

JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

19 October 2006 *

In Case T-311/04,

José Luis Buendía Sierra, official of the Commission of the European Communities, residing in Brussels (Belgium), represented by M. van der Woude and V. Landes, lawyers,

applicant,

v

Commission of the European Communities, represented by G. Berscheid and V. Joris, acting as Agents, and by D. Waelbroeck, lawyer,

defendant,

* Language of the case: French.

APPLICATION for annulment of:

- the decision of the Director-General of the Legal Service of the Commission to award the applicant only one directorate-general priority point in the 2003 promotion exercise, communicated on 2 July 2003, as confirmed by a decision of the appointing authority notified on 16 December 2003;

- the decision of the appointing authority not to award the applicant any special priority points for additional activities in the interest of the institution in the 2003 promotion exercise, notified via the Sysper 2 system on 16 December 2003;

- the following decisions: the decision of the appointing authority to award the applicant a total of 20 points in the 2003 promotion exercise; the merit list of Grade A5 officials in the 2003 promotion exercise, published in *Administrative Notices* No 69-2003 of 13 November 2003; the list of officials promoted to Grade A4 in the 2003 promotion exercise, published in *Administrative Notices* No 73-2003 of 27 November 2003; and, in any event, the decision not to include the applicant's name in those lists;

- so far as may be necessary, the decision of the appointing authority of 15 June 2004 rejecting his complaint submitted on 12 February 2004,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 29 September 2005,

gives the following

Judgment

Legal framework

- ¹ The Staff Regulations of Officials of the European Communities, as in force at the material time ('the Staff Regulations'), include an Article 26, first and second paragraphs, worded as follows:

'The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;

(b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.'

2 The first paragraph of Article 43 of the Staff Regulations provides:

'The ability, efficiency and conduct in the service of each official, with the exception of those in Grades A1 and A2, 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.'

3 The first subparagraph of Article 45(1) of the Staff Regulations is worded as follows:

'Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.'

4 On 30 October 2001, the Commission adopted communication SEC(2001) 1697 on the 'career development report' (staff appraisal) and promotion. In it, it outlines its guidelines on staff policy, so as to 'link ... career development with an assessment of

past results and of the potential of the jobholder concerned'. It states inter alia that 'merit ... constitutes [the] core feature [of the new promotion system]'. The Commission adds that this 'merit is a dynamic and cumulative concept ("capital") ... Merit is quantified through a system of points. After a certain time (depending on the merit accumulated) the "capital" of points entitles the official to be proposed for a promotion to a higher grade'. The Commission makes clear that 'ratings received in the context of the staff career development report ... correspond to [merit points]' ('MP') to which priority points ('PP') are added. The Commission notes that 'the attribution of [those PP] must always be justified, in writing, by merit-based considerations'. They 'are intended to reward officials deemed most deserving and to increase their chances of promotion in the future or to allow them to actually be promoted in the current exercise'. The Commission makes clear that 'the award of [PP] must also be justified through detailed narrative assessments'. It adds that '[PP] will be allocated following a hierarchy of criteria aimed at differentiating between meritorious staff'. According to the Commission, '[t]he basic criterion should be the comparison of merits across the [directorate-general] as a whole; this would include taking into account the person's potential (based on objective assessment of demonstrated performance and competence)'. The Commission stresses the fact that 'one of the aims of the system is to ensure the highest possible degree of consistency of appraisals across the various Commission departments'. Finally, it states that '[l]inked to this, is the aim that different promotion speeds for staff in one directorate-general be comparable to those in other directorates-general'.

- 5 On 26 April 2002, the Commission adopted a decision on general provisions for implementing Article 43 of the Staff Regulations and a decision on general provisions for implementing Article 45 of the Staff Regulations ('GIP 43' and 'GIP 45' respectively).

- 6 Under Article 1(1) of GIP 43, an annual report, called a career development report ('CDR'), 'will be drawn up on the ability, efficiency and conduct in the service of each permanent ... member of staff ...'.

- 7 Article 2(1) of GIP 43 defines the concepts of MP and PP for the purposes of GIP 43 and GIP 45. Under the second to fifth subparagraphs of Article 2(1) of GIP 43:

'Both [MP] and [PP] are intended to reward merit and the attribution of [PP] must always be justified by merit-based considerations.

[MP] are the points generated by career development report markings.

[PP] are the points which may be awarded by:

- (a) Directors-General (for A/LA staff) ... to deserving members of staff, once the career development reports have been completed in the DG or service. The criteria for attribution are laid down in Article 6 of [GIP 45];
- (b) the appointing authority upon recommendation by the promotion committees to deserving staff who have accepted additional duties in the interest of the institution. The criteria for attribution are laid down in Article 9 of [GIP 45];
- (c) the appointing authority upon recommendation by the promotion committees in response to appeals against the award of [PP] as provided for in Article 13, paragraph 2, of [GIP 45].

Both [MP] and [PP] accumulate over the years. After a promotion, the amount of points corresponding to the promotion threshold is deducted; any remaining balance of points is kept for the subsequent exercise.’

- 8 According to *Administrative Notices* No 99-2002 of 3 December 2002 on the (transitional) staff appraisal exercise 2001-02, ‘during [his] appraisal, each official will be given an overall mark between 0 and 20’. That mark is then converted into MP usable for promotion purposes. It is apparent from the same *Administrative Notices* that, with certain exceptions, the number of MP corresponds to the overall appraisal mark.
- 9 Article 3 of GIP 45 provides that officials may be promoted only ‘after consideration of the comparative merits of the officials eligible for promotion’. Under that article, ‘[t]he primary consideration is therefore the number of [MP] and [PP] that each official has accumulated over the previous year(s)’. The Commission adds that ‘[o]ther secondary considerations can be taken into account to decide between officials with an equal number of [MP] and [PP], as indicated in Article 10, paragraph 1, [of GIP 45]’.
- 10 Article 4 of GIP 45 provides:

‘The promotion exercise consists of the following two phases:

- (a) DGs and subsequently the promotion committees, defined in Article 14, award [PP] according to the modalities set out in Articles 6, 7 and 9;

(b) the actual promotion procedure which is described in Article 10.'

11 Under Article 6 of GIP 45, the directors-general or directors distribute the PP made available to each directorate-general (the 'DGPP'), after consulting the joint evaluation committees.

12 According to Article 6(1) of GIP 45, for the purposes of that distribution, 'each DG will have available ... a package of [PP] equal to 2.5 times the number of officials in grades which are still susceptible to promotion and who occupy a post in that DG'. However, it is clear from that provision and from *Administrative Notices* No 99-2002 that directorates-general whose average score in terms of MP, for a given grade, exceeds the average of 14 out of 20 by more than one point will have their package of PP reduced by an amount corresponding exactly to the excess. However, directorates-general may justify that excess and the promotion committees may, on exceptional grounds, decide to annul part or all of that reduction.

13 Article 6(2) of GIP 45 provides that, 'at the beginning of the exercise aimed at awarding [PP], Directors-General and Directors shall meet in each DG to agree on criteria for the attribution of the package of [PP] among Directorates'.

14 Under Article 6(3) of GIP 45:

'Having considered the results of the [CDRs], Directors-General, upon proposals by their Directors, for A staff, ... award [PP] to officials deemed most deserving, inter alia, on the grounds that:

- (i) they have contributed to the attainment of results which stretch beyond the individual's objectives and which fall within the Directorate/Directorate-General work programme, including by providing assistance to other units, or

- (ii) they have demonstrated special efforts and outstanding results in carrying out their tasks, as recorded in their [CDRs].'

15 Article 6(4) of GIP 45 provides that, 'in order to differentiate between staff':

- '(a) 50% of the [PP] forming part of the package made available to the DG will be shared out among the best performing officials who have demonstrated outstanding merits in meeting the criteria under (i) and (ii) [of paragraph 3]. These officials correspond to approximately 15% of the DG population per grade. Each official shall receive between 6 and 10 points.

- (b) The remaining 50% will be shared out among other officials who are regarded as deserving in the light of the criteria under (i) and (ii) [of paragraph 3] and who will be allocated between 0 [and] 4 points per individual.

The same official cannot receive points drawn from both groups. Therefore, the maximum amount of [PP] that a single official can be awarded at each promotion exercise is 10'.

- 16 Article 8 of GIP 45 provides that once PP have been awarded following the procedure laid out in Article 6, the Directorate-General (DG) for Personnel and Administration is to draw up merit lists for each grade, and in rank order of points, publish them on the intranet and communicate them to all staff. Those lists are to include those officials who are not more than five points below the promotion threshold and those who have reached or exceeded it.
- 17 Under Article 13(1) of GIP 45, within five working days of the publication of the merit list referred to in Article 8 of GIP 45, officials can appeal against the award decisions for [PP] to the promotion committee ('the internal appeal'). Under Article 13(2) of GIP 45, '[u]pon examining each case, should the Promotion Committee deem it appropriate, it shall propose the award of a number of [PP]. In its reasoned opinion, the Promotion Committee shall issue a recommendation to the appointing authority', which decides on any award of supplementary PP, the number of which thus allocated is to be published ('appeal priority points or APP').
- 18 Under Article 9(1) of GIP 45, the promotion committees are also responsible for making recommendations to the appointing authority regarding the award of PP in recognition of additional duties carried out in the interest of the institution ('ADPP'). Those duties are listed in Annex I to GIP 45.
- 19 Article 12 of GIP 45 lays down transitional arrangements for the 2003 promotion exercise, in order 'to take proper account of merit over time'. That provision establishes, in paragraph 3, three categories of transitional PP ('TPP'):
- '(a) [TPP] will be awarded to officials within the limit of 1 point per number of years spent in the grade, up to a maximum of 7 points. In addition, the Promotion

Committees will have available a package of [TPP] equal to 0.25 per official and will be able to award them up to a maximum of 2 points per official.

(b) DGs will be able to award [TPP] in order to take account of staff proposed in the previous exercise but not promoted ...' ('carry-overs').

20 According to *Administrative Notices* No 18-2003 of 17 February 2003 (Promotions 2003 — Categories A, LA, B, C and D — Operational budget — Carry-overs from the 2002 promotion exercise), and *Administrative Notices* No 34-2003 of 2 May 2003 (2003 promotion exercise), point III, up to four special additional PP ('SAPP') may be awarded.

21 Article 10 of GIP 45 provides as follows:

'1. Once the procedure described under Article 9 has been completed, the Promotion Committees referred to in Article 14 meet to deliberate on the merit list and to make proposals for promotion choosing from among the group of officials whose number exceeds the actual promotion possibilities (group of *ex aequo*). When choosing between officials with an equal number of points, the Committees shall, in particular, take account of elements such as seniority in grade and considerations of equal opportunities. This exercise shall begin no later than 15 May. The Committees shall justify their proposals and submit them to the appointing authority. The merit list containing these proposals will be published on the intranet; regarding those officials whose number of points matches the threshold, this list will distinguish those who have been proposed by the Promotion Committee from those who have not.

2. In order to be promoted, an official must have totalled at least 10 [MP] in his career development report of the last appraisal exercise. ...

3. In June, on the basis of the proposals of the Promotion Committees, the appointing authority decides which officials to promote to each grade. When an official is promoted, the threshold is deducted from the merit account. The balance of points is kept for subsequent years.

4. In July, DG [Personnel and Administration] publishes the list of promoted staff.'

22 Article 14(1) and (2) of GIP 45 provides:

'1. Five Promotion Committees are set up for respectively: A staff, LA staff, B staff, C staff and D staff.

2. The composition of the Committees is as follows:

— For A staff: A Chairman, who is the Director-General of DG [Personnel and Administration]; a number of members equal to the number of Directors-General and Heads of Services; 15 members appointed by the Central Staff Committee at least at A4/LA4 level.

— ...'

Facts and procedure

- 23 The applicant has been an official of the European Communities since April 1991. He has been a member of the Commission's Legal Service since 1 July 2001.
- 24 On 15 March 2003, the applicant was awarded a mark of 16 out of 20 on his CDR for the period from July 2001 to December 2002. That mark was converted into 16 MP.
- 25 By a decision communicated to the applicant on 3 July 2003, the Director-General of the Legal Service also awarded him one DGPP on the basis of Article 6 of GIP 45.
- 26 Pursuant to the first sentence of Article 12(3)(a) of GIP 45, the Legal Service also allocated three [TPP] to him, awarded at the rate of one point per year spent in the grade ('DGTTP'), corresponding to three years' seniority in Grade A5.
- 27 The merit list referred to in Article 8 of GIP 45, relating to the 2003 promotion exercise, which concerned Grade A5 officials such as the applicant, was published in *Administrative Notices* No 48-2003 of 7 July 2003. It includes, for each official concerned, the accumulated number of MP and DGPP, but also of DGTTP and SAPP. The applicant's name does not appear on it.
- 28 The applicant lodged an internal appeal on 14 July 2003, on the basis of Article 13 of GIP 45, against the award of only one DGPP. In that appeal he also sought the award of ADPP. The promotion committee for Category A staff met on 17 and 24 October 2003 to consider, inter alia, that appeal.

- 29 The abovementioned promotion committee subsequently adopted, on 13 November 2003, the merit list of Grade A5 officials provided for in Article 10 of GIP 45. That list was published in *Administrative Notices* No 69-2003 of the same date. The applicant's name does not appear on it.
- 30 On 20 November 2003, the appointing authority drew up the list of officials promoted in the 2003 exercise, which does not include the applicant's name. That list was published in *Administrative Notices* No 73-2003 of 27 November 2003.
- 31 After consulting his individual promotion file on the Sysper 2 site of the Commission's intranet on 16 December 2003, the applicant discovered that he had been awarded a total of 20 points in the 2003 promotion exercise.
- 32 The Commission published a summary note of the progress of the promotion exercise in question in *Administrative Notices* No 82-2003 of 19 December 2003.
- 33 By note of 12 February 2004, the applicant submitted a complaint under Article 90(2) of the Staff Regulations.
- 34 That complaint was rejected by decision of the appointing authority of 15 June 2004, and communicated to the applicant on the following day.
- 35 By application lodged at the Registry of the Court of First Instance on 22 July 2004, the applicant brought the present action.

- 36 The defence was lodged on 19 November 2004.
- 37 By letter received at the Court Registry on 14 January 2005, the applicant waived his right to lodge a reply.
- 38 In application of Article 14 of the Rules of Procedure of the Court of First Instance and on a proposal from the Fifth Chamber, the Court, after hearing the parties in accordance with Article 51 of the Rules of Procedure, decided to refer the case to a chamber of extended composition.
- 39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the applicant and the Commission in writing to answer a number of questions by 31 August 2005. The parties complied with those requests within the prescribed period.
- 40 By letter of 15 September 2005, the Registry of the Court of First Instance invited the parties to submit their observations on the other party's answers to the Court's written questions by 23 September 2005. The applicant and the Commission lodged their observations at the Court Registry on, respectively, 23 and 22 September 2005.
- 41 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 29 September 2005.

Forms of order sought by the parties

42 In its application, the applicant claims that the Court should:

- order, by way of measures of organisation of procedure, the production of documents;

- annul the following acts:
 - the decision of the Director-General of the Legal Service of the Commission to award the applicant only one directorate-general priority point in the 2003 promotion exercise, communicated on 2 July 2003 and confirmed by a decision of the appointing authority notified on 16 December 2003;

 - the decision of the appointing authority not to award the applicant any ADPP in the 2003 promotion exercise, notified via the Sysper 2 system on 16 December 2003;

 - the following decisions: the decision of the appointing authority to award the applicant a total of 20 points in the 2003 promotion exercise; the merit list of Grade A5 officials in the 2003 promotion exercise, published in *Administrative Notices* No 69-2003 of 13 November 2003; the list of officials promoted to Grade A4 in the 2003 promotion exercise, published in *Administrative Notices* No 73-2003 of 27 November 2003; and, in any event, the decision not to include his name in those lists;

— so far as may be necessary, the decision of the appointing authority of 15 June 2004 rejecting his complaint submitted on 12 February 2004;

— order the defendant to pay the costs.

⁴³ The defendant contends in its defence that the Court should:

— declare inadmissible and unfounded the arguments put forward by the applicant seeking annulment of the decision to award him a total of 20 points;

— dismiss the remainder of the action as unfounded;

— make an appropriate order as to costs.

⁴⁴ At the hearing, the Commission withdrew its arguments concerning the inadmissibility of the action in so far as it is directed against the decision to award the applicant a total of 20 promotion points. The Court took formal note of this in the minutes of the hearing.

45 In response to that declaration, the applicant declared that he was withdrawing his claims seeking annulment of the individual decisions awarding or not awarding him PP in the various categories provided for, to the extent that it remained possible to contest the validity of the criteria for awarding specific points in the action against the decision fixing the total number of promotion points. The Court took formal note of this in the minutes of the hearing.

Admissibility

46 As stated in paragraph 44 above, the Commission withdrew, at the hearing, its objection concerning the admissibility of the action in so far as it is directed against the decision awarding the applicant a total of 20 points in the 2003 promotion exercise.

47 It must be recalled, however, that, since the conditions for admissibility of an action are a matter of public policy and hence mandatory, the Court may examine them of its own motion and its review is not confined to the objections of inadmissibility raised by the parties. In particular, it is for the Court alone, irrespective of the views expressed by the parties, to ascertain and determine, in each instance, whether an act adversely affecting an official did in fact take place (see Case T-275/02 *D v EIB* [2005] ECR-SC I-A-51 and II-211, paragraph 42, and the case-law cited).

48 According to settled case-law, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position constitute acts or decisions against which an action for annulment may be brought (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; Joined Cases T-32/89 and T-39/89 *Marcopoulos v Court of Justice* [1990] ECR II-281, paragraph 21; and Case T-324/02 *McAuley v Council* [2003] ECR-SC I-A-337 and II-1657, paragraph 28).

49 It is also apparent from the case-law that, where a decision is adopted by a procedure involving several stages, only the measure definitively laying down the position of the author of the decision, and not the provisional measure intended to pave the way for the final decision, is open to review (*Marcopoulos v Court of Justice*, cited in paragraph 48 above, paragraph 21, and *McAuley v Council*, cited in paragraph 48 above, paragraph 28).

50 In this case, the applicant challenges the validity of various acts forming part of the 2003 promotion exercise, which constitutes the first exercise governed by the new GIP 43 and GIP 45, claiming, inter alia, that some of those acts are non-existent.

51 In those circumstances, the Court finds it necessary to describe, in turn, the rationale of the new promotion system and the conduct of the whole promotion exercise, for the purpose of determining the act which adversely affects the official and the time-limits for bringing actions against it.

1. *Promotion system*

52 It must be pointed out that, according to the relevant provisions, promotion is based on merit and the level of the official's performance demonstrated from year to year and expressed in the form of points awarded in the annual appraisal and promotion exercise.

53 Accordingly, Article 3 of GIP 45, headed 'Grounds for promotions', states that '[t]he primary consideration is therefore the number of [MP] and [PP] that each official has accumulated over the previous year(s)'.

54 In addition, it is apparent from Article 5 of GIP 45 that an official can secure promotion only after accumulating a precise total number of points, which is at least equal to a reference threshold or 'promotion threshold' set, for each promotion exercise, by the promotion committees.

55 Article 5(3) of GIP 45 provides as follows:

"The promotion threshold indicates the number of points (merit and priority) necessary to be liable to be promoted to a given grade; subject to budgetary possibilities, officials whose number of points exceeds the threshold will be promoted. Officials whose points match the threshold may be promoted or may have to wait for a subsequent promotion exercise, depending on the promotion rate.'

56 Article 10(3) of GIP 45 supplements the provision cited above by providing that '[w]hen an official is promoted, the threshold is deducted from the merit account. The balance of points is kept for subsequent years'.

57 The total number of points obtained by an official in a promotion exercise is the result of a complex process in the course of which that official is awarded MP, resulting from the marks and assessment in the CDR, then PP, which may be awarded, according to Article 2(1) of GIP 43, either by the director-general or directors of each directorate-general (DGPP) or by the appointing authority upon recommendation by the promotion committees (ADPP and APP).

58 In addition, for the 2003 promotion exercise, the first year of implementation of the new promotion procedure, transitional arrangements were laid down by Article 12(3) of GIP 45, 'in order to take proper account of merit over time'. Those arrangements cover the award, firstly, of TPP, automatically awarded to officials at the rate of one point per year of seniority but up to a maximum of seven points (DGTPP, first sentence of Article 12(3)(a) of GIP 45) or upon recommendation by the promotion committees, when justified by the official's situation and up to a maximum of two points per official (TPP, second sentence of Article 12(3)(a) of GIP 45), and, secondly, of up to four SAPP for officials proposed for promotion in the 2002 exercise but not promoted (Article 12(3)(b) of GIP 45 and *Administrative Notices* Nos 18-2003 and 34-2003).

2. *Conduct of the promotion exercise*

59 The promotion exercise is carried out each year after the completion of the appraisal exercise and its first stage, after the award of MP, is the award of PP at the level of each directorate-general.

60 In this case, by a decision communicated to the applicant on 3 July 2003, the Director-General of the Legal Service awarded him one DGPP on the basis of Article 6 of GIP 45, which was added to the 16 MP already received. Pursuant to the first sentence of Article 12(3)(a) of GIP 45, the Legal Service also awarded him three DGTPP corresponding to three years' seniority in Grade A5. The applicant did not, on the other hand, receive any SAPP on the basis of Article 12(3)(b) of GIP 45.

61 In addition to individual and confidential information provided to each official by his directorate-general concerning the accumulated number of MP and PP (Article 6(8) of GIP 45), the Commission's DG for Personnel and Administration draws up and

publishes, after the DGPP have been awarded, a merit list for each grade, which includes the names of officials who are not more than five points below the promotion threshold and of those who have reached or exceeded it, showing the accumulated number of MP and DGPP obtained by each of them (Article 8 of GIP 45).

- 62 As regards the 2003 promotion exercise, the abovementioned merit list, concerning Grade A5 officials such as the applicant, was published in *Administrative Notices* No 48-2003 of 7 July 2003. It shows, for each official concerned, the accumulated number of MP and DGPP, but also of DGTPP and SAPP awarded in the course of applying the transitional arrangements.
- 63 The list referred to in Article 8 of GIP 45 does not determine definitively the position of the officials, whether or not they are included in that list, in the context of the promotion exercise.
- 64 Firstly, an official who is not satisfied with the number of DGPP awarded has the opportunity, within five working days from the publication of the abovementioned merit list, to appeal to the competent promotion committee which may, where appropriate, issue a recommendation to the appointing authority to award APP to the official concerned (Article 13 of GIP 45). The applicant did in fact properly lodge such an appeal on 14 July 2003.
- 65 Secondly, officials can also receive, after publication of the merit list referred to in Article 8 of GIP 45, ADPP (Article 9 of GIP 45) and, under the transitional arrangements, transitional priority points awarded by the appointing authority on the proposal of the promotion committees ('PCTPP') (second sentence of Article 12(3)(a) of GIP 45).

66 The second stage of the promotion exercise consists of the meeting of the promotion committees and of the transmission to the appointing authority of proposals falling within their spheres of competence.

67 It is established that the promotion committees have, essentially, a twofold competence. The first is to recommend to the appointing authority the award of certain PP (Articles 9, 12 and 13 of GIP 45), it being observed that those committees normally deliver an opinion on the award of APP before issuing the recommendation on individual awards of ADPP (Article 13 of GIP 45). The second is to propose to the appointing authority a ranking in order of the officials in the group of '*ex aequo*', that is, the group of officials who have reached the promotion threshold, but whose number exceeds the actual promotion possibilities (Article 10 of GIP 45).

68 Nevertheless, in view of a lack of precision in the wording of GIP 45, establishing the details of the involvement *ratione temporis* of the promotion committees gives rise to some difficulty.

69 Thus, Article 10 of GIP 45 provides that the promotion committees meet to deliberate on the merit list and to make proposals for promotion choosing from among the group of *ex aequo* 'once the procedure described under Article 9 has been completed'. This latter phrase, read in conjunction with Article 13 of GIP 45, could indicate that Article 10 of GIP 45 implies an initial involvement of the promotion committees and the appointing authority, after the publication of the merit list provided for in Article 8 of GIP 45, in regard to the proposal and then the decision on the award of PP.

70 The purpose of that involvement would be to finalise the position of the officials as regards the total number of points awarded in the promotion exercise and would necessarily be followed by a further meeting of the promotion committees to draw up proposals regarding the ranking in order of the officials in the group of *ex aequo*.

- 71 Such an approach is not, however, consistent with either the letter or the scheme of GIP 45.
- 72 It should be pointed out, firstly, that the use of the term ‘procedure’ does not seem appropriate, in the sense that Article 9 of GIP 45 does not, strictly speaking, contain a description of a complete procedure, with the setting of a precise timetable, but a description of the division of competence between the promotion committees and the appointing authority in regard to the award of ADPP.
- 73 Secondly, the interpretation mentioned in paragraphs 69 and 70 above implies the existence of an intermediate decision by the appointing authority fixing the total number of points. However, Article 9 of GIP 45 makes no reference whatsoever to the adoption by the appointing authority of such an act and merely sets out, in general terms, the latter’s competence in principle in regard to the award of PP, without specifying exactly when that competence is to be exercised.
- 74 The same applies to Article 13 of GIP 45, relating to the award of APP, which simply provides for the appointing authority’s decision-making power without further specifying when that power is to be exercised in the course of the promotion exercise. In addition, while Article 13(2) of GIP 45 provides that the number of APP thus allocated by the appointing authority is to be published, it does not specify at what stage that publication takes place, it being observed that, for the 2003 exercise, the number of APP awarded was specified in the summary note of the conduct of the promotion exercise in question, published in *Administrative Notices* No 82-2003.
- 75 In actual fact, it is established that no article of GIP 45 either mentions or specifies, *ratione temporis*, the adoption by the appointing authority of a separate intermediate decision fixing the total number of points.

76 Thirdly, Article 10 of GIP 45 states that the promotion committees meet to ‘deliberate on the merit list’, a term which first appears in Article 8 of GIP 45 and which refers to the list of the officials who are no more than 5 points below the promotion threshold and those who have reached or exceeded it, showing the accumulated number of MP and DGPP, as well as DGTTP and SAPP under the transitional arrangements, obtained by each of them. Taking such a list into account makes sense only if that document is still of interest at that stage, which would not be the case where a decision of the appointing authority fixing the total number of points was adopted after the publication of that list.

77 As regards the scheme of GIP 45, it should be pointed out that Article 10(3) of those GIP states that, ‘in June, on the basis of the proposals of the promotion committees, the appointing authority decides which officials to promote to each grade’.

78 It is thus apparent that, for obvious reasons of sound administration and legal certainty, provision has been made for delaying until the normal conclusion of the promotion procedure the adoption, *ratione temporis*, of a formal decision by the appointing authority enabling all the officials concerned to know where they stand in a certain and definitive manner as regards the outcome of the promotion exercise.

79 An interpretation of GIP 45 which had the effect of dividing up the involvements of the promotion committees and the appointing authority and of necessitating the adoption by the latter of an intermediate act concerning the total number of points would be liable to overcomplicate the situation of the officials eligible for promotion, as regards both the determination of the act adversely affecting them and as regards compliance with the time-limits for bringing actions, which would be contrary to the requirements of legal certainty.

80 In those circumstances, it must be held that, after publication of the merit list referred to in Article 8 of GIP 45, the promotion committees meet to draw up their proposals concerning both the award of the PP falling within their competence and the ranking in order of the officials in the group of *ex aequo*. All of those proposals are embodied in the merit list mentioned in Article 10(1) of GIP 45.

81 In this case, it should be pointed out that, following the proceedings of the promotion committee for Category A staff, which met on 17 and 24 October 2003, the merit list referred to in Article 10 of GIP 45 was published in *Administrative Notices* No 69-2003 of 13 November 2003.

82 That list includes the names of the officials, together with their position, who have reached or exceeded the promotion threshold and those who are not more than 5 points below that threshold, showing:

- the total number of points proposed for each of them, which for some officials may have increased in comparison with that mentioned in the merit list published on 7 July 2003, as a result of proposals by the committee to award them ADPP, APP and PCTPP;

- the letter 'p' next to the name of an official for whom the committee proposes a promotion, an entry which is a legal requirement and relevant only in regard to the group of *ex aequo*, that is to say, the group of officials who have reached the promotion threshold but whose number exceeds the actual promotion possibilities, a situation necessitating a ranking in order of those concerned, based, inter alia, on seniority in grade and considerations of equal opportunities.

83 Nor does the list referred to in Article 10 of GIP 45 finalise the position of the officials, whether or not included in that list, in the context of the promotion exercise.

84 As has already been stated, whether as regards awards of PP or as regards differentiations within the group of *ex aequo*, the promotion committee merely puts forward proposals for the attention of the appointing authority, which alone has the power to decide, as is clear from Article 2 of GIP 43 and from Articles 10 and 14(4) of GIP 45. It must, in that regard, be pointed out and regretted that GIP 45 contains certain textual inaccuracies which could give rise to confusion as to the role of the promotion committee, as exemplified by the heading of Article 9, 'Award of [PP] by Promotion Committees', even though paragraph 3 of that article clearly states that these are individual 'proposals' for the award of PP submitted to the appointing authority which 'takes the decision on the award of [PP]'. The same is true, as the Commission acknowledged at the hearing, of the wording of the second sentence of Article 12(3)(a) of GIP 45 relating to the award of PCTPP.

85 Article 10(3) of GIP 45 also makes clear that the appointing authority 'decides' which officials to promote to each grade on the basis of the 'proposals' of the promotion committees, which are not binding on the appointing authority, since the latter must take the decision, first, on the award of points, then on the ranking order of the officials in the group of *ex aequo*. The appointing authority can therefore either accept or reject the proposals of the promotion committees, a circumstance which, in the latter case, may result, for the official concerned, in a decrease or increase in the total number of points, with the consequence that he may then be above, at or below the promotion threshold.

86 The third and final stage of the promotion exercise is the adoption of the list of promoted officials. In the present case, the appointing authority adopted the list of officials promoted to Grade A4 on 20 November 2003 and it was published in

Administrative Notices No 73-2003 of 27 November 2003 and thus communicated to all the officials concerned, including the applicant. It is apparent from that list that the appointing authority approved all the promotion committee's proposals both as regards the award of points and as regards the ranking order of the officials in the group of *ex aequo*.

3. *Act adversely affecting the official*

⁸⁷ It follows from the foregoing that the promotion procedure culminates in the formal adoption of the list of promoted officials. That final decision identifies the officials promoted in the promotion exercise in question. Accordingly, it is on publication of that list that the officials who considered themselves eligible for promotion learn, in a manner which is final and not open to doubt, of the assessment of their respective merits and that their legal position is affected (Case T-144/95 *Michaël v Commission* [1996] ECR-SC I-A-529 and II-1429, paragraph 30, and Joined Cases T-188/01 to T-190/01 *Tsarnavas v Commission* [2003] ECR-SC I-A-95 and II-495, paragraph 73).

⁸⁸ It is important, however, to point out that the award of points in a given year has effects which are not limited and confined solely to the current promotion exercise. The new promotion system is based on taking into account accumulated merits, represented by points accumulated year after year. It follows that the points awarded in a given year may influence several promotion exercises.

⁸⁹ In a similar context, the Court held, in Case T-323/02 *Breton v Court of Justice* [2003] ECR-SC I-A-325 and II-1587, paragraphs 52 to 54, that the determination of the number of points for the purpose of a promotion is a self-contained act which produces binding legal effects capable of affecting the interests of the official by distinctly altering his legal position, even though it is not one of the stages of the promotion procedure.

90 Even though it concerns a promotion system providing for only one category of points, that case-law is capable of being applied to the present case. It must therefore be held that the final act in which the promotion exercise culminates is of a complex nature, in that it comprises two separate decisions, namely the appointing authority's decision adopting the list of promoted officials and the appointing authority's decision fixing the total number of points, on which the first abovementioned decision is based. That decision of the appointing authority fixing the total number of points constitutes a self-contained act against which, as such, in the light of the case-law referred to in the previous paragraph, a complaint may be submitted and, where appropriate, an action may be brought before the Court under the system of remedies provided for by the Staff Regulations.

91 Consequently, an official who is included in the list of promoted officials may, if he disputes the total number of points which he has been awarded by the appointing authority and thus the balance kept for subsequent years, submit a complaint and, where appropriate, bring an action before the Court against the only act awarding points which entails binding and definitive legal effects in regard to him.

92 Similarly, it is conceivable that an official who is not promoted and who does not wish to challenge his non-promotion in the exercise in question but only the refusal to award him a certain number of points, which could not enable him to reach the promotion threshold, may bring identical proceedings.

93 Moreover, an official who is not promoted on account of the allegedly unjustified award of an insufficient number of points, and who is therefore below the promotion threshold, may direct his action both against the appointing authority's decision fixing the total number of points and against that adoption of the list of promoted officials. Even though those acts can in fact be differentiated legally and form the subject of separate claims for annulment, there is no doubt that they are in fact closely linked in a case of refusal of promotion, since such a refusal is necessarily and solely connected with the total number of points awarded to the official in

question in relation to the promotion threshold, except where, having reached that threshold and being in the group of *ex aequo*, the official in question was not promoted, on the basis of secondary considerations connected with seniority in grade or equal opportunities.

- 94 In the latter situation, the official concerned may properly bring an action only against the appointing authority's final decision adopting the list of promoted officials on account of errors of assessment made by the appointing authority in ranking in order the officials included in the group of *ex aequo*.
- 95 In this case, it must be borne in mind that the applicant, who was not promoted in the 2003 promotion exercise, submitted a complaint then brought an action before the Court of First Instance directed at, inter alia, the appointing authority's decision awarding him a total of 20 points, the list of officials promoted to Grade A4 in the 2003 exercise and the appointing authority's decision adopting that list in so far as it refuses promotion with regard to him.
- 96 The applicant also challenges, in the context of the present action, the validity of the individual decisions awarding him only one DGPP or refusing him the award of ADPP, and the validity of the decision not to include him in the merit list of Grade A5 officials published in *Administrative Notices* No 69-2003 of 13 November 2003, and the list as such.
- 97 Those decisions constitute acts preparatory, prior and necessary to the final decision adopting the promotions and to the detachable and self-contained decision which it involves, namely the fixing of the total number of points, annulment of which is sought by the applicant in the present proceedings. That is the case with the decision awarding DGPP, irrespective of whether or not an internal appeal was brought against it under Article 13 of GIP 45. Although, in the absence of such an appeal, the appointing authority cannot alter the number of DGPP by awarding APP, the decision awarding DGPP none the less remains a merely preparatory act, since the maximum amount of DGPP which could be awarded would not, in itself, enable the promotion threshold to be reached.

- 98 According to the case-law, such acts may not be the subject of a separate action for annulment, although their lawfulness may always be disputed in the course of an action directed against the final decision (Case T-134/02 *Tejada Fernández v Commission* [2003] ECR-SC I-A-125 and II-609, paragraph 18).
- 99 At the hearing, the applicant did, admittedly, declare that he was withdrawing his claims for annulment of the individual decisions awarding him only one DGPP or refusing him the award of ADPP, but on condition that he would legally have the opportunity to challenge the validity of the criteria for awarding those points in the course of the action directed against the decision fixing the total number of points.
- 100 The Court finds that such a withdrawal is inadmissible. Only a clear and unconditional discontinuance of heads of claim contained in the application can be accepted by the Court (order in Case T-73/91 *Gavilan v Parliament* [1992] ECR II-1555, paragraph 26).
- 101 Finally, it should be noted that the applicant seeks, in the present action, in so far as is necessary, annulment of the appointing authority's decision of 15 June 2004 rejecting his complaint. In that regard, it must be recalled that, according to case-law, the administrative complaint and its rejection, whether express or implied, by the appointing authority 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 (Case 293/87 *Vainker v Parliament* [1989] ECR 23, paragraph 8; Case C-343/87 *Culin v Commission* [1990] ECR I-225, paragraph 7; Case T-36/94 *Capitanio v Commission* [1996] ECR-SC I-A-449 and II-1279, paragraph 33; and Case T-375/02 *Cavallaro v Commission* [2005] ECR-SC I-A-151 and II-673, paragraph 59).

4. *Time-limits for bringing actions*

102 It must be recalled that the Staff Regulations make general provision in Articles 90 and 91 for the rights of action of members of the staff against administrative acts adversely affecting them. Those provisions make it clear that the system for the settlement of disputes thereby established is based in its entirety on the requirement that exercise of the right of action is permitted only subject to strict observance of the time-limits which have been laid down (Case 23/80 *Grasselli v Commission* [1980] ECR 3709, paragraph 25, and Case T-87/91 *Boessen v ESC* [1993] ECR II-235, paragraph 27).

103 Observance of the time-limits for bringing actions laid down in Articles 90 and 91 of the Staff Regulations implies that the official is explicitly and fully aware of the act adversely affecting him.

104 As regards the period of three months prescribed for the official to submit a complaint against an act adversely affecting him, Article 90(2) of the Staff Regulations provides that the period in question is to start to run:

‘— on the date of publication of the act if it is a measure of a general nature;

— on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if, however, an act affecting a specified person also contains a complaint against another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication ...’.

105 Those provisions, which establish a link between the point from which the three-month period starts to run and the legal nature of the act in question, must be interpreted, in this case, having regard to the specific nature of the promotion procedure, namely that the final act in which the promotion exercise culminates is of a complex nature, in the sense that it comprises two separate decisions, namely the appointing authority's decision adopting the list of promoted officials and the appointing authority's decision fixing the total number of points following that exercise, on which the first abovementioned decision is based. That decision of the appointing authority fixing the points following the promotion exercise constitutes a self-contained act against which, as such, a complaint may be submitted and, where appropriate, an action may be brought before the Court under the system of remedies provided for by the Staff Regulations.

106 It follows from the abovementioned conclusion that three types of action for annulment may, at the very least, be contemplated following the promotion exercise:

- an action directed solely at the appointing authority's decision fixing the total number of points, which may be brought by an official who has been promoted but disputes his balance of points or by a non-promoted official who disagrees with the number of points awarded but does not challenge the absence of promotion;

- an action directed both against the appointing authority's decision fixing the total number of points and against its decision adopting the list of promoted officials, which may be brought by an official not promoted because of the allegedly unjustified award of an insufficient number points and who is therefore below the promotion threshold or by an official who, while having a number of points equal to the promotion threshold, disputes both the insufficiency of that number and the choices made by the appointing authority from within the group of *ex aequo* on the basis of secondary considerations;

- an action directed solely at the decision by which the appointing authority adopts the list of promoted officials, which may be brought by a non-promoted official whose number of points is equal to the promotion threshold and who criticises only the abovementioned choices.

107 While the appointing authority's decision fixing the total number of points indisputably constitutes a measure affecting a specific individual, against which a complaint may be submitted within a period of three months starting to run on the date of notification of the decision to the addressee but in no case later than the date when the person concerned receives such notification, the appointing authority's decision adopting the list of promoted officials constitutes a cluster of acts affecting specific individuals, which are addressed to the officials promoted to the grade concerned. However, that cluster of acts adversely affects the official whose name does not appear on the list in so far as it constitutes an implied refusal to promote him.

108 Accordingly, the appointing authority's decision adopting the list of promoted officials must be regarded, so far as concerns the non-promoted official, as an act affecting a specified person which is also capable of adversely affecting another person, as referred to at the end of the second indent of Article 90(2) of the Staff Regulations (see, to that effect, Joined Cases 122/79 and 123/79 *Schiavo v Council* [1981] ECR 473, paragraphs 21 to 23, and the order of 2 June 2005 in Case T-326/03 *Vounakis v Commission* (not published in the ECR), paragraph 24). In that situation, under that same provision, the period starts to run, as regards the non-promoted official, on the date when he receives notification of the act in question but in no case later than the date of its publication.

109 In view of the Commission's obligation, laid down in Article 10 of GIP 45, to publish the list of promoted officials in the *Administrative Notices*, the submission by an official of a complaint, in the situation referred to in the second indent of paragraph 106, would be subject to two different points from which time starts to run in relation to the act in question. As regards the situation contemplated in the third indent of paragraph 106, it would normally be appropriate to take the date of publication as the point from which the period within which the complaint must be lodged starts to run.

- 110 Such a situation is not, however, compatible with the specific nature of the new promotion procedure, constituted by the existence of an act adversely affecting an official which is of a complex nature.
- 111 While the publication of the list of promoted officials, which contains only the names and positions of the persons concerned, gives all the officials concerned the opportunity to know where they stand in a certain and definitive manner as regards the outcome of the promotion exercise, it does not enable them to know the appointing authority's decision fixing the total number of points.
- 112 Only by consulting his individual promotion file on the Commission's intranet and the Sysper 2 site will a promoted or non-promoted official be able to have access to his total number of points and their breakdown.
- 113 Thus, the official concerned will be able to ascertain whether he has or has not reached the promotion threshold and whether his refusal of promotion is explained by secondary considerations, such as those mentioned in Article 10 of GIP 45, and to find out, firstly, the outcome of any internal appeal against the number of DGPP granted, secondly, the number of any ADPP awarded and, finally, as regards the 2003 promotion exercise, the number of any PCTPP awarded in the course of implementing the transitional arrangements.
- 114 Those items of information are capable of guiding the official concerned in taking a decision as to whether to submit a complaint, since he is finally able to take the view, in the light of the number and breakdown of the points received, of the definitive promotion threshold adopted by the administration, and of the officials actually promoted in the exercise in question, that it is appropriate to initiate such a procedure or that it is appropriate to initiate it only against the appointing authority's decision fixing the total number of points or that adopting the list of promoted officials.

- 115 As has been stated, even though they can indeed be differentiated legally and form the subject of separate claims for annulment as in this case, there is no doubt that the appointing authority's decision fixing the total number of points and its decision adopting the list of promoted officials are, in actual fact, closely connected. However, publication of that list does not enable the officials concerned to have full knowledge of the act adversely affecting them, by nature complex, in which the promotion procedure culminates.
- 116 Moreover, the 2003 promotion exercise shows that a large number of days may elapse between the date of publication of the list of promoted officials and the date on which the official can usefully consult his promotion file on Sysper 2. That time-lag is explained by the time taken by the competent department to update the site in question with the data on all the officials concerned by the promotion exercise, who numbered 14 000 in 2003. That length of time needed for updating is obviously not known precisely at the time of publication of the abovementioned list in the *Administrative Notices*, which, in 2003, do not contain any information in that regard.
- 117 Even if it is reasonable to assume that the official concerned, like the applicant in this case, will know his total number of points and their breakdown within the period of three months set running for the submission of a complaint, the time taken to update the individual promotion files on the Sysper 2 site will reduce accordingly that length of time made available to the official to prepare properly and submit his complaint, if the hypothesis is accepted that there are two points from which time starts to run where the person concerned contests both the appointing authority's decision adopting the list of promoted officials and its decision fixing the total number of points.
- 118 In those circumstances, it must be held that, in the interests of legal certainty, equal treatment and sound administration, the point from which the three-month period for the submission of a complaint directed both against the appointing authority's

decision adopting the list of promoted officials and against its decision fixing the total number of points starts to run must be fixed as the date when the official obtains effective access to his updated individual promotion file on the Sysper 2 site.

119 In that regard, it must be observed that, in its reply to the Court's questions, the Commission made it clear that consultation of that site is 'traced' electronically for security reasons and that an 'access protocol' therefore enables the dates and originators of consultations to be recorded.

120 In addition, it is apparent from the file that the Commission published in *Administrative Notices* No 82-2003 a summary note on the conduct of the 2003 promotion exercise which includes a point 4 worded as follows:

'Update of files on Sysper 2

The proposals for the award of points issued by the promotion committees and approved by the appointing authority are now shown in each official's file.

In accordance with Article 25 of the Staff Regulations, which provides that any decision relating to a specific individual must be communicated to the official concerned, each official is hereby invited to consult his file on Sysper 2.'

- 121 Although that process cannot be treated as actual notification within the meaning of Article 90(2) of the Staff Regulations, it must be held, in order to prevent any possibility of belated calling in question of the legal situations resulting from the promotion exercise, that consultation by the official of his individual promotion file on Sysper 2 must take place within a reasonable time from the publication of the summary note which now forms part of the Commission's practice in relation to the promotion procedure.
- 122 In this case, it is common ground that the applicant learned of the fixing of his total number of points and their breakdown by consulting his updated individual promotion file on Sysper 2 on 16 December 2003, that is, before the date of publication of the summary note, and that he submitted his complaint, directed at both the appointing authority's decision adopting the list of promoted officials and its decision fixing the total number of points, on 12 February 2004, thus observing the time-limit laid down for that purpose.
- 123 That complaint was rejected by decision of the appointing authority of 15 June 2004 and communicated to the applicant on the following day. He brought the present action on 22 July 2004, that is, within the period of three months laid down in Article 91(3) of the Staff Regulations.
- 124 It follows from all the foregoing considerations that the present action must be declared admissible.

Substance

1. *The pleas of illegality of certain provisions of GIP 43 and GIP 45*

- 125 The applicant challenges, first, the legality of Article 2 of GIP 43 and Articles 3, 6, 7, 9, 10, 12 and 13 of GIP 45. He criticises, in essence, the non-decisive nature of MP,

the absence of any obligation to state reasons for the award of PP, the failure to have regard to the right to a fair hearing and the ineffectiveness of appeals under Article 13 of GIP 45. Secondly, the applicant raises a plea of illegality against Articles 6 and 7 of GIP 45, read in the light of *Administrative Notices* No 99-2002. He submits that those provisions limit the discretion of the directorates-general in regard to the award of DGPP and that they prevent them from undertaking effective consideration of the comparative merits of officials. The applicant pleads, thirdly, illegality of Article 12 of GIP 45. Contrary to its wording, that article is not transitional in character, attaches predominant importance to seniority in grade, does not define the criteria for the award of PCTPP and entrusts the award of such points, wrongly, to the promotion committees. The applicant raises, fourthly, a plea of illegality against Article 9 of and points 1, 2, 3, 5 and 6 of Annex I to GIP 45. Those provisions result in an overvaluation of certain duties and in breach of equal treatment for officials. Fifthly, the applicant challenges the legality of Article 7(2) of GIP 45 which favours officials employed in small directorates-general.

The first plea of illegality, directed against Article 2 of GIP 43 and Articles 3, 6, 7, 9, 10, 12 and 13 of GIP 45

- ¹²⁶ The applicant raises a plea of illegality against Article 2 of GIP 43 and Articles 3, 6, 7, 9, 10, 12 and 13 of GIP 45 on the basis of Articles 25 and 26 of the Staff Regulations and of Article 45 of the latter, which guarantees equal treatment, promotion based on merit, reasonable career prospects and consideration of comparative merits. He also invokes the right to sound administration and to an impartial and fair procedure, as well as the right to be heard.

The allegedly non-decisive nature of MP

— Arguments of the parties

- ¹²⁷ The applicant asserts that the majority of officials in the Legal Service received between 13 and 16 MP. Promotions are therefore not determined by merits as

evidenced by the reports referred to in Article 45 of the Staff Regulations. They result from the number of PP which may be awarded up to a maximum of 21 points. Those points are distributed irrespective of merits. It follows that there was a breach of the principle of equal treatment, of the principle of promotion based on merit, of the principle of career progression and of the principle of consideration of the comparative merits, which are guaranteed by Article 45 of the Staff Regulations.

128 The Commission replies that PP reward merits and that they improve its capacity to differentiate between officials on the basis of their abilities.

— Findings of the Court

129 The first subparagraph of Article 45(1) of the Staff Regulations provides that the appointing authority is to grant promotions after consideration of the comparative merits of the officials and of the periodic appraisal reports on them.

130 Merit is therefore the main criterion for the purposes of promotion, and other criteria, such as age, or seniority in grade or in the service, may be taken into account only as a subsidiary matter (Case 9/82 *Ohrgaard and Delvaux v Commission* [1983] ECR 2379, paragraph 19; *Vainker v Parliament*, cited in paragraph 101 above, paragraphs 16 and 17; Case T-241/02 *Callebaut v Commission* [2003] ECR-SC I-A-215 and II-1061, paragraph 44; and Case T-330/03 *Liakoura v Council* [2004] ECR-SC I-A-191 and II-859, paragraph 49). Moreover, the appointing authority must undertake the abovementioned comparative consideration with care and impartiality, in the interest of the service and in accordance with the principle of equal treatment for officials (Case T-76/92 *Tsirimokos v Parliament* [1993] ECR II-1281, paragraph 21; Case T-78/92 *Perakis v Parliament* [1993] ECR II-1299, paragraph 16; Case T-240/01 *Cougnon v Court of Justice* [2003] ECR-SC I-A-263 and II-1283, paragraph 70; Case T-216/03 *Tenreiro v Commission* [2004] ECR-SC I-A-245 and II-1087, paragraph 68; and Case T-132/03 *Casini v Commission* [2005] ECR-SC I-A-253 and II-1169, paragraph 53).

131 Within the framework thus defined, the appointing authority has broad discretion. It may undertake consideration of the merits in the manner it considers most appropriate (*Tsirimokos v Parliament*, cited in paragraph 130 above, paragraph 16; *Perakis v Parliament*, cited in paragraph 130 above, paragraph 14; *Cougnon v Court of Justice*, cited in paragraph 130 above, paragraph 62; and *Tenreiro v Commission*, cited in paragraph 130 above, paragraph 68).

132 With effect from the 2003 promotion exercise, and in order to facilitate a more objective and easier comparison of the merits of the officials eligible for promotion than before, GIP 43 and GIP 45 introduced a promotion system based on quantification of merits, characterised by the annual award to officials of MP and PP.

133 It must be pointed out, first of all, that that new system strengthens the link, established by Article 45 of the Staff Regulations, between the periodic appraisal of officials and promotion. Accordingly, the effect of the third subparagraph of Article 2(1) of GIP 43 read in conjunction with *Administrative Notices* No 99-2002 is that each official receives an overall mark between 0 and 20, which is then converted, in principle, into a number of MP which can be used for the purposes of promotion. In addition, Article 10(2) of GIP 45 provides that the promotion of an official is subject to the condition that he has totalled at least 10 MP in his last CDR. Moreover, under the third subparagraph of Article 6(4)(b) of GIP 45, officials who have been awarded a 'poor' or 'insufficient' marking in their CDR cannot be awarded PP.

134 It is important, next, to bear in mind that Article 3 of GIP 45, headed 'Grounds for promotions', states that '[t]he primary consideration is ... the number of [MP] and [PP] that each official has accumulated over the previous year(s)'. It is the addition of MP and PP that will enable officials to reach or exceed, as the case may be, the promotion threshold. PP on their own are not decisive for the promotion of an official.

- 135 Finally, and above all, it must be pointed out that, as the second subparagraph of Article 2(1) of GIP 43 clearly states, '[b]oth [MP] and [PP] are intended to reward merit and the attribution of [PP] must always be justified by merit-based considerations'.
- 136 As regards PP, Article 6(4)(a) and (b) of GIP 45 provide for the award of up to a maximum of 10 DGPP. Under Article 6(3) of GIP 45, the purpose of those points is to reward officials who have exceeded their individual objectives, having demonstrated special efforts and achieved outstanding results, as recorded in their CDRs. In addition, as has already been stated (see paragraph 133 above), 'poor' or 'insufficient' markings in the CDR mean that the official concerned cannot be awarded PP.
- 137 Article 9 of and Annex I to GIP 45 provide for the award of one or two ADPP. Their purpose is to distinguish members of staff who have successfully carried out additional duties in the interest of the institution. Those duties consist of 'trainer/public speaker' activities or of various contributions to the organisation of competitions or to joint bodies. It should be noted that the CDRs include a section specifically designed to list the duties in question.
- 138 Consequently, in so far as DGPP and ADPP are also based on merit, their award as a supplement to MP does not infringe Article 45 of the Staff Regulations and the abovementioned principles.
- 139 Finally, in respect of the 2003 promotion exercise, since this was the first year in which the new promotion procedure was implemented, transitional arrangements were laid down in Article 12(3) of GIP 45 'in order to take proper account of merit over time', arrangements which cover the award of TPP (see paragraph 58 above).

The applicant has raised a plea of illegality aimed specifically at that provision, alleging, here again, infringement of Article 45 of the Staff Regulations. However, for the reasons set out in paragraph 191 et seq. below, this plea cannot be upheld.

140 In the light of the foregoing considerations, the present complaint must be rejected.

Failure to state reasons

— Arguments of the parties

141 The applicant maintains that, contrary to the second paragraph of Article 25 of the Staff Regulations, GIP 45 does not require reasons to be stated for the proposals and decisions concerning the award of DGPP, ADPP and TPP. He submits that that failure to state reasons is a source of arbitrariness.

142 The Commission observes that the obligation to state reasons is a general principle of Community law. It infers from this that the inclusion of a specific provision in GIP 45 would have been superfluous. Moreover, that principle requires reasons to be stated only for acts adversely affecting officials and GIP 45 comply with that obligation.

— Findings of the Court

143 The Court notes that the second paragraph of Article 25 of the Staff Regulations provides that any decision adversely affecting an official must state the grounds on which it is based. It therefore does not require reasons to be stated for proposals, recommendations or opinions which, in themselves, do not adversely affect officials.

- 144 Accordingly, as regards DGPP, Article 6(6) of GIP 45 does not infringe the second paragraph of Article 25 of the Staff Regulations by requiring the joint evaluation committees to justify their proposals only where they differ from those of the directorates-general. Nor does Article 9 of GIP 45 infringe that provision by not requiring the promotion committees to state reasons for their recommendations regarding the award of ADPP. The same finding must apply to the proposals which the promotion committees make for the award of PCTPP on the basis of Article 12(3)(a) of GIP 45 and to Article 13(2) of GIP 45, under which the promotion committees are to deliver a reasoned opinion only where they propose the award of APP.
- 145 Moreover, decisions of the directorates-general relating to the award of DGPP, DGTTP and SAPP, as is the case with decisions of the appointing authority relating to ADPP, PCTPP and APP, are not covered by the second paragraph of Article 25 of the Staff Regulations, since they are preparatory acts (see paragraph 90 et seq. above).
- 146 As has already been stated (see paragraph 90 et seq. above), the final act in which the promotion exercise culminates is of a complex nature, in that it comprises two separate decisions, namely the appointing authority's decision adopting the list of promoted officials and its decision fixing the total number of points, on which the first abovementioned decision is based. The officials concerned are entitled, depending on their situation, to submit a complaint against either of those decisions or against them both.
- 147 In that context, it must be recalled that the obligation to state reasons is satisfied, in regard to promotion, when the appointing authority states reasons for its decision rejecting a complaint lodged under Article 90(2) of the Staff Regulations (see, to that effect, Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraphs 11 to 13, and Case T-218/02 *Napoli Buzzanca v Commission* [2005] ECR-SC I-A-267 and II-1221, paragraph 59).

148 It follows that this part of the plea must be rejected as unfounded.

Failure of GIP 45 to have regard to Article 26 of the Staff Regulations and to the right to be heard

— Arguments of the parties

149 The applicant claims that decisions awarding PP constitute the culmination of a procedure which may be based on material not included in an official's file and which does not grant the person concerned the right to be heard before the administration adopts an act adversely affecting him. In particular, the appointing authority rules on internal appeals following a procedure which does not involve the participation of both parties. The award of PP therefore infringes the right to a fair hearing and Article 26(a) of the Staff Regulations.

150 The Commission denies that GIP 45 infringe the right to a fair hearing and the prohibition on taking into account material not included in the official's personal file. GIP 45 do not permit account to be taken of such material. Moreover, officials have the opportunity to be heard during the promotion procedure. Article 13 of GIP 45 provides for an appeal against the decision awarding PP before the culmination of the promotion procedure. Moreover, a promotion procedure cannot be compared with proceedings 'initiated against a person'. Consequently, the case-law relating to the right to be heard before the adoption of an act adversely affecting an official is irrelevant.

— Findings of the Court

- 151 Article 26 of the Staff Regulations provides that the personal file of an official must contain '(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct' and '(b) any comments by the official on such documents'. The same article states that 'the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed'.
- 152 The purpose of Article 26 of the Staff Regulations is to guarantee an official's right to a fair hearing by ensuring that decisions taken by the appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file (*Perakis v Parliament*, cited in paragraph 130 above, paragraph 27; Case T-496/93 *Allo v Commission* [1995] ECR-SC I-A-127 and II-405, paragraph 75; Case T-302/02 *Kenny v Court of Justice* [2003] ECR-SC I-A-235 and II-1137, paragraph 32; and Case T-144/03 *Schmit v Commission* [2005] ECR-SC I-A-101 and II-465, paragraph 133). It applies to promotions, since the abovementioned phrase 'administrative status' covers, inter alia, the main career events (*Schmit v Commission*, paragraph 134).
- 153 In this case, it must be pointed out that the plea raised is based only on mere conjecture on the part of the applicant, who has failed to demonstrate that the decisions awarding PP, some of which do not come from the appointing authority, are based on matters other than the appraisal reports, which are not included in officials' files.
- 154 GIP 45 do not contain any provision which would allow the Commission to depart from Article 26 of the Staff Regulations, as interpreted by the case-law. It is clear, on the contrary, that certain provisions of GIP 45 establish a direct link between the award of PP and the CDR.

155 It is thus apparent from Article 6 of GIP 45 that DGPP are awarded by directors-general or directors after considering the results of the CDRs and in the light of the merits of the officials concerned, as recorded in the CDRs. Moreover, the CDRs include a section relating to additional duties carried out in the interest of the institution during the appraisal period, on the basis of which ADPP are then awarded.

156 It is important to note that the drawing-up of the CDR is part of a complex process in which the officials are closely involved in accordance with Article 43 of the Staff Regulations, which provides that the periodical report is to be communicated to the official who 'shall be entitled to make any comments thereon which he considers relevant'.

157 Finally, the applicant cannot properly plead infringement of the right to a fair hearing in regard to decisions on the award of PP, including that of the appointing authority ruling on the internal appeals, referred to in Article 13 of GIP 45, since those decisions merely constitute acts preparatory to the decisions fixing the total number of promotion points and adopting the list of promoted officials. The right to a fair hearing does not apply to such acts, but to acts adversely affecting officials (see, to that effect, Case T-211/98 *F v Commission* [2000] ECR-SC I-A-107 and II-471, paragraphs 28 and 29, and the case-law cited).

158 Consequently, this part of the plea must be rejected as unfounded.

Effectiveness of appeals under Article 13 of GIP 45

— Arguments of the parties

159 The applicant claims that appeals brought under Article 13 of GIP 45 are not actually examined by the appointing authority. The latter merely approves the proposals of the promotion committees.

160 The Commission disputes this and contends that the power conferred on it by Article 13 of GIP 45 does not prevent it from accepting the proposals of the promotion committees.

— Findings of the Court

161 If this complaint is to be interpreted as calling in question the legality of Article 13 of GIP 45, it is sufficient to observe that it is based on a mere assertion by the applicant and is not the subject of any legal argument. Moreover, that article cannot be interpreted as dispensing the appointing authority from actually examining the appeals in question, since it reserves to it the power to decide. The question whether the appointing authority actually examined the applicant's internal appeal is the subject-matter of another plea (paragraph 304 below).

Infringement of the principle of sound administration and of the right to an impartial and fair procedure

162 Finally, the applicant pleads infringement of the principle of sound administration and of the right to an impartial and fair procedure.

163 However, he does not put forward any arguments distinct from those examined above. The complaint is therefore unfounded. In any event, the Court refers to the foregoing explanations.

164 In the light of the foregoing considerations, the plea of illegality directed against Article 2 of GIP 43 and against Articles 3, 6, 7, 9, 10, 12 and 13 of GIP 45 must be rejected.

The second plea of illegality, directed against Articles 6 and 7 of GIP 45 read in the light of Administrative Notices No 99-2002, which impose a target average restricting the discretion of the directorates-general

Arguments of the parties

165 The applicant raises a plea of illegality against Articles 6 and 7 of GIP 45 in conjunction with *Administrative Notices* No 99-2002. He bases his plea on infringement of Article 45 of the Staff Regulations, of the principle of equal treatment and of the principle of career progression.

166 The applicant submits that the provisions in question set quotas of MP and DGPP for the directorates-general. In the first place, the directorates-general are invited not to exceed a 'target average' of 14 MP in each grade and where that average is exceeded by more than one point it results in a corresponding reduction in the number of DGPP allocated to them. Secondly, there is no possibility of allocating more than 2.5 DGPP per official to the directorates-general. The applicant submits that those quotas are binding. They restrict the discretion of the directorates-general and prevent effective comparison of the merits of officials eligible for promotion. The possibility, provided for in Article 6(1) of GIP 45, of requesting a derogation from the target average does not adequately remedy those constraints because it depends on the initiative of each directorate-general, is discretionary and has to be

authorised by the promotion committees, although the appointing authority alone has the power to decide on promotion. The abovementioned quotas have the effect that the list of promoted officials depends more on 'strategies' put in place by each directorate-general than on a genuine comparison of the merits of staff.

- 167 The Commission replies that *Administrative Notices* No 99-2002 provides only for a target average of 14 points. The objective of that average is legitimate. It consists not in limiting the discretion of reporting officers in individual cases, but rather in avoiding a general inflation in markings which would lead to their depreciation. That average, moreover, is not binding. An average which exceeds it but remains below 15 points still has no consequences. Above that, the number of DGPP is reduced unless a derogation is granted. Finally, that possibility of being granted a derogation under Article 6(1) of GIP 45 constitutes a solution to the problems posed by the existence of a quota of 2.5 DGPP per official and by the possible concentration of outstanding officials in certain directorates-general.

Findings of the Court

- 168 It is important to bear in mind that, within the framework of its broad discretion, the appointing authority may undertake consideration of comparative merits in the manner it considers most appropriate (see paragraph 131 above).
- 169 As is made clear in communication SEC(2001) 1697, 'the new [promotion] procedure constitutes a break with the past'. In the light of past acknowledgements of heterogeneity in the appraisals of officials in different directorates-general and of the subsequent difficulty for the appointing authority in undertaking consideration of the comparative merits of all the officials concerned in accordance with the principle of equal treatment, the Commission sought to objectivise the professional

appraisal of staff to a greater extent in order to make the promotion system as fair as possible. That objective is reflected in a quantification of merit by means of a points system and in provisions of GIP 45 aimed at ensuring consistency in the award of those points in the Commission as a whole.

170 Accordingly, Article 6(1) of GIP 45 provides that directorates-general are to have available a package of DGPP equal to 2.5 times the number of officials in grades which are still susceptible to promotion and who occupy a post in that directorate-general. That same provision states that '[directorates-general] whose average score in terms of MP, for a given grade, exceeds the Commission target average by more than one point will have their package of [PP] reduced by an amount corresponding exactly to the excess'. *Administrative Notices* No 99-2002 states that 'the Directorates-General are invited to appraise their staff in line with an average of 14 [MP] out of 20 (called the "target average mark"). This average of 14 points must be adhered to across all grades in each Directorate-General'. They add that 'the Directorates-General that achieve an average above 15 for a particular grade will be penalised. This involves reducing the quota of [PP] available to that [Directorate-General] for the grade and promotion exercise in question'.

171 It should also be noted that Article 6(1) of GIP 45 provides that, where directorates-general justify the excess, they are entitled to refer the matter to the promotion committee which may, on exceptional grounds, decide to annul part or all of the reduction made.

172 Contrary to the applicant's assertions, neither the existence of the quota of DGPP nor the target average is such as to limit the discretion of the directorates-general to an extent which is contrary to Article 45 of the Staff Regulations, to the principle of equal treatment and to the principle of career progression. It is clear, on the contrary, that those two mechanisms are such as to favour the effective expression of an appraisal which is representative of the merits of the officials by ensuring the highest level of comparability of appraisals in all the directorates-general of the Commission and, consequently, equal treatment for those officials, as expressly

demanded by the applicant. It is important, in that regard, to remember that, in practice, consideration of the comparative merits must be undertaken on a basis of equality, using comparable sources of information (see, in particular, *Tsirimokos v Parliament*, cited in paragraph 130 above, paragraph 21, and Case T-157/98 *Oliveira v Parliament* [1999] ECR-SC I-A-163 and II-851, paragraph 35).

- 173 As regards the quota of DGPP, it meets the general objective of PP, which is to reward those among the officials who are the most deserving, so as to increase their chances of promotion (see paragraph 4 above). A limit on the number of points available is designed to induce the directorates-general to make such a selection. That objective is itself compatible with Article 45 of the Staff Regulations, equal treatment and career progression.
- 174 As regards the target average, it must be noted that the abovementioned system does not impose on the directorates-general an absolute obligation to comply with that average but encourages them to do so.
- 175 Nevertheless, the fact that the directorates-general take account of the target average which they are given does not in any way mean that their discretion is limited to an extent contrary to Article 45 of the Staff Regulations, the principle of equal treatment and the principle of career progression.
- 176 Firstly, that average expresses mathematically the assessment of an average official's performance. It does not limit the possibility for reporting officers to differentiate between the assessments made individually of the performance of each official according to whether that performance is below or above that average. The bands given by *Administrative Notices* No 99-2002 do not alter that finding. Those notices merely recommend that reporting officers reserve, first, marks from 17 to 20 for officials deserving rapid promotion; second, marks from 12 to 16 for those deserving

normal promotion; third, marks of 10 or 11 for those in slow careers; and fourth, marks below 10 for officials who need to improve their performance and for whom promotion is out of the question for that particular exercise. The same *Administrative Notices* state that 'a mark between 17 and 20 will be given to roughly 15% of officials, a mark between 12 and 16 to approximately 75% and a mark of 10 or 11 to about 10%'. However, those bands are merely the result of observation of the way in which promotions have generally been granted in the past. They are only indicative and non-binding in character. In addition, unlike the target average, the abovementioned bands are not even the subject of incentives. No consequences are attached to their non-observance. It follows that the target average, even in conjunction with those bands, does not prevent reporting officers from using a very wide range of markings.

¹⁷⁷ Moreover, GIP 43 and GIP 45 do not prohibit the use of marks involving decimal fractions. Article 4(4) of GIP 43 expressly envisages the use of half-points and *Administrative Notices* No 99-2002 suggests a mark of '10 or 11' for officials deserving slow promotion. Consequently, reporting officers are able to nuance their assessments of officials.

¹⁷⁸ The circumstance that the whole range of points remains available to reporting officers differentiates the system introduced by Article 6(1) of GIP 45 and by the abovementioned *Administrative Notices* from the system invalidated by the judgment in Case T-296/01 *Tatti v Commission* [2003] ECR-SC I-A-225 and II-1093. First of all, that system was binding. Moreover, it combined an average with a ceiling of 30 points, which was lower than the maximum of 50 points theoretically available.

- 179 Secondly, the indication of a target average of 14 out of 20 serves to avoid the risk of inflation in markings. Such inflation would have the effect of reducing the range of points actually used by reporting officers and would, consequently, undermine the function of periodic reports, which is to reflect, as faithfully as possible, the merits of the officials reported on and to facilitate an effective comparison thereof. In contrast, the contested system obliges reporting officers to carry out a more rigorous comparison of the individual merits of each official.
- 180 Thirdly, the indication of a target average also serves to reduce the risk of a disparity in the averages of the markings given by the various directorates-general, which would not be justified by objective considerations connected with the merits of the officials reported on. It therefore protects officials from discriminatory treatment depending on whether they belong to one directorate-general or another.
- 181 Fourthly, the target average system takes account of the most commonly observed reality, namely a homogeneous breakdown of the officials reported on around the average level of merit. Consequently, the Commission was entitled to infer from that statistical observation that, in all probability, the setting of a target average representative of that average would not restrict the discretion of reporting officers.
- 182 The applicant none the less maintains that the target average raises difficulties in departments where very good officials are concentrated.
- 183 However, Article 6(1) of GIP 45 allows directorates-general to depart from the target average when their particular situation does not coincide with the common reality. No consequences arise where the target average is exceeded by one point. Moreover, where it is exceeded by more than one point, the directorate-general concerned is entitled to refer the matter to the promotion committees which may, on exceptional

grounds, decide to annul part or the entirety of the reduction made in the number of PP in cases where the target average is exceeded by such an amount, where that directorate-general provides sound justification for the excess. As it is, a concentration of very good officials manifestly constitutes such justification.

184 The applicant also claims that the abovementioned derogation does not constitute a ‘sufficient remedy’, in so far as it depends on the initiative of the directorates-general and that the grant of such a derogation falls within the discretion of the promotion committee and not of the appointing authority, which alone has the power to decide on promotions.

185 In addition to finding a total absence of arguments in support of the criticism relating to the initiative of the directorates-general, it must be observed that that initiative appears to be fully justified and logical in the context of a system which may result in a reduction in the number of DGPP allocated to the directorates-general themselves and not to any official in particular.

186 As regards the ‘discretion’ of the promotion committees, it must be remembered that, under the first sentence of Article 45(1) of the Staff Regulations, promotion is to be by decision of the appointing authority, after consideration of the comparative merits of the officials eligible for promotion, undertaken in the manner it considers most appropriate. In that regard, a promotion committee’s decision whether or not to annul part or all of the reduction in DGPP where the target average has been exceeded cannot be placed on the same footing as the abovementioned promotion decision. The promotion committee’s decision falls within the framework of the new promotion procedure laid down by the appointing authority and it therefore cannot legitimately be claimed that the powers conferred by the Staff Regulations on that authority were disregarded.

- 187 Finally, it must be observed that, in addition to the overall arithmetical mechanisms contained in Article 6(1) of GIP 45, Article 13 of GIP 45 provides that any official can lodge an internal appeal which may lead the appointing authority to grant him one or more APP 'outside the DG ... package'. According to *Administrative Notices* No 82-2003, the appointing authority thus allocated 156 APP to Category A officials who brought such an appeal.
- 188 Article 6(1) in conjunction with Article 13 of GIP 45 characterises the balance of the new promotion system designed to give the appointing authority a better basis for undertaking consideration of the comparative merits of all the officials eligible for promotion to the grade concerned, by ensuring the highest possible level of consistency of assessments between the various directorates-general of the Commission.
- 189 It is thus apparent that, contrary to the applicant's assertions, the packages provided for in Article 6(1) of GIP 45 and *Administrative Notices* No 99-2002 do not in any way preclude effective consideration of the comparative merits of the officials eligible for promotion and do not, in themselves, impose a choice of 'strategies' incompatible with Article 45 of the Staff Regulations and the principles of equality and career progression. Such a choice would only indicate an irregularity in the application of GIP 45.
- 190 It follows from the foregoing considerations that the plea of illegality must be rejected, it being observed that the fact that the Commission amended the rules applicable from the 2004 promotion exercise onwards cannot have any influence whatsoever on the legality of the system introduced for the previous exercise.

The third plea of illegality, directed against Article 12 of GIP 45, which attaches excessive importance to seniority, is imprecise and fails to have regard to the competence of the appointing authority

- 191 The applicant raises a plea of illegality against Article 12 of GIP 45. The transitional arrangements which it contains are contrary to Article 45 of the Staff Regulations. First of all, he criticises their transitional character. Next, he claims that they confer decisive character on seniority in grade. Finally, he disputes the power of the promotion committees to award PCTPP.

The transitional character of Article 12 of GIP 45

— Arguments of the parties

- 192 The applicant disputes the transitional character of Article 12 of GIP 45 on the ground that Article 13 of the general provisions for implementing Article 45 of the Staff Regulations, adopted on 24 March 2004, maintained in substance the category of DGTPP and renewed in its entirety the category of PCTPP.

- 193 The Commission replies that Article 12 of GIP 45 does introduce a transitional system, which will be progressively discontinued, as evidenced by the changes introduced by the abovementioned general implementing provisions of 24 March 2004.

— Findings of the Court

- 194 The Court notes that the first sentence of Article 12(3) of GIP 45 provides that ‘transitional arrangements will be put in place in order to take proper account of merit over time’. Those arrangements are laid down in Article 12(3)(a) and (b) of GIP 45. According to footnote 5 to GIP 45, Article 12 concerns ‘the first promotion exercise of 2003’. Their transitional character is thus established. The fact that certain provisions of Article 12 were subsequently extended cannot affect their legality which must be assessed in the light of the wording as applied.
- 195 The complaint disputing the transitional character of Article 12 of GIP 45 must therefore be rejected.

The alleged decisive character conferred on seniority in grade by TPP

— Arguments of the parties

- 196 The applicant observes that, under the first sentence of Article 12(3)(a) of GIP 45, DGTTP are awarded according to seniority in grade and regardless of the merit of officials. They have decisive character. The applicant points out that DGTTP may represent up to 7 points, whereas in practice MP have a range of only 3 points since they generally fall between 13 and 16. However, it follows from Article 45 of the Staff Regulations that seniority in grade can play only a subsidiary role.

197 He adds that the need to arrange the transition from one promotion system to another cannot justify that provision. The applicant observes in this connection that the Parliament and the Court of Justice have set up systems for converting previous markings into appraisal points which are less at variance with the rule of promotion according to merit. Finally, he maintains that the Commission could have taken account of merit over time by resorting to the method, already used, of averaging the analytical assessments in the periodic reports. The mechanism of DGTPP, attaching greater importance to seniority in grade, therefore goes beyond what is necessary to ensure an orderly transition from the old system to the new.

198 The applicant then submits that the second sentence of Article 12(3)(a) of GIP 45 calls, in essence, for the same criticism. He also notes that that provision does not set any precise criteria for the award of PCTPP. Promotion decisions may thus be 'determined by arbitrary and unreasoned decisions, in a manner contrary to Article 45 of the Staff Regulations, to the principle of career progression and to the principle of equal treatment'.

199 The applicant further maintains that Article 12(3)(b) of GIP 45 infringes Article 45(1) of the Staff Regulations. According to the judgment of the Court of Justice in Case C-446/00 P *Cubero Vermurie v Commission* [2001] ECR I-10315, paragraph 36, Article 45 of the Staff Regulations precludes the automatic promotion of officials not promoted in the preceding exercise, even though they previously appeared on the list of the most deserving officials. The applicant adds that *Administrative Notices* No 18-2003 offers a supplement of four SAPP to any directorate-general which gives at least six DGPP to such an official. However, DGPP do not constitute a reliable indicator of merit. Seniority in grade is again rewarded.

200 The Commission reiterates that the promotion procedure at issue seeks to reward merit over time. It points out that an official cannot receive more than seven DGTPP, corresponding to a maximum of seven years spent in the grade. That limitation is designed not to favour those whose careers are particularly slow.

- 201 The Commission then states that it is apparent from *Administrative Notices* No 82-2003 that PCTPP are intended to compensate for any disadvantages arising from the transition between the old and the new system and which would not otherwise be sufficiently taken into account.
- 202 The Commission further maintains, in regard to SAPP, that the principle laid down in the judgment in *Cubero Vermurie v Commission*, cited in paragraph 199 above, is irrelevant in this case. The practice criticised by that judgment consisted in automatically promoting officials who, in the preceding promotion exercise, appeared on the list of the most deserving candidates. However, SAPP are only one category of PP provided for by GIP 45. Moreover, they are not among the most important, in so far as they cannot exceed four points. The judgment in *Cubero Vermurie v Commission* clearly states that, in a promotion procedure, the institution may take into account the fact that an official appears on the list of carry-overs.
- 203 Finally, the Commission states that it did not adopt a system for converting markings into points on account of the difficulties arising from the insufficient harmonisation of the old periodic reports.

— Findings of the Court

- 204 It must be observed, as a preliminary point, that it is inherent in a change of rules that new situations are created on a given date as a result of adapting the account taken of situations constituted earlier. In the present case, it was for the appointing authority to adapt, on a transitional basis, the change in the rules relating to the promotion of officials by taking into account the constraints inherent in the transition from one method of management to another.

- 205 The new promotion system entered into force in the 2003 promotion exercise and transitional arrangements were therefore laid down by Article 12(3) of GIP 45 in order to take account of the merit accumulated in their grade by the Commission officials in post at the time of the entry into force of that system. Those arrangements cover the award of various transitional points to those officials.
- 206 The first sentence of Article 12(3)(a) of GIP 45 provides for the automatic award to officials of one DGTTP per year spent in the grade, up to a maximum of seven such points. As the Commission states, the number of years spent in a grade may be regarded as an objective, but only partial, indicator of the merit accumulated by an official. It is however common ground that the directorates-general do not have, in that regard, any discretion and that the number of DGTTP awarded to an official necessarily corresponds to the number of years of seniority in his grade, subject to a maximum limit of seven years.
- 207 The second sentence of Article 12(3)(a) of GIP 45 allows the award of a maximum of two PCTPP per official. According to *Administrative Notices* No 82-2003 and the Commission's answers to the Court's questions, those PCTPP were introduced in order to resolve, on an equitable basis, specific problems arising from the transition between the old and the new system. The fact remains that that particular purpose of PCTPP necessarily falls within the scope of the objective of all the transitional points of which they form part, namely to take into account the merit accumulated by an official since his last promotion. Consequently, the second sentence of Article 12(3)(a) of GIP 45 does not, in itself, infringe Article 45 of the Staff Regulations. The fact that the award of PCTPP could lead, as the applicant claims, to arbitrary promotions would result from the individual application of Article 12 of GIP 45 and not from its inherent illegality.
- 208 Finally, Article 12(3)(b) of GIP 45 confers on directorates-general the possibility of awarding, in accordance with *Administrative Notices* Nos 18-2003 and 34-2003, up to four SAPP to officials proposed during the previous promotion exercise but not promoted.

- 209 It is important, in this regard, to remember that the appointing authority is, in principle, entitled to take into consideration, in the assessment of candidates' comparative merits, the fact that an official has already been proposed for promotion in a previous exercise, on condition that he has not ceased to be deserving of promotion and that his merits are assessed in comparison with those of other candidates for promotion (Case C-207/99 P *Commission v Hamptaux* [2000] ECR I-9485, paragraph 19, and *Casini v Commission*, cited in paragraph 130 above, paragraphs 69 and 70). However, a practice consisting in automatically promoting a carry-over from the previous promotion exercise infringes the principle of consideration of the comparative merits of the officials eligible for promotion (*Tenreiro v Commission*, cited in paragraph 130 above, paragraph 82).
- 210 In this case, it is established that SAPP constitute only one of the five categories of PP and that their award does not automatically lead to promotion. Moreover, it follows from Article 12(3)(b) of GIP 45, read in the light of *Administrative Notices* No 18-2003, that the award of SAPP is subject to a twofold condition. Thus, *Administrative Notices* No 18-2003 states that officials proposed and not promoted in the 2002 promotion exercise 'may receive up to 4 SAPP, provided that they receive at least 6 [PP] and that the result of the comparison of merits is confirmed'. It follows that SAPP are awarded to officials proposed but not promoted in the 2002 exercise who continue to show the same merits or even superior merits, after consideration of their merits in comparison with those of the other candidates for promotion.
- 211 The abovementioned obligation to have received a minimum of six DGPP, a requirement on which the applicant and the Commission agree, means that only officials who demonstrate a particularly high level of performance are eligible for SAPP. It must be borne in mind that DGPP reward special merits, as recorded in the CDRs of the officials concerned, and that the inclusion of any 'poor' or 'insufficient' markings in the CDR makes it impossible for the official concerned to be awarded PP. It must therefore be concluded that Article 12(3)(b) of GIP 45, read in the light of *Administrative Notices* No 18-2003, is not contrary to Article 45 of the Staff Regulations and that the applicant's criticism is therefore not valid.

- 212 It follows from the foregoing considerations that only the conditions for the award of DGTTP involve taking into account seniority in grade, contrary to the rules which normally govern promotion procedures.
- 213 However, the applicant's criticisms must be viewed in the light of the fact that the rules contested by way of a preliminary plea constitute a transitional measure. The constraints inherent in changing from one method of management to another, in respect of officials' careers, may require the administration to depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to the situations at issue. However, such departures must be justified by an overriding requirement connected with the transition, and their duration and scope should not exceed what is necessary to ensure an orderly move from one system to the other (Case T-30/02 *Leonhardt v Parliament* [2003] ECR-SC I-A-41 and II-265, paragraph 51).
- 214 In this case, the adoption of a system characterised by quantification of merit and by the need to reach, in the 2003 exercise, a certain threshold corresponding to an accumulated number of MP and PP in order to be promoted involved taking into account the merits accumulated by the officials since their last promotion, in the form of an award of a certain number of points and according to a method which complied with the principle of equal treatment.
- 215 The measure consisting in automatically awarding DGTTP based on seniority in grade meets that imperative need connected with the transition, and the provisions of GIP 45, by limiting its scope, support the conclusion that the appointing authority did not go beyond what was necessary to ensure an orderly transition from one system to another.
- 216 Firstly, GIP 45 limit the period of validity of Article 12 to the 2003 promotion exercise only.

- 217 Secondly, the first sentence of Article 12(3)(a) of GIP 45 confers very limited weight on DGTPP since they cannot exceed seven points out of a maximum total of 45 accumulated MP and PP. In that regard, it must be borne in mind that any official can receive a mark between 0 and 20, which is then converted into MP. The fact that officials in the Legal Service received, according to the applicant, between 12 and 16 MP is not relevant for the purpose of assessing the inherent legality of Article 12 of GIP 45.
- 218 Thirdly, Article 10(2) of GIP 45 provides that promotion of an official is to be subject to the condition that he must have totalled at least 10 MP in his last CDR. That provision further limits the effects of taking into account seniority in grade by establishing, including for the transitional period of the 2003 exercise, an irreducible basis for the promotion according to merit of the official eligible for promotion.
- 219 It follows that Article 12(3) of GIP 45 does not, in itself, confer a decisive role on seniority in grade and that the measure of awarding DGTPP cannot be regarded as exceeding the powers available to the appointing authority for the purpose of adapting, on a transitional basis, the change in the rules relating to the promotion of officials.
- 220 It should be added that the Commission was under no obligation to adopt, as the system for converting previous markings, that known as the average analytical assessment or that applied by the Parliament and the Court of Justice, allegedly less at variance with the rule of promotion according to merit. The purpose of changing the existing method of promoting officials is, by definition, to rectify certain problems resulting from the application of the earlier rules. It is therefore inherent in such a reform process, the need for which the administration has wide discretion to assess (see, to that effect, Case 62/75 *de Wind v Commission* [1976] ECR 1167, paragraph 17, and Case T-557/93 *Rasmussen v Commission* [1995] ECR-SC I-A-195 and II-603, paragraph 20), that the merits of officials should begin to be evaluated on a new basis from a given date. The administration cannot be expected, under the

new system, to take account, in exactly the same way, of all the marks awarded to officials under the old system, since that would almost inevitably negate the effectiveness of the reform of the promotion system, and staff are, in any event, not entitled to expect the existing rules to remain unchanged (see, to that effect, *Leonhardt v Parliament*, cited in paragraph 213 above, paragraph 55).

221 In any event, the existence of other transitional systems does not, on its own, prove that the Commission exceeded the permissible limits in adopting Article 12 of GIP 45.

222 Consequently, this part of the plea must be rejected.

Lack of competence of the promotion committees to award PCTPP

— Arguments of the parties

223 The applicant maintains that the second sentence of Article 12(3)(a) of GIP 45 confers on the promotion committees the power to award PCTPP, in contravention of Article 45 of the Staff Regulations which reserves to the appointing authority the power to promote officials.

224 The Commission replies that the role of the promotion committees is merely to propose to the appointing authority that it award PCTPP and not to award them themselves.

— Findings of the Court

225 The Court has already held (see paragraph 84 above) that the second sentence of Article 12(3)(a) of GIP 45 must be read in the light of Article 2 of GIP 43, Article 10 and Article 14(4) of GIP 45, under which the promotion committees merely put forward proposals for the attention of the appointing authority, which alone has the power to decide. The promotion committees therefore only propose to the appointing authority that PCTPP be awarded. It follows that the complaint is unfounded.

226 It follows from the foregoing that Article 12 of GIP 45 does not infringe Article 45 of the Staff Regulations.

227 The plea of illegality of Article 12 of GIP 45 raised by the applicant must therefore be rejected as unfounded.

The fourth plea of illegality, directed against Article 9 of and Annex I, points 1, 2, 3, 5 and 6, to GIP 45 as resulting in certain activities being overvalued

Arguments of the parties

228 The applicant raises a plea of illegality against Article 9 of and Annex I, points 1, 2, 3, 5 and 6, to GIP 45, based on infringement of Article 45 of the Staff Regulations, breach the principle of equal treatment and breach of the principle of career progression.

229 The applicant claims that the duties rewarded with ADPP by Annex I, points 1, 2, 3, 5 and 6, to GIP 45 duplicate activities justifying the award of MP and DGPP, with the result that they are overvalued.

230 Firstly, the applicant infers that duplication from Article 7(3) of GIP 45, from Article 5(5)(a) and (b) of GIP 43 and from the Commission decision of 6 December 2002 adopting specific detailed rules relating to the appraisal of officials and temporary agents seconded as staff representatives. Those provisions include specific rules relating to periodic reports on officials seconded as staff representatives and to the award to them of DGPP. Secondly, the applicant raises the point that Article 5(5)(c) of GIP 43 makes reports on other elected, appointed or delegated staff subject to consultation of an ad hoc appraisal group. Thirdly, he submits that the duties of a representative of the administration on the bodies referred to in Annex I to GIP 45 are an integral part of the ordinary duties of the officials concerned.

231 The Commission replies that the terms of Article 9 of GIP 45 expressly exclude any 'double counting' of activities which would favour certain officials.

232 It also points out that no member of the Legal Service promoted in 2003 received ADPP for representation duties or for having been a member of a body listed in Annex I to GIP 45. It infers from this that the applicant has no legal interest in contesting the legality of the application of the abovementioned provisions to those particular situations.

Findings of the Court

233 It must, first of all, be recalled that, for a plea of illegality to be admissible, the general measure which it is sought to have declared unlawful must be applicable,

directly or indirectly, to the issue with which the application is concerned and there must be a direct legal connection between the contested individual measure and the general measure (Case T-60/99 *Townsend v Commission* [2000] ECR-SC I-A-11 and II-45, paragraph 53, and Case T-343/02 *Schintgen v Commission* [2004] ECR-SC I-A-133 and II-605, paragraph 25).

234 In this case, it is established that the applicant did not receive any ADPP notwithstanding an express request to that effect (see paragraph 28 above), which situation he is challenging in the present action (see paragraph 308 below).

235 In those circumstances, it must be held that the decisions fixing at 20 the applicant's total promotion points and refusing promotion are based on Article 9 of and Annex I to GIP 45 and that the plea of illegality raised is, therefore, fully admissible, irrespective of the fact, irrelevant as it is, that no Grade A5 official in the Legal Service received ADPP in the 2003 promotion exercise.

236 Under Article 9(1) of GIP 45, ADPP reward only 'additional' duties, as listed in Annex I to those provisions, carried out by an official in the interest of the institution. Moreover, the second subparagraph of Article 9(2) of GIP 45, which sets out the three 'criteria for eligibility' for ADPP, states that only 'activities [which] do not form part of [the] job profile' of the officials concerned may be taken into account. Consequently, ADPP can only reward duties distinct from the official's normal activities, not covered by an annual appraisal and, therefore, not serving as a basis for the award of MP.

237 It must also be observed that the CDR differentiates between, on the one hand, activities rewarded with MP and DGPP and, on the other hand, duties qualifying for

the award of ADPP. The 'main achievements' of officials must appear in Section 5.1 of the CDR and other activities carried out at 'unit, [directorate-general] or Commission level ... beyond [their] own work plan' must be accounted for in Section 5.2. Those two sections count towards the quantified appraisal summary which is converted into MP. However, additional duties, which are the subject of Annex I to GIP 45, are only noted in Section 6.6, which follows the abovementioned summary.

238 Moreover, the duties carried out by officials on full-time or part-time secondment as staff representatives in unions and Staff Regulations bodies are appraised according to specific detailed rules under Article 5(5)(a) and (b) of GIP 43. The purpose of those rules is to include the duties in question in the official's periodic appraisal. Those duties therefore lead to the award of MP in accordance with the second subparagraph of Article 2(1) of the abovementioned GIP. They may also give rise to the award of DGPP in accordance with Article 7(3) of GIP 45. However, they cannot give rise to the award of ADPP, since they form part of the 'job profile' of the officials concerned.

239 Conversely, occasional duties taken on, within the bodies referred to in Annex I to GIP 45, by officials elected, appointed or delegated by the staff or by officials representing the administration do not, by definition, form part of the usual activities or, therefore, the job profile of the officials concerned. The existence of an obligation for the reporting officer and the countersigning officer of the department to which an official elected, appointed or delegated by the staff is posted to consult and take into account, when drawing up the CDR for that official, the opinion of the ad hoc group for the appraisal and promotion proposals of staff representatives is not such, on its own, as to invalidate the above conclusion.

240 Moreover, it must be observed that the scales laid down in Annex I to GIP 45 for activities giving rise to ADPP include, in each instance, the figure 0. It follows that, assuming that an activity referred to in Annex I to GIP 45 can also be rewarded with

DGPP, the legal framework in any event enables the appointing authority to avoid any double counting of merits by awarding 0 ADPP for the activity in question.

241 It follows from the foregoing considerations that the plea of illegality of Article 9 of GIP 45 must be rejected as unfounded.

The fifth plea of illegality, directed against Article 7(2) of GIP 45 as being discriminatory

Arguments of the parties

242 The applicant raises a plea of illegality against Article 7(2) of GIP 45, based on Article 45 of the Staff Regulations, the principle of equal treatment and the principle of career progression.

243 The applicant maintains that that provision institutes a 'specific mechanism' which favours officials of directorates-general and services which have fewer than four officials in a given grade. Those directorates-general and services always have 10 DGPP available, so that they are not obliged to adhere to an average of 14 MP and their officials can receive more DGPP than other staff.

244 The Commission observes first of all that Article 7(2) of GIP 45 does not concern MP. It then maintains that that provision is necessary for compliance with the principles invoked by the applicant in so far as, without it, officials of directorates-

general or services with modest numbers of staff would be systematically disadvantaged, since they would not have access to the 6 to 10 PP forming part of the package made available to the directorate-general and shared out among the best performing officials who have demonstrated outstanding merits in meeting the criteria under paragraph 3(i) and (ii) ('large award of DGPP'). They could never, in any case, aspire to 10 DGPP.

Findings of the Court

²⁴⁵ The Court recalls that, under the principle of equality, different situations should not be treated identically unless such treatment is objectively justified (see *Breton v Court of Justice*, cited in paragraph 89 above, paragraph 99, and the case-law cited).

²⁴⁶ Under Article 6(1) of GIP 45, 'each DG will have available, for distribution, a package of [PP] equal to 2.5 times the number of officials in grades which are still susceptible to promotion'. In addition, the award of the DGPP thus allocated is subject to a distribution ratio set out in Article 6(4) of GIP 45, according to which 50% are shared out between the best performing officials who may receive between 6 and 10 DGPP and the remaining 50% are shared out among other officials who may be awarded up to 4 DGPP per individual.

²⁴⁷ It is established that the strict application of such a rule to directorates-general where the total number of staff in each grade is rather modest has the effect, mechanically, of reducing considerably the number of DGPP to be distributed among the officials working within those entities, to the obvious detriment of those officials.

- 248 It is thus clear that those officials are in a situation which is objectively different from that of their colleagues in post in large directorates-general or services, which explains and justifies different treatment from that applied to those colleagues.
- 249 In addition, specifically in order to comply with the principles of equal treatment and career progression invoked by the applicant, Article 7(2) of GIP 45 provides that where a directorate-general or service has fewer than four officials in a given grade, the total number of available PP is 10 and their award is not subject to the distribution ratio set out in Article 6(4) of GIP 45. It is obvious that, without the contested measure, an official in one of the abovementioned directorates-general or services would have virtually no prospect of obtaining a large DGPP award and could never obtain 10.
- 250 Finally, it must be observed that the award of DGPP to officials in directorates-general and services without at least four officials per grade is based on the recognition of special merits, defined in Article 6(3) of GIP 45, and that it is not established that the measure at issue goes beyond what is necessary to establish genuine equal treatment.
- 251 It follows from the foregoing considerations that the plea of illegality of Article 7(2) of GIP 45 must be rejected as unfounded.

2. The plea alleging non-existence of the decisions on the internal appeals and on the award of ADPP, PCTPP and SAPP

- 252 In his observations on the Commission's answers to the Court's written questions, the applicant raises a plea alleging that 'the defendant did not adopt in the

prescribed manner' the decisions on the internal appeals and on the award of ADPP, PCTPP and SAPP. In his view, the Commission merely communicated *Administrative Notices* mentioning their alleged adoption. The applicant infers from this that those decisions are non-existent and that the decision awarding him a total of 20 promotion points, the merit list and the list of promoted officials are therefore defective in so far as they are based on non-existent preparatory acts. In any event, the decision not to include him in the abovementioned lists is also flawed. In the alternative, he pleads infringement of essential procedural requirements.

253 The applicant claims that this plea is admissible since it is based on facts which came to light in the course of proceedings. The Court finds that it is not necessary to examine this question. This plea can be construed as alleging infringement of essential procedural requirements or non-existence of decisions which should have been adopted in the course of the promotion exercise. Such pleas may be raised at any stage of the proceedings (see, as regards infringement of essential procedural requirements, Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, paragraph 14, and Case T-154/98 *Asia Motor France and Others v Commission* [2000] ECR II-3453, paragraph 46; see, as regards non-existence of a decision, Case T-15/89 *Chemie Linz v Commission* [1992] ECR II-1275, paragraph 395).

254 The Court observes that the applicant submits that the decisions on the internal appeals and on the award of ADPP, PCTPP and SAPP are non-existent, taking as his basis the absence of signed texts and written documents. The Court points out in this regard that it put two written questions to the Commission concerning the dates on which the appointing authority rejected the applicant's internal appeal and refused to award him ADPP. In its answers, the Commission stated that those decisions had been taken on 20 November 2003 without, however, attaching copies of them, but referring to *Administrative Notices* No 82-2003 and to the notifications effected via the Sysper 2 system on 16 December 2003.

255 At the hearing, the Commission stated that it had computerised the promotion procedures and in particular the processing of the promotion committees' proposals and opinions. That statement is one of the consequences of communication SEC (2001) 1697 which linked the implementation of the new rules on appraisal and promotion to the development of an 'integrated IT' tool for ... management'. Article 10(1) of GIP 45 confirms the importance of such a tool by requiring the publication, on the Commission's intranet, of the promotion committees' merit lists and proposals as regards the method of differentiating between the *ex aequo* officials. The Commission did, moreover, explain, that the decisions at issue resulted from the affixing, by the responsible authority, of an electronic signature on a digital document prepared for that purpose. The applicant did not dispute that such is in fact the *modus operandi*. Moreover, the Staff Regulations and GIP 45 do not impose any form on the adoption of the decisions in question. In particular, Article 90(2) of the Staff Regulations, which provides that officials 'may submit to the appointing authority a complaint against an act', does not preclude such an act from being expressed other than on paper (see, as regards oral acts, Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641, paragraphs 9 and 10, and Case T-51/01 *Fronia v Commission* [2002] ECR-SC I-A-43 and II-187, paragraph 31).

256 It is apparent from those considerations that, even though they were not formalised by a multiplicity of individual written documents, the decisions relating to the internal appeals, the ADPP, the PCTPP and the SAPP were certainly adopted by the appointing authority and by the directorates-general, so far as concerns the SAPP.

257 Consequently, the legal inferences which the applicant draws from the absence of signed texts and written documents are unfounded, whether as regards the non-existence of decisions or as regards the infringement of essential procedural requirements.

258 It follows that the plea alleging non-existence of the decisions on the internal appeals and on the award of ADPP, PCTPP and SAPP must be rejected in its entirety.

3. *The pleas alleging illegality of the implementation of GIP 45*

259 The applicant contests, in the first place, the decision to award him only one DGPP. He criticises the statement of reasons for the decision of 12 February 2004 by which the appointing authority rejected his complaint against the number of DGPP awarded to him. He also maintains that the Commission failed to have regard to the link which exists between the number of MP and the number of DGPP. The applicant also claims that the Commission did not undertake effective consideration of the comparative merits. He further asserts that the Commission's decision is not based on any factors relating to his personal situation. Furthermore, the applicant considers himself to be the victim of discrimination as compared with officials employed in services which have assigned a more important role to merits. He also alleges that the Commission failed to comply with the rules which it has laid down for itself.

260 In the second place, the applicant criticises the manner in which the internal appeal procedure organised in accordance with Article 13 of GIP 45, at the end of which he did not receive any APP, was conducted. He alleges, firstly, the absence of any proposals from the directors. He then condemns the fact that the promotion committee for Category A officials did not state reasons for its recommendations to the appointing authority concerning his appeal. He also maintains that the appointing authority did not genuinely exercise its prerogatives.

261 In the third place, the applicant contests the decision not to award him any ADPP. In this connection, he criticises the absence of a statement of reasons for the promotion committee's recommendations. He also maintains that the appointing authority merely approved those recommendations. Finally, he submits that the appointing authority classified his activities wrongly in the light of Article 9 of GIP 45.

262 In the fourth place, the applicant challenges the refusal to award him any PCTPP, alleging failure to state reasons.

263 In the fifth place, the applicant criticises the list of promoted officials, submitting that the appointing authority failed to compare the respective merits of the promotion candidates itself.

The pleas contesting the decision to award the applicant only one DGPP

Breach of the obligation to state reasons

— Arguments of the parties

264 The applicant maintains that the decision to award him only one DGPP was not adequately reasoned in relation to his individual situation. He points out to that effect that, in its decision rejecting his complaint of 15 June 2004, the Commission claims to be entitled to base the award of DGPP on information other than that resulting from the CDRs. However, it failed to identify those matters.

265 The Commission replies that the appointing authority must state reasons for the decision rejecting a complaint against a promotion, but that it is nevertheless not required to disclose to the rejected candidate the comparative assessment made by it. It may confine itself to establishing the existence of the legal conditions to which the Staff Regulations make the validity of promotions subject. The appointing authority satisfied that obligation by recalling that it may act on the basis of other information relating to the administrative and personal position of officials, which is such as to qualify the assessment made solely on the basis of the staff reports (see Case T-221/96 *Manzo-Tafaro v Commission* [1998] ECR-SC I-A-115 and II-307, paragraph 18, and the case-law cited).

— Findings of the Court

- 266 It must first be pointed out that the applicant's argument is ambiguous. It can be interpreted as calling in question solely the adequacy of the reasons set out in the decision of 15 June 2004. If that were the case, the applicant would refer, not to the failure to state reasons or to the inadequacy of the statement of reasons, but to the error of law or assessment made by the Commission in basing its decision to award the applicant only one DGPP on erroneous considerations.
- 267 In any event, since a plea alleging failure to state or failure sufficiently to state the reasons on which a Community act is based is a matter of public policy which must be raised by the Community judicature of its own motion, it must be examined whether the Commission gave a sufficient statement of reasons for the decision awarding the applicant one DGPP (Case C-166/95 P *Commission v Daffix* [1997] ECR I-983, paragraph 24; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67; and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757, paragraph 125).
- 268 According to settled case-law, the purpose of the statement of the reasons required by the second paragraph of Article 25 of the Staff Regulations is, on the one hand, to provide the person concerned with details sufficient to allow him to ascertain whether or not the measure adversely affecting him is well founded and, on the other, to enable the Community judicature to review the legality of the measure (Case 195/80 *Michel v Parliament* [1981] ECR 2861, paragraph 22; Joined Cases T-178/95 and T-179/95 *Picciolo and Caló v Committee of the Regions* [1997] ECR-SC I-A-51 and II-155, paragraph 33; and *Napoli Buzzanca v Commission*, cited in paragraph 147 above, paragraph 57). Moreover, the sufficiency of the statement of reasons must be appraised in the light of the nature of the measure in question (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraph 71, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and TecnaGrind v Commission* [2002] ECR II-4547, paragraph 168)

and of the factual and legal context in which it was adopted (Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 16, and *Napoli Buzzanca v Commission*, cited in paragraph 147 above, paragraph 60).

269 It must therefore be examined, in this case, whether the decision awarding the applicant one DGPP satisfies the requirements of the second paragraph of Article 25 of the Staff Regulations.

270 For that purpose, it must be recalled that decisions on DGPP are preparatory acts (see paragraph 97 above) and that as such they do not need to state the reasons on which they are based. However, the appointing authority is obliged to state the reasons for its decision rejecting a complaint against the decision fixing the total number of promotion points (see paragraph 147 above).

271 It should also be added that the sufficiency of the statement of reasons must be assessed in the light of the main arguments to which the institution responds (see, to that effect, Joined Cases T-39/92 and T-40/92 *CB and Europay International v Commission* [1994] ECR II-49, paragraph 122, and Case T-143/03 *Smit v Europol* [2005] ECR-SC I-A-39 and II-171, paragraph 42).

272 Since, in his complaint, the applicant had called in question the legality of the decision to award him only one DGPP, the statement of reasons for the rejection of the complaint should, therefore, have related to the criteria governing the award of DGPP and their application to the applicant's individual situation.

273 After asserting in general terms that it is entitled to act on the basis not only of candidates' MP, but also of other aspects of their merits, the appointing authority explained, in its decision rejecting the complaint, that the award of only one point to

the applicant 'fit[ted] into the overall strategy adopted by the [Legal Service] for the transitional promotion exercise in 2003 ... of optimising the number of promotions of its officials ... Under the transitional system in force in 2003, the officials with the highest levels of seniority (that is, whose number of TPP reached the maximum of 7, with in one case also 4 SAPP), and with the same number of MP, automatically obtained a high total number of promotion points. By making the large DGPP award to the latter officials who were long-serving, the [Legal Service] thus eliminated them from the 2004 list of officials eligible for promotion, to the benefit of the non-promoted officials such as the [applicant]'.

274 In the decision rejecting the complaint, the Commission also refers to the Legal Service's guidelines for the 2003 promotion exercise. Those guidelines state that large DGPP and SAPP awards are to be made in order to 'determine the promotions in 2003' (Annex 1B to the guidelines). In addition, it is apparent from that annex that, for the 2003 promotion year, the Legal Service used as the main criterion for awarding DGPP 'the total MP and [DG]TPP' of the officials in a given grade. According to the Legal Service, that total represented a 'balanced way of taking into account merit and seniority in grade'.

275 Finally, in the decision rejecting the complaint, the Commission refers to the necessary 'transition to a system based on taking into account merit over time'. It refers inter alia, for that purpose, to the judgment in *Leonhardt v Parliament*, cited in paragraph 213 above, paragraph 51.

276 In the light of the foregoing, it must be held that the reasons set out in the decision rejecting the complaint satisfy the obligations which the second paragraph of Article 25 of the Staff Regulations imposes on the appointing authority. That decision explains sufficiently the criteria which had been laid down by the Legal Service for the award of DGPP and their application to the individual situation of the applicant. In particular, the decision rejecting the complaint reveals factors other

than MP — such as the seniority of the officials eligible for promotion — which influenced the decision awarding the DGPP. The decision rejecting the complaint thus enables the applicant to ascertain the reasons which led the Commission to award him only one DGPP and also enables the Court to carry out its review of legality.

277 It follows that the plea alleging infringement of the second paragraph of Article 25 of the Staff Regulations must be rejected.

Infringement of Article 45 of the Staff Regulations and Articles 6 and 13 of GIP 45, breach of the principle of career progression, manifest error of assessment and misuse of powers

— Arguments of the parties

278 The applicant points out that, under Article 6(4)(a) of GIP 45, the ‘best performing’ officials are to be awarded 50% of the DGPP, at a rate of 6 to 10 points per official. However, the applicant observes that he received only one DGPP, even though he had been credited with 16 MP following his CDR and had thus received the highest mark in the Legal Service. He should therefore have received 9 or 10 points out of the 37 distributed by the Legal Service in large DGPP awards. Moreover, since the four Grade A5 officials in the Legal Service who received large DGPP awards had received markings below 16 MP, he submits that the appointing authority did not correctly compare the merits.

279 In the applicant’s submission, it is also apparent from the Legal Service guidelines that it awarded DGPP on the basis of the ‘total MP and TPP’. It is however clear

from *Administrative Notices* No 48-2003 that officials in the Legal Service who received large DGPP awards had obtained six or seven DGTTP. The applicant infers from this that seniority was favoured, even though it may be taken into account only as a subsidiary consideration. Moreover, the abovementioned guidelines and the appointing authority's decision of 15 June 2004 reveal that the objective was not to reward individual merit, but to promote the officials with the most transitional points in order to 'optimise the promotion prospects of the Legal Service staff in the 2003-05 period'. The applicant concludes from this that promotion according to merit became promotion by seniority and that the procedure was vitiated by misuse of powers.

280 The Commission replies that the objective of the provisions governing the 2003 promotion exercise is to take into account the performances of officials over the years. The PP system reflects that concern. However, the CDR does not give a complete picture of the merits of officials. It reflects only one year of their career. Moreover, the first subparagraph of Article 6(4) of GIP 45 does not provide for large DGPP awards to the officials who have received the most MP following their last CDR. Such awards are reserved for those who have demonstrated exceptional merits as described in Article 6(3)(i) and (ii) of GIP 45. Article 6(3)(ii) refers to the special efforts and outstanding results of officials, which are recorded in 'their career development reports'. The use of that plural reflects the concern to base DGPP on 'merit over time'. It follows that the Commission was entitled to award them on the basis of MP, but also in the light of other aspects of merit. That was the case in this instance.

281 The Commission further maintains that it is not required to furnish proof of consideration of the comparative merits unless the applicant produces a body of sufficiently convergent circumstantial evidence tending to show that such consideration was lacking. However, the absence of correlation between MP and DGPP does not constitute such a body of circumstantial evidence since DGPP cannot be based solely on the number of MP. Moreover, the merits of one official cannot preclude the equal or greater merits of other officials from being taken into account.

282 The Commission further asserts that TPP were intended to facilitate the transition to the new promotion system by taking account of the length of service of officials in a given grade, in accordance with the objective of rewarding their perseverance. It also states that, because of the difficulties arising from the fact that periodic reports were not harmonised under the previous system, it was necessary to award PP to reflect merit over time on the basis of an 'objective benchmark'. That benchmark is provided by the number of years spent in a grade, as used in limited fashion for the award of DGTPP.

283 In the view of the Commission, it follows from the foregoing that the total of MP and TPP, which serves as the basis for calculating the DGPP, reflects merit over time and not mere seniority in grade.

284 Relying on *Leonhardt v Parliament*, cited in paragraph 213 above, paragraph 55, the Commission further maintains that, if the effectiveness of the reform of the promotion system is not to be negated, the Commission cannot be expected to take account of all the marks awarded to officials under the old system.

285 The Commission then denies that there was any misuse of powers in acting on the basis of the need to organise a transition and of the possibility of taking into account the situation of carry-overs.

— Findings of the Court

286 It should be borne in mind that, with effect from the 2003 promotion exercise, and in order to facilitate a more objective and easier comparison of the merits of the

officials eligible for promotion than previously, GIP 43 and GIP 45 introduced a promotion system based on quantification of merits, characterised by the annual award to officials of MP and PP. PP include DGPP as referred to in Article 6 of GIP 45.

287 By the present plea, the applicant calls in question the legality of the decision by which he was awarded only one DGPP in the 2003 promotion exercise. In the applicant's submission, the Commission infringed Article 6 of GIP 45 by favouring the criterion of seniority in the award of DGPP to officials eligible for promotion.

288 It is important to bear in mind first that DGPP are intended, as Article 6(3) of GIP 45 states, to reward the 'officials deemed most deserving'. According to that same provision, those are officials who have 'contributed to the attainment of results which stretch beyond the individual's objectives' (subparagraph (i)) or who have 'demonstrated special efforts and outstanding results in carrying out their tasks, as recorded in their [CDRs]' (subparagraph (ii)). Large DGPP awards, namely 6 to 10 DGPP, are, in accordance with Article 6(4), to be reserved for the 'best performing officials', whereas 'small' DGPP awards, namely 0 to 4 DGPP, are, in accordance with that same provision, to be 'shared out among other officials who are regarded as deserving in the light of the criteria under [Article 6(3)]'.

289 It must also be pointed out that Article 6 of GIP 45 makes no reference to seniority in grade as a criterion for the award of DGPP.

290 It follows that the award of DGPP must be based on considerations connected with the particular merits of the officials in question, large DGPP awards being reserved for officials who have demonstrated exceptional merits. Without there being any need to rule on the issue of whether, and to what extent, seniority in grade may be

used as a secondary criterion for awarding DGPP, that criterion could not, in any event, constitute a decisive factor for the award of DGPP (see, by analogy, Case 298/81 *Colussi v Parliament* [1983] ECR 1131, paragraph 22; *Vainker v Parliament*, cited in paragraph 101 above, paragraphs 16 and 17; Case T-280/94 *Lopes v Court of Justice* [1996] ECR-SC I-A-77 and II-239, paragraph 138; and Case T-163/01 *Perez Escanilla v Commission* [2002] ECR-SC I-A-131 and II-717, paragraph 29).

291 In order to examine whether the present plea is well founded, it must be recalled that, in assessing the merits to be taken into consideration in the context of a promotion decision under Article 45 of the Staff Regulations and, consequently, also in the context of a decision awarding PP, the administration possesses a wide discretion and the Community judicature must restrict its review to consideration of the question whether, regard being had to the various considerations which have influenced the administration in making its assessment, the latter has kept within proper bounds and has not used its power in a manifestly incorrect way (Case 282/81 *Ragusa v Commission* [1983] ECR 1245, paragraph 9; Case 324/85 *Bouteiller v Commission* [1987] ECR 529, paragraph 6; and *Breton v Court of Justice*, cited in paragraph 89 above, paragraph 98).

292 In this case, the Commission explained in the decision rejecting the complaint that ‘the award of one DGPP to [the applicant] fits into the overall strategy adopted by the [Legal Service] for the transitional promotion exercise in 2003 ... of optimising the number of promotions of its officials’. It adds that ‘the officials with the highest levels of seniority (that is, whose number of [DG]TPP reached the maximum of 7, with in one case also 4 SAPP), and with the same number of MP, automatically obtained a high total number of promotion points’ and thus received large DGPP awards. It further explains that ‘the strategy of trying to ensure that the officials with the greatest number of [DG]TPP/SAPP were promoted — while obviously taking account of their merit — was legitimate’.

- 293 The decision rejecting the complaint also refers to the Legal Service guidelines for the 2003 promotion exercise. Those guidelines state that large DGPP awards and SAPP were awarded so as to ‘determine the promotions in 2002’ (Annex 1B to the guidelines). It is also apparent from that annex that, for the 2003 promotion year, the Legal Service used as the main criterion for the award of DGPP ‘the total MP and [DG]TPP’ of officials in a given grade. That total represented, according to the Legal Service, a ‘balanced way of taking into account merit and seniority in grade’. Where, for different officials in a given grade, the ‘total [thus obtained was] equal, merit [had to] prevail over seniority in grade’.
- 294 In its defence, the Commission confirmed that ‘DGPP [were] awarded within the Legal Service on the basis of the total of the MP + [DG]TPP of each official’, while stressing the fact that ‘the sum of MP and [DG]TPP, which serves as the basis for the calculation of DGPP, is intended ... to reflect merit over time’.
- 295 As regards the issue of whether the decision awarding one DGPP to the applicant complies with the criteria laid down in Article 6(3) of GIP 45, it must be held that the method applied by the Legal Service for awarding DGPP had the consequence that officials eligible for promotion to Grade A4 who totalled fewer MP than the applicant, but who had more years of seniority in grade, received more DGPP than the applicant.
- 296 Accordingly, the applicant, who totalled 16 MP, received only one DGPP, whereas four Grade A5 officials in the Legal Service who totalled 14 or 15 MP obtained large DGPP awards, despite the fact that their merits, as appraised in their CDRs, were inferior to those of the applicant. For those four officials, ranked second, third, fourth and fifth in order of seniority in Grade A5 in the Legal Service, the total sum of their MP and DGTPP was at the minimum of 21 (minimum 14 MP and 7 DGTPP), whereas for the applicant, who had less seniority in grade, that sum was 19 (16 MP and 3 DGTPP).

297 It follows that the award of one DGPP to the applicant does not result from the application of the criteria in Article 6(3) of GIP 45. The administration has made the award of DGPP dependent, not on consideration of the special, or even exceptional, merits of the officials concerned, but on a mathematical calculation, namely the sum of MP and DGTPP, the number of the latter necessarily corresponding to the number of years of seniority (see paragraph 206 above). The criteria for the award of DGPP applied by the Legal Service to the 2003 promotion exercise, far from rewarding ‘officials ... most deserving’, as required by Article 6(3) of GIP 45, thus had the objective consequence, in this case, of favouring officials with a lower number of MP than the applicant in so far as, due to greater seniority in grade, the difference between their DGTPP and the applicant’s 3 DGTPP was greater than the difference between their MP and the applicant’s 16 MP.

298 As regards the Commission’s argument that the award of DGPP is based on merit over time and not on seniority, it must be observed firstly that Article 12 of GIP 45 provides for the award of TPP ‘in order to take proper account of merit over time’. By contrast, as regards DGPP, Article 6 of GIP 45 contains no explicit reference to such a criterion.

299 It must however be made clear that, as the Commission points out, the special merits referred to in Article 6(3) of GIP 45, which justify the award of DGPP, do not necessarily result exclusively from the last CDR of the officials concerned. Article 6(3)(ii) of GIP 45 includes a reference to CDRs — mentioned in the plural — in order to be able to distinguish the most deserving officials for the purpose of awarding DGPP.

300 The method used by the Legal Service, which determines DGPP on the basis of the sum of the MP and DGTPP, was not suitable for that purpose. The MP which were taken into account for the purpose of awarding only one DGPP to the applicant are the 16 MP resulting from the last CDR prior to the promotion exercise. Nor were

any merits which were recorded in the previous periodic reports taken into account in the determination of the DGTTP. The award of those DGTTP is made automatically, in accordance with Article 12(3)(a) of GIP 45, 'within the limit of 1 point per number of years spent in the grade, up to a maximum of 7 points'.

301 Finally, the Commission refers to the necessary 'transition to a system based on taking into account merit over time'. It refers inter alia, for that purpose, to *Leonhardt v Parliament*, cited in paragraph 213 above, paragraph 51. However, it should be remembered that although, in that judgment, the Court accepted that the administration could depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to promotion procedures, this was only in order to satisfy an overriding requirement connected with the transition between the old and new promotion systems and in order to take into account the constraints inherent in changing from one method of management to another. Yet it is established that DGPP constitute a permanent and not a provisional aspect of the new promotion system and the reference to *Leonhardt v Parliament*, is therefore irrelevant. As an incidental point, the Court notes that the taking into account of merit accumulated in their grade by Commission officials in post at the time of the entry into force of that system did, moreover, justify the award of three categories of transitional points.

302 It follows from all the foregoing that the decision awarding one DGPP to the applicant was determined by the sum of the applicant's MP and DGTTP and therefore infringes the criteria laid down in Article 6(3) of GIP 45. Consequently, the decision fixing the total number of the applicant's promotion points is illegal in so far as it awards one DGPP to the applicant.

303 There is no need to examine the other complaints which the applicant puts forward against that decision. They could not lead to a more extensive annulment since they concern the same category of points.

The plea contesting the legality of the decision not to award any APP to the applicant

304 The applicant contests in essence the duration of the examination of the internal appeal which he lodged on the basis of Article 13 of GIP 45. He also criticises the failure to state reasons for the promotion committee's recommendation. Finally, he claims that the appointing authority did not carry out an effective examination of his appeal.

305 The Court notes that the internal appeal must be lodged, pursuant to Article 13(1) of GIP 45, within five working days following the publication of the 'merit list referred to in Article 8'. That list is drawn up 'once [PP] have been awarded following the procedure laid out in Article 6'. The internal appeal therefore concerns the decisions relating to DGPP. That conclusion is not called in question by the fact that the applicant supplemented his appeal by arguing why he should obtain ADPP.

306 The refusal to grant the applicant any APP is thus a confirmation of the decision to award him only one DGPP. Consequently, the pleas put forward against the latter decision must be interpreted as being also directed against the rejection of the internal appeal. However, the examination of the previous plea establishes that the decision to award one DGPP to the applicant is vitiated by a manifest error of assessment and that it infringes Article 45 of the Staff Regulations, Article 6 of GIP 45 and the principle of career progression. The same irregularities therefore affect the refusal to award APP to the applicant.

307 Accordingly, there is no need, in this case, to examine the pleas specifically criticising the examination of the applicant's internal appeal.

The plea directed against the refusal to award any ADPP to the applicant

- 308 The applicant contests the refusal to award him ADPP, relying on failure to state reasons for the promotion committee's recommendations, Article 45 of the Staff Regulations, Article 9 of GIP 45, the principle of equal treatment, manifest error of assessment and misuse of powers.

Failure to state reasons for the promotion committee's recommendations

— Arguments of the parties

- 309 The applicant, who received no ADPP, complains that the promotion committee for Category A officials did not state reasons for its proposals in that regard.

- 310 The Commission replies that a preparatory act is not required to state the reasons on which it is based.

— Findings of the Court

- 311 The Court finds the argument unfounded for the reasons set out in paragraphs 144 and 145 above.

Failure of the appointing authority to exercise the competence conferred on it by Article 9 of GIP 45

— Arguments of the parties

312 The applicant claims that the appointing authority merely approved the joint committee's proposals and that it did not take account of the trainer/public speaker and representation duties which he carried out.

313 The Commission replies that the appointing authority did in fact carry out a comparative examination of the files of the officials who were eligible for ADPP, but that it decided, on the basis of that examination, not to award any to the applicant. It adds that there is nothing to prevent the appointing authority from adopting the promotion committees' proposals, as it did in this case.

— Findings of the Court

314 The Court recalls that, under Article 9(3) of GIP 45, the award of ADPP forms the subject of proposals within a joint working group of each competent promotion committee. After they have been 'endorsed' by those committees, those proposals are then submitted for decision to the appointing authority.

315 The appointing authority gave its decision on 20 November 2003. The fact that, in that context, it adopted the promotion committees' recommendations as its own is not sufficient to show that it did not genuinely exercise its powers. The appointing authority may in fact share the assessments of the promotion committees.

- 316 In any event, the applicant directed his complaint *inter alia* against the refusal to award him ADPP. However, the appointing authority rejected the applicant's complaint following reasoning which proves the effective examination of that category of points. It pointed out that the lectures and other activities referred to by the applicant were closely connected both with the nature of his duties and with the matter with which he was dealing in the Legal Service. The appointing authority further observed that the 'transparency group' of the Legal Service, in which the applicant is involved, is an informal body. It therefore took the view that that committee could not be placed on the same footing as a joint committee since the list of additional duties set out in Annex I to GIP 45 is exhaustive. Finally, the appointing authority observed that the applicant's 2001-02 CDR did not mention any additional duties in the section intended for that purpose.
- 317 Consequently, the argument to the effect that the appointing authority did not genuinely exercise its powers is unfounded.

Infringement of Article 9 of GIP 45 by the appointing authority

— Arguments of the parties

- 318 The applicant claims that he represents Grade A5 officials within a transparency group in the Legal Service. He also gave courses and lectures both outside the institution and to his colleagues, which he did outside his normal duties. The applicant submits, moreover, that the fact that he acquired the knowledge necessary for those courses and lectures by virtue of the duties carried out within the Legal Service is irrelevant. He then complains that the Legal Service did not draw the attention of the promotion committee to the duties in question and did not mention them in his 2001-02 CDR. Finally, the applicant claims that officials received ADPP for activities similar to his own, or even less important. He requests that the Court

invite the Commission to produce an anonymous list of Grade A5 officials who obtained ADPP for ‘trainer/public speaker’ and representation activities, specifying the activities actually carried out. He also requests that the Commission be invited to explain in what respect those activities differed, *ex hypothesi*, from the sphere of activities of the officials concerned within the institution.

319 The Commission points out that, in the context of a promotion procedure, the appointing authority has wide discretion. It then asserts that the ‘transparency group’ of the Legal Service is only an informal body, not comparable to the committees listed in Annex I to GIP 45. It follows that the promotion committee for Category A officials did not have the power to award PP to the applicant in recognition of that involvement. Finally, the fact that the applicant carried out activities as a trainer/public speaker did not confer on him a right to receive ADPP. The limited number of points to be awarded means that they can only be awarded to the most deserving officials in accordance with the criteria set out in Article 9 of GIP 45. The fact that an official has merits does not preclude others from having equal or greater merits.

— Findings of the Court

320 The Court observes that Article 9(2) of GIP 45 allows the appointing authority wide discretion. It first of all makes the award of ADPP subject to three criteria. These relate to whether the duties in question were carried out in the interest of the institution, whether or not they form part of the job profile of the official concerned and whether he has carried them out successfully. The verification of each of those criteria confers a discretion on the appointing authority. Article 9(2) of GIP 45 then fixes a package of points to be distributed according to the number of officials eligible for promotion. Its distribution according to the scales laid down in Annex I to GIP 45 for the various activities mentioned in that annex also involves a choice, based on an evaluation of the merits likely to be relevant. The Court reiterates that, in this context, its review must be restricted to the question whether the

administration, in exercising its discretion, kept within proper bounds and did not use its power in a manifestly incorrect way (see paragraph 291 above).

321 As regards, first, the activities carried out by the applicant within the ‘transparency group’, it is important to reiterate that Annex I to GIP 45 lists exhaustively the additional duties in the interest of the institution which can justify the award of ADPP under Article 9 of GIP 45. Since activities within the transparency group are not mentioned in Annex I to GIP 45, the appointing authority did not make an error of law or manifest error of assessment by not awarding any ADPP to the applicant in respect of his involvement in that group.

322 Secondly, as regards the claimed trainer/public speaker activities carried out by the applicant, it is important to point out that such activities may, in accordance with Annex I to GIP 45, give rise to the award of one ADPP. However, the applicant’s job description mentions ‘communication on [certain] legal aspects — internal communication’. Moreover, his 2001-02 CDR states that he is responsible for ‘informing the Commission and its services of developments in litigation and Community law [and for] disseminating knowledge and experience of Community law’. It follows that the appointing authority did not make an error of law or manifest error of assessment by considering that the training course and lectures given by the applicant for the benefit of colleagues fell within the scope of his normal duties. Consequently, the appointing authority took the view, correctly, that the second indent of the second subparagraph of Article 9(2) of GIP 45 precluded the applicant from being rewarded by the award of one ADPP.

323 The applicant also claims external activities. These consisted of two lectures on Community competition law and European administrative law given at Spanish universities, participation in a legal research project in the telecommunications field at the request of the Italian authorities and a publication on services of general economic interest. The applicant has not, however, provided any evidence which would permit the inference that those activities were carried out ‘in the interest of the institution’ in accordance with the second indent of the second subparagraph of Article 9(2) of GIP 45. Moreover, the appointing authority was able to point out, in

its decision of 15 June 2004, that the Legal Service had not mentioned the applicant's name on the list of officials who were, in its view, eligible for ADPP. The appointing authority was also able to observe that the Legal Service had likewise not reported the abovementioned activities in the section of the CDR devoted to 'additional duties'. The applicant criticises that omission, but that criticism is not admissible in so far as it calls in question the 2001-02 CDR which he did not contest at the appropriate time. The applicant also asserts that he entered the duties in question in the part of the CDR which he was required to complete personally. However, that entry is not decisive, since the view which he takes of his own activities is, naturally, marked by subjectivity.

324 Finally, the applicant's request to the effect that the Commission should produce to the Court an anonymous list of the recipients of ADPP, which should also mention the activities which gave rise to the award of the ADPP and the explanations of why those activities were considered not to relate to the normal duties of the officials concerned, cannot be granted. The applicant has not demonstrated that the activities which, in his view, should have given rise to the award of ADPP satisfied all the eligibility criteria set out in Article 9(2) of GIP 45. For the sake of completeness, even assuming that a given official had been awarded one ADPP for having carried out activities satisfying the criteria in Article 9(2) of GIP 45, it would by no means follow that the decision not to award any ADPP to the applicant was illegal.

325 It follows that the plea alleging infringement of Article 9 of GIP 45 is unfounded.

Misuse of powers

— Arguments of the parties

326 The applicant submits that the award of ADPP was vitiated by misuse of powers. He maintains that 'trainer/public speaker' duties were taken into account only in

isolated cases and in an arbitrary manner, even though Annex I to GIP 45 ranks them fourth out of six in decreasing order of importance. He also observes that the 2004 version of those GIP did not include them because ‘the boundary between activities as a public speaker or trainer and the official’s normal activity is difficult to determine’.

³²⁷ In the defendant’s submission, its replies to the previous parts of the plea show that the applicant’s activities as a trainer/public speaker were taken into account adequately and that the ADPP were awarded in accordance with the criteria set out in Article 9 of GIP 45. Moreover, the fact that the activities in question were deleted from Annex I to GIP 45 as from the 2004 exercise, because of difficulties in applying that criterion, does not demonstrate any misuse of powers.

— Findings of the Court

³²⁸ The Court recalls that the concept of misuse of powers has a precise scope and refers to the use of powers by an administrative authority for a purpose other than that for which they were conferred on it. A decision is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the purpose of achieving an end other than that stated (Case C-121/01 P *O’Hannrachain v Parliament* [2003] ECR I-5539, paragraph 46; Case T-118/95 *Anacoreta Correia v Commission* [1996] ECR-SC I-A-283 and II-835, paragraph 25; and Case T-389/02 *Sandini v Court of Justice* [2004] ECR-SC I-A-295 and II-1339, paragraph 123).

³²⁹ Misuse of powers is thus a ground of annulment in its own right, which cannot be inferred from an error in the application of Article 9 of and Annex I to GIP 45.

Moreover, examination of the previous arguments has shown that Article 9 of GIP 45 was correctly applied. Furthermore, the fact that trainer/public speaker activities were removed from Annex I to GIP 45 from the 2004 promotion exercise onwards does not prove that the refusal to award ADPP to the applicant in the 2003 promotion exercise had a hidden purpose or, more generally, that the provisions contained under that heading were incorrectly applied to him.

330 The argument is therefore unfounded. The same is therefore true of the whole of the plea directed against the decision not to award any ADPP to the applicant.

The plea directed against the refusal to award PCTPP to the applicant

Arguments of the parties

331 The applicant maintains that the decision of the promotion committee for Category A officials on the award of PCTPP is not reasoned. Nor is the appointing authority's decision concerning his complaint.

332 The Commission replies that a preparatory act is not required to be reasoned and that the explanations contained in the rejection of the applicant's complaint are sufficient.

Findings of the Court

333 The Court reiterates that promotion committees are responsible only for proposing the award of PCTPP (see paragraph 84 above). They are under no obligation to state reasons for their proposals for the reasons already set out in paragraph 143 et seq. above. The applicant cannot, moreover, complain that the appointing authority did not justify its refusal to award him PCTPP in its decision of 15 June 2004. He did not claim, in his complaint, that he should have been awarded such points and he has not adduced any detailed arguments in that regard. Furthermore, the appointing authority's decision includes a statement of reasons on the implementation of the transitional arrangements. Finally, *Administrative Notices* No 34-2003 had already stated that 'the promotion committees ... may propose the award of a maximum of 2 points to officials whose situation justifies it' and *Administrative Notices* No 82-2003 had specified the main circumstances which had led to their award.

334 The plea is therefore unfounded.

The plea directed against the list of promoted officials

Arguments of the parties

335 Irrespective of pleas challenging the validity of preparatory acts and capable of affecting the legality of the list of promoted officials, the applicant also criticises its validity directly. He maintains that the appointing authority failed to compare the respective merits of the candidates when it decided on the promotions and that it merely approved the merit list drawn up by the promotion committee.

336 In the Commission's view, the appointing authority is not prohibited from endorsing the proposals made by the promotion committees and the applicant has not proved that it failed effectively to exercise its discretion.

Findings of the Court

337 The Court reiterates that that committee adopted, on 13 November 2003, the merit list referred to in Article 10 of GIP 45 in the light of the list published on 7 July 2003 and of its proposals for the award of ADPP, APP and PCTPP. The appointing authority adopted the list of promoted officials on 20 November 2003, in conformity with those proposals. However, both the criteria for awarding MP and PP and the procedures introduced by GIP 43 and GIP 45 objectify the assessment of merits and reduce the factors which encourage the appointing authority to depart from the promotion committees' proposals.

338 In any event, the convergence of view between the promotion committee for Category A officials and the appointing authority is not sufficient to prove that the latter did not genuinely exercise its powers.

339 The plea is therefore unfounded.

4. *Scope of the annulment*

340 The Court has held that the complaints directed against the decision to award only one DGPP to the applicant (paragraph 286 et seq. above) are well founded. The irregularities thus found affect the decision to award him a total of only 20 promotion points.

341 It must however be examined whether those irregularities also affect the list of officials promoted to Grade A4 in the 2003 promotion exercise or, in any event, the refusal to include the applicant's name in it.

342 The answer to that question depends on whether the measures which the Commission finds it necessary to take in order to remedy the abovementioned irregularities could bring the applicant up to the promotion threshold, set at 31 points for the 2003 exercise by *Administrative Notices* No 69-2003.

343 In this case, the applicant is entitled to 16 MP and 3 DGTPP. He could also receive up to 10 DGPP under Article 6(4)(a) of GIP 45. Finally, under Article 13(2) of GIP 45, the appointing authority may award, on appeal, 'supplementary (outside the DG and promotion committee package)' APP. In its answers to the Court's questions, the Commission stated that 'such an appeal is admissible ... even if the directorate-general concerned has awarded 10 [DGPP] to the official concerned, that is, the maximum possible points'. In addition, it stated that APP could be awarded 'without limitation'. That interpretation is consistent with the decisive role which Article 45 of the Staff Regulations confers on the appointing authority in assessing the merits of officials for the purposes of possible promotion. It explains, moreover, the limited impact of the target average and of its penalty, provided for in Article 6(1) of GIP 45 and *Administrative Notices* No 99-2002, on the authority's discretion (paragraph 168 et seq. above).

344 In those circumstances, it is conceivable that the applicant could reach the abovementioned promotion threshold.

345 It follows that the decisions of 20 November 2003 by which the appointing authority, on the one hand, set at 20 points the total number of promotion points awarded to the applicant for the 2003 promotion exercise and, on the other, refused to include him in the list of officials promoted to Grade A4, must be annulled.

346 However, the applicant seeks annulment of the merit list of Grade A5 officials and the list of officials promoted to Grade A4 in their entirety. He submits that, contrary to the previous system, decisions taken in the context of the 2003 promotion exercise continue to produce effects after it has ended, on account of the system of accumulating a capital store of promotion points. He also claims that the pleas of illegality which he raised against GIP 43 and GIP 45, the non-existence of preparatory acts and the failure to compare merits affect the whole of the procedure and all the officials concerned by it.

347 However, it is clear from paragraph 87 et seq. above that the merit list referred to in Article 10 of GIP 45 is a preparatory act which, as such, is not amenable to annulment.

348 Moreover, it is evident from the examination undertaken by the Court in paragraphs 125 to 256 above that the applicant's claim for annulment of the list of promoted officials in its entirety on account of the illegality of GIP 43 and GIP 45 or on account of the non-existence of preparatory acts is based, in any event, on an erroneous premiss, since the pleas of illegality and the plea in question are unfounded.

349 Finally, annulment of the whole list of promoted officials, numbering 141, would constitute an excessive penalty (see, to that effect, Case 24/79 *Oberthür v Commission* [1980] ECR 1743, paragraph 13; Case T-68/91 *Barbi v Commission* [1992] ECR II-2127, paragraph 36; *Rasmussen v Commission*, cited in paragraph 220 above, paragraph 52; and Case T-281/01 *Huygens v Commission* [2004] ECR-SC I-A-203 and II-903, paragraph 141). That assessment is not contradicted by the circumstance, which is moreover current, that the decisions taken in the context of the promotion exercise at issue do not exhaust their effects at the end of the exercise, because the applicant could in the future enter into competition with officials whose promotion was not annulled.

Measures of organisation of procedure

350 The applicant requests that the Court order a number of measures of organisation of procedure.

351 First, he requests the Court to ‘invite the defendant to produce anonymised data showing the TPP, MP and DGPP awarded to each Grade A5 official in the Legal Service’. The Court finds that such a measure would be pointless in the light of the findings made in paragraph 296 above.

352 Secondly, the applicant requests the Court to ‘invite the defendant to produce the proposal concerning the award to the applicant of DGPP, which should have been made by Mr Santaolalla Gadea, the director to whom the applicant is responsible, or any document mentioning such a proposal’. That measure was ordered in the course of the proceedings by the Court.

353 Thirdly, the applicant has requested that the Court ‘invite the defendant to produce an anonymised list of Grade A5 officials who received points for trainer/public speaker activities, specifying the activities carried out and explaining in what respect those activities fall outside the sphere of activity of those officials within the institution’. There is no need to grant that request for the reasons set out in paragraph 324 above.

Costs

³⁵⁴ Under 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. Since the defendant has been unsuccessful, it must be ordered to pay all the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

- 1. Annuls the Commission's decisions fixing the total of the applicant's promotion points at 20 points and refusing to include him in the list of officials promoted to Grade A4 in the 2003 promotion exercise;**
- 2. Dismisses the remainder of the action;**

3. Orders the Commission to pay the costs.

Vilaras

Martins Ribeiro

Dehousse

Šváby

Jürimäe

Delivered in open court in Luxembourg on 19 October 2006.

E. Coulon

Registrar

M. Vilaras

President

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