

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
5 December 1990 *

In Case T-82/89,

Antonio Marcato, a former official of the Commission of the European Communities, residing in Brussels, represented by Philippe-François Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13, rue Aldringen,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the list of officials found to be most worthy of promotion in 1988 into Grade B 2,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

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

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearings on 29 March and 20 September 1990,

gives the following

* Language of the case: French.

Judgment

Facts of the case

- 1 The applicant, born on 25 March 1928, entered the service of the Commission on 12 November 1958. After being established in Grade D 2 with effect from 1 January 1962, and following several promotions, he was appointed in 1975 to Grade B 4 and assigned to Division XIX B 2 'Accounting, financial management and information' at the Commission. On 30 March 1987, Directorate-General XIX modified his duties.
- 2 His staff report for the period from 1 July 1985 to 30 June 1987, drawn up by the deputy head of division, Mr Lemoine, was submitted to him only on 13 April 1988. The applicant challenged certain details in that report, and an appeal in respect of the reporting procedure was pending at the time of the oral procedure.
- 3 The promotion procedure which gave rise to the dispute was conducted in a number of stages, in accordance both with the 'General Provisions for implementing the Procedure for Promotion within a Career Bracket', which the Commission adopted by decision of 21 December 1970 and amended by decision of 14 July 1971 (published in *Administrative Notices* No 42 of 13. 5. 1975, and hereinafter referred to as 'the General Provisions'), and with the rules governing promotion procedures published in *Administrative Notices* No 514 of 10 November 1986.
- 4 The first stage of that procedure consists in the publication of the list of officials eligible for promotion who possess the requisite seniority. The applicant, established since 1 October 1980 in Grade B 3 and therefore possessing the minimum of two years' seniority required by Article 45 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), was included on the list of officials eligible for promotion to Grade B 2 in 1988, which was published on 15 February 1988.

- 5 In the next stage of the procedure, the Commission's directorates-general draw up a list of officials whom they propose for promotion. In the circumstances, that list, which was published on 16 March 1988, comprised the names of four officials in Directorate-General XIX. The applicant's name was not amongst them.

- 6 After learning that his directorate had not proposed him for promotion, the applicant sent a letter on 9 June 1988 to Mr Valsesia, President of the Promotion Committee for Category B, asking for his case to be reconsidered. That letter apparently remained unanswered. By letter of 30 June 1988, the applicant wrote to Mr Morel, the Director-General of Directorate-General XIX, asking him to state the precise reasons for which the applicant had not been proposed for promotion. By a memorandum of 3 August 1988, Mr Morel replied that the applicant's case had been taken into consideration twice: first when Directorate C had drawn up its proposals, and the second when the definitive list had been drawn up for Directorate-General XIX. According to that memorandum, the selection had been made on the basis of a comparative examination of the relevant criteria.

- 7 In the meantime, the Promotion Committee for Category B had met on 15 and 16 June 1988 in order to examine the proposals for promotion to Grades B 2 and B 4. With regard to the applicant, the Minutes of those meetings state that 'the committee takes formal note of the detailed explanations furnished by the representative of Directorate-General XIX as regards the conduct of Mr Mercato (sic). That opinion is in conformity with the line taken in the past by other representatives of Directorate-General XIX and would therefore seem to be confirmed. However, in view of certain differences in the reports concerning Mr Mercato, the committee considers that his position should be clearly defined'. The Promotion Committee drew up the draft lists of officials found to be most worthy of promotion without including the applicant's name.

- 8 On the basis of those draft lists, the Commission's Director-General for Personnel and Administration and the Director of the Publications Office, acting in their capacity as the appointing authority, drew up on 11 July 1988 a list of officials found to be most worthy of promotion in 1988 into Grade B 2. The list, which did not include the applicant's name, was published in the Commission's information sheet of 29 July 1988. It contained the names of two of the four officials proposed by Directorate-General XIX.

- 9 On 23 September 1988 the applicant lodged a complaint with the Commission pursuant to Article 90(2) of the Staff Regulations. Relying on the absence of a staff report for the period from 1 July 1985 to 30 June 1987 and on the fact that, in his view, the memorandum addressed to him by Mr Morel on 3 August 1988 constitutes a refusal on the part of the Commission to notify him of the reasons for its decision not to include his name on the list of officials put forward by the directorate-general, the applicant claims that the Commission did not comply with the second paragraph of Article 25 (any decision adversely affecting an official must state the grounds on which it is based) or with Article 45(1) (consideration of the comparative merits of officials) of the Staff Regulations. He accordingly sought 'the annulment of the list of officials found to be most worthy of promotion, published on 29 July 1988, and a complete revision of the promotion procedures for 1988'.
- 10 However, out of concern that his complaint might be inadmissible and taking the view that he could rely by analogy on the case-law of the Court concerning selection boards (judgments in Case 44/71 *Marcato v Commission* [1972] ECR 427 and in Case 37/72 *Marcato v Commission* [1973] ECR 361), the applicant — without awaiting a decision on his complaint — immediately brought an action which was lodged at the Court Registry on 28 October 1988 (Case T-47/89 [1990] ECR II-231).
- 11 The list of officials promoted to Grade B 2 was published on 31 October 1988. It did not contain the applicant's name and included only one official from Directorate-General XIX.
- 12 On 6 April 1989, as the Commission had not yet reacted to his complaint, the applicant brought the present action, which was lodged at the Court Registry on 10 April 1989. In his application, he pointed out that he was not discontinuing his first action but, faced with what in his view was an implied decision of rejection, he was bringing a second action in order to ensure that his rights were fully protected.

- 13 On 7 April 1989 the Commission adopted an express decision rejecting the applicant's complaint, which was notified to him on 25 April 1989. The Commission pointed out that the contested staff report had been submitted to the applicant on 13 April 1988 and considered that the applicant's allegations did not substantiate the existence of an infringement of Articles 25 and 45 of the Staff Regulations.

Course of the procedure

- 14 In his first action Mr Marcato sought the annulment of the list of officials found to be most worthy of promotion to Grade B 2 in 1988 (Case T-47/89). The action was also directed 'in so far as is necessary' against Mr Morel's letter of 3 August 1988, in which the latter refused to give an unequivocal explanation of the reasons for the applicant's exclusion from that list. The applicant relied on two submissions, one alleging infringement of the second paragraph of Article 25 of the Staff Regulations (inadequate statement of reasons) and the other alleging infringement of Article 45(1) of the Staff Regulations (irregularity in the consideration of the comparative merits of the officials concerned on account of the absence of the applicant's most recent staff report).
- 15 The Commission raised an objection of inadmissibility against that action. It maintained that the action had been brought in disregard of Article 91(2) of the Staff Regulations since a direct action was not admissible in the circumstances, which was disputed by the applicant.
- 16 By decision of 24 February 1989, the Court of Justice (Fourth Chamber) decided to consider the objection of inadmissibility at the same time as the substance of the case. The written procedure subsequently followed the usual course before the Court of Justice.
- 17 In the present action, the applicant also seeks the annulment of the list of officials found to be most worthy of promotion in 1988 into Grade B 2. The action is also directed 'in so far as is necessary' against Mr Morel's letter of 3 August 1988. This action is based on the same submissions and arguments as the first, that is to say infringement of the second paragraph of Article 25 and Article 45(1) of the Staff Regulations.

- 18 In the proceedings before the Court of Justice, the Commission raised an objection of inadmissibility in accordance with Article 91 of the Rules of Procedure, without lodging a defence on the substance of the case. The applicant submitted observations against that objection.
- 19 By order of 15 November 1989, the Court of Justice referred the two cases to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities. By two orders of 6 December 1989, the Court of First Instance (Fifth Chamber) joined the two cases for the purposes of the oral procedure and the judgment and decided to exclude from consideration two documents produced by the defendant.
- 20 On hearing the report of the Judge-Rapporteur, the Court decided to accede to the Commission's request for a ruling on the objection of inadmissibility without considering the substance of the case. It put two questions to the Commission. The applicant, represented by Mr Vandersanden of the Brussels Bar, and the defendant presented oral argument at the first hearing on 29 March 1990. In reply to the questions put by the Court, the Commission's representative produced at the hearing the text of the amended Commission decision of 21 December 1970 laying down the aforesaid General Provisions. It is apparent from Point 8 of those provisions that only such officials as are on the lists of officials considered to be most deserving of promotion (within a career bracket) may be promoted in the course of that year. The Commission's representative confirmed that so far — in the case of officials in Grade B, C and D — that rule had been observed by the Commission without a single exception.
- 21 By judgment of 20 June 1990, the Court of First Instance dismissed the application in Case T-47/89 as inadmissible on the ground that, if the contested list constituted an act adversely affecting the applicant, the action had been brought too soon or, if not, there was no act against which an action might be brought. In the present case, Case T-82/89, the Court ruled that the objection of inadmissibility raised by the defendant would be considered at the same time as the substance of the case (Joined Cases T-47/89 and T-82/89 *Marcato v Commission* [1990] ECR II-231).

- 22 Following that judgment, the Court requested the parties to confirm that, as they had stated at the hearing on 29 March 1990, all the pleadings submitted in Case T-47/89 should be taken into consideration for the purposes of the judgment on the substance of the present case.
- 23 By a document of 29 June 1990, the applicant gave valid confirmation that all the pleadings submitted in Case T-47/89 might be taken into consideration for the purposes of the judgment on the substance of Case T-82/89. Since the applicant has lodged a second application meeting all the requirements of the Rules of Procedure of the Court of Justice, since both cases have the same subject-matter and since the applicant has relied on the same submissions, there is no reason to preclude him from making general reference, in his document of 29 June 1990, to all the submissions and arguments put forward in Case T-47/89.
- 24 In its defence of 2 July 1990, the Commission also provided the confirmation requested by the Court. It reaffirms in their entirety, for the purposes of the present case, the substantive arguments which it put forward in its defence and rejoinder in Case T-47/89 to counter the applicant's submissions. It would be contrary to the principle of the sound administration of justice to require the Commission to make a formal and superfluous reiteration of its submissions and arguments in its new defence.
- 25 On 20 September 1990, a second hearing was held before the Court, at which the applicant was again represented by Mr Vandersanden. In reply to a question put by the Court, the representatives of the parties confirmed that the applicant had taken retirement at his own request, with effect from 1 May 1990. The representative of the Commission stated that, when the rules governing promotion procedures were amended, it might be considered whether the statements of representatives of the directorates-general on promotion committees should be included in their entirety in the personal files of the officials concerned. The President declared the oral procedure closed at the conclusion of the hearing.

Forms of order sought by the parties

26 The applicant claims that the Court should:

- (i) declare the action admissible and well founded;
- (ii) 'annul the list of officials found to be most worthy of promotion in 1988 into Grade B 2 (including BS and BT), published in *Administrative Notices* No 565 of 29 July 1988 (p. 9 et seq.), for infringement of Article 25 (in particular, the second paragraph thereof) and Article 45(1) of the Staff Regulations';
- (iii) order the defendant to pay the whole of the costs.

In its objection of inadmissibility of 12 May 1989, the Commission contends that the Court should:

- (i) dismiss the action as inadmissible;
- (ii) make an appropriate order as to costs.

In its defence of 2 July 1990, the Commission contends that the Court should:

- (i) dismiss the action as unfounded;
- (ii) make an appropriate order as to costs.

Admissibility of the action

27 In support of its objection to the admissibility of this case, raised in accordance with Article 91 of the Rules of Procedure of the Court of Justice, the Commission first reiterates the arguments which it put forward in Case T-47/89. In that case, it

relied in its defence of 28 March 1989 on the judgment of the Court of Justice in Case 346/87 *Bossi v Commission* [1989] ECR 303, in which the Court held that a list of officials found to be most worthy of promotion is merely a preparatory act whose regularity may be called in question only in an application brought against the decision concluding the promotion procedure. According to the Commission, that constitutes an absolute bar to proceeding with the case. Since the applicant did not lodge a complaint against the list of officials promoted to Grade B 2, which has therefore become definitive in relation to him, the Commission concluded that the application should be dismissed as inadmissible.

- 28 The Commission acknowledged that the Court of Justice, in its judgment in Case 86/77 *Ditterich v Commission* [1978] ECR 1855, at pp. 1865 and 1866, dismissed as unfounded, without declaring it inadmissible, an application for the annulment of a decision establishing a list of officials considered to be most deserving of promotion. However, the Commission considered that since, pursuant to Article 92 of the Rules of Procedure, the Court 'may' of its own motion consider whether there exists any absolute bar to proceeding with a case, the Court has merely a power in that regard, and that judgments which, for reasons of judicial policy, dismiss applications as unfounded without first enquiring whether they are admissible are therefore not uncommon. In the Commission's view, the judgment in *Bossi* thus does not represent a reversal of the case-law laid down in *Ditterich*.
- 29 The Commission claimed that the principles laid down by the Court in its judgment in *Bossi* must be applied *mutatis mutandis* to the present action, notwithstanding the fact that it was brought a few months before that judgment was given. Even if that judgment constituted a reversal of case-law, the court adjudicating on the substance of the case should always take account of the most recent case-law. In addition, it would be contradictory, to say the least, if such a reversal could be applied to the applicant in *Bossi* but not to the applicant in this case.
- 30 With regard to the fact that the list in question is binding on the appointing authority so far as promotions during the financial year are concerned, the Commission pointed out that, as the Court of Justice has held, even preparatory acts which are binding on the administration, such as the opinions of an establishment board or an invalidity committee, cannot be referred separately to the Court.

- 31 Finally, referring again to the judgment in *Bossi*, the Commission raised in its rejoinder of 6 July 1989 the question of the applicant's continued interest in seeking the annulment of the list of officials found to be most worthy of promotion despite his failure to challenge within the prescribed period the list of officials actually promoted, which has therefore become definitive.
- 32 In the pleadings submitted in the present case, the Commission refers again to the judgment in *Bossi* which, it claims, is in line with the consistent case-law of the Court of Justice. It refers to the judgment of the Court of Justice in Case 11/64 *Weighardt v Commission* [1965] ECR 285 and the order in Joined Cases 78/87 and 220/87 *Santarelli v Commission* [1988] ECR 2699, at p. 2703. Since the applicant did not lodge a complaint against the list of officials promoted to Grade B 2, no legal proceedings bringing that list into question may now be brought. The Commission considers, therefore, that the application is inadmissible.
- 33 At the hearing, the Commission claimed that the applicant can no longer be promoted after retirement. It also raised the question of what benefit the applicant could derive from a re-examination of his theoretical chances of promotion in the 1988 financial year, in view of the fact that he had failed to challenge within the prescribed period the promotions decided on in respect of that year.
- 34 The applicant considers that the action is admissible. He also reiterates the arguments put forward in this regard in Case T-47/89. The applicant first compared the judgment in *Bossi* with the judgment in *Ditterich*, in which, in his view, the Court held an action directed against a list of officials proposed for promotion to be admissible. The applicant concluded that the judgment in *Bossi* constitutes a reversal of previous case-law, and that the question should be raised whether, in those circumstances, the principles laid down by the Court in *Bossi* may be relied upon by the defendant as an absolute bar to proceeding with the action. In his view, such an objection of inadmissibility should be covered by the rules on admissibility applicable at the time when the action was brought.
- 35 The applicant then asserted that, since the list of officials found to be most worthy of promotion is binding on the appointing authority, it was unnecessary to regard

it as a preparatory act except in relation to the officials included on it but not subsequently promoted. In the case of officials not included on the list, however, the application of the principles laid down by the Court in its judgment in *Bossi* would mean an impairment of their rights and interests. If those principles were applicable to them, they would have to await the publication of the list of officials promoted in order to be able to assert their rights, first before the administration, and then before the Court. The chances of securing a 'rectification' in their favour would therefore be reduced.

36 In the present case, the applicant reasserts that the list of officials found to be most worthy of promotion is an act adversely affecting him inasmuch as it automatically prevented him from inclusion on the list of those promoted. An official whose name has not been proposed by the promotion committee cannot be promoted by the appointing authority and is thus, the applicant claims, definitively barred from promotion.

37 At the hearing, the applicant stated that he had himself applied for retirement. He claimed that a decision which he himself had brought about could not be pleaded against him in order to challenge his interest in bringing an action.

38 Having regard to those factual and legal considerations, it is appropriate to begin by determining the act of the Commission against which the action is directed. The applicant has pointed out that the action, 'in so far as is necessary', is 'also' directed against Mr Morel's letter. However, that letter refers only to the proposals for promotion drawn up by Directorate-General XIX, which have not been challenged by the applicant. The applicant sought only the annulment of a subsequent list which was not commented on in the letter in question. It follows that Mr Morel's letter is not an act contested in the action. It is merely a factual detail on which the applicant relies in support of one of his submissions, namely that the second paragraph of Article 25 of the Staff Regulations was infringed. Accordingly, the action is directed only against the appointing authority's decision establishing the list of officials found to be most worthy of promotion in 1988 into Grade B 2.

39 For the purpose of considering the objection of inadmissibility raised by the Commission, it must be noted that the decisions underlying the contested list are necessarily of two different kinds. On the one hand, the appointing authority

decides to include certain officials eligible for promotion on the list; on the other hand, it excludes the other officials eligible for promotion. Consequently, it should first be determined whether the inclusion of certain officials on the list is an act capable of adversely affecting an official who is not included.

40 The parties have rightly claimed that the inclusion of an official's name on a list of officials found to be most worthy of promotion is merely a preparatory measure. It is a preliminary to promotion in so far as it is an essential prerequisite therefor. However, the appointing authority is not obliged to promote an official included on the list. Therefore the decision to include an official on the list in question does not directly affect his legal position, since no decision concerning his possible promotion has yet been taken (see also the judgment of the Court of Justice in Case 143/84 *Vlachou v Court of Auditors* [1986] ECR 459, at p. 476). Nor can the mere fact that another official is included affect the legal position of officials who are not included, since it can only be affected by the actual promotion of that other official. Therefore the decision to include an official's name on the list of those found to be most worthy of promotion within a career bracket does not constitute an act adversely affecting another official.

41 It follows that the application is inadmissible in so far as the applicant seeks the annulment of the entire list of officials found to be most worthy of promotion.

42 However, the application also seeks the annulment of the decision of the appointing authority establishing the list of officials found to be most worthy of promotion in so far as it excludes the applicant from that list. The Commission, referring to the judgment in *Bossi*, cited above, considers that part of the application also inadmissible.

43 It must be borne in mind, first of all, that the judgment in *Bossi* was delivered in a different legal context from that in the present case. Mr Bossi, the applicant in that case, was an official in Grade B 2 and had challenged a list of officials found to be most worthy of promotion to Grade B 1, that is to say into a different career bracket. According to the new measures governing promotions and careers adopted by the Commission on 24 November 1976 and published in *Administrative Notices* No 132 of 10 January 1977, the Commission publishes vacancy notices for

such promotions into a different career bracket. Officials may then submit an application, even if they are not on the list of officials found to be most worthy of promotion. For promotions into another career bracket, therefore, the appointing authority is not bound by its adoption of that list, which is consequently a provisional measure inasmuch as it does not produce any definitive effect. As far as promotions within the same career bracket are concerned, however, it is clear from Point 8 of the abovementioned General Provisions (see above, paragraph 3) that the appointing authority is bound by its own adoption of the list in question.

- 44 The facts in the present case are more similar to those in *Ditterich*, in which the annulment of a list of proposals for promotion to Grade A 4, that is to say within the same career bracket, was sought. The action in that case was thus brought against a list of officials producing effects similar to those of the list contested in the present case. That action was not dismissed as inadmissible. Even though, in *Ditterich*, the Commission did not challenge the admissibility of the application on the ground that the contested list was a preparatory act, this Court must take the judgment in that case into consideration.
- 45 It is also relevant to note that in its judgment in Joined Cases 181 to 184/86 *Del Plato and Others v Commission* [1987] ECR 4991, in which the annulment was sought of a number of decisions whereby an *ad hoc* committee had refused to enter the applicants' names on a list of Category B officials in the scientific or technical services capable of performing Category A duties, the Court of Justice did not dismiss the applications until it had considered the substance of the case. In that case, in accordance with the system instituted by the Commission, the appointing authority had automatically adopted the list of successful candidates (see the Opinion of Mr Advocate General Mischo at p. 5003). Although the Commission did not argue that the act was preparatory in that case either, the judgment is also one which must be taken into consideration by this Court.
- 46 The Commission referred also to the case-law of the Court of Justice relating to the opinions of the Establishment Board provided for under Article 102(1) of the Staff Regulations. The Court of Justice regarded those opinions, which, if unfavourable, were binding on the appointing authority, as measures inseparable from the appointing authority's decision on establishment. It considered that they

did not have a direct adverse effect on the applicants (judgment in Case 26/63 *Pistoij v Commission* [1964] ECR 341, at p. 352; judgment in Case 11/64 *Weighardt v Commission* [1965] ECR 285, at p. 298). However, such an opinion was addressed only to the appointing authority and thus did not constitute a decision relating to a specific individual within the meaning of the second paragraph of Article 25 of the Staff Regulations (judgment in Case 80/63 *Degreeef v Commission* [1964] ECR 391, at p. 403). It must also be borne in mind that the judgments cited in that regard concern an individual integration procedure unlike the collective promotion procedure with which the present case is concerned. The opinion of the Establishment Board was followed by a decision of the appointing authority on establishment, and that decision was addressed to the official concerned. The present action is brought against an act of the appointing authority which concerns all officials eligible for promotion. The question whether the part of that act which refers to those officials who were excluded from the list may be separated from the rest of the procedure, and whether it directly affected the legal position of the officials excluded, therefore arises in a different legal context from that of the integration procedures considered in *Pistoij*, *Weighardt* and *Degreeef*.

47 The Commission also relied on the case-law of the Court of Justice concerning the procedure for retirement on grounds of invalidity. However, it must be observed that the order of the Court of Justice in *Santarelli*, cited above, which was mentioned in that connection, concerns a decision of the appointing authority to refer the applicant's case to the Invalidity Committee. Such a decision is undoubtedly a preparatory measure inasmuch as it is followed, on completion of the individual procedure, by another decision which is addressed to the official concerned. In the present case, the decision adopting the list of officials found to be most worthy of promotion was not followed by an individual decision affecting the officials not listed. As far as promotion is concerned, a decision relating to a specific individual is taken only with regard to officials who are promoted, and no decision is addressed to those who are not. The case-law of the Court of Justice concerning preparatory measures in the context of the individual procedure for retirement on grounds of invalidity, like that concerning the opinions of the Establishment Committee, cannot therefore be transposed to the collective procedure of promotion within a career bracket.

48 This Court is aware that the considerations examined by the Court of Justice in paragraphs 22 to 24 of its judgment in *Bossi*, cited above, may be regarded as applicable also to the present situation. It therefore considers that it is necessary to re-examine the question whether, in the present case, the decision to exclude the applicant from the list of officials found to be most worthy of promotion was merely a preparatory act.

- 49 First of all, the exclusion of an official not included on such a list becomes definitive when, on the basis of that list, the appointing authority takes its decisions regarding promotion. In accordance with Point 8 of the General Provisions, only such officials as are on the list concerned may be promoted in the course of the year in question, and then only if adequate funds are available. Although those General Provisions do not have the character of strict law (see the judgment of the Court of Justice in Case 782/89 *Geeraerd v Commission* [1980] ECR 3651, at p. 3663), the Commission observes that rule without exception, at least as far as officials in Grades B, C and D are concerned. Those circumstances alone suggest that the decision to exclude an official from the contested list is an act directly and adversely affecting the official excluded, since the Commission considers itself bound by the contents of the list. The decision to exclude an official may therefore be separated from the subsequent steps in the promotion procedure, which concern only the officials included on the list, still awaiting promotion.
- 50 If that were not so, the official would have to wait until the final decisions on promotion were taken before challenging — at least — one of those promoting an official on the list. Such a constraint would be likely to prove prejudicial to sound personnel management and administration. If an official not on the list claims that a purely procedural irregularity was committed either before or when that list was drawn up, then it is in both his interest and that of the institution that such a complaint should be examined as soon as possible. In order to ensure sound personnel management, therefore, the official must be able to lodge a complaint immediately so that the appointing authority may rectify any errors before the promotion procedure is completed.
- 51 It would, moreover, be contrary to the principle of sound administration for a procedural irregularity concerning only one official to result in the calling into question of the promotions of all the officials on the list. If the applicant had been obliged, as the Commission asserts, to challenge the decisions of promotion in order to defend his rights, he would have had to bring an action against at least one of those decisions, even though his complaint was unrelated to the merits of the official (and colleague) promoted. Such a result also appears incompatible with both the principle of sound administration and the desire to avoid straining relations between members of staff. In its judgment in a similar case, Case 24/79 *Oberthür v Commission* [1980] ECR 1743, the Court of Justice held that the annulment of the promotions of all the officials who had in fact been promoted would constitute an excessive penalty for the irregularity committed in the

applicant's individual case and that it would be arbitrary to annul the promotion of only one official.

52 It must therefore be held that the appointing authority's decision not to include the applicant on the contested list constitutes an act which, as regards the applicant, may be separated from the decisions bringing the procedure for promotion within the career bracket to an end. Although Point 8 of the General Provisions does not constitute a rule of law in the strict sense, the Commission is bound, as it maintained itself, by the list in question. Even on the assumption that the Commission retains — in exceptional circumstances the existence of which neither party has alleged in this case — the power to promote an official not on the list, such a theoretical hypothesis cannot be compared to the chances of officials eligible for promotion before the list is drawn up. An official not included on the list thereby loses any real chance of being promoted. His legal position is thus immediately and directly changed and affected at the moment when the decision to exclude him from the list is taken. It follows that the applicant was entitled to bring an action against that decision of the appointing authority without waiting for the final decisions on the promotions to be taken.

53 It must also be held that, contrary to the Commission's assertions, the applicant has an interest in bringing an action against the decision excluding his name from the list. The Commission claims that the promotions for 1988 have become definitive with regard to the applicant. However, if the decision not to include his name on the list were to be annulled, the appointing authority would be obliged, pursuant to Article 176 of the Treaty, to recommence the whole procedure with regard to the applicant. If, following that reconsideration, a new decision of the appointing authority were to amend the list in his favour, the applicant would be able either to benefit from a career reconstruction or to bring an action seeking compensation for whatever damage he had suffered as a result of the failure to include him on the list in 1988. The applicant's interest in bringing an action is therefore incontrovertible.

54 Nor has the applicant lost his interest in bringing an action as a result of his retirement, pursuant to Article 52 of the Staff Regulations. Since a subsequent claim for damages remains possible, the applicant has retained his interest in seeking a ruling on his application. The judgment of the Court of Justice in Joined

Cases 81 to 88/74 *Marenco v Commission* [1975] ECR 1247, on which the Commission relies, was delivered in circumstances different from those of the present case, since the applications which were dismissed as inadmissible in those cases had been brought by officials who had previously resigned.

- 55 The Court therefore considers that the application is admissible in so far only as it is directed against the appointing authority's decision not to include the applicant's name on the list of officials found to be most worthy of promotion.

The substance of the case

- 56 The applicant bases his application on two submissions, namely infringement of the second paragraph of Article 25 of the Staff Regulations and infringement of Article 45(1) of the Staff Regulations.

- 57 In his application, Mr Marcato maintains that the Promotion Committee for Category B and the appointing authority failed to comply with the second paragraph of Article 25 of the Staff Regulations. Mr Morel, the Director-General, should have explained to him the reasons for which Directorate-General XIX had not proposed him for promotion. In the applicant's submission, however, Mr Morel's letter of 3 August 1988 gave only vague and general reasons amounting to no reasons at all.

- 58 The Commission reiterates the arguments previously submitted in its defence in Case T-47/89. It claims that the failure to provide reasons on which the applicant relies does not concern the act contested in this action but another, prior act. The Director-General's letter of 3 August 1988 referred to the list of officials proposed for promotion by the Directorates-General. However, in the Commission's submission, that list is also a preparatory act which — since it is not a decision adversely affecting the applicant — does not fall within the scope of Article 25 of the Staff Regulations. There can therefore be no question of an infringement of that article.

- 59 Assuming it to be possible to regard the submission as referring also to the list of officials found to be most worthy of promotion, the Commission considers that the appointing authority is not obliged to state the reasons for decisions on promotion with regard to officials who are not promoted.
- 60 In support of its second submission, based on infringement of Article 45(1) of the Staff Regulations, the applicant puts forward two arguments. First, he alleges that the promotion procedure was rendered irregular by the fact that there was no staff report on him in respect of the period from 1 July 1985 to 30 June 1987. Secondly, he claims that he was unable to defend himself against the remarks made about him by the representative of Directorate-General XIX in the Promotion Committee.
- 61 The applicant states that his staff reports for the years 1973 to 1985 were excellent. The fact that there was no staff report in respect of the period from 1 July 1985 to 30 June 1987 meant that the Promotion Committee could not give his comparative merits consideration of a kind which was 'genuine, serious and free from personal bias'. The applicant expresses doubts over the number and distribution of the points awarded to him on 'objective' criteria and on criteria of merit.
- 62 In his reply in Case T-47/89, the applicant also stressed that there was a delay of over three months in communicating his staff report for 1985-87. Now (in 1990) that report is the subject of an assessment appeal procedure. He therefore considers that nothing in a document which is not yet final should be used as an argument against him.
- 63 With regard to his second argument, to the effect that he was denied the right to a fair hearing, the applicant stated in his reply in Case T-47/89 that the Promotion Committee for Category B reached its decision without having consulted the personal files of the officials eligible for promotion. He also alleged that nobody had expressed the slightest objection to the remarks made about him by the representative of Directorate-General XIX, although those comments were not borne out by his personal file. The applicant claimed that the decision not to include his name was based on the statements made by the representative of Directorate-General XIX within the Promotion Committee. Since he had not been

made aware of that person's attitude, he was unable to defend himself. If his conduct had been in any way unsatisfactory, which the applicant considers not to have been the case, his superiors should have informed him of the fact and sought to discuss it with him. In the applicant's opinion, the way in which the appointing authority acted unilaterally was inconsistent with the objective, impartial and equal treatment which should govern a promotion procedure. Since he was not given a hearing, he was unable to provide proof of his superior's animosity towards him. At the hearing before the Court, the applicant added that, according to information received from the staff representatives on the Promotion Committee, the representative of Directorate-General XIX expressed fierce opposition to his promotion.

- 64 The Commission reiterates the arguments which it put forward in Case T-47/89. It denies that there was no comparative consideration of the candidates' merits. It considers that the applicant has adduced no evidence in support of that allegation. It further avers that he has remained silent on the question whether his merits were at least equivalent to those of the officials included on the list of those found to be most worthy of promotion.
- 65 The Commission states that, in accordance with Point 8 of the 1986 rules governing promotion procedures the Promotion Committee for Category B made a comparative consideration of all the officials eligible for promotion on the basis of the proposals of their services and their order of priority. Pursuant to Point 9 of those rules, the Committee gave particular attention to the situation of officials, such as the applicant, who were over the upper limits of the age and seniority brackets laid down.
- 66 The Commission further emphasizes the fact that the appointing authority which drew up the list in question also considered the comparative merits of all those eligible for promotion. The applicant has mentioned no facts to support his contrary assumption. As regards the alleged animosity on the part of his superior, the applicant should have provided proof, as the Court of Justice held in its judgment in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497, at p. 522.
- 67 The staff report for the period 1985-87 is — according to the Commission — at least as important for the 1988 promotions as previous reports concerning a more distant past. The applicant received that report on 13 April 1988. The assessment

of his immediate superior was far from being as favourable as regards the services rendered by the applicant during the relevant period than had been the case for previous years.

- 68 The Commission refers to the case-law of the Court of Justice in support of its claim that the validity of that report was unaffected by a delay of slightly over three months (judgment in Joined Cases 36/81, 37/81 and 218/81 *Seton v Commission* [1983] ECR 1789, at p. 1805). It further points out that the Court of Justice has held that promotions granted are not to be annulled unless the irregularities found in the personal file of one official eligible for promotion were capable of having a decisive effect on the promotion procedure (judgment in Joined Cases 156/79 and 51/80 *Gratreau v Commission* [1980] ECR 3943, at p. 3955). The applicant has not referred to any fact from which it might follow that the alleged absence of his staff report was capable of having such a decisive effect on the course of the promotion procedure in question. Even if the assessments in question had been communicated to the applicant at the end of November 1987, there would have been no guarantee, in the Commission's submission, that the initial assessments would have been appreciably improved to an extent which would have rendered them at least equivalent to those of the officials included on the list if—for the purposes of hypothesis—the appeal procedure had been concluded by July 1988.
- 69 The reason for which the staff report did not appear in the applicant's personal file before the Promotion Committee started its proceedings was that, not having been signed in due time by the applicant, it could not be regarded as final. The Commission considers that by requesting a referral to an appeal assessor and then the consultation of the Joint Committee on Staff Reports, the applicant himself created conditions likely to slow down the course of the assessment procedure. It stresses that, in accordance with the judgment of the Court of Justice in Case 1/87 *Picciolo v Commission* [1988] ECR 711, at p. 736, the delay of which the applicant complains is, at least in part, attributable to his own attitude.
- 70 As regards the infringement of the right to a fair hearing, the Commission concludes from the rules on promotion procedures (see above, paragraph 3), Point 8 of which provides for the possibility of consultation between the Promotion Committee and a representative of the Director-General, that the applicant's complaints concerning the Committee's methods are unfounded. In the Commission's view, such consultation was all the more necessary in the applicant's case since he was over the upper limits of the age and seniority brackets laid down,

and the mediator had drawn the Committee's attention to the applicant's case. The documents produced by the Commission do not, in its view, support a finding that the detailed explanations of the representative of Directorate-General XIX had the negative consequences ascribed to them by the applicant.

- 71 The extract of the Minutes of the Committee meeting was, in the Commission's submission, completely neutral, and in no way revealed whether the applicant's merits or conduct were in any way unsatisfactory according to the representative of Directorate-General XIX. It was in any event open to the applicant as a precautionary step to argue his case before the staff representatives on the Committee in order to counterbalance any unfavourable appraisal of him voiced within the Committee by the representative of his Director-General.
- 72 In the Commission's submission, the Promotion Committee is not the proper place for quarrels and verbal confrontations between officials and representatives of the senior administration over the assessment of officials' merits and performance.
- 73 The Court considers that the submission based on infringement of Article 45(1) of the Staff Regulations, concerning the regularity of the promotion procedure, must be examined first. The applicant has put forward two arguments in that regard, including, in his reply in Case T-47/89, the fact that he was unable to defend himself against the allegations of the representative of Directorate-General XIX in the Promotion Committee even though his personal file did not bear out those remarks.
- 74 At the hearing, the Commission's representative claimed that the applicant did not refer in his submissions to an infringement of Article 26 of the Staff Regulations, which relates to the personal files of officials. It must, however, be noted that the submission on which the applicant relied in his application concerns the regularity of the promotion procedure. The Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance, do not preclude the presentation during the course of the procedure of new arguments in support of a submission made in the application. Consequently, the Court must consider the argument based on an infringement of the rules governing the keeping of personal files, as presented by the applicant in his reply.

- 75 It must also be noted that the applicant stated in his application that 'he has doubts over the points awarded to him on objective criteria and on criteria of merit' (p. 7). The argument was thus raised succinctly in the application itself. It is therefore necessary to consider whether during the course of the promotion procedure the Commission infringed Article 26 of the Staff Regulations, under which the personal file of an official is to contain all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct, and which provides that documents may not be used or cited by the institution against an official unless they were communicated to him before they were filed.
- 76 The draft list drawn up by the Promotion Committee and the appointing authority's subsequent decision not to include the applicant on the list of officials found to be most worthy of promotion were based, in the absence of a staff report, on the statements made by the Director-General's representative within the Promotion Committee. The Minutes of the committee's meetings show that when considering the applicant's conduct it took into consideration the relevant explanations of the Director-General's representative. Given the importance which they thus assumed, those oral statements, made in the context of a promotion procedure before a committee set up for that purpose, are to be regarded as constituting a report within the meaning of Article 26 of the Staff Regulations. They should therefore have been immediately put into writing and recorded in the applicant's personal file as required by Article 26. Examination of the applicant's personal file reveals that no transcription of those statements was recorded in it, even though they related to the applicant's conduct, which the Promotion Committee was required to take into account when considering the comparative merits of officials as prescribed by Article 45(1) of the Staff Regulations. In that regard, therefore, there was indeed an infringement of the provisions of Article 26 of the Staff Regulations.
- 77 Furthermore, like the General Provisions, the 1986 rules governing promotion procedures (see paragraph 3 above), Point 8 of which, relating to Promotion Committee proceedings, provides for the possibility of consulting a representative of the Director-General, constitute only internal measures (see the judgment in *Geeraerd*, cited above) and cannot therefore derogate from mandatory provisions of the Staff Regulations (see the judgment of the Court of Justice in Joined Cases C-41/88 and C-178/88 *Becker and Starquit v Parliament* [1989] ECR 3807) such as Article 26.

- 78 As the Court of Justice has consistently held, the purpose of Article 26 is to guarantee an official's right to a fair hearing by ensuring that decisions taken by the appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file. The consequence of those provisions is that a decision based on such matters is contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of a procedure vitiated by illegality (see the judgments in Case 233/85 *Bonino v Commission* [1987] ECR 739, at p. 759, in Case 88/71 *Brasseur v Parliament* [1972] ECR 499, at p. 505 and in Case 21/70 *Rittweger v Commission* [1971] ECR 7, at p. 18).
- 79 In the present case, the applicant's right to a fair hearing was not guaranteed by the fact that it was open to him to take the precautionary step of arguing his case before the staff representatives on the Promotion Committee. That possibility, to which the Commission referred, cannot replace the guarantees which officials enjoy in that regard under the Staff Regulations.
- 80 It must therefore be held that the appointing authority's decision excluding the applicant's name from the list of officials found to be most worthy of promotion was taken following a procedure vitiated by illegality. Before the Promotion Committee had drawn up the draft list, the applicant was unable to exercise the right conferred upon him by the Staff Regulations to submit his comments on the statements of the Director-General's representative which concerned him personally (subparagraph (b) of the first paragraph of Article 26 of the Staff Regulations). It follows that the appointing authority's decision excluding the applicant's name from the list in question must be annulled without there being any need to rule on the applicant's remaining arguments concerning the illegality of the promotion procedure or on his second submission alleging a failure to state the reasons for the decision.
- 81 The Court had considered the possibility of hearing the evidence of the Director-General's representative in order to ascertain the content of his statements concerning the applicant. However, even if the Court were to have taken such a measure of inquiry, it would have been necessary to annul the contested decision. It would not make good the infringement of the applicant's right to a fair hearing for him to learn during the present procedure what was said about him within the Promotion Committee. For his rights to be re-established, he must be afforded the opportunity, in accordance with Article 26 of the Staff Regulations, to submit his comments on the statements made by the Director-General's

representative concerning him personally (and not referring to other candidates). Only once the applicant has been given that opportunity can the Promotion Committee and the appointing authority validly reconsider their decision concerning him and decide, if appropriate, whether to include his name retroactively on the list. It follows that in any event the contested decision must be annulled.

Costs

⁸² 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 Commission has failed in the essential part of its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Annuls the appointing authority's decision excluding the applicant's name from the list of officials found to be most worthy of promotion in 1988 into Grade B 2;**
- (2) Dismisses the remainder of the application as inadmissible;**
- (3) Orders the Commission to pay the costs.**

Briët

Kirschner

Biancarelli

Delivered in open court in Luxembourg on 5 December 1990.

H. Jung

Registrar

II - 760

C. P. Briët

President