JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
20 September 1990 *

In Case T-37/89,

Jack Hanning, an official of the Council of Europe, residing in Strasbourg, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter, Head of Division, acting as agents, assisted by Alex Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the decision of the President of the European Parliament to disregard the results of Competition No PE/41/A and to commence Competition No PE/41a/A and for compensation for material and non-material damage,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

composed of: H. Kirschner, President of Chamber, C. P. Briët and J. Biancarelli, Judges

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 8 May 1990,

gives the following

* Language of the case: French.

Judgment

Facts

1 On 5 December 1986, the European Parliament (hereinafter referred to as 'the Parliament') published a notice of Open Competition No PE/41/A (Official Journal, English Edition C 311, p. 13) based on qualifications and tests intended to fill a post of English-language Head of Division in Grade A 3 to manage the London Information Office. Under the heading 'Competition — Procedure and Conditions of Eligibility', the competition notice stated that to support the statements made on the application form in regard to qualifications, diplomas and professional experience, candidates were to submit documentary evidence in the form of photocopies with their application form. It also stated that 'for the purpose of this application, candidates may not, under any circumstances, refer back to documents, application forms or other information submitted for previous applications'. Under the heading 'Applications', it was stated that 'this application form, together with the supporting documents concerning both education and professional experience, must be sent . . . not later than . . . 19 January 1987 . . . N. B. (in italics): Candidates, including officials and other servants of the European Communities, who fail to forward application forms and all supporting documents within the prescribed time-limit will not be admitted to the Competition'. Finally, it was stated on the application form that 'candidates who do not send copies of educational or other qualifications required by the closing date for the competition will be rejected. You may not make reference to any previous application. . . . Reminder: if you have not already forwarded the documents in question, you are reminded that documentary evidence of academic qualifications and professional experience should reach us not later than 19 January 1987 . . . '.

2 A notice issued by the Parliament under number 86/C 311/05 was published in the same number of the Official Journal. According to Point II. 1 of that notice, candidates could be asked, if necessary, to furnish additional documents or information.

3 After the applications had been submitted, the selection board for the competition admitted the applicant to the tests. It rejected, *inter alia*, the applications submitted by Mr Spence and Mr Waters, both officials of the Parliament, and by Mr Elphic

and Mr Morris, for failure to submit supporting documents or because the supporting documents submitted were inadequate. Seven candidates, including Mr Spence, Mr Waters, Mr Elphic and Mr Morris, contested the selection board's decision not to admit them to the competition. After deliberation, the selection board admitted Mr Spence and Mr Waters to the competition on the ground that the required supporting documents were on the personal files held in respect of them by the appointing authority.

4 On two occasions, the applicant was called to London to sit tests. On both occasions, they were postponed. Finally, the applicant sat the tests on 6 October 1987. On 29 October 1987, he was informed that his name had been placed on the list of four candidates considered suitable to occupy the post in question.

5 The list of suitable candidates in Competition No PE/41/A contained the following four candidates: the applicant with 72 points, Mrs Beck with 69 points and Mr Spence and Mr Waters with 63 points. According to the table of marks, a fifth candidate, Mr Tate, obtained 58 points, the minimum necessary to be included in the list. Since that list was to include at most four candidates, his name was not placed on the list.

6 On 19 November 1987, the Head of the Recruitment Service, Mr Katgerman, contacted the applicant and during their telephone conversation told him that he would have to undergo a medical examination before being taken on. The details of that telephone conversation are in dispute. By letter of 23 November 1987, Mr Katgerman confirmed the invitation to undergo a medical examination and gave him all the necessary information for that purpose.

7 On 30 November 1987, the applicant underwent the medical examination. At that time, he was received by Mrs Laurenti, of the Directorate-General for Personnel, who gave him information concerning the conditions under which he was to be taken on and showed him the draft letter containing his appointment.

8 In the meantime, Mr Elphic and Mr Morris both submitted complaints to the Parliament against the rejection of their applications. A third complaint was submitted by Mr Trowbridge, a candidate who, after being admitted to the competition, was not included in the list of suitable candidates.

9 On 8 December 1987, the Director of the private office of the President of the Parliament asked the Jurisconsult to advise on the question whether a decision to appoint made on the basis of the results of that competition was likely to be annulled on the basis of an application brought by an unsuccessful candidate. On 9 February 1988, the Parliament's Legal Department issued that legal opinion. After considering the three complaints mentioned above, the Legal Department came to the conclusion that the appointing authority was entitled to disregard the results of the competition and to initiate a new one. On 19 February 1988, the Director of the private office of the President informed the Secretary-General of the Parliament that the President had decided, on the basis of the opinion and having regard to the case-law on the matter, to disregard the results of the competition and to begin the entire competition procedure again.

10 By letter of 6 April 1988, signed by the Head of the Personnel Division, the Parliament informed the applicant that since the President had 'noted irregularities in the competition procedure', he 'deemed it appropriate not to make an appointment and instead to open a fresh recruitment procedure based on qualifications and tests'.

11 On 17 June 1988, the applicant submitted to the President of the Parliament a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') against that decision. He claimed, first, that he was the 'successful candidate' within the meaning of the first paragraph of Article 33 of the Staff Regulations and that by annulling the competition procedure, the Parliament had infringed the provisions of that article; in the second place, that the Parliament had infringed the principle of the protection of legitimate expectations; thirdly, that it did not comply with the conditions for the withdrawal of an administrative measure and fourthly, that it had misused its powers. He applied for the annulment of the contested decision and a declaration that he was entitled to be appointed to the post in question. He reserved the right to apply to the Court of Justice for compensation for the damage he had suffered.

12 On 30 March 1988, the Parliament published a notice of a new open competition (No PE/41a/A) intended to fill the same post (Official Journal, English Edition C 82, p. 17). The applicant took part in that competition. The list of suitable candidates drawn up following that competition was composed of the following four candidates: Mr Bond, with 80.5 points, the applicant, with 73 points, Mr Holdsworth, with 72 points, and Mr Wood, with 70.5 points. With 66 points, Mr Tate was once again in fifth position. Mr Bond was appointed as a result of the competition.

13 On 24 May 1989, the applicant submitted a second complaint, challenging the appointment of Mr Bond.

Procedure

14 It was in those circumstances that, by an application lodged at the Registry of the Court of Justice on 29 June 1988, the applicant brought an action for the annulment of the contested decision, a declaration that he is entitled to be appointed to the post in question and compensation for material and non-material damage.

15 An application for interim measures, brought by the applicant on the same day as this action to have the operation of the contested decision suspended in so far as it commenced a new recruitment procedure in place of the steps taken in Competition No PE/41/A, was dismissed by order of the President of the Third Chamber of the Court of Justice in Case 176/88 R *Hanning* v *Parliament* [1988] ECR 3915.

16 The written procedure took place entirely before the Court of Justice. It followed the normal course, having regard to the fact that, in accordance with Article 91(4) of the Staff Regulations, it was suspended until such time as, upon the expiry of the time-limit laid down in Article 90(2) of the Staff Regulations, an implied decision rejecting the applicant's first complaint had been taken.

17 By an order of the Court of Justice of 15 November 1989, the case was referred to the Court of First Instance under Article 14 of the Council Decision of 24 November 1988 establishing a Court of First Instance of the European Communities.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. At the Court's request, the Parliament submitted the files in Competitions Nos PE/41/A and PE/41a/A, which the applicant's representative consulted at the Registry.

19 During the oral procedure, which took place on 8 May 1990, the Court was made aware of the precise results of the two competitions as set out above. The President declared the oral procedure closed at the end of the hearing.

20 The applicant claims that the Court should:

(i) declare the application admissible and well founded;

(ii) in consequence, annul the decision of the President of the European Parliament contained in his letter of 6 April 1988 and declare that the applicant is entitled to be appointed following Competition No PE/41/A in which he was a successful candidate for recruitment;

(iii) award the applicant one franc as compensation for non-material damage and order the reimbursement of the whole of his material loss;

(iv) in any event, order the defendant to pay the whole of the costs.

The Parliament contends that the Court should:

(i) take note of the fact that it relies on the wisdom of the Court in regard to the admissibility of the application;

(ii) with regard to the substance, dismiss the application;

(iii) make an order as to costs in accordance with the applicable provisions.

The first head of claim seeking the annulment of the President's decision

Admissibility

21 The applicant is seeking the annulment of the decision of the President of the Parliament which he alleges is contained in the letter addressed to him on 6 April 1988. The nature of that decision should first of all be determined. In its rejoinder, the Parliament submitted the file concerning the decision. It can be seen from that file that on 9 February 1988 the Legal Department of the Parliament drew up an opinion for the President in which it expressed the view that as a result of the three complaints submitted, the appointing authority was entitled to disregard the results of Competition No PE/41/A and to hold a new competition. The Director of the President's private office informed the Secretary-General of the Parliament by note of 19 February 1988 that the President had decided, on the basis of the advice in the said opinion, to disregard the results of the competition and to start an entirely new competition procedure for the post in question. In accordance with that note, the applicant was informed by letter of 6 April 1988 that as the President had noted that irregularities had occurred during the procedure, he deemed it appropriate not to make an appointment and to initiate a new competition. It follows that this action is directed against the decision of the President to disregard the results of Competition No PE/41/A and to hold a new competition.

22 The Parliament raised the question whether the contested measure was not a general measure which could not be contested by an individual. However, the defendant institution admits that, after the list of suitable candidates had been drawn up, the decision not to proceed with the recruitment procedure deprived that list of its useful effect and with it the chances of the candidates whose names were on it. The Parliament itself has expressed the view that such a measure may therefore be regarded as adversely affecting the persons whose names appear on the list of suitable candidates. That consideration ultimately caused the Parliament not to contest the admissibility of the application.

23 According to the settled case-law of the Court of Justice, the fact that a candidate has taken part in a competition with the result that he has achieved a favourable position is evidence of an interest which he has in the outcome of that competition as determined by the appointing authority. Since those conditions are fulfilled in this case, the contested decision is capable of adversely affecting the applicant (see the judgment in Case 26/68 *Fux* v *Commission* [1969] ECR 145, at p. 153).

24 Moreover, the applicant submitted a complaint on 17 June 1988, that is to say, within the time-limit laid down in Article 90(2) of the Staff Regulations, in terms corresponding to the various claims made in the application. The President of the Third Chamber of the Court of Justice, in his interim order of 11 July 1988, considered that if the applicant succeeded, any appointment of another candidate at the end of the procedure in Competition No PE/41a/A would be void and the first recruitment procedure would resume its normal course as if the contested decision had not been adopted. The applicant's second complaint, dated 24 May 1989, challenging the appointment of another candidate to the post in question, was thus in any event unnecessary. Consequently, the first head of claim is admissible.

Substance of the case

25 In support of his application, the applicant relies on five submissions: in the first place, the Parliament infringed Article 33 of the Staff Regulations; secondly, it infringed the principle of the protection of legitimate expectations; thirdly, it infringed the conditions for revoking administrative measures and, fourthly, it misused its powers. Finally, the applicant claims that the statement of the reasons on which the decision is based is insufficient and incorrect.

26 With regard to the first submission, the applicant relies on the terms of Article 33 of the Staff Regulations according to which, 'before appointment, a successful candidate shall be medically examined . . . '. The applicant regards himself as the successful candidate. In his view, his appointment was subject only to the result of the medical examination being satisfactory. Since the result of that examination was satisfactory, there was no further obstacle to his appointment. The applicant claims that the fact that Mr Katgerman got in touch with him was a measure implementing the decision to appoint him. In the administration, senior officials — such as Mr Katgerman — do not do as they please, they act on instructions. Since Mr Katgerman informed him during their telephone conversation on 19 November 1987 that the President of the Parliament 'wished to complete the appointment procedure very quickly', the applicant had been obliged to have himself released from his duties at the Council of Europe as soon as possible. He claims that Mr Katgerman also told him, on 15 December 1987, that there had been a certain delay in the appointment procedure and that, very probably, the letter of appointment would be sent to him in the first half of January 1988. Only the implementing formalities, namely the signature of the President of the Parliament, remained to be completed. In those circumstances, the

Parliament should have appointed him to the job at issue. At the hearing, the applicant also claimed that his name was first on the list of suitable candidates.

27 The Parliament — referring to the judgment of the Court of Justice in Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, at p. 2915 — replies that the appointing authority is free to terminate a recruitment procedure. It is not bound by the list of candidates drawn up as a result of that procedure. Neither the results obtained by the applicant in the competition in question nor his place on the list of suitable candidates give him — in the Parliament's view — a right to be appointed. The information given to the applicant by the Parliament's staff or any preparatory measures that may have been taken cannot call into question the appointing authority's powers. The Parliament considers that the applicant's interpretation of Article 33 of the Staff Regulations is incorrect. According to that provision, the medical examination is to take place 'before appointment'. The powers of the appointing authority cannot be affected by a medical examination which was carried out only in order to complete the applicant's file.

28 With regard to the second submission, alleging an infringement of the principle of the protection of legitimate expectations, the applicant claims that no other candidate was called upon to undergo a medical examination. On the basis, once again, of information given to him by the Parliament's staff, he also claims that the decision of the President of the Parliament infringed the principle of the protection of legitimate expectations inasmuch as he could have expected to be appointed. In his reply, the applicant asked that Mr Katgerman should be heard and cross-examined as to the telephone conversations which took place in November and December 1987. The applicant admits that this submission may be relied on only as against the appointing authority. He considers, however, that it follows from the second paragraph of Article 21 of the Staff Regulations that the responsibility of a subordinate does not release a superior from his own responsibilities.

29 The Parliament denies that it suggested to the applicant that he should take any steps other than those concerning the medical examination. It considers that under those conditions, the applicant cannot rely on the principle of the protection of legitimate expectations, which the appointing authority itself cannot be said to have infringed. According to the Parliament, the officials who were in contact with the applicant acted only subject to a positive decision on the part of the appointing authority. The Parliament submitted a statement signed by Mr Katgerman to the effect that he merely asked the applicant to undergo a medical examination. In its view, no useful purpose would be served by hearing Mr Katgerman.

30 In his third submission, the applicant claims that the conditions for revoking administrative measures have not been fulfilled. He claims that after the medical examination, his appointment was not merely possible but real. Consequently, it created in his favour subjective rights the effect of which was to make it irrevocable. Even if the recruitment procedure was vitiated by certain irregularities, which it was not, the administrative measure appointing him could be revoked only in accordance with the principles of legal certainty and the protection of legitimate expectations. Moreover, the Parliament should have acted within a reasonable time, rather than waiting several months. In his reply, the applicant added that the Parliament has not alleged that there were any imperative reasons which might have justified the annulment of the competition and, consequently, it failed to observe the restrictions applicable to the unilateral revocation of administrative measures. The applicant also observes that the first competition had already been annulled as regards the date of the written tests, but that none the less the Parliament decided to reopen it and carry on with the same candidates.

31 The Parliament denies that there was an administrative measure creating subjective rights. In its view, the appointing authority never adopted a decision, whether formally or *de facto*, appointing the applicant. The purpose of the contested decision was to terminate and annul a defective competition and it could not affect rights which did not yet exist. The Parliament contends that the first competition was not annulled as regards the date of the steps in the competition. In fact, the selection board for the competition had postponed the tests once and then postponed them a second time, stating that details would be provided by letter. That letter — dated 20 July 1987 — definitively fixed the date of the tests for 6 October 1987.

32 In support of his fourth submission, alleging a misuse of powers, the applicant claims that the irregularities in the competition referred to by the Parliament to justify its decision to 'annul' it have not been explained by the institution. He considers that they were merely a pretext intended to conceal the real reason for the decision, which was the desire not to appoint the applicant. The applicant wonders what reasons could have led the Parliament to continue the appointment procedure up to the point of having him undergo a medical examination if such irregularities had really been committed before it was decided to appoint him. He draws attention to certain 'clues' indicating a misuse of powers: the Parliament did not indicate the gravity of the irregularities; the annulment of the competition was

a sudden, and to say the least, dubious volte-face on the part of the Parliament; the Staff Committee pointed out in a letter to the President of the Parliament that in the light of such a decision, the suspicion that political pressure had been exercised could not be dispelled; the subsequent development of the matter showed that the Parliament wished not merely to eliminate the alleged defects in the procedure but was seeking in reality to eliminate the applicant.

33 In his reply, the applicant added that having regard to the requirements established by the Court's case-law, the contested decision did not contain a sufficient statement of the reasons on which it was based. In his view, the result of the second competition tends to show that, contrary to what the Parliament has contended, the purpose of the decision was indeed not to appoint him. At the hearing, the applicant also referred to a letter from the Chairman of the selection board to the President of the Parliament dated 2 July 1987 which is in the file on Competition No PE/41/A. The letter is a reply to an opinion of the Jurisconsult which is not to be found in the file. The letter informs the President that after a wide-ranging exchange of views, the selection board considered that the documents in the file did not justify the procedure being stopped, a situation which would place the institution in a weak position in regard to third parties. Consequently, the selection board fixed the date for the tests as 5 and 6 October 1987. The applicant claims that that letter constitutes evidence of intervention during the course of the procedure by the highest authority of the Parliament.

34 The Parliament denies that it misused its powers. It contends that, in accordance with the judgment of the Court of Justice in Joined Cases 322/85 and 323/85 *Hoyer* v *Court of Auditors* [1986] ECR 3215, at p. 3227, it was required to annul the competition by a reasoned decision and to recommence the whole procedure. In order to show that the person of the applicant played no part in its hesitations and reflections, the Parliament produced, annexed to its rejoinder, the file concerning that decision.

35 In his fifth submission, the applicant claims in his application that the Parliament did not state precisely what were the alleged irregularities which had occurred in the competition. In his reply, he relies formally on the inadequacy of the statement of the reasons on which the contested decision is based. He claims that it contains no precise and convincing statement of the nature of the alleged irregularities. There is also no precise statement of how the selection board committed irregularities of such gravity that the Parliament could decide to recommence the competition procedure. At the hearing, the applicant criticized the fact that the Parliament waited until it submitted its rejoinder before producing the opinion of the Legal Department. He claimed that the late production of certain documents

did not affect the conclusion in law that the contested decision did not contain a sufficient statement of the grounds on which it was based. Moreover, the opinion of the Parliament's Legal Department was in contradiction with that of the Chairman of the selection board: the complaints on which the Legal Department's opinion was based cannot justify the annulment of the first competition. In its opinion, the Legal Department failed to take account of the position of the applicant as the successful candidate in the first competition. The Parliament should have terminated the first competition by appointing the applicant.

36 The Parliament states in its rejoinder that the decision to disregard the results of the competition was adopted on 19 February 1988 on the basis of the opinion of the Legal Department of the institution, the conclusions of which it adopted. It adds that the applicant became aware of the measure he is contesting only by virtue of the information he received on 6 April 1988, which indicated to him that the President of the institution had noted irregularities in the competition procedure. At the hearing, the Parliament contended that the irregularities in the competition procedure justified the contested decision. Since the Parliament had received several complaints, it considered that there was a serious risk that a decision to appoint a candidate on the basis of the results of the first competition would be annulled. In the Parliament's view, the contested decision was the only possible solution which would avoid actions, the outcome of which was very uncertain, being brought by candidates wrongly excluded from the competition.

37 The Court of First Instance considers that it should first examine the submission concerning the statement of the reasons on which the contested decision is based.

38 In that regard, it should be pointed out that Article 42(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to proceedings before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, prohibits the raising of fresh issues in the course of proceedings unless they are based on matters of law or fact which come to light in the course of the written procedure. However, the Court of Justice pointed out in its judgment in Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, at p. 1764, that a submission which may be regarded as amplifying a submission made previously, directly or by implication, in the original application, and which is closely connected with that previous submission, must be considered admissible. That is so in this case in regard to the submission alleging that the contested decision does not contain a sufficient statement of the reasons on which it is based since it was raised by implication in the application and is closely linked to the submission alleging a misuse of powers. Moreover, it should

be pointed out that the Court of First Instance must of its own motion consider whether the Parliament has fulfilled its obligation to provide an adequate statement of the reasons for its decision (see the judgments of the Court of Justice in Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, at p. 2098 and in Case 18/57 *Nold* v *High Authority* [1959] ECR 41, at p. 52).

39 According to the settled case-law of the Court of Justice, the purpose of the duty to state the reasons on which a decision is based is both to permit the person concerned to determine whether or not the decision is well founded and to enable it to be reviewed by the courts (see, for example, the judgments in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, at p. 2467 and in Case 108/88 *Jaenicke Cendoya* v *Commission* [1989] ECR 2711, paragraph 10).

40 The letter of 6 April 1988, which informed the applicant of the contested decision, referred merely to 'irregularities during the procedure' in the competition. It contained no indication of the character or nature of those irregularities and, therefore, of the reasons for which the President of the Parliament decided not to make an appointment and commence a new competition. However, if the applicant is to be permitted to determine whether the decision contained a defect allowing its legality to be challenged, the Parliament should have given him details of the character and nature of the irregularities in question. Moreover, the Court of First Instance would be unable, solely on the basis of that letter, to exercise its powers of review in regard to the contested decision. The fact that it was accompanied by a more detailed statement of reasons for the internal use of the institution is therefore of no effect. Under those circumstances, it must be held that the contested decision is void on the ground that it does not contain an adequate statement of the reasons on which it is based.

41 Although the lack of a statement of reasons cannot be remedied by the fact that the applicant learned the reasons for the decision during the proceedings before the Court (see the judgment of the Court of Justice in Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, at p. 2876 et seq.), the position is different where the statement of reasons is inadequate.

42 The Court of Justice has accepted that explanations provided during the proceedings could, in exceptional cases, deprive of its purpose a submission alleging that the statement of reasons is inadequate. Thus, in its judgment of 8

March 1988, the Court of Justice considered that the documents submitted in the course of the proceedings, which allowed the applicants to acquaint themselves with the reason for their exclusion from the competition, also enabled the Court to review the procedure and its results to an extent consistent with the broad discretion enjoyed by any selection board when making value judgments and to reject all the submissions as unfounded (Joined Cases 64, 71 to 73 and 78/86 *Sergio and Others* v *Commission* [1988] ECR 1399, at p. 1440). Similarly, in its judgment of 30 May 1984, the Court of Justice considered that the details given by the Parliament in reply to the questions put by the Court enabled it to exercise its power of judicial review and to check the correctness of the reasons stated. In those circumstances, the Court of Justice considered that the conciseness of the reasons was not sufficient to justify the annulment of the measure in question (Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323, at p. 2339).

43 In this case, the Parliament relied successively on two reasons which it regarded as justifying the decision of its president. In *Kohler* v *Court of Auditors*, the defendant institution had also put forward, one after another, various statements of the reasons on which its decision was based, the latest one being put forward at the hearing. The Court, after finding that none of the statements of reasons was capable of justifying the decision adopted in law, decided that that decision should be annulled (judgment in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641, at p. 657 et seq.).

44 It follows from those decisions that where the statement of reasons and any additional information on that subject provided at the hearing is inadequate, it is for the Court to verify whether the statements of reasons relied on by the defendant institution are of such a nature as to justify in law the contested decision.

45 In its defence, the Parliament contended, as the first ground for its decision, that it was free to terminate the recruitment procedure, just as it was entirely free to decide whether or not to initiate such a procedure (see the judgment of the Court of Justice in Case 135/87 *Vlachou*, cited above). In its view, the decision not to pursue the procedure is at the sole discretion of the appointing authority. It should be observed *in limine* that that argument was not among the reasons put forward initially to justify the contested decision, which referred only to alleged irregularities in the competition procedure.

46 Although the Court of Justice has decided in its judgment in Case 135/87 *Vlachou*, cited above, that the appointing authority has a wide discretion in choosing, in accordance with the order of preference set out in Article 29 of the Staff Regulations, the most appropriate method of filling a vacant post, it should be pointed out that the facts of that case were different to those which arose here. In *Vlachou*, the Court of Justice had, in a previous decision (judgment in Case 143/84 *Vlachou* v *Court of Auditors* [1986] ECR 459), annulled the appointment of the candidate who had come first in an earlier competition on the ground that the selection board had, by virtue of the system of awarding marks which it adopted, acted in breach of the principle of equal treatment of the candidates in the competition. Similarly, in its judgment in Case 26/68 *Fux* [1969] ECR 154, cited above, the Court of Justice also accepted that the appointing authority has a wide discretion by stating that it is not required to pursue a recruitment procedure which it has initiated by filling the post which has become vacant, but it should be pointed out that in that case the dispute concerned the decision to abolish the post which had been the subject of the competition, that is to say, a decision concerning the organization of the service. The Court of Justice dismissed the action brought against that decision by the candidate who had come first in the competition. In this case, however, the Parliament did not abolish the post in question. On the contrary, it initiated a second competition to fill it.

47 The Court of Justice has had occasion to set out the scope and limits of the appointing authority's discretion in regard to a decision not to pursue the recruitment procedure by appointing the candidate who came first in the competition held for that purpose, which is the subject of these proceedings, in its judgment in Joined Cases 316/82 and 40/83 *Kohler* [1984] ECR 641, at p. 658.

48 In that case, the Court of Justice considered that the Staff Regulations do not place the appointing authority under an obligation to pursue a recruitment procedure once it has begun by filling the vacancy concerned. The rule is none the less that, in filling a post declared vacant, the appointing authority must proceed with the appointment of successful candidates in accordance with the competition results. It can deviate from that rule only for sound reasons, justifying its decision clearly and fully. It follows that the Parliament was not free to terminate the competition procedure without considering whether there were sound reasons for not appointing the candidate who had come first in Competition No PE/41/A. Consequently, the arguments which the defendant institution puts forward on the basis of the appointing authority's discretion in regard to recruitment are not consistent with the limits of that power and do not justify the contested decision.

49 By way of a second statement of reasons, the Parliament produced a file concerning the contested decision. That file contained the opinion of its Legal Department of 9 February 1988 concerning the complaints submitted concerning the procedure in Competition No PE/41/A. On that occasion, the Parliament drew attention to the fact that the President adopted his decision solely on the basis of that opinion and in the light of the case-law on the matter.

50 It must therefore be considered whether this second statement of reasons contains sound reasons justifying the decision not to take account of the results of the competition. That statement of reasons, as it appears from the opinion of the Legal Department, is in two parts. First, the President of the Parliament came to the conclusion that there had been irregularities in the procedure in Competition No PE/41/A. He then concluded that those irregularities justified his decision to disregard the results of the competition and to initiate a new competition since several complaints had been submitted to the appointing authority concerning the course of the procedure in the first competition and since the selection board had excluded from the list of suitable candidates a candidate who, if the abovementioned irregularities had not occurred, should have been included in it.

51 It must first be verified whether the irregularities alleged by the Parliament actually occurred. According to the Parliament, those irregularities consisted of the fact that the selection board wrongly admitted two candidates to the competition who, since they did not produce the necessary supporting documents within the time-limit laid down in the competition notice, had to be excluded.

52 It is apparent from the documents which the Parliament has submitted to the Court that the selection board received 78 applications following the publication of the competition notice for Competition No PE/41/A. It rejected 50, of which 42 were on the ground, although not necessarily solely on the ground, that the candidate had failed to submit supporting documents, or that those submitted were insufficient. The applications of Mr Spence and Mr Waters, officials of the Parliament, and of Mr Elphic and Mr Morris, among others, were rejected on that ground. With regard to Mr Waters and Mr Morris, there were two other grounds; in the case of Mr Waters, it was the fact that he did not meet the age requirement and in the case of Mr Morris, the fact that he did not have sufficient professional experience.

53 Seven candidates, including Mr Spence, Mr Walters, Mr Elphic and Mr Morris, contested the selection board's decision not to admit them to the competition. At

its meeting of 21 May 1987, the selection board considered those complaints and noted a 'discrepancy' between the notice of the general conditions governing open competitions, published in the same number of the Official Journal as the competition notice, and the notice itself. As has been indicated above, the notice provided that candidates might be asked, if necessary, to furnish additional documents or information. It is apparent from a note of 22 January 1988 from the President to the Parliament's Jurisconsult that the selection board considered that that provision did not concur with the provision in the competition notice to the effect that supporting documents were to be submitted in the form of photocopies within the time-limit indicated. The selection board considered that that discrepancy could have misled Mr Spence and Mr Waters. They were officials of the Parliament whose personal files were held by the very division which was responsible for organizing the competition. The selection board considered that the documents contained in the two candidates' applications were sufficiently explicit to meet the requirements of the competition notice, and for that reason decided to admit them. Two members of the board voted to admit the candidates, one member voted against and two abstained. The other objections were rejected and the candidates were informed of that fact in writing. Following the tests, Mr Spence and Mr Waters were placed in the third and fourth positions on the list of suitable candidates. The fifth candidate to obtain the minimum number of points to be included on the list, namely Mr Tate, was excluded since the list was to include only four names.

54 In its opinion of 9 February 1988, the Parliament's Legal Department starts by pointing out that the obligation to submit all the required documents within the prescribed time-limit was set out twice in the competition notice and twice on the application form. It concludes that it was sufficiently clear. It notes that none of the candidates excluded claimed to have been confused by any divergent statement in the General Provisions. It was the selection board itself which took that factor into consideration. Consequently, no valid explanation has been given of the reasons which led the selection board to treat Mr Spence and Mr Waters more favourably than other candidates who had been excluded. The Legal Department concludes that the selection board infringed the competition procedure, first, by not applying the rules laid down in the competition notice, and subsequently by infringing the principle of equal treatment and the prohibition of discrimination.

55 That the opinion of the Parliament's Legal Department is well founded in that regard must be confirmed. The two candidates, who were officials of the Parliament, had been warned several times, including by way of a note in italics intended to attract their attention, not to forget to submit all the supporting

documents. The sentence in the General Provisions on the basis of which the selection board decided to admit them is not at all in contradiction with the terms of the competition notice. According to the settled case-law of the Court of Justice, it is incumbent on the candidates to provide the selection board with all the information they consider pertinent to the appraisal of their applications (judgment in Case 225/87 *Bellardinelli* v *Court of Justice* [1989] ECR 2353, paragraph 24). Consequently, the applications submitted by Mr Spence and Mr Waters were properly rejected at the start of the competition procedure. By admitting them later, the selection board committed an error of law. It must therefore be held that the selection board was wrong to admit Mr Spence and Mr Waters to the competition and to include their names on the list of suitable candidates. Consequently, it must be decided that the competition procedure was indeed vitiated by irregularities.

56 It must be considered, secondly, whether the reasons for which the President of the Parliament, having noted the irregularities mentioned above, decided to disregard the results of the competition justify that decision.

57 The opinion of the Legal Department and the decision of the President of the Parliament based on that opinion are founded upon the consideration of the complaints submitted concerning the course of the procedure in Competition No PE/41/A.

58 At the hearing, the Parliament explained that it regarded it as convenient to disregard the results of the first competition because of the complaints submitted by candidates who had not been admitted to the competition. If those candidates had been admitted to the tests, they might have obtained a better result than those on the list of suitable candidates. They could therefore have brought actions which might have led to the annulment of an appointment based on Competition No PE/41/A. By adopting the contested decision, the President of the Parliament was seeking, according to the defendant, to avoid that risk. It must therefore be considered whether the Legal Department's assessment of the complaints involved was of such a nature as to justify in law the contested decision.

59 It appears from the opinion of the Legal Department that three complaints were submitted concerning the procedure in Competition No PE/41/A. In the first complaint, dated 21 October 1987, Mr Elphic claimed that his application had been rejected on the ground that he had not supplied supporting documents, even though two other candidates in the same position had been admitted to the competition.

60 The second complaint was submitted on 6 November 1987 by Mr Trowbridge. Admitted to the tests, he had not been placed on the list of suitable candidates because he had obtained only 55 points, whereas the required minimum was 57 points. Mr Trowbridge opposed the admission of the two candidates who were officials of the Parliament and claimed that he had been asked no question concerning his career and experience, whereas, according to the Guide to Candidates, they should have constituted the subject-matter of the oral tests.

61 The third complaint was submitted on 24 November 1987 by Mr Morris. He contested the reasons for which his application had been rejected. He claimed that he had submitted the supporting documents required in regard to his qualifications and provided details concerning his professional experience.

62 The Parliament's Legal Department asked the selection board, in two memoranda of 3 and 10 December 1987, to inform it of its views on those complaints. By memorandum of 22 January 1988, the Chairman of the selection board replied that the board had completed its work and had therefore ceased to exist. However, the former members of the selection board had discussed the complaints at an informal meeting. The conclusion at which they arrived was that the three complaints were inadmissible. It was thus for the appointing authority itself to verify whether the complaints were well founded, as it was in any event required to do.

63 With regard to Mr Morris's complaint, the Legal Department noted in its opinion of 9 February 1988 that the complaint contained no details of the alleged irregular admission of two officials of the Parliament and had in any event been submitted outside the time-limit laid down in Article 90(2) of the Staff Regulations. The Legal Department concluded by saying that even if the complaint had not been out of time, the appointing authority could not have allowed it by reason of the principle that the selection board is independent.

64 Mr Trowbridge relied in his complaint on procedural irregularities in regard to the admission of the two candidates who were officials of the Parliament. However, the Legal Department considered that he could not show in that regard that he had an interest in bringing proceedings since the fact that he was not on the list of suitable candidates was due exclusively to the fact that he had not obtained the minimum number of points necessary to be on it. For the rest, the complaint was unfounded since the selection board is unrestricted in its choice of the questions to be put to candidates.

65 The Legal Department concluded, in sum, that Mr Morris's complaint was inadmissible and Mr Trowbridge's was partly inadmissible and partly unfounded. It added that 'on the other hand, Mr Elphic's claim is admissible and the appointing authority is entitled to examine the lawfulness of the procedure followed'.

66 Consequently, it should be noted that only Mr Elphic's complaint is covered by the statement of the reasons on which the contested decision is based. It must therefore be considered whether the said decision could be justified by the fear that an action brought by Mr Elphic might lead to the annulment of a decision making an appointment on the basis of the results of Competition No PE/41/A.

67 Mr Elphic complained that his application had been rejected whereas two other candidates in the same position were admitted to the competition. Although it is true that that complaint draws attention to the irregularity in the procedure, the Legal Department ought to have concluded that it was unfounded. No candidate has the right to be admitted unlawfully to a competition on the ground that other candidates have also been accepted unlawfully by the selection board (see the judgment of the Court of Justice in Case 34/80 *Authié* v *Commission* [1981] ECR 665, at p. 680). Consequently, an action brought by Mr Elphic for the annulment of a decision making an appointment on the basis of Competition No PE/41/A on the ground that he had not been admitted to the competition would have been rejected. It follows that Mr Elphic's complaint, as a factor in the statement of reasons relied on by the Parliament, is not of such a nature as to justify in law the contested decision.

68 The opinion of the Legal Department and the decision of the President are also based on the settled case-law of the Court of Justice regarding the requirement that the independence of selection boards be preserved. According to that case-law, the institution concerned has no power to annul or amend decisions of a selection board. However, in exercising its own powers, the appointing authority is required to take decisions which are free of irregularities. It cannot therefore be bound by decisions of a selection board where the illegality of those decisions is liable to vitiate its own decisions. It is for that reason that, where the appointing authority considers that one or more of the selection board's decisions refusing to admit candidates to the competition are illegal and that as a result the whole competition is invalidated, it cannot make an appointment. It is then under the duty to take formal note of that situation by means of a reasoned decision and recommence the whole competition procedure following publication of a new notice (see the judgments of the Court of Justice in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199, at p. 3211 et seq. and in Joined Cases 322/85 and 323/85 *Hoyer* v *Court of Auditors*, cited above, at p. 3227 et seq.).

69 In the light of those decisions of the Court of Justice, the Parliament's Legal Department considered the effect of the fact that a fifth candidate who had obtained the required minimum number of points was not included in the list of suitable candidates drawn up by the selection board. In the Legal Department's view, the appointing authority could not envisage the appointment of that candidate, who had been successful in the competition but had none the less been excluded from the list of suitable candidates by the inclusion of two candidates who should not have been included in it. The Legal Department concludes that the appointing authority was entitled to disregard the results of the competition and to initiate a new one.

70 It should be noted that the facts of this case are different from those in *Schwiering* and *Hoyer*, cited above. In those two cases, the competition procedure was irregular because the selection board had wrongly refused to admit candidates to the competition whereas in this case, the irregularity in the procedure in Competition No PE/41/A stems from the wrongful admission of two candidates who should have been excluded. Although it is true that, in principle, all steps in a competition are necessarily vitiated by an unlawful refusal to admit a candidate, the position is not the same where one or more candidates have been wrongly admitted. In those circumstances, the appointing authority is faced with a competition procedure and a list of suitable candidates of which the parts which are irregular may be severed from those which are not. In this case, only the participation of Mr Spence and Mr Waters in the competition and their inclusion in the list of suitable candidates were illegal. The other candidates validly took part in the competition and their placing at the end of it was not influenced by the unlawful participation of two candidates wrongfully admitted.

71 If the approach adopted by the Court of Justice in its judgments in Case 321/85 *Schwiering*, and in Joined Cases 322/85 and 323/85 *Hoyer*, cited above, is applied to this case, in which the competition procedure is partly vitiated, it must be concluded that the appointing authority is not bound by the board's decisions to the extent that they are illegal. However, that does not mean that, for that reason, it was impossible to appoint a candidate on the basis of the competition. Its duty not to adopt illegal decisions merely prohibits it from appointing Mr Spence or Mr Waters who, because of the irregularities in the competition, should not have been on the list of suitable candidates. On the other hand, the appointing authority had to take account of the possibility of appointing the applicant, who had been validly included in the list. It should be added that the appointing authority had also to envisage the possible appointment of Mrs Beck, whose inclusion in the list was also not vitiated by any illegality.

72 Faced with such a situation, the appointing authority was required to comply with the decision of the Court of Justice in Joined Cases 316/82 and 40/83 *Kohler*, cited above. According to that decision, before deciding to disregard the results of a competition, the appointing authority must consider the possibility of filling the vacant post by appointing one of the persons properly included in the list of suitable candidates. In the first place, it had therefore to consider the possibility of appointing the applicant, who had been placed first on the list of suitable candidates (see the judgments in Case 62/65 *Serio* v *Commission of the EAEC* [1966] ECR 561, at p. 571 and in Case 246/84 *Kotsonis* v *Council* [1986] ECR 3989, at p. 4005 et seq.). Although those judgments accept that the appointing authority is entitled to ignore the precise order of merit resulting from the competition for reasons which it is incumbent on it to evaluate and justify before the Court, it should be pointed out that it must have reasons connected with the interest of the service for appointing a candidate other than the one placed first. Even if the appointing authority was aware that there were reasons connected with the interest of the service other than the irregularities in the competition which suggested that the applicant should not be appointed, it should then, according to the same case-law, have considered the possibility of appointing Mrs Beck.

73 The Parliament should have included in its consideration of the possibility of appointing the applicant or Mrs Beck a consideration of the merits of Mr Tate, who had been wrongly excluded from the list of suitable candidates solely because of the irregularities in the competition. Article 30 of the Staff Regulations, which permits the appointment only of candidates whose names appear on the list of suitable candidates, does not prevent the appointment of Mr Tate after such a consideration. The appointing authority could thus validly compare Mr Tate, the fifth candidate having obtained the minimum number of points, to the applicant and Mrs Beck in the context of the consideration of the reasons connected with the interest of the service which might lead to the two candidates at the top of the list not being appointed. Since the appointing authority did not carry out such a consideration, it did not exercise its discretion in accordance with law.

74 It is only if the Parliament had validly decided that reasons connected with the interest of the service justified the appointment of Mr Tate that Article 30 would have prevented such a decision. If the Parliament, after adopting a decision not to appoint the applicant or Mrs Beck, the reasons for which were duly stated, had wanted to appoint Mr Tate, the irregularities in the competition procedure would have prevented it. In those circumstances, a decision not to take account of the results of the competition would have been justified by sound reasons. Since no consideration was given to the appointment of the applicant or Mrs Beck, the contested decision is vitiated by an error of law.

75 It follows from the foregoing that the reasons relied on by the Parliament in its rejoinder to justify the contested decision are without foundation, since the reasons put forward by the Legal Department were not sufficient to permit the appointing authority to disregard any part of the results of the competition and to commence a new competition. That being so, the appointing authority has failed to comply with the case-law of the Court of Justice according to which, in the absence of sound reasons to the contrary, it should have considered the possibility of appointing the applicant (see the judgment in Joined Cases 316/82 and 40/83 *Kohler*, cited above).

76 It should be pointed out that the submission concerning the statement of the reasons on which the contested decision is based does not rely exclusively on the insufficient nature of those reasons. The documents submitted by the Parliament as an annex to its rejoinder and the file in Competition No PE/41/A, submitted at the Court's request, permitted the applicant to discover the reasons for the contested decision. It is apparent from the applicant's statements at the hearing that after becoming aware of the reasons, he enlarged his plea by alleging that the decision was not well founded.

77 Under those circumstances, the Court can decide only that the reasons put forward by the Parliament during the procedure are not of such a nature as to justify in law the decision of the President of the Parliament. Consequently, the contested decision was not based on grounds valid in law, and the submission that the reasons on which the decision is based are without foundation must be accepted.

78 It is therefore not necessary to rule on the question whether or not the submission that the statement of reasons is insufficient has lost its purpose. The decision of the President of the Parliament to disregard the results of Competition No PE/41/A and to commence Competition No PE/41a/A should be annulled, as should the implied decision rejecting the applicant's complaint of 17 June 1988. It is not necessary to consider the applicant's other submissions in support of the first head of claim.

The second head of claim to the effect that the applicant should be appointed

79 The applicant asks the Court to declare that he is entitled to be appointed on the basis of Competition No PE/41/A. Those conclusions are inadmissible. The Court

cannot, without encroaching upon the prerogatives of the administration, order an institution to adopt the measures necessary for the enforcement of a judgment by which decisions concerning steps in a competition are annulled (see the judgment of the Court of Justice in Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, at p. 2005). In accordance with the first paragraph of Article 176 of the EEC Treaty, the Parliament is required to take the necessary measures to comply with the judgment of the Court, in particular in regard to the reopening of the appointment procedure following Competition No PE/41/A and the annulment of the commencement of the procedure in Competition No PE/41a/A, having regard, in particular, to the interlocutory order of 11 July 1988, cited above.

The third and fourth heads of claim concerning compensation for alleged damage

80 The applicant claims that by annulling the competition, the Parliament committed a fault and was guilty of an act of bad management. He alleges that, on the one hand, he suffered material loss by virtue of the fact that he had to bear the cost of travelling to Luxembourg for the medical examination and to London to find accommodation. He also claims that he suffered non-material damage because the Parliament's conduct put him in a very embarrassing position in the Council of Europe. He had to ask his superiors to consider within what reasonable period he might terminate his service in Strasbourg. That application was not well received. He now fears that he has been personally discredited and that his future promotion, and therewith his legitimate career expectations, have been affected. The uncertainties caused by the attitude of the Parliament and the ultimate refusal to take him on affected his private life. He therefore claims one franc by way of symbolic damages.

81 The Parliament claims that the appointing authority's decision was well founded and that, consequently, it did not infringe the individual rights of the applicant, which, in the institution's view, do not exist. It states that it intends to reimburse the applicant's expenses for his trip to Luxembourg. On the other hand, it considers that the expenses of the trip to London, made entirely on the applicant's own initiative, should be borne by him and that the claim for compensation for non-material damage should be rejected.

82 With regard to the claim for compensation for alleged material damage, it should be pointed out that the applicant did not set out in his application the extent of the damage he claims to have suffered even though he could easily have expressed the

expenses incurred during his two trips to London in figures. Consequently, he has not fulfilled the requirements of Article 38(1) of the Rules of Procedure of the Court of Justice. The Court of Justice has decided that in certain special cases, in particular if it is difficult to express the damage suffered in figures, it is not essential to state the exact extent of the damage or to state the precise amount of the compensation claimed (see the judgments of the Court of Justice in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, at p. 543 and in Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, at p. 1090). However, the applicant has neither shown nor even claimed that there were any special circumstances justifying his failure to express the loss in figures. It follows from the foregoing that that claim is inadmissible.

83 With regard to the claim for compensation for non-material damage, it should be pointed out that according to the case-law of the Court of Justice, the annulment of an administrative act challenged by an official constitutes appropriate and, in principle, sufficient reparation for any non-material harm he may have suffered. Moreover, the contested decision contains no negative assessment of the applicant's capacities which might have been offensive to him (see the judgment of the Court of Justice in Case C-343/87 *Culin* v *Commission* [1990] ECR I-225, paragraphs 25 to 29). Consequently, the annulment of the Parliament's decision to disregard the results in Competition No PE/41/A constitutes in itself appropriate reparation for any non-material harm suffered by the applicant. It follows that the claim against the Parliament for one franc by way of symbolic damages has no purpose, having regard to the annulment contained in this judgment, and there is no need to rule on that subject (see the judgment of the Court of Justice in Joined Cases 44, 77, 294 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259, at p. 3279).

Costs

84 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the Parliament has failed in its submissions, it must be ordered to pay the costs, including those of the application for interim measures in Case 176/88 R.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

(1) Annuls the decision of the European Parliament to disregard the results of Competition No PE/41/A and to initiate Competition No PE/41a/A as well as its implied decision rejecting the applicant's complaint of 17 June 1988;

(2) Dismisses the remainder of the application;

(3) Orders the European Parliament to pay the costs.

Kirschner Briët Biancarelli

Delivered in open court in Luxembourg on 20 September 1990.

H. Jung
Registrar

C. P. Briët
President of Fifth Chamber