

Where the appointing authority appoints a person appearing on a list of suitable candidates arranged in order of merit and follows that order in so doing it is not required to give to the candidates not selected who appear lower on the list than the candidate appointed a statement of the reasons for its decision not to appoint them, the selection board being deemed to have informed the successful candidates of their relative positions on the list and to have provided an adequate statement of reasons at the same time.

On the other hand, if the list of suitable candidates is drawn up without reference to order of merit, for example in alphabetical order, and the appointment of one candidate from the list involves the immediate cancellation of the list, that decision directly and immediately affects the legal situation of the other successful candidates and the reasons on which it was based must therefore be notified to them. It would be unrea-

sonable, unfair and contrary to the letter and spirit of the second paragraph of Article 25 of the Staff Regulations if the best candidates, included on a list of suitable candidates drawn up otherwise than in order of merit, could be excluded from the recruitment procedure without being given any statement of grounds whatsoever that might enable them to find out the reasons for which they were not ultimately selected by the appointing authority and to determine whether or not such reasons were sound.

7. Explanations given in the course of the proceedings may, in exceptional cases, render devoid of purpose a plea that a statement of reasons was not provided, so that there is no longer any justification for annulment of the contested decision.
8. It is not for the Court to address orders to the Community institutions or to substitute itself for them.

JUDGMENT OF THE COURT (Fifth Chamber)
20 March 1991 *

In Case T-1/90,

Gloria Pérez-Mínguez Casariego, residing in Madrid, represented by Miguel Angel Auñón-Auñón, of the Madrid Bar, and by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

applicant,

* Language of the case: Spanish.

v

Commission of the European Communities, represented by Miguel Díaz-Llanos de la Roche, a legal adviser, and Daniel Callejo Crespo, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision making an appointment to the post corresponding to post No 12 in Commission Competition COM/A/537 and for the appointment of the applicant to that post,

THE COURT (Fifth Chamber),

composed of: C. P. Briët, President of the Chamber, D. Barrington and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 24 January 1991,

gives the following

Judgment

The facts

- 1 On 12 December 1985, the Council adopted Regulation (ECSC, EEC, EURATOM) No 3517/85 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal L 335, p. 55).
- 2 Article 1(1) and the first subparagraph of Article 1(2) of that regulation were worded as follows:

'1. Notwithstanding the second and third paragraphs of Article 4, Article 5(3), Article 7(1), the third paragraph of Article 27, Article 29(1)(a), (b) and (c) and Article 31 of the Staff Regulations of Officials of the European Communities, provision may be made until 31 December 1988 for vacant posts to be filled by Spanish and Portuguese nationals up to the limits set in the context of budgetary discussions within the institutions responsible.

2. Appointments to grades A 3, A 4, A 5, LA 3, LA 4, LA 5, B 1, B 2, B 3 and C 1 shall be made after a competition on the basis of qualifications organized in accordance with Annex III to the Staff Regulations.'

3. For that purpose the Commission published on 4 November 1986 a notice of open competition based on qualifications, under reference COM/A/537, with a view to filling 35 posts, in order to constitute reserve lists for the recruitment of principal administrators of Spanish nationality in a career bracket comprising Grades A 5 and A 4 (Official Journal C 278, p. 14).

4 The competition notice gave the following details:

the reserve list was to be established in order to fill vacant or newly-created posts in the abovementioned category through the selection of persons of Spanish nationality in accordance with Council Regulation No 3517/85;

the persons selected and entered on the reserve list could be appointed in accordance with the requirements of the various departments;

no later than 31 December 1987, the appointing authority would set the date on which the reserve list was to expire, having regard to the extent to which it had been used.

5 In response to questions submitted in writing by the Court of First Instance on 27 November 1990, the Commission indicated on 5 December 1990, first, that for

most of the posts covered by Competition COM/A/537, including post No 12, a list of suitable candidates was drawn up specifically for each post; secondly, that, for post No 12, the appointment of the candidate decided upon by the appointing authority entailed immediate extinguishment of the corresponding list of suitable candidates and, thirdly, that it was not possible for a successful candidate included on a list for a specific post to be appointed to another post in the same competition.

- 6 A list of the 35 posts to be filled was annexed to Competition Notice COM/A/537, together with a description of the duties corresponding to each of them and, in some cases, the particular requirements concerning university education, knowledge of languages and relevant experience.
- 7 The job description for post No 12 was as follows:

‘DG IX — Personnel and Administration

Assisting the head of the central library with the management and development of his department:

organization and supervision of various administrative and specialized tasks;

bibliographical research;

preparation of reports;

development of relations with documentation departments, directorates general and external relations.

This post calls for further vocational training and several years’ practical experience in the relevant fields, together with organizational ability’.

- 8 The applicant submitted an application for post No 12 in DG IX within the prescribed period.

- 9 On 14 May 1987 the Head of the Personnel Selection Division wrote a letter to the applicant informing her that she satisfied the conditions for admission laid down in the competition notice and that the Selection Board had drawn up a list of candidates who met those conditions. He also stated that 'the Selection Board will shortly undertake a comparative examination of the qualifications of the candidates on that list, having particular regard to the nature and extent of their relevant experience'.
- 10 On 30 September 1987, the Selection Board for Competition COM/A/537 issued a reasoned report concerning post No 12. The report indicated, first, that the Selection Board had drawn up a list of six candidates fulfilling the conditions laid down in the competition notice; secondly, that the Selection Board had interviewed the six candidates in order to consider their qualifications in greater depth, compare their merits, with reference in particular to the specific requirements based on the nature of the duties involved, and make an additional examination of their certificates, references and statements concerning the prescribed qualifications; and, thirdly, that after carrying out a comparative examination of the candidates' merits, the Selection Board had placed two candidates, in alphabetical order, on the list of successful candidates: the applicant and María Gutiérrez Díaz. That list was forwarded on 2 October 1987 to the Head of the Careers Division.
- 11 On 2 October 1987, the head of the Personnel Selection Division wrote a letter to the applicant informing her that in Competition COM/A/537 the Selection Board had decided to enter her name on the list of successful candidates for post No 12, Principal Administrator, and that that list had been sent to the appointing authority so that it could appoint the candidate of its choice.
- 12 The two candidates on the list of suitable candidates were invited to Brussels and interviewed on 9 and 10 November 1987 by Mr Gaskell, the head of the library, Mr Hay, the Director-General of DG IX, and Mr Torres-Simo, an assistant to the Director-General of DG IX. At that time, they underwent the medical examination provided for in Article 33 of the Staff Regulations of Officials of the European Communities.
- 13 On 10 November 1987, Mr Ristori, an assistant to the Director-General of DG IX, sent a memorandum to Mr Valsesia, the Director of Personnel, in the following terms:

'I should be grateful if you would put in hand the official procedure for the recruitment of Mrs Gutiérrez Díaz, a successful candidate in Competition COM/A/537 (A/5-4 ES), which covered post No 12 — DG IX.

This decision is taken in agreement with Directorate IX-E and the Directorate-General, since the profile of the person concerned is better suited to the requirements of the department in view of her management and data-processing experience, over and above her knowledge of the relevant field.'

- 14 On 16 December 1987, Mrs Malhotra, an official in the Careers Division, sent a letter to Mrs Gutiérrez Díaz confirming that she could take up her duties at the Commission on 1 February 1988.

- 15 On 12 April 1988, Mr Arendt, the Head of the Careers Division, sent a letter to the applicant in which he informed her that, following the interview on 9 November 1987, it had been decided not to appoint her as a Principal Administrator in DG IX, post No 12. The applicant states that she never received that letter.

- 16 On 21 February 1989, the applicant sent a letter, described as a 'request', based on Article 90(1) of the Staff Regulations, in which she sought:
 - (i) to have the result of the competition officially communicated to her and to be informed whether Mrs Gutiérrez Díaz had been appointed an official, together with a statement of reasons;

 - (ii) if Mrs Gutiérrez Díaz had been appointed a Principal Administrator, to have that appointment annulled and declared void;

 - (iii) to be appointed an official, since she satisfied all the necessary conditions and had all the qualifications that might be required for the competition for the post of Principal Administrator;

(vi) in the alternative, in the event of her above request being rejected, to have the competition declared null and void 'as from the admission to the competition of Mrs Gutiérrez Díaz or as from the point at which the procedure was vitiated by another defect'.

17 In addition, in the same letter she stated that the interviews of 9 and 10 November 1987 with Mr Gaskell and Mr Hay had gone well, since she had been informed that she satisfied 'all the conditions required, over and above the other candidates' and that she would 'certainly be the candidate selected for the post'. By contrast, the interview with Mr Torres-Simo had been rather unsatisfactory since he had displayed 'surprising animosity and aversion' to her, and that interview, for which, moreover, there was no provision, had not dealt with any important matter relevant to the competition. She also stated that she had been surprised to learn, through unofficial channels, that it appeared that Mrs Gutiérrez Díaz had been appointed to the post on conclusion of the competition. Finally, she based her 'request' on the following pleas in law: infringement of Articles 5(3), 25 and 28 of the Staff Regulations, failure to observe the procedure laid down in Annex III to the Staff Regulations, manifest error of appraisal, breach of the principle of equality of treatment and misuse of powers.

18 On 13 September 1989, the applicant submitted a complaint against the implied rejection of her 'request' of 21 February 1989, seeking the annulment of the appointment of Mrs Gutiérrez Díaz to the post of Principal Administrator in question and the appointment of the applicant to that post, and in the alternative the annulment and reopening of the competition procedure. She stated, first, that persons who are not officials of the Communities are entitled to bring actions against Community institutions when they have an interest in bringing an action, relying in that respect on the judgments of the Court of Justice in Case 27/63 *Raponi v Commission* [1964] ECR 129 and Case 77/74 *Küster v Parliament* [1975] ECR 949. She then alleged, first, an infringement of the second and third paragraphs of Article 25 of the Staff Regulations and of the terms of the competition notice, since the appointing authority should have notified her of the results of the competition; secondly, infringement of Article 27 of the Staff Regulations, as interpreted by the Court of Justice, in particular in its judgment in Case 282/81 *Ragusa v Commission* [1983] ECR 1245, since the appointment of Mrs Gutiérrez Díaz was the result of manifest errors of appraisal and not of consideration of the

conditions laid down in Article 27; thirdly, infringement of Article 33 of the Staff Regulations, since a favourable medical examination must without fail be followed by the appointment of the candidate selected; fourthly, infringement of Article 5 of Annex III to the Staff Regulations and of Articles 28(d) and 30(2) of the Staff Regulations, since the candidate ultimately appointed did not, she maintains, appear on the list of candidates drawn up by the Selection Board for the competition; fifthly, a misuse of powers in the form of procedural irregularities and the failure to take account of the qualifications and skills of the applicant, relying in that regard on the judgment of the Court of Justice in Case 9/81 *Williams v Court of Auditors* [1982] ECR 3301; sixthly, infringement of Article 5(3) of the Staff Regulations and of the principle of equal treatment, as interpreted in particular in the judgments of the Court of Justice in Case 29/74 *De Dapper v Parliament* [1975] ECR 35, and Case 24/78 *Martin v Commission* [1979] ECR 603.

- 19 By decision of 27 September 1989, which was notified to the applicant on 4 October 1989, the Commission rejected that complaint.

Procedure

- 20 Mrs Pérez-Mínguez Casariego brought the present action by application received at the Registry of the Court of First Instance on 2 January 1990.
- 21 On 6 June 1990, the applicant lodged an application for permission to use a language other than the language of the case. The Commission was invited to submit its observations thereon but did not do so.
- 22 On 6 July 1990, pursuant to Article 29(2)(c) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance, pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (hereinafter referred to as 'the Rules of Procedure of the Court of Justice'), the Court made an order authorizing the parties to proceed with the action in the French language.
- 23 On 27 November 1990, the Court (Fifth Chamber) put to the defendant, by letter from the Registry, certain questions concerning the nature of the various lists of

suitable candidates for Competition COM/A/537, the appointment procedure followed by the appointing authority and its effects on the list of suitable candidates for the posts to which they relate and, finally, the possibilities offered to candidates appearing on a list of suitable candidates who were not selected by the appointing authority. The Commission replied to those questions on 5 December 1990.

- 24 The applicant claims that the Court should:
- (i) Annul the appointment of Mrs Gutiérrez Díaz as Principal Administrator;
 - (ii) Appoint Gloria Pérez-Mínguez Casariego as Principal Administrator inasmuch as she possesses all the qualifications and abilities required by the competition for appointment to the post;
 - (iii) In the alternative, annul the decision by which Mrs Gutiérrez Díaz was appointed Principal Administrator, on the ground that she does not possess the necessary qualifications, that there was a breach of a procedural requirement in that her name was not included in the list of suitable candidates and that she did not meet the conditions laid down in the requirements for the competition, or on the ground that her abilities are less than those of the applicant, annul the procedure from the point at which the list of suitable candidates was drawn up, and order that the competition should proceed with an assurance of complete impartiality and that the participants in the competition should be informed of the results of the competition and of any decisions concerning them.
- 25 In her reply, the applicant, making the following additional pleas in law, claimed that the Court should:
- (i) Order the defendant to pay the costs;
 - (ii) Subsidiarily, order the defendant to produce the documents relating to the appointment of Mrs Gutiérrez Díaz, withholding and reserving nothing, and in particular:
 - (a) if the decision making the appointment emanates from the Commission, the said decision;

- (b) if Mr Hay, the Director-General for Personnel and Administration, had powers to take such a decision, the decision taken by him;
 - (c) and the memoranda sent by Messrs Hay, Gaskell and Torres-Simo to the Commission or by them to Mr Hay;
- (iii) Order the defendant to give full explanations to the Court as to the circumstances in which Mr Ristori considered it appropriate, as early as 10 November 1987, to prepare the memorandum appended as Annex 7 to the defence;
- (iv) Pursuant to Articles 45(1) and 47(5) of the Rules of Procedure, order that such facts as it considers it necessary to have proved be proved by witnesses in order to clarify such circumstances as it considers appropriate.

She also stated that she 'no longer claims that the annulment of the procedure must necessarily give rise to her being appointed'.

26 The Commission contends that the Court should:

- (i) Declare the application inadmissible;
- (ii) In the alternative, dismiss the application as unfounded;
- (iii) Make an appropriate order as to costs.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

Admissibility

28 The Commission raised three objections of inadmissibility, on the respective grounds that the application was out of time, the fact that Mrs Gutiérrez Díaz is

not a party to the present proceedings and the fact that the claims made before the proceedings and those set out in the application to the Court do not correspond.

The first ground of inadmissibility: the application was lodged out of time

- 29 The defendant states, as a preliminary point, that it must be inferred from the forms of order sought in the application that the aim pursued is the annulment of the decision appointing Mrs Gutiérrez Díaz and of the decision of the Selection Board including her in the list of suitable candidates. However, the applicant did not challenge those decisions within the prescribed time-limits even though they were notified to her by letters of 12 April 1988 and 2 October 1987 respectively. Consequently, those two decisions have become final since they were not challenged within the prescribed time-limits and in accordance with formal requirements.
- 30 The defendant adds that, even if it were conceded that the letter of 12 April 1988 was not received by the applicant, the application would still be out of time. By virtue of Article 90(2) of the Staff Regulations, the period for lodging a complaint starts to run on the day on which the decision is notified to its addressee and in no case later than the date on which the person concerned received such notification, if the measure affects a specified person. According to the Commission, the applicant admits that she had notice of Mrs Gutiérrez Díaz's appointment to the post at issue no later than the date of lodgment of her 'request' of 21 February 1989. Moreover, she had notice of the 'cut-off' date of 31 December 1988 indicated in Council Regulation No 3517/85. It concludes that the applicant should have lodged a complaint within a period running from 31 December 1988 or from 21 February 1989 and not a mere request on the latter date.
- 31 The defendant further contends that, even if the applicant's letter of 21 February were to be seen as a 'complaint', the application, received on 2 January 1990, would nevertheless be inadmissible since it was lodged more than three months after the expiry of the four-month period at the end of which there is an implied rejection under the second subparagraph of Article 90(2) of the Staff Regulations. Furthermore, the decision of 27 September 1989 could not have operated to make time run again since in any case it was adopted after the expiry of the period for bringing an action laid down in the latter part of Article 91(3) of the Staff Regulations. In that regard, the Commission relies on the judgment in Case 58/88 *Olbrechts v Commission* [1989] ECR 2643.

- 32 Finally, the defendant refers to the consistent case-law of the Court of Justice according to which the time-limits for bringing actions, being mandatory and binding, are not subject to the discretion of the parties or of the Court. The legality of administrative decisions cannot be challenged indefinitely without offending against the requirement of legal certainty for third parties and affecting acquired rights. It relies in that respect on the following judgments of the Court of Justice: Case 55/64 *Lens v Court of Justice* [1965] ECR 837; Case 20/65 *Collotti v Court of Justice* [1965] ECR 847 and Case 4/67 *Muller v Commission* [1967] ECR 365.
- 33 The applicant claims, in the first place, that she never received the letter of 12 April 1988 and that the letter of 2 October 1987, informing her of her inclusion on the list of suitable candidates in question, gave no indication of the inclusion of Mrs Gutiérrez Díaz on that list or, *a fortiori*, of any appointment of that person. She then states that the date of 12 April 1988 given by the Commission as the date of the notification which it sent her is either too late, since that notification should have borne the same date or, at the very least, a date close to that appearing on the letter of 16 December 1987 sent to Mrs Gutiérrez Díaz, or too early, since Mrs Gutiérrez Díaz had to take up her duties at the beginning of 1988 and it was therefore necessary to await the end of the nine-month probationary period to see whether she met the requirements laid down for the post in question. Indeed, if she had not met those requirements, it would have still been possible to have recourse to the applicant.
- 34 Repeating that no official notification was made, the applicant then states how she became aware, by stages, of the appointment of Mrs Gutiérrez Díaz. She knew of her application and certainly met her at the time of the interviews of 9 and 10 November 1987, but she was waiting for an official notification from the Commission. She then learned unofficially that Mrs Gutiérrez Díaz held the post in question but considered that that fact could have no repercussions on her own candidature since the post could be occupied by a member of the auxiliary or temporary staff or on a contractual basis. When the position was clarified she lodged her request dated 21 February 1989. In any event, she did not learn of the official appointment of the other candidate until she read the Commission's reply to her complaint, which was sent to her on 4 October 1989, and formal evidence of that appointment was disclosed to her only in the annexes to the defence of 16 February 1990.

- 35 In her rejoinder, the applicant returns to the question of the initial classification of the pre-litigation procedure. She concedes that the letter of 21 February 1989, which she had originally described as a 'request', in fact constituted a 'complaint against the appointment, if any, of Mrs Gutiérrez Díaz'. According to the applicant, that letter 'does not constitute a request, since it does not seek from the appointing authority a decision regarding her'. However, the administration, despite its duty of care towards her, had not informed her that her request constituted a complaint in that it was directed against a decision (*Olbrechts v Commission*, supra). Moreover, in the reply to the complaint which it sent on 4 October 1989, the Commission itself described the applicant's letter of 13 September 1989 as a 'complaint'. It must therefore be inferred that her application was lodged in time. The applicant adds that, even if her letter of 21 February must be regarded as a request, her application is admissible since the time-limits laid down in the Staff Regulations for steps prior to proceedings were in fact complied with.
- 36 The Court finds, first, that the present action is concerned primarily with the annulment of the decision appointing the other person included on the list of suitable candidates for post No 12 and not the decision of the Selection Board to include her on that list. In the first place, the applicant, in her reply, expressly abandoned the plea in law concerning the absence of Mrs Gutiérrez Díaz from the list of suitable candidates and, in the second place, the decision of the Selection Board for the competition in question is not referred to in the orders sought in the application.
- 37 The question whether the applicant received the letter of 12 April 1988 which the Commission claims to have sent her must now be considered. The Court of Justice has consistently held that 'it is the responsibility of the party alleging that an action is out of time to prove on what date the decision was notified' (judgments in Case 108/79 *Belfiore v Commission* [1980] ECR 1769, Case 194/87 *Maurissen v Court of Auditors* [1989] ECR 1045 and Case 58/88 *Olbrechts v Commission*, supra). In the present case, the Commission has produced no evidence, such as a post-office receipt, to prove that the applicant actually received the document in question. In the absence of such evidence, the Court must take the view that the applicant had no opportunity to learn the content of that letter of 12 April 1988 or therefore of the effective appointment of Mrs Gutiérrez Díaz until she received the reply to her 'complaint' of 13 September 1989, which the Commission sent to her on 4 October 1989.

- 38 Furthermore, the legal classification of the applicant's letter of 21 February 1989, which is a matter for the Court alone, depends on what knowledge the applicant had of the outcome of the recruitment procedure when that letter was written. The Commission, relying on the terms of that letter of 21 February 1989, contends that the applicant was aware, at least unofficially, of Mrs Gutiérrez Díaz's appointment to the post at issue. However, the Court, having regard to all the circumstances of the case and the actual terms of the abovementioned letter, considers it impossible to assert that in February 1989 the applicant had sufficiently certain and precise knowledge of the appointment of Mrs Gutiérrez Díaz to post No 12 in Competition COM/A/537.
- 39 Consequently, it was wholly logical and justified for the applicant to submit to the appointing authority a request under Article 90(1) of the Staff Regulations that it take a decision concerning the outcome of the recruitment procedure in which she had taken part. She used the legal remedy open to her for that purpose to enable her to seek a decision concerning her, that is to say, in the present case, the final decision or decisions in the recruitment procedure at issue in which she had taken part. The fact that Regulation No 3517/85 imposed the time-limit of 31 December 1988 for appointments is not pertinent to the question of the legality of a request under Article 90(1) of the Staff Regulations in the present context where the applicant sought, by that means, to be given the results of the recruitment procedure. Moreover, in any event the Commission itself, in its reply of 4 October 1989 to the applicant's complaint, described the letter of 21 February 1989 as a 'request under Article 90(1) of the Staff Regulations' and the complaint lodged with it on 13 September 1989 in response to the implied decision rejecting her request as 'complaint No R/96/89'.
- 40 Therefore, without its even being necessary to examine the obligations incumbent on the Commission by virtue of its duty of assistance in the conduct of the litigation procedure, it must be stated that the applicant's letter of 21 February 1989 must, by reason of the particular circumstances of the case, be classified as a request under Article 90(1) of the Staff Regulations and that the objection that the present application is out of time and thus inadmissible cannot be upheld. The implied decision rejecting the request came into being on 22 June 1989. The complaint, dated 13 September 1989, was lodged within the period of three months provided for in Article 90(2) and the application, registered on 2 January 1990, was lodged within the period of three months provided for in Article 91(3) against the express decision of 4 October 1989 dismissing the complaint.

The second ground of inadmissibility: Mrs Gutiérrez Díaz is not a party to the proceedings

- 41 The defendant contends that, quite apart from the procedures for intervention and third-party proceedings, Mrs Gutiérrez Díaz has a fundamental right to have access to the Court to defend her legitimate rights and interests and that it is not permissible, in any circumstances, for her to be denied means of defence. In its view, the present ground of objection is a matter of procedural propriety and an order should have been made for Mrs Gutiérrez Díaz to be summoned and for all the procedural documents to be disclosed to her. At the hearing, whilst adhering to this ground of objection although conceding that it was not 'an objection of inadmissibility in the strict sense of the term', the Commission stated that it was necessary, in view of the circumstances of the case, for the Court to give a ruling on this procedural remedy which the Rules of Procedure of the Court do not expressly prohibit or, at least, on the possibility of serving a copy of the application, in parallel with its publication in the *Official Journal of the European Communities*, on an official whose appointment is called in question.
- 42 In the applicant's view, compulsory intervention is a procedure unknown to the Community legal system and is superfluous in this case since Mrs Gutiérrez Díaz did not consider it appropriate to lodge an application to intervene within the prescribed period, doubtless considering that the Commission would safeguard her rights adequately.
- 43 The Court considers it appropriate to refer to the judgment of the Court of Justice in Case 12/69 *Wonnerth v Commission* [1969] ECR 577, in which it held that 'the application is . . . inadmissible to the extent to which it seeks the compulsory intervention of Mr Arning, as this form of legal action is not provided for in the Rules of Procedure'. Furthermore, the rights of persons not made parties to an action are safeguarded by the Rules of Procedure of the Court of Justice which makes available to them, at the same time, the right to intervene voluntarily, which Mrs Gutiérrez Díaz could have done, having necessarily been aware of the application through the summary published in the *Official Journal of the European Communities*, and the remedy of third-party proceedings. And in any event, procedural rules must, if they are to be relied on by individuals, be laid down expressly in legislation and cannot be inferred by the Court, particularly where the judicial protection of individuals is already assured under appropriate conditions.

44 This ground of objection must also therefore be dismissed.

The third ground of inadmissibility: the claims made in the documents lodged under the administrative procedure before the proceedings were instituted and those set out in the application to the Court do not correspond

45 The defendant contends that the request and the complaint are directed against Competition COM/A/470, whereas the application relates to the appointment of Mrs Gutiérrez Díaz following Competition COM/A/537. In the defendant's view, this contradiction renders the application inadmissible since it does not fulfil the requirements of Article 91(2) of the Staff Regulations.

46 The applicant admits that she in fact made 'slight errors' in the wording of the pre-litigation documents and the application by referring on occasion to Competition Notice COM/A/470, but she considers those errors to be of no significance since the Commission's reply of 4 October to her complaint is in fact concerned with Competition COM/A/537 and was annexed to her application. In that regard, she refers to the judgment of the Court of First Instance in Case T-57/89 *Alexandrakis v Commission* [1990] ECR II-143, in which it was held that where the applicant has made a slight error which could not have misled the Commission as a party to the proceedings it is appropriate to allow such corrections as are necessary in order to give the application due scope and meaning.

47 The Court considers it necessary to point out that the Court of Justice has consistently held, with respect to consistency between pre-litigation documents and the application commencing an action, that 'it is sufficient that the official . . . should submit to the Court claims which have the same subject-matter as those set out in the complaint and that the heads of claim should be based on the same matters as those relied on in the complaint' (see, in particular, Case 142/85 *Schwierung v Court of Auditors* [1986] ECR 3177).

48 In the present case the applicant may indeed on several occasions have confused Competition COM/A/470 with Competition COM/A/537 in her documents. However, it is apparent from the request of 21 February 1989, from the complaint of 13 September 1989 and from the application to the Court that those documents

indeed have the same subject-matter, namely the appointment of the applicant to the post at issue and the concomitant annulment of the appointment of Mrs Gutiérrez Díaz to that post and were prompted by the same cause, namely the wrongful failure of the appointing authority to select the applicant to undertake the duties corresponding to post No 12 referred to in Competition Notice COM/A/537. Furthermore, Competition COM/A/537 is referred to at least once in all those documents, either in the main body of them or in their annexes. Moreover, the Court notes that the applicant does not refer to Competition COM/A/470 in the forms of order sought. Finally, it must be emphasized that such clerical errors were not in any case such as to mislead the Commission, whose answer to the complaint and defence both clearly show that it understood perfectly well that the subject-matter of the dispute was the outcome of Competition COM/A/537 and not Competition COM/A/470.

- 49 It follows that this ground of objection must also be dismissed. Consequently, the application must be declared admissible.

Substance

- 50 In addition to the forms of order sought in the application, the applicant made additional claims in her reply, to the effect that the Court should require the defendant to produce certain documents, provide certain information and take evidence from witnesses. It is therefore necessary to consider successively the claims for annulment of the decision appointing Mrs Gutiérrez Díaz and of the recruitment procedure from the point at which the list of suitable candidates was drawn up, the claims that the Court should order that the applicant be appointed or that that competition procedure be reopened and finally the claim that certain preparatory measures should be undertaken.

The claim that the appointment of Mrs Gutiérrez Díaz and the recruitment procedure from the point at which the list of suitable candidates was drawn up should be annulled

- 51 In support of this claim, the applicant initially put forward six pleas in law: infringement of Article 25 of the Staff Regulations and of the competition notice, manifest error of appraisal constituting an infringement of Article 27 of the Staff Regulations, infringement of Article 33 of the Staff Regulations, infringement of Article 5 of Annex III to the Staff Regulations, misuse of powers and breach of the principle of equal treatment.

- 52 The Commission has stated that the reasoning and arguments set out in its reply to the applicant of 4 October 1987 to the applicant's complaint should be regarded as reproduced in full in its defence.
- 53 Since, at the hearing, the applicant expressly abandoned her pleas concerning infringement of Article 33 of the Staff Regulations and infringement of Article 5 of Annex III thereto, it will be logical to consider successively the plea concerning manifest error of appraisal constituting an infringement of Article 27 of the Staff Regulations, the plea concerning breach of the principle of equal treatment, the plea concerning misuse of powers and finally the plea concerning infringement of Article 25 of the Staff Regulations.

The plea concerning manifest error of appraisal constituting an infringement of Article 27 of the Staff Regulations

- 54 The applicant states that Mrs Gutiérrez Díaz's application did not fulfil the requirements laid down in the competition notice and that, moreover, her qualifications and *curriculum vitae* were inferior to those of the applicant. Consequently, the 'subjective and erroneous' assessments of the appointing authority infringed Article 27 of the Staff Regulations, according to which 'recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity', as interpreted by the Court in its judgment in *Ragusa v Commission*, *supra*.
- 55 The defendant states that the applicant has put forward no argument and produced no evidence to support her assertions. Moreover, neither the applicant, nor the appointing authority, nor even the Court of First Instance or the Court of Justice may challenge the soundness of the value judgments and assessments of a Selection Board for a competition (see the judgment of the Court in Case 144/82 *Detti v Court of Justice* [1983] ECR 2421). In that connection it relies on the case-law of the Court according to which 'the examination of ability which Selection Boards must undertake is above all of a comparative nature and, for this reason, covered by the cloak of secrecy inherent in such deliberations' (see the judgments in Case 44/71 *Marcato v Commission* [1972] ECR 427 and Joined Cases 112/73 and 114 to 145/73 *Capogrande and Others v Commission* [1974] ECR 957). Finally, in its judgment in Case 121/76 *Moli v Commission* [1977] ECR 1971, the Court of Justice stated that it lacked jurisdiction to decide on the appointment of an official in the place and stead of the appointing authority. In that regard, the Commission refers also to the judgment of the Court of First

Instance in Case T-128/89 *Brumter v Council* [1990] ECR II-545, according to which, where the appointing authority enjoys a wide discretion, the Court's review 'must be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, it has remained within reasonable bounds and has not used its authority in a manifestly incorrect manner'.

56 The Court considers it appropriate, as a preliminary observation, to cite the judgment of the Court of Justice in *Capogrande, supra*, in which it was held that 'the examination of ability which Selection Boards must undertake is above all of a comparative nature and, for this reason, covered by the cloak of secrecy inherent in such deliberations, so that they cannot be subjected to control by the Court except in the event of obvious infringement of the rules which govern the proceedings of Selection Boards'. Moreover, attention must be drawn to the scope of the Court's review of decisions in recruitment procedures, having regard to the discretion granted to the appointing authority. That review is limited to considering the propriety of the procedures used by the administration, checking the material exactitude of the facts relied on by the administration in adopting its decision and, finally, establishing that there was no manifest error of appraisal, error of law or misuse of powers that might vitiate the administrative decision.

57 In the present case, the Court must find that the plea as to manifest error of appraisal, as presented by the applicant, is not supported by any evidence on which to base an assessment of its merits. Indeed, it is based on peremptory assertions which are not supported, for example, by precise information comparing the situations of the applicant and Mrs Gutiérrez Díaz. Moreover, the applicant has neither challenged nor discussed the statement of the reasons for the contested appointment decision, which is given in Mr Ristori's letter of 10 november 1987, which came to her notice when the defence was notified to her. Consequently, there is nothing before the Court to support any finding of a manifest error of appraisal constituting an infringement of Article 27 of the Staff Regulations.

58 It follows that this plea in law cannot be upheld.

The plea as to breach of the principle of equal treatment

- 59 The applicant considers that a review of the irregularities by which the procedure in Competition COM/A/537 was, in her view, vitiated shows an arbitrary attitude on the part of the appointing authority which is 'contrary to the interests of the Community institutions and of justice in general'. She maintains that the person ultimately appointed was appointed without any account being taken or check being made of her qualifications and abilities. She relies in that regard both on the judgment of the Court of Justice in *Williams v Court of Auditors*, supra, and on the Commission's reply of 4 October 1989 to her complaint in which it stated that 'the factors involved in that assessment (depend) not only on the competence and professional merit of the persons concerned but also on their character, their conduct and their personalities as a whole, for which a statement of reasons thus cannot be given'. In her view, recourse to such criteria to justify an appointment is not permissible since a competition procedure should pursue the appointment of the best candidate, without the need for any reliance on subjective criteria.
- 60 According to the applicant, taken together, those factors constitute a breach of the principle of equal treatment laid down in Article 5(3) of the Staff Regulations, according to which 'Identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service'. In a competition, the application of objective criteria enabling the best candidate to be selected should be based solely on a fair, impartial and non-discriminatory assessment of the candidates' qualifications. In that respect, she refers to the judgments in Case 29/74 *De Dapper v Parliament* and Case 24/78 *Martin v Commission*, both cited above.
- 61 The defendant contends that it is apparent from the documents before the Court that the appointing authority and the Selection Board in Competition COM/A/537 sought, in the recruitment procedure at issue, to select the candidate best qualified to occupy post No 12 in that competition.
- 62 The Court finds that the applicant has not adduced in support of this plea any information by reference to which its merits can be assessed. She merely states, in imprecise and general terms, that the qualifications and abilities of Mrs Gutiérrez Díaz were not checked or taken into account, whereas it is apparent from the Selection Board's final report of 3 September 1987 that it carried out a complete

examination, *inter alia* by means of interviews, of the skills and qualifications of the six candidates who met the conditions laid down in the competition notice. There is no evidence before the Court to show that the Commission infringed Article 5(3) of the Staff Regulations and thus breached the principle of equal treatment.

- 63 Consequently, this plea in law cannot be upheld.

The plea as to misuse of powers

- 64 In support of this plea, the applicant puts forward the same arguments as those set out in support of the preceding plea concerning breach of the principle of equality of treatment. She added at the hearing that, in view of the speed with which the appointment decision was taken, there could have been no consultation between the persons who conducted the interviews and it must be concluded that the decision had been taken in advance.
- 65 In response, the defendant refers to its arguments on the question on breach of the principle of equal treatment and also expresses its surprise at being criticized for its diligence when its concern for speed and efficiency was justified by the specific circumstances of the recruitment in the present case of officials of Spanish nationality and by the interests of the service.
- 66 Since the Court has already dealt with the arguments common to the previous plea and the present plea, it need only concern itself with the argument concerning the allegedly excessive speed of the adoption of the decision by the appointing authority. In that regard, in his memorandum of 10 November 1987, Mr Ristori states that the appointment decision was 'taken in agreement with Directorate IX-E and the Directorate-General'. The applicant cannot therefore allege lack of consultation between the people she met at the time of the interviews. Moreover, the period of about one day that elapsed between completion of the interviews and the drafting of the abovementioned memorandum from Mr Ristori does not, in view of the small number of candidates and the fact that all the persons involved in the interviews belonged to the same directorate-general, appear to be indicative of a misuse of powers. On the contrary, in fact, it reveals a concern to deal as promptly as possible with the problems associated with the filling of vacant posts in the Commission.

The plea as to infringement of Article 25 of the Staff Regulations and of the competition notice

- 67 The applicant claims that the obligation, first, to notify in writing individual decisions having an adverse effect and, secondly, to state the reasons on which they are based derives both from the second and third paragraphs of Article 35 of the Staff Regulations and from the very terms of the competition notice at issue. Consequently, the defendant contravened those requirements by failing to notify her of the result of the competition and of the detailed conclusions concerning her. Moreover, the absence of any information on the outcome of the competition for more than two years placed the applicant in an ambiguous situation where she was 'kept constantly in a state of expectation and . . . prevented from taking the action that would have been available to her to defend her legitimate interests'.
- 68 The defendant states with respect to the obligation of notification that the result of Open Competition COM/A/537 was in fact notified to the applicant by letter of 2 October 1987 from the Head of the Recruitment Division and that the final decision of the appointing authority informing her that her application had been unsuccessful was also notified to her by letter of 12 April 1988. It states in its rejoinder that the latter letter 'has nothing to do with the requirement laid down in the competition notice of informing candidates of the conclusions concerning them and that the applicant was in fact informed of the Selection Board's conclusions concerning her. It adds that, even if there is inadequate evidence that that letter was received, such a circumstance cannot have the effect of automatically causing the applicant to be appointed and all the previous steps in the competition procedure to be annulled. Moreover, according to the Commission, Article 25 of the Staff Regulations refers to communication 'in writing' and it has been proved that that obligation was fulfilled since the Commission sent her the letter dated 12 April 1988.
- 69 The Commission then states, with regard to the obligation to state the reasons for the final appointment decision adopted by the appointing authority, that in Case 16/64 *Rauch v Commission* [1965] ECR 135, where the applicant, whose name appeared on a list of suitable candidates, was not ultimately appointed by the appointing authority the Court held that 'This decision (the one by which the candidate finally selected was appointed) did not need to state the reasons on which it was based to the person to whom it was addressed since it did not adversely affect her. The applicant's demand would mean that the appointing authority would have to give reasons for not having taken another decision. The

recruiting procedure is clearly designed to make such a statement of reasons unnecessary, and in any event to state them might well be to the detriment of the unsuccessful candidates' (see also *Case 27/63 Raponi v Commission*, supra). In its view, that judgment must be interpreted as meaning that 'once the candidates have been informed of the results of the competition, (the Commission) is not required to notify each appointment made to those candidates who were not selected for that post' and that, in addition, the candidates included on the list of suitable candidates by the Selection Board for the competition would know that, between the adoption of that list and its expiry, they might receive an offer of employment from the Commission.

70 At the hearing, the Commission added that candidates included on a list of suitable candidates cannot claim any right to appointment and that it would be inconceivable for there to be any obligation to inform them of the appointment of any other candidate or candidates from the same list, accompanied by an adequate statement of reasons addressed to them. In the first place, it would be difficult to manage such a system from the administrative point of view, particularly in competitions with numerous candidates in which provision is made for lists of suitable candidates of considerable length and, in the second place, the result of such an obligation would be that the drafting of such 'decisions' by the appointing authority would be rendered extremely complex in view of its wide discretion at that final stage of the recruitment procedure and of the fact that, in the opinion of the Selection Board for the competition, all the candidates on the list of suitable candidates deserve to be appointed. Finally, in the Commission's view, it would be a delicate matter to approach the obligation to state the reasons for an appointment decision, vis-à-vis the candidates appearing on a list of suitable candidates who were not ultimately appointed, in a manner which differed according to whether the recruitment procedure concerned involved a small or a large number of candidates.

71 With respect to the obligation of notification laid down by the second paragraph of Article 25 of the Staff Regulations and, in the present case, by the competition notice as well, the Court observes that the outcome of the competition, as decided on by the Selection Board, was in fact notified to the applicant by letter of 2 October 1987 from the defendant, which is annexed to the application. Consequently, it seems clear that the applicant has no reason to allege infringement of the specific provision of the competition notice according to which candidates are to be informed individually of the results of the competition in which they took part. As to the argument that the applicant was left in a state of expectation as a result of the Commission's conduct, it must be pointed out that she need merely have sent her request to the Commission at an earlier stage and that the uncertainty of which she complains derives only from her own inaction.

- 72 It must also be observed that the appointing authority's decision concerning the applicant, that is to say the decision not to appoint her, was in fact notified to her in writing in the letter of 12 April 1988, which came to her notice no later than the time at which she received the Commission's reply to her complaint. In that regard, a finding that that notification was belated cannot, in itself, constitute an infringement of the first sentence of the second paragraph of Article 25 of the Staff Regulations such as to entail annulment of the contested measure (see the judgments in Case 125/80 *Arning v Commission* [1981] ECR 2539 and in Case 111/83 *Picciolo v Parliament* [1984] ECR 2323).
- 73 With respect to the obligation to state reasons laid down by the second paragraph of Article 25 of the Staff Regulations, the Court finds, first, that it merely reiterates the general obligation laid down in Article 190 of the EEC Treaty, in that that provision of the Staff Regulations states that 'any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the grounds on which it is based'. In its judgment in Case 195/80 *Michel v Parliament* [1981] ECR 2861, the Court of Justice held that 'the requirement that a decision adversely affecting a person should state the reasons on which it is based is intended to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested'. The obligation to state reasons, thus described, therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons.
- 74 In the second place, regard must be had to the structure of a recruitment procedure involving the participation of a competition Selection Board, organized in accordance with Article 29(1) of the Staff Regulations and Annex III thereto, as applied to the present case. Such a procedure involves three phases, involving successively the Selection Board and the appointing authority. The first two stages, which are the responsibility of the Selection Board, consist, first, in checking that the applications satisfy the requirements of the competition notice and, secondly, in making a selection from the candidates admitted to the competition, by means either of a comparative scrutiny of their diplomas, other qualifications and relevant experience, or reference to the marks obtained in tests or, finally, the application of both those selection criteria, depending on the nature of the competition in question. The second stage takes the form, as far as the Selection Board is concerned, of placing on a list of suitable candidates to be submitted to the appointing authority those candidates which it regards as the best. The list is drawn up either according to order of merit or, as in the present case, in alphabetical order. The appointment by the appointing authority of one or more candidates from that list of suitable candidates marks the third and last stage of the recruitment procedure; the appointing authority can depart from any order of

merit drawn up by the selection board only on overriding grounds relating to the proper functioning of the service and must state its reasons for doing so (judgment of the Court of First Instance in Joined Cases T-160/89 and T-161/89 *Kalavros v Court of Justice* [1990] ECR II-871).

75 Admittedly, in Case 16/64 *Rauch v Commission*, supra, which concerned a decision taken at the third stage of the recruitment procedure described above, the Court of Justice held: 'However, no formal decision "not to appoint" the applicant has taken place, but only a decision to appoint Miss Kurtz. This decision did not need to state the reasons on which it was based to the person to whom it was addressed since it did not adversely affect her. The applicant's demand would mean that the appointing authority would have to give reasons for not having taken another decision. The recruiting procedure is clearly designed to make such a statement of reasons unnecessary, and in any event to state them might well be to the detriment of the unsuccessful candidates.'

76 However, it must be pointed out that in *Rauch* the list of suitable candidates, also comprising two names, was set out according to order of merit, by contrast with the present case, and that the appointing authority proceeded to appoint the person appearing first on the list. The Selection Board for the competition was therefore, as usual, under an obligation to inform the two candidates of their relative positions and at the same time provide an appropriate statement of reasons. In such circumstances, as the Court of Justice pointed out, the very principle of a competition operates so as fully to discharge the function of an adequate statement of reasons addressed to the other candidates, since it is clear that the appointing authority need not give to the candidates who were not appointed and who are lower on a list of suitable candidates drawn up according to order of merit a statement of its reasons for not appointing them. It was for that reason that, in those very specific circumstances, the Court held that 'the recruiting procedure is clearly designed to make such a statement of reasons unnecessary'. On the other hand, the situation in this case is entirely different since, in the first place, the candidates were not listed according to order of merit and, in the second place, the listed candidate who was not appointed was given no statement of grounds whatsoever to enable her to find out, even in summary form, the reasons for which she was not ultimately selected by the appointing authority.

77 In such circumstances, where the competition procedure was not such as to provide, in itself, a sufficient indication of reasons and where the decision appointing a candidate directly and immediately affects the legal situation of the other candidate on the list of suitable candidates, the Court is of the opinion that the obligation to state reasons must be fully discharged with respect to the latter candidate. It would be truly unreasonable, unfair and contrary to the very letter and spirit of the second paragraph of Article 25 of the Staff Regulations if candidates rejected in the first two stages of the procedure were entitled to receive decisions relating to them together with a statement of the reasons on which they were based and were thus able fully to enforce their rights, as has consistently been held by the Court of Justice (see in particular the judgments in Case 44/71 *Marcato v Commission*, supra, and Case 195/80 *Michel v Parliament*, supra) whereas better candidates who had succeeded in reaching the third stage of the competition procedure and appeared on a list of suitable candidates drawn up irrespective of order of merit could be excluded from the recruitment procedure without being given any statement of grounds whatsoever that might enable them to find out the reasons for which they were not ultimately selected by the appointing authority and to determine whether or not such reasons were sound.

78 In a recruitment procedure such as that at issue in this case, it is clear, from an analysis of the reasons for which the appointing authority decided at the final stage to appoint a candidate appearing on a list of suitable candidates for a single post, that that decision will inevitably be accompanied by a concomitant decision — at the very least an implicit, but nevertheless necessary, decision — not to appoint the other candidate or candidates on the list of suitable candidates. Moreover, the Commission expressly acknowledged that fact in its reply to the applicant's complaint where it states that 'the decision in the memorandum of 12 April 1988 by which the administration informed the applicant that she had not been chosen, undeniably affects the complainant's situation directly and immediately'. Furthermore, in the present case — by contrast with 'open' recruitment procedures in which the candidates appearing on a reserve list are eligible to be appointed, over a period of time, to different posts — the appointing authority's decision not to appoint the applicant to post No 12 certainly affects her adversely since, as the Commission confirmed in its reply to the written questions put to it by the Court, the decision to appoint Mrs Gutiérrez Díaz had the immediate effect of cancelling the list of suitable candidates on which the applicant had been included. Because of this, the applicant had no further expectation of any appointment and was excluded from any recruitment procedure.

79 The Court also considers that the argument that a statement of the reasons for the final decision of the appointing authority might be detrimental to the unsuccessful candidates is irrelevant. In the first place the statement of the reasons for any decision having an adverse effect contains, by its very nature, a relatively negative assessment of the persons to whom it relates. Secondly, the concern to uphold the principles of legality and protection of the individual's rights must take precedence over consideration of the supposed reactions of the unsuccessful candidates on receiving such a statement of reasons. Finally, the unsuccessful candidates are the only persons who have notice of that statement of reasons which is not and must not, in any circumstances, be made public (see Joined Cases T-160/89 and T-161/89 *Kalavros v Court of Justice*, supra).

80 Finally, the Court considers that the Commission's argument concerning a differing approach to the obligation to state reasons according to whether the competition involves a large or a small number of candidates has no foundation. Provided that the order of merit decided by the Selection Board is observed, it is clear that the legal situation of the candidates appearing on a substantial reserve list which is valid for a relatively long period is not directly and immediately affected by an appointment made by the appointing authority from that reserve list, since they continue to be eligible for appointment to a vacant or newly created post throughout the period of validity of the reserve list, even if, as the Commission correctly noted, they are merely eligible, and not entitled, to be appointed. Accordingly, the argument which the Commission bases on an allegedly excessive workload deriving from such statements of reasons cannot be accepted: firstly because such statements of reasons will ultimately be few in number; secondly because, initially, they may be drafted in clear but relatively succinct terms, subject to their being expounded at the request of the persons concerned; and, finally — it must be observed — because the litigation provoked by the absence or inadequacy of statements of reasons for administrative decisions certainly creates much more work for the administration than would have been involved in the drawing up of appropriate and sufficient statements of reasons enabling such litigation to be avoided.

81 In the present case, the Court finds that, without there being any need to examine closely the circumstances of its receipt, that the letter of 12 April 1988 informed the applicant of the decision not to appoint her to the post at issue. The decisional nature of that measure is confirmed by its very terms: '... it has been decided not to select you...'. If confirmation be needed, it is expressly provided by the Commission's abovementioned response to the applicant's complaint. Furthermore, it is obvious, and is not denied by the Commission, that that decision contains no

information whatsoever which could indicate to the applicant the reasons which led the appointing authority not to select her. But it is apparent from the foregoing considerations that that decision affected her adversely since it had an immediate and direct impact on her legal situation by definitively excluding her from the recruitment procedure as a result of the simultaneous cancellation of the list of suitable candidates on which she appeared.

82 In those circumstances, the Court considers that the defendant was under a legal obligation to give a statement of reasons to the applicant and that it did not comply with that essential obligation, which is laid down in the second paragraph of Article 25 of the Staff Regulations.

83 However, at this stage, it must be pointed out that in the present case the defendant disclosed to the Court, during the written procedure, the statement of reasons for the contested decision which appears in the abovementioned memorandum from Mr Ristori dated 10 November 1987. Moreover, at the hearing, the Commission's representative stated, in reply to a question asked by a member of the Court, that the defendant confirmed that it was in fact that statement of reasons that prompted it to reject the applicant's application and that the Commission associated itself entirely with the very terms of that statement of reasons.

84 However, neither in her reply nor at the hearing did the applicant challenge that statement of reasons, which was as follows: 'the profile of the person concerned (Mrs Gutiérrez Díaz) is better suited to the requirements of the department, in view of her management and data-processing experience, over and above her knowledge of the relevant field'.

85 Having drawn these conclusions, the Court considers it necessary to consider the exact scope of the plea as to the lack of a proper statement of reasons for the appointing authority's decision rejecting the applicant's application at the final stage of appointment to the post at issue and to decide whether the applicant still has an interest in judgment being given in respect of that plea.

86 As regards, first, the scope of the plea as to the lack of a proper statement of reasons for the appointing authority's decision not to appoint the applicant, the

Court finds that the fact that, as in the present case, that plea is well founded is certainly not such, by itself, as to entail the annulment of the decision appointing Mrs Gutiérrez Díaz or, similarly, the annulment of the recruitment procedure from the point at which the list of suitable candidates was drawn up. A finding as to the infringement of Article 25 of the Staff Regulations would only be capable of bringing about the annulment, for lack of a statement of reasons, of the appointing authority's decision not to appoint the applicant. Accordingly, it would impose on the Commission the requirement, pursuant to Article 176 of the EEC Treaty, to infer all the consequences of the judgment of the Court and take the necessary measures to comply with its judgment, which might include, for example, confirmation of that decision together with provision of an appropriate statement of reasons. The Court must therefore conclude that the present plea, namely that a proper statement of reasons was not given for the decision not to appoint the applicant, must in fact be treated, having regard to the other forms of order sought in the application, as seeking the annulment of that decision alone.

⁸⁷ With regard, secondly, to the question whether the applicant still has an interest in judgment being given on this plea, reference must first be made, by analogy, to the judgment in 111/83 *Picciolo v Parliament*, supra, in which the Court of Justice stated that 'since all the objections raised by the applicant in regard to the decision of the appointing authority not to accept his application for the vacant post have been shown to be ill-founded, the applicant has no legitimate interest in the annulment of the appointment of another candidate to that post, which he cannot himself validly claim'. Reference must also be made to the judgment in Joined Cases 64/86, 71/86, 72/86, 73/86 and 78/86 *Sergio v Commission* [1988] ECR 1399, in which the Court of Justice held that 'as a result of the explanations given in the course of the proceedings, the argument that insufficient reasons were given may, in exceptional cases, lose its purpose and cease to justify the annulment of the decision in question'.

⁸⁸ In the present case it is apparent from all the foregoing considerations that, in the first place, the applicant has made no pleas such as to bring about annulment of the decision appointing the candidate finally selected by the appointing authority for the post at issue; secondly, no plea has likewise been made which can bring about the annulment of the recruitment procedure from the point at which the list of suitable candidates was drawn up; and finally that the applicant failed, even when in a position to do so, to challenge the correctness of the reasons for which the appointing authority rejected her application, regardless of how belatedly those reasons were disclosed to her and even if the initial decision rejecting her application was vitiated by the lack of a proper statement of reasons.

89 In those circumstances, the Court finds that the claims made in the application for annulment of the Commission decision making an appointment to post No 12 in Competition COM/A/537 and annulment of the recruitment procedure from the point at which the list of suitable candidates was drawn up must be refused and that the claim for annulment of the appointing authority's decision rejecting the applicant's application on the ground that it was vitiated by the lack of a proper statement of reasons has become devoid of purpose.

The claim that the Court should order that the applicant be appointed and, in the alternative, that the competition procedure should be reopened

90 The Court considers it appropriate to recall the terms of the first paragraph of Article 176 of the Treaty establishing the European Economic Community, which is applicable to the Court of First Instance by virtue of Article 4 of the Council decision of 24 October 1988 establishing a Court of First Instance of the European Communities, according to which the institution that adopted the act is 'required to take the necessary measures to comply with the judgment of the Court'.

91 Accordingly, it must be stated that the applicant's claim that the Court should order appointment of the applicant and, in the alternative, resumption of the competition procedure, are inadmissible since the Court cannot, without encroaching upon their prerogatives, address orders to the institutions or substitute itself for them (see the judgments of the Court of Justice in Case 121/76 *Moli v Commission*, supra, and Case 225/82 *Verzyck v Commission* [1983] ECR 1991).

The claim that the Court should order the production of documents, require the Commission to give certain explanations and obtain witness evidence

92 The applicant relies on Article 42(1) of the Rules of Procedure of the Court concerning the tendering of evidence and, in her reply, requests clarification of the conditions under which Mrs Gutiérrez Díaz was appointed. She states that it was only through the Commission's defence that she was able to secure any information concerning that appointment.

- 93 The defendant contends that the applicant has not succeeded in showing the existence of irregularities in the procedure followed and that the administration cannot be criticized for the speed and effectiveness with which it proceeded to appoint the candidate best suited to the post in question, particularly since there was a time-limit on the validity of that procedure.
- 94 The Court finds that the applicant's claims are directed essentially to obtaining from the Court an order for preparatory inquiries comprising, in particular, the production of documents concerning the recruitment procedure. In that regard, it must be remembered that pursuant to Article 45(1) of the Rules of Procedure of the Court, the Court is to 'prescribe the measures of inquiry that it considers appropriate by means of an order setting out the issues of fact to be determined'. It is clear from that provision that it is for the Court to appraise the usefulness of any such measure. In the present case, it appears, first, from the information before the Court and, secondly, from everything stated above, that the measures requested by the applicant would be of no help to the Court, which considers that adequate information is available to it from the proceedings as a whole.
- 95 Consequently, those claims must also, in any event, be dismissed.

Costs

- 96 Pursuant to the second subparagraph of Article 68(3) of the Rules of Procedure of the Court of Justice, the Court may order even a successful party to reimburse costs which it has, by its conduct, caused the opposite party to incur.
- 97 In its judgment in 111/83 *Picciolo v Parliament*, supra, the Court of Justice stated: 'Although the applicant has failed in all his submissions it is none the less necessary, in making an order as to costs, to take into account the considerations referred to above regarding the conciseness of the statement of the reasons of which the decision of the appointing authority not to accept the applicant's application was based. It was only as a result of the replies provided by the

Parliament to the questions put by the Court that it was possible for the applicant fully to assess the reasons stated. In those circumstances the applicant cannot be criticized for having brought the matter before the Court in order to obtain a review of the legality of the decisions of the appointing authority in question' (see also the judgment of the Court of First Instance in Joined Cases T-160/89 and T-161/89 *Kalavros v Court of Justice*, supra).

- 98 In the present case, it must be stated that the same reasoning falls to be applied in view, on the one hand, of the lack of proof of notification to the applicant of the decision concerning her, as alleged by the Commission, and, on the other, of the more important fact that no statement of reasons was provided for that decision addressed by the Commission to the applicant.
- 99 In those circumstances, the second subparagraph of Article 69(3) of the Rules of Procedure must be applied and the Commission must be ordered to pay the costs in their entirety.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

- (1) **Rejects the claims for annulment of the Commission decision making an appointment to the post corresponding to post number 12 in Competition COM/A/537 and the annulment of the recruitment procedure from the point at which the list of suitable candidates was drawn up;**
- (2) **Dismisses as inadmissible the claims that the Court of First Instance should order that the applicant be appointed and alternatively that the competition procedure should be reopened;**
- (3) **Declares that it is unnecessary to rule on the claim that the Commission's decision rejecting the applicant's candidature should be annulled;**

- (4) **Dismisses the claim that the Court of First Instance should order preparatory inquiries;**
- (5) **Orders the Commission of the European Communities to pay all the costs, including those of the applicant.**

Briët

Barrington

Biancarelli

Delivered in open court in Luxembourg on 20 March 1991.

H. Jung

Registrar

C. P. Briët

President