

JUDGMENT OF THE COURT (Fourth Chamber)

7 June 2007*

In Case C-362/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 23 September 2005,

Jacques Wunenburger, represented by E. Boigelot, avocat,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall and G. Berscheid, acting as Agents and V. Dehin, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, G. Arestis, J. Malenovsky and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

- In this appeal, Mr Wunenburger asks the Court of Justice to set aside the judgment of the Court of First Instance of the European Communities of 5 July 2005 in Case T-370/03 *Wunenburger v Commission* [2005] ECR-SC I-A-189 and II-853 ('the judgment under appeal'), dismissing as inadmissible his action for annulment of three decisions of the Commission of the European Communities adopted in the

context of an appointment procedure (together ‘the contested decisions’). By those decisions, the Commission, in its capacity as the appointing authority, appointed another candidate and rejected both the applicant’s candidature and his complaint.

Legal context

- 2 Article 7(1) of the Staff Regulations of Officials of the European Communities, in the version applicable to the present case (‘the Staff Regulations’), provides that:

‘The appointing authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade.

...’

- 3 The second paragraph of Article 25 of the Staff Regulations states that:

‘Any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the grounds on which it is based.’

4 Article 29(1) of the Staff Regulations provides that:

‘Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

...

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests ...’

5 Article 45(1) of the Staff Regulations provides that:

‘Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and the reports on them.

...’

The background to the dispute

- 6 On 19 September 2002, the Commission published notice of vacancy COM/138/02 ('the notice of vacancy') for the grade A2 post of Director of Directorate C 'Africa, Caribbean, Pacific' in the EuropeAid Co-operation Office. The notice of vacancy referred to the following tasks, namely, ensuring the effective and efficient management of projects and programmes throughout the period of the operational cycle, from identification to final evaluation, and preparing and supervising the decentralisation of management to delegations in States in Africa, the Caribbean and the Pacific. Solid experience of the personnel management, mobilisation and supervision of large teams and an aptitude for defining priorities and for communication were required.

- 7 The appellant, then an official in grade A3 in the Directorate-General 'External Relations' and head of the Commission's delegation in Croatia, along with nine other candidates, submitted an application for the post at issue.

- 8 After interviewing each candidate, the Director-General of the EuropeAid Co-operation Office ('the director-general') by memorandum of 18 November 2002 ('the director-general's memorandum') informed the Commission's Directorate-General 'Personnel and Administration' that he had classified the candidates into two groups. The first group was made up of six candidates whom he considered to have 'the aptitude to carry out the duties of the post at issue and who ... [would] meet both the demands and the challenges of the post under consideration', whilst the second group was made up of four candidates who '[would] not satisfy all the qualities, competences and aptitudes necessary for the post in question'. The applicant's name appeared in the second group.

- 9 Subsequently, the Consultative Committee on Appointments ('the Consultative Committee') adopted a list of six candidates, corresponding to the first group drawn up in the director-general's memorandum. The Consultative Committee, in a decision of 12 December 2002, considered that four candidatures, including that of Mr Naqvi, could be taken into consideration for the next stage of the selection procedure. On 8 January 2003, the Commission, acting as the appointing authority, decided to appoint Mr Naqvi to the post concerned ('the appointment decision').
- 10 By letter of 11 March 2003, the appellant was notified that his candidature for the post in question had been unsuccessful ('the decision rejecting the candidature'). On 2 April 2003, he lodged a complaint against the decision to appoint. A decision rejecting that complaint was made on 14 July 2003 ('the decision rejecting the complaint').
- 11 By decision of 11 March 2004, with effect from 1 April 2004, the Commission proceeded to retire Mr Naqvi in the interests of the service pursuant to Article 50 of the Staff Regulations. Following that decision, a new selection procedure ('the second selection procedure') was launched in which the appellant was again a candidate. His candidature was not successful and he did not contest the result of the second selection procedure.

The action before the Court of First Instance and the judgment under appeal

- 12 By application lodged at the Registry of the Court of First Instance on 5 November 2003, the appellant brought an action seeking the annulment of the contested decisions.

- 13 The Commission submitted that there was no need to adjudicate and that, in any event, the appellant's claims should be rejected.
- 14 The Commission contended that the action had become devoid of purpose owing to the retirement of Mr Naqvi and the launch of the second selection procedure, in which the appellant had participated: the appellant therefore no longer had any interest in pursuing the case.
- 15 The Court of First Instance dismissed the Commission's submissions that there was no need to adjudicate.
- 16 First, the Court of First Instance held that the dispute still had a purpose on the ground that the appointment decision had produced effects up until 1 April 2004 and that the decision rejecting the candidature was still producing effects.
- 17 Secondly, the Court of First Instance held, citing Case 207/86 *Apesco v Commission* [1988] ECR 2151, paragraph 16, and Case T-182/94 *Marx Esser and Del Amo Martinez v Parliament* [1996] ECR-SC I-A-411 and II-1197, paragraph 41), that the appellant retained an interest in obtaining judgment concerning the lawfulness of the selection procedure at issue, in order to ensure that the alleged unlawfulness would not recur in a similar procedure in the future.
- 18 In support of his action for annulment, the appellant asserted, by his first plea in law, that the Commission had breached the second paragraph of Article 25 of the Staff Regulations by failing to state reasons for the decision rejecting the complaint.

- 19 The Court of First Instance rejected that first plea in law by holding at paragraphs 28 to 35 of the judgment under appeal that it was possible from the statement of reasons contained in the decision rejecting the complaint to understand the essential basis of the decision and to assess whether the conditions which the Staff Regulations lay down for the proper conduct of the selection procedure had been observed.
- 20 By his second plea in law, the applicant relied on breach of Articles 7, 29(1)(a) and 45(1) of the Staff Regulations and breach of the principles of protection of legitimate expectations, equality of treatment and reasonable career prospects.
- 21 That second plea in law was also rejected by the Court of First Instance which held, first, at paragraphs 51 to 60 of the judgment under appeal, that the participation of the director-general in the selection procedure did not in itself constitute an irregularity and had not had any effect on the independence of the Consultative Committee. Therefore, the procedure had not led to discrimination detrimental to the appellant. The Court of First Instance noted that the criteria used in the decision rejecting the candidature appeared in the notice of vacancy and that, in any event, the requirements were inherent in any grade A2 post. In that context, the Court of First Instance took the view that the scope of the terms ‘challenges of the post’, appearing in the director-general’s memorandum, should not be exaggerated.
- 22 At paragraphs 61 to 83 of the judgment under appeal, the Court of First Instance held, secondly, that Mr Naqvi satisfied all the conditions required in the notice of vacancy and that the appointing authority had not committed a manifest error of assessment in selecting him.

Submissions of the parties

23 Mr Wunenburger claims that the Court should:

- declare the appeal admissible;
- annul the contested judgment;

and, in a new decision,

- annul the appointment decision;
- annul the decision to reject the candidature;
- annul the decision to reject the complaint;
- dismiss the cross-appeal brought by the Commission as inadmissible or, at the very least, unfounded;
- order the Commission to pay the costs.

24 The Commission contends that the Court should:

- principally, declare the Commission's cross-appeal admissible and well-founded and, consequently, annul the judgment under appeal inasmuch as it rejects the Commission's submissions that there was no need to adjudicate, which were presented at first instance;

- make an appropriate order for costs;

- in the alternative, dismiss the appeal as being inadmissible or, at the very least, as being unfounded;

- order Mr Wunenburger to pay the costs of the present appeal.

The cross-appeal

25 Since it is only necessary to address the main appeal if the Court dismisses the Commission's cross-appeal, the cross-appeal must be addressed first.

Arguments of the parties

- 26 In support of its cross-appeal, the Commission contends, first, that, in order to hold that the appellant had an interest in bringing proceedings, the Court of First Instance had to rely on the purely hypothetical need to prevent any other such instances of unlawfulness in the future.
- 27 The Commission points out that the appellant disputes the role played by the director-general in the pre-selection of candidates. In this case that is a purely factual circumstance incapable of recurring in another case. In addition, the Court of First Instance took the reasoning followed by the Court in *Apesco v Commission* too far, since the situation in the present case, namely an act of appointment, lacks the requisite automatically recurrent nature.
- 28 Secondly, the Commission states that, despite having had an undeniable interest in challenging the decision addressed to him in the course of the second selection procedure, the appellant brought no action, preferring to continue his action in the case giving rise to the judgment under appeal. According to the Commission this amounts, in the context of the present case, to an abuse of procedure which the Court of First Instance should have recorded by ruling that there was no need to adjudicate.
- 29 Therefore, in its further submissions on the cross-appeal, the Commission recognises that it erred when it suggested that it was for the appellant to seek the annulment of the appointment decisions taken in the course of the second selection procedure, since it had already reduced the number of directors and had transferred a director from the same directorate-general to the post left vacant by Mr Naqvi, in the exercise of the wide discretion which it enjoys in the reorganisation of its

services. Nevertheless, the Commission maintains that those circumstances support the view that a decision of the Court of First Instance favourable to the appellant was incapable of having any practical effect, and therefore his action is devoid of any purpose.

30 The appellant is of the view that the Commission's cross-appeal is inadmissible, since the judgment under appeal does not adversely affect the Commission, the action having been rejected as being unfounded.

31 On the merits, the appellant asserts, first, that the cross-appeal cannot be upheld, since the Commission has not established in it that the dispute is devoid of purpose.

32 He is of the view that, contrary to the Commission's contention, he did not obtain, following Mr Naqvi's retirement, everything he could have as a result of the annulment of the decision to reject the candidature and from the appointment decision.

33 In addition, even the fact that he was able to present his candidature in the second selection procedure cannot remove the irregularity of the contested decisions.

34 Secondly, the appellant considers that the Commission is restricting excessively the notion of 'interest in bringing proceedings' by evading the question of the appellant's interest in obtaining a judgment on, first, the unlawfulness of the procedure and, second, the unlawfulness of the decision to reject the candidature, in order to ensure that those instances of unlawfulness do not recur in the future.

35 The appellant asserts that the Court of First Instance was merely applying settled case-law in finding, at paragraph 19 of the judgment under appeal, that the dispute still had a purpose.

Findings of the Court

The admissibility of the cross-appeal

36 Under the second paragraph of Article 56 of the Statute of the Court of Justice, an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions.

37 It is clear from case-law that an appeal brought against a judgment of the Court of First Instance is admissible in so far as the latter has rejected a plea of inadmissibility raised by one party against an action, even though the Court of First Instance subsequently in the remainder of the same judgment dismissed that action as being unfounded (see Case C-23/00 P *Council v Boehringer* [2002] ECR I-1873, paragraph 50, and Case C-141/02 P *Commission v max.mobil* [2005] ECR I-1283, paragraphs 50 and 51).

38 In the present case, it is not disputed that the Commission raised a plea that there was no need to adjudicate before the Court of First Instance, and it is clear from paragraph 12 of the judgment under appeal that that plea was dismissed at paragraph 21 of that judgment and that the Court of First Instance dismissed the action as being unfounded.

39 In order to assess the admissibility of a cross-appeal brought against a judgment dismissing an action on the merits, there is no need to determine whether the plea, raised before the Court of First Instance and dismissed by it, seeks the dismissal of the action because it is inadmissible or because it has become devoid of purpose. Those are two preliminary issues, which, if successful, would prevent the Court of First Instance from ruling on the merits.

40 Consequently, the cross-appeal brought by the Commission is admissible.

The merits of the cross-appeal

41 In dismissing the plea that there was no need to adjudicate raised by the Commission, the Court of First Instance held, first, at paragraph 19 of the judgment under appeal, that the dispute still had a purpose inasmuch as the appointment decision produced effects and that the decision to reject the candidature continued to produce effects. Secondly, the Court of First Instance held, at paragraph 20 of the judgment under appeal that the appellant retained an interest in bringing proceedings in order to ensure that the alleged unlawfulness would not recur in the future in a similar procedure to that at issue.

42 At the outset, it is necessary to point out that an appellant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which it will be inadmissible. That objective of the dispute must continue, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see, to that effect, Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 21, and, by analogy, Case C-19/93 P *Rendo and Others v Commission* [1995] ECR I-3319, paragraph 13, and Case C-174/99 P *Parliament v Richard* [2000] ECR I-6189, paragraph 33).

- 43 If the appellant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court of First Instance on the merits cannot bring him any benefit.
- 44 In the present case it is not in dispute that, when he lodged his actions, the appellant had an interest in bringing proceedings, since the contested decisions adversely affected him (see, to that effect, Case 50/84 *Bensider and Others v Commission* [1984] ECR 3991, paragraph 8, and Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain v Council* [2002] ECR I-3439, paragraph 23). His action was therefore admissible.
- 45 Admittedly, by virtue of the second selection procedure, organised following Mr Naqvi's retirement, the contested decisions had become obsolete on the date on which the Court of First Instance delivered its judgment.
- 46 As the Advocate General pointed out at point 41 of her Opinion, that second selection procedure deprived the appointment decision of its effects in relation to the appellant. That decision was inseparable from the decision to reject the candidature, and as the decision to reject the complaint only confirmed these two decisions, the second selection procedure deprived all the contested decisions of their effects as regards the appellant.
- 47 However, the obsolescence of the contested decisions, which occurred after the lodging of the action, does not in itself place the Court of First Instance under an obligation to declare that there is no need to adjudicate for lack of purpose or for lack of interest in bringing proceedings at the date of the delivery of the judgment.
- 48 First, it must be noted that, when the Court of First Instance ruled, the dispute still had a purpose, since the contested decisions had not been formally withdrawn by the Commission.

49 The Court of First Instance was therefore fully entitled to hold, at paragraph 19 of the judgment under appeal that the dispute had retained its purpose.

50 Secondly, it follows from the case-law of the Court of Justice that the appellant may also retain an interest in claiming the annulment of an act of a Community institution to prevent its alleged unlawfulness recurring in the future (see, to that effect, Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraph 32; *AKZO Chemie v Commission*, paragraph 21, and *Apesco v Commission*, paragraph 16).

51 That interest in bringing proceedings follows from the first paragraph of Article 233 EC under which the institutions whose act has been declared void are to be required to take the necessary measures to comply with the judgment of the Court (see, to that effect, *Simmenthal v Commission*, paragraph 32, and Case 76/79 *Könecke v Commission* [1980] ECR 665, paragraph 9).

52 However, that interest in bringing proceedings can only exist if the alleged unlawfulness is liable to recur in the future independently of the circumstances of the case which gave rise to the action brought by the appellant.

53 At paragraph 20 of the judgment under appeal, the Court of First Instance held that the appellant retained an interest in obtaining a judgment regarding the lawfulness of the selection procedure at issue so that the alleged unlawfulness might not recur in the future in a similar procedure to that in the present case.

- 54 In that regard the Court of First Instance based its decision on the plea in law, relied on by the appellant alleging that the selection procedure was unlawful owing to the pre-selection of candidates on the basis of the director-general's memorandum. The Court of First Instance held that it could not be ruled out that the director-general might play a similar role in a subsequent and similar selection procedure.
- 55 It is therefore necessary to establish whether the unlawfulness alleged by the appellant in the present case, the possibility of which was upheld by the Court of First Instance in order to establish the existence of an interest in bringing proceedings, is liable to recur in the future independently of the circumstances of the case which gave rise to the judgment under appeal.
- 56 As pointed out by the Advocate General at point 45 of her Opinion, decisions on staff appointments are never repeated mechanically, inasmuch as every decision is unique and is dependent on the assessment of the respective qualities of the candidates and the demands of the post to be filled, which may vary very considerably from one case to another.
- 57 However, in the present case, the appellant disputes not only the lawfulness of the contested decisions but also the procedure which led to their adoption. The appellant asserts that the procedure was discriminatory and consequently unlawful in itself — in other words, independently of the content of the contested decisions. According to the appellant, the director-general's memorandum bound the Consultative Committee and the appointing authority, preventing them from assessing the respective skills and aptitudes of the candidates who were not pre-selected in the memorandum.

- 58 As the Advocate General pointed out at point 47 of her Opinion, in contrast to the substantive assessment of different candidatures for a post to be filled, the detailed rules of a selection procedure, laying down — as in the present case, according to the appellant — a pre-selection performed by the director-general and binding the Consultative Committee and the appointing authority, are liable to be referred to in the future in the context of similar procedures.
- 59 From the appellant's perspective, the question of the lawfulness of the detailed rules of the selection procedure for the post at issue prove therefore to be relevant in view of future candidatures for posts such as the post at issue.
- 60 The Court of First Instance was therefore fully entitled to hold, at paragraph 20 of the judgment under appeal that the appellant still had an interest in bringing proceedings.
- 61 Having regard to the foregoing, it must be held that the Court of Justice did not err in law in rejecting, at paragraph 21 of the judgment under appeal, the plea of no need to adjudicate.
- 62 Therefore, the cross-appeal brought by the Commission must be dismissed as unfounded and the main appeal considered.

The main appeal

The first plea in law

- 63 The first part of the appellant's first plea in law alleges a distortion of the facts and the second part alleges an error of law and a contradictory and insufficient statement of reasons.

The first part

- 64 The appellant is of the view that the Court of First Instance distorted the facts appearing in the director-general's memorandum.

- 65 The appellant infers from the comments appearing in the memorandum — according to which Mr Naqvi 'appeared ... more suited to conception, reflection and analysis than to the reorganisation and management of a large operational team' — that Mr Naqvi did not have the skill necessary to lead and motivate a large team. According to the appellant, such a skill was, however, essential for the post at issue.

- 66 It is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the appeal is limited to questions of law and that, therefore, the Court of First Instance has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. The appraisal of the facts does not constitute, save

where the clear sense of the evidence produced before the Court of First Instance is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, in particular, Case C-449/99 P *BEI v Hautem* [2001] ECR I-6733, paragraph 44; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraphs 69 and 70; and Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraphs 82 and 83).

⁶⁷ Under settled case-law, an alleged distortion of the facts must be obvious from the documents on the Court's file without there being any need to carry out a new assessment of the facts and the evidence (see Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraph 54; Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 108; and, to that effect, Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 37).

⁶⁸ It is not however apparent from the examination of the director-general's memorandum that the Court of First Instance distorted the facts. In fact, it is expressly demonstrated there that Mr Naqvi satisfied the criteria stated in the description of post, which permitted him to be classified by the director-general in the group of candidates suited to perform the duties of director in the post in question. Consequently, no evidence was apparent from the director-general's memorandum that Mr Naqvi lacked the skills required for the post.

⁶⁹ The Court of First Instance was therefore able to hold at paragraphs 63 to 68 of the judgment under appeal, without distorting the facts appearing in the director-general's memorandum, that Mr Naqvi indeed satisfied all the conditions required in the notice of vacancy and in particular that he had the skills to manage a large team.

- 70 If it is correct, according to the director-general's memorandum, that the ability to manage, mobilise and supervise large teams was an essential criterion, the use of the word 'particularly' appearing in the memorandum must be understood as showing a weighting of the Mr Naqvi's different skills. It was not possible to deduce that he did not have the skills required for the post at issue.
- 71 Consequently, the examination of the director-general's memorandum does not show that the Court of First Instance manifestly distorted the facts contained therein.
- 72 The first part of the first plea in law is therefore inadmissible.

The second part

- 73 In the second part of the first plea in law, the appellant maintains, first, that, contrary to the Court of First Instance's finding at paragraph 32 of the judgment under appeal in the light of the director-general's memorandum, the reasons stated for the decision to reject the complaint do not make it possible to understand the essential basis of that decision. Therefore, the Court of First Instance erred in law in dismissing, at paragraphs 28 to 35 of the judgment under appeal, the plea in law alleging breach of the second paragraph of Article 25 of the Staff Regulations.
- 74 It must be observed that, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and

Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, does not satisfy the requirement to state reasons under those provisions (see, *inter alia*, Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraphs 15 and 16, and Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073, paragraphs 25 and 26).

75 In the present case, however, in order to contest the finding made by the Court of First Instance concerning the absence of an infringement of the second paragraph of Article 25 of the Staff Regulations, the appellant in his appeal has merely reproduced the arguments which he relied on in that respect in support of the first plea in law of his application before the Court of First Instance. That Court, at paragraphs 28 to 35 of the judgment under appeal, dismissed that plea in law. In reality, such an appeal is no more than a request to re-examine the application submitted to the Court of First Instance, which, under Article 56 of that Statute, falls outside the jurisdiction of the Court of Justice (see Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35, and Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, paragraph 47).

76 Therefore, that complaint must be dismissed as inadmissible.

77 Second, the appellant alleges that the Court of First Instance stated reasons in its judgment in a contradictory and insufficient way in rejecting his first plea in law, at paragraphs 28 to 35 of the judgment under appeal.

- 78 It is clear from the first sentence of Article 36 read in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice, that judgments of the Court of First Instance must state reasons in order, first, to enable a person concerned by a judgment to acquaint himself with the reasons for the judgment of the Court of First Instance and, secondly, to provide the Court of Justice with sufficient information to permit it to exercise its power of review (see *Technische Unie v Commission*, paragraph 85 and the case-law cited).
- 79 In the present case, as pointed out by the Advocate General at point 66 of her Opinion, the Court of First Instance examined in detail at paragraphs 28 to 35 of the judgment under appeal the decision to reject the complaint and revealed in detail and without contradictions why according to it, the Commission had fulfilled the obligation to state reasons to which it was subject.
- 80 The fact that the Court of First Instance, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgement for failure to state reasons.
- 81 The second part of the first plea in law must therefore be rejected as partly inadmissible and partly unfounded.
- 82 Consequently, the first plea must be rejected as unfounded.

The second plea in law

- 83 By its second plea in law, the appellant alleges that the Court of First Instance distorted certain facts and evidence and erred in law in failing to annul the contested decisions for breach of Articles 7, 29(1)(a), and 45(1) of the Staff Regulations.

The first part

- 84 By the first part of his second plea in law, the appellant asserts that the judgements expressed in the director general's memorandum on his candidature and on that of Mr Naqvi are identical, except in relation to 'reform-mindedness'. Mr Naqvi having been classified, in the director general's memorandum, in the first group of candidates on the basis, in particular, of the 'challenges of the post', it is alleged to be clear that those challenges corresponded in fact to the 'reform-mindedness'. Therefore, by ruling that undue significance should not be ascribed to the term 'challenges', the Court of First Instance minimised the scope of an essential factor in the selection process for candidates. The appellant also submits that the determining criterion relating to the 'challenges of the post' does not appear at all in the notice of vacancy.

- 85 Thus, the Court of First Instance, by ruling that undue significance should not be ascribed to the term 'challenges' and in not verifying whether the procedure was in conformity with the notice of vacancy, is alleged to have distorted the evidence placed before it.

- 86 As pointed out by the Advocate General at point 74 of her Opinion and as the Commission has correctly submitted, the appellant must be considered to be claiming that the Court of Justice should review the Court of First Instance's findings

of fact, which according to settled case-law referred to at paragraph 66 of the present judgment, come exclusively within the jurisdiction of the Court of First Instance, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and where there is distortion of the evidence put before the Court of First Instance.

87 The appellant has not adduced evidence that the documents in the case reveal the substantive inaccuracy of the findings made by the Court of First Instance or a distortion by it of the evidence.

88 The Court of First Instance in any event found at paragraph 55 of the judgment under appeal, that the term 'challenges' originated in the director-general's memorandum and that the scope of that term should not be exaggerated, it being merely the expression of the director-general's opinion as to the personal qualities of the candidates and not the introduction of a new criterion not stated in the notice of vacancy. That purely factual assessment comes exclusively within the jurisdiction of the Court of First Instance, which in the present case has not exceeded its power to evaluate the facts and the evidence.

89 Concerning the criterion of 'reform-mindedness', it is necessary to add that the Court of First Instance found at paragraphs 57 and 58 of the judgment under appeal that the requirement that candidates had to have the capability to see through reforms arose clearly from the description of the tasks appearing in the notice of vacancy. The appellant has not adduced any evidence to that effect which would prove that that finding was marred by a substantive inaccuracy in the light of the documents in the case or that the Court of First instance distorted the facts.

90 The first part of the second plea in law is therefore inadmissible.

The second part

- 91 By the second part of his second plea in law, the appellant contests the assessment made by the Court of First Instance at paragraph 54 of the judgment under appeal, according to which the power of the director-general to pre-select candidates did not affect the independence of the Consultative Committee. The appellant considers that the Consultative Committee was, de facto, bound by the director-general's advice, since there was no factual element enabling it to reject the director-general's analysis and to pre-select other candidates. Thus, the Court of First Instance failed to have regard to the influence exercised by the director-general on the rest of the selection procedure before the Consultative Committee. That influence is illustrated, in the present case, by the fact that the Consultative Committee only granted an interview to the candidates belonging to the first group in the director-general's memorandum.
- 92 Whilst points of law — such as, in the present case, the lawfulness of the selection procedure which was examined at first instance — may be discussed again in the course of an appeal (Case C-68/05 P *Koninklijke Coöperatie Cosun v Commission* [2006] ECR I-10367, paragraph 55 and the case-law cited), the legal arguments advanced in support of the appeal must be indicated precisely. That requirement is not satisfied by an appeal which, without including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance (see *Koninklijke Coöperatie Cosun v Commission*, paragraph 54).
- 93 In the present case it must be noted that, as the Advocate General pointed out at point 78 of her Opinion, the appellant is only reiterating an argument already expounded before the Court of First Instance, as is clear from paragraph 39 of the judgment under appeal, without including an argument identifying specifically the error of law allegedly vitiating the judgment under appeal.

- 94 The second part of the second plea in law is therefore inadmissible.
- 95 The second plea in law must therefore be dismissed in its entirety.
- 96 It follows from the foregoing that Mr Wunenburger's appeal must therefore be rejected in its entirety.

Costs

- 97 Under the first subparagraph of Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with Article 70 of the Rules of Procedure, which is also applicable to disputes between the Communities and their servants, the institutions are to bear their own costs. Nevertheless, it follows from the second paragraph of Article 122 of the Rules of Procedure that Article 70 does not apply to appeals brought by an official or any other servant of an institution against that institution.
- 98 Since the Commission applied for the costs of the main appeal against Mr Wunenburger and the latter has been unsuccessful, he must be ordered to pay the costs of the main appeal. Since Mr Wunenburger applied for costs of the cross-appeal against the Commission and the latter has been unsuccessful, it must be ordered to pay the costs of the cross-appeal.

On those grounds, the Court (Fourth Chamber) hereby

- 1. Dismisses the main appeal and the cross-appeal.**

- 2. Orders Mr Wunenburger to pay the costs of the main appeal.**

- 3. Orders the Commission of the European Communities to pay the costs of the cross-appeal.**

[Signatures]