

JUDGMENT OF THE COURT (Third Chamber)

21 February 2008*

In Case C-348/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice brought on 17 August 2006,

Commission of the European Communities, represented by D. Martin and F. Clotuche-Duvieusart, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Marie-Claude Girardot, represented by C. Bernard-Glanz and S. Rodrigues, avocats,

applicant at first instance,

* Language of the case: French.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, A. Ó Caoimh (Rapporteur), P. Lindh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 24 May 2007,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

- 1 By its appeal, the Commission of the European Communities seeks annulment of the judgment of the Court of First Instance of the European Communities of 6 June 2006 in Case T-10/02 *Girardot v Commission*, [2006] ECR-SC I-A-2-129 and II-A-2-609, ‘the judgment under appeal’, in which that court, first, set the amount of financial compensation payable by the Commission to Mrs Girardot pursuant to the Court’s judgment of 31 March 2004 in Case T-10/02 *Girardot v Commission* [2004] ECR-SC I-A-109 and II-483, ‘the interim judgment’, at EUR 92 785 together with interest

payable from 6 September 2004, at the rate set by the European Central bank for main refinancing operations, plus two percentage points, and, secondly, ordered the Commission to pay the costs.

Legal context

- ² Article 29(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), in the wording applicable at the material time, provides:

'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;
- (b) whether to hold competitions internal to the institution;
- (c) what applications for transfer have been made by officials of other institutions of the three European Communities

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.’

3 Article 91(1) of the Staff Regulations provides:

‘The Court of Justice of the European Communities shall have jurisdiction in any dispute between the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting such person within the meaning of Article 90(2). In disputes of a financial character the Court of Justice shall have unlimited jurisdiction.’

4 Article 2(d) of the Conditions of employment of other servants of the European Communities (‘the Conditions of employment’) in the wording applicable at the material time, provides:

‘For the purposes of these Conditions of employment, “temporary staff” means:

...

(d) staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned’

5 The fourth and fifth paragraphs of Article 8 of the Conditions of employment provide:

‘Temporary staff to whom Article 2[(d) of the Conditions of employment] applies shall be engaged on the following conditions:

- temporary staff in Category A or B required to perform duties necessitating scientific or technical qualifications shall be engaged for not more than five years; their contracts may be renewed,

...

The contracts of temporary staff to whom Article 2[(d) of the Conditions of employment] applies who are engaged for a fixed period may be renewed not more than once for a fixed period. Any further renewal shall be for an indefinite period.’

6 Article 47 of the Conditions of employment provides:

‘Apart from cessation on death, the employment of temporary staff shall cease:

...

(2) Where the contract is for an indefinite period:

(a) at the end of the period of notice stipulated in the contract ... In the case of a servant within the meaning of Article 2[(d) of the Conditions of employment] the period of notice shall not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of ten months ... ;

(b) at the end of the month in which the servant reaches the age of 65 years.'

7 Cases of termination without notice are specified in Articles 48 to 50 of the Conditions of employment.

Facts

8 Mrs Girardot entered the service of the Commission on 1 February 1996 as a national expert on secondment. She retained that status until 31 January 1999.

9 By contract of 15 January 1999, entered into for a period of two years and subsequently renewed for a supplementary period of one year, Mrs Girardot was employed as a temporary staff member within the meaning of Article 2(d) of the Conditions of employment. As such, she was assigned successively to the Commission's 'Industry' Directorate-General then to its 'Information Society' Directorate-General.

- 10 On 26 July 2000 the Commission's 'Personnel and Administration' Directorate-General published a notice of vacancy stating that, in accordance with its decision on the new research personnel policy, the Commission was holding 'internal reserve competitions' which included the competition COM/T/R/ST/A/2000 for careers brackets at grades A 8/A 5, A 4 and A 3 of Category A to be paid from scientific and technical appropriations in the research and investment budget. That notice stated, inter alia, that, following a single test consisting of an interview with a selection board, the candidates who obtained the required number of points would be registered on a list of persons entitled to be appointed to a permanent post.
- 11 On 9 and 12 February 2001 the 'Personnel and Administration' Directorate-General published two vacancy notices for permanent posts to be paid from research appropriations with the intention of enabling temporary staff members to become permanent officials.
- 12 By letters of 20 February 2001 Mrs Girardot expressed her interest in a Category A post published in the vacancy notice of 9 February 2001, and also for seven other Category A posts published in the vacancy notice of 12 February 2001.
- 13 By letter of 13 March 2001 the Commission informed Mrs Girardot that her application for the seven posts in the vacancy notice of 12 February 2001 'could not be taken into consideration' on the ground that those posts 'were open only to staff covered by the Staff Regulations in the service of the Commission who had been successful candidates in an open competition'. In respect of each of those posts, the Commission accepted the application of seven other temporary staff members, whose names all appeared on the list produced following the 'internal reserve list competition' COM/T/R/ST/A/2000, and the Commission subsequently appointed each of them to the post in which they had expressed interest.

- 14 By letter of 15 March 2001 the Commission then informed Mrs Girardot that it 'could not accept her application' for the post which appeared in the vacancy notice of 9 February 2001.
- 15 On 8 June 2001 Mrs Girardot lodged a complaint against the decisions to reject her applications contained in the two letters. That complaint was rejected by implied decision.

Procedure before the Court of First Instance

- 16 By application lodged at the Registry of the Court of First Instance on 18 January 2002 Mrs Girardot brought an action seeking annulment of the Commission's two decisions dated 13 and 15 March 2001 rejecting her application for eight permanent posts to be paid from research and investment appropriations ('the contested decisions') and the consequent annulment of the eight decisions by the Commission appointing third parties to those posts.
- 17 By its interim judgment the Court of First Instance annulled the two contested decisions on the ground that the Commission had not demonstrated that it had properly examined the merits of Mrs Girardot's application in relation to each of the posts in question before rejecting it and, correspondingly, before accepting the application of other candidates (paragraph 83 of the interim judgment).
- 18 The Court of First Instance rejected, however, the claims of Mrs Girardot seeking annulment of the decisions appointing the successful candidates to the posts in ques-

tion. The Court held, after balancing the respective interests of Mrs Girardot, the service and the third parties who had been appointed, that such an annulment would have excessively penalised the Commission for the unlawful act it had committed (paragraphs 85 to 88 of the interim judgment).

19 Nevertheless, having observed that the Community courts have the power, in order to ensure that an annulment by the Court serves some useful purpose for the applicant, to make use of the unlimited jurisdiction conferred on them in proceedings concerning financial matters and to order, of its own motion, the defendant to make payment of compensation or request that it find an equitable outcome as appropriate, the Court of First Instance, in order adequately to protect Mrs Girardot's rights, requested the parties to seek an agreement on fair financial compensation for the unlawful rejection of her applications. The Court of First Instance stated that, in quantifying that compensation, account should be taken of the fact that Mrs Girardot could no longer take part in the next procedure, which the Commission would take care to conduct in accordance with the rules, since, because the temporary staff contract attaching her to the Commission had come to an end and had not been renewed, she was neither in a position nor entitled to express her interest in vacant posts by responding to a 'specific research' vacancy notice. If agreement could not be reached, the Court of First Instance stated that the parties were to submit their estimates of damages with supporting figures within three months from delivery of the interim judgment (paragraphs 89 to 91 of the interim judgment).

The judgment under appeal

20 Since the parties could not reach an agreement on the amount of fair financial compensation, they sent their submissions on the quantum of damages to the Court of First Instance on 6 September 2004.

- 21 In her heads of claim, Mrs Girardot asked the Court of First Instance to set the amount of financial compensation, together with interest to be determined by the Court, as her principal claim, at EUR 2 687 994; in the alternative, at EUR 432 887 and, further in the alternative, at EUR 250 248.
- 22 The Commission, for its part, asked the Court of First Instance to set that amount at EUR 23 917.43, considering it reasonable to award to Mrs Girardot, as can be read in paragraph 45 of the judgment under appeal, ‘first, payment of three months’ basic salary to correspond to the minimum period of notice laid down in [Article 47(2)(a) of the Conditions of employment] namely EUR 18 917.43, in compensation for loss of the opportunity to obtain one or other of the eight posts in question, and, secondly, EUR 5 000 in compensation for loss of the opportunity to take part in a further procedure for the filling of vacant posts’. That amount was to be supplemented by compensatory interest due between delivery of the interim judgment and actual payment of the sum due, together with token damages of one euro in compensation for non-material harm.
- 23 After examination of the various forms of damage claimed by Mrs Girardot the Court of First Instance, by the judgment under appeal, first, set the amount of the financial compensation payable by the Commission at EUR 92 785, together with interest payable from 6 September 2004 at the rate set by the ECB for main refinancing operations, plus two percentage points, and, secondly, ordered the Commission to pay the costs.
- 24 In relation to, first, the claimed loss of an opportunity to be recruited to a vacant post within the Commission, the Court of First Instance first stated, in paragraph 54 of the judgment under appeal, that the contested decisions had deprived Mrs Girardot, definitively and irreversibly, given the impossibility of restoring the position prior to their adoption, not only of the right to expect that her applications would be examined by the Commission, but also of the possibility that one of them would be accepted by the Commission. The Court then stated, in paragraphs 55 and 56 of that judgment, that the loss of an opportunity to occupy a vacant post within a

Community institution and to receive the financial advantages attaching to such a post was damage which was material, as the parties had agreed. Lastly, the Court stated, in paragraphs 57 and 58 of the judgment under appeal, that, in order to assess the extent of the damage resulting from the loss of an opportunity as claimed in the present case, it was necessary to 'determine the difference between the earnings which Mrs Girardot would have received if the chance that her applications would be successful had materialised and the earnings which she in fact received after the unlawful rejection of her applications, and then, if appropriate, to assess, as a percentage, what chance Mrs Girardot had that such an eventuality would materialise'.

25 As regards, first, the difference in earnings, the Court of First Instance explained, in paragraph 59 of the judgment under appeal, that that criterion was justified by the fact that while Mrs Girardot had lost a chance of occupying one of those posts and, consequently, of obtaining the corresponding financial benefits, she had not remained without employment.

26 In order to determine a possible difference in earnings, the Court of First Instance first established, in paragraphs 61 to 82 of the judgment under appeal, the period in which comparison was to be made between the financial terms of employment which Mrs Girardot would have enjoyed if she had been recruited by the Commission and those which she actually enjoyed. The Court of First Instance rejected, in paragraphs 73 to 77 of that judgment, the Commission's argument that reparation for Mrs Girardot's loss of an opportunity could be achieved solely by the award of fair financial compensation amounting to the equivalent of payment of three months' net salary, corresponding to the minimum notice period laid down in Article 47(2)(a) of the Conditions of employment. The Court of First Instance held that that argument amounted to claiming that the length of time Mrs Girardot would have remained in the service of the Commission if it had recruited her was so hypothetical that it should be considered that the Commission terminated her employment immediately after its commencement, which was not credible. In those circumstances, in paragraph 78 of the judgment under appeal, the Court of First Instance held that, to take account of all the possibilities of termination of employment as laid down in Article 47(2) and Articles 48 to 50 of the Conditions of employment, the period to be considered might be set *ex aequo et bono* at five years, including the period of notice, running from the date of effective appointment of the candidates accepted by

the Commission on conclusion of the procedure for the filling of vacant posts from which Mrs Girardot was unlawfully excluded. On the other hand, in paragraph 80 of the judgment under appeal, the Court of First Instance dismissed Mrs Girardot's arguments relating to the probability of becoming a permanent official on the ground that that factor was not a matter of certainty.

27 The Court of First Instance then determined, in paragraphs 83 to 95 of the judgment under appeal, the extent of the loss of earnings over that period. For that purpose, in paragraph 86 of that judgment, the Court of First Instance decided *ex aequo et bono*, in the absence of evidence produced by Mrs Girardot to enable the Court to determine the remuneration which would have been paid to her if her applications had been successful, and how that remuneration would have progressed, that Mrs Girardot would have received net monthly remuneration equivalent, on average, to the last remuneration paid to her by the Commission, which corresponded to a post in a grade A 5, step 4. In paragraph 85 of that judgment, the Court of First Instance rejected Mrs Girardot's argument that she would have been selected for a post in a grade A 4.

28 As regards, secondly, the assessment of the opportunity lost, the Court of First Instance, after making the finding, in paragraphs 96 and 97 of the judgment under appeal, that the applications submitted by Mrs Girardot satisfied the requisite conditions to be considered, examined, in paragraphs 98 to 122 of that judgment, whether the chance of which she had been deprived could be regarded as a certainty, in the sense that Mrs Girardot would have had, if not every chance of obtaining one of the posts in question, at least a strong chance of obtaining one. Having established, in paragraphs 102 to 107 of that judgment, that Mrs Girardot was the only candidate for each of the posts at that stage of the procedure, that she could claim significant prior experience within the Commission, that her services were held in esteem and that her qualifications and the specification of the posts were sufficiently matched, the Court of First Instance ruled as follows in paragraphs 115 to 117 of that judgment:

'115 Having regard to the foregoing facts, it cannot be held that, on conclusion of the first stage of the procedure for the filling of vacant posts laid down

by Article 29(1) of the Staff Regulations, the Commission, which might have preferred to have a wider choice ..., would certainly have accepted one of Mrs Girardot's applications and, consequently, that she had every chance of being awarded a temporary staff contract within the meaning of Article 2(d) of the Conditions of employment and of obtaining the financial advantages attaching to its performance. It may none the less be considered that Mrs Girardot had a strong chance in that regard, of which she was deprived because of the rejection of her applications by the Commission, which, on the evidence, did not examine them.

- 116 During the stage of the procedure for the filling of vacant posts laid down by Article 29(1)(b) of the Staff Regulations, another candidate, also a temporary staff member, expressed to the Commission his interest in each of the eight posts in which Mrs Girardot had also expressed her interest The Commission could accept one or other of those candidates. However, the Commission was also at liberty not to accept any of the competing applications, after having examined them, and to proceed to the stage of the procedure laid down by Article 29(1)(c) of the Staff Regulations The Commission might finally, while respecting the principles stated in the case-law, not pursue that procedure Those factors are such as to reduce the chance which Mrs Girardot had that her application to occupy one of the posts in question would be successful.
- 117 However, if Mrs Girardot had been entitled to take part in a fresh procedure for the filling of vacant posts, held after annulment of the decisions rejecting her applications ..., she might profitably have expressed her interest in other posts of the same kind and, having regard to, inter alia, the factors stated in paragraphs 103 to 106 above, might have been successful in one of them, a point which the Commission does not dispute. That factor is such as to increase the chance which Mrs Girardot had that she would succeed in her application to obtain, as a temporary staff member within the meaning of Article 2(d) of the Conditions of employment, a permanent post paid from research and investment appropriations, corresponding to Category A, requiring scientific qualifications and vacant within the Joint Research Centre in the Commission's "Research" DG or in its "Information Society" DG.'

29 In those circumstances, the Court of First Instance concluded, in paragraphs 118 and 119 of the judgment under appeal, that Mrs Girardot had a strong chance that her application would be successful and, consequently, the Court applied *ex aequo et bono* a multiplying factor of 0.5 to the loss of earnings she suffered. In paragraph 120 of that judgment, the Court of First Instance declined to raise that factor to 0.996 in accordance with the method proposed by Mrs Girardot, since under that method the extent of the chance lost depended solely on the number of applications lodged by her while disregarding the other factors set out earlier in that judgment.

30 As regards, secondly, the other losses claimed by Mrs Girardot, the Court of First Instance rejected them as irrelevant in paragraphs 123 to 125 of the judgment under appeal, on the ground that the objective of the fair financial compensation, having regard to Mrs Girardot's applications for annulment, was to give effect to the interim judgment and adequately protect her rights by providing *ex aequo et bono* compensation for the impossibility of restoring the position prior to the unlawful act and was not, in the absence of a prior claim for damages, to make reparation for any other harm which that unlawful act might additionally have caused her. In any event, the Court of First Instance considered, in paragraphs 125 to 138 of that judgment, that none of the other losses could be taken into consideration when setting the amount of the fair financial compensation. In particular, as regards the non-material harm resulting from the deterioration of Mrs Girardot's mental health and her depression and the physical harm caused by the unlawful rejection of her applications, the Court of First Instance considered, in paragraphs 133 and 137 of that judgment, that Mrs Girardot had not produced any evidence of their existence, such as a medical certificate or appropriate expert report.

The forms of order sought by the parties

31 By its appeal, the Commission claims that the Court should:

— annul the judgment under appeal;

- order the Commission to pay Mrs Girardot a sum of EUR 23 917.40;

- order that each of the parties should bear its own costs in relation to the present proceedings and to the proceedings before the Court of First Instance.

32 Mrs Girardot contends that the Court should:

- declare the appeal brought by the Commission to be inadmissible and, in any event, unfounded;

- declare her cross-appeal to be admissible, to annul the judgment under appeal and to uphold her claims for annulment and damages submitted at first instance;

- order the Commission to pay the costs.

The main appeal

Arguments of the parties

33 The Commission submits a single ground of appeal, alleging that the method used by the Court of First Instance to calculate the loss of opportunity is an infringement of Article 236 EC and of the conditions governing the liability of the Commission.

34 The Commission explains, first, that, given the conflicting case-law of the Court of First Instance on the matter, the objective of its appeal is to obtain, in the interests of legal certainty, a ruling from the Court of Justice on the manner of calculating the loss of an opportunity to be recruited by the Commission when it has made an unlawful decision depriving the person concerned of the expectation that his application will be examined. The Commission adds that the objective of its appeal is thus that the Court of Justice identify a consistent legal argument and a method for the purpose of calculating such loss of opportunity which would be applicable in all situations.

35 The Commission makes clear on that point that it accepts the idea that the loss of an opportunity to obtain a post is material damage for which compensation can be paid. On the other hand, it cannot accept the manner in which the Court of First Instance quantified the damage suffered by Mrs Girardot.

36 According to the Commission, paragraph 58 of the judgment under appeal is on that point vitiated by errors of law. The only damage suffered by Mrs Girardot which is actual and certain is that resulting from the failure to examine her application and not that resulting from a hypothetical loss of earnings for a period which is no less hypothetical. Although, in paragraphs 99 and 116 of that judgment, the Court of First Instance recognises, first, that the Commission was under no obligation to complete the recruitment procedure and, secondly, that it is not the function of the Court to carry out in the place of the Commission a consideration of the comparative merits of candidates, the Court did in fact undertake such a consideration in paragraphs 62 to 95 of that judgment. The Court of First Instance therefore did not assess the actual and certain damage linked to the loss of opportunity, but determined the hypothetical damage linked to loss of earnings, which presupposes an entitlement to be recruited. The Court of First Instance thereby misinterpreted the concept of loss of opportunity as loss of the certainty of obtaining a post, and in so doing failed to recognise the margin of discretion and freedom to choose which the Community institutions must have in the area of recruitment.

37 The Commission stressed moreover, at the hearing, that there is no direct causal link between the wrongful act committed by the Commission, namely its failure

to take Mrs Girardot's applications into consideration, and the damage ultimately determined by the Court of First Instance in the judgment under appeal. However, according to the case-law (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* [1979] ECR 3091, paragraph 21), the damage must be a direct consequence of the conduct alleged to be unlawful.

38 The Commission considers that the error of law is further demonstrated by the fact that, to calculate the loss of earnings, the Court of First Instance took into consideration the earnings received in the interim by the person concerned. In the event that the post she held during the period in question had been better paid than that which she could have held at the Commission, she would have suffered no loss of earnings while she would still have suffered a loss of opportunity. Since that method depends on circumstances which are a matter of chance, it is likely to lead to discrimination between candidates in the same recruitment exercise.

39 According to the Commission, the error in the reasoning of the Court of First Instance is magnified by the second point made in paragraph 58 of the judgment under appeal, namely that the difference in earnings may, 'where appropriate', be adjusted in amount by a percentage representing the chance which the person concerned had of being recruited. That point shows again that the objective of the Court of First Instance was to quantify the damage caused by a hypothetical loss of earnings and not that caused by loss of the chance of being recruited, since the calculation of that loss of earnings may be assessed only by reference to the hypothetical chance of obtaining the post in question. Moreover, for this purpose the Court of First Instance indulged in indiscriminate speculation when quantifying the degree of probability that Mrs Girardot would be recruited, although she had no right to be recruited.

40 Consequently, the Commission considers that in the judgment under appeal takes the opposite approach to the calculation of the loss of an opportunity to be recruited to that which is correct in law, since there was first a calculation of the loss of earn-

ings hypothetically suffered by Mrs Girardot, and then an adjustment to the amount obtained by means of a weighting linked to the probability of her being recruited. The quantification of that loss of opportunity ought to be based on something other than the loss of earnings, which presupposes that recruitment was a certainty.

41 In those circumstances, the Commission, in accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, invites the Court to declare that the loss of opportunity suffered by Mrs Girardot may be made good fairly by the award of a lump sum equivalent to three months' net salary corresponding to the sum which would be paid to her during the notice period for a contract of indefinite duration — namely in this case EUR 18 917.43 — together with the sum, also a lump sum payment, of EUR 5 000 as compensation for the fact the person concerned may no longer take part in a later recruitment procedure.

42 Mrs Girardot contends that the appeal is inadmissible for two reasons. Firstly, the Court of First Instance alone has jurisdiction to carry out an assessment of the damage resulting from the loss of an opportunity. Accordingly, unless the Commission complains that the Court of First Instance did not specify the criteria adopted to carry out the assessment of the damage suffered, the Commission is not justified in criticising the assessment made in the judgment under appeal on that matter nor, a fortiori, in expecting the Court of Justice to issue a decision of principle on the method to be used to calculate compensation for material damage resulting from the loss of an opportunity. Moreover, there are a vast number of different situations which can only be looked at on a case-by-case basis. Secondly, the ground of appeal to the effect that the Court of First Instance was providing compensation for the loss of a certainty of obtaining a post and not the loss of an opportunity was not raised at first instance and, consequently, represents a new ground of appeal, production of which is prohibited by Article 42(2) and Article 118 of the Rules of Procedure.

43 In any event, as to the merits, Mrs Girardot states that the damage she has suffered is actual and certain since the Commission's unlawful refusal to examine her applications deprived her of the chance, first, to have one or several of them accepted and secondly, to subsequently express her interest in any other post if she had still

been entitled to do so. In addition, the method used in the judgment under appeal, which consists of enumerating the advantages which Mrs Girardot might have received if she had been recruited and then determining as a percentage the chance which she had of being recruited is a procedure previously adopted by the Court of First Instance (see, in particular, Case T-144/02 *Eagle and Others v Commission* [2004] ECR-SC I-A-275 and II-1231, paragraphs 149 and 163) and which is affirmed in Belgian academic writing. That method is suited to the making good of damage resulting from the loss of an opportunity, which, by definition, is not certain to materialise.

- 44 As regards the complaint that there may be discrimination between candidates in the same recruitment exercise, Mrs Girardot considers that it ignores the second part of the reasoning of the Court of First Instance, the objective of which is precisely to determine the factor to be applied to the established loss of income in the event that the chance of being recruited had materialised. Furthermore, it seems fair that, where the probability of recruitment is the same, the candidate who has suffered a greater loss of income should be awarded greater compensation than a candidate who has suffered a lesser loss of earnings. These candidates not being in comparable situations, the principle of equal treatment is not infringed.

Findings of the Court

Admissibility

- 45 As regards, first, the objection of inadmissibility on the ground that the Court of Justice has no jurisdiction to assess the extent of the reparation for the damage suffered by Mrs Girardot, it must be borne in mind that, in accordance with settled case-law, when the Court of First Instance has found that there is damage, it is for that Court alone to assess, within the confines of the claim, how and to what extent

the reparation for the damage should be provided, subject to the qualification that in order for the Court to be able to review the judgments of the Court of First Instance, those judgments must be sufficiently reasoned and, and as regards the quantification of damage, that they state the criteria taken into account for the determination of the amount decided upon (see, to that effect, Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66; Case C-259/96 P *Council v De Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33; and Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraphs 34 and 35, and order of 14 December 2006 in Case C-12/05 P *Meister v OHIM*, not published in the ECR, paragraph 82).

⁴⁶ However, in the present case, while it is true that the Commission disputes, by its appeal, the method used by the Court of First Instance to determine the extent of reparation for the damage suffered by Mrs Girardot, the Commission claims in that regard that the judgment under appeal is vitiated by several errors of law, in that the method in question, set out in paragraph 58 of that judgment and then applied in paragraphs 59 to 122 of that judgment, is equivalent, in reality, to an alteration of the form of the damage as it was described in that judgment, namely the loss of an opportunity to be recruited, and, consequently, to a misinterpretation of the essential nature of that damage, with the result that the damage actually determined in that judgment — according to the Commission, the loss of the certainty of being recruited and the loss of the corresponding remuneration — either is not actual or certain, or has no direct causal link with the alleged unlawful act.

⁴⁷ Such a ground of appeal, which concerns the coherence of the reasoning adopted by the Court of First Instance to establish the method used to determine the extent of the reparation for the damage suffered, is a question of law which may be brought on appeal to the Court of Justice (see, to that effect, *Lucaccioni v Commission*, cited above, paragraphs 27 to 29).

⁴⁸ On the other hand, as Mrs Girardot correctly states, the Commission cannot, by this appeal, request that this Court specify the manner in which the loss of an opportunity

to be recruited by a Community institution must be assessed in every situation where a party has been unlawfully deprived of the right to have his application examined.

49 In fact, the jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas argued before the Court of First Instance (see *Commission v Brazzelli Lualdi and Others*, cited above, paragraph 59). Consequently, the Court of Justice has jurisdiction, in such proceedings, solely to examine whether the argument within the appeal identifies an error of law vitiating the judgment under appeal (see, to that effect, Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35, and Case C-76/01 P *Eurocoton and Others v Council* [2003] ECR I-10091, paragraph 47).

50 Secondly, the objection that the ground of appeal put forward by the Commission in support of its appeal, namely that there are errors of law vitiating paragraph 58 of the judgment under appeal, is inadmissible because it is new cannot be upheld, since the findings complained of by the Commission in this appeal were made for the first time in the judgment under appeal (see, to that effect, Case C-449/99 P *EIB v Hautem* [2001] ECR I-6733, paragraphs 88 and 89, and Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 33).

51 It follows that the Court of Justice has jurisdiction, in this appeal, solely to examine whether the method adopted by the Court of First Instance in the judgment under appeal for the purposes of determining the extent of the reparation for the damage suffered resulting from the loss of an opportunity suffered by Mrs Girardot is vitiated by an error of law. The remainder of this appeal is inadmissible.

Substance

- 52 In accordance with settled case-law, in a claim for damages brought by an official the Community can be held liable for damages only if a number of conditions are satisfied: the illegality of the allegedly wrongful act committed by the institutions, actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered (see Case 111/86 *Delauche v Commission* [1987] ECR 5345, paragraph 30; *Commission v Brazzelli Lualdi and Others*, cited above, paragraph 42, and *Council v De Nil and Impens*, cited above, paragraph 23).
- 53 As regards the condition relating to the allegedly unlawful act, it is clear from paragraph 83 of the interim judgment, against which no appeal has been brought and which must therefore be considered to be final, that the unlawful conduct in the present case resides in the fact that, by the two contested decisions, the Commission did not demonstrate that it had properly examined the merits of Mrs Girardot's application in relation of each of the posts she had applied for, before rejecting it.
- 54 As regards the condition relating to damage, the damage for which compensation is sought must be actual and certain (see, to that effect, Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others v Council and Commission* [1982] ECR 85, paragraph 9, and Case C-243/05 P *Agraz and Others v Commission* [2006] ECR I-10833, paragraph 27).
- 55 In the present case, it is not a matter of dispute that, because of the unlawful act committed by the Commission, Mrs Girardot lost, definitively and irremediably, the chance of being recruited to a post within the departments of that institution on the conclusion of the procedure in question in this case and that, consequently, that loss of an opportunity represents damage which is for her actual and certain.

56 Further, it is clear from the findings made by the Court of First Instance, in particular in paragraphs 84 to 91 of the interim judgment, which, for the reasons given in paragraph 53 of this judgment, can no longer be challenged in this appeal, that the actual and certain damage suffered by Mrs Girardot extends to the fact that it was impossible for her to take part in a fresh and properly conducted recruitment procedure, since Mrs Girardot was no longer either in a position or even entitled to express her interest in posts to be filled by replying to a 'specific research' vacancy notice in respect of posts for which she had submitted applications.

57 By this appeal, the Commission challenges the method adopted by the Court of First Instance to determine the extent of the reparation for the damage suffered. The Commission claims that, by that method, the Court of First Instance did not quantify the actual and certain damage resulting from the loss of opportunity suffered by Mrs Girardot but, in fact, evaluated a different form of damage, purely hypothetical, resulting from the loss of earnings which she might have suffered if she had been entitled to be recruited, thereby transforming the loss of opportunity to be recruited to a post into the loss of the certainty of obtaining a post.

58 On that point, it must be emphasised that, under the second sentence of Article 91(1) of the Staff Regulations, the Court of First Instance has, in disputes of a financial character, unlimited jurisdiction, pursuant to which it has the power, if need be, of its own motion to order the defendant to pay compensation for the damage caused by the defendant's wrongful act and, in such a case, taking account of all of the circumstances of the case, to assess the damage suffered *ex aequo et bono* (see, inter alia, Case 24/79 *Oberthür v Commission* [1980] ECR 1743, paragraph 14; Joined Cases 176/86 and 177/86 *Houyoux and Guery v Commission* [1987] ECR 4333, paragraph 16; Case C-90/95 *P de Compte v Parliament* [1997] ECR I-1999, paragraph 45; and *EIB v Hautem*, cited above, paragraph 95).

59 In addition, in accordance with the case-law referred to in paragraph 45 of this judgment, when the Court of First Instance has determined that there is damage, it alone

has jurisdiction to decide, within the confines of the claim and subject to compliance with the obligation to state reasons, how and to what extent reparation for the damage should be provided.

60 However, as the Commission itself acknowledged at the hearing in response to a question from the Court on that matter, it is very difficult, if not impossible, to specify a method whereby it is possible accurately to quantify the chance of being recruited to a post within that institution and, consequently, to assess the damage resulting from the loss of that chance.

61 Consequently, for the purpose of examining whether the judgment under appeal is vitiated by an error of law as regards the determination of the extent of the compensation for the damage resulting from the loss of opportunity suffered by Mrs Girardot, account must be taken of the margin of appreciation which the Court of First Instance has, when exercising its unlimited jurisdiction, in relation to the method to be chosen to carry out such a determination.

62 It is clear from the judgment under appeal that, to determine the extent of the reparation for the damage caused in this case to Mrs Girardot, the Court of First Instance considered that it should, first, specify the loss of earnings suffered by her, by establishing the difference between the earnings which she would have received if she had been recruited and the earnings which she actually received following the unlawful act, and then, secondly, assess, as a percentage, the chance she had of being recruited in order to weight the loss of earnings thus calculated.

63 It is admittedly true that, to the extent that the method employs the criterion of the loss of earnings suffered by the person concerned, it is a corollary of that method, as the Commission has rightly observed, that when the earnings actually received after

the unlawful conduct are higher than the earnings which were lost because of it no compensation would be awarded, although an opportunity would still have been lost.

⁶⁴ In addition, such a method, as the Commission has also stated, necessarily imposes on the Community courts the task of carrying out, as the Court of First Instance did in paragraphs 59 to 95 of the judgment under appeal, a prospective examination in an attempt to construct the fictitious career which she might have achieved within that institution, relying on a series of suppositions which, while they fall within that appraisal of the facts by the Court of First Instance against which no appeal lies, remain, by their nature, at best uncertain, both as to the length of her employment and the progression in the amount of her earnings.

⁶⁵ Moreover, it is true that the criterion of loss of earnings cannot by itself determine the extent of the reparation for the damage caused following the loss of an opportunity to be recruited. In such a situation, the damage suffered cannot be identified with the earnings which would have been received if the chance had materialised, since, as the Court of First Instance stated in this case in paragraph 116 of the judgment under appeal, when account is taken of the discretion which the Commission has in this area, the party cannot claim any right to be recruited. Consequently the damage for which such a person is entitled to obtain compensation cannot correspond to the loss of earnings resulting from the loss of a right (see, by analogy, Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [2000] ECR I-203, paragraphs 59 and 60).

⁶⁶ However, it cannot therefore be concluded that the criterion of the loss of earnings to which the Court of First Instance had recourse in the judgment under appeal, taking account of the discretion which that Court has in the method to be adopted for that purpose, is unsuited to determining the extent of the reparation for the damage resulting from the loss of opportunity suffered by Mrs Girardot in the present case.

67 Indeed, since the value of the chance lost by her is, as the Advocate General in essence stated in point 77 of his Opinion, a function of the income attributable to that chance materialising, the loss of earnings suffered because of the alleged unlawful conduct, while that cannot by itself determine the extent of the reparation for the loss of opportunity, constitutes nevertheless a relevant criterion. Even though Mrs Girardot had no right to be recruited, the value to be attributed to that chance depends therefore, at least in part, on the amount of the earnings which she could have expected.

68 On that point, it must also be observed that the alternative method proposed by the Commission in this appeal for the purposes of making good the damage suffered by Mrs Girardot, which consists in awarding her lump sum compensation the amount of which is set at the three months' net remuneration to be paid for the minimum notice period laid down in Article 47(2)(a) of the Conditions of Employment, is also based on the amount of earnings lost because of the alleged unlawful conduct. In those circumstances, the Commission can hardly criticise the relevance of that criterion.

69 In addition, it must be accepted that the remuneration actually received subsequent to the unlawful acts also partly determines the extent of the reparation for the damage, since any injured party has the obligation to minimise his loss. In that regard, the claim by the Commission that there is a risk of discrimination cannot be upheld. If two unlawfully excluded candidates do not suffer the same loss of earnings, they cannot, even when they have the same chance of being recruited, be considered to be in an identical or similar situation as to the extent of the damage suffered.

70 Furthermore, even if the Court of First Instance, in order to determine the extent of the reparation for the loss of opportunity suffered by Mrs Girardot, did indeed seek to determine the amount of the earnings lost by her, that court did not rely on that criterion alone to determine the extent of that reparation.

- 71 It is true that, by ruling in paragraph 58 of the judgment under appeal that, in order to determine the extent of the reparation for the loss of opportunity suffered by Mrs Girardot, it was necessary 'if appropriate' to make an assessment of the chance she had of being recruited, suggesting thereby that that assessment was merely optional, the Court of First Instance committed an error of law, since the omission of that assessment, which is part of the very definition of loss of opportunity, would amount to evaluating only the loss of earnings suffered by Mrs Girardot, although she had no right to be recruited.
- 72 However, that error is inoperative since, having, calculated the loss of earnings suffered by Mrs Girardot, in paragraphs 59 to 95 of the judgment under appeal, the Court of First Instance, in paragraphs 96 to 122 of that judgment, in fact applied to that loss a percentage which was intended, on the basis of all the particular facts of the case — the appraisal of those facts by that court not being open to appeal — to quantify the chance which Mrs Girardot had of being recruited.
- 73 However, that criterion, applied in that way, in order to weight the criterion relating to loss of earnings, following a method also adopted, as the Advocate General stated in point 55 of his Opinion, in the domestic law of several Member States, is capable of providing relevant guidance to determine the extent of the reparation for the loss of opportunity suffered by Mrs Girardot, since it is thereby possible for the purposes of that determination, to take account of the probability of her receiving the earnings which she in fact irremediably lost.
- 74 It is true that, as the Commission submitted at the hearing, the degree of chance thus calculated by the Court of First Instance is hypothetical and that it cannot itself be considered actual or certain. However, that factor is irrelevant, since it is common ground that the damage suffered by Mrs Girardot because of the loss of opportunity to be recruited is actual and certain and that the Court of First Instance has a margin of appreciation as to the method to be adopted to quantify it.

- 75 Lastly, it must in any event be held that the method proposed by the Commission, described in paragraph 68 of this judgment, is manifestly less suitable for determining the extent of the reparation for the damage resulting from the loss of an opportunity than that adopted in the judgment under appeal.
- 76 Such a method, which has the effect of entirely ignoring the particular circumstances of Mrs Girardot's situation in order to propose a rule designed to provide reparation in a consistent manner for the loss by any party of the opportunity of being recruited, fails, contrary to the requirements set out in the case-law (see, in particular, Joined Cases 169/83 and 136/84 *Leussink and Others v Commission* [1986] ECR 2801, paragraph 13, and *Lucaccioni v Commission*, cited above, paragraphs 22 and 28), to ensure that the individual damage actually suffered by the party concerned because of the particular unlawful acts of which she was the victim is fully compensated, and, in addition, deprives the Community courts of the margin of appreciation which they have to determine the extent of the reparation for the damage.
- 77 Furthermore, that alternative method, since it amounts to claiming, as the Court of First Instance observed in paragraph 74 of the judgment under appeal, that the length of time Mrs Girardot would have remained in the service of the Commission if it had recruited her is so hypothetical that it should be completely disregarded and, consequently, that it should be considered that her employment was terminated as soon as it had begun, would result in the provision of compensation for fictitious damage which was neither actual nor certain.
- 78 It follows that the Commission, which does not, moreover, dispute that the statement of the reasons of the judgment under appeal is sufficient in law, has not demonstrated that the Court of First Instance, in exercising the discretion available to it in this matter, has, by the method adopted, misinterpreted the damage suffered in this case by Mrs Girardot, by not determining the actual and certain damage resulting for her from the loss of an opportunity of being recruited.

79 It is not disputed that there is a direct causal link between that damage and the alleged unlawful conduct in the present case.

80 In those circumstances, it must be concluded that the main appeal is unfounded and, consequently, that it must be dismissed.

The cross-appeal

Arguments of the parties

81 By the cross-appeal, Mrs Girardot claims that the Court of First Instance infringed Community law by making several manifest errors of assessment.

82 First, Mrs Girardot submits that, by adopting only a period of five years as the reference period for calculating the difference in remuneration, the Court of First Instance made a manifest error of assessment, in that, in paragraph 80 of the judgment under appeal, it excluded from the factors under consideration the loss of opportunity of a career, when the prospect of appointment as an established official was not a matter

of doubt, since at the time the Commission had, in line with clearly defined policy, appointed numerous temporary staff members as established officials, and the eight candidates finally recruited were all appointed as established officials.

83 Secondly, Mrs Girardot claims that, by referring to the net monthly earnings corresponding, on average, to the last remuneration paid to her by the Commission in a post in grade A 5, the Court of First Instance made a manifest error of assessment in determining the difference in remuneration, in that, in paragraph 85 of the judgment under appeal, that court disregarded the fact that she had a greater chance of being recruited to a post in grade A 4 than to a post in grade A 5 since five of the eight posts for which she had applied were in grade A 4. In addition, the Court of First Instance should have constructed the progression of her career on the basis of the average time taken for promotion from one grade to another and taken account of pension rights she would have acquired in the event of recruitment.

84 Thirdly, Mrs Girardot considers that, by setting the chance she had of being recruited at 50%, the Court of First Instance made a manifest error of assessment as to the probability of that chance materialising, in that, in paragraph 116 of the judgment under appeal, the Court failed to take into account that her chances of being recruited were increased by the fact that for each of the posts in question there was only one other competing candidate, that each of those others was recruited and that a candidate applying for eight posts has more opportunity to be recruited than a candidate who presents himself for only one post. In addition, a one in two chance does not amount to a strong chance.

85 Fourthly and lastly, Mrs Girardot considers that the Court of First Instance made a manifest error of assessment by not taking into account, in paragraphs 133 to 138 of the judgment under appeal, all the evidence of non-material and physical harm, whereas the medical certificates produced by her within these proceedings record the existence of a depressive syndrome from which she has suffered since the date of the unlawful rejection of her applications.

⁸⁶ At the hearing, the Commission submitted that the cross-appeal was entirely inadmissible since its objective was to challenge the appraisal of facts carried out by the Court of First Instance.

Findings of the Court

⁸⁷ As is clear from Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal lies on points of law only and therefore the Court of First Instance alone has jurisdiction to find and to appraise the facts, save where the factual inaccuracy of its findings results from the documents in the case before it. The appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, inter alia, *EIB v Hautem*, cited above, paragraph 44; Case C-121/01 P *O'Hannrachain v Parliament* [2003] ECR I-5539, paragraph 35; and order of 27 April 2006 in Case C-230/05 P *L v Commission*, not published in the ECR, paragraph 45).

⁸⁸ In addition, 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 (see, inter alia, Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 15, and Case C-68/05 P *Konink-*

lijke Coöperatie Cosun v Commission [2006] ECR I-10367, paragraph 54; order of 19 March 2004 in Case C-196/03 P *Lucaccioni v Commission* [2004] ECR I-2683, paragraph 40, and order in *Meister v OHIM*, cited above, paragraph 95).

⁸⁹ According to the case-law, that requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, confines itself to repeating or reproducing the pleas in law and arguments submitted to the Court of First Instance, including those founded on facts explicitly rejected by that Court. Such an appeal amounts in reality to a request for no more than a re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see, inter alia, *Bergaderm and Goupil v Commission*, paragraph 35, and *Eurocoton and Others v Council*, paragraph 47, both cited above; and the order in *Lucaccioni v Commission*, cited above, paragraph 41).

⁹⁰ Furthermore, according to the case-law set out in paragraph 45 of this judgment, when Court of First Instance has determined that there is damage, it alone has jurisdiction, within the confines of the claim, to assess the form and extent of reparation for the damage.

⁹¹ In the present case, it must be held that, by this cross-appeal, Mrs Girardot, as she herself stated at the hearing in response to a question from the Court on that point, seeks not to identify errors of law allegedly vitiating the reasoning of the Court of First Instance in the judgment under appeal but rather, by (i) repeating her arguments relied on at first instance and (ii) putting forward supposed new evidence, she

seeks to challenge the assessment of facts which that Court undertook in that judgment for the purposes of determining the extent of reparation for the damage, but she does not either allege any distortion of those facts or advance the slightest legal argument capable of demonstrating why the assessment by Court of First Instance of her arguments was erroneous in law. That being the case, Mrs Girardot therefore does no more than request a re-examination of the judgment under appeal.

92 Consequently, the cross-appeal must be dismissed as inadmissible.

93 It follows from all of the foregoing that the main appeal and the cross-appeal must be dismissed.

Costs

94 Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs, if they are applied for in the successful party's pleadings. Since Mrs Girardot applied for costs against the Commission and the latter has been unsuccessful in its grounds of appeal, the Commission must be ordered to pay the costs of the main appeal. Since the Commission applied for the costs of the cross-appeal against Mrs Girardot and she has been unsuccessful in her grounds of appeal, she must be ordered to pay the costs of that appeal.

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

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

- 2. Orders the Commission of the European Communities to pay the costs of the main appeal;**

- 3. Orders Mrs Girardot to pay the costs of the cross-appeal.**

[Signatures]