applications on the ground of the illegality, having regard to mandatory provisions of the Staff Regulations, of the internal guidelines of the institution on which those decisions are based.

3. A rule of conduct adopted by an institution which, in breach of the Staff Regulations, restricts the exercise of a right conferred on its employees by the Staff Regulations cannot be regarded as being in conformity with the Staff Regulations merely because the appointing authority reserves the right to adopt discretionary decisions in particular cases. Such a possibility is not sufficient to guarantee full exercise of the right in question, since it is subject to a discretionary assessment by the appointing authority for which there is no provision in the Staff Regulations.

4. An institution which does not allow temporary staff recruited otherwise than from reserve lists drawn up following open competitions to enter internal competitions is thereby adopting as a preliminary criterion for admission to the competition the purely circumstantial requirement that the temporary staff should have been recruited on the basis of such a list, even though there is no necessary link between that requirement and the possession of certain diplomas or evidence of formal qualifications.

Such a criterion, based on a circumstantial aspect of the procedure whereby temporary staff were recruited, is not in conformity with the objective of internal competitions since, in principle, the Staff Regulations make it possible to establish temporary staff of an institution by means of an internal competition. That criterion is also manifestly contrary to the objective of the recruitment procedures laid down by the mandatory provisions of the first paragraph of Article 27 and Article 29(1) of the Staff Regulations, which is to ensure the recruitment of officials of the highest standards of ability. Finally, it leads to an unjustifiable difference of treatment between temporary staff recruited 'otherwise than' from a reserve list and the remaining temporary staff.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
8 November 1990 *

In Case T-56/89,

Brigitte Bataille, Rosalia Bellomo-Gullo, Eirwen Butland-Deboeck, Elisabeth Couzon, Elke Eggerder, Nadine Germeaux-Timmermans, Ursula Gresch-Bothe, Wiebke Käselau, Enrica Malcotti-Tucci, Isabelle Mertz, Mireille Meskens,

* Language of the case: French.

Christiane Muller, Freddy Naegels, Marie-Jeanne Olejniczak, Anna Pettinicchio, Marie-Claude Schiltz, Christa Schwan, Ludivine Weech, temporary staff attached to the Socialist and Communist and Allies Groups of the European Parliament, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62 avenue Guillaume,

applicants,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter, Head of Division, acting as Agents, with an address for service in Luxembourg at the Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of the decisions rejecting their applications for internal competition No B/164 organized by the European Parliament and, additionally, of the decisions rejecting their complaints,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

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

Registrar: H. Jung

having regard to the written procedure and following the hearing on 3 July 1990,

gives the following

Judgment

The circumstances giving rise to the application

1 It is apparent from the table annexed to the General Budget of the European Communities for 1988 that the 1988 staff complement of the European Parliament (hereinafter referred to as 'the Parliament') comprised 2 975 permanent posts and 430 temporary posts, of which 392 were staff for the political groups. Those figures and that distribution of posts have remained almost unchanged in the years since then.

2 When employees are recruited for assignment to the political groups, the functions of the appointing authority are exercised by the president of the political group concerned. The conditions under which temporary staff in the Parliament, whether or not assigned to a political group, may enter the European civil service by means of an internal competition were laid down in internal rules concerning the recruitment of officials, temporary staff, auxiliary staff and local staff (hereinafter referred to as 'the Rules'), which were adopted by the enlarged Bureau of the Parliament in 1979.

3 Article 1 of the Rules provides:

'No one may be appointed an official, within the meaning of Article 1 of the Staff Regulations, subject to the provisions of Article 29(2) of the Staff regulations unless his or her name appears on a valid reserve list, drawn up following an external open competition held on the basis of qualifications, or tests, or qualifications and tests.'

4 The second paragraph of Article 3 provides:

'Temporary staff recruited otherwise than from lists drawn up following external open competitions may not take part in internal competitions unless authorized by special decision adopted by the appointing authority after hearing the views of the Joint Committee.'

5 Finally, pursuant to Article 11,

'the provisions of Articles 1, 3, 6 and 8 shall not apply to local, temporary or auxiliary staff (with the exception of "replacement" auxiliary staff) already employed by the European Parliament on the date of entry into force of the present internal rules'.

6 The applicants were engaged by the Parliament, represented in their case by the president of the political group to which they were to be assigned, as temporary staff. In accordance with the policy of the institution, their contract contained the following clause:

'... [name of the person concerned] acknowledges having taken note of the Conditions of Employment of Other Servants of the Community (in particular Title II thereof) and of the implementing provisions applicable thereto and undertakes not to take part in internal competitions, in conformity with the decision of the enlarged Bureau of the Parliament of 25 and 26 June 1979'.

7 On 22 February 1988, the Parliament published Notice of Internal Competition No B/164 for the recruitment of administrative assistants (f/m) in Career Bracket B 5/B 4. The notice indicated the qualifications and knowledge required for admission to the competition and laid down no further condition for admission. The applicants submitted applications for that competition.

8 At the end of April and the beginning of May 1988, the applicants each received a letter signed on behalf of the Secretary-General of the Parliament by Mr Katgerman, the head of the recruitment department, informing them that their applications could not be considered since the Rules provided that 'temporary staff recruited otherwise than from lists drawn up following external open competitions may not take part in internal competitions'.

9 At the beginning of July, all the applicants lodged a complaint, in identical terms, against the rejection of their applications. The complaints were based on two pleas in law. First, they claimed that the Parliament had infringed the 'principle whereby priority must be accorded to internal recruitment procedures, of whatever kind, over external competitions'. Secondly, the applicants maintained that the principle of equal treatment had been infringed by the Parliament in several respects. They claimed in particular that the clause in their contract of employment which prohibited them, pursuant to the decision of the enlarged Bureau adopting the Rules, from taking part in internal competitions was contrary, first, to the provisions of the Staff Regulations and the Conditions of Employment of Other Servants, which are based on the principle of equality of treatment and, secondly, to the relevant decisions of the Court of Justice.

10 On 12 September 1988, the Secretary-General of the Parliament dismissed the complaints on the ground that, although the appointing authority was entitled to make internal competitions open to all employees of the institution, it was under no obligation to do so. The principle of equal treatment had been observed in so far as the situation of an employee who had passed an open competition was different from that of one who had not taken such a competition. All employees who, like the applicants, had been recruited otherwise than from reserve lists drawn up following external open competitions were, in any event, excluded from the competition.

11 Two of the applicants, namely Miss Meskens and Mrs Schiltz, are in a particular situation. After they took up their duties with the Parliament their names were entered on reserve lists drawn up following open competitions. In addition to their complaints, which did not refer to those particular circumstances, each of them sent a letter to the Secretary-General of the Parliament on 4 July 1988 claiming that the decision not to admit them to the internal competition constituted a manifest error and requesting a review of that decision.

12 On 30 August 1988, the Secretary-General refused to accede to those requests on the ground that the two applicants' recruitment had not been based on their passing open competitions since they had been recruited before the procedures for those competitions had been completed.

13 On 27 February 1989, the Parliament amended its internal rules on the recruitment of officials and other staff. It is apparent from the text produced to the Court that, under the new Rules, temporary staff are no longer excluded from internal competitions but as a general rule they must have seven years' seniority in the institution in order to be admitted on the same terms as officials. The new Rules entered into force on 1 March 1989; no provision was made for them to be retroactive. The tests for internal competition No B/164 were held on 6 March 1989; and the applicants were accordingly unable to take part.

Procedure

14 In those circumstances, the applicants, by application lodged at the Registry of the Court of Justice on 23 November 1988, brought the present action for annulment of the decisions rejecting their applications for the internal competition in question.

15 The applicants claim that the Court should:

(i) declare their action admissible and well founded;

(ii) consequently, annul the decision of the Secretary-General of the Parliament rejecting the applicants' applications for internal competition No B/164 and authorize them to take part in it and, as an incidental measure, annul the decisions of the Secretary-General dismissing the complaints lodged by the applicants;

(iii) order the defendant to pay all the costs.

The Parliament contends that the Court should:

(i) uphold the claims made by it in its defence;

(ii) make an appropriate order as to costs.

16 The written procedure was conducted in its entirety before the Court of Justice. By order of the Court of Justice of 15 November 1989, the case was referred 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.

17 Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. At the end of the hearing on 3 July 1990, the President declared the written procedure closed.

The admissibility of the application

18 The Parliament, without expressly contending that the application is inadmissible, states that the exclusion of the applicants from the competition is based on the second paragraph of Article 3 of the Rules. It follows, according to the Parliament, that there were no individual decisions refusing to admit them to the competition.

19 However, it should be observed that by applying the second paragraph of Article 3 of the Rules, the appointing authority necessarily examined the applications submitted by the applicants. It is apparent from the letters from the head of the Parliament recruitment department that the appointing authority refused to consider the applicants' applications on the ground that they had not been recruited from reserve lists drawn up following external open competitions, the criterion laid down in the second paragraph of Article 3 of the Rules. It follows that the doubts expressed by the Parliament are unfounded.

20 It is also appropriate at this stage for the Court to consider, of its own motion, a particular aspect of the pre-litigation procedure. In parallel with the complaints that they lodged at the same time as those of the other applicants, Miss Meskens and Mrs Schiltz, in their letters to the Secretary-General of the Parliament of 4 July 1988, requested review of the decisions concerning them on grounds specific to them, namely that they had been entered on reserve lists following open competitions. It must be observed that those letters consequently contain an additional plea in support of the complaint submitted by the applicants Meskens and Schiltz.

21 By letter of 30 August 1988, the Secretary-General refused, with respect to that specific point, to act on those two complaints; he rejected all the complaints on 12 September 1988.

22 It must be pointed out that such conduct of the pre-litigation procedure, although not provided for in Article 46 of the Conditions of employment of other servants or Article 90 of the Staff Regulations, is not contrary to those provisions. In a collective pre-litigation procedure, it may be appropriate for certain claims, relating to only some of the future applicants, to be dealt with in separate letters. Consequently, the pre-litigation procedure was properly conducted and was brought to an end on 12 September 1988 by the decisions of the appointing authority closing it.

23 The application is, therefore, admissible.

Substance

24 Essentially, the applicants base their application on the two pleas already set out in their complaints, namely infringement of the principle whereby internal recruitment procedures must take precedence over external competitions and breach of the principle of equal treatment.

The first plea in law

25 The applicants claim in the first place that, by reserving appointments as officials to persons appearing on a reserve list drawn up following an external open competition, the Parliament is giving recruitment by external competition precedence over recruitment by internal competition. In their view that practice represents a flagrant breach of the third paragraph of Article 4 of the Staff Regulations. In support of that view, they rely on the judgment in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7, at p. 15, in which the Court recognized that internal recruitment procedures, of whatever kind, are to enjoy priority over external competitions.

26 According to the applicants, the priority enjoyed by internal competitions over external competitions is not simply a possibility which the appointing authority is entitled to evaluate but is a rule that the institutions must respect. They consider that, whilst it may be true that that rule does not compel the appointing authority systematically to initiate an internal competition before organizing an external competition but merely requires it to consider that possibility, the existence of that discretion does not in any way alter the fact that temporary staff must be allowed to compete on the same terms as officials once the appointing authority has seen fit to organize an internal competition. It follows that, in so far as they are in breach of the Staff Regulations, the Rules cannot be relied on against the applicants. The applicants also infer from the fact that the Parliament amended the Rules during the course of the proceedings that it no longer rejects, as a matter of principle, the view advanced by them.

27 The applicants also consider that it is illegal for the Parliament to refuse to admit temporary staff to an internal competition. They refer to the judgment in Case 16/64 *Rauch* v *Commission* [1965] ECR 135, in which the Court held that 'other servants' may be admitted to internal competitions. They add that, in its judgment in Case 265/81 *Giannini* v *Commission* [1982] ECR 3865, at p. 3875, the Court recognized the right of a member of the temporary staff to participate in an internal competition and to take legal proceedings to defend that right.

28 The interpretation whereby persons already in the service of an institution are entitled to take part in internal competitions is confirmed, in the applicants' view, by Article 27 of the Staff Regulations, according to which recruitment is to be directed to 'securing for the institution the services of officials of the highest standard of ability, efficiency and integrity', which implies the need to recruit officials on as broad a basis as possible. The applicants rely on the judgment of the Court in Case 123/75 *Küster* v *Parliament* [1976] ECR 1701, at p. 1710, in support of their claim that the purpose of opening an internal competition procedure is to widen the range of candidates as far as possible so as to enable the appointing authority to make the most judicious and appropriate choice from amongst them.

29 The applicants then refer to the second paragraph of Article 4 of the Staff Regulations, according to which vacant posts in an institution are to be notified to the staff of the institution. They consider that provision to relate to the staff in its entirety and not merely to the people whose names appear on reserve lists drawn up following external open competitions. They infer that it confirms and

strengthens their position regarding the admission of 'other servants' to internal competitions.

30 Finally, the applicants consider that their contract of employment is unlawful in so far as it prohibits them from taking part in internal competitions. The fact that they signed that contract cannot be construed as a waiver of their right to challenge the validity of the Rules. They maintain that they had no alternative but to sign the contract, otherwise they would not have been appointed as temporary staff, that they were not able to ascertain their rights at that time and that the consent given by them in good faith and without their knowing that the clause in question was illegal cannot be relied on to prevent their challenging the legality of the decision of the Parliament adversely affecting them.

31 In view of their special situation, Miss Meskens and Mrs Schiltz also claim that their applications for internal competition No B/164 should not have been rejected on the ground that they had passed an external competition only after being recruited as temporary staff in the Parliament. First, they emphasize that even if the Parliament were entitled to restrict access to the internal competition — which it was not — there is nothing in the Rules to show that success in an external open competition must necessarily antedate recruitment as a member of the temporary staff. They consider that additional requirement to be even contrary to the position taken by the Parliament itself, namely that staff who have passed an external competition are to be treated as if they were officials because they offer the same guarantees concerning independence and standards of ability. Secondly, the applicants are of the opinion that the Parliament's position leads, in some degree, to the result that recruitment as a member of the temporary staff is made conditional upon passing an open competition. That is contrary to Articles 12 to 15 of the Conditions of Employment of Other Servants, according to which the recruitment of temporary staff does not require a competition to be held beforehand.

32 The Parliament contends that no obligation to admit all its staff to an internal competition derives either from the judgment in Case 16/64 *Rauch*, cited above, or from Article 27 of the Staff Regulations. That article is concerned with the purpose of recruitment. It is not for the applicants to determine the most appropriate means of attaining that purpose. In this case, the institution took the view that the participation of temporary staff recruited otherwise than from reserve lists drawn up following external open competitions was not the best means of achieving that object. The judgment in *Rauch*, read in context, merely upholds the discretion enjoyed by the administration in that regard.

33 The Parliament contends that the judgment of 25 November 1976 in Case 123/75 *Küster*, relied on by the applicants to show that internal competitions are intended to widen the range of candidates as far as possible so that the appointing authority has a 'sufficiently wide choice', concerned the decision to organize an internal competition rather than have recourse to a promotion procedure for which only one candidate was eligible. According to the Parliament, that judgment was delivered in circumstances wholly different from those of this case, where 702 candidates have been admitted even though the maximum number of candidates to be placed on the reserve list is 44.

34 According to the Parliament, the obligation to publish vacancy notices does not imply that all the staff of the institution are entitled to apply, but leaves the appointing authority free to determine the conditions to be laid down for that purpose, having regard, for example, to the candidates' vocational and other qualifications or administrative situation. The second paragraph of Article 4 of the Staff Regulations establishes that vacant posts are to be notified only so that all those who fulfil those conditions may submit applications. The applicants have not fulfilled those conditions, particularly as regards their administrative status.

35 The Parliament recognizes that internal recruitment procedures are to take priority over external competitions but denies that an obligation thereby attaches to the institution concerned to open its internal competitions to all its staff. The judgment in *Rauch, supra*, does not uphold any such obligation on the part of the institutions but merely grants them the possibility of admitting servants other than officials to internal competitions.

36 The Parliament considers that the logic of the internal competition procedure provided for in Article 29 of the Staff Regulations implies that it is merely a possibility available to the institution rather than an obligation incumbent upon it. According to the judgment of the Court of Justice in Joined Cases 12 and 29/64 *Ley* v *Commission* [1965] ECR 107, at p. 121, the appointing authority is not bound to hold an internal competition but merely to examine the possibilities of so doing before holding an external competition. The Parliament considers that, *a fortiori*, its discretionary power must include the right to determine the conditions under which an internal competition is to be held and, in particular, what categories of its staff may enter. It emphasizes that the institutions' discretion regarding the organization of their departments has been upheld by the Court of Justice (for example in its judgment in Case 69/83 *Lux* v *Court of Auditors* [1984]

ECR 2447, at p. 2463). The provisions at issue of the Rules and the corresponding clause included in the contracts of employment are no more than a manifestation of that discretion, which is based on the consideration that, for temporary staff not recruited from reserve lists drawn up following external open competitions, it is not, in principle, appropriate to organize internal competitions.

37 In its defence, the Parliament contended that, even if temporary staff were to be granted the right to enter internal competitions, the applicants would have to be deemed to have waived the right to do so on signing their contracts of employment. In its rejoinder, the Parliament states, on the other hand, that the clause in the contracts is merely for information. It leaves to the Court the question whether or not it amounts to a waiver. In any case, the question of its legal classification arises, in its opinion, only where temporary staff are granted the right to enter internal competitions.

38 As regards the situation of the two applicants who had passed external open competitions, Miss Meskens and Mrs Schiltz, the Parliament contended, in its defence, that it had not yet taken a final decision at that time. In its rejoinder, the Parliament purports to justify the definitive rejection of the applications in the meantime by a strict reading of the second paragraph of Article 3 of the Rules. Since the two candidates had been recruited before they passed the external competition their admission to the internal competition would have called for a special decision of the appointing authority and the latter, after consulting the Joint Committee, did not adopt such a decision.

39 It is appropriate first to consider whether, under the Staff Regulations, temporary staff are entitled to take part in internal competitions in their institutions and, if so, to decide whether the Parliament was nevertheless right to reject, by means of the contested decisions, the applicants' applications.

40 No provision of the Staff Regulations or the annexes thereto excludes temporary staff from taking part in internal competitions. On the contrary, the second paragraph of Article 4 of the Staff Regulations provides that vacant posts are to be notified to the 'staff' of the institution concerned. Article 29(1)(b) of the Staff Regulations refers to competitions 'internal to the institution'. Those provisions do not envisage any differentiation between the various categories of staff.

41 Moreover, in *Rauch, supra,* the Court of Justice held that the expression 'competition internal to the institution', taken as it stands, means any person employed by the institution, in whatever capacity. According to the judgment of the Court in Case 23/74 *Küster* v *Parliament* [1975] ECR 353, 'there is nothing to prevent the admission of temporary staff to internal competitions'. Finally, in the *Giannini* judgment, the Court of Justice recognized that a member of the temporary staff had an interest in bring an action against a decision to fill a post by promoting another candidate on the ground that the applicant 'could enter an internal competition if the contested decision were annulled' (Case 265/81, *supra*). Consequently, it must be stated that temporary staff are in principle entitled to take part in competitions internal to their institutions. Contrary to the Parliament's contention, that right under the Staff Regulations does not constitute an unlawful privilege for temporary staff which would lead to discrimination against people not employed by the institutions.

42 Since, in principle, the applicants are entitled to take part in internal competitions, it is necessary to consider whether, by the contested decisions, the Parliament was properly able to deprive them of that right. The Parliament contends that it was entitled to restrict the access of temporary staff to internal competitions by exercising its discretionary power in the matter. In that context, it must be stated that the Staff Regulations do indeed confer upon the institutions a wide discretion concerning the organization of competitions. Thus, Articles 4 and 29 of the Staff Regulations give the appointing authority several possibilities of exercising that power where vacant posts are to be filled in an institution. Similarly, Article 1 of Annex III to the Staff Regulations confers a wide discretion on the appointing authority for the organization of competitions. In the present case, however, the appointing authority's decision to restrict the access of temporary staff to internal competitions was not taken in the exercise of the said powers expressly conferred by the Staff Regulations but on a general basis, not for the organization of a specific competition, by means of rules adopted in relation to competitions by the enlarged Bureau of the Parliament.

43 It must be pointed out that those Rules do not constitute general provisions for giving effect to the Staff Regulations within the meaning of Article 110 thereof. They are internal guidelines which do not have the status of rules of law and which, in any event, are not capable of derogating from the mandatory provisions of the Staff Regulations. They are merely rules of conduct indicating the practice to be followed by the institution (see judgments of the Court of Justice in Case 280/85 *Mouzourakis* v *Parliament* [1987] ECR 589, at p. 607, and in Joined Cases C-41/88 and C-178/88 *Becker and Starquit* v *Parliament* [1989] ECR 3807, paragraph 7). On the basis of those rules of conduct, the appointing authority

adopted the individual decisions rejecting the applicants' applications. The applicants are therefore entitled to contest those decisions on the ground of the illegality of the general Rules on which they are based (see judgments of the Court of Justice in Joined Cases 44, 46 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383, at p. 393 et seq., and in Joined Cases 181 to 184/86 *Del Plato and Others* v *Commission* [1987] ECR 4991, at p. 5017). Consequently, it is necessary to decide whether the second paragraph of Article 3 of the Rules, as adopted by the enlarged Bureau of the Parliament in 1979, is compatible with the mandatory rules of the Staff Regulations.

44 The applicants maintain that that provision disregards the priority to be accorded to internal competitions over external competitions by virtue of Articles 4 and 29(1) of the Staff Regulations. The Parliament replies that the appointing authority is not required to hold an internal competition before organizing an external competition. However, it must be stated that, if the appointing authority chooses the priority method of recruitment represented by the internal competition, it must, when organizing it, comply with the provisions concerning the procedure for such competitions, in particular those laid down in Annex III to the Staff Regulations.

45 It should first be borne in mind that under Article 1(1)(d) of the said Annex III, the appointing authority must, in organizing an internal competition, specify the 'diplomas and other evidence of formal qualifications' required for the posts to be filled. By excluding temporary staff 'recruited otherwise than from reserve lists drawn up following external open competitions', the second paragraph of Article 3 of the Rules did not adopt, as the sole preliminary criterion for selection, the passing of an external open competition — a criterion on whose legality the Court will not therefore have to adjudicate — but added the merely circumstantial requirement that the temporary staff should have been recruited on the basis of such a reserve list, a requirement not necessarily linked with the possession of certain diplomas or other evidence of formal qualifications. Thus, if the appointing authority were unaware that the member of staff recruited was on a reserve list or if that employee were included on such a list after recruitment, as in the case of the applicants Meskens and Schiltz, he or she was 'recruited otherwise than from' the lists in question and could not take part in internal competitions. The criterion adopted was not therefore linked with possession of a 'diploma' or other 'evidence of formal qualifications' within the meaning of Article 1(1)(d) of Annex III to the Staff Regulations.

46 Since that criterion is not one expressly mentioned in Annex III to the Staff Regulations, it is necessary to decide whether it infringes other provisions of the Staff Regulations.

47 In principle, the Staff Regulations make it possible to establish temporary staff on the basis of an internal competition. In the present case, the selection system adopted, whereby the admission of temporary staff was made conditional on a circumstantial aspect of the procedure by which they were recruited, was intended to exclude that possibility of establishment and did not therefore correspond to that aim of internal competitions.

48 It is then necessary to consider whether that requirement conflicts with the system provided for in Article 29(1) of the Staff Regulations. That system is based on the view that passage from the first phase — promotion or transfer — to the second phase — the organization of an internal competition — must allow an increase in the number of possible applications in order to attain the aim envisaged in Article 27 of the Staff Regulations, namely the appointment of officials of the highest standards of ability. The criterion adopted in the second paragraph of Article 3 of the Rules does not, however, represent an appropriate means of achieving that aim. There is no necessary link between the fact of a member of the temporary staff's being recruited 'otherwise than from reserve lists drawn up following external open competitions' and his merits and qualifications: if the appointing authority is unaware, when recruiting an employee, that he is on a reserve list drawn up following an external open competition of another institution or if the employee is not entered on such a list until after he is recruited, he is not, as a matter of principle, admitted to an internal competition, even if the external open competition which he passed corresponded, as regards the degree of difficulty and level of knowledge required, to the internal competition planned by the institution. Consequently, the second paragraph of Article 3 of the Rules may result in the exclusion of a candidate with the same qualifications as, or possibly better qualifications than, those of other candidates admitted to the competition. Such a result is manifestly contrary to the purpose of the first paragraph of Article 27 and Article 29(1) of the Staff Regulations, namely recruitment of officials of the highest standards of ability. The provisions whereby the first paragraph of Article 27 defines the aim to be pursued by all recruitment procedures and Article 29(1) lays down the framework for the procedures for filling vacant posts are mandatory in character. It follows that the second paragraph of Article 3 of the Rules is in breach of the mandatory provisions of the first paragraph of Article 27 and Article 29(1) of the Staff Regulations. Such a rule of conduct, being contrary to the Staff Regulations, cannot, in any circumstances, serve as a legal basis for individual decisions preventing temporary staff from exercising a right under the Staff Regulations, namely the right to participate in internal competitions.

49 Admittedly, it must be borne in mind that the second paragraph of Article 3 of the Rules provided that, by special decision of the appointing authority, a member of

the temporary staff recruited otherwise than as a result of an external open competition may be allowed to take part in an internal competition. Such a decision was to be taken after consultation of the Joint Committee, which implies that the appointing authority enjoyed a discretion in the matter. However, a rule of conduct which, in breach of the Staff Regulations, restricts the exercise of a right conferred thereunder cannot be regarded as being in conformity with the Staff Regulations merely because the appointing authority reserves the right to adopt discretionary decisions in particular cases. Such a possibility is not sufficient to guarantee full exercise of the right in question granted by the Staff Regulations, since it is subject to a discretionary assessment by the appointing authority for which there is no provision in the Staff Regulations. The possibility of such a decision does not therefore alter the finding that the second paragraph of Article 3 of the Rules is incompatible with the Staff Regulations.

50 In those circumstances, it must be stated that all the contested decisions were adopted pursuant to an internal rule which infringed the first paragraph of Article 27 and Article 29(1) of the Staff Regulations.

51 It follows that the clauses included in the applicants' contracts of employment, by virtue of which they undertook not to take part in internal competitions, can constitute no impediment to the applicants' candidacy. A selection criterion adopted in breach of the Staff Regulations cannot be endowed with a legal basis by means of a special clause included in a contract of employment. Consequently, the applicants' first plea in law is well founded, for which reason it is necessary to consider their second plea merely *ad abundiantam.*

The second plea in law

52 In support of their second plea, namely that the principle of equal treatment has been infringed, the applicants state in the first place that, according to the previous decisions of the Court of Justice, all the staff employed by an institution must be able to take part in internal competitions. They add that the Parliament is wrong to contend that a difference exists between officials and other servants who have passed an open external competition, on the one hand, and, on the other, the remaining servants of the institution which justifies exclusion of the latter from internal competitions. They are of the opinion that the institution's — legitimate — concern to ensure high standards of ability and independence on the part of the European civil service is not incompatible with the participation of all temporary staff in an internal competition. First, they consider that an increase in the number of candidates increases the chance of finding competent officials. Secondly, they maintain that, if the performance of some staff

falls short of that of officials and other servants who have already passed an external competition, that difference in standard will be confirmed by the tests in the internal competition and the employees concerned will be eliminated. That is why, when an internal competition is organized, all persons in the service of the institution must be treated in the same way and have equal access to the competition procedure.

53 The Parliament contends, in the first place, that by comparison with the other institutions it has a particularly large number of temporary staff nearly all of whom are assigned to political groups. Thus, the proportion of temporary posts to permanent posts is almost 15%, whereas in the Commission the corresponding percentage is barely half that figure. It adds that, in category A, the number of temporary staff assigned to the political groups is almost half the number of officials in that category (167 as against 339 for the 1988 budgetary year).

54 The Parliament states, referring to two judgments of the Court of Justice of 11 July 1985, in Case 119/83 *Appelbaum* v *Commission* [1985] ECR 2423, and Joined Cases 66 to 68/83 and 136 to 140/83 *Hattet and Others* v *Commission* [1985] ECR 2459, that the principle of equality of treatment applies only to identical or similar situations. According to the Parliament, that principle was respected since all the candidates in the same circumstances as the applicants, that is to say all temporary staff not recruited from reserve lists, were excluded from the competition at issue.

55 The Parliament seeks to show that there is a difference between staff who have passed an external competition and those who have not, a difference which means that there can be no breach of the principle of equal treatment. It states that most temporary staff work in the political groups. The latter freely choose who is to work for them and it is legitimate for them and they may legitimately take account of political factors. The Parliament Secretariat exerts no influence on that choice, confining itself to giving effect thereto at the administrative and financial level. In choosing its officials the Secretariat, on the other hand, must observe strict political neutrality. According to the Parliament, it would be at the very least surprising for the Secretariat to be compelled to allow the participation in its

internal competitions of persons whose recruitment had been wholly outside its control. The Parliament draws attention to the fact that the same situation does not arise in the other Community institutions, where all staff are subject to the same recruitment authority and political criteria do not operate.

56 The Parliament goes on to say that there is an essential difference between an external open competition and an internal competition. Since the former draw a very large number of candidates, competition is very strong and selection very rigorous. The officials of the institutions have to pass that test and thereby display competence justifying the benefits of the public service. By contrast, internal competitions are in principle reserved, unless the institution decides otherwise, to people who no longer need to show that they have the merits to become officials. The nature and level of the tests is therefore different and competition is not so strong. For those reasons, the Parliament considers that the results of an external open competition cannot be seriously compared with those of an internal competition.

57 It follows from the answer given in response to the first plea in law that the applicants' second plea is also well founded. The second paragraph of Article 3 of the Rules in force at that time gave rise to unequal treatment between temporary staff recruited 'otherwise than' from a reserve list and the remaining temporary staff. It was not, therefore, a question of a distinction between the various categories of people employed by the Parliament (see, in this connection, the judgments of the Court of Justice in Joined Cases 118 to 123/82 *Celant and Others* v *Commission* [1983] ECR 2995, at p. 3012, and in Case 37/87 *Sperber* v *Court of Justice* [1988] ECR 1943, at p. 1956 et seq.) but a difference within one and the same category, namely that of temporary staff. In such circumstances, the Court held that the principle of equal treatment is infringed where the legal and factual situation of the persons concerned does not justify the different treatment in question (see the judgments of the Court of Justice in *Appelbaum, supra,* at p. 2454, and *Hattet, supra,* at p. 2469, and in Case C-100/88 *Oyowe and Others* v *Commission* [1989] ECR 4285).

58 The second paragraph of Article 3 of the Rules could have consequences running counter to the objective of an internal competition as defined by the first

paragraph of Article 27 of the Staff Regulations and as mentioned above (paragraphs 47 to 49). The criterion adopted in that provision could, in fact, lead to exclusion of a candidate despite his inclusion on a reserve list drawn up following an external open competition which corresponded, as regards degree of difficulty and knowledge required, to the internal competition planned by the institution. A criterion that makes possible such decisions, which are incompatible with the objective of the recruitment procedures provided for in the Staff Regulations, namely that of recruiting the best candidates, cannot justify different treatment within the category of temporary staff. The applicants' second plea in law is therefore also well founded.

59 The Parliament contends that the annulment of the decisions at issue would have serious consequences for its recruitment policy and personnel management. It stated, at the hearing, that the political groups recruit their temporary staff rather on the basis of political considerations. Moreover, the Parliament says, efforts are being made to make Member's assistants, who have hitherto only a contract with the Member of Parliament for whom they work, temporary staff. Consequently, the Parliament considers that it is possible that its staff complement might, one or two years hence, comprise 3 000 officials and 2 000 temporary staff. All the temporary staff would seek rapidly to become officials. First, the organization of internal competitions would become very difficult, since the principle of political balance is held to be very important in the Parliament. Secondly, open external competitions would cease to be the normal means of access to the civil service within the Parliament.

60 It must be stated that the foregoing considerations of administrative policy are not, in principle, relevant to interpretation of the Staff Regulations. Moreover, the fears expressed by the Parliament appear to be without foundation. It is incumbent on the Community institutions to organize internal competitions in such a way as to eliminate any danger that they might allow the rules governing access to the European civil service to be circumvented.

61 Accordingly, the 14 contested decisions must be annulled.

Costs

62 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to proceedings before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs. Since the Parliament has failed in its pleas, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

(1) Annuls the decisions of the Parliament rejecting the applicants' applications for internal competition No B/164;

(2) Orders the Parliament to pay the costs.

Kirschner Briët Biancarelli

Delivered in open court in Luxembourg on 8 November 1990.

H. Jung
Registrar

C. P. Briët
President