OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 February 1989 *

Mr President,
Members of the Court,

1. The action brought before the Court by Mr Del Plato concerns, essentially, the circumstances in which the appointing authority may disregard the possibility of internal promotion and have recourse to outside recruitment to the scientific and technical services.

2. The applicant, who holds a degree in architecture, is an official of the Commission of the European Communities employed at the Joint Research Centre at Ispra. He has worked there since 1967, and is at present in Grade B 3 of the scientific and technical services.

3. The Court has already had occasion to consider his unsuccessful attempts to move to Category A when he and his colleagues brought actions contesting the refusal to include their names on a list of persons capable of performing Category A duties. [1]

4. The facts relating to the present application may be summarized as follows:

(i) On 29 April 1986, Mr Del Plato submitted his candidature in response to a vacancy notice for the post of head of the department in which he works. This met with an oral refusal, given on the same day by an official in the Applications Office. On 30 April 1986, therefore, the applicant submitted his candidature by registered letter with acknowledgment of receipt.

(ii) On 9 September 1986, in the absence of any reply from the Commission, Mr Del Plato submitted a complaint, which was registered at the General Secretariat of the Commission on 11 September 1986. Meanwhile, a new organizational chart showed that Mr Timm had been appointed to the vacant post.

(iii) The Commission replied to that complaint by a letter of rejection on 9 April 1987.

5. On 10 April 1987, Mr Del Plato brought an action before the Court, seeking:

(i) the annulment of the refusal to accept his candidature,

(ii) the annulment of the appointment of Mr Timm,

(iii) the annulment of the implied rejection of his prior complaint,

and, in the alternative,

* Original language: French

1 — Judgment of 10 December 1987 in Joined Cases 181 to 184/86 *Del Plato and Others* v *Commission* [1987] ECR 4991

(iv) an order that the Commission pay damages.

6. After the lodging of its own defence on the substance of the case, and of the applicant's reply, the Commission raised a number of objections of inadmissibility against Mr Del Plato's application. It pointed out that those objections could be raised at any stage in the proceedings, on the ground that they related to the time-limits for the lodging of appeals, which are mandatory. It is true that the Court has consistently held in its decisions that those time-limits are of such a nature. [2]

7. However, an examination of the objections of inadmissibility reveals that, while the first objection does relate to the time-limits for the lodging of appeals, inasmuch as it seeks a declaration that the application for annulment of the refusal to accept the applicant's candidature is inadmissible for being out of time, the three other objections are based on the absence of an interest in bringing proceedings, on the fact that no appeal can lie against the contested act, and on the absence of a prior complaint. Article 42(2) of the Rules of Procedure prohibits the raising of any fresh issues in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the written procedure. Article 92(2) of those rules, however, provides that the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

2 — Judgment of 12 July 1984 in Case 227/83 *Moussis* v *Commission* [1984] ECR 3133, paragraph 12. See also the judgment of 5 June 1980 in Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, paragraph 3; judgment of 19 February 1981 in Joined Cases 122 and 123/79 *Schiavo* v *Council* [1981] ECR 473, paragraph 27; judgment of 13 November 1986 in Case 232/85 *Becker* v *Commission* [1986] ECR 3401, paragraph 8.

8. The applicant defers to the Court's judgment on this question.

9. The Court has ruled on such points in previous decisions. Thus, by its own motion, it has, pursuant to Article 92(2) of the Rules of Procedure, considered that an absolute bar to proceeding with a case existed on the following grounds:

(i) absence of any interest in bringing proceedings, [3]

(ii) absence of a prior complaint or irregularities in the procedure relating thereto, [4]

(iii) absence of a decision adversely affecting the applicant, [5]

(iv) *res judicata*, [6]

(v) existence of an act not of direct and individual concern to the applicant, [7]

3 — Order of 7 October 1987 in Case 108/86 *Di Muro* v *Council and Economic and Social Committee* [1987] ECR 3933, paragraph 10; order of 24 September 1987 in Case 134/87 *Vlachou* v *Court of Auditors* [1987] ECR 3633, paragraphs 6 to 10; order of 28 November 1985 in Case 19/85 *Grégoire-Foulon* v *Parliament* [1985] ECR 3771, paragraphs 7 to 9.

4 — Order of 18 March 1987 in Case 13/86 *von Bonkewitz-Lindner* v *Parliament* [1987] ECR 1417, paragraphs 5 to 7; order of 4 June 1987 in Case 16/86 *Pertoldi* v *Economic and Social Committee* [1987] ECR 2409, paragraphs 5 to 8.

5 — Order of 7 October 1987 in Case 248/86 *Brüggemann* v *Economic and Social Committee* [1987] ECR 3963, paragraph 6.

6 — Order of 1 April 1987 in Joined Cases 159 and 267/84, 12 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraphs 3 and 4.

7 — Order of 26 September 1984 in Case 297/83 *Les Verts* v *Council* [1984] ECR 3339, paragraph 7; order of 26 September 1984 in Case 216/83 *Les Verts* v *Commission and Council* [1984] ECR 3325, paragraph 7.

(vi) finally, for the record, expiry of the period within which proceedings may be brought. [8]

10. Such an approach in those decisions could in my opinion lead to the drawing of a distinction between bars to proceeding which are not absolute as a matter of public policy, and which can therefore be raised only *in limine litis*, and those which, as a matter of public policy, are absolute and which, being of such a nature that they can be raised at any time by the Court of its own motion pursuant to Article 92(2) of the Rules of Procedure, may also be raised by the parties at any stage of the proceedings. It would be difficult to see why the Court could still raise an absolute bar to proceeding when the parties, who are also interested in compliance with public policy, could no longer do so. Such an approach, which has the merit of being logical, would appear to reconcile the requirements of public policy with the protection of the rights of the defence.

11. In the present case, in any event, the objections raised by the Commission are clearly admissible. As I have stated, the Court has in previous decisions acknowledged the absolute nature of bars to proceeding on the grounds of the absence of an interest in bringing proceedings, the non-appealable nature of the contested act and the absence of a prior complaint. I shall now turn, therefore, to consider the relevance of those objections.

12. The first objection relates to the claim for the annulment of the rejection of the applicant's candidature. The Commission claims, first, that the issue has not been properly defined inasmuch as the applicant applied for promotion and not to take part in an internal competition and, secondly, that because his candidature of 29 April 1986 was refused on the same day by the competent department his prior complaint of 11 September 1986 was submitted after the expiry of the four-month period, that the implied decision rejecting that complaint was merely a confirmation of the first rejection, and that no appeal, therefore, could lie against that decision.

13. The first branch of the objection appears to be irrelevant. In the application the Court is asked to annul the refusal of a request to take part in an internal competition, but the written candidature appended to the application refers to Article 29(1)(a) of the Staff Regulations, that is to say the provision dealing with the promotion-transfer procedure. In fact, the Commission never held an internal competition. What the applicant is objecting to is the defendant's refusal to offer him a promotion-transfer, despite the fact that his name does not appear on the list of the persons capable of performing Category A duties, because he considers that the Commission need not adhere to that list. The apparent reason for the dispute which seems to have arisen in relation to a refusal of admission to a competition is that the applicant claims that under Article 29 of the Staff Regulations, taken as a whole, the Commission was under an obligation first to consider whether the post could be filled by promotion or transfer within the institution and then, before having recourse to an exceptional procedure, to consider whether to hold an internal competition, in which he was confident of being able to take part had it been held. The Commission's refusal to consider the applicant's candidature is based both on the fact that the applicant's name does not appear on the list of persons capable of performing Category A duties

8 — Judgment of 4 February 1987 in Case 276/85 *Cladakis* v *Commission* [1987] ECR 495, paragraph 6, order of 16 June 1988 in Case 371/87 *Progoulis* v *Commission* [1988] ECR 3091, paragraphs 10 and 11, order of 15 October 1986 in Case 349/85 *Denmark* v *Commission*, not published, paragraph 2; order of 15 March 1984 in Case 131/83 *Vaupel* v *Court of Justice*, OJ C 128, 15 5 1984, paragraph 5

and on the fact that Article 29 of the Staff Regulations does not apply to the recruitment of members of the temporary staff. The issue would therefore appear to be perfectly adequately defined.

14. The second branch of the exception could only be justified on the assumption that the applicant's candidature did in fact meet with an express rejection on 29 April 1986. In that case, the prior complaint of 11 September 1986 would clearly be out of time. The implied rejection of that complaint on the expiry of the four-month period would thus be merely a confirmation of the express rejection on 29 April 1986.

15. But what is the actual position? On 29 April 1986, the applicant handed his candidature to an official in the appropriate office who refused it without giving any reason. On the following day, he sent his candidature by registered mail with acknowledgment of receipt. It does not seem that the oral refusal can be considered to be a decision of the appointing authority within the meaning of Article 90 of the Staff Regulations. That refusal was merely a material act, unsupported by written confirmation, unaccompanied by any statement of the grounds on which it was based and not actually emanating from the appointing authority.

16. The candidature submitted on 30 April 1986 must therefore be considered to have been rejected by an implied decision on the expiry of the four-month period provided for in Article 90(1) of the Staff Regulations, that is to say on 30 August 1986. The applicant submitted his prior complaint on 11 September 1986, within the three-month period prescribed in Article 90(2) of the Staff Regulations. That prior complaint was, again, rejected by an implied decision on 11 January 1987 and then by an express confirmatory decision on 9 April 1987 contained in a letter sent to the applicant through administrative channels. The appeal was filed on 10 April 1987, before the expiry of the prescribed period.

17. It therefore appears that both branches of the first objection should be dismissed.

18. The second objection of inadmissibility concerns the application for the annulment of Mr Timm's appointment. The question is whether the applicant had an interest in seeking that annulment even though, according to the Commission, he was not eligible for appointment to the post. I propose to look at this objection when considering the substance of the case, since its validity depends to a large extent on the outcome of the application for the annulment of the rejection of the applicant's candidature.

19. The third objection of inadmissibility relates to the application for the annulment of the implied decision rejecting the applicant's complaint. The Commission bases its argument on the Court's judgment in *Plug* v *Commission*, according to which

'every decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged'. [9]

20. However, in its judgment of 19 January 1984 in *Andersen* v *Council*, the Court declared that

'in staff cases where it is a rule that a complaint must necessarily be made before

9 — Judgment of 9 December 1982 in Case 191/81 *Plug* v *Commission* [1982] ECR 4229, paragraph 13.

an action is brought the applicants' interest in seeking annulment of the decision rejecting their complaint at the same time as the measure adversely affecting them cannot be denied whatever the specific effect of the annulment of such a decision in a given case'. [10]

21. The Court's more recent decisions are even clearer. In its judgment of 17 January 1989 in *Vainker* v *Parliament*, for example, it declared that

'the administrative complaint and its rejection, whether express or implied, by the appointing authority thus constitute an integral part of a complex procedure. Consequently, 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'. [11]

22. In its judgment of 26 January 1989 in *Koutchoumoff* v *Commission* the Court adopted the same solution, ruling that

'under the system established by the Staff Regulations, the official must submit a complaint against the decision which he is contesting and appeal to the Court against the decision rejecting his complaint. When those conditions are met, the action is admissible whether it is directed against the initial decision alone, the decision rejecting the complaint, or both'. [12]

23. Finally, the Court has recently taken the same approach in its judgment of 2 February 1989 in *Bossi* v *Commission*. [13]

24. I propose that the Court should confirm those recent decisions by ruling that the action against the implied decision rejecting the prior complaint is admissible.

25. The fourth objection of inadmissibility challenges the alternative claim for damages on two grounds: that the claim was not made in a prior complaint, and that the inadmissibility of an application for annulment entails the inadmissibility of a claim for damages with which it is closely connected. Those two points refer to the consistent case-law of the Court, in which it has frequently been pointed out that

'an official may not submit to the Court conclusions with a subject-matter other than those raised in the complaint'. [14]

26. In my opinion in the *Bossi* case, [15] I had occasion to express my views with regard to the interpretation of the concept of identical subject-matter. At that time the Court's case-law did not appear to be definitively settled with regard to claims for damages tacked on to applications for annulment brought before the Court when only the latter had been sought in a prior complaint.

10 — Judgment of 19 January 1984 in Case 260/80 *Andersen* v *Council* [1984] ECR 177, paragraph 4

11 — Judgment of 17 January 1989 in Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 8

12 — Judgment of 26 January 1989 in Case 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99, paragraph 7

13 — Judgment of 14 February 1989 in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraphs 9 and 10

14 — Judgment of 20 May 1987 in Case 242/85 *Geist* v *Commission* [1987] ECR 2181, paragraph 9. See also the judgment of 10 December 1987 in Case 277/84 *Jansch* v *Commission* [1987] ECR 4923, paragraph 10.

15 — Opinion delivered on 1 December 1988 in Case 346/87, cited above

27. The Court resolved those difficulties in its recent judgment in *Bossi*, in which it declared that

'A complaint whereby an official is contesting the fact that his name has not been entered on the list drawn up within a promotion procedure calls on the appointing authority to remedy the alleged illegality and take all necessary measures to place the applicant in the situation in which he would have been had the illegality not been committed. Those measures necessarily include redress for the harm which the applicant may have suffered by reason of the alleged illegality and which the adoption of a new act not vitiated with illegality would not guarantee'. [16]

28. It would therefore appear that the first branch of this objection of inadmissibility cannot succeed.

29. The outcome of the second branch is closely bound up with the admissibility of the application for annulment, the Court having held for many years that

'the inadmissibility of a request for annulment brings with it the inadmissibility of a claim for damages with which it is closely connected'. [17]

Inasmuch as I am proposing that the Court should declare the application for annulment inadmissible, I am naturally bound to put forward an opinion in favour of the admissibility of the claim for damages.

30. After those lengthy considerations, rendered necessary by the thoroughness with which the Commission has put forward its objections of inadmissibility, I shall turn my attention to the merits of the application.

31. There are four claims before the Court, but it is immediately apparent that the outcome of the first claim, for the annulment of the rejection of the applicant's candidature, will almost automatically determine the result of the other three. If the Court dismisses the application for the annulment of Mr Del Plato's candidature, then, as the Court has consistently held, [18] he is not entitled to challenge Mr Timm's appointment as he has no interest in bringing proceedings inasmuch as he is not — I would almost say no longer — eligible for appointment to that post. Likewise, the claim for the annulment of the implied decision rejecting the prior complaint must necessarily have the same outcome as the main claim for the annulment of the rejection of the candidature. Finally, the claim for damages cannot be successful if the Court declares that the appointing authority was lawfully entitled to reject Mr Del Plato's candidature.

32. I shall therefore first devote my consideration to the claim for the annulment of the rejection of the candidature. In this regard, it is necessary to bear in mind the points of law decided by the Court in its previous judgment of 10

16 — Cited above, paragraph 28.

17 — Judgment of 12 December 1967 in Case 4/67 *Muller* v *Commission* [1967] ECR 365, especially pp. 373 and 374.

18 — Judgment of 30 May 1984 in Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323, paragraph 29; judgment of 29 October 1975 in Joined Cases 81 to 88/74 *Marenco* v *Commission* [1975] ECR 1287, paragraphs 6 and 7.

December 1987 [19] which form the background out of which the present case arose.

33. In that judgment, the Court pointed out that the provisions of Article 45(1) of the Staff Regulations refer only to promotions within the same service or category and are of no relevance to cases where an official is transferred from one category to another, and that the provisions of Article 45(2), which require a competition to be held for transfers from one category to another, do not apply, under the second paragraph of Article 98, to officials who occupy posts in the field of nuclear science calling for scientific or technical qualifications and who are paid from appropriations in the research and investment budget. The Court concluded that the appointing authority was entitled to transfer officials in the scientific and technical services to a higher category without holding a competition, and therefore to institute a *sui generis* procedure, based on, but differing in several respects from, the competition procedure, such as the one set up by the Commission on 3 June 1983, entitled 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services'. [20]

34. Those 'Procedures', the legality of which the Court has recognized, provide for a selection procedure by an *ad hoc* committee which is to draw up a list of officials judged to be eligible for transfer to Category A. In its judgment cited above, the Court dismissed Mr Del Plato's application seeking, essentially, the annulment of the refusal to place his name on that list.

19 — Joined Cases 181 to 184/86 *Del Plato and Others* v *Commission*, cited above, paragraphs 13 and 14

20 — *Administrative Notices* No 409 of 24 June 1983

35. The applicant has learned from that decision. He claims, in substance, that:

(a) his candidature should have been considered since there is no obligation to hold a competition when officials in the scientific and technical services are transferred from Category B to Category A, and that the appointing authority may depart from the list of candidates considered capable of performing Category A duties;

(b) the Commission infringed Article 29(1) of the Staff Regulations by not considering whether to hold an internal competition;

(c) the Commission infringed Article 29(2) of the Staff Regulations by holding an external competition when such a procedure is authorized by that article only in exceptional cases;

(d) the Commission infringed the second subparagraph of Article 29(1) of the Staff Regulations inasmuch as the procedure for constituting a reserve for future recruitment may be followed only once it has been decided whether to hold an internal competition.

36. I wish to state at the outset that those submissions are not, in my view, well founded.

37. With regard to the first submission, it is true that the Commission could have

appointed Mr Del Plato to the post in question, even though he was not on the list of candidates considered capable of performing Category A duties, if it had considered that there were objective reasons for considering that he had the appropriate background for the vacant post.

38. The Commission is not strictly bound by the 'Procedures' it has established. It was perfectly entitled to choose an official whose name did not appear on the list if there were objective reasons for so doing. The Court has, in that connection, held that:

'although an internal directive has not the character of a rule of law which the administration is always bound to observe, it nevertheless sets forth a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so, since otherwise the principles of equality of treatment would be infringed'. [21]

39. The Commission does, however, have a discretionary power in that regard, and the Court's power of review is restricted to ensuring that there has been no manifest error of appraisal or, although no such claim is made in this case, abuse of power. The Court has consistently held that:

'the appointing authority must be allowed a discretionary power covering all aspects of potential importance for the recognition of previous experience, both as regards the nature and duration of such experience and as regards the extent to which it matches the requirements of the post to be filled'. [22]

40. The applicant claims that he had the required background and experience for the post in question since, he claims, he had already filled the post on a temporary basis.

41. In that connection, the Court has made it clear that:

'although . . . an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a temporary posting, the fact that he agrees to perform them may be a factor to be borne in mind in connection with promotion, but does not give him the right to be reclassified'. [23]

42. In the present case, the applicant has produced no evidence of a manifest error of appraisal on the part of the Commission. The first submission should therefore, in my opinion, be dismissed.

43. The second, third and fourth submissions assume that Article 29 of the

21 — Judgment of 30 January 1974 in Case 148/73 *Couvage* v *Commission* [1974] ECR 81, paragraph 12; see also the judgment of 1 December 1983 in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981, paragraph 20; and *Del Plato and Others*, cited above, paragraph 10.

22 — Judgment of 5 February 1987 in Case 280/85 *Mouzourakis* v *Parliament* [1987] ECR 589, paragraph 5; see *Blomefield*, cited above, paragraph 26; see the judgment of 12 July 1984 in Case 17/83 *Angelidis* v *Commission* [1984] ECR 2907, paragraph 16.

23 — Judgment of 11 May 1978 in Case 25/77 *De Roubaix* v *Commission* [1978] ECR 1081, paragraph 17; see also the judgment of 12 July 1973 in Case 28/72 *Tontodonati* v *Commission* [1973] ECR 779, paragraph 8.

Staff Regulations is applicable to the situation submitted for the Court's consideration.

44. In its defence, the Commission states that members of the scientific and technical services are recruited essentially as temporary staff and that Article 29 of the Staff Regulations, which appears in Title III, 'Careers of Officials', is therefore not applicable to the case in issue. It is true that Article 1 of the Staff Regulations defines an official as a person appointed to an *established* post on the staff of one of the institutions of the Communities. Part II of the Staff Regulations, moreover, includes provisions (Articles 1 to 50a) relating specifically to temporary staff, which make applicable by analogy certain articles of the Staff Regulations of Officials. Article 29 of the Staff Regulations is not one of those articles. It would therefore appear not to be applicable to the recruitment of a member of the temporary staff.

45. The previous decisions cited by the applicant with reference to Article 29, moreover, do not appear to be relevant.

(i) The *Van Belle* judgment [24] states that candidates who are already officials of the Communities may not be excluded from a recruitment procedure other than a competition to fill an official's post.

(ii) The *van der Stijl* judgment [25] merely points out that the recruitment procedure other than the competition procedure referred to in Article 29(2) may be adopted only in exceptional cases.

Both those cases involved appointment as an *official*.

46. It should also be noted that, even should the Court decide that Article 29 is applicable by analogy, it has in any event recognized that the appointing authority has a wide discretion, from the outset of the recruitment procedure, to consider the possibilities of both internal and external recruitment. [26]

47. The four submissions made in support of the application for the annulment of the rejection of the applicant's candidature are therefore not, in my opinion, well founded.

48. As I stated earlier, the dismissal of the first claim for annulment means that the claim for the annulment of Mr Timm's appointment is inadmissible, and that the claim for the annulment of the implied decision rejecting the prior complaint and the claim for damages must be dismissed on their merits.

24 — Judgment of 5 December 1974 in Case 176/73 *Van Belle* v *Council* [1974] ECR 1361.

25 — Judgment of 7 October 1985 in Case 128/84 *van der Stijl* v *Commission* [1985] ECR 3281.

26 — Judgment of 14 July 1983 in Case 10/82 *Mogensen* v *Commission* [1983] ECR 2397.

49. I therefore conclude that:

(1) the objections of inadmissibility raised by the Commission to the claims for the annulment of the rejection of Mr Del Plato's candidature and of the implied decision rejecting his prior complaint and to the claim for damages should be dismissed,

(2) those three claims should be dismissed on their merits,

(3) the claim for the annulment of Mr Timm's appointment should be dismissed as inadmissible,

(4) Mr Del Plato should be ordered to pay the costs, with the exception of those incurred by the Commission, which it is to bear in accordance with Article 70 of the Rules of Procedure.