OPINION OF ADVOCATE GENERAL LENZ

delivered on 1 April 1993 *

Mr President,
Members of the Court,

A — Introduction

1. In this case the Court of Justice is called upon to decide an appeal of the European Parliament against a judgment of the Court of First Instance delivered on 12 February 1992 in Case T-52/90 on the application of Cornelis Volger, an official (hereinafter 'the applicant'). [1]

2. The applicant had contested before the Court of First Instance *inter alia* the Parliament's decision to refuse his application for a post to be filled, according to the vacancy notice, by transfer. The Court of First Instance upheld two of the applicant's pleas and therefore acceded to his application. In the first place he claimed that the contested decision had been adopted without his being given a hearing in a procedure which was unlawful owing to breach of the principle of equal treatment and of the right of the official to be heard; [2] secondly the refusal of his application for the post had not stated the grounds on which it was based. [3]

3. In its appeal the Parliament claims that the assessments of the Court of First Instance on both of those aspects are contrary to Community law.

4. The Parliament claims that the Court should:

(1) quash the decision of the Court of First Instance of 12 February 1992;

(2) grant the forms of order sought by the Parliament at first instance, namely:

— declare the action unfounded;

— make an appropriate order as to costs;

(3) make an order as to the costs of this appeal in accordance with the Rules of Procedure of the Court of Justice.

The applicant contends that the Court should:

— dismiss the appeal;

— order the Parliament to pay the costs.

* Original language: German

1 [1992] ECR II 121

2 Paragraphs 24 to 30 of the contested judgment

3 Paragraphs 36 to 43 of the contested judgment.

5. I shall discuss other details of the background, the content of the contested judgment and the arguments of the parties so far as necessary in the course of this Opinion. For the remainder I refer to the Report for the Hearing.

B — Discussion

I — *The Parliament's plea concerning the assessments of the Court of First Instance with regard to the failure to hear the applicant*

6. This plea falls into two parts. The first concerns the 'official's right to be heard', [4] which the Court of First Instance expressly regarded as having been infringed. [5] The second relates to the 'consideration of the comparative merits of the candidates'. [6] In the latter the Parliament, after various references to the actual course of the procedure, considers the concept of the consideration of comparative merits in general [7] and then deals with breach of the principle of equality of treatment criticized by the Court of First Instance. [8]

7. 1. In this respect it must be stated that at first sight it is not clear from the contested judgment how the infringement of the right to be heard, recognized by the Court of First Instance, and the breach of the principle of equal treatment are explained. It is first necessary therefore, so as to be able to appreciate the Parliament's criticisms correctly, to consider the grounds of the judgment.

8. On the question of the interview with the applicant the Court first of all referred to the appointing authority's obligation, in accordance with Article 29(1)(a) in conjunction with Article 45 of the Staff Regulations, to consider the comparative merits of the officials eligible for promotion and of their staff reports. This obligation is *inter alia* an expression of the principle of equality of treatment. [9]

9. However, in the considerations next put forward the Court of First Instance does not deal with the specific aspect of equality of treatment. It raises instead the general question of whether the defendant, the Parliament, 'in fact considered the relative merits of the applicant's candidature ... in the exercise of its discretion'. [10] Within the framework so defined the Court then refers first of all [11] to the judgment in Case C-269/90 *Technische Universität München* v *Hauptzollamt München-Mitte*, [12] according to which 'where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative proceedings is of even more fundamental importance'. According to the words of the Court of Justice quoted in the contested judgment, those guarantees include in particular 'the right of the person concerned to make his views known'.

10. Secondly [13] the Court of First Instance states in detail that — as is apparent from all the documents before it — the appointing authority intended to base its consideration of the comparative merits of the candidates

4 — Paragraph 15 et seq. of the appeal.
5 — Paragraph 29 of the contested judgment.
6 — Paragraph 22 et seq. of the appeal.
7 — Paragraph 28 et seq. of the appeal.
8 — Paragraph 29 of the contested judgment.
9 — Paragraph 24 of the contested judgment.
10 — Paragraph 25 of the contested judgment.
11 — Paragraph 26 of the contested judgment.
12 — [1991] ECR I-5469.
13 — Paragraphs 27 and 28 of the contested judgment.

in particular or a discussion with the head of division responsible for the post to be filled, Mr Janssen. In the applicant's case, however, it departed from the principle thus laid down and applied to the other candidates. In the proceedings at issue, in fact, the applicant was not able to have such a discussion with Mr Janssen; a previous conversation which he had had with him could not be taken into consideration as it had taken place before the publication of the vacancy notice and was unconnected with any procedure for filling the post in question. It follows that, according to the Court of First Instance, Mr Janssen could not have acquainted himself with the applicant's point of view or evaluated his merits in the light of the requirements set out in the vacancy notice. [14]

11. In view of the contents of the relevant grounds of judgment, my view is that the Court of First Instance considered the 'official's right to be heard' as a procedural guarantee not expressly envisaged in the Staff Regulations, which nevertheless is of general application in transfer and promotion procedures on the basis of the judgment in the *Technische Universität München* case. The Court is in fact linking the right so defined to the fact that in a consideration of the merits of the candidates the appointing authority has a 'discretion' [15] or a 'power of assessment'. [16] However, that fact concerns every procedure of this nature and cannot be linked — together with the right to a fair hearing — to the principle of equality of treatment, referred to in paragraph 29 of the judgment, the analysis of which requires, by its nature, a consideration of the facts of the individual case.

12. If this interpretation of the contested judgment is accepted as far as the 'official's right to be heard' is concerned, it automatically becomes clear what the Court meant in accepting that there had been a breach of the principle of equality of treatment. That breach must lie in the fact that the Parliament, contrary to the procedure which it had laid down and followed as regards the other candidates, did not grant the applicant an interview with Mr Janssen.

13. 2. Both the said parts of the plea put forward by the Parliament must be considered on that basis.

14. (a) As regards the considerations put forward in the judgment at first instance concerning the 'official's right to be heard', the Parliament first refers to the uncontested fact that the Staff Regulations do not provide for any such right in cases of this kind. The Court, it is claimed, failed to appreciate that even under the relevant case-law the administrative authority is not obliged to give a systematic hearing to candidates before filling a post — whether by transfer or promotion or on the basis of a competition. [17] That case-law provides for a hearing only in the case of acts of the administration which are

14 — See paragraph 28 of the contested judgment.

15 — Paragraph 25 of the contested judgment.

16 — Paragraph 26 of the contested judgment.

17 — Possible exceptions to this principle, which the Parliament itself recognizes, are of different kinds and must therefore be considered in the context appropriate to each of them. In this respect it may be noted that in paragraph 18 of the appeal the Parliament refers to the judgment in Case 75/77 *Mollet* [1978] ECR 897. I shall refer later in this section of my Opinion to the point on which that judgment turns. In so far as the Parliament on the other hand refers to the fact that there is no instruction by any of its responsible bodies providing for an interview with applicants in the context of staff matters referred to above (paragraph 20 of the appeal) and that the vacancy notice itself did not envisage an interview (paragraph 21 of the appeal), I shall refer to this again in the following section (paragraph 38 et seq. below).

liable gravely to affect the interests of the individual, a condition which is not met here. On the other hand the principles set out in the judgment in the *Technische Universität München* case cannot, it is claimed, be transposed unchanged to the field of the European civil service.

15. It is possible to agree in essentials with this view of the Parliament.

16. (aa) First it must be stated that the Court of First Instance was mistaken in thinking that the fact that the appointing authority has a discretion in the field of transfers and promotions is a sufficient basis for a right to be heard. [18] That fact by itself has no bearing on whether the legitimate interests of the person concerned require a hearing in every individual case. Both the nature of the procedure, which leads to discretionary decisions and the actual nature of the latter may affect these interests differently. Seen in this light, the principle laid down by the Court of First Instance would be an obstacle to speedy action by the administrative authority and its application would not depend on circumstances justifying such an obstacle. It would therefore be contrary to the principle of sound administration.

17. It is not surprising therefore that the Court's view is based on an unfounded interpretation of the judgment in the *Technische Universität München* case, as may be seen from a closer examination of that judgment.

18. In that case an importer was asking for exemption from import duties for a scientific apparatus in pursuance of Regulation No 1798/75. [19] Under Article 3(1)(b) thereof, freedom from customs duties is granted only if no instruments or apparatus of equivalent scientific value 'are being' manufactured in the Community. In view of that condition the Commission, which had intervened in pursuance of implementing Regulation No 2784/79, the implementing regulation, [20] had decided that the apparatus in question could not be imported free of duty because apparatus of equivalent scientific value, capable of being used for the same purposes, was being manufactured in the Community. That decision was based on the recommendation of a group of experts. However, Regulation No 2784/79 did not give the party concerned the opportunity to explain his position to the group of experts or to comment on the information before the group or to take a position on the group's recommendation. [21]

19. As the administrative procedure concerning customs exemption entails 'complex technical evaluations', [22] however, there is a risk that in the absence of such an opportunity the Commission decision might be based on incomplete information: the importer knows best what technical characteristics the scientific apparatus must have in view of the work for which it is intended. [23]

20. The foregoing examination shows that the principle set out in that judgment is not explained only by the discretion vested in the relevant Community institution in decisions on exemption from duty but is also

18 — See paragraph 25 in conjunction with paragraph 26 of the contested judgment.

19 — Regulation (EEC) No 1798/75 of the Council of 10 July 1975 on the importation free of common customs tariff duties of educational, scientific and cultural materials (OJ 1975 L 184, p. 1).

20 — Commission Regulation of 12 December 1979 laying down provisions for the implementation of Council Regulation (EEC) No 1798/75 (OJ 1979 L 318, p. 32).

21 — Paragraph 23 of the judgment in Case C-269/90.

22 — Paragraph 13 of the judgment in Case C-269/90.

23 — Paragraph 24 of the judgment in Case C-269/90.

closely connected to the scientific and technical nature of the assessment to be made.

21. The judgment is also based on the consideration that a decision taken without the importer concerned being given a hearing might impair the rights of the defence [24] in so far as it was based on facts and documents — harmful to his interests — on which he has not had an appropriate opportunity to make his views known. [25] That special feature also seems to me decisive as regards the fact that the Court of Justice then recognized the importer's right to be heard.

22. There is therefore nothing in the judgment in the *Technische Universität München* case to confirm the finding of the Court of First Instance that Mr Volger had a right to be heard by reason of the discretion vested in the appointing authority. That finding must therefore be entirely rejected as it is not justified by the grounds on which it is based.

23. (bb) However, it must next be considered whether the nature of the measure requires from another point of view that Mr Volger be heard. If that question is answered in the affirmative the Court of Justice might uphold the contested finding of the Court of First Instance on the grounds specified. [26]

24. In this connection it should be noted that in the past the Court of Justice has recognized in the context of the European civil service two types of right to be heard as procedural guarantees going beyond the Staff Regulations.

25. The first is closely linked to the right recognized in the *Technische Universität München* judgment. It is the right 'to take a position' on statements made by third persons, or on documents used for the purposes of a decision by the appointing authority, which are prejudicial to the person concerned. [27] That right was given specific expression in the second paragraph of Article 26 of the Staff Regulations, [28] but applies equally outside the scope of that provision. That is the position for example where the selection board in the course of a competition procedure has relied — at least to some extent — on information and opinions from superior officers to refuse admission of candidates to tests. [29]

26. Similarly the results of medical examinations carried out for the purpose of recruitment may not be used against the candidate unless he has been able to have notice of them — through a doctor of his choice — and to make known his view. [30]

27. The opportunity to 'take a position' afforded by these principles thus relates to any prejudicial statements and documents. The Court of First Instance however does not put forward in its grounds of judgment any circumstances of that kind but would

24 — Cf., with regard to the law relating to the Community civil service, judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 20.

25 — See paragraph 25 of the judgment in Case C-269/90.

26 — Cf. the judgment in Case C-30/91 P *Lestelle* v *Commission* [1991] ECR I-3755, paragraph 27; and the order of 3 December 1992 in Case C-32/92 P *Macrae Moat* v *Commission* [1992] ECR I-6379, paragraph 11.

27 — Cf. judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 20.

28 — Cf. for example the judgment of the Court of First Instance in Case T-82/89 *Marcato* v *Commission* [1990] ECR II-735, paragraph 73 et seq. with references in paragraph 78 to the case-law of the Court of Justice.

29 — Case 293/84 *Sorani* v *Commission* [1986] ECR 967 and in Case 294/84 *Adams* v *Commission* [1986] ECR 977.

30 — Case 121/76 *Moli* v *Commission* [1977] ECR 1971 and in Case 75/77 *Mollet* v *Commission* [1978] ECR 897.

grant a right to be heard independently of that, namely in general as an aspect of a guarantee of the consideration of the comparative merits of an application by the appointing authority. The right, as so defined, therefore finds no support in that part of the case-law of the Court of Justice considered here.

28. At any rate, it must be noted that the applicant alleged at first instance that he had had no opportunity to comment on the opinion of the head of division of the Hague office on which the Parliament based its rejection of his application. [31] In this respect he relied on a judgment forming part of the case-law I have mentioned. [32] On that point the Parliament pointed out, and the contested judgment does not show that the applicant disagreed, that the head of division in question simply expressed an opinion as to the appointment [33] (that is, not on circumstances in the applicant's past as an official, which might have been prejudicial to him). The findings of the Court of First Instance on the applicant's right to be heard cannot therefore be upheld from this point of view either.

29. The Court of Justice recognized another kind of right to be heard in the *Almini* [34] and *Oslizlok* [35] cases, concerning retirement in the interests of the service (Article 50 of the Staff Regulations) without assignment to another post; the hearing must relate to the proposed measure itself, the possibilities of another posting and the grounds which the appointing authority intended to take into account. [36]

30. However, this kind of right to be heard too is unrelated to the right which the Court of First Instance has conceded to the applicant, who should, in that Court's opinion, have the opportunity to represent his merits in an oral interview with Mr Janssen, not to express his views with regard to a proposed decision adversely affecting him. [37]

31. (cc) As may be seen from this survey of the case-law, a 'right to be heard' in the sense previously understood of a procedural right outside the framework of the Staff Regulations has no place in the context of this case.

32. In my view such a conclusion is not fortuitous. Such a right logically presupposes that the interests of the individual are exposed to specific risks not envisaged by the Staff Regulations, which may be averted by an interview.

33. However, there is no such risk discernible in this case. It could not be acknowledged that the applicant had a right to be heard in the sense of such a procedural guarantee.

34. The question whether the appointing authority, in the absence of an interview with the applicant, had the basis which the Staff

31 — Cf. paragraph 22 of the contested judgment.

32 — That is to say, the *Adams* judgment, see footnote 29.

33 — Paragraph 23 of the contested judgment.

34 — Case 19/70 *Almini* v *Commission* [1971] ECR 623.

35 — Case 34/77 *Oslizlok* v *Commission* [1978] ECR 1099.

36 — Case 19/70 *Almini*, paragraphs 12 to 16, and Case 34/77 *Oslizlok*, paragraphs 27 to 37.

37 — Only the refusal of the application could be considered as such in this case, but to regard that as the subject of the interview would be manifestly absurd.

Regulations (themselves) require for a proper evaluation of his application is another matter which I shall deal with in the next section.

35. (b) I must now consider whether, as the Court of First Instance thinks, the appointing authority breached the principle of equality of treatment by omitting in the applicant's case the hearing decided upon, which had been granted to the other candidates. The Parliament's argument with regard to the relevant grounds set out by the Court of First Instance is based in the first place on the concept of a consideration of the comparative merits of the candidates on which the Court also based its reasoning. [38] With regard to this concept some preliminary reflection is accordingly necessary [39] and will then serve as the framework for considering the arguments put forward by the appellant. [40]

36. (aa) Even though Article 45 (promotion) referred to by the Court of First Instance [41] is not applicable to appointment to a vacant post by way of *transfer*, it is undeniable that the requirement of a consideration of the comparative merits of the candidates envisaged by that provision is also in principle justified in such a case. Since under Article 7 of the Staff Regulations the appointing authority makes transfers 'solely in the interest of the service' it must, in view of the requirements for a vacant post, which define the interest of the service, compare (consider the 'comparative merits of') the abilities of the candidates for that post. [42] The situation is similar to that in which a post is to be filled by promotion. In that case, in the consideration of the merits in pursuance of Article 45 a certain stress is placed on taking account of such previous performance as may be of importance for that very post. In view of the similarity of the criteria it is not surprising that the Court of Justice should also have referred to a 'consideration of the comparative merits' of candidates in cases in which the notice had stated a post might be filled either by transfer or by promotion. [43] It therefore seems justifiable to describe as a 'consideration of the comparative merits' the comparison between candidates required by the combined provisions of Article 29(1)(a) and Article 7 and to apply the principles developed by the case-law with regard to Article 45 in so far as it is possible to transpose them to this case.

37. As regards the meaning of that requirement of a 'consideration of the comparative merits' as far as the interests of candidates are concerned, one must agree with the view of the Court of First Instance that it must *inter alia* ensure equality of treatment between them. In fact, the selection in the interests of the service means conversely that advantages which are not objectively justified must not be conferred on certain officials to the detriment of their colleagues. That prohibition therefore forms part of the framework of the principles of equality of treatment and objectivity which must govern the public service. [44]

38. (bb) The infringement of this requirement of equal treatment noted by the Court

38 — See paragraph 8 above.

39 — See paragraph 36(f) below.

40 — See paragraphs 38 et seq. and 53 et seq. below.

41 — Paragraph 24 of the contested judgment.

42 — Cf. judgment in Case 233/85 *Bonino* v *Commission* [1987] ECR 739, paragraph 5; judgment of the Court of First Instance in Case T-25/92 *Vela Palacios* v *Commission* [1993] ECR II-201, paragraph 40.

43 — Case 52/86 *Banner* v *Parliament* [1987] ECR 979.

44 — Cf. judgment in Case 48/70 *Bernardi* v *Parliament* [1971] ECR 175 at paragraph 27.

of First Instance rests — exclusively or at any event primarily [45] — on the fact that the appointing authority departed in the applicant's case from the procedure it had itself laid down. [46]

39. On this point the Parliament challenges the statements of the Court of First Instance according to which

'it is apparent from all the documents before the Court that the appointing authority intended to assess the respective merits of the candidates on the basis in particular of a discussion between each one and the head of division responsible for the Hague office, Mr Janssen.' [47]

40. It emphasizes that the vacancy notice by no means prescribes such a special procedure. Moreover no instruction from any competent authority of the Parliament envisages or prescribes such a formality. [48] The documents to which the Court refers, namely the internal memoranda of 5 and 27 September 1990 and the reply to the complaint of 20 December 1990 are all subsequent to the vacancy notice. [49] They are based, according to the Parliament, on a mistake by the head of division responsible for the Hague office, [50] which the Parliament had already stressed at first instance: [51] the informal talk with the applicant which took place in June led Mr Janssen to say that he had interviewed the three candidates. [52] The Court of First Instance also noted that mistake because in its legal assessment it accepted that an interview had been granted to only two of the three candidates before the appointing authority took its decision to fill the post. [53]

41. As regards the problem thus defined, it should be observed at the outset that the criticism made of the Parliament's approach by the Court of First Instance *does not mean* that the Parliament *actually took as its basis* for the consideration of merits *the result of the informal interview* in June 1989. The Court is relying rather on the fact that as concerns the applicant, in the absence of an interview subsequent to the vacancy notice that consideration of the comparative merits *had no basis* which met the criterion previously laid down. [54] The Court of First Instance explains, entirely in conformity with that idea, that the informal interview in June 1989 could not have cured that defect. [55]

42. A further point seems to me to be essential for an understanding of the grounds of judgment. The Court does not base its view on the idea that observance of the procedure chosen, in its opinion, by the Parliament would have led to the appointment of another candidate. The contested judgment nowhere mentions such an appointment. On the contrary, paragraph 3 of the grounds of judgment states that the post in question has been filled from 1 October 1988 'to the present' by temporary staff. The applicant too has challenged only the rejection of his application and not the appointment of a rival candidate. Consequently the decisive point for the Court of First Instance in the

45 — I shall consider in the next section (paragraph 54 et seq.) the difference of treatment between the applicant and the other candidates which must also be taken into account as a feature of such an infringement.

46 — Paragraphs 27 and 29 of the contested judgment.

47 — Paragraph 27 of the contested judgment.

48 — Cf. paragraph 33 and paragraphs 20 and 21 of the appeal.

49 — Paragraph 34 of the appeal.

50 — Paragraphs 34 and 35 of the appeal.

51 — Paragraph 10 of the appeal.

52 — Paragraph 9 of the appeal.

53 — Paragraph 11 of the appeal.

54 — Cf. the second subparagraph of paragraph 28 of the contested judgment.

55 — Second subparagraph of paragraph 28 of the contested judgment

point under discussion here is the fact that the Parliament laid down a procedure which in the case of the applicant it did not follow. [56]

43. When the grounds of judgment are viewed from this angle, the Parliament's criticism to the effect that neither the vacancy notice nor internal instructions from its departments required the candidates to be heard seems in the last resort to be justified.

44. In fact on the basis of the documents which it analysed, the Court simply stated that the appointing authority originally — the date is not stated — *intended* to base its assessment on an interview with the candidates. On the other hand the Court did not find any evidence to establish that, for the purposes of the contested procedure for filling the post at The Hague, the requirement of an interview *had been laid down in a legally binding manner.*

45. It seems clear to me that the appointing authority cannot be bound by a rule of procedure such as that at issue here simply because at some time it had thought of applying it. On the contrary, for that it is necessary for the appointing authority to have announced openly its intention to lay down a binding standard for its procedure.

46. That idea is firmly supported by the case-law. I refer to the judgments with regard to the appointing authority's obligation to observe the conditions laid down in the vacancy notice as well as those relating to recruitment boards such as are provided for in various Community institutions.

47. As regards the obligation to comply with the conditions set out in the vacancy notice, the Court of Justice has recently summarized its consistent case-law by stating that

'although the appointing authority has wide discretion in comparing the candidates' merits and reports, especially with a view to the post to be filled, it must exercise it within the self-imposed limits set by the vacancy notice'. [57]

48. The vacancy notice must 'give those interested the most accurate information possible about the conditions of eligibility for the post to enable them to judge for themselves whether they should apply for it'. [58]

49. If the passages quoted are compared with this case, it may be seen clearly that here it is precisely that factor, which is so decisive for this case-law, namely a public statement expressing the appointing authority's intention to be legally bound, which is lacking.

50. A similar idea emerges also from the case-law regarding so-called recruitment boards. The judgment in Case 222/81 *Ragusa* v *Commission* [59] states

56 — See the wording of paragraphs 27 and 29 of the contested judgment and the reference in paragraph 29 to the judgment in Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes* [1987] ECR 3259 (paragraph 19).

57 — Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 13.

58 — *Frederiksen* — see previous footnote — paragraph 14.

59 — [1983] ECR 1245, paragraph 18.

'when, by a decision of an internal nature, the appointing authority voluntarily institutes a compulsory consultative procedure which is not prescribed by the Staff Regulations, it is obliged to abide by such a procedure, which cannot be regarded as lacking any legal validity'. [60]

51. For the purpose of this case I think it is decisive that the Court of Justice speaks of a 'decision' and describes its subject as a 'compulsory' consultative procedure.

52. As the conditions making a given procedure compulsory are not met in this case, the Court of First Instance could not describe the Parliament's conduct as illegal simply because it diverged — whether from the point of view of equality of treatment or any other point of view — from that procedure. The Parliament's criticism is therefore justified on this point and it is not necessary to consider the argument by which it calls in question the conclusions drawn by the Court of First Instance from the memoranda of 5 and 27 September and from the reply of 20 December 1990 to the applicant's complaint.

53. (cc) However, we must still consider the point referred to by the Court of First Instance in paragraph 28 of the contested judgment according to which the fact that the applicant could not have a discussion with Mr Janssen meant that he had not received the same treatment as the other candidates. That aspect is different from the problem I have just dealt with, which concerned the obligation to comply with a given procedure.

54. It is not clear from the contested judgment whether the difference in treatment between the candidates could by itself, in the Court's view, make the decision at issue illegal. The Court of Justice must in any case consider that question, [61] if only because the applicant expressly raised it in his argument at first instance. [62]

55. On the problem as thus defined the Parliament expressed the view at first instance that generally speaking a study of the personal file is enough to assess an application for transfer. Moreover, it claimed, the applicant was well known to the persons responsible in the relevant directorate general as he had been assigned to it for some 10 years. He had suffered no disadvantage as compared with the other candidates, who did not belong to that directorate general, which was why they had been given an interview.

56. The Parliament essentially repeated that argument in the procedure before the Court of Justice.

57. It must be stated in this respect that the principle of equality of treatment which is linked to the concept of consideration of the comparative merits means that the merits must be assessed not only according to the same criteria but also

60 — The judgment of the Court of First Instance in Case T-128/89 *Brumter* v *Council* [1990] ECR II-545 (summary publication) was to the same effect; see paragraph 23 of the full text.

61 — See paragraph 24 above in conjunction with the judgments cited in footnote 26.

62 — Paragraph 22 of the contested judgment.

'on a basis of equality and taking account of comparable sources of information'. [63]

58. That requirement constitutes one of the limits to the discretion, which is in general very wide, [64] enjoyed by the appointing authority in considering the comparative merits of candidates. [65]

59. In the application of this principle the staff report under Article 43 of the Staff Regulations plays a decisive role by reason of the guarantees linked to it. [66] It must contain *inter alia* no unsubstantiated evaluations, [67] the official may make comments thereon [68] and where appropriate, even after internal competitions, it may be challenged. [69]

60. In view of this importance attached to officials' staff reports the appointing authority is not in general obliged, as the Parliament has rightly pointed out, to have an interview with all the candidates for a vacant post. In particular the authority may as a general rule exclude from the beginning such candidates as do not, on the basis of their staff reports, appear suitable for the post concerned.

61. It may nevertheless happen that vacancy notices contain very specific conditions with regard to which the staff reports do not give direct information. In such cases other reliable sources of information must be drawn upon, primarily, for example, relevant documents included in the personal file. For the rest, however, it is for the candidate himself

'to provide all the useful facts and information which will permit the appointing authority to decide whether or not he fulfils the conditions laid down in the vacancy notice'.

62. Moreover:

'it is for that authority alone, or where appropriate the selection committee, to decide whether additional information should be obtained from the candidates'. [70]

63. In the light of these considerations it cannot be stated that the decision at issue is based on a breach of the principle of equality of treatment on the sole ground that in the case of the contested procedure for filling the post the applicant, unlike the other candidates, was unable to have an interview with Mr Janssen. In fact, if the applicant's arguments set out in the contested judgment are considered, it may be seen that he has not produced any evidence that it would have been possible for him to demonstrate, in an interview with Mr Janssen after the publication of the vacancy notice, relevant merits which were not already known to the appointing authority from his staff reports, other documents from his personal file or his application or which he might not already

63 — Case 97/63 *De Pascale* v *Commission* [1964] ECR 515 and particularly 528.

64 — See previous footnote.

65 — See as regards promotions, for example, the judgment in Case 52/86 *Banner* v *Parliament* [1987] ECR 979, paragraph 9; for transfers, see the judgment in the *Bonino* case, loc. cit., paragraph 5.

66 — Consistent case-law; see for example the judgment in Case C-68/91 P *Moritz* v *Commission* [1992] ECR I-6849, paragraph 16.

67 — Case 61/76 *Geist* v *Commission* [1977] ECR 1419, paragraph 46.

68 — Cf. the second paragraph of Article 43 of the Staff Regulations.

69 — Cf. judgment in Joined Cases 6/79 and 97/79 *Grassi* v *Council* [1980] 2141, paragraph 20.

70 — Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323, paragraph 13.

have shown in his application. The reference made by the Court of First Instance to such a possibility [71] is altogether abstract and therefore irrelevant.

64. Admittedly in this case a breach of the principle of equality of treatment was conceivable in the event of the post having been assigned to a candidate who could be transferred and who had been granted such an interview. It would then have been possible to question the significance of the interview, the significance it actually had in the appointment and what significance might properly have been attached to it for that purpose. But as I have said, [72] no such appointment was made. It is therefore unnecessary to go further into this aspect. The Parliament's argument with regard to the different situations of the applicants [73] falls, in my view, into this category. It is unnecessary therefore to go into them either.

65. 3. As a result of the foregoing considerations, it may be stated that the Court of First Instance wrongly assumed that the decision at issue was illegal because the procedure for examining the applications was contrary to the principle of equality of treatment and officials' right to be heard.

71 — Paragraph 28 of the contested judgment.
72 — See paragraph 42 above.
73 — See paragraph 55 above.

II — *The Parliament's plea relating to the findings of the Court of First Instance as regards the absence of a statement of the grounds on which the measure at issue was based.*

66. 1. The considerations put forward by the Court of First Instance and challenged by the Parliament are based on the following uncontested facts:

— The applicant was informed by a standard form on 4 July 1990, in answer to his application for the post, that the appointing authority had decided to hold Open Competition PE/49/A.

— On 18 July 1990 the applicant made a complaint against that decision.

— He received no answer within the period of four months laid down by the second subparagraph of Article 90(2) of the Staff Regulations.

— On 18 December 1990, that is, one month after the expiry of the said period and two months before the expiry of the period for bringing proceedings pursuant to the second indent of Article 91(3), the applicant brought an action before the Court of First Instance.

— By letter of 20 December 1990 the Parliament expressly rejected the applicant's complaint.

67. It may be stated by way of addition that there is no dispute as to the meaning of the reply to the applicant's application for the

post. Although it is true that the — unfortunate — reference to the holding of an open competition might be understood as a rejection, on the other hand it still did not contain any reasoning. [74] Moreover it may be seen from the appeal that the express rejection of the complaint, dated 20 December 1990, which was available to the Court of First Instance, explained why the applicant's application for the post had not been considered. [75]

68. 2. On that basis the Court of First Instance [76] expressed the view that in the event of a decision rejecting an application for a post the appointing authority was required to give its grounds, at least at the stage of the rejection of the complaint. But before bringing his action the applicant had not received any reasoned rejection of his complaint. The Court stated that the defect consisting in the complete absence of a statement of grounds could not be cured by explanations given by the appointing authority after the bringing of the action, which puts an end to the appointing authority's opportunity to make its decision legal by a reasoned rejection of the complaint.

69. In that context the Court of First Instance rejected an argument put forward by the Parliament on the basis of the second indent of Article 91(3) of the Staff Regulations. According to the second sentence of that indent, where a complaint is rejected by express decision after being rejected by implied decision but within the period for bringing proceedings, the period for bringing proceedings is to start to run afresh. The possibility there envisaged of curing the lack of a statement of grounds by an express reply to the complaint is, in the view of the Court of First Instance, inextricably linked to the opportunity to bring proceedings. A reasoned reply after proceedings have been brought would no longer fulfil its purpose of allowing the person concerned to evaluate the expedience of starting an action or the Court to review the correctness of the grounds given.

70. 3. In that respect the Parliament [77] has claimed before the Court of Justice that the interpretation of the Staff Regulations given by the Court of First Instance would result in the official's being able, on the expiry of the period of four months under Article 90(2), to bring an action before the Court with a guarantee of absolute success and in the defendant institution's being in any event ordered to pay the whole of the costs. Officials would thus be encouraged to resort to litigation.

71. That interpretation is, according to the Parliament, contrary to the purpose of the legal remedies envisaged by the Staff Regulations and is based on an incorrect understanding of the concept of implied rejection and the relevant consequences.

72. As regards the purpose of the legal remedies envisaged by the Staff Regulations, the Parliament alleges that Articles 90 and 91 provide for a stage for settlement of disputes within the institution, which may extend over almost seven months or even 10 if account is taken of the final sentence of Article 91(3) of the Staff Regulations. The Parliament discusses that provision in the light of that purpose, which it claims is called in question by the interpretation of the

74 — Paragraph 38 of the contested judgment and the Parliament's statements during the oral procedure before the Court of Justice: p. 10 of the minutes of the hearing.

75 — See paragraph 5 of the appeal.

76 — Cf. paragraphs 36 to 43 of the contested judgment.

77 — Cf. paragraphs 39 to 51 of the appeal.

Court of First Instance, or more precisely by the automatic result that an implied rejection would lead in any event to annulment because there is an irrebuttable presumption that there is no statement of grounds.

73. On the concept of implied rejection and its scope the Parliament observes that the case of implied rejection has been expressly envisaged and accepted as proper by the Staff Regulations and that it involves no 'penalty'. During the oral procedure the Parliament referred in this respect to the judgment of the Court of First Instance in Case T-11/91 *Schloh* v *Council*, [78] according to which the absence of a reply to a complaint is no indication of irregularity. [79] The Court of First Instance, on the other hand, is likening an implied rejection to a procedural defect even though there might in fact be grounds corresponding to the duty to state grounds for the rejection within the administration. In this case such an actual statement of grounds was set out in the express rejection of the complaint.

74. In previous case-law the implied rejection of an administrative complaint was not systematically equated to an absence of reasoning of the initial decision, against which the complaint was directed. On this point the Parliament refers in particular to the judgment in Case 121/76 *Moli* v *Commission*. [80]

75. The Parliament thinks that an appropriate way to deal with cases of this kind would be to require the defendant institution automatically to pay costs whilst reserving the actual dispute for the final judgment.

76. 4. (a) All these considerations lead me to make some preliminary general remarks regarding the requirement of a statement of grounds laid down in the Staff Regulations.

77. This requirement is laid down in the second paragraph of Article 25, in principle for decisions adversely affecting an official, but is expressly repeated in Article 90(2) for purposes of decisions relating to a complaint. As the Court of Justice has consistently held, the obligation to provide a statement of grounds is intended

'to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested'. [81]

78. In the light of that interpretation of the obligation to state grounds, contrary to what the Parliament evidently thinks, [82] it does not matter whether the appointing authority *had* specific grounds for adopting an act adversely affecting an official. To comply with its obligation under the second paragraph of Article 25 and Article 90, it must *state* these grounds.

78 — [1992] ECR II-203.

79 — See paragraph 72 of the *Schloh* judgment.

80 — See footnote 30 above.

81 — Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22.

82 — See paragraph 73 above.

79. However, it is correct that that requirement may in certain circumstances be restricted in its scope by other considerations. One such circumstance is envisaged by the Staff Regulations themselves as regards a statement of the grounds on which decisions relating to a complaint are based, that is to say, in the event of an implied rejection. In my view the purport of that provision is to spare the administrative authority from issuing a statement of grounds where it would be only a repetition of information already contained in the communication of the original decision. That was the context in which the following statement was made in the judgment in Case 121/76 *Moli*, [83] referred to by the Parliament:

'Under the conditions referred to in the fourth subparagraph of Article 90(2) of the Staff Regulations the statement of reasons on which an implied decision rejecting a complaint is based is necessarily deemed to be the same as the statement of reasons or the absence of reasons for the decision which was the subject of the unanswered complaint, with the result that the grounds for each of them must be reviewed at one and the same time.' [84]

80. By that judgment the Court of Justice annulled the initial decision at issue and the implied decision rejecting the complaint *inter alia* because neither contained a statement of grounds; in other words: because the implied reference in the decision on the complaint (which was the result of the mere expiry of the period for reply) to the grounds of the original decision was to something which did not exist. The question whether the implied rejection of a complaint complies with the requirement of a statement of grounds therefore depends on whether (and how) the grounds on which the initial decision was based were stated.

81. Consequently, contrary to the Parliament's assertion, it is perfectly possible — without making a presumption of illegality incompatible with the Staff Regulations — to challenge the implied rejection of a complaint on the basis of the statement of grounds, that is, where the original decision contained no statement of grounds.

82. (b) These general principles are also applicable, with one special feature, to cases such as this. That special feature lies in the fact that in cases where a post is filled by promotion or transfer the Court of Justice does *not* require the *initial decision* to be provided with a statement of grounds, even with regard to the candidates rejected, since

'a statement of these reasons might harm some if not all unsuccessful candidates'. [85]

83. However, in this case the rejection of the complaint must state the grounds on which it is based, [86] as the Parliament expressly admitted at first instance. [87] By his complaint the person concerned is in fact expressing the wish to be informed of the reasons for the rejection of his application in so far as the appointing authority maintains it. He thus dispenses with the protection against any unfavourable assessments. As the Court of Justice has also explained in the judgment in

83 — See footnote 30.

84 — Paragraph 12 of the judgment.

85 — Case 188/73 *Grassi* v *Council* [1974] ECR 1099, paragraph 12, in cases of promotion; also, in cases of assignment to another post: the judgment in Case 233/85 *Bonino* (footnote 42), paragraph 4.

86 — Case 188/73 *Grassi*, previous footnote, paragraph 13; judgment in Case C-343/87 *Culin* v *Commission* [1990] ECR I-225, paragraph 13; see also the judgment of the Court of First Instance in Case T-11/91 *Schloh* (footnote 78), paragraph 73.

87 — Paragraph 34 of the contested decision.

Case C-343/87 *Culin*, [88] the statement of grounds provided at the complaint stage serves also as the statement of grounds for the original decision. [89]

84. It follows from all the foregoing considerations, as regards this case, that at the time the action was brought there was a complete absence of any statement of grounds for the measure at issue, confirmed by the implied rejection of the complaint. The argument before the Court of First Instance therefore rightly concentrated on the question whether that defect could be cured by the appointing authority's statements provided after proceedings were commenced.

85. On this question I should like first of all to consider the significance of the second indent of Article 91(3) in a case in which a complaint is at first rejected by implication and subsequently expressly rejected within the period in which proceedings may be brought. In this respect I can only agree with the Court of First Instance. That provision is not sufficient to cure the absence of a statement of grounds after proceedings have been started. The extension of the period for bringing proceedings for which it provides may certainly prolong the preliminary procedure under Articles 90 and 91 of the Staff Regulations, the object of which is

'to encourage an amicable settlement of the difference which has arisen between officials or servants and the administration'. [90]

86. But such an effect can follow only where the stage in question has not been terminated by the initiation of proceedings by the person concerned within the period of three months running from the implied decision of rejection. The provision under consideration presumes that there has been an express decision to reject a complaint 'before the period for lodging an appeal has expired', when 'the period for lodging the appeal shall start to run afresh'. However, after an action has been brought there can no longer be a decision 'before the period for lodging an appeal has expired', and to start the period for taking such action to run afresh would logically no longer have any sense because proceedings have already been started within the due period. Nor would there any longer be any practical purpose because the opportunity provided by the reopening of the period for the person concerned to consider, for the purpose of bringing proceedings, the grounds put forward by the administrative authority becomes nugatory once the action has been started.

87. Such a concept would make sense only if the applicant discontinued his action and started *another one* — within the fresh period laid down. However, this provision deals only with bringing an action, so that an amicable settlement of the dispute is possible only if the appointing authority sends its express decision before the action is begun.

88. If the initial decision has not provided a statement of grounds, the appointing authority, to make sure of its position, must observe the period of four months for rejection of the complaint, since the Staff Regulations regards proceedings begun after that period as lawful even if they are brought at once.

89. Apparently to improve the chances of bringing things to a happy ending, in 1972, when the provision in question was inserted in the Staff Regulations, the period for bringing an action in the event of an implied rejection of the complaint, which was originally

88 — Footnote 86.

89 — Loc. cit., paragraphs 13 and 14.

90 — Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, paragraph 32.

two months and therefore not so long as in the case of an express rejection, was also fixed at three months. [91]

90. In this case there was no statement of grounds by the time the action was brought and, as we have seen, the second indent of Article 91(3) cannot justify the belated statement of grounds. The explanations subsequently supplied to the applicant could no longer serve the purpose of the obligation to state the grounds, namely to provide the applicant with information with regard to possible proceedings. In such a situation the Community judicature in principle declares the contested decision void. [92] The prospects of success of an action in the total absence of a statement of grounds, to which the Parliament takes exception, are therefore, as may be seen from this case-law and the considerations I have put forward, embodied in the purpose and scheme of Articles 90 and 91 and by no means contrary to them.

91. I must however still consider whether from certain points of view it may be appropriate to set this principle aside. The previous case-law has recognized that idea in certain special cases on the basis again of the two objectives of the statement of grounds, namely to inform the applicant and the Community judicature. If the proceedings have made such information possible it may, 'in exceptional cases, lose its purpose and cease to justify the annulment of the decision in question'. [93]

92. In this respect the case-law falls into two groups of cases. [94]

93. The first group is obviously based on the idea that, even if the legal proceedings, according to the judgments in the *Michel* and *Culin* cases, must not be a mere prolongation of the preliminary administrative procedure, there is nevertheless a close relationship between the statement of the grounds on which the contested measure is based and the arguments of the defendant institution before the Community judicature.

94. Entirely from that point of view the Court of Justice [95] and the Court of First Instance [96] have accepted in certain cases that an *insufficient* statement of grounds may be *supplemented* after the action has been brought.

95. Such a procedure however is out of the question here because there was a complete *absence* of any statement of grounds before the proceedings were brought.

96. However, on the basis of the same idea, the Court of First Instance has accepted a subsequent statement of grounds in a case in which it was entirely absent before proceedings were brought. [97] I might say in this

91 — Cf. the wording of Article 91 in the version of Regulation No 31 (EEC), 11 (EAEC), *Journal Officiel* 1962 p. 1385; the amendment leading to the version at present in force is based on Regulation No 1473/72 of 30 June 1972 (OJ, English Special Edition 1972 (III), p. 703).

92 — See the judgments in Case 195/80 *Michel* (footnote 81 above) and in Case C-343/87 *Culin* (footnote 86 above).

93 — Judgment in Joined Cases 64/86, 71/86 to 73/86 and 78/86 *Sergio* v *Commission* [1988] ECR 1399, paragraph 52.

94 — See below paragraphs 93 to 97 for one group and paragraphs 98 and 99 for the other.

95 — See in addition to the *Sergio* judgment, the judgment in Case 111/83 *Picciolo* [1984] ECR 2323.

96 — Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, in the case of *Schloh* (footnote 78) and Case T-25/92 *Vela Palacios* [1993] ECR II-201.

97 — Joined Cases T-160/89 and T-161/89 *Kalavros* v *Court of Justice* [1990] ECR II-871.

connection, without necessarily expressing a view on that case-law, that that case differed in an essential respect from this one. It involved a procedure under Article 29(2) of the Staff Regulations in which the post had been assigned to a candidate other than the applicant. In that case the Court of First Instance made it clear that the duty to provide a statement of grounds was limited by 'the duty of confidentiality due to the other candidates'. [98] The Court of Justice recognized a similar limitation in a case of a contested promotion: the statement of grounds may then relate only to the presence of the legal conditions on which, under the Staff Regulations, the validity of the promotion depends. [99] The case-law shows that an entirely formal statement of grounds which can hardly be of use to the person concerned satisfies that requirement. [100] In these circumstances the absence of a statement of grounds before the action is brought naturally has less importance than where it would need to be more detailed. It may be added for the sake of completeness that in such cases review by the Community judicature of the substance of the case is all the more important and that an effort will be made to elucidate actively the relevant circumstances if that seems necessary. [101]

97. As regards the case now before the Court, it should be remembered that the contested procedure for filling the vacant post did not result in an appointment. The rejection of the applicant's application for the post can therefore only rest on grounds concerning him personally. In that respect the appointing authority was not entitled to rely on ready-made statements with regard to the legality of the procedure but was required to explain to the applicant why it regarded his merits as insufficient with regard to the requirements of the post to be filled. It follows that the aspect of a restricted duty to provide a statement of grounds — regard being had to the explanations provided during the contested action — provided no justification for not annulling the measure at issue for lack of a statement of grounds.

98. Another aspect, which might justify such an exception to the principle of annulment of the measure at issue, may be seen in the judgment in Case 12/84 *Kypreos* v *Council*. [102] In that case no grounds had been stated before the initiation of proceedings for the refusal to include the applicant in the list of suitable candidates in connection with an open competition. It was based however on the fact that the applicant had not obtained the minimum number of marks in a compulsory language test. There was no indication of any illegality in the award of marks. In that case, if the Court had annulled the decision for lack of a statement of grounds the defendant institution could not in any case have included the applicant in the list of suitable candidates. It could only have repeated the same decision, the grounds for which would by then already have been known to the applicant, who would then no longer have had any legal interest in annulment. [103]

98 — Paragraph 70 of the *Kalavros* judgment.

99 — The *Grassi* judgment (footnote 85 above), paragraph 14; see also the judgment of the Court of First Instance in the *Schloh* case (footnote 78 above), paragraph 73.

100 — See paragraphs 16 to 18 of the *Grassi* judgment and paragraph 10 in conjunction with paragraphs 73 to 76 of the *Schloh* judgment.

101 — See in particular, in addition to the *Kalavros* and *Schloh* judgments, the judgment of the Court of First Instance in Case T-25/90 *Schönherr* v *Economic and Social Committee* [1992] ECR II-63, paragraph 30.

102 — [1985] ECR 1005.

103 — Other examples taken from the case-law are based on similar considerations: judgments of the Court of First Instance in Case T-37/89 *Hanning* (see footnote 96 above), which concerned irregularities in a competition procedure, in Case T-1/90 *Pérez Minguez* [1991] ECR II-143, paragraph 86, and in Case T-156/89 *Valverde Mordt* [1991] ECR II-407, in particular paragraph 133.

99. As regards this case there do not seem to be any compelling legal reasons for rejecting the applicant's application for the post. After an annulment of the contested measure it would then once more be within the discretion of the appointing authority to transfer the applicant in accordance with his application. The aspect just referred to consequently does not justify any divergence from the principle set out in the *Michel* and *Culin* judgments.

100. It follows, therefore, that the Court of First Instance was justified in upholding the applicant's third plea.

C — Conclusion

101. I therefore propose, having regard to the foregoing considerations, that the Court should:

— dismiss the appeal;

— order the Parliament, in pursuance of Article 69(2) of the Rules of Procedure, to pay the costs, including those of the intervener.