candidates. To that end, the Court is required to take account not only of the need to restore the rights of candidates who have been adversely affected but also of the legitimate expectations of the candidates who passed the competition. Accordingly, the judgment of the Court of First Instance annulling both the irregular test and the subsequent acts in the competition procedure is vitiated by an error in law in that it does not limit the consequences of the annulment to reinstatement of the applicants' rights.

REPORT OF THE JUDGE-RAPPORTEUR
in Case C-242/90 P *

I — Facts and procedure before the Court of First Instance

According to the judgment of the Court of First Instance of 12 July 1990 in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395:

'1. By Notice of Open Competition COM/A/482, published on 12 February 1987 (Official Journal C 34, p. 15), the Commission commenced an open competition, based on qualifications and tests, to constitute a reserve of administrators in Grades 7 and 6 of Category A in the field of agriculture, fisheries and cooperation with developing countries.

2. According to the notice of competition, the tests were to take place in two stages: the first written and the second oral.

3. The written test was also divided into two stages: a first written test consisting of a series of multiple-choice questions to test candidates' general knowledge in the fields covered by the competition; and a second written test which was a drafting test designed to test candidates' analytical ability and their experience of dealing with case studies. Candidates could take part in the second written test only if they passed the first.

4. Candidates who obtained an aggregate of at least 60 marks out of 100 in the two written tests with a pass mark in both tests were admitted to the oral test.

5. The four applicants were among the 877 candidates who were allowed to take the written tests. The first written test was held on 20 November 1987 in 19 different centres in Europe, South America and Australia. The

* Language of the case: French.

candidates obtained a pass mark in the eliminatory test and took the second written test.

6. In that second written test, for which three-and-a-half hours were allowed, the selection board asked candidates to write a memorandum, based on a case study, containing not more than 800 words in total. The memorandum, addressed to the President of the Commission, was to include a summary of the Court of Auditors' special report on the system for paying agricultural export refunds and the candidates' own views on the problem in question.

7. Of the 800 words in the memorandum, 300 were to be used to express the candidate's own opinions. Candidates were to count the number of words used themselves and enter those figures in a table. Candidates who failed to observe the abovementioned conditions or whose answers were illegible would not have their papers marked.

8. After the second written test had been held but before it was marked, the selection board instructed markers not to mark papers which were obviously too long, that is to say in excess of 1 200 words.

9. The applicants failed at the stage of the second written test, having failed to achieve the pass mark of 60% for the two tests. Consequently, they were not allowed to take part in the oral test, as the Head of the Recruitment Division informed them by a letter of 21 March 1988.

10. Only 172 candidates were admitted to the oral test, and 167 in fact took part.

11. Finally, a list of suitable candidates was drawn up on 26 May 1988, comprising 67 successful candidates.'

In those circumstances, by an application lodged at the Court Registry on 25 May 1988, the original applicants brought an action against the decisions adopted by the selection board in competition COM/A/482. By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

The original applicants claimed that the Court of First Instance should:

— declare the present application admissible and well founded;

— consequently, annul the marking of the written tests in the competition in its

entirety or at least annul the decision of the Selection Board not to admit the applicants to the oral tests in the competition;

— order the defendant to pay all the costs.

The Commission contended that the Court of First Instance should:

— dismiss the application as unfounded;

— award costs in accordance with the applicable provisions.

The Syndicat des Fonctionnaires Internationaux et Européens and the Union Syndicale were granted leave to intervene in support of the forms of order sought by the applicants.

In support of their application, the original applicants alleged, first, breach of the rules for the holding of the second written test and of the principles of equal treatment, objectivity and protection of legitimate expectations. They stated that, the selection board, after deciding to allow candidates a limited time, imposed a maximum number of words (800), obliging them to count them themselves, and then departed from its instructions and asked the markers not to correct tests containing more than 1 200 words. By so doing, the selection board required the markers to take account of tests of candidates who had deliberately disregarded those instructions. Secondly, the original applicants considered that the Commission had adduced no evidence as to the number of candidates who had exceeded the limit imposed or the number of words used in excess of that limit. By doing so, the Commission did not allow the Court of First Instance or the applicants to verify whether the contested decisions resulted in distortion of the comparative examination of the candidates' merits.

In response to a request from the Court of First Instance to produce 'extracts from the files concerning the second written test of the 67 successful candidates or any other relevant information which might prove the number of words used by those candidates in their written answer in the second written test', failing which to 'produce evidence that only five persons exceeded the limit of 800 words (comprising one with 810, two between 820 and 830 and two others with between 840 and 850 words) and to show that the five abovementioned candidates do not appear on the list of suitable candidates', the Commission stated that it was physically impossible for it to produce the written tests because they had been destroyed, despite instructions to the contrary given by Mr Kalbe, head of the Recruitment Division, at the time of his transfer.

When heard as a witness on the facts concerning correction of the second written test and the outcome of the tests after completion of the competition concerned, Mr Kalbe told the Court of First Instance that

'33. ... the instructions to markers were given by the Chairman of the Selection Board before the second written tests were marked. The issue of the prescribed number of words having been exceeded arose, as far as the Selection Board was concerned, when the European Public Service Union raised it in a

circular to members of staff before the oral tests took place. The Selection Board thereupon asked the secretariat to carry out a check. A second check was carried out at the time of the application to the Court of Justice for interim measures. The check was carried out on the papers of the 172 candidates who were admitted to the oral test. Of those, the secretariat checked the papers of candidates who had given approximately 800 as the total number of words. The secretariat carried out a random sample of the other papers. That check showed that only five candidates had exceeded the limit of 800 words. Mr Kalbe was unable to give the names of those five persons because the check had been carried out by comparing the code numbers of the successful candidates with the numbers of the abovementioned five persons. None of those five were on the list of successful candidates. According to the witness, the files containing written tests are usually kept for a long time. With regard to the tests in question, he had given the necessary instructions for them to be kept. However, he had had to leave the Recruitment Division at the end of July 1989. When he searched the archives at the time of the written procedure he found nothing. His conclusion was that the papers must have been destroyed.'

The Court of First Instance stated, in the judgment under appeal:

'42. It must be pointed out that the notice of competition in question indicates, in Section VII, the nature of the written tests, the time allowed and the way in which the written tests are to be marked. In particular, the second written test was to be a drafting test based on a case study, designed to test candidates' analytical ability and their experience of dealing with case studies. In accordance with the notice of competition the Selection Board asked candidates to draft a memorandum of a practical nature and required them to observe both a time-limit (three and a half hours) and a limit on the number of words (800), failing which their papers would not be marked.

43. The purpose of the limits imposed was to ensure that candidates dealt with the subject of the written test on the same terms and to enable markers to apply objective criteria uniformly to comparable tasks. A failure to observe the limit of 800 words, if substantial, constitutes an irregularity of such a kind as to vitiate both the contested decision of the Selection Board regarding the marking of the test and the rest of the procedure.

44. However, in an open competition based on qualifications and tests consisting of a number of stages, an irregularity in an intermediate stage is a ground for the annulment of the contested decision only if it distorts the outcome of the competition. In such a case, the competition is a complex administrative procedure inasmuch as earlier acts are incorporated in the final act.

45. In the present case, the applicants claim that the instructions given to the markers by the Selection Board substantially modified the conditions under which the second written test was held. That submission, which has been shown to be factually correct, appears well founded in law. For the reasons

given above, the Selection Board's subsequent increase by up to 50% in the number of words allowed in the test constitutes a substantial irregularity which cannot be justified either by grammatical differences in the languages used nor by any errors of calculation made by candidates, as the administrative wrongly claims.

46. The Commission's contention that the instructions given to the markers did not directly affect the applicants is unfounded. The applicants have a legitimate interest in putting forward that submission which concerns observance of limits which were imposed in an open competition in order to ensure that only comparable papers would be marked.

47. However, having regard to the foregoing considerations (paragraphs 43 and 44), the defendant's argument that the five candidates exceeded the limit of 800 words only slightly and that that slight irregularity could not have distorted the final outcome of the competition appears material and must be considered.

48. As the applicants have shown that the Selection Board allowed the prescribed limits to be exceeded, it is for the Commission to adduce proof of the veracity of its earlier assertions, particularly as in the present case the tests at issue are in the Commission's possession.

49. By an order of 13 February 1990 the Commission was asked to adduce such proof by producing the material documents. It stated that it was unable to comply with that part of the order. At the hearing, the Commission's representative stated that it was physically impossible for him to produce the written tests because they had been destroyed after the transfer of Mr Kalbe, Head of the Recruitment Division at the material time. Consequently, the Court of First Instance decided to hear witnesses, whose evidence is set out at length in this judgment under the heading "Procedure".

50. It emerges from that evidence that it was not the Selection Board which checked whether the limit of 800 words had been exceeded. The check was carried out by the secretariat of the Recruitment Division, in particular at the time of the proceedings for interim measures. Mr Kalbe's evidence shows that that check was not carried out on all the papers of the 172 candidates admitted to the oral test but was confined to the papers of candidates who had entered a figure of approximately 800 words in the appropriate table; only a random sample was carried out on the rest of the papers. It is therefore possible that some of the unchecked papers may have exceeded the prescribed limit. Consequently, the result of that check cannot be considered to be reliable. Moreover, there is no evidence of the names of the five candidates who, according to the administration, exceeded the limit but were not included on the list of successful candidates. Only the identification of those persons would enable the applicants to seek to rebut that assertion.

51. Consequently, the Commission has not substantiated its principal contention that only five candidates slightly exceeded the limit of 800 words and that those five are not on the list of successful candidates.

52. The Court of First Instance is therefore unable to determine whether the principle that candidates must be treated equally was observed in the marking of the second written tests or whether that irregularity may have distorted the final outcome of the competition.

53. Consequently the applicants' submissions must be upheld and the marking of the second written test in Competition COM/A/482 and the subsequent acts in the procedure must be annulled. The new marking procedure must be a comparative reassessment of the papers which comply with the prescribed limits. However, if the papers of the 172 candidates who were admitted to the oral tests must be considered to be definitively lost, or if it is impossible to guarantee the secrecy of the Selection Board's work in a new marking procedure, the administration can of course repeat the competition procedure, from the second written test onwards.'

The Court of First Instance decided, on those grounds, to annul 'the decision of the Selection Board in Competition COM/A/482 concerning the marking of the second written test, and the subsequent acts in the competition procedure' and ordered the Commission to pay the costs.

II — Subject-matter and relief sought in the appeal

1. By a document lodged at the Registry of the Court of Justice on 7 August 1990, the Commission appealed against the abovementioned judgment of the Court of First Instance, which had been notified to it on 13 July 1990, on the ground that it was delivered in breach of Community law.

By order of 15 November 1990, the Court of Justice granted leave to John Allen and others, Georges-Marc André and others, Purificación Alberdi Anchia and others, Iñigo Acasibar Zubizarreta and others, Patric Buggenhout and others and the Fédération de la Fonction Publique Européenne to intervene in support of the forms of order sought by the Commission.

The Commission claims that the Court of Justice should:

— annul the judgment delivered by the Court of First Instance in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395 in so far as it annulled all the acts in the procedure in competition COM/A/482 as from correction of the second written text and did not limit the consequences of that annulment to reinstatement of the rights of the original applicants, namely A. Albani, A. Caferri, C. Caruso and B. Buffaria, or:

  — made it necessary for the tests to be reopened for candidates other than the applicants as well;

  — entailed the obligation for the Commission to cancel the list of suitable candidates and decide to cancel the appointments made;

and to draw the appropriate consequences in law from that annulment;

— make an order as to costs in accordance with the relevant provisions.

Messrs Albani, Caferri, Caruso and Buffaria contend that the Court of Justice should:

— dismiss the appeal brought on 7 August 1990 by the Commission of the European Communities against the judgment delivered by the Court of First Instance in Case T-35/89;

— and consequently order the appellant to pays the costs of the proceedings at both instances in their entirety.

2. By a separate document lodged at the Registry of the Court of Justice on 9 August 1990, the Commission also applied for interim measures suspending enforcement of the contested judgment in so far as, in its view, it obliged it to cancel the appointments of 38 officials following the annulment of the second written test in competition COM/A/482.

By order of 27 November 1990, the President of the Court of Justice dismissed that application on the ground that neither the proceedings before the Court of First Instance nor the judgment of the Court of First Instance were concerned with the appointments already made following the competition at issue and that the Commission was not therefore under any obligation, pending the decision of Court of Justice on the appeal, to cancel the appointments made before the date of the judgment of the Court of First Instance (Case C-242/90 P-R *Commission* v *Albani and Others* [1990] ECR I-4329, paragraphs 21 and 24).

3. By applications lodged at the Registry of the Court of First Instance on 4 and 8 October 1990, the interveners Acasibar Zubizarreta and Others and Buggenhout and Others submitted applications initiating third-party proceedings against the judgment of the Court of First Instance of 12 July 1990 under Article 39 of the Protocol on the Statute of the Court of Justice of the EEC and Article 97(1) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance.

By letter of 3 December 1990, the Commission requested that the Court of Justice, pursuant to the third paragraph of Article 47 of the Protocol on the Statute of the Court of Justice of the EEC, suspend the appeal proceedings until judgment was delivered by the Court of First Instance in the third-party proceedings.

By order of 6 February 1991, the Court of Justice granted that request in the interests of sound administration of justice.

By orders of 26 March 1992, the Court of First Instance dismissed the applications initiating third-party proceedings as manifestly inadmissible on the ground, among others, that those making the applications had failed to intervene in the main proceedings following the notice published on 18 June 1988 (OJ 1988 C 159, p. 5) setting out the forms of order sought and summarizing the pleas in law in Case T-35/89 TO1 *Zubizarreta and Others* v *Albani and Others* [1992] ECR II-1599.

4. On 26 July 1991 the Commission caused to be published in the *Official Journal* a notice as to the 'reopening of competition COM/A/482' for those candidates who had passed the first written test and had not yet been appointed officials (OJ 1991 C 197, p. 14).

III — Summary of the parties' pleas in law and arguments

1. The *Commission* states at the outset that the contested judgment is not under appeal because it annuls the marking of the second written test in competition COM/A/482. For the Commission that judgment is *res judicata*. The judgment is submitted to the Court of Justice for review in so far as it does not limit the consequences of such annulment to reinstatement of the rights of the original applicants but must be read as extending them to the acts of the subsequent procedure, in particular by rendering invalid the list of suitable candidates and the appointments made from that list.

In support of its appeal, the Commission puts forward three pleas in law, alleging breach of the principle of legal certainty and the principle of proportionality— to be balanced against the requirements of legality — and breach of the general obligation to state the grounds on which judgments are based.

(a) Breach of the principle of legal certainty

(1) The Commission states, first, that the principle of legal certainty is an integral part of the Community legal order. The second paragraph of Article 174 of the EEC Treaty expresses that principle in that, in the specific case of annulment of a regulation, the Community judicature shall, if it considers this necessary, state which of the effects of the regulation are to be considered as definitive. A balance must be struck between the requirements of legality and the imperatives of legal certainty.

In that connection, the Commission emphasizes that it is settled case-law that, where an open competition is defective, only the decision of the selection board refusing an applicant admission to a particular test or to enter him on a list of suitable candidates is to be annulled, without it being 'necessary to call in question the entire results of the competition or to annul the appointments which have been made as a result thereof' (Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, paragraph 33; to the same effect, see Case 31/75 *Costacurta* v *Commission* [1975] ECR 1563, Joined Cases 4/78, 19/78 and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403, Case 255/78 *Anselme née Heirweigh* v *Commission* [1979] ECR 2323, Case 67/81 *Ruske* v *Commission* [1982] ECR 661, Case 16/81 *Alaimo* v *Commission* [1982] ECR 1559, and Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, and the Opinion of Advocate General Rozès in that case).

That case-law is justified, first, by the 'serious effects' which might arise from an annulling judgment applicable *erga omnes* and retroactively and secondly by the adverse effect on 'legal relationships established in good faith' (Case 61/89 *Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205, paragraph 17, and Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze dello Stato* v *Salumi* [1980] ECR 1237, paragraph 10; see also Case 24/86 *Blaizot* [1988] ECR 379, paragraph 28).

As regards good faith on the part of the successful candidates and in particular the officials appointed, the Commission observes that nothing in the proceedings commenced before the Court of First Instance could undermine the strong views of the persons concerned, who were each certain that they had complied with the limit of 800 words.

As regards the actual extent of the serious effects which might follow from implementation of the contested judgment, it is clear, in the Commission's view, that the void left by the departure of 38 officials assigned to highly specialized posts would jeopardize the continuity of the public service in a number of areas in which, in particular, the Council has entrusted management responsibilities to the Commission. If recourse were not possible to an available list of suitable candidates — also annulled in this case by the Court of First Instance — it would take months or even years to fill the posts in question. To that problem must be added the gravity of the harm suffered by the officials appointed following the competition and in particular the non-material damage that would be suffered by those on the list of suitable candidates.

(2) In its observations on the statements lodged by the interveners in support of the appeal, the Commission refers to the abovementioned order of the President of the Court of Justice of 27 November 1990 in which the latter expressed the view that the Commission was under no obligation, pending the decision on the appeal, to cancel the appointments made before the date of the contested judgment since 'neither the proceedings before the Court of First Instance nor the operative part of its judgment were or are directed at appointments which have already been made as a result of the competition in dispute'. The Commission wonders whether, with respect to the effects of the decision of the Court of First Instance, the appointments, which can be legally dissociated from the competition procedure, must in any event be regarded as definitive as a result of their not having been covered by Case T-35/89 or as having been the subject of a separate action brought within the prescribed period. In the event of the Court of Justice considering that it is necessary, with regard to the effects of a judgment finding that an open competition was conducted improperly, to expound a new approach, departing from its earlier case-law (*Detti*, cited above) so as to leave unaffected the appointments (which were not directly contested) but not the list of suitable candidates, the Commission draws the attention of the Court to the consequences of such an approach from the standpoint of the principle of non-discrimination, to the detriment of those who passed the competition but were not appointed.

As regard the legal position of the latter candidates, the Commission points out that inclusion on the list of suitable candidates, although not conferring any right to be appointed an official, is a preliminary to appointment, being an essential precondition. The annulment of that list thus definitively affects any chance which the successful candidates might have had of being appointed.

According to the Commission, the Court of First Instance did not, as it should, weigh the personal interest of the four original applicants in seeking annulment of the entire procedure against the legitimate expectations of the successful candidates.

As far as the personal interest of the four original applicants is concerned, the Commission observes that the percentage of vacant posts (as a result of transfer, reassignment, ordinary cessation of service, and so

on) within DG VI, the Agriculture Directorate, as compared with the total number of staff in category A (some 350 posts) is permanently between 6 and 9%. Thus, at present the number of vacant posts to which the candidates who pass a competition like the one at issue could be appointed is 27 (disregarding the posts left vacant as a result of the 'redeployment' policy, which are essentially filled by internal reassignments). Because of this quasi-permanent stock of posts, the lists of suitable candidates in open competitions (which are not yet held with sufficient frequency) are extensively used. Consequently, had it been necessary to reorganize the disputed tests solely for the four applicants, there is nothing to say that their possible subsequent inclusion on the present list, which would of course have been extended by the Commission, would have been to no avail. Moreover, the Commission had stopped recruiting from the present list until completion of the tests organized for the four applicants in order to preserve equality of opportunity between the suitable candidates.

As far as the legitimate expectations of the suitable candidates is concerned, the Commission states that proof of the central issue in the proceedings before the Court of First Instance, establishing beyond dispute that the fault committed by the selection board could not vitiate the results of the competition — that is to say proof of the fact that only five candidates had exceeded the limit and that they did not appear on the list of suitable candidates — could not be produced on conclusion of the procedure owing to the fact that the tests were destroyed in error. The judgment delivered in favour of the four unfortunate candidates who had a personal interest in calling for their tests to be marked, could not however detract from the legitimate interest of the suitable candidates in having the list of suitable candidates maintained since they were each convinced that they had kept within the limit of 800 words.

It is common ground that the material impossibility, criticized by the Court of First Instance, of proving that the results of the competition were not distorted by the selection board's decision does not in itself prove that the results of the competition were in fact distorted. In the Commission's opinion, it would be contrary to the principle of the protection of legitimate expectations — which is an aspect of the principle of legal certainty — to make suitable candidates who had acted in good faith and had been able to demonstrate their considerable qualifications and professional worth, bear the burden of proving that they in fact observed the limit of 800 words, having regard to the fact that the personal interests of the four original applicants would be substantially protected by the organization of fresh tests specially for them.

(b) Breach of the principle of proportionality

According to the Commission, the same considerations are conducive to the view that there was a breach of the principle of proportionality.

The Commission observes in that connection that the Court of First Instance annulled the decision of the selection board concerning the marking of the second written test because it was 'unable to determine whether the principle that candidates must be treated equally was observed' in the marking of that test or 'whether that irregularity may have distorted the final outcome of the competition'. In other words, it is an irregularity, namely the fact that the selection board, after the conduct of the second written test but before it was marked, gave instructions not to mark papers that were clearly much too long, and thereby departed from the limits imposed, which has not been shown to have

actually distorted the final outcome of the competition, which justified the annulment by the Court of First Instance of the results of the competition and the serious consequences therefore for the suitable candidates.

However, in the Commission's view, the Court of First Instance could have reasonably deduced from the statements of the witnesses, particularly Mr Benda and Mr Kalbe, that all, or nearly all, the suitable candidates had kept within the number of words imposed. In those circumstances, the principle of proportionality justified annulment only of the decisions of the selection board concerning marking of the papers of the four original applicants in the second written test. The consequential annulment of all the subsequent acts could only have been justified if it had been positively established, by any legal means, that the suitable candidates had likewise not kept within the limit of the maximum number of words.

In conclusion, the Commission considers that the contested judgment lacks proportionality in that it did not consider it sufficient, having regard to all the legitimate interests involved, to reinstate the rights of the four original applicants as a necessary and sufficient consequence of that annulment.

(c) Breach of the principle that judgment must indicate the grounds on which they are based

The Commission considers, finally, that by annulling the results of the competition and the appointments made following it without giving the reasons for the change in direction of the case-law resulting from its judgment, having regard in particular to the principles of legal certainty and proportionality, the Court of First Instance failed in its obligation to indicate the grounds for its judgments.

2. The interveners, *Allen and Others* and *Alberdi Anchia and Others*, all of whom are officials appointed following their success in competition COM/A/482, contend primarily that the contested judgment does not entail the annulment of their appointments. In the alternative, they consider that the general principles of non-discrimination, legal certainty, protection of legitimate expectations and proportionality preclude any effect on their appointments.

Mr Allen and Others state in particular that the four original applicants did not seek annulment of the appointments announced by the appointing authority and that the Court of First Instance annulled only 'the subsequent acts *in* the competition procedure', not the acts subsequent *to* the competition procedure, namely the appointments. Appointments are independent and separable from the competition procedure. According to Mr Allen and Others that independent nature is clear from the Staff Regulations themselves since the competition procedure and the making of appointments are governed by different provisions: the latter is governed by provisions in the actual body of the main text of the Staff Regulations (Title III, Article 27 et seq.), whilst the former is governed by an annex to the Staff Regulations (Annex III).

They contend in that connection that the list of suitable candidates does not confer on the successful candidates any right to be appointed. The fact of having passed a competition does not imply that an appointment will follow. In their view, such appointments create their own legal effects.

The acts of the competition, on the one hand, and the appointments, on the other, are, according to Mr Allen and Others, distinct acts, taken by different authorities in each case (the selection board in the case of the competition procedure and the appointing authority in the case of appointments).

Accordingly, the annulment of an act of the competition does not entail annulment of appointments. The latter must be the subject of a special procedure, which is inappropriate in this case since the original applicants brought their action only against the decisions adopted by the selection board for competition COM/A/482 (see paragraph 12 of the judgment of the Court of First Instance) and not against those of the appointing authority.

Mrs Alberdi Anchia and Others state in particular that they support the Commission in its pleas concerning breach of the principles of legal certainty, protection of legitimate expectations and proportionality. They add that, since the appeal was brought, they have been entered on promotion lists. The annulment of their appointments would therefore infringe the principles of appointment for life and protection of the career rights of officials.

In connection with their contention that the general principle of non-discrimination has been contravened, Mrs Alberdi Anchia and Others emphasize that by the notice reopening competition COM/A/482 the Commission informed the candidates participating in the competition who had passed the first written test the they would be called on to take part in the resumed second written test. By not making any change concerning the successful candidates in the competition who have already been appointed, the notice reopening the competition treats the latter differently from those who passed the first written test and the successful candidates not yet appointed to posts. That difference of treatment can be justified only if the appointments are regarded as definitive and no longer open to challenge.

3. The interveners *Acasibar Zubizarreta and Others*, successful candidates in competition COM/A/482 who, when the contested judgment was delivered, had not yet been appointed, observe, as a preliminary point, that that judgment should not be interpreted as establishing a distinction between the candidates appointed and those who were not yet appointed (but in many cases were on the point of being appointed). Either the list of suitable candidates is void, so that the appointments made on the basis of that list are necessarily so as well, by reason of the retroactive effect of the annulment (see *inter alia* Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraphs 29 and 30) or else the Court of First Instance limited the annulment so as not to invalidate the list of suitable candidates, in which case the successful candidates in the competition can all be appointed. The latter hypothesis is all the more plausible since the possibility of the annulling judgment being made effective *erga omnes* — contrary to the settled case-law of the Court of Justice — was not even discussed before the Court of First Instance.

In the event that the contested judgment was to be construed as drawing a distinction between the successful candidates appointed and those not yet appointed, Mr Acasibar Zubizarreta and Others support the forms of order sought by the Commission and allege in particular breach by the said judgment of the general principles of law concerning legal certainty, proportionality, the requirement of stating the grounds of judgments and equality of treatment, and also Articles 174 and 176 of the EEC Treaty.

As regards breach of the principle of legal certainty, they emphasize in particular that according to settled case-law of the Court of Justice candidates who have failed a competition do not in any circumstances have a sufficient personal interest in calling for annulment of the competition in its entirety. Their main interest consists in seeking the possibility of re-sitting the competition themselves. That interest must be balanced against the legitimate interests of the successful candidates in the competition, including the legitimate expectations and good faith of the persons concerned. The Commission had already taken steps with a view to appointing some of the successful candidates in that competition. Those steps were in some cases at an advanced stage (posts officially offered and accepted, medical examinations completed, and so on). Some had even been prompted to make arrangements to leave their previous employment. By annulling the marking of the second written test in competition COM/A/482 in its entirety, and the subsequent acts in the procedure, the contested judgment thus infringed the principle of legal certainty.

Mr Acasibar Zubizarreta and Others consider, finally, that the annulment of the list of suitable candidates but not of the appointments made on the basis of that list (assuming that the Court of First Instance intended drawing such a distinction) would infringe Articles 174 and 176 of the EEC Treaty since those provisions require the institution not only no longer to apply the measure itself but also to annul all circumstances for the implementation of that act (*Asteris*, cited above).

4. The *Fédération de la Fonction Publique Européenne (FFPE)* supports the forms of order sought by the Commission and draws attention in particular to the principles of appointment for life and protection of career rights. In this case, those principles would be contravened if the appointments made before 12 July 1990, the date of the judgment of the Court of First Instance, were now put in question.

5. *Mr Albani and Others* and *Union Syndicale — Bruxelles* observe, first, that annulment of the marking of the second written test in the competition automatically involves annulment of all 'consequential acts' in so far as they derive exclusively from the annulled act, which provides their only basis and *raison d'être*. Since the Commission has not attacked the decision concerning marking of the second written test in the competition, it has no grounds for attacking the 'consequential acts' following that decision. The appeal should therefore be declared inadmissible or at least unfounded.

In their observations on the statements in intervention supporting the forms of ought sought in the appeal, Mr Albani and Others and Union Syndicale also state that since the list of suitable candidates drawn up by the selection board in competition COM/A/482 expired on 31 December 1991, the interveners Acasibar Zubizarreta and Others have no interest in seeking annulment for the judgment of the Court of First Instance by reason, in particular, of their agreement without reservation to participate in the resumed competition.

With respect to the plea alleging breach of the principle of legal certainty, Mr Albani and Others and Union Syndicale observe that the Commission is wrong to invoke that principle in an attempt to evade the consequences of the successive faults of which it is

guilty. To accept the Commission's view would be tantamount to authorizing an institution deliberately to adopt unlawful decisions in the certain belief that those decisions would subsequently be rendered lawful by the Court in view of the adverse repercussions which the annulment of such illegal decisions might have for the sound organization of its departments.

Mr Albani and Others and Union Syndicale state that, by contrast with the position in the judgments cited by the interveners, the rights of the original applicants could not be adequately protected by merely reopening the competition specifically for them. Indeed, as was pointed out by several witnesses heard by the Court of First Instance, the requirement of not exceeding the prescribed maximum number of words was regarded by the selection board as an essential condition. It thus pointed out at the hearing that the members of the selection board considered that, if a candidate was incapable of complying with an instruction given for the tests in a competition, he would likewise be incapable of complying with instructions or directions from his superiors. In those circumstances, the plea as to breach of the principle of legal certainty should be rejected.

As regards the Commission's reliance on the principle of proportionality, Mr Albani and Others and Union Syndicale state that mere annulment of the marking of the tests of the original applicants would place the selection board under an obligation to arrange for special tests for them and to enter them, if successful, on the list of suitable candidates. The applicants would thus be competing with candidates included on that list who should have been eliminated when the second written test was marked. In view of the number of candidates appearing on that list who have already been or are about to be appointed, the Court of First Instance had no alternative but to find that the rights of the original applicants would not be adequately protected merely by annulment of the decisions concerning them.

Mr Albani and Others and Union Syndicale also contend that the interveners are not entitled, by reason of the successive faults committed by the Commission in this case, to produce evidence as to the propriety of their second written test and therefore of their right to be included on the list of suitable candidates. It follows that they have not provided evidence of the contravention of that right and, therefore, breach by the Court of First Instance of the principle of proportionality.

Finally, Mr Albani and Others and Union Syndicale observe that the pleas which the interveners Acasibar Zubizarreta and Others purport to base on the principle of non-discrimination and on Articles 174 and 176 of the EEC Treaty are irrelevant since the Commission did not consider it necessary to extend the validity of the list of suitable candidates drawn up by the selection board for the competition. In their view, even if the judgment of the Court of First Instance had not had the effect of annulling the list of suitable candidates, the Commission could still not lawfully make any appointment on the basis of an expired list.

M. Zuleeg
Judge-Rapporteur