the administration has no discretion and is bound to act as it did. In such a case the annulment of the contested decision could only give rise to another decision substantially identical to the decision annulled.

REPORT FOR THE HEARING
delivered in Case 432/85 *

I — Summary of the facts

Since 13 October 1980 Mrs Souna has worked continuously for the Office for Official Publications of the European Communities as a self-employed proof-reader, supplying services on demand, first in Athens and subsequently, from 7 January 1981, in Luxembourg.

On 15 February 1985 the Commission published a notice of Open Competition COM/B/416 (Official Journal 1985, C 43, p. 16), based on tests, to constitute a reserve of administrative assistants (Grade B 5/B 4) in the Office for Official Publications.

The notice of competition stated that candidates must have been born after 15 February 1949 and before 16 February 1967.

As Mrs Souna was born on 1 November 1948, she did not comply with that age-limit.

However, the notice of competition provided for exceptions to the age-limit.

First, the second paragraph of Section III B 1 of the notice of competition stated that the age-limit did not apply to candidates who, between 15 February and 29 March 1985, had been serving continuously as an official or other servant of the European Communities for at least one year.

Secondly, (a), (b) and (c) of the third paragraph of Section III B 1 of the notice of competition provided that the age-limit would be raised by a specified period for candidates who at any time had been out of paid employment in order to look after a young child, candidates who had performed military service, and candidates who had a physical handicap.

Mrs Souna applied for admission to the competition.

On 6 August 1985 the Head of the Recruitment Division informed her that the Selection Board had refused to admit her to the tests on the ground that she did not comply with the age-limit and did not qualify for any of the exemptions provided for for candidates who had been out of paid employment for at least one year in order to look after a young child, candidates who had performed military service and candidates who had a physical handicap.

On 24 August 1985 Mrs Souna asked that that decision should be reconsidered and

* Language of the Case: French.

relied on the exception provided for for candidates who had been serving continuously as an official or other servant of the European Communities for at least one year.

On 29 August 1985 the Head of the Recruitment Division replied that he had submitted her request to the Selection Board, but the Board would not meet again until about the middle of September.

By telegram dated 26 September 1985 the Head of the Recruitment Division informed Mrs Souna that the Selection Board had maintained its decision not to admit her to the written tests on the ground that she was outside the age-limit fixed in the notice of competition.

On 23 December 1985 Mrs Souna brought the present action.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it requested Mrs Souna to produce certain documents. Mrs Souna did so within the period prescribed.

II — Conclusions of the parties

Mrs Souna claims that the Court should:

Declare that the refusal to admit her to Competition COM/B/416 is illegal, and consequently annul it;

Fix *ex aequo et bono* the damage suffered by her, or else fix such damage at one unit of account;

In any event, order the Commission to pay the costs.

The *Commission* claims that the Court should:

Dismiss the application as inadmissible and, in the alternative, as unfounded;

Make an appropriate order as to costs.

III — Submissions and arguments of the parties

Mrs Souna puts forward the following four submissions in support of her application:

(1) Breach of the administration's duty of good faith towards its staff;

(2) Breach of the principle *patere legem quam ipse fecisti*;

(3) Failure to state the reasons for the decision, since a manifestly erroneous statement of reasons is tantamount to giving no reasons at all;

(4) Breach of the principle of non-discrimination.

The *Commission* contends that the application is both inadmissible and unfounded.

A — *Admissibility*

According to the *Commission*, the application is inadmissible because it was lodged more than three months after the decision of 6 August 1985. It contends that the decision of 26 September 1985 merely confirmed the previous decision. Since Mrs Souna was not a servant of the Communities, the two decisions were bound to examine whether she could be admitted to the competition solely on the basis of the exceptions provided for for candidates who had been out of paid employment for at least one year in order to look after a young child, candidates who had performed

military service and candidates who had a physical handicap. Since a decision which merely confirms another decision does not reopen the time-limit for bringing an action, the application is out of time.

Mrs Souna argues that her request of 24 August 1985 that the decision should be reconsidered relied on an exception to the age-limit other than that on which the decision of 6 August 1985 excluding her from the competition was based. Moreover, on 29 August 1985 the Head of the Recruitment Division had informed her that her application would be reconsidered. She was therefore entitled to consider in all good faith that the decision transmitted by the telegram of 26 September 1985 marked the end of a fresh examination of her application. The act adversely affecting her was therefore the decision notified by telegram of 26 September 1985 and the application lodged on 23 December 1985 was within the prescribed period.

B — *The substance*

1. *Breach of the administration's duty of good faith towards its staff*

According to Mrs Souna, the exception to the age-limit in favour of temporary and auxiliary staff who had worked for the European Communities for at least one year is intended to compensate for the inconveniences connected with the precariousness of their position. The principle that the administration owes a duty of good faith towards its staff requires that that exception should be extended to self-employed persons supplying services on demand.

The *Commission* makes no separate reply to this submission.

2. *Breach of the principle* patere legem quam ipse fecisti

According to Mrs Souna, the notice of competition stated that the exception to the age-limit applied to candidates who had been serving continuously as 'officials or servants' of the European Communities for at least one year. The term 'servant' referred to anyone who, like Mrs Souna, was in the service of the Communities. The Commission ought therefore to have admitted her to the competition.

The *Commission* replies that the text of the notice of competition, which does not exist in French, refers in the Greek, German and English language versions not to 'servants' but to 'other servants'. That expression denotes 'other servants' as the term is used in the Conditions of Employment of Other Servants of the Communities, which necessarily excludes self-employed persons supplying services on demand.

3. *Breach of the obligation to state the reasons for the decision, since a manifestly erroneous statement of reasons is tantamount to giving no reasons at all*

Mrs Souna complains that the Commission did not give any reason for the decision notified by telegram of 26 August 1985 and in particular did not reply to the arguments set out in her request of 24 August 1985 that it should reconsider its decision. If it is necessary to refer to the statement of reasons contained in the decision of 6 August 1985 refusing her application, the statement of reasons is erroneous since it is based on the erroneous idea that Mrs Souna is not a servant of the European Communities.

The *Commission* confines itself to stating that the Selection Board rightly refused to admit Mrs Souna to the competition on the ground that she was outside the age-limit fixed in the notice of competition and could not benefit from the exemption laid down for candidates who had been serving continuously as officials or other servants of the European Communities for at least one year.

4. Breach of the principle of non-discrimination

According *to Mrs Souna,* the fact that self-employed proof-readers, who work under the same conditions as proof-readers classified as 'other servants', do not enjoy the same advantages as the latter constitutes discrimination. The Commission should therefore allow self-employed candidates to qualify for the exemption from the age-limit. She argues that the European Parliament has for some years treated self-employed persons who apply for competitions in the same way as members of the auxiliary staff. She herself was admitted to Competition PE/28/A of the European Parliament by way of exemption from the prescribed age-limit, because of her work at the Office for Official Publications of the European Communities.

According to the *Commission,* there is no discrimination. The legal relationship between the Commission and members of the temporary and auxiliary staff is entirely different from that between the Commission and self-employed proof-readers supplying services on demand. The former are in the position of subordinates governed by a Council regulation, the Conditions of Employment of Other Servants of the Communities. Self-employed proof-readers retain some independence and are governed by the General Regulations governing the services provided by free-lance proof-readers.

Finally, the Commission considers that the Court has indirectly settled the present dispute by holding in its judgments of 11 July 1985 in Case 43/84 *Maag* v *Commission* ECR 2581, and Case 111/84 *Cantisani* v *Commission* [1985] ECR 2671, that free-lance interpreters do not have the status of servants of the Communities within the meaning of the Conditions of Employment of Other Servants of the Communities.

IV — Documents and information supplied by the parties after the hearing

A — *Documents supplied by Mrs Souna at the request of the Court*

The Court requested Mrs Souna to produce any documents capable of establishing the nature and length of the services which she has provided for the Office for Official Publications.

It appears from the documents lodged by Mrs Souna that she worked continuously for the Office for Official Publications in Athens from 20 October 1980 to 4 January 1981, at first part-time and then full-time, on the basis of six successive contracts stating that she was a self-employed proof-reader and that she was responsible for paying social security contributions and taxes relating to the contract. It is also clear from the documents lodged that she worked

full-time for the Office for Official Publications in Luxembourg from 7 January 1981 to 31 March 1985 continuously except during the annual holiday periods, on the basis of 51 successive contracts also stating that she was a self-employed proof-reader.

B — *Answers to questions asked by the Court*

1. How many self-employed proof-readers were working in the Office for Official Publications when the notice of competition was published?

According to the Commission there were 48 self-employed proof-readers.

2. How many self-employed proof-readers applied to take part in the competition?

The Commission replied that 23 did so.

3. How many of them were admitted to the tests? What were the grounds on which the others were refused?

From the Commission's reply it appears that 14 candidates were admitted, 4 were refused because they did not satisfy the age requirement and 5 were refused because they did not have the necessary qualifications.

4. At what stage is the competition procedure now? If the applicant wins her case, can she still be admitted to the tests?

The Commission replied that the competition procedure had been completed but that if Mrs Souna won her case, the Selection Board of the competition would resume its functions in relation to her.

5. Did Mrs Souna in fact satisfy the conditions for the exception to the age-limit (having worked continuously for a certain period)?

According to the Commission Mrs Souna did in fact serve continuously for at least one year in the period specified by the notice of competition. However, she could not benefit from the exception to the age-limit because she did not supply the services as a servant within the meaning of the notice of competition.

6. Do the reasons for which the Staff Regulations permit an exception to the age-limit to be provided for for servants require the scope of that exception to be restricted to servants in the strict sense, thus excluding self-employed candidates?

The Commission replied that the application of the exception to the age-limit to self-employed candidates must be refused in order to avoid a theoretical confusion between the working relationships governed by private law and those governed by public law.

R. Joliet
Judge-Rapporteur