should not be able to rely on the right to bring third-party proceedings. Since publication in the Official Journal of the subject-matter of the original application and the form of order sought therein is intended to enable third parties to inform themselves about actions pending before the Community courts, it is by reference to that publication that a third party must assess whether it has an interest in intervening in the original proceedings.

If it is clear from that notice that the subject-matter of and form of order sought in the original proceedings disclosed that the third party had an interest in intervening, that party must show that it was prevented, for valid reasons, from bringing an application to intervene. Its subjective assessment as to the outcome of the proceedings does not constitute a valid reason justifying the third party's non-participation in the original proceedings. Accordingly, a third party may not argue that, given the information as to fact and law known at the time when the action was started, a reasonable person would have been entitled to think that the judgment bringing the proceedings to an end would not prejudice his rights.

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
26 March 1992 *

In Case T-35/89 TO1,

Inigo Ascasibar Zubizarreta and Others, represented by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

third-party applicants,

v

Alessandro Albani and Others, all resident in Brussels, represented by Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson, S.àr. l., 1 Rue Glesener,

applicants in the original proceedings,

* Language of the case: French.

and

European Public Service Union, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson S.àr. l., 1 Rue Glesener,

intervener in the original proceedings,

and

Commission of the European Communities, represented by Gianluigi Valsesia, Principal Legal Adviser, and Sean van Raepenbusch, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendant in the original proceedings,

APPLICATION to set aside the judgment delivered by the Court of First Instance (Third Chamber) on 12 July 1990 in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Third Chamber),

composed of: B. Vesterdorf, President, A. Saggio and C. Yeraris, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and third-party proceedings

1 By application lodged at the Court Registry on 4 October 1990, Inigo Ascasibar Zubizarreta and 15 other persons, all successful candidates in Open Competition COM/A/482, the notice of which had been published on 12 February 1987 (Official Journal 1987 C 34, p. 15), instituted, 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, applicable *mutatis mutandis* to proceedings before the Court of First Instance, third-party proceedings to contest 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.

2 The contested judgment annulled the decision of the Selection Board in that competition concerning the marking of the second written test and the subsequent acts in the competition procedure, on the ground that the Selection Board failed to observe the limit of 800 words imposed on the candidates admitted to that test, thereby breaching the principle of equal treatment.

3 On 7 August 1990 the Commission brought an appeal against that judgment before the Court of Justice, seeking to have the contested judgment quashed in part. More specifically, the Commission, while accepting that the annulment of the decision concerning the marking of the second written test is *res judicata*, requests the Court of Justice to quash the judgment of the Court of First Instance in so far as it annuls all the subsequent acts in the competition procedure and does not restrict the effects of that annulment to re-establishing the rights of the four applicants in the original proceedings.

4 By a separate document, the Commission also applied for interim measures to suspend the operation of the contested judgment in so far as, in its view, the judgment required it, as a consequence of the annulment of the second written test of that competition, to revoke the appointments of 38 officials which had been made following Competition COM/A/482.

5 By order of 15 November 1990, the Court of Justice allowed the application by the third parties to intervene in the proceedings on appeal in support of the submissions of the Commission.

6 By order of 27 November 1990, the President of the Court of Justice dismissed the application for interim measures which had been brought in the proceedings on appeal, on the ground that neither the proceedings before the Court of First Instance nor the operative part of that court's judgment affected appointments which had already been made as a result of the competition in question and that, accordingly, the Commission was not required, pending the decision of the Court of Justice on the appeal, to revoke the appointments made before the date of the judgment of the Court of First Instance.

7 By letter of 3 December 1990, the Commission requested the Court, pursuant to the third paragraph of Article 47 of the Protocol on the Statute of the Court of Justice of the EEC, to stay the proceedings on appeal until the Court of First Instance had given judgment in the third-party proceedings.

8 By judgment of 6 February 1991, the Court of Justice allowed the application to stay the proceedings on appeal, in the interest of the efficient administration of justice, until the Court of First Instance had given judgment.

9 The written procedure followed the normal course. The Court of First Instance considers that, under Articles 111 and 113 of its Rules of Procedure, it is appropriate to rule on the admissibility of these third-party proceedings without opening the oral procedure.

Forms of order sought

10 The third parties claim that the Court should:

(i) vary the disputed judgment so that it no longer annuls the marking of the second written test in the competition in its entirety and the subsequent acts in

the competition procedure, but only the decision of the Selection Board not to admit the four applicants in the original proceedings to the oral tests in the competition;

(ii) order the other side to pay the costs.

11 The Commission contends that the Court should:

(i) hold the third-party proceedings admissible, and accordingly

(ii) vary the contested judgment so that it no longer annuls the marking of the second written test in the competition in its entirety and the subsequent acts in the competition procedure, but only the decision of the Selection Board not to admit the four applicants in the original proceedings to the oral tests in the competition;

(iii) make an appropriate order as to costs.

12 The applicants in the original proceedings and the European Public Service Union, Brussels, intervener in support of their submissions in the original proceedings, contend that the Court should:

(i) dismiss the application originating third-party proceedings as inadmissible, or in the alternative as unfounded;

(ii) order the third parties to pay the costs.

Admissibility

13 The third parties, supported by the Commission, the defendant in the original proceedings, claim that their application for initiating third-party proceedings is admissible because the conditions laid down by Article 97(1) of the Rules of Procedure of the Court of Justice are satisfied.

14 The applicants in the original proceedings and the European Public Service Union, intervener in support of their submissions in the original proceedings, claim that the application is not admissible on the ground that the third parties satisfy neither the condition that the contested judgment be prejudicial to their rights nor the condition requiring the existence of valid reasons preventing them from intervening in the original proceedings.

Non-participation in the original proceedings (as third parties)

(a) Arguments of the parties

15 The third parties claim that they were unable to intervene in the original proceedings because there was nothing apparent from the notice published in the Official Journal concerning the lodging of the application or from what they could have known of the written procedure which provided reasonable cause for their intervention.

16 First, they contend that it follows from a reading of the notice published in the Official Journal (Official Journal 1988 C 159, p. 5) that the applicants were requesting the Court to 'annul: the entire procedure for correcting the written tests of the competition or at least annul the decision of the Selection Board not to admit the applicants to the oral tests of the competition'. According to that notice, the applicants' 'contentions and main arguments adduced in support' alleged disregard of the criteria laid down for the candidates by the Selection Board (a limit of 800 words). The notice continued: 'After deciding to give the applicants a limited time, and to restrict them to a maximum number of words which they were required to count themselves, the Selection Board gave different instructions to the examiners'. That being the case, the third parties, who assert that they strictly respected the maximum word-limit laid down in the competition, consider that they could legitimately have expected that any judgment granting the applicants'

claim would negatively affect only those successful candidates who had not respected the criteria laid down.

17 Secondly, they claim that their interest in intervening in the proceedings became apparent only at the point in the procedure before the Court of First Instance when they learnt that the Commission had in the meantime destroyed the written test papers, so that it could no longer be established which candidates had exceeded the set word-limit. It is precisely the fact that the Commission had lost the test papers which had a decisive influence on the Court's decision and led it to give a judgment having an import greater than that which the applicants' original claims, as published in the Official Journal, required.

18 Two other factors reinforced the third parties' conviction that they had no interest in intervening. First, both the Court of Justice and the Court of First Instance have consistently held that, in cases concerning open competitions, annulment must be restricted to what is absolutely necessary, namely to annulling the decision of the Selection Board only in relation to the applicants; secondly, the fact that the President of the Second Chamber of the Court of Justice had, by order of 21 June 1988, dismissed the application lodged by the four applicants in the original proceedings for a suspension of the further stages of Competition COM/A/482 and, in particular, of the drawing up or publication of the list of suitable candidates resulting from that competition.

19 In their reply to the Commission's observations, the third parties put forward their arguments differently. They claim that case-law has still not definitively established the conditions for third-party proceedings to be admissible. The only precedents are two judgments of the Court of Justice dating from 1962 given in Joined Cases 42 and 49/59 *Breedband NV* v *Aciéries du Temple and Others* (Third-party proceedings) [1962] ECR 145 and Joined Cases 9 and 12/60 *Belgium* v *Vloebergbs and High Authority* (Third-party proceedings) [1962] ECR 171. In *Breedband*, the third-party proceedings were held inadmissible on a number of grounds. It does not follow at all from that judgment that publication in the Official Journal is in itself decisive for determining whether third-party proceedings are admissible. In

Vloeberghs, on the other hand, the Court of Justice accepted that the condition that the third party should have been unable to take part in the original case was satisfied since the publication in the Official Journal did not suggest that the third party had an interest in intervening. However, according to the third parties in these proceedings, it cannot be deduced *a contrario* from that judgment that publication in the Official Journal in itself enables it to be determined whether the third party was or was not able to take part in the original case.

20 The third parties consider that it is also unrealistic to expect any person who may be affected by an action to read the C Series of the Official Journal every day in order to find out whether such an action has been started. On the other hand, a party would admittedly have been able to intervene under the Rules of Procedure if the application had been 'officially notified to' or 'served on' him, which was not the case here. Article 39 of the Protocol on the Statute of the Court of Justice of the EEC is, moreover, less strict than its Rules of Procedure, in so far as it provides that third-party proceedings may be brought by any persons 'to contest a judgment rendered without their being heard'. It is accordingly not a question of demonstrating that the third party 'was unable to take part in the original case'.

21 The third parties accordingly conclude that determination of the question whether it is possible in theory for a third party to intervene in the original proceedings cannot be based solely on publication in the C Series of the Official Journal of the notice concerning the lodging of the application instituting those proceedings. Besides, they consider that they have sufficiently demonstrated that the notice did not indicate in any event in what respect they had an interest in intervening. Finally, they state that this argument does not mean that they admit that they were aware that the notice had appeared in the Official Journal but simply that even if they had been aware of it they would have seen no reason to intervene.

22 The Commission takes the same position and adopts the same arguments as the third parties on this issue. It points out that the judgment of the Court of First Instance in question, of 12 July 1990 in Case T-35/90, broke new ground in departing from settled case-law on the effects arising from the annulment of a competition procedure, although this possibility was not the subject of argument before the Court, either during the written procedure or during the oral procedure. The Commission accordingly raises the question whether the fact that it was impossible for the defendant in the original proceedings to put forward its

views on that change in the case-law and also the failure to make any attempt to ascertain whether the persons on the list of suitable candidates had observed the limit of 800 words amount to a breach of the principle of *audi alteram partem*. As to the burden of proof regarding that last point, the Commission points out, in response to the contentions of the applicants in the original proceedings, that they have never provided any proof that even one successful candidate exceeded the limit of 800 words.

23 The applicants in the original proceedings and the European Public Service Union, Brussels, intervener in support of their submissions in the original proceedings, first make the point that third-party proceedings are exceptional. Contrary to what the third parties say, the conditions for the admissibility of third-party proceedings are clearly laid down in case-law. The Court of Justice reiterated them in particular in its order on third-party proceedings in Case 292/84 TO *Bolognese* v *Scharf and Commission* [1987] ECR 3563. These parties add that, in disregard of the wording of Article 97 of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* in this case, all the arguments put forward by the third parties seek to substantiate the reasons for which they considered that they had no interest in intervening in the original proceedings. However, they have put forward no reasons to show how they were unable to participate in those proceedings.

24 Secondly, the applicants and the intervener in the original proceedings claim that it is for the third parties to produce evidence showing why it was impossible for them to participate in the original proceedings. The third parties admit that they were not unaware of the fact that the application in the original proceedings sought the annulment of 'the marking of the written tests in its entirety or, in the alternative, of the decision of the Selection Board not to admit them to the oral test' (application originating third-party proceedings, paragraph 8, p. 6). It accordingly appears that, being aware of the form of order sought in the action for annulment brought by the applicants in the original proceedings, they knew perfectly well the consequences which would follow if the Court of First Instance granted that order and that they declined to intervene in the original proceedings with full knowledge of all the implications.

25 Thirdly, the applicants and the intervener in the original proceedings rely on the fact that the third parties admit having followed the progress of the proceedings

for interim measures brought by the applicants in the original proceedings. The third parties would have known that the Commission had refused voluntarily to produce copies of the second written test and to allow the interveners' counsel to verify its assertion that only five candidates had exceeded the limits imposed in that test. Moreover, that assertion, which was put forward only during the oral procedure concerning the application for interim measures, provoked the criticism which the President of the Court directed at the Commission in the order for interim relief. The thirds parties cannot therefore maintain that the need for the Commission to produce proof of its assertions did not become apparent until the oral procedure on the substance of the case.

26 Finally, the applicants in the original proceedings state that the third parties took no step vis-à-vis the Commission to ensure that the copies of the second written test in the competition would be retained and that the Commission — and thus they themselves as well — could accordingly demonstrate that the main defence plea was well founded. In support of their argument, they rely on a higher principle of law that the burden of proving an assertion falls on the party putting it forward. The third parties merely assert that they respected the limits imposed during the second written test, without producing proof of their assertion.

(b) Legal assessment

27 It should be noted that Article 39 of the Protocol on the Statute of the Court of Justice of the EEC, applicable under Article 46 of that Statute to procedure before the Court of First Instance, provides that 'Member States, institutions of the Community and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights'. An analogous provision is contained in the Statutes of the Courts of Justice of the ECSC (Article 36) and of the EAEC (Article 40).

28 In determining the cases in which and conditions upon which third-party proceedings may be brought, the Rules of Procedure of the Court of Justice, in Article 97(1) of Chapter 6, entitled 'Exceptional review procedures', provide, as conditions of admissibility, that the application for initiating third-party proceedings must: '... (b) state how [the contested] judgment is prejudicial to the

rights of the third party; (c) indicate the reasons for which the third party was unable to take part in the original case . . . '.

29 Those Rules also provide, in Article 16(6), that 'Notice shall be given in the *Official Journal of the European Communities* of the date of registration of an application initiating proceedings, the names and addresses of the parties, the subject-matter of the proceedings, the form of order sought by the applicant and a summary of the pleas in law and of the main supporting arguments'.

30 Identical provisions are laid down by Articles 123(1) and 24(6) of the Rules of Procedure of the Court of First Instance which came into force on 1 July 1991.

31 It follows from the abovementioned provisions that the Community legislature considered third-party proceedings to be an exceptional review procedure which may be initiated by interested persons who, for valid reasons, were unable to intervene in the original proceedings. The extraordinary, even exceptional, nature of third-party proceedings is justified by the consideration that, in the interests of the efficient administration of justice and certainty in legal relations, it is necessary to prevent so far as possible persons having an interest in the result of proceedings pending before the Court of Justice or the Court of First Instance from asserting that interest after the Community court has delivered its judgment and thus settled the question in dispute (abovementioned judgments of the Court of Justice in Joined Cases 42 and 49/59 *Breedband NV* v *Aciéries du Temple and Others* (Third-party proceedings) [1962] ECR 145 and Joined Cases 9 and 12/60 *Belgium* v *Vloeberghs and High Authority* (Third-party proceedings) [1962] ECR 171; orders of the Court of Justice in three similar matters, Case C-147/86 TO1 *Panhellinia Omospondia Idioktiton Frontistirion Xenon Glosson and Others* v *Greece and Commission* [1989] ECR 4103, at paragraph 15; TO2 *Panhellinios Syndesmos Idioktiton Frontistirion Xenon Glosson and Trechas* v *Greece and Commission* [1989] ECR 4111, at paragraph 15; and TO3 *Panhellinios Syndesmos Idioktiton Idiotikon Technikon Epangelmatikon ke Naftikon Scholikon Monadon* v *Greece and Commission* [1989] ECR 4119, at paragraph 15).

32 Accordingly, any interested person who was in a position to participate in the original proceedings but who failed to intervene should not be able to rely on the right to bring third-party proceedings. Since publication in the Official Journal of the subject-matter of the original application and the form of order sought therein is intended to enable third parties to inform themselves about actions pending before the Community courts, it is by reference to that publication that a third

party must assess whether it has an interest in intervening in the original proceedings (see the judgment in *Breedband*, cited above).

3 If it is clear from that notice that the subject-matter of and form of order sought in the original proceedings disclosed that the third party had an interest in intervening, that party must show that it was prevented, for valid reasons, from bringing an application to intervene. Its subjective assessment as to the outcome of the proceedings does not constitute a valid reason justifying the third party's non-participation in the original proceedings. Accordingly, a third party may not argue that, given the information as to fact and law known at the time when the action was started, a reasonable person would have been entitled to think that the judgment bringing the proceedings to an end would not prejudice his rights.

4 This Court notes that in the present case the third parties do not deny that the notice published on 18 June 1988 in the Official Journal (Official Journal 1988 C 159, p. 5) concerning the action brought on 25 May 1988 by Alessandro Albani and Others against the Commission clearly indicated that in that action the entire marking procedure for the written tests in the competition at issue was being challenged. That notice reproduced the entire order sought by the applicants and the summary of the pleas in law which it contained referred to the alleged fact that the Selection Board, after imposing on the candidates a maximum limit regarding the number of words, gave the markers different instructions and thus disregarded the principles of equality of treatment and the protection of legitimate expectations. The third parties consider, however, that their omission to bring an application to intervene was justified for two reasons. First, they thought that, since they had respected the limit set as to the number of words, there was no risk that their inclusion in the list of successful candidates would be annulled: their interest in intervening only became apparent when the Commission stated, during the oral procedure, that the copies of the written tests had in the meantime been destroyed. Secondly, they thought that their belief that they had no interest in intervening was supported by the established case-law of the Court of Justice, restricting the effects of an annulment of an open competition to the applicants alone.

5 Given all the considerations set forth above, it must be stated that the interest of the third parties, who were successful candidates in the competition in issue, in the outcome of the original proceedings was clear from the actual content of the notice published in the Official Journal. Their arguments cannot put the existence

of that interest in doubt and offer no valid reasons explaining why it was impossible for them to intervene in the original proceedings. Their case is based on their subjective assessment as to the outcome of the proceedings, more specifically as to the possibility of an annulment by the Community court of the inclusion of their names on the list of successful candidates. The fact that the Commission was unable, in the original proceedings, to substantiate its argument that the irregularity which occurred at an intermediate stage in the competition did not distort its final outcome is something which may happen in the course of any action. The same applies to the third parties' assertion that the judgment of the Court of First Instance departs from settled case-law of the Court of Justice. Furthermore, in each case the extent of the effects of annulling an open competition are to be assessed by the Community court in the light of the irregularity found.

36 In their reply to the Commission's observations, the third parties also claim that the publication in the Official Journal of the notice providing information about the action cannot alone determine the admissibility of the third-party proceedings and that notice of the original proceedings should have been served on them in accordance with Article 39 of the Protocol on the Statute of the Court of Justice of the EEC, which provides that third-party proceedings are to be available to all persons 'to contest a judgment rendered without their being heard'.

37 It should be noted that the Court of Justice has already ruled on this point in the context of the application of the ECSC Treaty — which ruling remains wholly valid in the context of the application of the EEC Treaty — to the effect that Article 97(1)(c) of the Rules of Procedure of the Court of Justice are compatible with the principle concerning third-party proceedings contained in the Protocol on the Statute of the Court of Justice, which is implemented by Article 97 (judgment in *Breedband*, cited above). The Rules of Procedure, which provide only for voluntary intervention and not for compulsory intervention (judgment of the Court of Justice in Case 12/69 *Wonnerth* v *Commission* [1969] ECR 577, at paragraph 8), do not require notice of proceedings to be served on any third party who may have an interest, but only a notice to be published in the Official Journal to enable third parties to learn about actions brought before the Community courts. Account must be taken of the specific character of the Community legal order, the rules of which apply to national authorities, to individuals who are

nationals of Member States and to legal persons having their registered office within the Community, and even to economic agents from a third country carrying on business in Community territory.

58 It follows from all the foregoing, without its being necessary to examine the question whether the contested judgment prejudices the rights of the third parties, that the application for initiating third-party proceedings must be dismissed as manifestly inadmissible.

Costs

59 In accordance with the provisions of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, in proceedings relating to the employment of Community officials, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application for initiating third-party proceedings is dismissed as inadmissible;

2. The third parties shall bear their own costs as well as the costs of the applicants in the original proceedings and of the European Public Service Union, Brussels, intervener in the original proceedings. The Commission shall bear its own costs.

Luxembourg, 26 March 1992.

H. Jung
Registrar

B. Vesterdorf
President