision to hold a competition and the content of the notice of competition complied with the Staff Regulations. The information needed to answer that two-part question was known at the time when the notice was published and the applicant could have made use of it within the time-limit. It would be contrary to the principles of legal certainty, the protection of legitimate expectations and proper administration to accept that the applicant was entitled to wait for all the steps in the contested competition to have been completed and for the results to be known before he challenged the acts entailed in the holding of the competition.

89 Consequently, the present claim is inadmissible inasmuch as it seeks the annulment of the decision to hold Competition No CJ 32/88 and the annulment of the notice of competition relating thereto.

90 On the other hand, in so far as the present claim is directed against the list of suitable candidates adopted following the competition, it must be stated that a pre-litigation procedure was unnecessary (see, for example, the judgment of the

Court of Justice in Case 44/71 *Marcato* v *Commission* [1972] ECR 427, p. 433 et seq.). However, as the applicant did nevertheless submit a complaint, the time-limit for bringing an action started to run, in accordance with Article 91 of the Staff Regulations, from the day on which the decision taken in response to the complaint was notified to the applicant (judgment in Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, paragraph 17). It follows that the applicant contested the list of suitable candidates within the time-limit prescribed in the Staff Regulations.

91 However, it must be considered to what extent that list is an act capable of adversely affecting the applicant. A list of suitable candidates is the result of two distinct types of decisions adopted by the Selection Board. Firstly, the Selection Board decides to include certain candidates on the list; secondly, it refuses to include on it the other candidates who took part in the competition.

92 With regard to the candidates included on the list, the list is a measure preparatory to an appointment decision (see the judgment of the Court of Justice in Case 143/84 *Vlachou* v *Court of Auditors* [1986] ECR 459, paragraph 11). As regards the candidates not included on the list, the mere inclusion of the other candidates does not change their legal position, which is affected only by the actual appointment of another person to the post which the competition was held to fill. On the other hand, the decision not to include a candidate on the list of suitable candidates is an act adversely affecting the person in question (see the judgment of the Court of Justice in Case 144/82, cited above).

93 Consequently, the claim for the annulment of all the steps in Competition No CJ 32/88 is admissible only in so far as it concerns the refusal of the Selection Board to include the applicant on the list of suitable candidates.

(b) *The pleas put forward in support of the claim*

(aa) The inoperative pleas in law

94 Since the applicant failed to contest the decision to hold Competition No CJ 32/88 within the prescribed time-limit, he cannot rely on pleas in law based on the alleged irregularity of the abovementioned decision in order to seek the annulment of the decision refusing to include him on the list of suitable candidates (see the

judgments of the Court of Justice in Case 294/84, cited above, and in Joined Cases 64, 71 to 73 and 78/86, cited above). Consequently, it is not necessary to consider in the present context the pleas based on breach both of the principle of proper administration and Articles 7 and 29 of the Staff Regulations and of the principle of the protection of legitimate expectations, pleas which call into question only the decision to hold the competition and which do not concern the manner in which the subsequent steps in the competition were taken.

95 With regard to the plea based on infringement of Regulation No 3517/85, the applicant claims that Article 1(2) of the regulation, according to which

'Appointments to grades A/3, A/4, A/5, LA/3, LA/4, LA/5, B/1, B/2, B/3 and C/1 shall be made after a competition on the basis of qualifications, organized in accordance with Annex III to the Staff Regulations',

is mandatory and precludes the possibility of recourse to a competition based on qualifications and tests for appointments in the higher career brackets of each category, give preference instead to competitions based on qualifications. He considers that, even though that regulation was applicable only until 31 December 1988 and the appointment decisions adopted on the basis of the contested competition were made in 1989, the defendant institution was bound by it because the posts in question had been vacant since September 1987 and the temporary appointments made to fill them ought to have ceased to produce all effects in June 1988.

96 The defendant institution contests that plea on the ground that the system of special appointments introduced by Regulation No 3517/85 is not mandatory but optional. In its rejoinder, it adds that the regulation refers only to the filling of posts of officials by means of open competitions open to candidates from outside the Community institutions. In its opinion, the authorization to derogate from the provisions of the Staff Regulations provided for in Regulation No 3517/85 could not apply to Competition No CJ 32/88, which was based on qualifications and tests, since that competition was an internal competition. Moreover, the defendant institution draws attention to the fact that no provision of Chapter 3 ('staff reports, increments and promotion') was mentioned among those from which the appointing authority may derogate by virtue of Regulation No 3517/85.

97 The plea based on the infringement of Regulation No 3517/85 concerns only the decision to hold Competition No CJ 32/88. Consequently, that plea is inoperative with regard to the decision of the Selection Board to refuse to include the applicant on the list of suitable candidates. Since the Selection Board was bound by the provisions of the notice of competition for Competition No CJ 32/88, a competition based on qualifications and tests, it is inconceivable that it should have been required to include the applicant on the list of suitable candidates in application of a regulation concerning the holding of competitions based on qualifications.

98 In addition, it must be added that Regulation No 3517/85 does not in any event impose any obligation on the institutions to hold internal competitions for the nationals of the new Member States. According to Article 1 of the regulation, provision 'may' be made for vacant posts in higher grades, for example in Grade LA 5, to be filled after a competition on the basis of qualifications. The appointing authorities of the institutions were therefore not obliged to hold such a competition automatically. Moreover, Regulation No 3517/85 refers only to 'appointments' to posts in Grade LA 5 and makes no mention either of promotion or of Article 45 of the Staff Regulations. Consequently, the applicant, who was already an official of the Court of Justice, had no right whatever to require a competition based on qualifications to be held on the basis of the regulation in question.

(bb) The plea relating to the composition of the Selection Board in Competition No CJ 32/88

99 The applicant claims that the candidates did not officially know the composition of the Selection Board until the start of the written test. According to the applicant, the way in which the Selection Board was composed was contrary to the letter and spirit of the third paragraph of Article 3 of Annex III to the Staff Regulations, according to which 'members of the Selection Board shall be chosen from officials whose grade is at least equal to that of the post to be filled'. He considers that the purpose of that provision is to ensure that all the members of the Selection Board are capable of assessing the ability of the candidates to carry out the duties relating to the post to be filled. The applicant points out that the notice of competition required candidates to have 'a perfect knowledge of the Spanish language'. He maintains that the Chairman of the Selection Board, Mr Fell, who is of German mother tongue, did not have a perfect knowledge of Spanish. Even if his duties as Chairman of the Selection Board consisted mainly in ensuring the harmonization of the criteria applied, it was difficult, according to the applicant, for him to perform that task with regard to a language 'of which he does not have a mastery'.

100 The applicant also challenges the appointment, as a member of the Selection Board, of Mr Dastis, a member of the temporary staff in Grade A 5, assigned as a legal secretary to the Chambers of a Member of the Court of Justice. Relying on the fact that Article 45(2) of the Staff Regulations in conjunction with Annex I to those regulations draws a distinction between Grade A officials and those in the language service in so far as it requires a competition for a transfer from one category to the other, the applicant alleges that an A 5 official and an LA 5 official cannot be considered to be in the same grade. He adds that candidates for category A posts are never required to have a knowledge of more than two Community languages whereas revisers must always have a knowledge of at least three languages. Finally, he claims that Article 3(3) of Annex III to the Staff Regulations does not permit members of the temporary staff to be members of selection boards in competitions.

101 The applicant deduces from the foregoing that the Selection Board was in fact composed of only one person who was validly appointed, namely the Head of the Spanish Translation Division. The applicant maintains that that person could not demonstrate the necessary objectivity by reason of the fact that he knew the language combinations and the handwriting of the candidates. At the hearing, the applicant also pointed out in that regard that he had been working as a reviser for more than a year when the tests in the competition were held and that the nature of that work prevented him from using a dictaphone or a typewriter. He points out that, since no examiner was appointed in order to resolve those problems, the objectivity which Article 3 of Annex III to the Staff Regulations seeks to guarantee was lacking in the present case, and he concludes from that that the contested competition is automatically void.

102 The defendant institution replies, firstly, that the Chairman of the Selection Board, Mr Fell, wrote his doctoral thesis on Spanish family law and that he worked for a certain period as a legal assistant at the German Chamber of Commerce in Madrid so that he has a good knowledge of the Spanish language in general and of Spanish legal terminology. It adds that his role as Chairman of the Selection Board in Competition No CJ 32/88 was to ensure that the criteria used to assess the candidates were consistent with those used in all competitions. It considers that all selection boards must include a person who is acquainted with and represents the values and traditions of the institution and its working methods and that Mr Fell was particularly suited to perform those functions owing to his long experience of legal translation.

103 The Court of Justice points out, secondly, that Mr Dastis, as a career diplomat, was required to demonstrate, in a difficult competition, at least an excellent knowledge of French and English and a good legal training. It contends that the applicant was aware of those facts and that he himself had said to his Head of Division that Mr Dastis was one of the persons most suited to be on the Selection Board in the contested competition. It asks the Court of First Instance to examine as a witness the Head of Division, Mr Cervera, as to those statements. As regards Mr Dastis's status as a member of the temporary staff, the defendant institution refers to the case-law of the Court of Justice according to which neither the Chairman of the Selection Board nor the other members need necessarily be officials (judgments in Case 90/74 *Deboeck* v *Commission* [1975] ECR 1123, paragraph 35 and in Joined Cases 64, 71 to 73 and 78/86, cited above).

104 The defendant institution considers that the applicant's assertion that the Selection Board included only one person who was validly appointed is a reformulation of the argument which he has advanced a number of times on the subject of Mr Cervera, according to which 'he could not demonstrate the objectivity which constitutes the essential purpose of competitions based on qualifications and tests', since, inter alia, he was able to recognize the handwriting of the candidates. According to the defendant institution, the Court need not be detained unduly by that allegation, with regard to which it contends that the majority of the candidates dictate or use a typewriter. It prefers to emphasize the judgment of the Court of Justice in Case 34/80 (*Authié* v *Commission* [1981] ECR 665, paragraph 26) in which it refused to accept criticisms which concentrated, in the same way, on one of the members of the Selection Board and emphasized that such criticisms 'fail to appreciate . . . the nature of selection boards, which are collegial bodies operating in complete independence . . . '.

105 It should be pointed out that, in order to be constituted in accordance with the provisions of the Staff Regulations and Article 3 of Annex III thereto, the selection board in a competition on the basis of qualifications and tests must be composed in such a way as to guarantee an objective assessment by the selection board of the candidates' professional qualities in their performance in the tests (see the judgment of the Court of First Instance in Joined Cases T-32/89 and T-39/89 *Marcopoulos* v *Court of Justice* [1990] ECR II-281).

106 The Court considers that the requirements which the abilities of the members of a selection board called on to assess the professional qualities of candidates for

revisers' posts must satisfy are similar, but not identical, to those laid down in the Court's judgment in Joined Cases T-32/89 and T-39/89, cited above. Firstly, the members of the selection board must have a good understanding of the language in which the candidate will be required to revise, which does not mean, however, that each member must necessarily have a perfect knowledge of that language. Secondly, they must have some legal knowledge. Thirdly, there must be some experience within the selection board of the revision of legal texts.

107 Moreover, the appointing authority and the Staff Committee have a wide discretion in assessing the abilities of the persons whom they are called on to appoint, pursuant to Article 3 of Annex III to the Staff Regulations, as members of the selection board and it is not for the Court to criticize their choice unless the limits of that discretion have not been observed.

108 In the present case, two members of the Selection Board were of Spanish mother tongue and the third had a good knowledge of that language. Two members had experience of legal translation and revision, the third was a lawyer of Spanish mother tongue and, as a legal secretary in the Chambers of a Member of the Court of Justice, had experience of working in a multi-lingual environment involving frequent use of translations. The Court finds that a selection board so composed fulfils the requirements set out above in paragraph 106 and is such as to ensure an objective assessment of the candidates' performances.

109 The fact that one of the members of the Selection Board was a member of the temporary staff was not such as to render the composition of the selection board irregular. According to the case-law of the Court of Justice, Article 3 of Annex III to the Staff Regulations does not require that the members of a selection board must necessarily be officials (judgments in Case 90/74 and in Joined Cases 64, 71 to 73 and 78/86, cited above). Consequently, any statements that the applicant may have made with regard to the qualifications of Mr Dastis to be on the Selection Board have no bearing on whether this plea is well founded. It is therefore unnecessary to examine the witness proposed by the defendant institution on that matter.

110 Finally, with regard to the doubts expressed by the applicant as to the objectivity of one of the members of the Selection Board, namely Mr Cervera, on the ground that he could recognize the handwriting and the language combinations of each of the candidates, it should be pointed out that the applicant has not adduced any circumstance from which it could be inferred that Mr Cervera was biased against him. In addition, the numbering of the tests guaranteed, as far as possible, the anonymity of the candidates (see the judgment of the Court of Justice in Case 149/86 *Santarelli* v *Commission* [1988] ECR 1875, paragraph 25), which, in any event, does not appear among the detailed rules of procedure for competitions laid down in Annex III to the Staff Regulation. Consequently, the mere possibility that a member of the Selection Board might have been in a position to identify the candidates from their handwriting and their language combinations is not sufficient to lead the Court to find that the composition of the Selection Board was unlawful or that it was not such as to guarantee an objective assessment of the professional abilities of the candidates in the competition.

111 It follows that neither the appointing authority nor the Staff Committee exceeded the limits of the discretion conferred on them by Article 3 of Annex III to the Staff Regulations and that the plea based on the allegedly irregular composition of the Selection Board in Competition No CJ 32/88 is unfounded.

(cc) The two pleas based on the allegation that the Selection Board's choice of texts for the tests in Competition No CJ 32/88 constituting a misuse of powers and a 'serious error'

112 Although the applicant stated all his objections concerning the content of the written tests in Competition No CJ 32/88 under the heading 'misuse of powers', under the same heading he put forward a second plea in law based on the serious error which the Selection Board allegedly committed in choosing the texts which it set in the aforementioned tests. According to the applicant, the test consisting in the translation of a French text into Spanish was misconceived because it did not contain any linguistic difficulties and was arbitrary. He claims that the text chosen consisted of a small number of paragraphs removed from their context, taken from an academic work on 'an obscure rule of administrative law', entirely unrelated to Community law, and that the alleged verification of knowledge which was supposed to be the object of that test was based only on the mastery of two or three terms which were the key to the whole text. The applicant considers that the 'heads-or-tails' character of that test was made all the worse since the test

accounted for 60 marks, that is to say 37.5% of the total marks awarded for the written tests. The applicant observes that, in contrast, the subject-matter of the text chosen for the translation from German was clearly Community-related and was simple for candidates in such internal competitions, and he adds that, according to some translators, this text did not contain any major linguistic difficulties either. He considers that that test, which was marked out of 40, gave an advantage to those who sat it, of whom he was not one. At the hearing, he claimed that the file on the competition in question produced by the defendant institution at the request of the Court did not contain the texts set in the tests so that he was not in a position to prove that the texts were not of the same degree of difficulty. According to the applicant, that is an irregularity which has prevented the Court from evaluating the extent to which the texts vary in difficulty.

113 In that context, the applicant repeats that the Selection Board knew the languages chosen by each candidate and that Mr Cervera, the only member of the Selection Board who, according to the applicant, was formally qualified to be a member, could not demonstrate the necessary objectivity. The applicant is surprised that, even though he passed the written tests and was allowed to take part in the oral test, in which he obtained 30 marks out of 40, the Selection Board did not include him on the list of suitable candidates owing to the allegedly insufficient overall mark which he obtained for all the tests. The applicant considers that result to be especially surprising since over a period of more than two years, during which he revised and translated thousands of pages, he had satisfied the five quality controls which he mentioned in support of his plea in law based on the protection of legitimate expectations (see above, paragraph 69).

114 The applicant infers from the above that the choice of the texts set in the French and German tests respectively constituted a 'serious substantive error', implying a misuse of the power conferred by the appointing authority on the Selection Board, whose principal aim was to determine objectively who were the best translators to be appointed as revisers, an aim which could not be achieved with the persons chosen to be members of the Selection Board and with the methods of selection used by those persons.

115 In his reply, the applicant stated, firstly, that the arguments he put forward in support of the previous plea — based on the irregular composition of the Selection

Board — must also be taken into consideration in the context of the present plea, which is based on a misuse of powers. He claimed, secondly, that the judgment of the Court of Justice in Case 228/86 (*Goossens* v *Commission* [1988] ECR 1819), according to which it is not for the Court to criticize the detailed content of a test, unless that content is not confined within the limits laid down in the competition notice or is not consonant with the purposes of the test or of the competition, is not relevant in the present case. He pointed out that, unlike the applicants in *Goossens*, cited above, he was not claiming that the tests were too difficult in relation to the posts to be filled and to the training courses held prior to the tests, but that they were ineffectual as a way of revealing clearly the differences between the candidates' knowledge of languages and thus enabling the best to be chosen objectively.

116 The applicant adds that the fact that the two successful candidates in the competition had obtained the highest marks in the previous competition held for the purpose of filling posts in Grade LA 6 cannot be relied on to prove the worth of the tests at issue. He considers that the use of information relating to a competition held for the purpose of filling posts in Grade LA 6 in order to justify an assertion concerning another competition held for the purpose of filling posts in a higher grade is contrary to the judgment of the Court of Justice in Case 143/82, cited above. According to the applicant, that invalid argument is perhaps the best indication that a misuse of powers was committed and that it had already been decided before the competition was held who would be appointed following the competition.

117 In order to prove that the texts set in the written tests in Competition No CJ 32/88 were inappropriate, the applicant requested in his application that an expert witness from the Oficina de Lenguas del Ministerio de Asuntos Exteriores del Reino de España (Languages Service of the Ministry of Foreign Affairs of the Kingdom of Spain) should be examined as to whether those texts, in particular the French and German texts, were appropriate having regard to the objectives set out in the competition notice, namely to establish whether candidates possessed 'a perfect knowledge of Spanish, a thorough knowledge of French and a good knowledge of two other official languages of the Community'. In his rejoinder, however, the applicant withdrew his request for such an expert's report on the ground that it was possible for the Court to appraise the texts.

118 The defendant institution considers that the applicant has not proved, or even alleged, a misuse of powers. It argues that the actual content of this plea consists in a criticism of the written tests in the competition, 'with a number of digressions . . . on the subject of the members of the Selection Board'. It considers that there is no need to refute the applicant's criticism of the written tests in the competition, which in its view is of a literary nature. In support of that argument it relies on the case-law of the Court of Justice according to which selection boards have a wide power of appraisal regarding the arrangements for and detailed content of the tests in a competition (judgments in Case 228/86, cited above, and Joined Cases 64, 71 to 73 and 78/86, cited above). It contends that the texts used in the competition at issue meet the objectives of the competition and do not exceed the limits laid down in the competition notice. As evidence of the seriousness with which the texts in the competition were chosen, it points out that the two successful candidates in Competition No CJ 32/88 had obtained the highest marks in Competition No CJ 160/86 based on qualifications and tests, held for the purpose of recruiting Spanish-language lawyer-linguists, which in its view means that it is impossible to consider, as the applicant does, that the tests in the second competition are a 'caricature of the "heads-or-tails" method of selection'.

119 In order to determine whether the plea based on a misuse of powers is well founded, it must be considered whether, in the present case, the Selection Board used its power to select the texts set in the written tests for a purpose other than the one for which the power was conferred on it, which was to select the candidates most suited to becoming revisers.

120 The applicant does no more than hint vaguely at what he considered to be the real purpose pursued by the Selection Board. While some of the arguments which he puts forward imply that the Selection Board's purpose was to exclude him from the list of suitable candidates or indeed to give favourable treatment to other candidates, the applicant refrains from making any express allegation of a concrete nature, supported by evidence, as to the objectives, contrary to the Staff Regulations, said to have been pursued by the Selection Board. Since the French test was compulsory for all the candidates in the competition, there is nothing to suggest that the text chosen was selected for the purpose of excluding the applicant from the list of suitable candidates or of giving an advantage to other candidates. By refraining from adducing objective, relevant and consistent evidence of a misuse of powers, the applicant has not provided sufficient support for the allegations which he has made in that regard (see the judgment of the Court of Justice in Joined Cases 361 and 362/87 *Caturla-Poch and de la Fuente Pascual* v *Parliament* [1989] ECR 2471, paragraph 21). It follows that that plea in law must be rejected.

121 With regard to the plea according to which the Selection Board committed a 'serious error' in the choice of the texts it set in the translation tests, in particular for the translations from French and German, it should be pointed out that, as the defendant institution rightly maintained, the selection board in a competition has a wide discretion with regard to the content of the tests. It is not for the Community court to criticize the selection board's choice of tests unless that choice is not confined within the limits laid down in the competition notice or is not consonant with the purposes of the test or of the competition (judgments of the Court of Justice in Joined Cases 64, 71 to 73 and 78/86 and in Case 228/86, cited above). Moreover, the Court cannot substitute its own judgment for that of the selection board as regards the degree of difficulty of the tests (see the judgment of the Court of Justice in Case 268/80 *Guglielmi* v *Parliament* [1981] ECR 2295, paragraph 8).

122 In the present case, the competition notice stipulated the number of compulsory written tests. In addition, it specified that those tests would involve the translation of 'legal texts'. With regard to the allegedly arbitrary nature of the French test, while that test was on very specific subject-matter, apparently unrelated to Community law, it was nevertheless a legal text enabling the professional qualities of a reviser to be assessed. Consequently, the choice of the text was not incompatible with the wording and the purpose of Competition Notice No CJ 32/88. It follows that in making that choice the Selection Board did not exceed the limits of its discretion and did not use its discretion in a manifestly erroneous manner.

123 With regard to the applicant's allegation that the text selected for the German translation test gave an advantage to the candidates who chose that language, it must be pointed out that the principle of equality is indeed extremely important in competition procedures (see the judgment in Case 144/82, cited above) and it is for the Selection Board, which has a wide discretion in the matter, to ensure that the tests display substantially the same degree of difficulty for all the candidates (see the judgment in Case 228/86, cited above).

124 However, the applicant has adduced no specific evidence capable of proving that the Selection Board exceeded the limits of that discretion. In that regard it should be pointed out that in order to determine whether the principle of equal treatment

has been observed in the present case, a comparison cannot be made between the text set in the French test, which was compulsory for all candidates, and the one set in the German test, which only some of the candidates sat. The applicant could have been at a disadvantage in relation to candidates whose language combinations were different from his only if there was an imbalance between the tests from among which the candidates could choose.

125 As regards the texts set in the tests which he sat in languages other than French (English, Portuguese and Italian), the applicant merely claimed during the written procedure that those texts were not related to Community law whereas the text set in the German test was, and that, for the purpose of choosing the best revisers, the tests were, on the whole, of no practical use. However, the applicant never adduced any specific evidence relating to the tests which he himself took. Consequently, and notwithstanding the fact that he knew their content and degree of difficulty, the applicant has not supported his allegation that the texts set in those tests did not fulfil the objectives of the competition. As for the German test, the applicant has merely alleged that it did not contain any major linguistic difficulties. That information is likewise not capable of proving that the Selection Board exceeded the limits of its discretion by choosing the text in question or that there was an imbalance between that text and the texts set in the English, Portuguese and Italian tests. Moreover, although in his complaint of 28 February 1989 the applicant claimed that the Dutch text was not unrelated to Community law because it concerned social security, he did not allege that the Selection Board committed any error whatsoever or created an imbalance by choosing that text. Accordingly, the Court asked the defendant institution to lodge the file on the competition, with the exception of the candidates' papers.

126 At the hearing the applicant claimed that that was an irregularity in the course of the procedure. He did not, however, develop in any way his assertion concerning the existence of an imbalance between the content of the written tests. That being so, there was no need for the Court to order a measure of inquiry concerning the texts set in the different tests.

127 It follows that the plea based on a manifest error in the choice of the texts set in the tests by the Selection Board must also be rejected.

(dd) The statement of the reasons upon which the decision is based

128 The applicant, who in his complaint of 28 February 1989 criticized the fact that the decision did not explicitly state why he had not been included on the list of suitable candidates, did not expressly raise that plea in law during the written procedure. However, in the context of the plea based on a misuse of powers he called into question the validity of the Selection Board's decision by referring to the fact that he did not know the exact marks which he had obtained in the written and oral tests. In those circumstances, it should be pointed out that the Court is required to determine of its own motion whether the obligation to state the reasons for the decision refusing to include the applicant on the list of suitable candidates has been fulfilled (see the judgments of the Court of Justice in Case 18/57 *Nold* v *High Authority* [1959] ECR 41, at p. 52, Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, paragraph 19 and Case T-37/89, cited above).

129 At the hearing, in reply to a question put by the Court, the applicant stated that he regarded as inadequate the statement, in the note of 2 February 1989, of the reasons upon which the contested decision was based. The defendant institution replied that the obligation to provide a statement of reasons in the context of a competition procedure applies in particular to decisions refusing admission to the competition. It added that the applicant could have asked for an explanation to be given if he had considered that the statement of the reasons on which the contested decision was based was inadequate.

130 With regard to the obligation to provide an unsuccessful candidate with a statement of the reasons for the decision not to include him on the list of suitable candidates following a competition, it should be pointed out that that obligation is not incompatible with the requirement that the proceedings of the selection board should be secret laid down in Article 6 of Annex III to the Staff Regulations. That requirement precludes disclosure of the views of the individual members of selection boards and revelation of the factors relating to individual or comparative assessments of candidates (see the judgment of the Court of Justice in Case 89/79 *Bonu* v *Council* [1980] ECR 553, paragraph 5). It does not preclude, however, each candidate from being notified of the marks which he personally was awarded in the appraisal of his qualifications or after his participation in the tests (see the judgments of the Court of Justice in Joined Cases 64, 71 to 73 and 78/86, cited above, paragraph 49 and in Case 144/82, cited above, paragraph 27). It follows that the general reference to the results of the tests in the note informing the applicant of the Selection Board's decision did not on its own constitute an adequate statement of reasons. Similarly, the letter sent to the applicant by the President of the Court of Justice on 18 August 1989 did not contain information regarding the abovementioned marks.

131 However, the marks which the applicant obtained in the various tests were notified to him in the course of the oral procedure. Consequently, he was given the opportunity to confirm that the marks which he was awarded in the written tests were sufficient for him to be admitted to the oral test but that the overall mark which he obtained in all the tests was lower than the pass mark set in the competition notice for inclusion on the list of suitable candidates. The doubts which he had expressed in that regard were thus dispelled. The applicant was also given the opportunity during the oral procedure of submitting his observations regarding the Selection Board's assessment of his performance in the tests and of developing the pleas in law which he made in that regard.

132 However, neither examination of the marks awarded in the competition, as provided to the Court, nor the applicant's submissions during the oral procedure have revealed fresh evidence of such a kind as to call into question the regularity of the procedure followed by the Selection Board or the marks which it eventually awarded. Similarly, notification of the marks enabled the Court to review the regularity of the list of suitable candidates drawn up following the competition to an extent consistent with the broad discretion enjoyed by any selection board when making value judgments.

133 Since the substantive pleas put forward by the applicant against the contested decision have proved to be unfounded, annulment of the decision on the ground that it did not contain an adequate statement of reasons could only result in the adoption of a fresh decision which would be identical in substance to the annulled decision but which would be notified with the marks obtained by the applicant. The Selection Board would not, in the present case, have any discretion and the defendant institution would simply re-notify the marks obtained in the test. Accordingly, the applicant has no legitimate interest in seeking the annulment of the decision at issue for breach of a procedural requirement (see the judgments of the Court of Justice in Case 432/85 *Souna* v *Commission* [1987] ECR 2229, paragraph 20 and in Case 117/81 *Geist* v *Commission* [1983] ECR 2191, paragraph 7). It follows that the insufficient statement of the reasons for the contested decision can no longer be regarded as a breach of an essential procedural requirement that would in itself justify the annulment of that decision (see the judgment in Joined Cases 64, 71 to 73 and 78/86, cited above, paragraph 53).

134 Consequently, the claim for the annulment of the decision of the Selection Board not to include the applicant on the list of suitable candidates in Competition No CJ 32/88 must be dismissed.

3. *The claim for the annulment of the appointments made on the basis of Competition No CJ 32/88*

135 The defendant institution contends that that claim is inadmissible because the applicant has no legitimate interest in seeking anything other than the decision adopted by the Selection Board in the competition in relation to himself. The applicant claims that the appointments made on the basis of the competition in question must be annulled, as must all other acts based on the same competition, because the competition is void.

136 Since all the pleas in law put forward by the applicant against the steps taken in Competition No CJ 32/88 must be rejected, the applicant has no legitimate interest in the annulment of the subsequent acts adopted on the basis of the aforementioned competition, in particular the appointments (see the judgment of the Court of Justice in Case 108/88 *Jaenicke-Cendoya* [1989] ECR 2711, paragraph 27). It follows that this claim is inadmissible.

D — The applicant's claims for damages

137 Under his third, fifth and sixth heads of claim, the applicant submits four claims for compensation for the damage which he considers he has suffered. He seeks orders requiring, firstly, the defendant institution to acknowledge that it was inappropriate to require him to participate in competition No CJ 32/88; secondly, his retroactive appointment as a reviser; thirdly, the payment of a sum equivalent to the difference between the salary which he received and that which he would have received as a reviser from the time when his temporary posting as reviser was withdrawn until his definitive appointment as a reviser took effect; finally, payment of the token sum of ECU 1 as compensation for the non-material damage which he claims to have suffered.

1. *The claim for 'an order requiring the appointing authority to admit that it was inappropriate to make the applicant take part in Competition' No CJ 32/88*

(a) *Admissibility*

138 The defendant institution contends that this claim is inadmissible. According to the Court of Justice, the only purpose which such a claim could serve would be to contest the decision to hold the competition in question, which the applicant did not do within the time allowed.

139 The applicant considers that his third head of claim, in which the claim now under discussion is to be found together with the one seeking his appointment as reviser, represents the simplest way of compensating him for the damage which he has suffered and that it is based principally on the administration's implied rejection of his application for the post declared vacant by Notice No CJ 41/88. He considers that he contested that implied rejection within the prescribed time-limit. According to the applicant, his request that the appointing authority be ordered to admit its error in not leaving him any other choice but to take part in the contested competition concerns not so much the holding of the competition as the appointing authority's interpretation of Article 45 of the Staff Regulations and 'its obstinate refusal to admit that [passing] a competition for an LA 3 post specifically encompassing the characteristics of an LA 5 post is not sufficient to evidence the abilities of an official "eligible for promotion"'. He submits that if the Court were to follow the arguments of the appointing authority on that issue, it would anticipate its decision on the substance of the case.

140 It must be considered, firstly, whether the applicant is not seeking, by means of the present claim, a declaration of principle from the Court concerning the validity of Notice of Competition No CJ 32/88. According to the case-law of the Court of Justice, such claims in support of an application for annulment are inadmissible (see the judgments of the Court of Justice in Case 12/69 *Wonnerth* v *Commission* [1969] ECR 577, paragraph 6 and in Case 108/88, cited above, paragraph 9).

141 However, the Court considers that by the present claim the applicant is in substance seeking from the Court a declaration that the defendant institution committed a service-related fault by making him participate in the competition at issue instead of promoting him. Such a request may be made in the context of a claim for damages (see the judgments of the Court of Justice in Joined Cases 10 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763, paragraph 23 et seq. and in Case 68/63 *Luhleich* v *Commission* [1965] ECR 581).

142 The fact that the applicant himself submitted his application to take part in the competition at issue does not necessarily render the present claim inadmissible. In a similar case of an action for annulment, the Court of Justice recognized that a measure adopted at the request of an official can adversely affect the official concerned on the ground that it must always be possible to bring an action against an unlawful decision (see the judgment of the Court of Justice in Case 20/68 *Pasetti* v *Commission* [1969] ECR 235, paragraph 2). Similarly, it must always be possible to bring an action for damages in the case of a service-related fault committed at the request of an official.

143 Since the action originates in the employment relationship between the applicant and the defendant institution, it is necessary to consider, secondly, whether the provisions of Articles 90 and 91 of the Staff Regulations have been complied with (see the judgments of the Court of Justice in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, paragraph 7 and in Case 401/85 *Schina* v *Commission* [1987] ECR 3911, paragraph 9). In that regard, it should be pointed out that the conduct of the institution which the applicant seeks to have censured consists both in the decisions to hold Competition No CJ 32/88 and to allow the applicant to participate therein and in the implied refusal to promote him to a post of reviser once he failed the competition. Thus it is necessary to determine, having regard to those three factors, whether a pre-litigation procedure was followed which complied with the provisions of the Staff Regulations.

144 The applicant did not challenge the decision to hold the competition at issue within the time-limits (see above, paragraphs 86 to 89). Consequently, he cannot rely on the alleged unlawfulness of that decision in an action for damages (see the judgment in Case 401/85, cited above). However, the documents produced by the defendant institution show that the applicant was informed of his admission to the tests in the competition by a note from the administration of 9 December 1988. Since the applicant included in his complaint of 28 February 1989 a request that the institution should 'please acknowledge . . . that it was inappropriate for me to be required to participate in the competition . . . ', the Court finds that he challenged his admission to the competition within the time-limit laid down in the Staff Regulations. Thus, the applicant submitted a request pursuant to Article 90(1) of the Staff Regulations concerning his promotion to a post of reviser, and he contested within the prescribed time-limit the implied rejection of that request by a complaint pursuant to Article 90(2) of the Staff Regulations. Consequently, the present claim is admissible in so far as it seeks a declaration that a service-related fault was committed inasmuch as the applicant was admitted to the competition at issue rather than promoted to a post of reviser, as he had requested.

(b) *Substance*

145 With regard to the existence of a service-related fault for which the institution is responsible, it must be pointed out, firstly, that Article 4 of Annex III to the Staff Regulations requires the appointing authority to send to the Chairman of the Selection Board in the competition the list of the candidates who satisfy the conditions laid down in Article 28(a), (b) and (c) of the Staff Regulations for appointment as an official. That provision does not give the appointing authority any discretion to remove persons who fulfil the prescribed conditions from the list. Since Article 4 of Annex II thus confers on the appointing authority a non-discretionary power, the fact that it acted in accordance with that provision cannot constitute a service-related fault.

146 As for the decision of the Selection Board to admit the applicant to the tests in the competition, it must be observed that under the first paragraph of Article 5 of Annex III to the Staff Regulations the Selection Board is obliged to include on the list of candidates all those who meet the requirements set out in the notice of competition. Since the applicant is himself convinced that in the present case his qualifications fulfilled the prescribed conditions, he has in no way proved that the Selection Board committed an error in assessing those qualifications. On the contrary, the Selection Board was under an obligation to include him on the list of candidates admitted to the tests. Consequently, that decision cannot constitute a service-related fault.

147 With regard, finally, to the implied decision refusing to promote the applicant to a post of reviser without his having passed the competition at issue, it is sufficient to point out that the applicant did not fulfil the conditions laid down in the Staff Regulations for appointment to such a post without having passed a competition held for that purpose.

148 Consequently, the claim for a declaration that a service-related fault was committed for which the defendant institution was responsible by virtue of the fact that it required him to participate in Competition No CJ 32/88 rather than promoting him, is unfounded.

2. *The claim for relief in the form of the applicant's appointment as a reviser with retroactive effect from 1 September 1988*

149 The defendant institution considers that that claim is inadmissible. It relies on Article 176 of the EEC Treaty according to which it is for the institution whose act has been declared void to take the necessary measures to comply with the judgment of the Court. In its view, it follows from that provision and from the judgment of the Court of Justice in Case 110/63 (*Willame* v *Commission* [1965] ECR 649) that, after annulling a decision refusing to appoint an official, the Court could neither decide on his appointment nor order that the applicant should be appointed by the appropriate ways and means.

150 The Community court may not give directions to a Community institution without encroaching upon the powers of the administration. That principle not only renders inadmissible, in an action for annulment, heads of claim seeking an order requiring a Community institution to adopt the measures necessary for the enforcement of a judgment by which a decision is annulled (see the judgment of

the Court of Justice in Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, paragraph 19 et seq.), but it is also applicable, in principle, in proceedings in which the Court has unlimited jurisdiction such as those provided for under the second sentence of Article 91(1) of the Staff Regulations (see the judgment of the Court of Justice in Case 26/63 *Pistoj* v *Commission* [1964] ECR 341, at p. 376). It follows that an applicant may not, in an action for damages, ask the Court to order the defendant institution to adopt specific measures to make good the alleged damage. Consequently, the claim to that effect is inadmissible.

3. *The claim for payment of the difference in salary*

(a) *Admissibility*

151 The admissibility of this claim, which originates in the employment relationship of the applicant, must be appraised in the light of Articles 90 and 91 of the Staff Regulations. In the two administrative complaints which he submitted, the applicant did not seek pecuniary reparation for damage which he allegedly suffered. However, he asked the appointing authority in his complaint of 17 March 1989 to appoint him as a reviser 'on equal terms with' the three successful candidates in Competition No CJ 32/88. The request to be appointed with retroactive effect from the same date as the successful candidates in the competition contains an implied request for payment of the difference in salary for the period in question. Consequently, the pre-litigation procedure also referred to this claim made by the applicant (see the judgment of the Court of Justice in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 28). It follows that the aforementioned claim must be considered to be admissible.

(b) *Substance*

152 In order to decide whether the claim for compensation is well founded, it must be considered whether the applicant has proved that the defendant institution is responsible for a service-related fault of which he is the victim and which has caused the damage for which he seeks compensation.

153 It follows from the considerations relating to the claim for the annulment of the rejection of the applicant's application for the post referred to in Vacancy Notice No CJ 41/88 that no service-related fault can be found to have been committed in the context of that decision since the applicant did not fulfil the conditions laid down in the Staff Regulations for promotion.

154 The applicant criticizes the defendant institution for having selected temporary revisers rather than holding a competition for the appointment of established revisers and of excessive delay in holding Competition No CJ 32/88. In that regard, it has already been found (see above, paragraph 66) that the conduct of the appointing authority complied with the provisions of the Staff Regulations and with the principle of proper administration. Consequently, it cannot be considered to constitute a service-related fault.

155 It should, moreover, be pointed out that the defendant institution maintained the temporary postings beyond the period prescribed for that purpose by Article 7 of the Staff Regulations. However, that extension did not cause any damage to the applicant, who, on the contrary, benefited from it. While it is true that under Article 7 of the Staff Regulations the applicant ought no longer to have received the allowance which he was being paid, it follows from the foregoing considerations (see above, paragraph 61) that that provision did not give him any right to be promoted to a post of reviser and to receive the salary relating to that post.

156 With regard to the fact that the appointing authority decided to hold Competition No 32/88 rather than wait for the applicant to become eligible for promotion, it must be pointed out that the applicant did not contest the decision to hold the competition within the time-limits. Accordingly, it must be pointed out that an official who fails to contest in due time a decision of the appointing authority is not permitted to rely on the alleged unlawfulness of that decision in an action for damages (see the judgment of the Court of Justice in Case 106/80 *Fournier* v *Commission* [1981] ECR 2759, paragraph 17).

157 Finally, it follows from the Court's reasoning relating to the claim for the annulment of the decision not to include the applicant on the list of suitable candidates in Competition No CJ 32/88 that the Court has not found any irregularity of such a kind as to constitute a service-related fault in the conduct of the said competition up to the moment when the decision was adopted. However, the inadequacy of the notification of the reasons upon which that decision was based could constitute a service-related fault. Nevertheless, while that conduct led the applicant to challenge a decision of whose grounds he had only an inadequate knowledge, it was not the cause of the reduction in the applicant's salary.

158 Consequently, the claim seeking the payment of a sum equal to the difference between the salary which he received and that which he would have received as a reviser is unfounded.

4. *The claim for payment of the token sum of ECU 1 as compensation for the non-material damage suffered by the applicant*

159 The applicant maintains that he suffered considerable non-material damage owing to the treatment which he received from the various departments of the administration of the Court 'from the time when his rights began to been ignored'. He felt misused and offended and that his professional prestige had been affected by a series of acts and omissions which began, firstly, with the failure to reply to his applications for the posts declared vacant by Notices Nos CJ 66/87 and CJ 41/88 and which continued, secondly, with the holding of Competition No CJ 32/88 on the basis of qualifications and tests, which was vitiated by the irregularities which he has described in his various pleas in law and, thirdly, by his exclusion from the list of suitable candidates drawn up following what he considers to have been a parody of a competition — which runs counter to a whole series of acts adopted a various levels of the institution — and, fourthly, by his being deprived of his temporary posting as reviser. He adds that the appointing authority's reply to his complaint concerned only the procedural aspects of the matter. It expressed 'understanding' for the applicant's frustration, which the applicant considers to be ironic in the extreme and entirely inadequate after so many negligent acts.

(a) *Admissibility*

160 It must be considered, firstly, whether that claim was the subject of a pre-litigation procedure in conformity with Articles 90 and 91 of the Staff Regulations. Although in his two complaints the applicant did not ask for the token sum of one ecu as compensation for non-material damage, that request is closely linked to the claims for relief in the form of the annulment of the rejection of his application for the post referred to in Vacancy Notice No CJ 41/88 and of the decision not to include him on the list of suitable candidates drawn up following Competition No CJ 32/88, in respect of which a pre-litigation procedure in accordance with the Staff Regulations did take place. The claim can therefore be considered to be admissible.

(b) *Substance*

161 Since the applicant did not contest the decision to reject his application for the post declared vacant by Notice No CJ 66/87 he is not permitted to rely on the alleged unlawfulness of that decision in the present action for damages (see above, paragraph 156).

162 As regards the failure to reply to his application for the post referred to by Vacancy Notice No CJ 41/88, it should be stated that Article 90(1) of the Staff Regulations provides for the possibility of the appointing authority's rejecting a request by implication and does not therefore require it to give an express reply to the requests submitted to it by officials. Consequently, the appointing authority's failure to respond to the applicant's application for the post does not constitute a service-related fault.

163 Furthermore, it follows from the Court's reasoning relating to the claim for the annulment of the decision not to include the applicant on the list of suitable candidates in Competition No CJ 32/88 that the same reasoning also applies to his exclusion from that list. With regard to the service-related fault which may have been constituted by the inadequate notification to the applicant of the reasons on which that decision was based, the applicant has not claimed that that was one of the causes of the non-material damage which he allegedly suffered. In any event, it did not affect the applicant's professional prestige. The withdrawal of the temporary posting as reviser cannot in itself be regarded as a service-related fault since the period for which the post could be held pursuant to Article 7(2) of the Staff Regulations had expired. Finally, the reply given by the appointing authority to the applicant's complaints does not contain any factor of such a kind as to have caused him non-material damage and the reply therefore appears to have been appropriate.

164 Consequently, the claim for compensation for the non-material damage allegedly suffered by the applicant is unfounded.

165 It follows from all the foregoing considerations that the application must be dismissed.

E — Costs

166 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those Rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities. Moreover, under the first subparagraph of Article 69(3) of those Rules, the Court may, where the circumstances are exceptional, order that the costs be shared or that the parties bear their own costs. In that regard, account must be taken of the inadequate communication, by the defendant institution, of the reasons for the decision to exclude the applicant from the list of suitable candidates in Competition No CJ 32/88. If the applicant had been aware of the marks which he had obtained in the tests he would have had at his disposal information which was important for assessing the regularity of the decision that he contested and which might have caused him to refrain from bringing a part of the present proceedings before the Court. Since that conduct helped to give rise to a part of the dispute, the defendant institution must be made to bear, in addition to its own costs, one-quarter of the applicant's costs. The applicant is to bear three-quarters of his own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the Court of Justice to bears its own costs and one-quarter of those of the applicant, who shall bear three-quarters of his own costs.

Briët Kirschner Biancarelli

Delivered in open court in Luxembourg on 27 June 1991.

H. Jung
Registrar

C. P. Briët
President of the Fifth Chamber