

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
3 March 1993^{*}

In Case T-58/91,

Dierck Booss, an official of the Commission of the European Communities, residing in Brussels, and

Robert Caspar Fischer, an official of the Commission of the European Communities, residing in Rhode-St-Genèse (Belgium),

represented by E. Lebrun and, during the oral procedure, by E. Boigelot, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of L. Schiltz, 2 Rue du Fort Rheinsheim,

applicants,

v

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decisions of 4 and 11 July 1990 concerning two Grade A 2 posts in the Directorate General for Fisheries and its decision of 24 April 1991 rejecting the applicants' complaint,

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

composed of: C. W. Bellamy, President, H. Kirschner and A. Saggio, Judges,

^{*} Language of the case: French.

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 October 1992,

gives the following

Judgment

The facts

- 1 In 1990 the applicants were advisers in Grade A 3 in the Commission's Legal Service; they had been attached to the Agriculture and Fisheries branch since 1984. Mr Booss is of German nationality. Mr Fischer, who is of Netherlands nationality, has in the mean time been appointed Principal Legal Adviser in Grade A 2 in the Commission's Legal Service.
- 2 On 30 May 1990 the Commission amended the organigramme of the Directorate General for Fisheries (hereinafter 'DG XIV') and published three vacancy notices, each of which concerned a post as director in DG XIV.
- 3 Vacancy Notice COM/47/90, which concerned Directorate B, External Resources and Markets (hereinafter 'Directorate B'), contained the following job description:

'Directing and coordinating the work of the units responsible for negotiating agreements on fisheries with non-member countries and market policy concerning fisheries.'

The following qualifications were required:

‘Thorough knowledge of the fisheries policy and associated international relations.’

- 4 Vacancy Notice COM/49/90, which concerned Directorate D, Structures (hereinafter ‘Directorate D’), contained the following job description:

‘Directing and coordinating the work of the units responsible for the structural policy for fisheries.’

The following qualifications were required:

‘Thorough knowledge of the fisheries policy.’

- 5 Those two vacancy notices, together with a third, COM/48/90 concerning Directorate C, Internal Resources and Conservation Policy (hereinafter ‘Directorate C’), were published on 11 June 1990 with a view to ascertaining whether the posts could be filled by promotion and transfer within the Commission. At the same time the Commission began the procedure for inviting applications for transfer from the other Community institutions under Article 29(1)(c) of the Staff Regulations of Officials of the European Communities (hereinafter ‘the Staff Regulations’).
- 6 Following the publication of Vacancy Notice COM/47/90, concerning Directorate B, applications were received from the two applicants in these proceedings and three other Grade A 3 officials of the Commission, Mr S., Mr M. and Mr V. D. On the closing date for applications Mr V. D. did not yet have the requisite length of service in his grade for promotion. Consequently, only the other four applications were submitted to the Consultative Committee on Appointments (hereinafter ‘the Consultative Committee’). Vacancy Notice COM/49/90, concerning Directorate D, attracted only two applications, from the applicants in these proceedings. Vacancy Notice COM/48/90, concerning Directorate C, attracted three applications, from the applicants in these proceedings and a third person, Mr B.

- 7 No applications were registered under Article 29(1)(c) of the Staff Regulations.
- 8 On 28 June 1990 the Consultative Committee issued three opinions, each concerning the applications for the three posts declared vacant. Opinion No 68/90, concerning the four applications for the post of Director of Directorate B, ends with the following sentence: 'At the close of its deliberations, the committee has come to the conclusion that none of the candidates has all the knowledge and qualifications required.' Opinion No 70/90, concerning the two applications for the post of Director of Directorate D, ended with the same conclusion. Opinion No 69/90, concerning Vacancy Notice COM/48/90, took notice that Mr B. had withdrawn his application on that date. Once again the opinion ended with the following sentence: 'At the close of its deliberations, the committee has come to the conclusion that none of the candidates has all the knowledge and qualifications required'.
- 9 On 4 July 1990 the Commission considered the applications. According to special minutes No 1019 of the meeting, the Commission, after taking note of the three opinions of the Consultative Committee, considered the comparative merits of the candidates for each post according to the characteristics of the post to be filled. 'After also considering the reports on the ability, efficiency and conduct in the service of each candidate', the Commission declared in each of the three cases that 'none of the candidates has all the knowledge and qualifications required'. It consequently decided not to fill the vacant posts under Article 29(1)(a) of the Staff Regulations and to 'proceed to a subsequent stage of the procedure'.
- 10 Following the Commission's meeting, the Consultative Committee met the same day (4 July 1990). According to opinion No 73/90, dated the same day, the committee, 'following the Commission's decision of 4 July 1990 to accept other applications', considered two applications for the vacant post in Directorate B, one from Mr Manuel Arnal Monreal, Professor of Political Economy at the University of Zaragoza and the other from Mr V. D., who in the mean time had become eligible for promotion. The committee 'took note' of the standard of the candidates and submitted their applications to the Commission.

- 11 As regards the vacancy in Directorate D, the Consultative Committee, after also referring in its opinion No 74/90 to the Commission's decision of the same day to accept external applications, considered the application from Mr Emilio Mastracchio, the only such application received. Mr Mastracchio was an official of the Commission in Grade A 3 but did not have the necessary seniority for promotion. The committee 'took note' of the candidate's abilities and submitted his application to the Commission.
- 12 There was only one candidate for the vacant post in Directorate C: that was Mr L., Director of Live Resources at the Ifremer Centre at Paris. In its opinion No 75/90 the committee 'took note' of this candidate's abilities and submitted his application to the Commission.
- 13 On 11 July 1990 the Commission again considered the questions relating to the filling of the three posts. According to special minutes No 1020 of the meeting, the Commission decided not to hold internal competitions. It noted that no applications had been registered under Article 29(1)(c) of the Staff Regulations and took note of the three opinions of the Consultative Committee of 4 July 1990. As regards the post in Directorate B, the Commission, after considering the comparative qualifications and merits of the two candidates, Mr Manuel Arnal Monreal and Mr V. D., decided to appoint Mr Manuel Arnal Monreal under Article 29(2) of the Staff Regulations. It likewise appointed the only candidate, Mr Emilio Mastracchio, to the post of Director of Directorate D. As regards the post in Directorate C, the Commission, after considering the qualifications and merits of the only candidate, Mr L., decided to appoint him under Article 29(2) of the Staff Regulations. The three appointments were announced to the Commission's staff on 18 July 1990 in *Administrative Notices* No 32/90. The Commission subsequently informed the applicants on different dates that the appointing authority had been unable to accept their applications for the posts in question.
- 14 On 18 October 1990 the applicants submitted a complaint to the appointing authority against the appointment of Mr Manuel Arnal Monreal to Directorate B and the appointment of Mr Emilio Mastracchio to Directorate D. In their complaint

the applicants expressed their doubts as to the legality of the contested decisions. Complaining of a breach of Articles 29(1) and 45(1) of the Staff Regulations and a misuse of procedure, they claimed that the procedure adopted in this case gave grounds for thinking that it had already been decided at the first stage of the procedure who the successful candidates were to be and that the vacancy notice had been published with the intention of taking no action in respect of any application under Article 29(1)(a) of the Staff Regulations. They also claimed that neither of the successful candidates possessed the thorough knowledge of the fisheries policy required by the vacancy notices; in order to be in a better position to protect their rights as laid down in the Staff Regulations, they asked the Commission to provide them with further information and the documents concerning the recruitment procedures followed.

- 15 On 3 May 1991 the Commission's Director-General for Personnel sent the applicants a decision of the Commission of 24 April 1991 concerning their complaint. The Commission stated that the appointments made under Article 29(2) of the Staff Regulations could not be challenged since the Commission had first of all taken account of the various possibilities provided for in Article 29(1). The Commission claimed that it had a wide discretion under Article 29 of the Staff Regulations and that its decisions could therefore be called in question only in the case of manifest error or misuse of power. It also stated that as the applicant's allegations regarding the knowledge of the candidates appointed were not accompanied by sufficient evidence the Commission had no alternative but to reject for their complaint.

The procedure

- 16 In those circumstances the applicants brought this action, which was lodged at the Registry of the Court of First Instance on 5 August 1991.
- 17 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. None the less, it decided to ask the Commission to answer certain questions and to produce certain documents. On 22 September 1992 the Commission lodged the administrative files concerning the filling of the three posts, and containing, *inter alia*, the correspondence relating to the

applications from Mr Arnal Monreal, Mr Mastracchio and Mr L., and Mr Mastracchio's personal file. The covering letter also referred to contacts with Mr Arnal Monreal which had taken place at the beginning of June 1990 and mentioned a memorandum of 20 June 1990 in which Mr Mastracchio had expressed his interest in the post in Directorate D.

18 By decision of the Court of First Instance of 18 September 1992, the Judge-
Rapporteur was assigned to the Fourth Chamber; consequently, the case was transferred to that Chamber.

19 The hearing took place on 28 October 1992. The parties presented oral argument and answered the questions put by the Court. The applicants lodged the text of a vacancy notice published in 1992 for the purpose of filling the post of director of Directorate A, General and Budgetary Affairs, of DG XIV.

20 The applicants claim that the Court should:

- declare their action admissible and well-founded;
- annul the Commission's decisions of 4 July 1990 not to fill by promotion the Grade A 2 posts of Director in DG XIV, namely in Directorate B and Directorate D, and to proceed to a subsequent stage in the procedure;
- annul the Commission's decisions of 11 July 1990 appointing Mr Manuel Arnal Monreal and Mr Emilio Mastracchio as Directors in DG XIV, in Directorate B and Directorate D, respectively;
- annul the Commission's decisions, notified by letters dated 3 May 1991, rejecting the applicants' complaint of 18 October 1990;

— order the defendant to pay the costs.

21 In its defence, the defendant contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

In its rejoinder, the defendant contends that the Court should:

— dismiss as unfounded all the applicants' complaints against the decision of the appointing authority rejecting their applications for the vacant posts;

— dismiss as inadmissible, for lack of legal interest in bringing proceedings, the applicant's pleas in law seeking the annulment of the appointment of other candidates to the posts in question, to which they could not validly aspire themselves; and, failing that, to reject their pleas as unfounded;

— order the applicants to pay their own costs.

Admissibility

The parties' arguments

22 The Commission claimed, first, that an action could be brought by an official only in his personal interest and on his own behalf. This action was therefore inadmissible in so far as it concerned the rejection of applications other than those of the applicants. Secondly, it contended that certain of the applicants' pleas in law were

at least in part inadmissible because they had not been raised during the pre-litigation stage or otherwise specified in the application. Thirdly, the Commission claimed that since the applicants did not fulfil the conditions to be appointed themselves to the posts at issue, the appointment of another candidate could not adversely affect them (see judgments of the Court of Justice in Case 111/83 *Picciolo v Parliament* [1984] ECR 2323 and of the Court of First Instance in Joined Cases T-160 and T-161/89 *Kalavros v Court of Justice* [1990] ECR II-871). Accordingly, all the applicants' arguments dealing with the final stage of the appointment procedure under Article 29(2) of the Staff Regulations are inadmissible.

Findings of the Court

- 23 As regards the Commission's first argument, it should be observed that, according to the applicants' pleas in law, their action is against 'the' decisions of the Commission of 4 July 1990 not to fill the two posts at issue. In their reply, the applicants claimed, *inter alia*, that the other candidates eliminated on 4 July 1990 also possessed the knowledge required by the relevant vacancy notices. In those circumstances, the action must be interpreted as being against all the decisions adopted by the Commission on 4 July 1990 in connection with the filling of the posts at issue. It should also be observed, however, that the rejection of the applications of Mr S. and Mr M. did not constitute acts adversely affecting the applicants. Consequently, the action must be dismissed as inadmissible in so far as it is directed against the decisions adopted in respect of those applications.
- 24 As regards the Commission's second argument, relating to the content of the complaint and the application, it should be observed that consideration of this argument is closely linked to that of the questions concerning the substance of the case. Consequently, it will be considered in the context of the various pleas to which it relates. The same applies to the third point raised by the Commission, which concerns the question whether the applicants themselves satisfied the conditions for appointment and whether, accordingly, they have a legitimate interest in the annulment of appointments at issue (see judgment of the Court of Justice in *Picciolo v Parliament*, paragraph 29). It is therefore necessary to consider the substance of the case.

Substance

25 In support of their applications, the applicants rely on two pleas in law. The first relates to failure to observe Articles 4, 27, 29(1) and (2) and 45 of the Staff Regulations, the unlawfulness of the procedure followed, the infringement of the principles of equality and the protection of legitimate expectation and also misuse of power and of procedure. The second plea refers to the statement of the grounds on which the contested decisions were based.

The applicants' first plea in law

— The parties' arguments

— The decisions not to fill the posts at issue by promoting the applicants

26 The applicants allege that the appointing authority reached its finding of 4 July 1990 to the effect that neither applicant had 'all the knowledge and qualifications required' without giving valid consideration to the question whether the posts could be filled by promotion. In their application, the applicants claimed that they possessed all the knowledge and qualifications required by the vacancy notices; at the hearing they further stated that Mr Booss had been President of the International Convention for the North Atlantic Fisheries. The decisions of 4 July 1990 excluding their applications are therefore manifestly unfounded.

27 In their reply, the applicants claimed that it was only when they read the Commission's special minutes No 1019, which were filed in an annex to its defence, that they learnt of that finding by the appointing authority, which, expressed in identical terms in each case, constitutes the ground for the decisions of 4 July 1990 not to fill the posts in question under Article 29(1)(a). Those grounds were not disclosed when the applicants were informed that the appointing authority had been unable to accept their applications, nor were they mentioned in the reply to their complaint. Consequently, any decision with regard to the applicants did not state the grounds on which it was based and was not validly notified to them. Furthermore, according to the applicants, the Commission did not adopt any definitive decisions with regard to them on 4 July 1990 (see paragraph 39, below).

- 28 According to the applicants, the procedure followed under Article 29(1) of the Staff Regulations was not terminated until 11 July 1990, the date on which the Commission found that there were no candidates under Article 29(1)(c) and decided not to hold internal competitions. In their opinion, the decision of 4 July 1990 to proceed to a subsequent stage in the procedure did not yet envisage proceeding to the procedure provided for in Article 29(2) of the Staff Regulations.
- 29 In the alternative, the applicants claimed that the decision of 4 July 1990 'to proceed to a subsequent stage in the procedure' did not contain the essential ingredients of a decision to follow a procedure other than the competition procedure. Such a decision should make clear whether the internal candidates are to be compared with the external candidates, since if the former are excluded there will be a risk that the Commission will not appoint the best candidate and that the internal candidates will be discriminated against in comparison with the external candidates. The decision of 4 July 1990 provides no answer to that question. Furthermore, the Commission failed to decide whether the officials who did not satisfy the conditions for promotion could apply under the procedure provided for in Article 29(2) of the Staff Regulations. It also failed to define the category or categories from which applications would be acceptable under that procedure or the detailed rules for inviting such applications (by advertising or any other non-discriminatory method of communication). The applicants maintain that such factors are indispensable to the legality of a decision opening a procedure for recruitment other than by competition.
- 30 The Commission observes as a preliminary point that the Staff Regulations are intended to confer wide discretion on the appointing authority in relation to recruitment to Grade A 1 and A 2 posts, since they lay down no conditions for the exercise of its power in making such appointments. The institutions therefore enjoy complete freedom in their choice of the most appropriate methods to fill those posts.
- 31 With more specific regard to the post in Directorate B, the Commission claimed in its rejoinder that the wording of the summary of the vacancy notice emphasized the minimum qualifications required for that post. These qualifications covered both 'knowledge and experience/ability in relation to the tasks to be carried out'

(see p. 1 of the vacancy notice) and particular knowledge concerning the direction and coordination of the work of the units concerned (see p. 2 of the vacancy notice).

32 According to the Commission, it follows from that wording of the vacancy notice that the post concerned implied that candidates must have abilities in two areas: the negotiation of commercial agreements with non-member countries and the management of market policy in relation to fisheries. In the light of these two branches of activity, the post was essentially aimed at candidates with training in economics. Although the legal and technical aspects of the tasks to be undertaken may be important, they are clearly outweighed by the economic approach. When commercial agreements are drawn up, their impact in the Community must be assessed in the light of the financial consideration offered to the non-member State. Each agreement must therefore be subjected to a detailed cost-effectiveness analysis by the Commission. The same applies to market policy, which essentially means the fixing of prices and the management of the markets according to the economic analyses which are closely linked thereto. For these reasons, the post was designed to attract candidates with a 'marked career profile as an economist', as required by the nature of the duties to be performed. Admittedly, knowledge in the area of the fisheries policy and international relations was also required under the special conditions, but expertise in economics was none the less the essential and indissociable quality which the person in charge of Directorate B was required to have.

33 The Commission states that none of the four candidates eligible for promotion had such a qualification. Mr S. had a diplomatic training, while Mr M.'s training was in philosophy and politics. The applicants are lawyers. It was for that reason that the Consultative Committee took the view on 28 June 1990 that none of the candidates had all the knowledge and qualifications required.

34 The Commission explains that on 4 July 1990, the full Commission considered the comparative merits of the candidates and came to the conclusion that none of them had all the knowledge and qualifications required. According to the minutes of the

meeting, some doubt seems to have arisen in the case of Mr M. (of British nationality), since of the four candidates he appeared to have the most experience in the economic field. His application was not accepted, however, because his abilities in that sphere were not deemed adequate and because 'geographical considerations' were unfavourable to his promotion. The only existing director of DG XIV already had British nationality, and the appointment of a second director of the same nationality would have seriously upset the geographical balance in the fisheries sector.

35 As regards the post in Directorate D, the Commission reiterates in its rejoinder that the wording of the summary of the vacancy notice emphasized the minimum qualifications required for that post. These qualifications covered both 'knowledge and experience/ability' in relation to the duties to be performed (see p. 1 of the vacancy notice) and special knowledge concerning the direction and coordination of the units concerned (see p. 2 of the vacancy notice).

36 The Commission claims that it follows from this wording of the vacancy notice that the post in question implied abilities in matters of 'structural policy'. The profile of this post, too, meant that it was essentially aimed at candidates with 'training in economics'. The structural fisheries policy depends essentially on intervention measures and associated socio-economic measures. A qualification in economics is therefore essential, but neither of the applicants had such a qualification. It was for this reason that the Consultative Committee came to the conclusion on 28 June 1990 that the applicants did not have all the knowledge and qualifications required, the same conclusion being reached by a meeting of the Commission on 4 July 1990.

37 The Commission therefore closed the stage of the procedure under Article 29(1)(a) by declaring on 4 July 1990 that none of the candidates had all the knowledge and qualifications required. The decision of 4 July 1990 to proceed to 'a' subsequent stage in the procedure could reasonably be regarded — regard being had to the level of the posts to be filled — only as referring to Article 29(2) of the Staff Regulations.

38 The Commission denies that it can have committed a manifest error of appraisal of the facts. It reiterates that the applicants did not meet one of the conditions required by the vacancy notices, namely 'knowledge and experience/ability in relation to the tasks to be carried out'. The procedure under Article 29(1)(a) was scrupulously followed. The Consultative Committee issued its negative opinions on 28 June 1990 after considering the applicants' candidatures and on 4 July 1990 the Commission did not commit any manifest error when it carried out its own evaluation. The mere reference by the applicants to their *curricula vitae* is not sufficient to establish such an error on the Commission's part.

— The appointments made by the Commission

39 The applicants state that the procedure followed under Article 29(1) of the Staff Regulations was not validly closed, and that when the Consultative Committee, by adopting its opinions, embarked on 4 July 1990 on the second stage of the procedure provided for in Article 29(2) it did not therefore have the authorization of the appointing authority. That fact renders the Consultative Committee's opinions unlawful and the two appointments made by the appointing authority on 11 July 1990 are therefore the result of invalid procedures. The appointing authority was never lawfully able to proceed to the subsequent stage in the procedure, under Article 29(2), since it had not validly completed the stage envisaged in Article 29(1)(a).

40 As regards the opinions adopted by the Consultative Committee on 4 July 1990, the applicants claim that Mr Arnal Monreal, Mr Mastracchio and Mr V. D. were chosen according to secret and discriminatory procedures, since the internal candidates who had applied under the procedure prescribed in Article 29(1)(a), like other officials who would have been declared eligible in the event of competitions, were excluded. That choice of candidates in that way, without any publicity, risked depriving the appointing authority of the opportunity of considering candidates of the highest standard of ability, efficiency and integrity. As far as the candidates who were already officials are concerned, these arbitrary procedures constitute a breach of the Staff Regulations, discrimination and misuse of procedure, since the Consultative Committee accepted of its own motion only the application of Mr V. D., no doubt in order to reduce the risk of being accused of discrimination.

- 41 As regards the appointments made by the appointing authority on 11 July 1990, the applicants observe, first of all, that the Commission followed the procedure provided for in Article 29(2) without any publicity.
- 42 As regards the persons appointed, namely Mr Arnal Monreal and Mr Mastracchio, the applicants have pointed out that the extracts from their *curricula vitae* published by the Commission in October 1990 showed no evidence, unlike that of Mr L., of lengthy and thorough experience of the fisheries policy. The risk that unqualified candidates might be appointed therefore materialized in this case.
- 43 Referring in their reply to the more detailed *curricula vitae* of the candidates in question, which were produced by the Commission as an annex to its defence (Annex H), the applicants claimed that, contrary to the Commission's allegations, the two candidates did not have a particular career profile demonstrating the ability to manage and run an important administrative unit. The two appointments are therefore unlawful, as the candidates did not satisfy the requirements set out in the vacancy notices, which are equally binding on the appointing authority when it follows the procedure provided for in Article 29(2).
- 44 In adopting its various decisions, the Commission therefore applied different criteria on 11 July 1990 from those which it had applied on 4 July 1990. Fairness and the interests of the service require that when the procedure envisaged in Article 29(2) is followed, the conditions applied in respect of external candidates and those applied in respect of persons who are already officials or other servants of the Communities be the same, or at least equivalent.
- 45 The applicants emphasize that in following the procedure provided for in Article 29(2) the Commission should have compared the external candidates with the internal candidates who had already come forward. While they accept that Article 29(2) allows the appointing authority to replace certain features characteristic of competitions with other procedural rules which it considers more appropriate, these must none the less observe the objectives of the competition procedure. The applicants observe that the Staff Regulations make no provision for competitions open to

external candidates alone (see the judgment of the Court of Justice in Case 176/73 *Van Belle v Council* [1974] ECR 1361, paragraph 8). The Commission's argument that it could apply the procedure provided for in Article 29(2) solely to candidates from outside the institutions is therefore wrong. In any event, the appointing authority could not exclude from such a recruitment procedure the candidates who had come forward during the previous stage, under Article 29(1)(a). The appointing authority's decision not to appoint one of those candidates following this first stage brings to a close only the preferential consideration to which internal candidates are entitled. The appointing authority's duty, set out in Article 27 of the Staff Regulations, to seek candidates of the highest standard, requires such an interpretation of the Staff Regulations. To exclude from the procedure under Article 29(2) the candidates who are recognized by Article 29(1)(a) as having a certain priority is therefore contrary to the objective of any recruitment procedure.

46 The Commission disputes the procedural defects alleged by the applicants. On 11 July 1990, the Commission, after closing the stage provided for in Article 29(1)(a) by its decisions of 4 July 1990, 'formally' decided not to hold internal competitions and 'expressly' observed that no applications had been registered under Article 29(1)(c) of the Staff Regulations. The procedure envisaged in Article 29(1)(b), namely a competition internal to the institution, is merely a possibility and is left to the discretion of the appointing authority, but is irrelevant where no candidate eligible for promotion has come forward. Consequently, there was no breach of the normal chronology between recourse to Article 29(1) and recourse to Article 29(2). The Consultative Committee was therefore legitimately entitled to adopt its opinions on 4 July 1990. The Commission further states that the committee simply took note of the standard of the candidates and submitted their applications to the full Commission.

47 The Commission further states that the Court of Justice has held that the decision to make use of the procedure provided for in Article 29(2) need not necessarily be taken when the vacancy notices are published and is not made subject to any condition as regards publication. The appointing authority is not required to make any arrangements to publicize this special procedure, still less to do so in any specific form. The Commission considers that this is the counterpart of fact that the individual characteristics of officials appointed to Grade A 1 and A 2 posts are regarded as so important. The fact that the procedure was not publicized did not in this case lead to any discrimination adversely affecting the applicants. In any event, such an

argument is unfounded, as is shown by the fact that the Commission considered Mr V. D.'s application.

48 On 11 July 1990 the Commission merely confirmed its decision of 4 July 1990 to resort to the procedure provided for in Article 29(2), by 'formally' stating that no applications had been received from other institutions and that it was inappropriate to hold an internal competition. Even if that statement in fact was a belated regularization, rather than a confirmation, of an earlier decision, that could have no influence on the content of the contested decisions. Accordingly, it does not constitute a substantial breach of procedure and, according to the case-law of the Court of Justice, provides no ground for annulment.

49 As regards the successful candidates, the Commission stated in its rejoinder that, regard being had to the special nature of the posts to be filled, the potential candidates had been approached 'by the Commission itself', since it is essential that persons occupying A 2 posts enjoy the personal confidence of those for whom they work. The argument that the procedure was not publicized is therefore unfounded.

50 As regards the appraisal of the candidates' qualifications, the Commission states that the appointing authority has a wide discretion which allows it to place greater emphasis on a candidate's ability to run and coordinate the work of several units than on his specialized knowledge, which may still be available within the sectors coming under the authority of the director to be appointed. In the present case the outstanding qualities of the successful candidates are evident from their *curricula vitae*. The appraisal of their applications could be called in question only in the event of manifest error or misuse of power, which would have to be demonstrated by the applicants.

51 In the Commission's view the successful candidate for the post in Directorate B did in fact present the essential components of the profile sought by the vacancy notice. He was Professor of Political Economy at the University of Zaragoza and had written a thesis on the regional problems of the Community and a number of

books and articles on the common agricultural policy and the Community's Mediterranean policy. During the written procedure the Commission did not deny that his abilities were essentially concentrated on agrarian and regional problems and not specifically on those of fisheries. None the less, it claimed that from an economic point of view agrarian and regional problems are virtually identical to those of fisheries, since they involve the same type of analyses as regards their economic impact.

52 At the hearing the Commission further stated that several of Mr Arnal Monreal's published work and articles demonstrated that he was not only a celebrated specialist in agriculture but also a specialist in the area of fisheries. He had, for example, identified regional problems in the Community connected with the fisheries sector, described the historical development of fishing in the region of Valencia (Spain) and explained certain trends in the fisheries sector in a study of agriculture and food supply in a number of Arab and Mediterranean countries. The appointment of Mr Arnal Monreal, a doctor of the universities of Montpellier and Madrid and a graduate of the University of Harvard, cannot therefore be vitiated by misuse of power or have been effected in manifest ignorance of his knowledge.

53 As regards the post in Directorate D, the Commission maintains that the successful candidate also had the desired career profile. As a doctor of economics and a specialist in the fields of European economy and international law, he had during the course of his experience with the Commission become familiar with the financial institutions and the European Monetary System and with directing the task-force for small and medium-sized undertakings ('SMUs'). He spent some time in the Cabinet of a member of the Commission and has written a number of articles in the field of economics focused on the Community credit policy, the New Community Instrument and SMUs. In the Commission's view, that experience in the field of economics made him an ideal person to work in the sphere of structural policy. That was the case with the post in question, in which the principal activity is concerned with measures to support SMUs in the fisheries sector. The Commission does not dispute that Mr Mastracchio had no previous specific responsibility for problems associated with fisheries, but considers that he none the less satisfied the essential constituents of the career profile sought.

54 Lastly, the Commission states that there is nothing in the Staff Regulations to require it to compare external candidates with internal candidates. According to the Commission, such an obligation exists only where the appointing authority has expressly decided, at the first stage of the procedure, not to reach a definitive conclusion and to throw the posts open to a wider range of candidates (see judgments of the Court of Justice in Case 128/84 *Van der Stijl v Commission* [1985] ECR 3281 and in *Picciolo v Parliament*, and judgment of the Court of First Instance in *Kalavros v Court of Justice*). In this case the full Commission had already eliminated on 4 July 1990 the four applications registered during the first stage, after considering their respective merits as required at that stage. Consequently, it could not subsequently accept those candidates in the second stage without going back on its own decision. Although in the case of *Moritz v Commission* the Commission reconsidered, in the procedure under Article 29(2), the two candidatures already eliminated beforehand, there was absolutely no requirement that it should do so (see judgment of the Court of First Instance in Case T-29/89 [1990] ECR II-787).

55 At the hearing, the applicants called in question the Commission's explanations in its rejoinder to the effect that the deciding criterion in the appraisal of the applications was the career profile of the successful candidates in the field of economics. They claimed that if the Court were to accept that argument vacancy notices would no longer serve any great purpose. In this case, the question arises as to why, if thorough knowledge of the fisheries sector was of only secondary interest, the Commission had mentioned that requirement in the vacancy notices.

— The fact that the posts in question were reserved for certain nationalities

56 The applicants claim that the change in DG XIV's organigramme had been the subject of discussion and assurances concerning the so-called 'geographical' distribution of certain posts and that both the successful candidates, Mr Arnal Monreal and Mr Mastracchio, had been 'preselected'. The change in the organigramme was preceded by the departure of three of the four directors in DG XIV; one of these (responsible for External Resources and Markets) was of Spanish nationality, one was French and one (responsible for 'structures') Italian. Each of the three new directors was therefore of the same nationality, and discharged the same duties, as his predecessor, apart from the French director, whose duties had been changed.

- 57 According to the applicants, the appointing authority's decisions of 4 July 1990 not to proceed with the internal applications were adopted with the sole purpose of excluding the candidates concerned from the subsequent stages of the procedure. The applicants claim that the true reason for the decisions was that they were not of the same nationality as the three former directors who had left DG XIV.
- 58 They claim that by appointing two preselected candidates the Commission achieved a previously conceived intention. It excluded all other actual or potential candidates in favour of two candidates who did not have the required knowledge, but only the required nationality. In the applicants' view, nationality can play only a secondary role when appointments are made and cannot lead to appointments which fail to take account of the occupational requirements laid down for the posts to be filled.
- 59 The applicants go on to state that their conviction that the filling of the posts at issue was constituted a misuse of power and abuse of procedure is further supported by the fact that the Commission took no action in response to a request which they had already submitted in their complaint, in which they had asked to be provided with certain information and certain documents (see questions 4 and 5, pp. 2 and 3 of the complaint, annex 7 to the application). Their analysis is also confirmed by the fact that the appointing authority examined the applications of only two officials, Mr Mastracchio and Mr V. D.
- 60 At the hearing, the applicants further claimed that in the mean time the fourth post as director in DG XIV, which up to then had been held by a British subject, became vacant. They lodged the summary of Vacancy Notice COM/052/92 concerning that post, pointing out that it no longer requires thorough knowledge of the fisheries sector, but that it contains a new requirement, since 'knowledge of English is desirable'. Mr M., of British nationality, was appointed to that post in the mean time. The applicants maintain that once again those facts confirm the misuse of power in their case.

- 61 The Commission observes that the applicants did not claim in their application that the Commission had wished to exclude all the candidates at the stage of the procedure envisaged in Article 29(1)(a) with the intention of making the two appointments at issue under Article 29(2) without considering the comparative qualifications of the new candidates and the four already eliminated. The Commission raises the question whether the submissions put forward by the applicants in that regard are new pleas in law, but sees no objection to answering them. The Commission observes that owing to the particular features of the special recruitment procedure envisaged in Article 29(2), it must be accepted that it was impossible for it to have used its powers for a purpose other than that for which they were conferred on it. The applicants have not adduced the slightest shred of evidence that the Commission was pursuing an unlawful motive or acting in a discriminatory manner. The fact that the successful candidates have the same nationality as their predecessors does not in itself prove the existence of misuse of power.
- 62 The arguments alleging a failure to comply with various provisions of the Staff Regulations, the unlawfulness of the procedure followed, a breach of the principles of equality and the protection of legitimate expectation and misuse of power should therefore be rejected.

— *Findings of the Court*

- 63 As the applicants' first plea in law alleges a failure to comply with a number of articles of the Staff Regulations and certain general principles of Community law and also misuse of power and abuse of procedure, it should be observed first of all that its scope is too comprehensive. The Court therefore considers that it is appropriate, in the interest of a precise appraisal of the various aspects of the case, to examine two distinct pleas, namely, first, a plea alleging infringement of Articles 4, 29(1) and 45 of the Staff Regulations and disregard of the vacancy notice and then a plea alleging infringement of the third paragraph of Article 27 of the Staff Regulations.

— The submission alleging infringement of Articles 4, 29(1) and 45 of the Staff Regulations and disregard of the vacancy notice

1. Admissibility

64 It should be observed at the outset that the applicants' complaint referred to their applications, which were rejected by the Commission, for the two posts at issue. The applicants expressed doubts as to the legality of the Commission's decisions to reject them (paragraphs 1 and 2 of the complaint). It was therefore clear from the content of the complaint that the applicants disputed the legality of the conduct of the first stage of the recruitment procedure. The applicants also called in question the appointment of the two successful candidates (paragraphs 2 and 4 of the complaint). It was therefore clear from the content of the complaint that the applicants also disputed the results of the second stage of the recruitment procedure. At the pre-litigation stage of the procedure, the applicants had therefore objected to all the decisions adopted by the Commission in the course of the procedure to fill the posts declared vacant.

65 It should next be observed that the applicants expressly referred in their application to Articles 4, 29(1) and 45 of the Staff Regulations. They claimed that the appointing authority's findings of 4 July in relation to the knowledge of the candidates who had come forward following the publication of the vacancy notices had been made without any valid consideration of the possibilities of filling the posts at issue by promotion (p. 13 of the application). In their plea referring to the statement of the grounds on which the decision rejecting their candidatures was based, the applicants stated that they fully satisfied the requirement in relation to knowledge of the fisheries policy as set out in the vacancy notices (p. 22 of the application). Lastly, the applicants claimed that the Court should annul the decisions adopted by the Commission on 4 and 11 July 1990. In accordance with Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, the application therefore contained a summary of the plea in law now being considered, a plea which concerns all the contested decisions of the Commission and which is based on the alleged irregularities affecting the conduct of the promotion procedure in which the applicants participated. This plea must therefore be regarded as admissible.

- ⁶⁶ Lastly, it should be pointed out that the applicants claimed at the hearing that the Commission's arguments regarding the successful candidates' qualifications contradicted the wording of the vacancy notices. The Court considers that this statement by the applicants constitutes only a supplementary argument regarding the defects in the promotion procedure. It should further be pointed out that even if it were a new plea in law it would be admissible under Article 48(2) of the Rules of Procedure of the Court of First Instance, since it was put forward only in reply to a point which the Commission did not reveal for the first time until the stage of the rejoinder.

2. Substance

- ⁶⁷ It should be observed at the outset that, according to the settled case-law of the Court of Justice, the appointing authority is required under Articles 29(1)(a) and 45(1) of the Staff Regulations to consider the comparative merits of the candidates eligible for promotion, acting within the legal limits which it has imposed on itself by the vacancy notice. The provisions of the Staff Regulations are not satisfied if the appointing authority becomes aware of conditions specially required to fill a post declared vacant only after the relevant vacancy notice has been published, regard being had to the candidates who have come forward, and if it interprets the wording of the vacancy notice in a way which seems to it to be in the best interests of the service. The Court of Justice has held that any other interpretation of the provisions of the Staff Regulations would deprive the vacancy notice of its basic function in the recruitment procedure, namely to give those interested the most accurate information possible of the nature of the conditions required to fill the post in question. On those grounds, for example, the Court of Justice annulled a decision appointing to a post in Grade L/A 3 an official who did not have the knowledge of languages required by the relevant vacancy notice (see Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraphs 38 to 40; see also Case C-343/87 *Culin v Commission* [1990] ECR I-225, paragraphs 20 to 22, where the Commission had replaced the criterion 'knowledge of ... the sectors concerned' with the criteria '... open-mindedness and organizing ability'). Since there are no specific provisions in the Staff Regulations governing promotion to Grade A 2, the Court of First Instance considers that in this case it is necessary to have regard to that case-law.

68 In order to explain the criteria which determined its choice, the Commission referred in this procedure to the wording of the summary of the vacancy notices which had accompanied the publication of the vacancy notices in question. It is true that, under the third indent of the heading 'minimum qualifications required for transfer/promotion', that summary refers to the requirement of 'knowledge and experience/ability in relation to the tasks to be carried out'. It should be pointed out, however, that under the same heading, a fourth indent, referring to 'posts requiring particular qualifications', states that for such posts the minimum qualifications required must include 'thorough knowledge and experience in/in relation to the sector of activity' concerned. In its Vacancy Notices COM/47/90 and COM/49/90, the Commission specifically required, in express terms, such particular qualifications. It follows that the wording of the 'summary of vacancy notices' is not to be interpreted as having exempted the Commission from considering the candidates' 'thorough knowledge' in the spheres indicated in the respective vacancy notices.

69 As regards Vacancy Notice COM/47/90, concerning a post as director in Directorate B, the Commission did not claim that training in economics and a 'marked career profile as an economist' were expressly required. None the less, it rightly referred to the description of the tasks to be carried out and the description of the function in question, which must be taken into consideration in the interpretation of a vacancy notice. The internal document concerning that vacancy notice, which the Commission produced as an annex to its rejoinder, reveals that the directorate was indicated (External Resources and Markets) and the function to be carried out by the director was described ('Directing and co-ordinating the work of the units responsible for negotiating agreements on fisheries with non-member countries and market policy concerning fisheries'). The Court considers that the designation of the directorate implies that it has an economic orientation. As regards the director's function, it also seems clear that a director with a career profile as an economist can fulfil such functions. However, the Court considers that it cannot be precluded that a director with a career profile in the field of diplomacy or political science or even in fisheries or the law, might also run such a directorate, especially if account is taken of the fact that specific knowledge of economics, where necessary, may be found within the directorate itself, at the level of the heads of division and their colleagues. Consequently, it should be stated that neither the description of the directorate concerned nor that of the duties to be performed necessarily means that the candidate must have training in economics and a 'marked career profile as an economist'.

- 70 Vacancy Notice COM/49/90 also required, as 'special qualifications', a thorough knowledge of the fisheries policy and of the relevant international relations. It should be observed that the fisheries policy comprises, in particular, elements in the spheres of economics, fisheries and the law. International relations in relation to fisheries are based on diplomatic negotiations concerning, above all, economic and legal issues. Thorough knowledge in that sphere, including the necessary knowledge of economics, may be acquired during their careers by officials who started their careers with training in economics, diplomacy, fisheries, politics or the law. They do not necessarily imply a 'marked career profile as an economist', which assumes a specific qualification in economics.
- 71 Therefore the Commission, which, at the time it adopted its decisions concerning the applicants' candidatures for promotion, required training in economics and a 'marked career profile as an economist', added to the knowledge required by the vacancy notice a new 'special qualification' which was not mentioned in the notice and did not necessarily follow from the description of the tasks to be carried out. That is not compatible with the purpose of the vacancy notice, which, as the Court has pointed out, is to give the persons interested accurate information as to the conditions required to fill the post in question.
- 72 It follows from the foregoing considerations that, as regards Vacancy Notice COM/47/90, the Commission, in appraising the applicants' candidatures for promotion, took as the decisive criterion one which did not appear in the vacancy notice. As in the *Culin v Commission* case, the Commission therefore breached the self-imposed legal limits. Consequently, the Commission's decisions not to fill the Grade A 2 post of director of Directorate B under the procedure provided for in Article 29(1)(a) must be annulled in so far as they concern the applicants' candidatures, and it is not necessary to consider whether it is possible to establish a manifest error of appraisal by the Commission of their knowledge of the fisheries policy.

73 It must next be considered whether the Commission's simultaneous decision 'to proceed to a subsequent stage in the procedure' must also be annulled. Account being taken of the link between the procedures to which the Commission successively had recourse in this case for the purpose of filling the post of director, the purpose of that decision was to allow it to consider the applications submitted outside the promotion procedure. Since the Commission did not withdraw the vacancy notice, its decision to proceed to a 'subsequent stage' must be regarded as the consequence of its decisions not to fill the post in question under Article 29(1)(a) of the Staff Regulations and to terminate its consideration of the possibilities of promotion within the institution. The decision to proceed to a 'subsequent stage' was therefore dependent on the decisions concerning the applications for promotion. If, as in this case, two of those decisions are annulled, the subsequent decision loses its legal basis to that extent. Since the decision is affected by the nullity of two of the earlier decisions, it must therefore, and to that extent, be annulled too.

74 As regards Vacancy Notice COM/49/90, concerning a post as director of Directorate D, the Commission did not claim that it was expressly required that candidates should have a training in economics. None the less, that vacancy notice is to be interpreted, once again, in the light of the description of the directorate concerned and the description of the duties to be performed. In that regard, it follows from the internal document produced by the Commission that the directorate in question is the Structures Directorate, a designation which, in the Court's view, implies an economic orientation. The director's function consists in directing and coordinating the work of the units responsible for the structural fisheries policy. Once again, it seems clear that a director with a training in economics can perform such duties. However, the Court considers that in this case, too, it cannot be precluded that a candidate with different training might also run such a directorate after acquiring the specific knowledge required during a career in which he has risen to a Grade A 3 post, since specific knowledge of economics, where necessary, may be found within the directorate itself, at the level of the heads of division and their colleagues. Consequently, it should be stated that neither the description of the directorate concerned nor that of the function to be performed necessarily implies that the candidate must have a training in economics.

75 Vacancy Notice COM/49/90 also required, as 'special qualifications', thorough knowledge of the fisheries policy. As the Court has stated above, the fisheries

policy comprises, in particular, elements in the sphere of economics, fisheries and the law. Thorough knowledge in that sphere, even orientated specifically towards the structural policy, may be acquired during their careers by officials who started with training in economics, diplomacy, fisheries, politics or the law. It does not necessarily imply training in economics. It must therefore be considered that the vacancy notice did not preclude applications from lawyers who were specialists in the fisheries policy.

76 Consequently, by requiring training in economics in the decisions which it adopted concerning the applicants' candidatures for promotion, the Commission once again added to the knowledge required by the vacancy notice a new 'special qualification' which was not mentioned in, and did not necessarily result from, the description of the duties to be performed. In doing so the Commission breached the self-imposed legal limits contained in Vacancy Notice COM/49/90. Its decisions not to fill the A 2 post of director of Directorate D under Article 29(1)(a) of the Staff Regulations must also be annulled, in so far as they concern the applicants' candidatures. Once again, the annulment of those decisions means that the decision to proceed to a 'subsequent stage' in the procedure is also void.

77 Lastly, the Court must consider whether the Commission's decisions appointing Mr Arnal Monreal and Mr Mastracchio must also be annulled. In that regard, it should be observed at the outset that the fact that the decisions not to fill the posts at issue under Article 29(1)(a) of the Staff Regulations are void has the consequence that the applicants' candidatures will have to be reconsidered by the Commission. The Commission may, of course, withdraw the vacancy notices which have been published. None the less, it cannot be denied that in the present circumstances the applicants have a legitimate interest in seeking the annulment of the decisions to appoint the above-mentioned candidates, which are closely linked to the decisions concerning their applications for promotion.

78 In making those appointments on 11 July 1990, the Commission expressly referred on two occasions to its decisions of 4 July 1990 not to fill the posts in question under Article 29(1)(a) of the Staff Regulations and to proceed to a subsequent stage in the procedure (see the Commission's special minutes No 1020, Annex E to the defence). According to the analysis contained in its rejoinder, the Commission, in doing so, either confirmed or regularized its earlier decision to proceed to a subsequent stage in the procedure. The Commission therefore regarded its decisions of 4 July 1990 as constituting the legal basis for its subsequent decisions, otherwise any 'confirmation', or even 'regularization', would have been superfluous.

79 The Court considers that the Commission's analysis corresponds to the legal position. In the light of the link between the procedures to which the Commission successively had recourse in this case, the legality of the decisions of 4 July 1990 constitutes a condition precedent for the legality of the subsequent decisions. The appointments on 11 July 1990 could therefore be validly adopted only after a lawful decision had been adopted on the applicants' candidatures for promotion. The annulment of the decisions of 4 July 1990 therefore means that the decisions of 11 July 1990 appointing Mr Arnal Monreal and Mr Mastracchio are void.

80 That solution is consistent with the case-law of the Court of Justice, which accorded a similar scope to the annulment of a decision terminating a recruitment procedure. In that case the appointing authority had considered that the result of a competition was irregular. It was held that the annulment of that decision meant that a subsequent appointment was void (see order of the President of the Third Chamber of the Court of Justice in Case 176/88 R *Hanning v Parliament* [1988] ECR 3915, paragraph 13).

81 The plea in law alleging an infringement of Articles 4, 29(1) and 45 of the Staff Regulations and disregard of the vacancy notice must therefore be upheld.

— The plea in law alleging an infringement of the third paragraph of Article 27 of the Staff Regulations

1. Admissibility

- 82 It should be observed as a preliminary point that the applicants claimed in their complaint that the two successful candidates had already been chosen at the first stage of the procedure to fill the posts at issue and that the vacancy notices had been published with the intention of not taking action in respect of any application at that first stage. The procedures were therefore misused (paragraph 3 of the complaint). However, the claim that the successful candidates were chosen in advance on grounds of their nationality does not appear in the complaint.
- 83 The Court of Justice and the Court of First Instance have consistently held that the rule requiring consistency between the complaint and the initiation of legal proceedings requires, on pain of inadmissibility, that a plea put forward before the Community judicature has been raised already in the complaint through official channels, so that the appointing authority was in a position to know in sufficient detail the criticisms which the person concerned is making against the contested decision. A submission which has not been 'relied on' in the complaint is therefore inadmissible (see judgment of the Court of First Instance in Case T-57/89 *Alexandrakis v Commission* [1990] ECR II-143, paragraphs 8 and 9). In Case 242/85 *Geist v Commission* [1987] ECR 2181, paragraph 9, the Court of Justice held, however, that while the conclusions submitted to the Court may contain only 'heads of claim' based on the same matters as those relied on in the complaint, those heads of claim may none the less be developed before the Community judicature by the presentation of submissions and arguments which need not necessarily appear in the complaint but must be closely linked to it.
- 84 In this case the applicants claimed in their complaint that the procedures for appointment had been misused because the candidates appointed had allegedly been chosen in advance. That head of claim, namely abuse of procedure, is closely linked to the complaint alleging an unlawful geographical division of the posts which the applicants raised only subsequently at the stage of their action before the Court. Accordingly, the Court considers that this head of claim is admissible even

though the applicants raised it only in their application and it was not expressly mentioned in the complaint.

2. Substance

85 It should first of all be pointed out that the rule laid down in the third paragraph of Article 27, that no posts are to be reserved for nationals of any specific Member State, must be observed in all the recruitment procedures provided for in Article 29 of the Staff Regulations, including the procedure provided for in Article 29(2) (see judgment of the Court of Justice in *Case 85/82 Schlob v Council* [1983] ECR 2105, paragraphs 37 and 38). Even as regards the recruitment of Grade A 1 or A 2 officials, the institutions are therefore not entitled to reserve posts for the nationals of certain predetermined Member States.

86 The first paragraph of Article 27 does, of course, provide that officials are to be recruited on the broadest possible geographical basis from among nationals of Member States. That provision, however, does not allow the appointing authority to reserve a post for a specific nationality unless such action is justified on grounds connected with the proper functioning of the service (see judgments of the Court of Justice in *Case 15/63 Lassalle v Parliament* [1964] ECR 31, at p. 38 and *Schlob v Council*, paragraph 37).

87 Consequently, it is next necessary to consider whether the applicants have adduced sufficient evidence before the Court to prove to the requisite legal standard their allegations that the posts at issue were unlawfully reserved to candidates of specific nationalities. As the Court requested the Commission to produce certain documents and to answer certain questions regarding the course of the procedure to fill the posts in question, it is necessary to consider the contents of the Commission's answer dated 22 September 1992 and the documents annexed thereto in the light of the explanations which the Commission submitted during the written procedure and at the hearing.

88 It should be pointed out first of all that the Commission itself stated that it approached potential candidates (p. 38 of the rejoinder). That step indicates that the Commission had no confidence in the results to be expected from the promotion procedures but took initiatives in parallel with those procedures.

89 It is also apparent from the Commission's answer of 22 September 1992 that the Spanish Minister for Agriculture and Fisheries contacted Mr Arnal Monreal at the beginning of June 1990 in order to ascertain whether he was interested in applying for a post as director in the Commission's DG XIV. Mr Arnal Monreal answered in the affirmative and was asked to send his *curriculum vitae* to the office of Mr Marín, Vice-President of the Commission, who was then responsible for the fisheries policy.

90 The administrative file produced by the Commission contains a letter to the Director-General of DG XIV from Mr Vice-President Marín's Chef de Cabinet, dated 19 June 1990 and worded as follows:

'Mr Vice-President Marín has asked me to forward to you the CV of Mr Arnal Monreal, who is a candidate for an A 2 post in DG XIV.'

Annexed to that letter was a 10-page *curriculum vitae*. There was no formal application of the type normally used by the Commission in its recruitment procedures.

91 In view of these clearly established facts, it must be stated that the Spanish Government contacted Mr Arnal Monreal at the beginning of June 1990, that is before the end of the first stage of the recruitment procedure, and that Mr Arnal Monreal sent his *curriculum vitae* to Mr Vice-President Marín's office before 19 June 1990, the date of the letter from his Chef de Cabinet. This two-fold finding therefore makes it possible to establish that the application in question was prepared and submitted before the applicants' applications had been rejected on 4 July 1990.

- 92 The Commission claims that this sequence of events may be explained by its desire to fill the post before the beginning of the summer vacation. That explanation is not convincing, since it was quite possible, in the absence of any special circumstances which have not been referred to by the Commission, for a temporary posting to be made during the vacation without any harmful consequences for the administration of the directorate in question.
- 93 The Court must also take into consideration the fact that, as the Commission itself states, Mr Arnal Monreal's abilities were essentially focused on agrarian and regional problems. It is true that the Commission claimed that from an economic aspect those problems are 'virtually identical' to fisheries problems and also that if a candidate had shown evidence, in addition to such an impressive training in economics, of greater specialization in the sphere of fisheries, he would have presented an 'even more ideal career profile' (pp. 10 and 11 of the rejoinder). The Court none the less considers that, even when account is taken of those statements, the Commission's explanations do not suffice to demonstrate that the candidate in question had thorough knowledge of the Community fisheries policy.
- 94 Apart from the evidence thus far taken into consideration, in particular the steps taken by the Commission in parallel to the course of the procedure for promotion, the speed of the decision-making procedures and the questionable nature of the application which was accepted, it should be observed that at the hearing the Commission's representative, in reply to a question put by the Court, said that the Spanish Government, without doubt one of those most affected by the fisheries policy, had put forward a candidate; that the Court should not 'be oblivious to certain political realities', and that there was a level where the geographical aspect became relevant.
- 95 The Court considers that all the evidence adduced, and especially the said remarks by the Commission's representative, combine to explain the course of the recruitment procedure in question. It is common ground that a post as director in DG XIV had previously been held by a Spanish national. It is apparent from the contacts which the Spanish Government had with Mr Arnal Monreal that it

considered, in the light of the vacancies which had arisen in 1990, that, politically speaking, it was 'owed' a director's post. It is apparent that, by accepting the 'Spanish' application presented to it, the Commission accepted, at least by implication, the 'political reality' to which its representative referred at the hearing. That approach by the Commission is consistent with the fact that Mr Arnal Monreal's application had been prepared before the decisions of 4 July 1990 had been adopted. It is also apparent that, without any need to await the results of the consideration of the internal applications, the Commission already knew, at least in June 1990, that the Spanish Government's candidate would in any event be appointed.

- 96 Consequently, it must be stated that the post in question had been reserved, within the Commission and on the basis of at least an implied agreement, for the only candidate of Spanish nationality, and that it had been so reserved before the decisions rejecting the applicants' candidatures had been adopted. The Commission agreed to accept a 'less ideal' candidate for the purpose of assigning the post to the only candidate of Spanish nationality. That decision was motivated by the 'political reality' pleaded before the Court, whilst considerations concerning the proper functioning of the service, which might have justified the 'broadest possible geographical basis' within the meaning of the first paragraph of Article 27 of the Staff Regulations, played no part.
- 97 As regards the post as director of Directorate D, the Commission explained that Mr Mastracchio had thought it appropriate, as early as 20 June, to send to Mr Vice-President Marín and Mr Vice-President Cardoso e Cunha, who was then responsible for personnel matters, a memorandum indicating his interest in the post declared vacant in the event of the rejection of any applications admissible under the rules governing promotion. Those statements are confirmed by a letter of 20 June 1990 in the administrative file concerning Directorate D produced by the Commission.
- 98 It should be observed, however, that the Commission accepted in its rejoinder that before being appointed Mr Mastracchio had never had any specific responsibility

for problems associated with the fisheries policy. The Commission further stated that if a candidate had had, in addition to Mr Mastracchio's career profile, such specific ability, 'he might have been preferred to him' (p. 14). The Commission therefore accepted that the candidate did not have specific knowledge of the fisheries policy, which is confirmed by the contents of his individual file as produced to the Court.

99 It should also be pointed out that, when asked by the Court to answer a question referring to any oral contacts which might have taken place with Mr Mastracchio, the Commission did not answer. It is therefore for the Court to appraise that evidence which arose during the procedure.

100 The Court considers that the letter from Mr Mastracchio constitutes evidence that his application was also prepared before the applicants' candidatures had been rejected on 4 July 1990. As is apparent from the foregoing considerations, the political significance of the post in question for the Italian Republic must not be overlooked. A post as director in DG XIV had previously been occupied by an Italian national. At the hearing the Commission's representative, during the discussion concerning the filling of the second post, repeated his remark about 'political realities which cannot be ignored'. Those convergent circumstances indicate that the post in question was regarded as an 'Italian post', even though no contacts with the Italian Government were established. In addition to those circumstances there is the fact that the Commission did not answer the Court's question regarding possible oral contacts with Mr Mastracchio. In the face of the Commission's silence on that point, and taking account of all the circumstances already described, the Court finds that — as for Directorate B — the post was reserved within the Commission for a candidate of a predetermined nationality. Once again, without its being necessary to await the results of the consideration of the internal applications, the Commission and Mr Mastracchio already knew in June 1990 that only an 'Italian' application had any prospect of being accepted. In accordance with that political reservation of the post, the Commission accepted the application of a candidate whose knowledge of the fisheries policy was debatable but who had the nationality envisaged. Considerations regarding the proper functioning of the service which might have justified a broad geographical basis within the meaning of the first paragraph of Article 27 of the Staff Regulations once again played no part.

101 In those circumstances, there is no need for the Court to hear of its own motion witnesses such as the Directors-General concerned or the Secretary-General of the Commission, whose evidence could in any event only provide details of agreements which have already been established. In the same way, there is no need to consider, in the context of the assessment of the evidence which it is the Court's duty to effect, the circumstances in which the third post of director was filled.

102 It follows that the Commission's decisions of 4 and 11 July 1990 which form the subject-matter of this action were also adopted in breach of the third paragraph of Article 27 of the Staff Regulations. The plea alleging an infringement of that provision must also be upheld.

103 Consequently, it is not necessary to consider the other complaints raised by the applicants in the context of their first or second plea, alleging a failure to state the grounds on which the decisions were based, and their applications for annulment must be granted to the extent to which they were declared admissible.

Costs

104 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Annuls, to the extent to which they concern the candidatures submitted by the applicants, the Commission's decisions of 4 July 1990 not to fill under Article 29(1)(a) of the Staff Regulations the vacant posts of Grade A 2 Director in DG XIV in Directorates B and D, and to proceed to a subsequent stage in the procedure;
2. Annuls the Commission's decisions of 11 July 1990 appointing Mr Manuel Arnal Monreal and Mr Emilio Mastracchio as directors;
3. Annuls the Commission's decision of 24 April 1991 rejecting the applicants' complaint;
4. Dismisses the remainder of the application;
5. Orders the Commission to pay the costs.

Bellamy

Kirschner

Saggio

Delivered in open court in Luxembourg on 3 March 1993.

H. Jung

C. W. Bellamy

Registrar

President