4. In the event of an act of an institution being annulled by one of the Community courts, it is for the institution, pursuant to Article 176 of the Treaty, to take the necessary measures to comply with the judgment. Where a decision of a selection board has been annulled, for failure to give a statement of reasons and for procedural irregularity, compliance with the judgment involves restoring the situation prevailing prior to the occurrence of the facts found unlawful by the Court. However, where, for reasons which are beyond its control, it is impossible for the administration to reconstitute the selection board as originally composed, it may, for the sole purpose of ensuring the continuity of the Community civil service, replace certain members, while in so doing maintaining a situation which is as close as possible to the original situation.

5. The assessments made by a selection board when appraising candidates' abilities may be subject to review by the Court only where there is a flagrant breach of the rules governing the selection board's work.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
15 July 1993 *

In Joined Cases T-17/90,

Erminia Camara Alloisio and Others

T-28/91,

Erminia Camara Alloisio and Others

and T-17/92,

Heidrun Blieschies and Others,

* Language of the case: French

officials of the Commission of the European Communities, represented by Marcel Slusny and Olivier-Marie Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented by Sean van Raepenbusch and Ana Maria Alves Vieira, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS for annulment of the decisions of the Commission of 26 June 1989 to re-open the procedure for competition COM/B/2/82, for the annulment of the decision of the selection board not to admit candidates to the tests for the said competition and for an order that the Commission pay damages,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Biancarelli, President, B. Vesterdorf and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 May 1993,

gives the following

Judgment

Facts

1 The applicants are part of a group of officials and servants of the Commission who, in December 1984, lodged applications before the Court of Justice seeking annulment of the decisions of the selection board for internal competition COM/B/2/82 not to admit them to the tests for that competition, which had been organized for the purposes of drawing up a reserve list of administrative assistants, secretarial assistants and technical assistants for the career-bracket comprising grades 5 and 4 in category B.

2 By two judgments of 11 May 1986 in Case 293/84 *Sorani and Others* v *Commission* [1986] ECR 967 and Case 294/84 *Adams and Others* v *Commission* [1986] ECR 977, the Court annulled the said decisions on the ground that the applicants had not had the opportunity of making observations on the opinions expressed to the selection board in their regard by their immediate superiors. Following those judgments, the selection board invited the candidates in question to appear before it in June 1986 so that they could answer the same questions as those which had been raised previously with their immediate superiors. By letters of 11 July 1986, the candidates were informed that the decisions not to admit them to the tests had been confirmed.

3 Following complaints lodged by certain candidates against those decisions of 11 July 1986, the selection board invited them to appear before it a second time in order to give them the opportunity of making observations on the answers given by their immediate superiors to the questions which the selection board had put to them. By letters of 12 February 1987, the officials in question were informed that the selection board considered that there was no need to alter the decision taken in their regard, sent to them on 11 July 1986. The applicants then brought further proceedings.

4 By judgment of 28 February 1989 in Joined Cases 100/87, 146/87 and 153/87 *Basch and Others* v *Commission* [1989] ECR 447, the Court annulled the decisions of the selection board not to admit the applicants to the tests on the grounds that they did not contain an adequate statement of the reasons on which they were based and that the procedure followed by the selection board was irregular.

5 In compliance with that judgment, the Director of Personnel of the Commission decided to call on the selection board to resume its work as from the point where it had been declared irregular by the Court.

6 By a memorandum of 26 June 1989, he indicated this to the applicants. The memorandum reads as follows:

'Re: Resumption of Competition COM/B/2/82 in compliance with the judgment of the Court of Justice of 28 February 1989 in Cases 100/87, 146/87 and 153/87 for the successful applicants in that case.

In order to comply with the judgment of the Court of Justice dated 28 February 1989, the appointing authority has decided to restart the proceedings of the Selection Board for the internal competition for advancement from Category C to Category B for which you had applied, at the stage where the procedure followed by the Selection Board with regard to your application was held by the Court to be irregular.

For this purpose, the Selection Board is to be forthwith reconstituted with its original members, unless they are no longer eligible, and will resume its proceedings in compliance with the judgment of 28 February 1989.

Those candidates declared admissible to the tests will be notified by the usual administrative channels of the date of the tests.

Those tests, as set forth under Paragraph III(1) of the terms of competition COM/B/2/82, will follow an admission procedure consisting of:

(a) a reexamination of candidates' files as they stood at the time of opening the competition;

(b) an interview with the candidates to assess the appropriateness of their knowledge and experience obtained prior to 25 October 1982 for performing Category B-level duties;

(c) an interview with their immediate superiors at the time to the extent which appears to the selection board to be necessary in order to assess their qualifications for performing Category B duties. It is pointed out that candidates will have the opportunity to request the selection board to obtain further information by consulting officials who, before 25 October 1982, exercised authority over them or supervised them.

...'

7 On 7 September 1989 a meeting was held between the Commission, represented by its Director of Personnel, and the representatives of the various trade unions for officials to which the candidates for competition COM/B/2/82 affected by the judgment in *Basch and Others* v *Commission* were affiliated.

8 Following that meeting, the Director of Personnel sent a memorandum dated 8 September 1989 to the trade union representatives. That memorandum reads as follows:

'The above-referenced meeting has allowed us together to take stock of the situation concerning the procedure applied as regards the candidates for COM/B/2/82 affected by the judgment of the Court of 28 February 1989 (applicants).

That judgment puts those candidates back in the position they were in at the point of the procedure at which the Court found that it was vitiated (absence of a statement of reasons at the time of the decision whether or not to admit applicants).

In those circumstances — of which the 28 candidates and the members of the selection board have been personally informed — the selection board will decide

whether or not to admit candidates to the competition, following interviews with their respective immediate superiors. Moreover, the candidates will have the opportunity of requesting the selection board to hear such other superiors as they may specify. Subsequently, the selection board will hear the candidates themselves at an interview which will also provide it with further material on which to base its decision.

For the purposes of the conditions laid down for the competition, the candidates will be deemed to be in the situation in which they were at the time (as regards, for example, training). In so far as is possible, the selection board will be made up of all its former members, in complete accordance with the practice and case-law in this area.

The reference period to be taken into account when considering whether candidates are to be admitted to the competition, shall be the period ending on 25 February 1982 or, if considered fair, on the date up to which the performance of other candidates, who either did not complain or were successful, was assessed.

I have noted the concern of the staff representatives — which I share — that the selection board should resume its work as soon as possible (*NB*: theoretically on 15 September 1989). I will also inform Mr P. of the request submitted for examining the possibility of adjusting the careers of such successful candidates as may be appointed in the future, so that it can be established in good time before a list of successful candidates has been drawn up'.

9 Subsequently, the candidates were again invited to appear before the selection board in October, November and December 1989 in order to be informed of the names of their assessors and of the officials responsible for supervising them. Furthermore, the selection board asked whether they wished to have other persons heard who might have assessed their professional abilities, and of whom the selection board might not be aware.

10 According to the Commission, following those interviews, the selection board heard all the abovementioned persons, save in the case of their death, categorical refusal or failure to reply after three requests. Once those hearings were finished, the selection board proceeded to the stage of admission to the tests for the competition. Eight candidates were admitted.

11 Before that stage was completed, the President of the Union of European Civil Servants, on behalf of the candidates in question and as their duly-appointed representative, by memorandum of 18 September 1989 lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), against the Director of Personnel's memorandum of 26 June 1989 announcing the resumption of the procedure for internal competition COM/B/2/82; the complainants further requested to be admitted to the competition without further formality and to be awarded compensation for the damage which they considered they had suffered.

12 On 20 December 1989, the Commission rejected those complaints in decisions notified to the complainants by memoranda dated 22 December 1989, which they received between 8 and 10 January 1990.

13 By application lodged at the Registry of the Court of First Instance on 9 April 1990, the complainants brought the first of the present actions being considered (Case T-17/90).

14 By memoranda of 8 August 1990, the future applicants in Case T-28/91 were notified that they had been refused admission to the tests for the competition.

15 The candidates who had not been admitted lodged complaints, between 31 October and 6 November 1990, registered between 31 October and 7 November 1990 at the General Secretariat of the Commission, seeking annulment of the decisions of the selection board and the administration refusing to admit them to the competition and for them to be considered 'admitted to the tests without further formality'. They also sought the award of compensation for the material and non-material damage alleged.

16 Those complaints were not given an explicit answer. However, the interdepartmental group responsible for considering the said complaints noted at its meeting of 6 March 1991 that the candidates had not been informed, before being heard by the

selection board, of the content of the opinions expressed by their immediate superiors or [illegible] the persons whom they had themselves designated to be heard by the selection board. For that reason, the administration informed the candidates, by letters of 13 March 1991, that they were to be invited to a further interview with the selection board.

17 Those interviews took place in April 1991. Subsequently, the selection board confirmed the previous admissions to the competition and admitted four new candidates to the tests, namely Ms Camera-Lampitelli, Ms Kottowski, Ms Lutz and Ms Seube.

18 Case T-28/91 was brought on 30 April 1991.

19 By letters of 28 May 1991, the future applicants in Case T-17/92 were informed of the selection board's decision not to admit them to the tests for the competition on the ground that they did not have the 'necessary potential for taking an overall approach and a sufficient sense of initiative'.

20 Between 30 July and 6 August 1991, the persons concerned made complaints against those decisions. In the absence of any reply, those complaints were rejected by implied rejection on the expiry of the time-limit prescribed under Article 90(2) of the Staff Regulations. However, on 14 April 1992 the administration sent a decision explicitly rejecting seven of the complaints.

21 It is against that background that Case T-17/92 was brought on 24 February 1992.

Procedure

22 By order of 6 February 1992, the Court of First Instance joined Cases T-17/90 and T-28/91 for the purposes of the written and oral procedure and the judgment. By

that same order, as regards Case T-28/91, the Court of First Instance decided under Article 114(4) of the Rules of Procedure to reserve its decision on a plea of inadmissibility raised by the Commission for the final judgment.

23 By order of 23 November 1992, the Court of First Instance joined Case T-17/92 to Joined Cases T-17/90 and T-28/91 for the purposes of the written and oral procedures and the judgment. By order of 28 April 1993, the Court of First Instance joined Case T-27/92 to Joined Cases T-17/90, T-28/91 and T-17/92 for the purposes of the oral procedure.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry. However, it called on the Commission to supply certain information regarding the composition of the selection board following the judgment in *Basch and Others* v *Commission*. The Court also requested the Commission to produce certain documents concerning the procedure for admission to the competition. The Commission complied with the requests of the Court within the given time-limit. The parties presented oral argument and answered the oral questions of the Court at the hearing on 18 May 1993.

Forms of order sought

Case T-17/90

25 In this case, the applicants claim that the Court should:

1. declare null and void the decision of Mr V, Director of Personnel, of 26 June 1989;

2. declare that the applicants should be admitted to Competition COM/B/2/82 with no further formality;

3. order that those applicants appointed thereunder should retrospectively enjoy the same benefits as those candidates already appointed or promoted, with effect from 1982;

4. order the Commission to pay BFR 200 000, subject to increase in the course of the proceedings, by way of damages for material and non-material damage, because of the setback to the applicants' careers;

5. order the Commission to pay the costs.

26 The Commission contends that the Court should:

1. declare the action inadmissible or, at least, unfounded;

2. make an appropriate order as to costs.

Case T-28/91

27 In this case, the applicants claim that the Court should:

1. declare null and void the decision of Mr V, Director of Personnel, of 26 June 1989;

2. declare that the selection board should not undertake a further examination, including the examination announced in Mr T's letter of 13 March 1991;

3. declare that the applicants should be admitted to Competition COM/B/2/82 with no further formality;

4. order that those applicants appointed thereunder should retrospectively enjoy the same benefits as those candidates already appointed or promoted, with effect from 20 February 1982;

5. order the Commission to pay BFR 200 000, subject to increase in the course of the proceedings, to each of the applicants by way of damages for material damage;

6. order the Commission to pay BFR 100 000, subject to increase in the course of the proceedings, to each of the applicants by way of damages for non-material damage;

7. order the Commission to pay interest at 8% on the damages as from the complaints in Case T-17/90;

8. order the Commission to pay the costs.

28 The Commission contends that the Court should:

1. declare the action inadmissible or, at least, unfounded;

2. make an appropriate order as to costs.

Case T-17/92

29 In this case, the applicants claim that the Court should:

1. declare null and void the decision of the selection board for Competition COM/B/2/82 not to admit the applicants to the next stage of the procedure for Competition COM/B/2/82;

2. admit the applicants, in any event, to Competition COM/B/2/82 with no further formality and without them having to undergo any training or examination thereof, the applicants being placed on the list of suitable candidates;

3. order retrospective application as regards the applicants, with effect from 20 February 1982, by granting them the same benefits as those candidates appointed or even promoted;

4. order the Commission to pay the applicants BFR 200 000, subject to increase in the course of the proceedings, by way of damages for material damage;

5. order the Commission to pay the applicants BFR 100 000, subject to increase in the course of the proceedings, by way of damages for non-material damage;

6. order the Commission to pay interest at 8% on the damages, as from the first complaint in the procedure with which Case 294/84 was concerned;

7. order the Commission to pay the costs.

30 The Commission contends that the Court should:

1. declare the action unfounded;

2. make an appropriate order as to costs.

Case T-17/90

Admissibility

Arguments of the parties

31 The Commission pleads, first, that the Director of Personnel's decision of 26 June 1989 does not constitute an act adversely affecting the applicants within the meaning of Article 90(2) of the Staff Regulations, since that decision is merely a preparatory act.

32 In this case, the contested decision was, according to the Commission, intended to reopen the work of the selection board. As a preparatory act forming part of the procedure for the examination of applications for admission to the competition, it may only, according to the case-law of the Court, validly be called into question in litigation in connection with an action against the final decision of the selection board.

33 The Commission contends, secondly, that where, as in this case, officials seek a decision of the appointing authority relating to them, in this instance a decision to admit them to a competition with no further formality, to undertake to grant them 'the same benefits as those enjoyed by candidates already appointed or promoted' since 1982, and to award them damages for alleged harm to the advancement of their career, the administrative procedure must be initiated by submitting to the appointing authority a request that it take such a decision, pursuant to Article 90(1) of the Staff Regulations. It is only against the decision to reject that request that the parties concerned may, within a further period of three months, submit a complaint to the appointing authority, pursuant to Article 90(2). According to the Commission, the action is also inadmissible in that regard 'for not having been preceded by a complaint against the rejection of the requests set out in the complaints of 22 September 1989'.

34 The Commission pleads, thirdly, that an applicant cannot claim compensation based on the unlawfulness of the institution's decision where the action for annulment against that decision is not admissible: the inadmissibility of the action for

annulment to which the claim for damages is ancillary entails the inadmissibility of the latter claim.

35 The applicants reply, first, that the Director of Personnel's decision of 26 June 1989 constitutes an act adversely affecting them since, as it was impossible to convene the selection board, it was essential to admit them to the competition with no further formality. In this regard, the applicants dispute the Commission's interpretation of the case-law of the Court of Justice and the Court of First Instance. They claim that the acts in issue were not preparatory, but were 'preliminary'.

36 They state, secondly, that their action was in fact preceded by complaints.

37 The applicants finally claim that it is possible to observe the administrative procedure in one stage. They state: 'The applicants point out ... that the view in issue does not constitute an absolute rule and they allege in any case that the maxim *stare decisis* may not, in any event, be relied upon ...'.

Findings of the Court

38 As regards the first claim put forward by the applicants, in which they seek the annulment of the Director of Personnel's decision of 26 June 1989, it should be pointed out that the decision, as moreover appears directly from its wording, was an act taken as a result of the judgment in *Basch and Others* v *Commission*, cited above. By that act, the Commission intended, in accordance with Article 176 of the EEC Treaty to take the necessary measures to comply with the said judgment.

39 In that regard, it should be noted that, as is apparent from the settled case-law of the Court of Justice and the Court of First Instance, developed in the context of Article 173 of the EEC Treaty, only measures producing binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his legal position constitute acts against which an action for annulment may be brought (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639 and Joined Cases T-32/89 and T-39/89 *Marcopoulos* v *Court of Justice* [1990] ECR II-281). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the same case-law that in principle an act is open to review only if it is a measure definitively laying down the position of an institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision. Moreover, in staff cases the Court of Justice has consistently held that acts preparatory to a decision do not adversely affect an official within the meaning of Article 90(2) of the Staff Regulations and therefore can be contested only incidentally in an action against measures capable of being annulled (see, for example, Case 11/64 *Weighardt* v *Commission* [1965] ECR 285 and Case 346/87 *Bossi* v *Commission* [1989] ECR 303).

40 In this instance, it appears from the decision in issue, communicated by memorandum of 26 June 1989, that it merely announces the reopening of the procedure for the competition and the detailed rules directly relating to that resumption. The Court can only find that the decision in issue does not contain any matter of a decisional nature separable from the competition procedure as a whole.

41 The Court considers that it is possible to deduce directly from a reading of Article 176 of the Treaty in conjunction with the body of rules in the Staff Regulations concerning the organization of competitions that the contested measure was a necessary result, for the purposes of continuing the competition procedure, of the annulment by the Court of Justice of certain of the decisions taken by the selection board. The effects of that measure do not go beyond those intrinsic to an intermediate procedural act and do not affect, beyond the factual situation of the applicants — who were bound to be subjected to a fresh assessment by the selection board — their legal position or their position under the Staff Regulations.

42 Accordingly, the Court considers that the decision to re-open the competition procedure constitutes a preparatory act forming part of that procedure as a whole, and that the applicants would be entitled to rely on the possible unlawfulness of that act only in the context of an action against the decision taken on completion of that procedure.

43 It follows that that head of the claim is inadmissible.

44 As regards the second and third heads of claim put forward by the applicants, it is sufficient to note, without it being necessary to give judgment in that regard on the plea of inadmissibility raised by the Commission, that such claims are not within the jurisdiction of the Court, which has no jurisdiction to issue orders to the institutions (see Case T-53/92 *Piette de Stachelski* v *Commission* [1993] ECR II-35).

45 As regards the damages sought under the fourth head of claim, the Court points out that, in the absence of an act adversely affecting the official in question, the pre-litigation procedure set up by Article 90 of the Staff Regulations is, in principle, a two-stage procedure. As is apparent from Article 90(1), any person to whom the Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. In the event of an unfavourable reply or in the absence of a reply, the person concerned may submit a complaint to the appointing authority, challenging its express or implied decision in accordance with Article 90(2) of the Staff Regulations. The complaint procedure is intended to compel the authority having control over the official to reconsider its decision in the light of any objections which that official may make (see Case 101/79 *Vecchioli* v *Commission* [1980] ECR 3069, paragraph 31). The pre-litigation procedure prescribed by Article 90 of the Staff Regulations, as a whole, is intended to permit and encourage the amicable settlement of differences which have arisen between officials and the administration (see Case 142/85 *Schwiering* v *Court of Auditors* [1986] ECR 3177, paragraph 11).

46 Furthermore, as regards the admissibility of a claim for compensation, it is apparent from the case-law of the Court of Justice, as analysed and elaborated by the Court of First Instance (see Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, paragraph 38, and Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731, paragraph 49) that it is only where there is a direct link between an action for annulment and a claim for compensation that the latter is admissible as incidental to the action for annulment, without necessarily having to be preceded both by a request from the person concerned to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the validity of the implied or express rejection of that request.

47 In this case, the claims for damages put forward by the applicants seek compensation for the material and non-material damage allegedly caused by the fact that the applicants were not admitted to the tests for a competition until eight years had elapsed and after several court actions, circumstances which caused a delay in the advancement of their careers. The action is therefore based not on a single measure whose annulment is requested but on several wrongful acts and omissions alleged against the administration. It was therefore imperative that the administrative procedure preceding the commencement of the action should have been initiated by a request by the persons concerned that the appointing authority compensate them for that damage (see Case T-29/91 *Castelletti and Others* v *Commission* [1992] ECR II-77 and *Piette de Stachelski* v *Commission*, cited above) and continued, where appropriate, by a complaint made against the decision to reject the request.

48 However, the memorandum which the applicants sent to the appointing authority on 18 September 1989 was not preceded or followed, in sufficient time, by any other approach to the administration satisfying the requirements of Article 90 of the Staff Regulations.

49 It follows that, even on the assumption that the abovementioned memorandum is to be interpreted as a complaint within the meaning of the Staff Regulations, it is established that the pre-litigation procedure did not take place in two stages in accordance with Article 90 of the Staff Regulations, since that complaint was not preceded by a request. If the memorandum of 18 September 1989 is to be construed

as a request, it is likewise established that no complaint was lodged against the decision to reject it. It clearly follows that the action, in so far as it seeks the award of damages, was not brought in the manner laid down by the Staff Regulations and is thus inadmissible.

50 It follows from the foregoing that the action must be dismissed as inadmissible as in its entirety.

Case T-28/91

Admissibility

Arguments of the parties

51 The Commission contends, principally, that to the extent that this action has the same subject-matter as Case T-17/90 and relies on the same grounds, the admissibility of the action meets with the objection of *lis pendens*. It refers, in that regard, to Joined Cases 45/70 and 49/70 *Bode* v *Commission* [1971] ECR 465 and Joined Cases 58/72 and 75/72 *Perinciolo* v *Council* [1973] ECR 511, and concludes that the applicants have no legal interest in bringing proceedings in the context of this case.

52 The Commission adds that the head of claim made against the administration's letters of 13 March 1991 is superfluous as regards the main claim for the annulment of the Director of Personnel's decision of 26 June 1989 and cannot therefore justify the existence of *lis pendens*. In that context, the Commission points out that the interviews referred to in the said letter took place without the persons concerned expressing any objection and led the selection board to admit, in addition to the 11 candidates already admitted, four of the applicants in Case T-28/91. In those circumstances, the Commission questions whether the applicants retain an interest in putting forward the head of claim in issue.

53 The Commission submits, in the alternative, that the administrative procedure prior to bringing the action was irregular and that the action must also be dismissed as inadmissible for that second reason.

54 To the extent that the requests sought admission to the competition with no further formality, receipt of the 'same benefits as those candidates already appointed or promoted' with effect from 1982 and the award of damages, this action — like Case T-17/90 — should have been preceded by both requests and complaints within the meaning of Article 90 of the Staff Regulations. In other words, Case T-28/91, which merely confirms the claims contained in Case T-17/90, could only have been brought against a complaint lodged within three months of the notification of the decisions of 20 December 1989 dismissing the initial requests already set out in the complaint of 18 September 1989. Since this action was brought on 30 April 1991 and was preceded by complaints lodged between 31 October and 6 November 1990 it is, therefore, inadmissible.

55 The applicants counter by saying, first, that they brought a fresh action because they had submitted complaints which they could not abandon without taking further action. They add that it was in their best interests, as long as the defendant considered their first action premature because it related to a preparatory act, to submit their arguments afresh where the acts alleged to be preparatory were followed by acts involving a decision.

56 Secondly, the plea of *lis pendens* can, according to the applicants, only be relied upon 'where there is already a judicial decision in existence, even if it is delivered at one and the same time as the decision relating to the *lis pendens* or to the authority of *res judicata* of the decision in the second procedure'.

57 Thirdly, in reply to the plea raised in the alternative by the Commission, the applicants claim that they cannot draft their submissions in a complaint in the same way as in an application to the Court. They can act against the appointing authority only by requesting it to remedy their situation, in particular by withdrawing the act in dispute, but they cannot plead that the act is null or claim damages, which it is not within the appointing authority's power to grant.

Findings of the Court

58 It should be pointed out at the outset that, since Case T-17/90 has been dismissed as inadmissible in its entirety, the plea of inadmissibility raised by the Commission, on the ground of the applicants' bringing a second action which is identical to the first, has become redundant. Accordingly, there is no need to give a decision on that plea.

59 The first head of claim submitted by the applicants is inadmissible on the same grounds as those set out in paragraphs 38 to 42, to which the Court expressly refers.

60 The second, third and fourth heads of claim may be dismissed as inadmissible for reasons set out in paragraph 44 of this judgment, to which the Court also expressly refers.

61 The claims for damages are inadmissible for identical reasons to those mentioned in paragraphs 45 to 49 above. It is clear from the documents before the Court that the applicants have complied with only one stage of the prior administrative procedure, which, in this case, necessarily results in the claims being inadmissible.

62 It follows that the action is inadmissible in its entirety.

Case T-17/92

Admissibility

63 The Commission has not raised any objection of inadmissibility in connection with this case.

64 However, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding.

65 The second and third heads of claim may be dismissed as inadmissible for the reasons set out in paragraph 44 of this judgment, to which the Court expressly refers.

66 The claims for damages are inadmissible for identical reasons to those mentioned in paragraphs 45 to 49 above. It is clear from the documents before the Court that the applicants have complied with only one stage of the prior administrative procedure, which, in this case, necessarily results in the claims being inadmissible.

67 It follows from the foregoing that Case T-17/92 is admissible only as regards the first head of claim seeking annulment of the decision of the selection board not to admit the applicants to continue the procedure for Competition COM/B/2/82.

The substance of the first head of claim

Arguments of the parties

68 The applicants claim, first, that the decision of the Director of Personnel, which was communicated to them by his memorandum of 26 June 1989, did not comply with the judgment given by the Court of Justice and that the reconstitution of the selection board announced in that memorandum was in fact impracticable. In the latter regard, the applicants argue that not only the chairman of the selection board, who was in no way prevented from continuing to carry out her duties, but also other members of the selection board were replaced without any of them having been 'no longer eligible'. The resignation of the chairman of the selection board was not, according to the applicants, justified by her concern not to damage the work of the selection board, as the Commission claims. According to the applicants, she was unjustified in refusing to take on the chairmanship of the selection board, which only she had the capacity to take on. The applicants consider that, because

of its chairman's resignation, the selection board was not able to continue its assignment properly and that it was, therefore, unable to operate. As regards the case-law of the Court of Justice cited by the defendant, the applicants point out that Case 24/78 *Martin* v *Commission* [1979] ECR 603 concerned the absence of a member of the selection board. However, in this case, it was, according to the applicants, still perfectly possible for the selection board to perform its duties; the absence of its chairman is not in any way justified and stems from a purely voluntary act on her part. Furthermore, as regards Case 34/80 *Authié* v *Commission* [1981] ECR 665, the applicants point out that in this case the issue is not whether a chairman can sit once again in that capacity, but the fact that, without any valid reason, the chairman did not so do.

69 The Commission counters by saying, first, that it complied with the judgment in *Basch and Others* v *Commission*. By the decision of 26 June 1989, it reconstituted the selection board as initially composed, unless persons were 'no longer eligible'; according to the Commission that expression covers cases of death, illness, change of assignment within the administration and, as in this case, resignation of the chairman of the selection board. That resignation was justified, as regards the chairman of the selection board, by the concern not to damage the work of the selection board when accusations of 'bias' had been made against her. Relying on the judgment in *Martin* v *Commission*, cited above, the Commission argues that the reasons mentioned above are such as to justify an encroachment on the principle of equal treatment for all candidates in the same competition, since it was impossible, in this case, to ensure the operation of the selection board in any other way. According to the Commission, the judgment in *Basch and Others* v *Commission* required it to remove the defects which had vitiated the competition procedure and to put the applicants back in the position they were in prior to the annulled decision. Only the continuation of the work by a selection board deliberately composed of different members would have been such as to jeopardize that result. Furthermore, in *Authié* v *Commission*, cited above, the Court of Justice held that there was no ground for complaint where a selection board whose decision to reject a candidature was annulled by the Court of Justice on the basis of a procedural defect and an insufficient statement of reasons did not reach a new decision in a different composition.

70 Secondly, the applicants claim that, contrary to the position adopted by the Director of Personnel in his memorandum of 8 September 1989, the selection board did not take account of criteria subsequent to the reference date set by the notice of competition, namely 25 February 1982.

71 The Commission points out that the reference period to be taken into consideration by a selection board is imposed by the notice of competition, which states that the reference period expired in February 1982. In this case, the selection board considered correctly that the reference period was that laid down by the notice of competition and, therefore, did not act in error. The Commission adds that the administration can neither commit nor, *a fortiori*, require the selection board to take into consideration a period subsequent to that laid down by the notice of competition.

72 Thirdly, the applicants claim that the selection board questioned, in their capacity as immediate superiors, officials whom it selected arbitrarily. Furthermore, they allege that no account was taken of the impossibility for the majority of those of their immediate superiors who were consulted to recall the facts, having regard to the time which had elapsed. Moreover, the applicants deny that those immediate superiors and the members of the selection board were in a position to rule on their merits and assert that the selection board did not examine all of the observations which they submitted.

73 The Commission refers to the fact that by letter of 13 March 1991 it gave notice to all the candidates for the competition that they were to be invited to an additional interview with the selection board, which would inform them of the content of the opinions of the persons consulted concerning them. Since those interviews took place in April 1991, the Commission considers that the applicants are wrong in maintaining that their immediate superiors were not heard or that they did not have the opportunity of commenting on the opinions expressed by the latter.

74 Fourthly, the applicants argue that 'in the event that the selection board examined the observations made by their immediate superiors, it did not interpret them correctly either as regards their meaning or as regards their scope'.

75 Two of the applicants, Mr Vitale and Mr Michiels, make specific complaints.

Mr Vitale claims that:

'— as regards written expression, his immediate superiors were unaware that the applicant had to compose orders for office supplies (and had done this since mid-1976 for a large division);

— as regards his taking an overall approach, the applicant does not know how his immediate superiors assessed this. The selection board questioned Mr C, who was not his immediate superior at the time and with whom he had had problems following the period to be taken into consideration. Mr H. made assertions which, first, did not refer to the relevant period and, secondly, were denied by the applicant;

— as regards his ability to organize his work independently, the applicant states that as from 1 July 1979 he has, on his own, been doing the work of three people'.

Mr Michiels argues that:

'— the work carried out by the applicant has, since 1971, always been done by a Category B (B3 or B2) official, which proves the applicant's ability to draft, to take an overall approach and to express himself in writing'.

76 The Commission states that the complaints put forward by Mr Michiels and Mr Vitale merely make unsupported assertions, without showing that irregularities were actually committed by the selection board.

Findings of the Court

77 The applicants essentially put forward two pleas based, first, on the alleged unlawfulness of the composition of the selection board at the time of taking the contested decision and, secondly, on certain misconduct by the selection board.

78 As to the first plea put forward by the applicants, it should be pointed out that in the event of an act of an institution being annulled by one of the Community Courts, it is for the institution, pursuant to Article 176 of the Treaty, to take the necessary measures to comply with the judgment.

79 In the case of a competition such as that in issue, where the Court of Justice has annulled a decision taken by the selection board for breach of the obligation to give a statement of reasons and for procedural irregularity, compliance with the judgment involves restoring the situation prevailing prior to the occurrence of the facts found unlawful by the Court.

80 However, it is apparent from the documents before the Court that it was not possible, in this case, to restore the situation to exactly what it was prior to the decision invalidated by the Court of Justice, since certain members of the selection board had resigned in the meantime. In those circumstances, it is necessary to determine whether the changes to the composition of the selection board were such as to make its subsequent work irregular.

81 In this regard, it should be pointed out at the outset that the work of a selection board in connection with a competition procedure governed by Annex III of the Staff Regulations must take place in such a way as to ensure the proper operation of recruitment for the Community civil service. Sometimes, that work is necessarily spread out over a long period, even several years, in particular where one of its decisions is annulled by one of the Community courts. It is therefore possible that the composition of a selection board may, in such circumstances, evolve over the years, as a result of events beyond the control of the administration. In those

circumstances, the administration should be recognized, for the purposes of ensuring the continuity of the Community civil service, as having the power to replace certain members of the selection board, while in so doing maintaining a situation which is as close as possible to the original situation, where it is impossible to reconstitute identically the selection board as originally composed. Such is the case in the event of serious illness, a change of assignment within the administration or the resignation of a member of the selection board, since in that latter case the appointing authority does not have any means of compelling a member of the selection board to sit against his or her will.

82 In this case, it is apparent from the answers supplied by the Commission at the request of the Court that the chairman and a member of the selection board resigned and that the appointing authority subsequently replaced them with two new members.

83 It follows from the foregoing considerations that, on the facts of the case, the changes to the composition of the selection board were the result of its being impossible for the administration to reconstitute the said selection board as originally composed. Those changes were therefore not unlawful, since the administration acted only in order to ensure the continuity of the Community civil service, and particularly since no misuse of power is alleged.

84 The composition of the selection board, such as it was at the time of the facts in in issue, was not therefore such as to invalidate the selection board's work and that plea must therefore be dismissed.

85 In respect of the second plea relied upon by the applicants, based on certain alleged misconduct on the part of the selection board, the applicants set out several arguments. The first alleges that the selection board omitted to take into account criteria subsequent to 25 February 1982. In that regard, it follows from the letter of 26 June 1989 that the reference period to be taken into consideration in fact expired

on 25 February 1982. That was also the date to be taken into account according to the Director of Personnel's letter of 8 September 1989, unless another date had been taken into consideration for assessing the performance of other candidates who were not complainants or were successful.

86 However, the Court notes that the applicants have not put forward any argument or evidence capable of proving the contention which underpins their arguments, namely that for certain candidates the selection board took into consideration criteria subsequent to the abovementioned reference date. It follows that the first argument must be rejected.

87 As to the second argument based on whether the selection board actually questioned the applicants' immediate superiors, it should be pointed out, first, that the applicants have not supplied any evidence in support of their contentions. Secondly, it appears from the documents produced in that context by the Commission at the request of the Court — which have not been disputed by the applicants — that the applicants' immediate superiors were in fact heard by the selection board.

88 As regards the alleged possibility that the immediate superiors might have forgotten the relevant facts, it is sufficient in relating that argument to note that the applicants' contentions have neither been supported by any evidence whatsoever, nor even been stated in specific terms.

89 As regards the third argument, that the members of the selection board were not in a position to decide on the applicants' merits and did not examine all the observations which the applicants put forward, the Court notes, first, that the applicants have not supported those contentions with any evidence allowing their validity to be assessed. Secondly, it appears from the minutes of the interviews between the

candidates and the members of the selection board, produced by the Commission at the request of the Court, that the selection board informed the officials concerned of the contents of the information supplied to it by their immediate superiors. It follows that that argument must be rejected.

90 As to the fourth argument put forward by the applicants against the selection board's interpretation of the information supplied by their immediate superiors, it is sufficient to note that it calls into question the actual assessment by the selection board of the abilities of the candidates. However, such assessments may be subject to review by the Court only where there is a flagrant breach of the rules governing the selection board's work (see Joined Cases 112/73, 144/73 and 145/73 *Campogrande and Others* v *Commission* [1974] ECR 957), which is not the case in this instance.

91 As regards, finally, the contentions put forward by two of the applicants, Mr Vitale and Mr Michiels, it is sufficient to note, as the Commission has done, these are mere assertions unsupported by any evidence whatsoever.

92 It appears from all the foregoing that examination by the Court of the complaints put forward by the applicants has not revealed any breach whatsoever of the rules governing the organization and the procedure for the competition. Consequently, the first head of claim must also be dismissed.

93 It appears from all the foregoing that Case T-17/92 must be dismissed in its entirety and consequently that all three actions must be dismissed.

Costs

94 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, under Article 88 of those Rules, in actions brought by Community servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the applications in Joined Cases T-17/90, T-28/91 and T-17/92;

2. Orders the parties to bear their own costs.

Biancarelli Vesterdorf García-Valdecasas

Delivered in open court in Luxembourg on 15 July 1993.

H. Jung J. Biancarelli

Registrar President