1. Preparatory acts, such as an opinion of an advisory committee on appointments which acts merely in an advisory capacity, cannot, even if they are the only acts of which the applicant claims to have notice, be the subject of an action. Only in an action brought against the decision adopted on conclusion of the procedure may the applicant contest the regularity of previous acts which are closely linked with that decision.

2. The procedures for notification of decisions are not, in principle, of such a kind as to affect the legality of the decisions in question.

3. Where an official brings an action for the annulment of an act of an institution and for compensation for damage caused otherwise than by the contested act, the claims are not closely linked with each other, so that the inadmissibility of the claim for annulment does not render the claim for compensation inadmissible.

4. A delay of some 17 months in drawing up a staff report is contrary to the principle of sound administration. Such a delay, if not justified by the existence of special circumstances, constitutes maladministration giving rise to non-material damage by reason of the uncertainty and anxiety arising from the fact that the official's personal file is incomplete and irregular.

   For an official to be deprived of any entitlement to compensation for the alleged non-material damage, he himself must have contributed significantly to the delay complained of.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
24 January 1991 *

In Case T-27/90,

Edward Patrick Latham, an official of the Commission of the European Communities, residing at Wezembeek-Oppem (Belgium), represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

applicant,

* Language of the case: French.

v

Commission of the European Communities, represented by Sean Van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the 'decision' of 20 July 1989 of the Advisory Committee on Appointments rejecting the applicant's candidature following publication of vacancy notice No 19 COM/63/89, 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, D. Barrington and J. Biancarelli, Judges,

Registrar: H. Jung

having regard to the written procedure and further to the hearing on 29 November 1990,

gives the following

Judgment

The facts

1 The applicant, who was born in 1926, was recruited by the Commission in 1971. He worked in the translation service until 1973 and then in the Directorate-General for the Internal Market and Industrial Affairs until 1983; since then, he has been employed in the directorate responsible for the protection and promotion of consumer interests. That department, which formed part of Directorate-General XI (hereinafter referred to as 'DG XI'), was removed from it and in 1989 became the Consumer Policy Service (hereinafter referred to as 'CPS'). The applicant is at present in the last step of grade A 4 and in the past has repeatedly, but without success, expressed his wish to be placed in a higher grade.

2 On 19 July 1988, the Commission adopted a decision published in *Administrative notices* No 578 of 5 December 1988 concerning the procedure for filling middle-management posts, the purpose of which was, in particular in procedures of that kind, to widen the role of the Advisory Committee on Appointments (hereinafter referred to as 'ACA'), set up by a Commission decision of 1980.

3 On 4 January 1989, the applicant sent a letter to Mr Jankowski, assistant to the Director-General of DG XI, in which he drew attention to the delay in drawing up his staff report for 1985 to 1987. Following a request from Mr Prendergast, a director and the reporting officer for the applicant, the latter forwarded to him on 15 February 1989 a draft text of paragraph 6(b) of his staff report, entitled 'Detailed description of the tasks undertaken during the reference period'. On 28 March 1989, the applicant wrote a further letter to Mr Jankowski stating that he might bring an action before the Court of Justice if his staff report was not sent to him.

4 On 27 April 1989, the applicant received his provisional staff report for the period 1985 to 1987 and discussed it with his reporting officer on 12 and 16 May 1989. On the latter date, the applicant sent a memorandum to his director setting out the changes suggested by him during the discussions.

5 On 7 July 1989, the applicant received an amended version of his provisional staff report and signed it on 27 July 1989, that signature being disputed by him. He had annexed to it observations in which, first, he noted that the statement that he proposed should be included in paragraph 6(b) to the effect that he had acted in the place of Mr Varfis, a Member of the Commission, at a Council meeting, had not been included by the reporting officer and, secondly, he referred to his poor relations with his superiors, his professional successes and the recognition by important outside organizations of his skills as a specialist in consumer law.

6 In the mean time, on 9 June 1989, vacancy notice No 19 COM/63/89/A 3/A 4/A 5 had been published for a post of head of unit, responsible for the Consumer information and training unit in the CPS. On 22 June 1989, the applicant submitted his candidature for that post, as did 16 other officials.

7 In its notice No 95/89 of 20 July 1989, the ACA, after hearing the views of Mr Barlebo-Larsen, Director-General of the CPS, took the view that only four candidatures should be considered for the post of head of the Consumer information and training unit; that submitted by the applicant was not among them. On 28 July 1989, Mrs Filippone, the secretary of the ACA, sent the applicant a letter in which she informed him that, following the meeting of 20 July 1989, it had been concluded, first, that 'as regards the level of the post of head of unit — CPS 4 — Consumer information and training, it should be filled at the level of A 5/4' and, secondly, that, 'as regards examination of the candidatures lodged and after examination thereof, your candidature should not be taken into account on this occasion'.

8 On 21 August 1989, Kenneth Roberts, an official in Grade A 4, was transferred from the Directorate-General for External Relations and appointed to the post at issue, head of the Consumer information and training unit, in the same grade, namely A 4. Notice of the appointment was published in the Commission's internal administrative publication, *Infor rapide*, No 31/89 of 26 September 1989.

9 On 22 August 1989, the applicant sent Mrs Filippone a memorandum in which, first, he stated that his personal file was not complete when his application was studied by the ACA, since it did not then contain his final staff report for the period 1 July 1985 to 30 June 1987, and, secondly, he suggested that, for that reason, the proceedings of the ACA were not valid.

10 On 14 September 1989, Mrs Filippone stated in reply to the applicant, first, that the ACA had in its possession the provisional staff report dated 21 April 1989, and that the report thus existed in the form of an administrative document; secondly, that the delays in placing staff reports in officials' files, attributable to the conduct of the internal recruitment procedure, could not be allowed to hold up other administrative procedures; finally, that the Director-General, to whom the applicant was subordinate, took part in the proceedings of the ACA and was thus able to provide it with all information concerning him.

11 On 27 September 1989, the applicant sent Mrs Filippone a further letter in which he claimed that the absence of his final staff report during the proceedings of the ACA had vitiated the internal recruitment procedure and caused him damage. He added that, if the irregularity were not rectified, he reserved the right to commence legal proceedings.

12 On 25 October 1989, the applicant lodged a complaint in which, first, he referred to his transfer from DG III to DG XI, the career hopes which his superiors themselves had encouraged, his disappointments and his poor relations with those superiors; secondly, he maintained that the absence of his final staff report at the proceedings of the ACA of 20 July 1989 rendered those proceedings improper, that the letter from Mrs Filippone of 28 July 1989 did not contain an adequate statement of reasons and that the Commission was under an obligation to compensate him for the damage which it had caused him.

13 After lodging that complaint, the applicant had discussions on 14 December 1989, as part of an interdepartmental meeting, with Mr Jankowski and Mr Denuit, assistants to the Director-General of the CPS, and Mr Pincherlé, a head of unit in DG IX. On 3, 8 and 10 January 1990, the applicant sent separate memoranda to Mr Jankowski, Mr Denuit and Mr Pincherlé in which he set out his complaints concerning his superiors. On 14 March 1990, he also sent Mr Freedman a memorandum in which he expressed his wish to be placed in grade A 3.

14 On 23 May 1990, Mr Hay rejected the applicant's complaint, relying, first, on the fact that the ACA, at its meeting of 20 July 1989, was in a position to appraise the applicant's candidature; secondly, on the absence of any infringement of the principle of equality regarding the calling of candidates for interview, since the applicant's Director-General had convened only those whom he did not know personally; finally, on the judgment of the Court of Justice in Case 104/88 *Brus* v *Commission* [1989] ECR 1873, according to which, in the case of promotions, the lack of a statement of the reasons for a decision refusing to promote a candidate cannot affect the validity of the promotion decision finally taken; *a fortiori*, such an interpretation applies where the filling of the post in question does not involve a promotion, as in the present case.

15 By application received at the Registry of the Court of First Instance on 25 May 1990, Mr Latham brought the present action against the Commission.

16 The hearing was held on 29 November 1990 at the end of which the President declared the oral procedure closed.

17 Mr Latham claims that the Court should:

(i) declare the application admissible and well founded;

(ii) consequently, annul the decision of 20 July 1989 rejecting his candidature for the A3/A4/A5 post advertised under reference COM 63/89;

(iii) compensate the applicant for the material and non-material damage suffered by him by awarding him on an equitable basis a payment of BFR 600 000;

(iv) order the defendant to pay the costs in their entirety.

18 The Commission contends that the Court should:

(i) declare the application inadmissible or, at least, unfounded;

(ii) make an appropriate order as to costs.

The claims concerning annulment of the ACA's 'decision' of 20 July 1989

19 The defendant makes two objections of inadmissibility: first, the contested measure is merely preparatory and does not adversely affect the applicant; secondly, the

applicant has no interest in bringing proceedings. It is appropriate to examine first the contention that the measure did not adversely affect the applicant.

20 The defendant states in the first place that the terms of reference of the ACA, which was established in the Commission in 1980, were amended following the Commission decision of 19 July 1988 which, without changing the Committee's advisory role, widened its powers to include the filling of middle-management posts at levels A 3, A 4 and A 5. Moreover, henceforth, the ACA is to consider, on an advisory basis, not only matters concerning the assessment of candidates' abilities but also the grade to be attributed to vacant posts, having regard in particular to the importance of the unit concerned. That decision was published in *Administrative notices* No 578 of 5 December 1988 and, by memorandum from Mr Hay of 5 December 1988, officials were informed that, as from 15 November 1988, they would be advised of the results of the proceedings of the ACA concerning them. The defendant infers that the applicant could not be unfamiliar with the details of the new procedures adopted by the Commission.

21 It further contends that it is clear from those texts that the ACA is an advisory body, that it has no powers to decide on how a vacant post is to be filled and that only the appointing authority is empowered to adopt such a decision. The ACA's opinion dated 20 July 1989, which was notified to the applicant by letter of 28 July 1989 from its secretary, is merely a preparatory measure which cannot adversely affect the applicant within the meaning of Articles 90 and 91 of the Staff Regulations of Officials of the European Communities. In that regard it relies on the following judgments of the Court and Court of First Instance: Case 11/64 *Weighardt* v *Commission* [1965] ECR 285, Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437, Case 17/78 *Deshormes* v *Commission* [1979] ECR 189, Case 26/85 *Vaysse* v *Commission* [1986] ECR 3131, Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529, Case 346/87 *Bossi* v *Commission* [1989] ECR 303, Case T-135/89 *Pfloeschner* v *Commission* [1990] ECR II-153; and the following Orders of the Court: Case 123/80 *B* v *Parliament* [1980] ECR 1789, Case 141/80 *Macevicius* v *Parliament* [1980] ECR 3509 and Joined Cases 78/87 and 220/87 *Santarelli* v *Commission* [1988] ECR 2699).

22 Finally, the defendant contends that the applicant could only challenge the regularity of the present internal recruitment procedure by bringing an action for annulment against the final decision of the appointing authority appointing the successful candidate. *Infor rapide* No 31/89, which was distributed to all staff, reported Mr Roberts' appointment to the vacant post. Mr Latham should therefore have inferred that his application for that post had been rejected by the appointing authority and, within the prescribed period, should have contested the final decision making that appointment.

23 The applicant claims, in the first place, that Mr Hay's memorandum of 5 December 1988 does not rank as an official communication from the Commission and consequently cannot be relied on as against officials; memoranda of that type are distributed in abundance to officials and it is not possible to ascertain the content of each of them; that memorandum made it clear that the full text of the Commission decision of 19 July 1988 would be distributed some days later, but that text had never been forwarded to him. He concludes that his ignorance of the new provisions was entirely understandable and raises the question whether 'such changes to the system of filling posts should not have been the subject of an official amendment of the Staff Regulations'.

24 Whilst recognizing that the ACA is an advisory committee, the applicant further states that in the present case the only communications received by him were the memoranda considered above of 28 July and 14 September 1989 from Mrs Filippone and that he has received no other information concerning the appointing authority's final decision. His only remedy was therefore to contest the first memorandum, having regard, first, to its very terms and, secondly, to the fact that no subsequent decision of the appointing authority confirmed or contradicted the conclusions of the ACA. At the hearing, the applicant expounded his argument as follows: in the first place, it is in his view apparent from the combined effect of paragraphs 3.2 and 3.3 of the decision of 19 July 1988 that the discretionary power of the appointing authority as regards the choice of the level of the post to be filled is curtailed since it is bound by the opinion of the ACA and in that respect the appointment is merely a 'consequential measure'; in the second place, the ACA's decision of 20 July 1989 does indeed constitute a measure adversely affecting the applicant since it is an act-in-the-law expressing a clear and definitive intention; thirdly, he points out that the ACA advisory procedure is not 'transparent' and that, moreover, the 1988 Guide to promotion makes no mention of it.

25 The Court considers that it is appropriate at the outset to recall the terms of paragraph 3.2 of the Commission decision of 19 July 1988 which, *inter alia*, enlarges the powers of the ACA; it provides that: 'After hearing the views of the relevant director-general, the Advisory Committee on Appointments shall give an opinion on: the qualifications of the candidates and their ability to discharge the duties of head of a unit; the level at which the appointment may be made, having regard to the particular importance of the unit by reason of its tasks and/or size'. According to paragraph 3.3 of that decision, 'on the basis of the opinion of the (ACA) and the proposal from the competent director-general, the Member of the Commission responsible for staff matters, by agreement with the Member of the Commission with responsibility for the directorate-general concerned, shall, on behalf of the Commission, adopt a decision concerning an appointment to the post in question, in accordance with the six-day procedure.'

26 This Court would first refer to the judgment in Case 129/75 *Hirschberg* v *Commission* [1976] ECR 1259, in which the Court of Justice stated that 'the purpose of the appeals provided for under Articles 90 and 91 of the Staff Regulations is to arrange for the review by the Court of acts . . . liable to affect the position under the Staff Regulations of officials and servants of the Communities'. In its order in Joined Cases 78 and 220/87 *Santarelli*, cited above, the Court stated that 'preparatory acts cannot be the subject of an action . . . and it is only in connection with an action brought against the decision taken at the conclusion of [the] procedure that the applicant can contest the legality of earlier steps which are closely linked to it'.

27 In the present case, it is clear from the very text of the provisions of the Commission's decision of 19 July 1988 cited above, and confirmed, if confirmation were needed, by the wording of the letter from the secretary of the ACA of 28 July 1989, that the Advisory Committee on Appointments has merely advisory powers regarding both appraisal of candidates' abilities and the level of the post to be filled. Accordingly, the measure adopted by the ACA on 20 July 1989 is preparatory and as such is not liable to affect the position of the applicant under the Staff Regulations or, consequently, to affect him adversely.

28 However, it is necessary also to reply to the applicant's argument that the fact that he did not receive the decision which adversely affected him should prompt the Court to treat the application for annulment of the ACA's measure as admissible, that being, according to him, the only act notified to him.

29 It must be recalled, in the first place, that the procedures for the notification of administrative decisions are not, in principle, of such a kind as to affect their legality. Furthermore, even if, as he maintains, the applicant had no notice of any decision adversely affecting him, such a circumstance is not capable of rendering admissible an application for the annulment of a purely advisory opinion. Furthermore, even if it were conceded that the applicant might have been, as he maintains, totally unaware of the appointing authority's decision on his application, it would have been sufficient for him to follow the procedure laid down for that purpose by the Staff Regulations, namely the procedure under Article 90(1) which enables an official to request the appointing authority to take a decision concerning him. However, he did not make use of that right under the Staff Regulations.

30 It must be stated, in the second place, that the applicant certainly did not receive a letter informing him personally of the decision appointing Mr Roberts to the post at issue since the Commission did not make any such notification. However, transfer or appointment decisions of that kind are, as a rule, made public both by the posting of notices and through the *Staff Courier*, it thus being possible to give officials notice thereof. In the present case, Mr Roberts' appointment to the post of Head of Unit 4 in the CPS was reported in *Infor rapide* No 31/89 of 26 September 1989. The applicant should therefore have displayed due diligence and a normal degree of vigilance so as to be in a position to commence proceedings before the Court in respect of the appointment decision which he regarded as adversely affecting him.

31 Finally, it must be observed that, although, in its judgment in Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543, the Court stated that the admissibility of an action challenging a communication from the administration cannot be questioned on the ground that the communication is merely an act preparatory to a decision yet to be made by the appointing authority, where its content and the nature of its source are such that it may be objectively considered as amounting to a final decision taken by the appropriate administrative authority, such a solution cannot be transposed to the present case. The terms of the resolution of the ACA of 28 July 1989 and the status of its author could not lead to confusion or to the resolution being regarded as a definitive decision of the competent administrative authority.

32 Consequently, without it being necessary to give a decision on the second objection of inadmissibility, namely the applicant's lack of interest in bringing an action, the claim for annulment of the decision of the ACA of 20 July 1989 must be rejected as inadmissible.

The claim for compensation

33 The applicant maintains that the absence of his complete staff report at the time of the promotion procedure for which he was a candidate constitutes 'maladministration such as to justify . . . compensation for the material and non-material damage suffered'. He adds that 'it is appropriate, in view of the facts of the case, the negligence involved, the many and serious — and sometimes intentional — wrongful acts on the part of the Commission towards the applicant, to award him compensation for the damage suffered, the damage being assessed *ex aequo et bono* at BFR 600 000'.

The claim for compensation for material damage

A — *Admissibility*

34 According to the defendant, the claim for compensation for material damage is inadmissible on two grounds. In the first place, the applicant did not contest the final appointment decision, even though, according to the judgment of the Court of Justice in Case 346/87 *Bossi* v *Commission* [1989] ECR 327, 'an official may not, by means of a claim for compensation, circumvent the inadmissibility of an application which concerns the same act and has the same financial end in view'; the defendant also refers in that respect to the judgment of the Court of Justice in Case 401/85 *Schina* v *Commission* [1987] ECR 3911. Secondly, the defendant points out that the Court of Justice held in its judgment in Case 4/67 *Muller, née Collignon* v *Commission* [1967] ECR 365 that the inadmissibility of a request for annulment brings with it the inadmissibility of a claim for damages with which it is closely connected.

35 The applicant did not expressly reply to that objection in his written submissions. However, at the hearing, he contended that in the present case there is 'a degree of independence' between the claim for annulment and the claim for compensation for damage.

36 This Court considers that it is appropriate, in the first place, to refer to the consistent decisions of the Court of Justice concerning the principle of the independent nature of remedies, in particular the judgment in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, in which it held that, since Articles 90 and 91 of the Staff Regulations make no distinction between the action for annulment and the action for damages as regards administrative and contentious procedure, the person concerned is at liberty, in view of the independence of the different types of action, to choose either one or the other, or both together, on condition that he brings his action within the period of three months after the rejection of his complaint.

37 However, the Court made an exception to the principle of the independence of remedies where the action for compensation bears a close link with an action for annulment which has been declared inadmissible (*Muller* v *Commission*, supra). Moreover, in its judgment in Case 59/65 *Schreckenberg* v *Commission* [1966] ECR 543, the Court stated 'although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this means circumvent the inadmissibility of an application which concerns the same illegality and has the same financial end in view'.

38 In this Court's view, it appears from an analysis of previous decisions of the Court of Justice in this area, in particular the judgments which declared claims for compensation inadmissible on the ground that they were closely linked with claims for annulment which had themselves been declared inadmissible, that two criteria have been laid down for the inadmissibility of claims for compensation. Such claims are inadmissible where an action for compensation seeks reparation exclusively for the consequences of the measure contested in the action for annulment, which has itself been declared inadmissible, or where the sole purpose of the claim for compensation is to make up for 'losses of remuneration' which would not have occurred if the action for annulment had been successful (see in that respect the judgments in the following cases: Case 53/70 *Vinck* v *Commission* [1971] ECR 601; Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177; Case 129/75 *Hirschberg* v *Commission* [1976] ECR 1259; Case 33/80 *Albini* v *Council and Commission* [1981] ECR 2149; Case 543/79 *Birke* v *Commission* [1981] ECR 2669; and *Bossi* v *Commission* cited above). On the other hand, where the two actions derive from different acts or courses of conduct on the part of the administration, the action for compensation cannot be identified with the action for annulment, even if both actions pursued the same financial result for the applicant (judgment in Case 79/71 *Heinemann* v *Commission* [1972] ECR 579).

39 In the present case, it must be pointed out that the applicant used very general terms in his application, referring to 'negligence, many and serious — and sometimes intentional — wrongful acts on the part of the Commission towards (him)'; it must be noted that he is not seeking, by his claim for compensation, reparation only for the effects of the contested measure, that is to say, in his view, the rejection of his application for the post at issue. Moreover, in evaluating the compensation for the damage which he claims to have suffered he did not take as a basis the remuneration he would have obtained if he had been successful in the recruitment procedure to which his claim for annulment relates. It must therefore be concluded that the action for compensation is not, in the circumstances of the present case, closely linked with the action for annulment.

40 Consequently, the claim for compensation for the material damage must be regarded as admissible.

B — *The substance*

41 The applicant claims to have suffered material damage as a result of procedural irregularities. His application was rejected, even though his qualifications were appropriate to the post to be filled, the final version of his staff report was not contained in the file before the ACA and, as he explained at the hearing, his Director-General may have expressed judgments on him to the ACA without his being able to establish whether they were well founded or, if necessary, defend himself.

42 The defendant contends that the damage alleged by the applicant is neither sufficiently direct nor sufficiently certain to merit compensation. In that regard, it refers to the opinion of Mr Advocate General Darmon in *Bossi* v *Commission*, cited above. In its view, the applicant has not established how the fact that his staff report was incomplete could have influenced the advisory opinion of the ACA and the final decision of the appointing authority. At the hearing, the defendant contended that the presence of the Director-General during the proceedings of the ACA was not capable of undermining the impartiality of the opinion of that body nor did it constitute a procedural irregularity.

43 In the Court's view, it must be observed that the applicant has produced no evidence in his submissions to indicate and particularize any material damage. He

merely makes an aggregate assessment of the compensation due for the damage which he claims to have suffered, without giving a breakdown of the compensation sought for each head of damage. Moreover, he has not established in what way the delay in preparing his staff report caused him material damage, particularly since his staff report, as submitted to the ACA, was almost in final form. Finally, in any event, being an official in the last step of grade A 4, the applicant cannot claim to have suffered any material damage as a result of the failure to appoint him to another post in grade A 4.

44 Consequently, without it being necessary to consider whether there is any causal link between any wrongful conduct on the part of the administration and the alleged damage, it must be stated that in any event the applicant has not proved any material damage. Accordingly, his claims for compensation for material damage must be dismissed.

The claim for compensation for non-material damage

45 The applicant claims to have suffered certain non-material damage from the delay in preparing his staff report. He relies on the judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497, according to which delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken. Moreover, he states that 'trickery' on the part of his colleagues has caused him non-material damage and that his legitimate expectation of promotion has been frustrated, this being the second head of his claim for compensation for non-material damage.

46 In the defendant's view, the applicant has not specified the exact nature of the alleged non-material damage, although that is required according to previous decisions of the Court of Justice (*Bossi* v *Commission*, supra, and Case 1/87 *Picciolo* v *Commission* [1988] ECR 711). Moreover, he has not shown how he would have been likely to have been transferred to the post of head of the unit in question or, at least, to be included on the list of officials put forward by the ACA, if his personal file had contained the final version of the staff report in question.

47 This Court finds, in the first place, that the 'trickery' on the part of his colleagues and his superiors and the 'non-material injuries' alleged by the applicant are insufficiently substantiated, and that the applicant has adduced no clear and precise evidence to show how such conduct on the part of the administration amounted to wrongful conduct capable of causing him non-material damage.

48 On the other hand, this Court considers that, as regards the delay in preparing the draft staff report, it is appropriate in the first place to recall the terms of the first paragraph of Article 43 of the Staff Regulations according to which 'the ability, efficiency and conduct in the service of each official . . . shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110'; secondly, the first paragraph of Article 6 of the Commission Guide to staff reports, according to which 'The assessor shall compile the report and refer it to the official assessed by 30 November in the year in which the reference period ends', and, thirdly, the judgment of the Court in *Castille* v *Commission, supra,* in which the Court held that 'delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken'.

49 As this Court held, in its judgment in Case T-73/89 *Barbi* v *Commission* [1990] ECR II-619, 'an official in possession of an irregular and incomplete personal file thereby suffers non-material damage as a result of being put in an uncertain and anxious state of mind with regard to his professional future' (see in that connection the judgments of the Court of Justice in Case 61/76 *Geist* v *Commission* [1977] ECR 1419, and Case 140/87 *Bevan* v *Commission* [1989] ECR 701). On the other hand, an official has no right to compensation for alleged non-material damage if he himself contributed significantly to the delay of which he complains or if the administration was not unreasonably slow in forwarding to him the draft report concerning him, in which case the delay must be justified by the existence of special circumstances (judgment of the Court of Justice in Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359).

50 In the present case, for the reference period 1985 to 1987, it was not until 27 April 1989 that the applicant received a draft staff report, whereas it should have been submitted to him no later than 30 November 1987. Thus, the Commission's delay

in preparing the provisional staff report provided for in the first paragraph of Article 6 of the Guide to staff reports was, in the present case, one year, four months and 27 days. Moreover, the Commission has not mentioned any special circumstance capable of justifying such a delay and the applicant did not in any way contribute to the delay. On the contrary, the delay incurred in preparing the staff report for the previous reference period, 1981 to 1983, was itself longer than three years, and the administration should have done everything possible to remedy that situation.

51 It must therefore be stated that the Commission's conduct constituted maladministration such as to entitle the applicant to compensation for the non-material damage suffered by him. In the circumstances of the present case, the Court considers that a sum of BFR 50 000 is a fair assessment.

Costs

52 Pursuant to the first subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance, pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, where each party succeeds on some and fails on other heads or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Moreover, pursuant to the second subparagraph of Article 69(3) the Court may order a party, even if successful, to reimburse the other party for costs which it has caused the latter to incur by its own conduct (judgment of the Court of Justice in Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323).

53 In the present case, it must be stated that the applicant has indeed failed on a number of heads of his claim. However, it is apparent from all the foregoing considerations that the application to the Court was largely provoked by maladministration on the part of the Commission. Accordingly, pursuant to the abovementioned provisions of the Rules of Procedure of the Court of Justice, it is appropriate to order the Commission to pay the costs in their entirety.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Orders the Commission to pay the applicant BFR 50 000 by way of damages;

(2) Dismisses the remainder of the application;

(3) Orders the Commission to pay the costs in their entirety.

Briët Barrington Biancarelli

Delivered in open court in Luxembourg on 24 January 1991.

H. Jung
Registrar

C. P. Briët
President of Chamber