OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 1 December 1988 *

Mr President,
Members of the Court,

1. Mr Bossi's application concerns in substance a question which, unfortunately, is frequent in actions brought by Community officials, namely what effect the absence of an official's periodic reports has on the lawfulness of a promotion procedure in which he has not been successful. The Court's case-law has already laid down the principles for answering such a question.

2. However, before addressing itself to the substance of the case, the Court must rule on several objections of inadmissibility raised by the Commission.

3. One of these does not seem to require any discussion. In the second head of the claim for annulment, the application refers to an act which was not in existence on the day the application was lodged. As the Commission has correctly pointed out the 'list of officials actually promoted in 1987' had not been drawn up or published when Mr Bossi lodged his application on 11 November 1987. That list was not published until 14 December 1987 when it appeared in *Administrative Notices* No 545.

4. What is more, such a list does not, strictly speaking, constitute the promotion decision as such. It is a method of giving information about decisions which have already been taken. Thus, a person who considers that he has been affected may either challenge one or more promotion decisions of which he has become aware by some other means or challenge them when the list is published, if he becomes aware of them through the list. On the other hand, Mr Bossi's application, which does not refer specifically either to promotion decisions taken prior to the lodging of his application or to a promotion list already drawn up and published, cannot be regarded as being admissible on this point. I do not think that a kind of 'prospective' application for annulment can be admissible.

5. The other objections of inadmissiblity concerning the third head of the claim for annulment and the three claims for compensation call for somewhat more extensive consideration.

6. I must say that the Commission's arguments supporting these objections seem to me excessively rigid, failing, in particular, to take into account the implications of the preliminary complaint procedure provided by the Community legislature in Article 90 of the Staff Regulations of Officials of the European Communities.

7. The essential purpose of this preliminary procedure, which Article 91 (2) of the Staff

* Original language French

Regulations makes obligatory, seems to me to be to encourage conciliation between the Community body concerned and its official and it is therefore a method of preventing disputes being brought before the Court. In the context of this procedure the resolution of disputes may entail consideration of both legality and expediency. Thus, the procedure should be allowed a measure of flexibility, untrammelled by excessive formalism.

8. To require that the claims formulated at the stage of the complaint to the appointing authority and the claims in the application to the Court be strictly identical is, in my view, precisely an example of such formalism.

9. As the Court has consistently held,

'an official may not submit to the Court conclusions with a subject-matter other than those raised in the complaint or put forward heads of claim based on matters other than those relied on in the complaint'. [1]

What is meant by conclusions having 'a similar subject-matter'?

10. The Commission insists on a very strict interpretation and contends that the claims for compensation are inadmissible since no claim for damages was formulated in the complaint to the appointing authority. At that time Mr Bossi requested 'the annulment of the decision not to enter his name on the list of officials considered most worthy of promotion to Grade B 1 in the 1987 financial year'. The Commission argues that before this Court Mr Bossi may only repeat this request and is not entitled to amplify it.

11. Such an interpretation might broadly be justified in the context of a rule that the subject-matter of an appeal must be identical to the claim at first instance. But it seems to me that the procedure for making the prior complaint to the appointing authority cannot be equated with bringing an action before a court of first instance. As we have seen, within the context of the complaint through official channels, a solution may be found to the dispute of recent origin which is not a legal solution in the strict sense.

12. Furthermore, it seems to me that the interpretation advocated by the Commission would of necessity lead officials to put everything in the complaint and from the outset give the maximum impact to the dispute with the administration which can only serve to render the preliminary procedure more difficult and contentious, placing the parties in a situation of conflict and thereby reducing the chances of their being reconciled. Thus, paradoxically, the requirement that they be identical *stricto sensu* has the potential to reduce the effectiveness of the prevention of dispute between the Community institutions and their staff and hence may actually increase disputes.

13. The Court's case-law does not finally seem to have decided between formalism and flexibility. In the *Jänsch* judgment of 10 December 1987 [2] the Court declared inad-

1 — Judgment of 20 May 1987 in Case 242/85 *Geist* v *Commission* [1987] ECR 2181, paragraph 9.

2 — Case 277/84 [1987] ECR 4923, paragraph 10 of the judgment.

missible a claim for damages for harm to the official's career 'since it was made for the first time in the application'; on the other hand, in the *Vincent* judgment of 10 June 1987,[3] the Court raised no objection of inadmissibility but dismissed on the merits a claim for compensation formulated for the first time in the reply whereas the Advocate General had proposed that the case should be declared inadmissible. It should also be recalled that in the *Oberthür* judgment of 5 June 1980[4] the Court 'of its own motion ordered the defendant [in the case the Commission] to pay compensation for the non-material damage caused by a wrongful act or omission on its part' although the applicant had not made any claim for damages.

14. Since the Court's case-law appears still to be wavering, this case provides the opportunity to take a firm position. I would invite the Court to decide that the concept of the identity of subject-matter should be less strict than the interpretation to which the Commission is inclined.

15. Any formal complaint by an official refers to a particular act or omission on the part of the administration. Its purpose is to remove the effects of the act or omission by changing the administration's conduct, obtaining compensation from the administration or both. Therefore, its subject-matter covers the various means which can lead to the removal of the effects in question. Before this Court, the application may not relate to a different act or omission since that would involve changing the cause of action. On the other hand, it is irrelevant to the requirement of identity of subject-matter that the same act or omission also gives rise before this Court to a claim for damages, whereas the complaint through official channels only involved a claim for annulment. In this case, annulment and damages have the same purpose, namely the removal of the same legal effects.

16. More specifically, on the basis of the facts before the Court, it should be held that the claim for annulment of the decision not to enter Mr Bossi's name in the list of officials considered the most suitable for promotion to Grade B 1 for the 1987 financial year, which was formulated in the complaint through official channels, and the claims for damages set out in the application to the Court have one and same purpose, namely the restitution of Mr Bossi's rights in the framework of the promotion procedure within the Commission in 1987.

17. Such an analysis seems to me to be in accordance with the case-law, reiterated in the *Rihoux* judgment of 7 May 1986[5] in which it was stated that:

'Article 91 of the Staff Regulations is designed to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. In order to comply with that requirement it is essential that the administration should be in a position to know with sufficient certainty the complaints or wishes of the person concerned. On the other hand, it is not the purpose of that provision

3 — Case 7/86 [1987] ECR 2473.

4 — Case 24/79 [1980] ECR 1743, paragraph 14 of the judgment

5 — Case 52/85 [1986] ECR 1555, paragraph 12

to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claim submitted at that stage changed neither the legal basis nor the subject-matter of the complaint'.

Once an official questions the regularity of one of the acts of the Commission or another institution then, to my mind, that institution is perfectly well aware that any harmful consequences of that possible irregularity may require redress.

18. For this reason I propose that the Court should dismiss the objections of inadmissibility raised by the Commission in so far as they allege that the subject-matter of the claims formulated before the Court is not identical to that of those in the complaint through official channels, except as regards the second head of claim for damages concerning the promotion procedures after 1987, that is to say promotion procedures other than that referred to in the complaint and, furthermore, subsequent to the date when the application was lodged.

19. The Commission also submits that the claims for damages are inadmissible because the applicant has not expressly pleaded a causal link between the alleged maladministration and the harm allegedly suffered and, further, that he cannot claim that certain acts should be annulled and at the same time seek compensation for the harm caused to him by those acts since, if the acts were annulled, there would be no further harm.

20. Contrary to the Commission's view, it seems to me that the causal link between the failure to promote the applicant from Grade B 2 to B 1 of which he complains and the claim for compensation corresponding to the annual difference in salary and other benefits between Grades B 2 and B 1 may easily be inferred from the application and that point does not pose any problem of admissibility. Furthermore, whilst I would like to be able to take such an optimistic view of administrative responsibility as to assume that the annulment of the acts *ipso facto* causes any harm to disappear, it seems to me that the reality of the law on Community staff matters does not allow us to make such an assumption and thence to infer that the claim is indeed inadmissible. The link between annulment and harm seems to me to be closely bound up with the specific circumstances of an annulment and therefore to the substance. Consequently, I would also propose that the Court dismiss the objections of inadmissibility in so far as they are based on the two arguments mentioned above.

21. The discussion regarding inadmissibility obliges me specifically to examine the objection relating to the fact that Mr Bossi's application also sought the annulment of the Commission's implied decision rejecting his complaint since, in the Commission's view, this was a purely confirmatory act which could not be the subject of an action.

22. Once again we see the Commission taking a very formalistic approach which seems to run directly contrary to the letter of the regulation which laid down the Community Staff Regulations and which furthermore seems at odds with the concept of a confirmatory act.

23. Let us first look at the Staff Regulations. Under Article 91:

'. . .

2. An appeal to the Court of Justice of the European Communities shall lie only if:

(i) the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein, and

(ii) the complaint has been rejected by express decisions or by implied decision.

3. Appeals under paragraph 2 shall be filed within three months. That period shall begin:

. . .

— on the date of expiry of the period prescribed for the reply where the appeal is against an implied decision rejecting a complaint submitted pursuant to Article 90 (2).'

It seems to me clear from those provisions that although the implied decision to reject the complaint by its very nature confirmed the administration's previous position, the Community legislature none the less expressly provided a rule referring to the time-limit on appeals to the Court where the appeal 'is against an implied decision rejecting a complaint'. Should the Commission's argument lead us to ignore this rule? I cannot think so.

24. Furthermore, it seems to me that the concept of a confirmatory act applied to the implied decision to reject a complaint does not make much sense. In administrative law generally the purpose of this concept is to remove the possibility of an action challenging an act which only restates a previous decision in respect of which an action would be time-barred. That has nothing to do with the situation which I have analysed above where the Community legislature provides for a preliminary administrative complaint procedure and provides expressly that during this obligatory procedure time shall not start to run as regards the action before the Court. If the administration fails to reply for four months, the Staff Regulations clearly treat that as a decision against which an appeal may be brought.

25. Therefore, neither the wording of the Staff Regulations nor the spirit of the concept of a confirmatory act appear to me to support the Commission's objection of inadmissibility.

26. The Commission cites the *Plug* judgment of 9 December 1982[6] in which the Court referred to the *Kuhner* judgment[7] and, contrary to the opinion of Advocate General Reischl, declared inadmissible the claims for the annulment of implied decisions rejecting the applicants' complaints, stating that:

'every decision purely and simply rejecting a complaint, whether it be express or implied, only confirms the act or failure to act to which the complainant takes exception and is not, by itself, a decision which may be challenged'.[8]

6 — Case 191/81 [1982] ECR 4229

7 — Judgment of 28 May 1980 in Joined Cases 33 and 75/79 [1980] ECR 1677.

8 — Case 191/81, supra, paragraph 13

27. However, other decisions of the Court adopt a different point of view. In the *Morbelli* judgment of 21 May 1981 [9] and in the *Andersen* judgment of 19 January 1984 [10] the Court did not regard the implied decision rejecting a complaint through official channels as merely confirmatory and incapable of being challenged before the Court. In the *Andersen* judgment the Court stressed that

'in staff cases where it is a rule that a complaint must necessarily be made before an action is brought the applicants' interest in seeking annulment of the decision rejecting their complaint at the same time as the measure adversely affecting them cannot be denied whatever the specific effect of the annulment of such a decision in a given case'. [11]

This position seems to me quite consonant with the wording of the Staff Regulations and the spirit of the concept of a confirmatory act which is irrelevant to an act which, by definition, was adopted within the time-limit for infringing an action. In so far as the Court's case-law appears to waver between the two approaches I would propose that the Court should definitively adopt the position in the *Andersen* case and reject the objection of inadmissibility raised against the third head of the claim for annulment.

28. Finally, the Commission has not pleaded the inadmissibility of the first head of the claim for annulment and I take the view that the Court should not of its own motion consider the issue of admissibility of that head of claim on the grounds that the list of officials considered most worthy of promotion to Grade B 1 is simply an act preparatory to the actual promotion decisions which alone are open to challenge and which the applicant has not duly contested. The *Castille* judgment of 6 February 1986 [12] did not enable the Court to deal with this question or to give its view on the analysis developed by Mr Advocate General Lenz who observed that

'the list of officials most deserving of promotion established by the appointing authority constitutes a final measure since an official not appearing on that list cannot be promoted'. [13]

But it may be stressed that in an earlier judgment, *Ditterich*, [14] the Court gave a ruling on the substance dismissing claims in an application relating to a list of most suitable officials adopted by the appointing authority. The Court considered that such a list is not simply a preparatory act and that an action may be brought against it. I would ask the Court to confirm that position in this case.

29. The objections of inadmissibility have detained us for some considerable time. However, the Commission in its pleadings dwelt on them at such length that I thought it necessary to give appropriate consideration to them and I not that my analysis is broadly the same as that of Mr Advocate General Tesauro in Case 224/87. If the Court should share this view, I would

9 — Case 156/80 [1981] ECR 1357.

10 — Case 260/80 [1984] ECR 177.

11 — Paragraph 4.

12 — Joined Cases 173/82, 157/83 and 186/84 [1986] ECR 497, paragraph 12.

13 — [1986] ECR 502.

14 — Judgment of 12 October 1978 in Case 86/77 [1978] ECR 1855.

ask it to give a reasoned decision on the objections so as to avoid the pleading of irrelevant claims of inadmissibility in future proceedings.

30. I turn now to the substance. The application consists of four submissions which may be summarized as follows. In the 1987 B 2 to B 1 promotion procedure the competent authorities had no knowledge of Mr Bossi's periodic reports for the 1981-83 and 1983-85 periods since those reports had not yet been drawn up. Thus, the authorities were not in a position to assess the merits of Mr Bossi, who met the conditions, laid down in the Staff Regulations, of eligibility to such a promotion. In those circumstances the absence of the periodic reports represented both an irregularity which vitiated the appointing authority's adoption of the list of officials most worthy of promotion to Grade B 1 and maladministration causing material and non-material harm.

31. It is apparent from the documents before the Court that the contested decision, which was published on 2 March 1987, was adopted at a time when Mr Bossi's periodic reports for the periods in question had not yet been drawn up or, therefore, placed in his personal file. Thus, the drawing-up of the list of officials considered most worthy of promotion and the steps preparatory thereto, that is to say, the consultation of the Promotion Committee and the finalization of the proposals of the directorate where Mr Bossi was serving, on the basis of which the Committee had deliberated, took place without those periodic reports having been taken into consideration. The documents reveal quite clearly that the procedure for drawing up the disputed reports only approached fruition during May 1987, in other words after Mr Bossi had submitted his complaint seeking the annulment of the decision not to enter his name on the list of officials deserving promotion.

32. In the light of the facts thus established, the applicant complains that there has been a breach of Articles 43 and 45 (1) of the Staff Regulations and of Article 6 of the general implementing provisions concerning staff reports, on the ground that the following essential information concerning him could not have been taken into consideration during the course of the promotion procedure: his acquisition of specialized knowledge regarding the adaptation of premises for computers and participation in English courses. He also complains that the contested decision was taken without his superior being consulted with respect to the period not covered by the periodic report.

33. For its part, the Commission maintains that, in the light of the Court's case-law, the promotion procedure was not vitiated by the absence of Mr Bossi's periodic reports since the bodies involved in this procedure had at their disposal all the information needed to assess his merits and the irregularity caused by the absence of those reports had no bearing on the choices by those bodies of officials who were older or more brilliant than the applicant or who had greater seniority.

34. According to the abovementioned *Oberthür* judgment, the periodic report which, under Article 43 of the Staff Regulations, must be made at least once every two years,

'constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration',

and the Court reiterated that

'pursuant to Article 45 (1) of the Staff Regulations officials may be promoted only after consideration of the comparative merits of the officials eligible for promotion and of the reports on them',

before concluding that

'consideration of the merits of candidates whose periodic reports had already been drawn up under Article 43 and of others in whose case this had not yet been done fails to meet the requirements of Article 45 with regard to consideration of the comparative merits of officials'. [15]

However, the Court indicated in the *Gratreau* judgment of 18 December 1980 that

'in exceptional circumstances the absence of periodic reports may be compensated for by the existence of other information on an official's merits'. [16]

The Court has also adopted a more flexible position by pointing out that its case-law did not imply

'that all candidates must be at exactly the same stage regarding the state of their periodic reports or that the appointing authority must postpone its decision if the most recent report on one or other of the candidates has not yet been drawn up',

adding that

'the fact that the personal file of one applicant is irregular and incomplete is not a sufficient ground for the annulment of the appointments unless it is established that this was capable of having a decisive effect on the appointment procedure'. [17]

35. In short, it seems to me that the Court's case-law has addressed two questions.

36. The Court has answered in the negative the question whether, if an official's periodic reports were unavailable during a promotion procedure, that procedure none the less complies with the requirement in Article 45 (1) of the Staff Regulations that the comparative merits of the candidates be considered, unless the absence of periodic reports is redressed by other relevant information. However, the Court held that such recourse would be exceptional which appears to me to indicate that such an opportunity must not represent a convenience, saving the administration the need to draw up periodic reports.

15 — Paragraph 8.

16 — Joined Cases 156/79 and 51/80 [1980] ECR 3943, paragraph 22.

17 — Judgments of 27 January 1983 in Case 263/81 *List* [1983] ECR 103, paragraph 27, and of 10 June 1987 in Case 7/86 *Vincent* [1987] ECR 2473, paragraph 17.

37. As regards the question whether an irregularity in the promotion procedure, consisting in the failure to comply with the requirement that the comparative merits of the candidates be examined, *must* lead to the annulment of the actual promotions, the Court has also given a negative response, unless it is shown that this irregularity may have had a decisive effect on the promotion decisions.

38. It might first be asked whether, in the promotion procedure at issue, the competent bodies were, despite the absence of Mr Bossi's periodic reports, duly able to consider the comparative merits of the candidates thanks to other information in their possession.

39. The Commission answers this question in the affirmative. It stresses that the proposals submitted to the Promotion Committee by the directorate where Mr Bossi was serving were drawn up after consulting the directors, heads of division and heads of specialized departments who are in a position to give a comprehensive assessment of the merits of each of the officials eligible for promotion with whom they are frequently in contact and the quality of whose work they can properly judge. On this point, the Commission referred to the letter from Mr Volpi, a director, dated 22 May 1987 which shows that Mr Bossi's present and former superiors participated in discussions within the directorate and that it was possible to take their assessments into account but that they led to the conclusion that 'in the light of Mr Bossi's age and seniority and his performance compared with that of his colleagues it was not appropriate to enter his name on the list of proposals'.

40. The Commission adds that if an official brings the matter before the Promotion Committee, that Committee is in a position to carry out a comparative assessment of his particular situation and thus if need be compensate for any oversights which might be open to criticism. Mr Bossi did not complain to the Committee that his name was not amongst those proposed by his Directorate-General. The Commission stresses that the appointing authority adopted the unanimous recommendation of the Promotion Committee.

41. I am not altogether convinced by this argument. It should be noted that it is based in part on a subsequent declaration from the administration, in particular from Mr Volpi, which gives assurances regarding the knowledge of Mr Bossi's qualities and merits at the time when the administration drew up its proposal. In the absence of more objective evidence, for example testimonies from Mr Bossi's direct or close superiors who participated in the discussions regarding the directorate's proposals, a simple unilateral declaration by the defendant subsequent to the applicant's complaint does not seem to me to suffice.

42. Furthermore, the evidence in the documents concerning the assessments by Mr Delhez, Mr Bossi's direct superior throughout the periods not covered by the periodic reports, does not make it clear whether he was consulted during the promotion procedure, in particular as regards the drawing-up of the directorate's proposals. At no time does the Commission specificially mention such consultation but confines itself to stressing that Mr Delhez had left once the proposals were made. The assertion that the proposals were drawn up 'following thorough discussion within each

directorate in which Mr Bossi's present and former superiors participated' [18] seems to me, in the absence of further details, very vague. In this respect, the fact that at the hearing the identity of this official's superiors was revealed does not in itself prove that those persons actually provided substantial information on his merits.

43. Furthermore, the Commission's statements in no way establish that Mr Bossi's situation was assessed within the Promotion Committee. It even seems that the contrary can be inferred. The Commission declares that that Committee is in a position to compensate for any oversights on the part of the directorates provided that the particular case is brought to its attention. Failing that, the Committee deliberates 'on the basis of the proposals from the departments and their order of priority' [19] which in plain language indicates that they do not re-examine the situation of all the eligible officials. Mr Bossi did not request the Committee to look into the fact that his name was not amongst the proposals from his directorate.

44. In this respect I would like to read a passage from the Commission's rejoinder which seems to me very revealing. At p. 5 of that document the Commission indicates that the Promotion Committee

'did not have its attention drawn by the applicant to his case and it is therefore difficult to imagine, given that it had to make a considerable reduction in the number of officials proposed before it drew up the list of the most worthy candidates, that the Committee might have chosen the name of the applicant who did not raise any particular objection to it that he had not been proposed by his Directorate-General'.

It could not be more clearly stated that no particular examination of Mr Bossi's merits took place before the Promotion Committee. It therefore seems difficult to accept that information provided to that Committee could compensate for the absence of the periodic reports in the assessment of the applicant's merits.

45. I do not consider that the fact that Mr Bossi did not himself bring his situation to the attention of the Promotion Committee can be held against him in the proceedings. Otherwise he would effectively be bearing the consequences of the administration's failure to act in so far as it did not draw up his periodic reports in good time. I take the view that under the Staff Regulations an official is entitled to have his merits assessed during a promotion procedure on the basis of his periodic reports or, exceptionally, if these are lacking, of all other relevant information. It is not incumbent upon him to make a special request to enjoy his entitlement and it cannot be refused him because he has not requested it.

46. Finally, since the appointing authority adopted the unanimous recommendation of the Promotion Committee when deciding on the list of the most deserving officials, nothing indicates that this latter phase included a particular examination of Mr Bossi's merits.

18 — P. 8 of the Commission's rejoinder.

19 — Paragraph 8 of Annex II of the Commission's defence and at p. 15.

47. According to the *Oberthür* judgment, it is for the Commission to show that the absence of an official's periodic report is compensated for by the factors capable of informing the Promotion Committee and the appointing authority of the official's merits for the period in question. [20]

48. In the light of the foregoing considerations I take the view that in the present case the Commission has not shown that the absence of the periodic report was compensated for by other information available to the competent authorities. I conclude from this that the requirements, set out in Article 45 (1) of the Staff Regulations that there be a consideration of the comparative merits of the officials eligible for promotion have not been satisfied and that that provision has not been complied with.

49. Does this make out the case for the annulment of the decision challenged or must it also be shown that the non-compliance with Article 45(1) of the Staff Regulations had a decisive effect on the promotion procedure?

50. I take the view that it is not necessary in this case to show a decisive effect. The Court's case-law shows clearly that the fairly strict, or even harsh, condition of the 'decisive effect' was added to avoid the automatic annulment of the often numerous promotions which had been adopted following procedures vitiated by an irregularity regarding the assessment of the merits of a single candidate. In fact, it is only the grave prospect of reopening the often considerable numbers of individual cases that justifies the Court's decision that definitive promotions following an unmistakable irregularity in the promotion procedure will not invariably be annulled. However, as we have seen, Mr Bossi's application is inadmissible with respect to the promotion decisions actually taken. Therefore, the application for annulment concerns only the appointing authority's decision on the list of the most deserving officials and the implied decision rejecting his complaint.

51. The decisions regarding promotions from Grade B 2 to Grade B 1 for 1987 are now final since they have not been regularly challenged. The situations of the officials promoted cannot be reopened. As the Commission's representative admitted at the hearing, the annulment of the appointing authority's decision on the list of officials most worthy of promotion to Grade B 1 would have no effect on their situations. Consequently, there appears to be no consideration of administrative expediency or preservation of individual situations to prevent the application to the irregularity in the Grade B 1 promotion procedure of the sanction called for by the principle of legality, that is to say by the annulment of the decision on the list of the most deserving officials. I would therefore request the Court to annul that decision.

52. Such a decision seems to me all the more desirable since it would plainly set an example with respect to the repeated administrative failures in the drawing-up of periodic reports.

20 — Case 24/79, cited above, paragraph 10 of the judgment

53. Mr Bossi's situation, in which the 1987 promotion procedure took its course although he had not been the subject of a periodic report since 1981, is not an isolated incident. The list of judgments given by the Court in similar cases is long. Unfortunately, the delay which the Court described in the *List* judgment as being 'considerable and inexplicable'[21] does not seem to be exceptional in the administrative practices of the Community institutions. Therefore, to my mind, the penalties imposed by the Court against such practices should serve to encourage the administration not to repeat them and to improve its efficiency.

54. In his Opinion in the *Gratreau* case[22] Mr Advocate General Mayras clearly addressed the problem of an adequate penalty for irregularities in the drawing-up of periodic reports. He referred to the *Oberthür* judgment, where the Court declared that there had been an irregularity in the promotion procedure because of the absence of periodic reports and the lack of information capable of replacing them but none the less considered that the annulment of the promotions of 40 officials would constitute an excessive penalty and preferred of its own motion to order the Commission to pay compensation for the non-material damage caused by its maladministration.[23] The Advocate General voiced his doubts concerning such a solution. In his eyes, the award of damages

'is not the appropriate remedy to attach by way of sanction to irregularities committed in a promotion procedure',[24]

and he quoted from his own Opinion in the *Oberthür* case:

'It is not all necessarily a question of money and the best means of improving the conduct of administrative procedures is not to quantify the damages'.[25]

He therefore took the view that in certain circumstances the annulment of the promotion decisions could constitute the appropriate penalty for the irregularities since the administration would be perfectly able to take the necessary consequential steps, for example, by reconstructing the careers in question.

55. On this point I share the opinion of my predecessor. I am aware that the Court is reluctant to penalize irregularities of the type found in this case by annulling the promotions but I consider that such a solution cannot always be avoided unless the administration is to be given immunity.

56. Consequently, the annulment of the appointing authority's decision on the list of the most deserving officials and not of the promotions themselves would serve as 'a shot across the Commission's bows', a warning which I hope would be sufficient to prevent both similar failures and recourse to penalties having harmful consequences for other officials.

57. There remain the claims for damages.

21 — Case 263/81, cited above, paragraph 28.
22 — Joined Cases 156/79 and 51/80 [1980] ECR 3943.
23 — Case 24/79, supra.
24 — Opinion in [1980] ECR 3965.
25 — [1980] ECR 1766.

58. The first head of claim for damages must in the circumstances be dismissed. The irregularity which has been held to exist consisted not in failing to promote Mr Bossi but in not having properly examined his merits. The administration's fault consisted in the failure to respect not any entitlement of Mr Bossi to be promoted but his right under Article 45 (1) of the Staff Regulations that the comparative merits of the officials eligible for promotion should be considered. There is nothing to show that, if this comparative examination had duly taken place, it would have culminated in Mr Bossi's promotion. In those circumstances the material harm which he cites consisting in the 'annual difference in salary and other benefits between Grade B 2 and Grade B 1' does not seem to me to be sufficiently direct or, more to the point, sufficiently certain to justify redress.

59. On the other hand it seems to be difficult not to give any compensation for the non-material damage. In the *Castille* judgment the Court considered that

'delays in the drawing-up of staff reports may themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken'. [26]

In the *Vincent* judgment, the Court recalled, citing the *Geist* judgment of 14 July 1977, that

'an applicant "suffers non-material damage resulting from the fact that he possesses a personal file which is irregular and incomplete, when the compulsory periodic report is a guarantee to an official for the regular progress of his career" and that the absence of periodic reports for which the institution alone is responsible may put him in an uncertain and anxious state of mind with regard to his future career'. [27]

60. In this case, the first discernible sign that Mr Bossi's periodic reports for the 1981-83 and 1983-85 periods were in the process of being drawn up appeared only after he lodged his complaint and after the list of officials considered most worthy of promotion had been drawn up and the promotion procedure was not reopened to examine his situation on the basis of new information. It seems to me that this factor proves the existence of non-material harm. This harm will not be redressed by the annulment of the appointing authority's decision on the list of the most deserving officials. The very fact that periodic reports were not drawn up constituted fault causing harm, irrespective of its consequences on the regularity of the promotion procedure. This appears to me to be the sense of the abovementioned *Castille* and *Geist* judgments.

61. In these circumstances I consider it appropriate that the Commission be ordered to pay compensation for the damage suffered. I suggest that the Court should assess it *ex aequo et bono* at BFR 25 000.

26 — Joined Cases 173/82, 157/83 and 186/84, *supra*, paragraph 36

27 — Case 7/86, *supra*, paragraph 25.

62. In conclusion I would propose that the Court should:

(1) declare the second head of the claim for annulment and the second head of the claim for damages inadmissible but reject the other objections of inadmissibility raised by the Commission;

(2) on the substance,

(a) annul the appointing authority's decision drawing up the list of officials considered most worthy of promotion to Grade B 1 in the 1987 financial year, published on 2 March 1987, and consequently annul the implied decision rejecting the applicant's complaint made on 15 April 1987;

(b) order the Commission to pay BFR 25 000 as compensation for the non-material damage suffered by Mr Bossi;

(c) dismiss the claim for compensation for material damage;

(3) order the Commission to pay the costs.