of officials, the Court, in exercising its powers of review, need not consider the experts' opinions produced in order to demonstrate those merits or order such experts' reports.

2. The second paragraph of Article 4 of the Staff Regulations, which concerns the internal publication of vacant posts, is to be read in conjunction with Article 29 (1) of the Staff Regulations, which fixes the order in which the institutions must examine the various possibilities of filling vacant posts, giving priority in this regard to the staff of the Communities over external candidates. Since the purpose of that provision is to protect the interests of the staff of the institution, external candidates may not plead breach of that provision so that a probationary official assigned to a post different from that to which the vacancy notice relates may not claim that he has been assigned unlawfully.

3. It is not an infringement of Article 34 (1) of the Staff Regulations for the appointing authority to decide, with the consent of the probationary official, to extend his probationary period in derogation from that provision, in order to give him a further opportunity to show that he possesses professional abilities which he had not satisfactorily demonstrated during the probationary period. Since it is a decision which gives him an advantage which he freely accepts, he may not plead that the decision should not have been adopted.

REPORT FOR THE HEARING
delivered in Case 75/85 *

I — Facts and written procedure

1. The applicant, V. R., who has a degree in physics from Rome University and who specialized in statistics at Lausanne Polytechnicum, passed the tests in Competitions Nos COM/A/143 and COM/A/313 held by the Commission in order to recruit administrators specializing in statistics and economics. In 1982 the Commission published Vacancy Notice No COM/305/82 for a post in Grade A 7/6 in the special department 'Community loans — Development of instruments' in the Directorate for Economic Structure and Community Intervention within Directorate-General II, Economic and Financial Affairs.

The vacancy notice described the duties involved as follows:

'Administrative and advisary duties, on the basis of general guidelines, in matters of economic analysis, with particular regard to:

* Language of the Case: Italian.

Surveying areas of activity for the Communities' borrowing/loan instruments more particularly covered by the New Community Instrument.'

As regards the qualifications required, the vacancy notice specified:

(1) Knowledge to university level evidenced by a diploma or equivalent professional experience;

(2) Theoretical knowledge of macro-economic analysis;

(3) Familiarity with the problems of business economics;

(4) Knowledge of banking techniques;

(5) Some experience relevant to the duties involved.'

By a decision of 2 August 1983 the Commission appointed Mr R. a probationary official in Grade A 6 in the abovementioned special department (II — B-4) with effect from 15 July 1983. However, the day before that decision was taken, that is to say on 1 August 1983, it decided to transfer the post in question and its occupant from that department to the Medium-term Projections Division (II — C-4) in the Directorate for Macro-Economic Analyses and Policies within the Directorate-General for Economic and Financial Affairs.

The work done by the applicant during the nine-month probationary period prescribed by Article 34 of the Staff Regulations was the subject of an end-of-probation report dated 21 March 1984.

As regards the applicant's ability to carry out the duties corresponding to his post, which was considered insufficient on the whole, the authors of the report recognized that he had good powers of understanding, adaptation and judgment, showed initiative, and had a good sense of organization and responsibility. However, they pointed out that the knowledge which he needed for carrying out his duties was inadequate. On the other hand, as regards his performance, the report favourably assessed the speed with which he carried out his work but stated that the quality of his work was inadequate.

In the explanatory observations it is stated, *inter alia*, that Mr R 'undoubtedly possesses high qualifications in mathematical statistics and in data-analysis techniques. His knowledge of macroeconomics is, however, more limited and his ability to write reports has proved inadequate'.

On the basis of those assessments, it was recommended in the report that the applicant be dismissed at the end of his probationary period.

By letter dated 18 April 1984, the Director of Personnel informed Mr R that in view of his end-of-probation report he had no alternative but to conclude that he should be dismissed. However, in view of Mr R's observations and certain points made by his superior, he was prepared to give him a further opportunity to prove his professional ability by asking him to carry out a 'comparative analysis of a statistical nature' in a three-month period starting on 15 July 1984. The applicant signified his agreement on that letter.

By letter of 25 April 1984 the administration sent the applicant the details of the study

which was entitled 'Monitoring of external trade study data'; its aim was defined as follows:

'Using the VISA (OSCE) and Volimex (DG II) data banks:

(a) Carry out a descriptive analysis of the value data expressed in NACE-CLIO (23 branches), with a geographical breakdown (internal, external, world);

(b) Compare those two sets of data;

(c) Analyse the adjustments made within the Statistical Data Bank;

(d) Try to explain the differences;

(e) Suggest improvements.

Suggestions for using that data in later applications (Statistical Data Bank of the Statistics Office, price indices of DG II) may also be made.'

On 10 July 1984 the study 'tutors' submitted their report on the work done. They stated that:

(i) 'Mr R possesses the theoretical knowledge necessary to carry out this type of study. He has used and understood the information provided to him;

(ii) He has tried to suggest solutions to the problem in question.'

However, the report went on to state that Mr R:

(a) 'lacked the ability to synthesize reflected in his difficulty in distinguishing between the essential and the minor and to spot the most relevant points. In particular, important conclusions are often lost in the body of the report, whilst long passages deal with relatively minor points;

(b) an inability to step back from the statistics to see the economic significance of the phenomena observed;

(c) an excessive use of scientific language which was obscure even to the readers for whom this kind of report is generally intended. In particular, the summary does not enable a reader unfamiliar with the problem to grasp its significance and to obtain guidance on the action needed.'

By a decision of 19 July 1984 the appointing authority dismissed the applicant with effect from 31 August 1984. In this regard the appointing authority considered in particular that:

'... In view of the end-of-probation report, the assessments of Mr R's ability and performance show that it is "insufficient" as regards: -

A — Ability to carry out his duties,

B.1 — Quality of work;

... Those assessments are borne out by the assessments of the study which Mr R was asked to do during the supplementary period;

... Those assessments show that Mr R has not shown sufficient professional aptitude to be established in the grade relating to his post.'

On 8 August 1984 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations against the decision to dismiss him. He claimed, in particular, that there were manifest errors in the assessment of his work.

By a decision of 13 December 1984 the Commission dismissed his complaint as unfounded.

2. By application of 20 March 1985, which was received at the Court on 21 March 1985, the applicant brought this action.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Third Chamber of the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Annul the Commission's decisions terminating his employment with effect from 31 August 1984, in particular Decision No 005235 of 13 December 1984 whereby the Commission rejected his complaint against his dismissal and also any measure preparatory to the abovementioned decisions.

(b) In the alternative, order the Commission to change the statement of reasons in the contested decisions so that they are not defamatory;

(c) In any event, order the Commission to pay him compensation, in an amount to be determined by the Court, for the material and non-material damage caused to him by the contested decisions;

(d) In any event, order the defendant to pay the costs.

The *Commission* contends that the Court should:

(i) Dismiss the application in its entirety;

(ii) Make an order as to costs in accordance with the provisions in force.

III — Submissions and arguments of the parties

1. *On the alleged infringement of essential procedural requirements*

(a) The *applicant* contends in the first place that essential procedural requirements have been infringed and, in particular, that the contested decisions contain contradictory statements of reasons and are vitiated by manifest error. In this regard he examines the assessments contained in the reports of 21 March 1984 and 10 July 1984 which form the basis of the decision to dismiss him.

As regards the end-of-the-probation report of 21 March 1984, he contends that the Commission did not indicate the knowledge which was required for the post and which he allegedly lacked. Secondly, he contends that the Commission cannot rely on his alleged insufficient ability to write reports when it had not indicated the way in which it wished the reports to be written.

As regards the report of 10 July 1984, the applicant considers that it wrongly criticizes him for lacking the ability to synthesize when the task he was given was to carry out 'a comparative analysis' and not a 'synthesis' of the problem set. Moreover, it is clear from an expert's report prepared by Professor Coppi of Rome University annexed to the application that the applicant had drawn up a 'key' which 'drastically simplified the analysis by highlighting a very limited number of factors whose interplay is the main source of the differences in question between the two statistical systems'.

The comment on his use of scientific language is also wrong and contradictory. Apart from the fact that the administration treats as a fault what is in fact a quality, it is necessary to consider the complexity of the

problem set. In any event, the language used is not especially technical, as is clear from an expert's report prepared by Professor La Bruna of Rome University which is also annexed to the application.

In support of the foregoing arguments the applicant asks the Court to order the drawing up of an expert's report on 'the scientific value of the paper'.

(b) The *Commission* observes first of all that, unlike an entrance competition whose purpose is to enable candidates to be selected on the basis of general, anticipated requirements, the purpose of the probationary period is to enable the administration to judge more accurately whether a candidate is suitable for a specific post. The administration's general assessment of the probationary official is based on a wide discretionary power and cannot be the result of a simple arithmetical calculation of the various positive or negative assessments. Consequently, even a single negative assessment might mean that the establishment of a probationary official would not be in the interests of the service if he is not entirely suited to the specific duties allocated to him.

In the present case, it is clear from the end-of-probation report that, although the applicant has high qualifications in mathematical statistics and data-analysis techniques, he lacks the ability to perform the duties pertaining to his post and, in particular, the necessary knowledge of economic-policy studies. Furthermore, it was found that his quality of work was unsatisfactory and that he was unable to integrate satisfactorily in the essential activities of the directorate.

As regards the report of 10 July 1984, the Commission disputes that there is any difference between the assessments contained in that report and what the adminstration asked the applicant to do. The aim of the work was not only to analyse the data but also to 'explain the differences' in the data and to 'suggest improvements'. Having regard to the aims of the department in question, it is inconceivable to make analyses without arriving at concrete conclusions.

The applicant's inability to express his ideas in an appropriate manner (excessive use of scientific language) also demonstrates his unsuitability for working in an administration which necessitates a particular form of expression.

As regards the expert's report requested on the scientific value of the applicant's study, the Commission disputes that it is relevant on the ground that it is not only a question of the quality of the scientific work but also of performing a certain type of work effectively within a public administration. Moreover, such a report would encroach on the power of assessment of the institution.

2. *The alleged infringement of the Staff Regulations and of the prohibition of discrimination*

(a) The *applicant* contends that Articles 4 and 34 of the Staff Regulations and the prohibition of discrimination have been infringed.

He considers that his posting to Directorate II-C-4 (Medium-term Projections) instead of to the special department II-B-4 (Community loans-Development of financial instruments), for which Vacancy Notice No COM/305/82 had been published, was contrary to the second

paragraph of Article 4 of the Staff Regulations which states that 'vacant posts . . . shall be notified to the staff . . . once the appointing authority decides that the vacancy is to be filled'. Since the applicant was posted from the outset to Division II-C-4, the decision of 2 August 1983 appointing him and assigning him to the special department II-B-4 was a sham.

The procedure followed by the administration also infringed the general principle prohibiting discrimination since a probationary official who is transferred must serve his probationary period in a post which is different from that to which the vacancy notice refers and which may consequently be less suited to his abilities. His transfer puts him in a worse position than a probationary official who is not transferred.

The applicant further contends that the extension of his probationary period was contrary to the first paragraph of Article 34 (1) of the Staff Regulations, which provides that 'the period shall be nine months for officials in Category A'. Since that provision is mandatory, no derogation may be made from it. Apart from that consideration, the principle prohibiting discrimination requires that all officials in the same grade should serve a probationary period of the same duration.

That conclusion is borne out by the second paragraph of Article 34 (1) which provides that 'where during his probationary period an official is prevented, by sickness or accident, from performing his duties . . . , the appointing authority may extend his probationary period by the corresponding length of time'. Such an exception would be meaningless if the administration had the power in any event to extend the probationary period. It is also clear from that provision that the probationary period may be extended only in order to make it coincide with the length of actual service and that when deciding to dismiss or establish a probationary official the administraiton must base its decision solely on the assessment of the probationary official's service during that period.

The fact that the applicant agreed to undergo an additional probationary period cannot lead to a different conclusion since his agreement was not freely given but was prompted mainly by the applicant's subordinate relationship to the administration, which had already made clear its inclination to dismiss him.

(b) The *Commission*, on the question of the posting of the applicant to Division II-C-4, observes that Article 4 of the Staff Regulations relates only to the internal publication of vacant posts and does not concern external candidates whose names are on the list of suitable candidates. The administration may legitimately redistribute the posts available between the various departments according to the interests of the service. What is more, the applicant was aware of his posting from his conversations and contacts with Commission officials.

The Commission further submits that, even assuming that the applicant has an interest in bringing proceedings, he ought to have challenged the appointment decision and not seek the annulment of the decision to dismiss him.

Finally, it should be pointed out that the applicant did not in any event meet the qualification requirements set out in the vacancy notice, namely knowledge of general economic analysis and of the problems of business economy as well as knowledge of banking techniques.

As regards the submission concerning the extension of the probationary period, the Commission observes that there is nothing to prevent the administration from exceeding, for reasons of fairness, the rights provided for in the Staff Regulations by adopting a more favourable attitude towards an official. In the present case, the Commission had treated the applicant preferentially by offering him a further opportunity to prove his professional abilities; that offer was freely accepted by the applicant in writing.

The second subparagraph of Article 34 (1) of the Staff Regulations in fact supports the Commission's arguments. The aim of that provision is to prevent the situation arising in which a probationary official who falls sick or who has an accident does not actually have a period of less than the nine months provided for in order to prove his professional abilities. It does not prevent the probationary period from being extended in order to allow a closer assessment to be made in the interests of the official who, without that assessment, should have been dismissed on the basis of the probation report.

3. *The claim for damages*

(a) In support of his claim for damages the *applicant* states that the damage caused to him by the decision to dismiss him arises from two facts:

First, the administration's assessments of his work are defamatory and therefore liable to injure his professional reputation. Secondly, the delay in defining his position due to the extension of his probationary period left him in an unfair position of uncertainty which prevented him from finding another occupation.

The applicant also submits that in any event even a valid decision may incur the administration's liability if it was adopted in special, oppressive conditions.

(b) The *Commission* replies that, from a general point of view, the awarding of damages depends on the applicant's proving the existence of an unlawful act, the damage suffered and the existence of a causal link between the act and the damage. In the present case none of those elements has been proved.

As regards the assessments made of the applicant, the Commission states that it has never denied his abilities as a statistician and researcher but merely found that they were not suited to the requirements of a public administration. Furthermore, any decision to dismiss a person necessarily contains negative assessments of that person's professional abilities and may cause him vocational difficulties. Finally, the Commission points out that it keeps decisions to dismiss officials and end-of-probation reports strictly confidential.

Secondly, as regards the alleged unfairness and uncertainty caused by the extension of the probationary period, the Commission points out that the applicant accepted the extension voluntarily and that therefore any damage is the result of his own attitude.

U. Everling
Judge-Rapporteur