

JUDGMENT OF THE COURT (Second Chamber)

22 December 2008 *

In Case C-443/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 21 September 2007,

Isabel Clara Centeno Mediavilla, official of the Commission of the European Communities, residing in Seville (Spain),

Delphine Fumey, official of the Commission of the European Communities, residing in Brussels (Belgium),

Eva Gerhards, official of the Commission of the European Communities, residing in Brussels,

Iona M.S. Hamilton, official of the Commission of the European Communities, residing in Brussels,

* Language of the case: French.

Raymond Hill, official of the Commission of the European Communities, residing in Brussels,

Jean Huby, official of the Commission of the European Communities, residing in Brussels,

Patrick Klein, official of the Commission of the European Communities, residing in Brussels,

Domenico Lombardi, official of the Commission of the European Communities, residing in Brussels,

Thomas Millar, official of the Commission of the European Communities, residing in London (United Kingdom),

Miltiadis Moraitis, official of the Commission of the European Communities, residing in Wezembeek-Oppem (Belgium),

Ansa Norman Palmer, official of the Commission of the European Communities, residing in Brussels,

Nicola Robinson, official of the Commission of the European Communities, residing in Brussels,

François-Xavier Rouxel, official of the Commission of the European Communities, residing in Brussels,

Marta Silva Mendes, official of the Commission of the European Communities, residing in Kraainem (Belgium),

Peter van den Hul, official of the Commission of the European Communities, residing in Tervuren (Belgium),

Fritz Von Nordheim Nielsen, official of the Commission of the European Communities, residing in Charlottenlund (Denmark),

Michaël Zouridakis, official of the Commission of the European Communities, residing in Sint Stevens Woluwe (Belgium),

represented by G. Vandersanden and L. Levi, *avocats*,

appellants,

the other parties to the proceedings being:

Commission of the European Communities, represented by J. Currall and H. Krämer,
acting as Agents,

defendant at first instance,

Council of the European Union, represented by M. Arpio Santacruz and M. Bauer,
acting as Agents,

intervener at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot,
J. Makarczyk, P. Küris and C. Toader (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 19 June 2008,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

- ¹ By their appeal, Ms Centeno Mediavilla, Ms Fumey, Ms Gerhards, Ms Hamilton, Mr Hill, Mr Huby, Mr Klein, Mr Lombardi, Mr Millar, Mr Moraitis, Ms Palmer, Ms Robinson, Mr Rouxel, Ms Silva Mendes, Mr van den Hul, Mr Von Nordheim Nielsen and Mr Zouridakis seek to have set aside the judgment of the Court of First Instance of the European Communities of 11 July 2007 in Case T-58/05 *Centeno Mediavilla and Others v Commission* [2007] ECR II-2523 ('the judgment under appeal'), by which the Court of First Instance dismissed their action challenging the recruitment decisions in respect of each of them ('the contested decisions'), in so far as those decisions fix their classification in accordance with the transitional provisions of the Staff Regulations of Officials of the European Communities, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1; 'the Staff Regulations' and 'the new Staff Regulations').

Legal context

- ² Regulation No 723/2004 entered into force on 1 May 2004.

- 3 Article 2(1) of Annex XIII to the Staff Regulations lays down the criteria for the correspondence of officials' grades as provided for under the Staff Regulations of Officials of the European Communities in the version applicable until 30 April 2004 ('the former Staff Regulations') and those provided for under the Staff Regulations. Those criteria are set out in the following table:

Former grade	New (intermediate) grade	Former grade	New (intermediate) grade	Former grade	New (intermediate) grade	Former grade	New (intermediate) grade
A1	A*16						
A2	A*15						
A3/LA3	A*14						
A4/LA4	A*12						
A5/LA5	A*11						
A6/LA6	A*10	B1	B*10				
A7/LA7	A*8	B2	B*8				
A8/LA8	A*7	B3	B*7	C1	C*6		
		B4	B*6	C2	C*5		
		B5	B*5	C3	C*4	D1	D*4
				C4	C*3	D2	D*3
				C5	C*2	D3	D*2
						D4	D*1

4 Article 5(5) of the Staff Regulations provides:

‘Identical conditions of recruitment and service career shall apply to all officials belonging to the same function group.’

5 Article 7(1) of the Staff Regulations provides:

‘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 function group which corresponds to his grade.’

6 Article 10 of the Staff Regulations, the wording of which is similar to that of Article 10 of the former Staff Regulations, provides that the Staff Regulations Committee, consisting of representatives of the institutions and of representatives of the institutions’ Staff Committees, ‘shall be consulted by the Commission on all proposals to revise the Staff Regulations’.

7 Article 31(1) of the Staff Regulations provides:

‘Candidates selected shall be appointed to the grade of the function group set out in the notice of the competition they have passed.’

- 8 Article 1 of Annex XIII to the Staff Regulations, headed ‘Transitional measures applicable to officials of the Communities’, states:

‘1. For the period from 1 May 2004 to 30 April 2006 Article 5(1) and (2) of the Staff Regulations are replaced by the following:

“1. The posts covered by the Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in four categories A*, B*, C* and D*, in descending order of rank.

2. Category A* shall comprise twelve grades, category B* shall comprise nine grades, category C* shall comprise seven grades and category D* shall contain five grades.”

2. Any reference to the date of recruitment shall be taken to refer to the date of entry into service.’

- 9 Article 12 of Annex XIII to the Staff Regulations provides:

‘1. Between 1 May 2004 and 30 April 2006, reference to grades in function groups AST and AD in paragraphs 2 and 3 of Article 31 of the Staff Regulations shall be made as follows:

— AST1 to AST4: C*1 to C*2 and B*3 to B*4

— AD5 to AD8: A*5 to A*8

— AD9, AD10, AD11, AD12: A*9, A*10, A*11, A*12.

2. In the case of officials recruited from lists of suitable candidates resulting from competitions published before 1 May 2004 Article 5(3) of the Staff Regulations shall not apply.

3. Officials who have been included in a list of suitable candidates before 1 May 2006 and are recruited between 1 May 2004 and 30 April 2006 shall:

— if the list was drawn up for category A*, B* or C*, be graded in the grade published in the competition,

— if the list was drawn up for category A, LA, B or C, be graded in accordance with the following table:

Grade of the competition	Grade of recruitment
A8/LA8	A*5
A7/LA7 and A6/LA6	A*6
A5/LA5 and A4/LA4	A*9
A3/LA3	A*12
A2	A*14
A1	A*15
B5 and B4	B*3
B3 and B2	B*4
C5 and C4	C*1
C3 and C2	C*2'

Background to the dispute

- ¹⁰ During the period from 11 April 2001 to 18 June 2002, the Commission published in the *Official Journal of the European Communities* a number of notices of open competitions to constitute reserves of Administrators in career bracket A7/A6 (COM/A/6/01, COM/A/9/01, COM/A/10/01, COM/A/1/02, COM/A/3/02 and CC/A/12/02), Assistant Administrators in career bracket A8 (competition COM/A/2/02) and Administrative Assistants in career bracket B5/B4 (competition COMB/1/02).
- ¹¹ Under the section headed 'Recruitment', those competition notices stated that if successful candidates were placed on a list of suitable candidates they would be eligible for appointment, as required.

- 12 Point D, headed 'General Information', of the notices of open competitions COM/A/1/02 and COM/A/2/02 contained the following statement:

'The Commission has formally transmitted to the Council a proposal to amend the Staff Regulations. This proposal contains, inter alia, a new career system. The successful candidates in this competition could, therefore, be offered a post on the basis of new Staff Regulations, if they have been adopted by the Council.'

- 13 There was an almost identical statement in notice of competition COM/A/3/02 referring to 'the provisions of the new Staff Regulations'.

- 14 The lists of suitable candidates drawn up following competitions COM/A/6/01, COM/A/9/01 and COM/A/10/01 ('the 2001 competitions') were published in the *Official Journal of the European Communities* on 19 November 2002 (competition COM/A/6/01), 8 March (competition COM/A/10/01) and 2 July 2003 (competition COM/A/9/01), respectively.

- 15 The letters informing the successful candidates in the 2001 competitions of their inclusion in the lists of suitable candidates stated inter alia that the validity of those lists was due to expire on 31 December 2003.

- 16 During the month of December 2003, the Commission's Directorate-General for Personnel and Administration sent a letter to each of the successful candidates in the 2001 competitions, informing them that the validity of the various lists of suitable candidates had been extended until 31 December 2004.

- 17 The lists of suitable candidates drawn up following competitions COM/A/1/02, COM/A/2/02, COM/A/3/02, COM/B/1/02 and CC/A/12/02 were published in the *Official Journal of the European Union* on 19 December 2003 (competition CC/A/12/02), 23 March (competitions COM/A/1/02 and COM/A/2/02) and 18 May 2004 (competitions COM/A/3/02 and COM/B/1/02), respectively.
- 18 The 17 appellants were included before 1 May 2004 in one of those lists of suitable candidates.
- 19 Ms Fumey, Ms Gerhards, Ms Hamilton and Mr Millar received a letter offering recruitment before 1 May 2004.
- 20 All the appellants were appointed probationary officials by the contested decisions, adopted after 1 May 2004 and taking effect at a date between that date and 1 December 2004.
- 21 By those decisions, the appellants were classified in grade pursuant to Article 12(3) of Annex XIII to the new Staff Regulations, that is to say, in grade B*3 (competition COM/B/1/02), grade A*5 (competition COM/A/2/02) or grade A*6 (all other competitions).

- 22 Between 6 August 2004 and 21 October 2004, each of the appellants lodged a complaint under Article 90(2) of the Staff Regulations against the decisions appointing them probationary officials in so far as those decisions fixed their classification, pursuant to Article 12(3) of Annex XIII to the Staff Regulations, at a grade less favourable than that set out in the notice of competition.
- 23 By decisions taken between 21 October 2004 and 22 December 2004, the appointing authority rejected the complaints lodged by the appellants.

Proceedings before the Court of First Instance and the judgment under appeal

The action before the Court of First Instance

- 24 By a single application lodged at the Registry of the Court of First Instance on 3 February 2005, the appellants brought an action seeking annulment of the contested decisions, in so far as the latter fixed their classification on the basis of Article 12(3) of Annex XIII to the Staff Regulations, and also reconstitution of their careers, an award of default interest payable in respect of all sums corresponding to the difference between the pay provided for by the former Staff Regulations and the pay they received and, last, an order that the Commission should pay the costs.

25 In support of their claims for annulment, the appellants raised, in the first place, the plea of illegality of Article 12(3) of Annex XIII to the Staff Regulations, putting forward seven arguments alleging infringement of Article 10 of the former Staff Regulations, breach of their rights acquired before the Staff Regulations entered into force and of the principles of legal certainty and non-retroactivity, breach of the principles of equal treatment and non-discrimination, breach of the principle of protection of legitimate expectations, infringement of Article 31(1) of the Staff Regulations and infringement of Articles 5 and 7 thereof, respectively.

26 In the second place, the appellants maintained that, by the contested decisions, the Commission had infringed the principle of good administration, its duty to have regard for the interests of officials, the principles of transparency, protection of legitimate expectations, good faith, equal treatment and non-discrimination, and the rule that grade and post must correspond.

The judgment under appeal

27 The Court of First Instance dismissed the action, finding that all the arguments put forward by the appellants were unfounded.

28 First, it rejected the plea of illegality in respect of Article 12(3) of Annex XIII to the Staff Regulations, holding that all the arguments raised in its support were groundless.

29 Concerning infringement of the second sentence of the second paragraph of Article 10 of the former Staff Regulations, the Court of First Instance recalled, in paragraphs 35 to 42 of the judgment under appeal, that there is incumbent on the Commission a duty to consult, extending not only to formal proposals but also to substantial amendments it makes to proposals which it has already examined. The character, whether substantial or specific and limited, of the amendments in question must be assessed, according to the Court of First Instance, from the point of view of their subject-matter and of the position of the amended provisions within the whole body of enacting terms proposed for adoption, and not from the point of view of the individual consequences which they may have for the situation of persons who may be affected by their implementation.

30 In this instance, the substituting of grade A*6 for grade A*7 envisaged in the proposal concerning the provision that is now Article 12(3) of Annex XIII to the Staff Regulations constitutes a specific adaptation of the transitional provisions in the direction of the new career structure, of which neither the general tenor nor the actual substance appears to be thus affected by the adaptation to the point of justifying a fresh consultation of the Staff Regulations Committee.

31 With regard to infringement of rights acquired by the appellants before the Staff Regulations entered into force and of the principles of legal certainty and non-retroactivity, the Court of First Instance found, in paragraphs 48 to 62 of the judgment under appeal, that Article 12(3) of Annex XIII to the Staff Regulations did not have retroactive effect. In so doing, it rejected the arguments relating to acquired rights, stating that the inclusion of candidates successful in open competitions in the lists of suitable candidates drawn up at the end of selection processes does no more than render the persons concerned eligible for appointment as probationary officials. That eligibility is necessarily to the exclusion of any acquired right, for the classification in grade of a successful candidate included in the list of suitable candidates from an open competition cannot be regarded as acquired so long as he has not been the subject of an appointment decision in good and due form. It is only after he has been the subject of such a decision that a candidate successful in an open competition can claim the status of official and therefore demand the application to him of provisions of the Staff Regulations.

32 As regards breach of the principles of equal treatment and non-discrimination as a result of the application of different classification criteria to candidates successful in the same competition, depending on whether they were recruited before or after the Staff Regulations entered into force, the Court of First Instance held, in paragraphs 75 to 90 of the judgment under appeal, that those two categories of persons are not in comparable situations. To that effect, it considered that, inasmuch as the post to which an official is assigned is determined by the decision to appoint and as the latter may be based only on the provisions applicable at the date of its adoption, the classification in grade of the candidates successful in open competitions and included in lists of suitable candidates before 1 May 2004, but recruited after that date, could lawfully be made only in accordance with the new criteria in force when the decision appointing them as probationary officials was adopted. By contrast, the successful candidates in the same competitions appointed before 1 May 2004 had necessarily to be classified in grade on the basis of the old criteria still in force on the date of their appointment, but abolished since that date by virtue of the entry into force of the new provisions of the Staff Regulations.

33 With regard to breach of the principle of protection of legitimate expectations in that the appellants inferred from the notices of competition concerning them an assurance that the rules of the former Staff Regulations would be applied to them, the Court of First Instance, in paragraphs 95 to 99 of the judgment under appeal, recalled the settled case-law according to which no one may plead breach of that principle unless he has been given precise assurances by the administration, and it found that the file did not contain any document which would enable the appellants to conclude that the Community institutions had given them any assurances capable of giving rise to a legitimate expectation that the old criteria of the Staff Regulations for the classification in grade of officials on their recruitment would be maintained. On the contrary, certain competition notices and correspondence from the Commission pointed out that the successful candidates in those competitions could be offered recruitment on the basis of new provisions of the Staff Regulations.

34 With regard to infringement of Article 31(1) of the Staff Regulations, concerning the principle that the grade awarded on appointment should correspond to the function group grade indicated in the notice of competition, the Court of First Instance, in paragraphs 108 to 115 of the judgment under appeal, found that by its very nature, a

transitional provision, such as Article 12(3) of Annex XIII to the Staff Regulations, derogates from certain rules of the Staff Regulations whose application is necessarily affected by the change of system. The derogation under this provision does not go beyond what follows from the appointment as officials, under the rules of the new Staff Regulations, of persons selected by competition procedures initiated and concluded under the old provisions.

35 So far as concerns infringement of Articles 5 and 7 of the Staff Regulations in relation to the principle of correspondence of grade and post, the Court of First Instance, in paragraphs 124 to 131 of the judgment under appeal, considered that, in so far as it lays down measures for the transition to the Staff Regulations from the former Staff Regulations, Article 12(3) of Annex XIII to the Staff Regulations, as a *lex specialis*, prevails over the general provisions of the Staff Regulations on the classification of officials and, in particular, Articles 5 and 7 thereof.

36 Second, concerning the alleged breach by the contested decisions of the general principles of sound administration, transparency, protection of legitimate expectations, equal treatment and non-discrimination, the correspondence of grade and post, of good faith and breach of the duty to have regard for the interests of officials, the Court of First Instance, in paragraphs 147 to 155 of the judgment under appeal, found that neither the competition notices nor the letters extending the validity of the lists of suitable candidates sent to the appellants indicated that the new criteria for classification in grade on recruitment were likely to entail a downward alteration of the grades of recruitment set out in the notices of competition.

Forms of order sought by the parties before the Court of Justice

37 By their appeal, the appellants claim that the Court of Justice should:

- set aside the judgment under appeal;
- as a result, grant the forms of order sought at first instance and, therefore,
- annul the classification in grade fixed in the contested decisions in so far as that classification is based on Article 12(3) of Annex XIII to the Staff Regulations;
- reconstitute the appellants' careers, including re-evaluation of their experience in the grades so corrected, their rights to advancement and their pension rights, starting from the grades at which they ought to have been appointed on the basis of the notices of the competitions following which they were placed on the lists of suitable candidates, either at the grades appearing in those notices of competition or at the grades corresponding to their equivalents according to the classification in the Staff Regulations, and at the appropriate step in accordance with the rules applicable before 1 May 2004, as from the date of the decision to appoint them;

- award them default interest on the basis of the rate set by the European Central Bank on all sums corresponding to the difference between the salary corresponding to their classification in the contested decisions and the classification to which they ought to have been entitled, until the date on which the decision to classify them in their proper grade is taken, and

- order the respondent to pay all the costs at first instance and on appeal.

³⁸ The Commission and the Council contend that the Court should:

- dismiss the appeal as unfounded, and
- order the appellants to pay the costs of the appeal.

On the admissibility of the appeal

³⁹ The Council maintains that some of the appellants' arguments are inadmissible, in that they do not identify any infringement of Community law by the Court of First Instance, but merely seek to have re-examined the arguments they had raised at first instance.

40 As the Advocate General observed in point 31 of her Opinion, it is settled case-law that an appeal is inadmissible if, without even including an argument specifically identifying the error of law allegedly vitiating the judgment at issue, it merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance. By contrast, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see, *inter alia*, Case C-10/06 P *Bustamante Tello v Council* [2007] ECR I-10381, paragraph 28).

41 In the instant case, the appellants have, for each ground of appeal, identified the legal errors which they consider the Court of First Instance to have made in various passages of the judgment under appeal. The fact that they recall, in that context, some of the arguments they advanced at first instance can therefore in no way affect the admissibility of their grounds of appeal.

42 It follows that all the grounds of appeal put forward by the appellants are to be regarded as admissible.

The appeal

43 In support of their appeal, the appellants claim that the Court of First Instance made several errors of law in its assessment of the plea of illegality in respect of Article 12(3) of Annex XIII to the Staff Regulations. They plead, in particular, infringement of Article 10 of the former Staff Regulations, infringement of their rights acquired before the Staff Regulations entered into force, breach of the principles of legal certainty and non-retroactivity and of the principles of equal treatment and non-discrimination, breach of the principle of protection of legitimate expectations, infringement of Articles 5, 7 and 31(1) of the Staff Regulations and, so far as certain parts of the assessment made by the Court of First Instance are concerned, breach of the duty to state reasons.

44 The appellants also challenge the Court of First Instance's determination concerning the pleas in law raised in support of the claim that the contested decisions are unlawful. In this regard, they maintain that the Court of First Instance failed to have regard to the principles of equal treatment and non-discrimination, and made an error of reasoning in its assessment of the lawfulness of those decisions.

The plea of illegality of Article 12(3) of Annex XIII to the Staff Regulations

The infringement of Article 10 of the former Staff Regulations and inadequate reasoning

— Arguments of the parties

45 Relying, inter alia, on the judgment of the Court of First Instance in Case T-13/97 *Losch v Court of Justice* [1998] ECR-SC I-A-543 and II-1633, the appellants maintain that, contrary to the findings of the Court of First Instance in paragraphs 35 to 42 of the judgment under appeal, the amendment to the Commission's proposal, relating to the substituting, in Article 12(3) of Annex XIII to the Staff Regulations, of grade A*6 for

grade A*7 as the grade to be assigned to persons included, before 1 May 2004, in lists of suitable candidates for grade A7, did affect the substance of the provisions of the Staff Regulations.

⁴⁶ In this regard, they argue that the effects of such an amendment, in relation to the earlier proposal, must be evaluated not only in the light of the subject-matter of the amended provisions and of their position in the reform overall, but also having regard to the effects on the situation of the officials concerned. In the circumstances, those amendments, as also acknowledged in paragraph 42 of the judgment under appeal, did have a significant impact both on the appellants' careers and on their pay. In their view, the amendment to the proposal ought therefore to have been put before the Staff Regulations Committee.

⁴⁷ In addition, the appellants take the view that the Court of First Instance failed to give adequate reasons for its conclusion that the substitution of grade A*6 for grade A*7 'fits into the broad logic and overall perspective of a progressive restructuring of career structures'. Such downgrading cannot be regarded as a rule enabling the progressive career system to be put into effect in stages.

48 The Commission and the Council remark that the amendment of the proposal concerning Article 12(3) of Annex XIII to the Staff Regulations is not one of substance, within the meaning of *Losch v Court of Justice*. It consists of a minor alteration to a transitional provision applicable to a limited group of persons and so falls within the broad logic of a progressive restructuring of careers, which has been one of the essential foundations of reform for all officials.

— Findings of the Court

49 By virtue of Article 283 EC, the Staff Regulations are to be laid down by the Council, on a proposal by the Commission and after consulting the other institutions concerned.

50 Article 10 of both the former and the current Staff Regulations provides for the setting-up of a Staff Regulations Committee, consisting of representatives of the institutions of the Communities and an equal number of representatives of their Staff Committees. It provides also that that committee is to be consulted on all proposals to revise the Staff Regulations and that the committee may put forward suggestions in connection with such revision.

51 In this respect, the Court of First Instance, in paragraphs 36 to 40 of the judgment under appeal, finding that the terms of Article 10 of the Staff Regulations are manifestly irreconcilable with a restrictive interpretation, declared that the Commission is obliged to consult the Staff Regulations Committee afresh before the legislative provisions in question are adopted by the Council, when amendments to a proposal concerning the Staff Regulations substantially affect the general tenor of the proposal, such obligation being excluded in the case of specific amendments of limited effect. So it held, referring

to Case C-280/93 *Germany v Council* [1994] ECR I-4973, that whether or not an amendment is substantial must be determined from the point of view of its subject-matter and the place occupied by the amended provisions in the enacting terms overall, and not from the point of view of the individual consequences that it might have for the officials concerned.

52 Furthermore, the Court of First Instance found that, in this case, the amendment to the proposal made by the Community legislature was not substantial, for it constituted an additional element of the reform, falling within the broad logic and overall perspective of a progressive restructuring of careers.

53 Contrary to the appellants' submission, that finding is not marred by any error of law. As a matter of fact, given that that amendment does not depart substantially from the text put before the Staff Regulations Committee, which was therefore able to express an opinion as to whether it might be possible to envisage a difference in recruitment grades between officials, successful in competitions held before the reform entered into force, who were recruited before that date, and those recruited after that date, it did not call for fresh consultation of the committee.

54 Moreover, the ground of appeal claiming that the judgment under appeal is inadequately reasoned is unfounded, because the reasoning for the conclusion in paragraph 40 of that judgment is perfectly explained in paragraph 39 thereof, where the Court of First Instance states that 'the restructuring of the grades of classification and pay scale of officials of the European Communities arising from the reform of career brackets introduced by the Community legislature had the immediate consequential effect of lowering the grades of recruitment for new officials, accompanied in due course by an expansion of their career prospects'. The Court of First Instance drew the conclusion, in paragraph 40, 'that the substitution of the grade A*6 for the grade A*7

initially envisaged constitutes an additional element of the reform, which fits into the broad logic and overall perspective of a progressive restructuring of career structures’.

55 It follows that the arguments raised by the appellants must be considered unfounded.

The infringement of the appellants’ acquired rights and the inadequacy of the reasoning

— Arguments of the parties

56 In support of the argument alleging infringement of acquired rights, the appellants claim that the Court of First Instance wrongly denied that they could, before the date on which the contested decisions were adopted, have acquired the right to have the classification indicated in the notices of competition observed. In their view, even if the notice of competition and inclusion in the list of suitable candidates did not confer entitlement to be recruited, they did create a right for all those taking part in the competition and still more for those included in that list to be dealt with in accordance with that notice (Case 138/84 *Spachis v Commission* [1985] ECR 1939) and, where relevant, to be recruited at the level and for the duties set out in that notice. The candidates appearing on the list of suitable candidates would, therefore, be entitled to observance of those conditions of recruitment in the event of their appointment. In addition, they state that four of them received recruitment decisions before 1 May 2004 and that those decisions fall within the ambit of the former Staff Regulations. The Court of First Instance, not having answered those arguments in the judgment under appeal, failed to have regard to its duty to give reasons.

57 The Commission counters that the legislature is bound to observe acquired rights when a legal situation has been definitively fixed under earlier legislation and the existence of the actual advantage that it confers on the individual concerned no longer depends on any act or omission on the part of the public authority in respect of which the latter enjoys discretionary power, if not some latitude.

58 The legal situation created by inclusion in a list of suitable candidates drawn up after an open competition does not, therefore, amount to an acquired right, but to eligibility for appointment, for the event giving rise to the right to observance of the conditions laid down by the Staff Regulations consists in the act of appointment. It would, therefore, be contradictory to argue, as the appellants do, that persons included in a list of suitable candidates are not eligible to claim the greater thing, namely, appointment as a probationary official, but are entitled to the lesser thing, namely, a certain recruitment grade.

59 The Council, raising arguments similar to those put forward by the Commission, adds that a notice of competition, while undoubtedly binding on the appointing authority, does not for that reason prevent the legislature, in connection with reform of the career system, from determining the equivalence of competition grades to recruitment grades according to the new system.

— Findings of the Court

60 It is to be borne in mind that the legal link between an official and the administration is based upon the Staff Regulations and not upon a contract (see, to this effect, Case 28/74 *Gillet v Commission* [1975] ECR 463, paragraph 4). It follows that the rights and obligations of officials may be altered at any time by the legislature.

61 It is well established that amending legislation, such as the regulations amending the Staff Regulations, applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation (see, to this effect, Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 24).

62 That is so except for situations originating and becoming definitive under the previous legislation, which create acquired rights (see, to this effect, Case 68/69 *Brock* [1970] ECR 171, paragraph 7; Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; and Case 270/84 *Licata v ESC* [1986] ECR 2305, paragraph 31).

63 A right is considered to be acquired when the event giving rise to it occurred before the legislative amendment. However, that is not the case when the event creating the right did not take place under the legislation that has been amended.

64 In the instant case, on the date on which the Staff Regulations entered into force, the appellants were candidates successful in competitions and included in lists of suitable candidates. As such, they had no acquired right to be appointed, but were merely eligible to be so. Their classification in grade was dependent on their appointment, which was a matter falling within the power of the appointing authority.

65 It follows that, in so far as the situation creating their right to observance of certain recruitment conditions had not come to an end before the Staff Regulations entered into force, the appellants cannot assert any acquired right (see, to this effect, *Gillet v Commission*, paragraph 5).

66 Those considerations hold good also for those of the appellants having been recruited as probationary officials before 1 May 2004 and appointed as officials after that date.

67 Consequently, in finding, in the circumstances of the case, that the successful candidates from the competitions concerned had no acquired rights, the judgment under appeal involves no breach of the principle pleaded by the appellants, and answers to the required legal standard the questions raised by them at first instance.

68 That argument is therefore to be considered to be unfounded.

The breach of the principles of equal treatment and non-discrimination and of the principles of separation of powers and of the hierarchy of norms, of the right to judicial protection and on the inadequacy of the reasoning

— Arguments of the parties

69 With regard to the breach of the principles of equal treatment and non-discrimination, the appellants maintain that all the successful candidates in one competition form a single category for the purpose of the observance of those principles. In their view, the Court of First Instance has, therefore, misconstrued those principles by considering that not all persons successful in the same competition have the right to be classified according to the conditions fixed by the notice of that competition.

70 According to the appellants, by making such a finding, the Court of First Instance conferred on the legislature the power to amend the provisions of the Staff Regulations without being bound to observe the principles of equal treatment and non-discrimination. Therefore, it, on the one hand, made impossible any judicial review of the legislature's power, contrary to the very foundations of the rule of law and in particular of the separation of powers and, on the other, infringed the right to judicial protection. In contrast, the Community judicature ought to determine whether a difference in treatment stemming from the entry into force of an amendment of rules of law must be regarded as justified.

71 Furthermore, the Court of First Instance failed to explain the reasons vindicating its decision not to follow its judgment in Case T-121/97 *Ryan v Court of Auditors* [1998] ECR II-3885, in which it found a breach of the principle of equal treatment concerning the pension rights of members of the Court of Auditors of the European Communities.

72 Last, the appellants note an error of law in paragraph 89 of the judgment under appeal, in that the Court of First Instance excluded any discrimination on grounds of age, because the appellants, particularly the older among them, found themselves, as a result of the application of Article 12(3) of Annex XIII to the Staff Regulations, classified at beginning-of-career level, whereas account had been taken, during the procedure for their recruitment, at grades A7/A6 or B5/B4, of professional experience that was, moreover, demanded.

73 The Commission submits that the Court of First Instance's reasoning is in no way based on the premiss that the Community legislature is not bound by the principle of equal treatment. In contrast, it raised the problem of the intertemporal operation of this principle and relied on the finding that the legislature is competent to adopt, for the future, amendments to the provisions of the Staff Regulations that it considers consistent with the interests of the service. Accordingly, in the Commission's opinion,

even if such amendments lead to a less favourable situation for officials than that obtaining under the former provisions, the persons concerned cannot demand the continuation of a legal state for which they could have been eligible at a particular time.

74 As a matter of fact, the principle of equal treatment has no intertemporal operation, in the sense that it does not prevent rules of law from varying. It is not, therefore, contrary to that principle for new legislation to treat the future effects of a situation arising under earlier legislation in a manner different from that in which that situation would have been treated before the legislative amendment.

75 The Council puts forward arguments similar to those raised by the Commission. It adds that the effect of application of the principle of equal treatment following the criteria referred to by the appellants would be unequal treatment of the various officials recruited after 1 May 2004, depending on whether they had been successful in competitions held before or after that date. In contrast, according to the Council, officials recruited after that date form a single category entitled to the same treatment under the Staff Regulations.

— Findings of the Court

76 As is clear from the Court's settled case-law, a breach of the principle of equal treatment, applicable to the law relating to the employment of Community officials, occurs when two categories of person whose factual and legal circumstances disclose

no essential difference are treated differently at the time of their recruitment and that difference in treatment is not objectively justified (see, to this effect, Case C-459/98 P *Martínez del Peral Cagigal v Commission* [2001] ECR I-135, paragraph 50).

77 In paragraphs 79 to 83 of the judgment under appeal, the Court of First Instance took account of the finding that the appellants could be lawfully classified in grade only in accordance with the criteria fixed by the Staff Regulations, in particular by Article 12(3) of Annex XIII thereto, in force at the date when the contested decisions were adopted. It drew the conclusion that the appellants could not be regarded as falling into the same category as candidates successful in the same competitions appointed before 1 May 2004, to whom the rules in force before the reform had to be applied. It held, therefore, that that provision, in laying down for the appellants a body of rules which differed from that applicable to other officials, does not compromise the principle of non-discrimination.

78 It is to be borne in mind here that it is well established that, in adopting applicable rules, especially in the sphere of the Community civil service, the Community legislature is obliged to observe the general principle of equal treatment.

79 In this instance, however, the legislature, in adopting Article 12(3) of Annex XIII to the Staff Regulations, which gives rise to a difference in the treatment of officials successful in the same competition, recruited before and after the reform respectively, has not infringed that principle, for the differentiated treatment affects officials who do not form part of a single category.

80 In fact, the appellants, as the Court of First Instance found, being officials recruited after 1 May 2004, are not in the same legal situation as officials recruited before that date for, at the moment when the reform entered into force, they, unlike officials already recruited, were merely eligible to be appointed.

81 Such a difference in treatment is, moreover, based on an objective factor independent of the will of the Community legislature, namely, the date of recruitment decided by the appointing authority. Furthermore, it may be added that, in balancing the interests of the different categories of officials in the gradual introduction of the new rules of the Staff Regulations, the Community legislature was able legitimately to decide that recruitment of persons in the appellants' particular situation would take place according to the terms of the new rules, affording them more advantageous treatment than that applied to officials successful in competitions held after 1 May 2004 and recruited later.

82 It follows from those considerations that, contrary to the appellants' arguments, first, the Court of First Instance did rule on observance of the principle of equal treatment in the light of Article 12(3) of Annex XIII to the Staff Regulations and, secondly, it made no error of law in its assessment with regard to observance of that principle.

83 In addition, so far as concerns the alleged discrimination on grounds of age pleaded by the appellants in respect of the situation of the older among them, the classification criteria set out in Article 12(3) of Annex XIII to the Staff Regulations are, as the Court of First Instance rightly stated, manifestly unconnected to any taking into account of the age of the successful candidates in the competitions concerned and, furthermore, having regard to category A, they distinguish the basic grade A*5 (formerly grade A8) from the higher grade A*6 (formerly grade A7/A6).

84 The appellants' arguments alleging breach of the principles of equal treatment and non-discrimination, separation of powers and the hierarchy of norms, and of the right to judicial protection must therefore be rejected.

85 Moreover, the judgment under appeal containing adequate reasoning in this respect, the Court of First Instance cannot be criticised for not explaining in the grounds of that judgment why its findings in the case before it differed from those made in its earlier judgment in *Ryan v Court of Auditors*.

86 It follows that the Court of First Instance has not infringed its duty to state reasons and that that argument must be rejected.

On the breach of the principle of protection of legitimate expectations and distortion of the evidence

— Arguments of the parties

87 According to the appellants, the Court of First Instance, by declaring that the administration had given no specific assurances as to their classification, failed to have regard to the principle of protection of legitimate expectations and distorted the sense of the documents in the case. They emphasise that not only did the notices of competition make no reference to work on amending the former Staff Regulations and the written documents available on Internet sites referred to the latter, but also, for four of them, no mention of the new rules was made either in the letters offering posts, received before the reform entered into force, or at the time of the pre-employment medical examination. The administration informed Ms Fumey on the day she entered

the service and Ms Gerhards, Ms Hamilton and Mr Millar by letters ‘amending’ the recruitment offers received four days before they entered the service.

88 The Commission and the Council counter that assurances given by an administrative authority cannot be taken into account for the purpose of determining the lawfulness of acts of the Community legislature. The arguments based on various factual aspects of the appeal are, therefore, irrelevant with regard to the plea of illegality of Article 12(3) of Annex XIII to the Staff Regulations. In addition, they remark that assurances given by the administration that do not take into consideration the provisions applicable cannot engender any legitimate expectations on the part of the person concerned. In any event, according to those institutions, the Court of First Instance took formal notice of the difference in situation of the various appellants.

— Findings of the Court

89 So far as the alleged breach of the principle of protection of legitimate expectations is concerned, the Court of First Instance, in paragraph 98 of the judgment under appeal, considered that the file contained nothing that might enable the appellants to conclude that the Community institutions had given them any assurances capable of giving rise to a legitimate expectation that the old criteria of the Staff Regulations for the classification in grade of officials on their recruitment would be maintained.

90 It is established that in this instance, before the contested decisions were adopted, some of the appellants received indications from the administration concerning their classification according to the criteria set out in the notices of competition. Those statements were, nevertheless, accompanied by warnings as to the possibility of recruitment’s being proposed on the basis of the new provisions of the Staff Regulations.

91 Even if it should be considered that those statements amounted to specific assurances such as to engender legitimate expectations in the addressees, it cannot be accepted, as the Court of First Instance held in paragraph 95 of the judgment under appeal, that the appellants may rely on those expectations to challenge the lawfulness of the legal rule on which the contested decisions were based. Individuals cannot rely on the principle of protection of legitimate expectations in order to oppose the application of a new legislative provision, especially in a sphere in which the legislature enjoys a considerable degree of latitude (see, *inter alia*, Case C-284/94 *Spain v Council* [1998] ECR I-7309, paragraph 43).

92 As the Advocate General observed in point 121 of her Opinion, acts of the administration cannot restrict the legislature's freedom of action, or yet constitute a criterion of lawfulness which the legislature must satisfy.

93 It follows that the appellants' arguments relating to breach of the principle of protection of legitimate expectations are groundless and that those relating to distortion of the evidence are irrelevant.

On the infringement of Article 31 of the Staff Regulations and inadequate reasoning

— Arguments of the parties

94 According to the appellants, Article 12(3) of Annex XIII to the Staff Regulations is contrary to Article 31 of the Staff Regulations relating to candidates' right to be appointed to the grade of the function group set out in the notice of the competition they have passed. They maintain that the transitional provisions criticised have, for the

appellants and for the appointing authority, a definitive and not a transitional effect. In their view, they were definitively appointed in accordance with what are known as the transitional provisions and the classification defined at the date their appointment took effect holds good throughout their careers. What is more, they submit that the Court of First Instance did not explain the reason for the derogation, introduced by Article 12(3) of Annex XIII to the Staff Regulations, from the transitional rules applied to other officials.

95 According to the Commission, as regards the categorisation of transitional or definitive, a distinction is to be drawn between, on the one hand, a provision and, on the other, the legal effects of a decision adopted on the basis of such a provision. Provisions are to be considered transitional if their ambit is restricted to situations in existence at a given moment or for a given period. In contrast, the legal effects of a decision adopted on the basis of a transitional provision may in fact be definitive in nature. The transitional nature of Article 12(3) of Annex XIII to the Staff Regulations is therefore quite in keeping with the definitive nature of the grade classification decision.

96 The Council adds that Article 12(3) of Annex XIII may derogate from Article 31 of the Staff Regulations, for the two provisions are to be found in the same legislative act and rank equally and, in addition, the first rule covers a specific situation whereas the second lays down a general rule. The fact that Article 12(3) of Annex XIII to the Staff Regulations constitutes a *lex specialis* in relation to Article 31 of the Staff Regulations is, therefore, sufficient to exclude any incompatibility between those two provisions.

— Findings of the Court

97 As set out in Article 31(1) of the Staff Regulations, candidates successful in a competition 'shall be appointed to the grade of the function group set out in the notice of the competition they have passed'.

98 Ruling on the arguments concerning infringement of that article of the Staff Regulations, the Court of First Instance first stated, in paragraph 109 of the judgment under appeal, that although it was necessarily to be inferred from that provision that successful candidates in open competitions must be appointed officials at the grade set out in the notice of the competition at the end of which they were recruited, the determination of the level of the posts to be filled and of the conditions for the appointment of the successful candidates to those posts, which the Commission had carried out under the provisions of the former Staff Regulations when it drew up the competition notices at issue, could not have extended its effects beyond the date of 1 May 2004 adopted by the Community legislature for the entry into force of the new career structure.

99 The Court of First Instance then pointed out, in paragraphs 110 to 113 of the judgment under appeal, that Article 12(3) of Annex XIII to the Staff Regulations is a transitional provision the sole purpose of which is to determine the classification of a certain category of officials and that it is open to the legislature to adopt, for the future, in the interests of the service, amendments to the provisions of the Staff Regulations, even if the amended provisions are less favourable than the former provisions.

100 Those findings are untainted by any error of law. First, although the candidate successful in a competition derives, in principle, the right from Article 31(1) of the Staff Regulations to be given the grade of the function group stated in the notice of competition if he is appointed, that provision can apply only where the law is unchanging, because it cannot compel the appointing authority to take a decision incompatible with the Staff Regulations as amended by the Community legislature and therefore unlawful. In addition, as pointed out in paragraphs 64 and 65 above, the appellants, as successful candidates in competitions held before the reform of the Staff

Regulations entered into force, cannot rely on any right acquired before the Staff Regulations entered into force to be appointed at a particular grade. Such a right can thus not be invoked on the basis of Article 31 of the Staff Regulations.

101 Secondly, Article 12(3) of Annex XIII to the Staff Regulations, as a transitional provision of a special kind, may introduce a derogation from the general rule provided for by Article 31 of the Staff Regulations applicable to a given category of officials.

102 Consequently, the appellants' arguments seeking to establish an error of law in the finding relating to the alleged infringement of that latter article and inadequate reasoning are without substance.

On the infringement of Articles 5 and 7 of the Staff Regulations and inadequate reasoning

— Arguments of the parties

103 According to the appellants, the Court of First Instance incorrectly considered that a transitional provision may derogate from Articles 5 and 7 of the Staff Regulations, which lay down the principle of correspondence between an official's grade and his post. In so doing, it accepted that a transitional provision may derogate from any provision of the Staff Regulations and from the general principles of law.

104 The Commission and the Council are of the view that the appellants have misconstrued the judgment under appeal, believing the Court of First Instance to have held that Article 12(3) of Annex XIII to the Staff Regulations derogated from the rule laid down in Article 7(1) of the Staff Regulations. On the contrary, on a correct reading of the Court of First Instance's judgment, equivalence of grade and post is protected.

— Findings of the Court

105 The arguments of the Commission and the Council must be considered well founded. Contrary to the appellants' claims, the Court of First Instance, in paragraphs 126 to 128 of the judgment under appeal, did not assert that Article 12(3) of Annex XIII to the Staff Regulations derogated from Articles 5 and 7 of the Staff Regulations, which lay down the principle of correspondence of grade and post. On the contrary, it is stated, in paragraphs 126 and 131 of the judgment under appeal, that Article 12(3) of Annex XIII to the Staff Regulations lays down the criteria for the application of such a principle for officials recruited during a transitional period.

106 In consequence, the arguments regarding infringement of Articles 5 and 7 of the Staff Regulations and inadequate reasoning must be regarded as groundless.

107 It follows from all the foregoing that the appellants' arguments seeking to obtain a declaration that the Court of First Instance's determination regarding the plea of illegality of Article 12(3) of Annex XIII to the Staff Regulations contained errors of law and was insufficiently reasoned must be rejected.

On the breach of the principles of equal treatment and non-discrimination and on the inadequacy of the reasoning in the determination of the lawfulness of the contested decisions

Arguments of the parties

108 The appellants maintain that, by rejecting the pleas in law supporting the claim for annulment of the contested decisions, the Court of First Instance infringed the principles of equal treatment and non-discrimination and failed to fulfil its duty to state reasons, in that by implication it considered unlawful the decisions to recruit certain successful candidates from the same competitions as those in which the appellants took part, adopted as a matter of priority at a date before 1 May 2004, and did not find that, by reserving to successful candidates recruited before 1 May 2004 treatment different from that afforded to the appellants, the Commission had failed to observe those principles.

109 The Commission argues that the appellants' interpretation of the judgment under appeal is mistaken.

Findings of the Court

110 In the judgment under appeal, in particular in paragraphs 150 to 152, the Court of First Instance first stated that a lack of prior information with respect to the appellants was not, in itself, such as to render the contested decisions unlawful. Secondly, it recalled that, according to settled case-law, the lawfulness of an individual measure contested

before the Community judicature must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and that, in this regard, the contested decisions had all been adopted in accordance with the new mandatory provisions of Article 12(3) of Annex XIII to the Staff Regulations, which had not been shown to be unlawful.

111 Such considerations, inasmuch as they place the determination relating to the contested decisions on the correct legal basis, namely, on the legislation in force at the time of their adoption (see Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paragraph 87), are not marred by any error of law and provide sufficient grounds for the rejection of the arguments raised at first instance. In consequence, the appellants' arguments alleging breach of the principles of equal treatment and non-discrimination are ineffective and the argument concerning inadequate reasoning is unfounded.

112 It follows from all the foregoing that the appeal must be considered to be unfounded and must be dismissed.

Costs

113 Under Article 69(2) of the Rules of Procedure, which applies 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. Under Article 70 of those rules, in proceedings between the Communities and their servants the institutions are

to bear their own costs. However, under the second paragraph of Article 122 of the same rules, Article 70 does not apply to appeals brought by officials or other servants of an institution against that institution.

114 The Commission having applied for an order for costs and the appellants having been unsuccessful, the latter must be ordered to pay the costs.

115 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, also applicable by virtue of Article 118 of those rules, the intervener in these proceedings is to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Ms Centeno Mediavilla, Ms Fumey, Ms Gerhards, Ms Hamilton, Mr Hill, Mr Huby, Mr Klein, Mr Lombardi, Mr Millar, Mr Moraitis, Ms Palmer, Ms Robinson, Mr Rouxel, Ms Silva Mendes, Mr van den Hul, Mr Von Nordheim Nielsen and Mr Zouridakis to pay the costs of the appeal;

3. Orders the Council of the European Union to bear its own costs.

[Signatures]