stage, it would be at liberty to organize an external recruitment procedure without having to consider internal candidates, contrary to its obligation under Article 29 (1) of the Staff Regulations to consider internal recruitment possibilities before organizing an open competition.

REPORT FOR THE HEARING
delivered in Joined Cases
341/85, 251, 258, 259, 262 and 266/86, 222 and 232/87 *

I — Facts and procedure

1. By a judgment of 7 October 1985 in Case 128/84 *van der Stijl* v *Commission* [1985] ECR 3281, the Court (Second Chamber) annulled the decision of the President of the Commission of 3 November 1983 appointing Mr Math to the post of Head of Division F 1 (Inspection) of the Euratom Safeguards Directorate within the Directorate-General for Energy and the decision of the appointing authority rejecting Mr van der Stijl's candidature for that post.

As can be seen from that judgment, the applicant, Mr van der Stijl, a Netherlands national who was an official in Grade A 4 assigned, since 1971, to the Euratom Safeguards Directorate in Division F 1 (Inspection), submitted his candidature for the post of head of that division on 1 June 1983 following Notice of Vacancy COM/963/83. As is also clear from the judgment, Mr van der Stijl had served as a replacement for the holder of the post, Mr Bommelle, who was ill.

The Commission had, however, on 20 July 1983 decided not to fill the vacant post at that stage and not to organize an internal competition, but to follow the recruitment procedure under Article 29 (2) of the Staff Regulations. Under Article 29 (2), a procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of officials in grades lower than Grade A 1 or A 2 in exceptional cases and for recruitment to posts which require special qualifications.

As stated in the judgment, it appeared from the information and explanations supplied during the proceedings that that decision was taken because the Commission considered the choice available to it under Article 29 (1) of the Staff Regulations was limited, the wish to preserve a geographical balance within the directorate in question playing an important part in the decision.

On 27 July 1983 the Commission decided to appoint Mr Bernard Math, one of the two officials of the Commissariat français à l'énergie atomique (French Atomic Energy

* Language of the case: French

Commission) proposed by the French authorities. The decision which was annulled was that of the President of the Commission of 3 November 1983 formally appointing Mr Math to the post in question with effect from 28 September 1983.

In its judgment of 7 October 1985 the Court observed that the specific nature of the post in no way justified the treatment of the case as exceptional within the meaning of Article 29 (2) of the Staff Regulations (paragraph 22 of the judgment) and that if, in a situation such as that in point, the appointing authority took the view that it was desirable to have a wider choice of candidates, including persons of various nationalities, the solution could be found within the framework of Article 29 (1) of the Staff Regulations since under that paragraph there remained the possibility of holding an open competition in which all potential candidates, both internal and external, could participate (paragraph 23 of the judgment).

The Court concluded that the Commission was not faced with an exceptional case justifying recourse to the extraordinary procedure under Article 29 (2) of the Staff Regulations and that the procedure followed by the Commission was vitiated by an infringement of the requirements laid down in that provision. The decisions arising from that procedure were thus to be held void (paragraph 24 of the judgment).

2. Following that judgment, on 16 October 1985 the Commission decided to engage Mr Math as a member of the temporary staff in Grade A 3 from 28 September 1983 for a period of two years, extended until 31 December 1985, to act as Head of Division F 1 (Inspection) of the Directorate-General for Energy.

On 18 December 1985 the Commission decided to extend Mr Math's engagement as a member of the temporary staff until 30 June 1986.

On the same day the Commission decided to organize Open Competition COM/A/477 on the basis of qualifications and tests to fill the post in question. A notice of competition was published in Official Journal C 67 of 22.3.1986, p. 8.

The oral tests laid down for the competition took place during the month of July 1986.

The successful candidate, Mr Math, was subsequently reappointed to the post in question.

3. On 16 October 1985 Mr Erik van der Stijl, who, within the Division F 1 (Inspection) was in charge of one of the two sectors forming the division, had, in a letter from his lawyer, drawn the Commission's attention to the fact that Mr Math's continuing to act as head of the division was incompatible with the Court's judgment of 7 October 1985 and put the applicant in a situation to which the third paragraph of Article 21 of the Staff Regulations applied.

On 21 October 1985 Mr van der Stijl submitted a complaint against the keeping in post of Mr Math.

On the same day, pursuant to Article 90 (1) of the Staff Regulations, Mr van der Stijl submitted a request that the Commission take a decision on his candidature of 1 June 1983 for the post in question, the rejection of that candidature having been declared void by the Court's judgment of 7 October 1985.

By letter of 22 October 1985 the Director of the Euratom Safeguards Directorate informed Mr van der Stijl of the Commission's decision of 16 October 1985 to engage Mr Math as a member of the temporary staff.

On 14 November 1985 Mr van der Stijl submitted a second complaint about that decision.

On the same day Mr van der Stijl brought an action before the Court of Justice (Case 341/85) in accordance with Article 91(4) of the Staff Regulations for the annulment of the abovementioned decision of 16 October 1985. The applicant applied at the same time for the adoption of interim measures.

On 16 January 1986 Mr van der Stijl submitted a third complaint about the Commission's decision of 18 December 1985 to extend Mr Math's engagement.

In the absence of any reaction to his request of 21 October 1985 relating to his candidature, on 7 April 1986 Mr van der Stijl submitted a fourth complaint directed against the implied rejection of his request.

On 10 April 1986, following publication of Notice of Competition COM/A/477, Mr van der Stijl submitted a fifth complaint directed against that Notice of Competition since he believed in particular that the conditions laid down therein were less strict than those contained in Notice of Vacancy COM/963/83 in respect of the same post.

On 17 April 1986 Mr van der Stijl applied to take part in Competition COM/A/477.

In a letter of 25 June 1986 the Director-General for Personnel and Administration informed Mr van der Stijl of the decision adopted by the Commission on 20 June 1986 rejecting his first three complaints relating, first, to Mr Math's maintenance in post after 7 October 1985, secondly to the decision to engage Mr Math as a member of the temporary staff, and thirdly to extend that engagement.

On 14 July 1986 Mr van der Stijl took part in the oral test laid down for Competition COM/A/477 which consisted of an interview with the selection board.

By a letter of 18 July 1986 the applicant was informed that the selection board had decided that they could not place his name on the list of candidates meeting very specific requirements ('le profil très particulier') for the vacant post.

By a letter of 25 July 1986 the Director-General of Personnel and Administration informed Mr van der Stijl of the decision adopted by the Commission on 18 July 1986 rejecting his fourth and fifth complaints above, first, the rejection of the request regarding his candidature and, secondly, Notice of Competition COM/A/477.

On 11 August 1986 Mr van der Stijl drew the Commission's attention to the irregularity of Mr Math's administrative situation after 30 June 1986.

On 28 August 1986 Mr van der Stijl submitted a sixth complaint about the maintenance of Mr Math in post after 30 June 1986.

On 1 September 1986 Mr van der Stijl's service came to an end after he had accepted termination of service under Council Regulation No. 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985, L 335, p. 56).

On 29 September 1986 Mr van der Stijl brought a second action before the Court of Justice (Case 251/86) seeking the annulment of the Commission's decision to maintain Mr Math in post after 7 October 1985 and of its decision of 18 December 1985 extending Mr Math's engagement as a member of the temporary staff (corresponding to his first and third complaints, which were rejected by the abovementioned letter of 25 June 1986).

On 13 October 1986 Mr van der Stijl brought a third action before the Court (Case 258/86) seeking the annulment of the decision of the selection board in Competition COM/A/477 to admit Mr Math to the competition and its subsequent decision to include Mr Math's name on the list of suitable candidates.

On 20 October 1986 Mr van der Stijl brought a fourth action before the Court (Case 262/86) seeking the annulment of the decision of the selection board in Competition COM/A/477, communicated to him by the abovementioned letter of 18 July 1986, not to include his name on the list of suitable candidates.

On 24 October 1986 Mr van der Stijl brought a fifth action before the Court (Case 266/86) seeking the annulment of Notice of Open Competition COM/A/477 and of the Commission's decision rejecting his request concerning his first candidature (corresponding to his fourth and fifth complaints, which were rejected by the abovementioned letter of 25 July 1986).

Following the announcement, in *Staff Courier* No 478 of October 1986, of the appointment of Mr Math to the post in question, Mr van der Stijl lodged a seventh complaint on 30 December 1986 directed against that appointment.

By letter of 10 July 1987 the Director-General of Personnel and Administration informed Mr van der Stijl of the decision adopted on 1 July 1986 by the Commission rejecting his sixth and seventh complaints concerning respectively the fact that Mr Math had been maintained in post after 30 June 1986 and Mr Math's reappointment.

Finally, on 27 July 1987, Mr van der Stijl brought a sixth action before the Court (Case 232/87) seeking the annulment of the decision appointing Mr Math (corresponding to his seventh complaint, which had been rejected by the abovementioned letter).

4. Geoffrey Cullington, an official in Grade A 4 assigned to Division F 1 (Inspection), is the person responsible within that division for the second of the two sections which make up the division.

Mr Cullington applied in April 1986 to take part in the abovementioned Open Competition COM/A/477 held in order to fill the post of head of that division.

On 19 June 1986 Mr Cullington lodged a complaint about Notice of Competition COM/A/477 since he considered, in particular, that the conditions laid down

therein in relation to experience were less strict than those laid down in the Notice of Vacancy COM/963/83 relating to the same post.

On 16 July 1986 Mr Cullington took part in the oral test laid down for the competition.

In an undated letter the Head of the Recruitment Division of the Directorate-General for Personnel and Administration informed Mr Cullington that the selection board had included his name on the list of suitable candidates.

On 13 October 1986 Mr Cullington brought an action before the Court (Case 259/86) seeking the annulment of the decision of the selection board in that competition to admit Mr Math to the competition and the selection board's subsequent decision to include Mr Math's name on the list of suitable candidates.

In a letter of 14 October 1986 the Director-General of Personnel and Administration informed Mr Cullington of the decision taken on 7 October by the Commission rejecting his complaint concerning the notice of competition.

In a letter of 16 December 1986 the Head of the Recruitment Division of the Directorate-General for Personnel and Administration informed Mr Cullington, in reply to his request of 26 November 1986, that he had not been chosen for the post in question.

On 18 December 1986 Mr Cullington lodged a second complaint about the appointment of Mr Math.

When he received no reply to that complaint, on 16 July 1987 Mr Cullington brought a second action (Case 222/87) seeking the annulment of the appointment of Mr Math.

5. Cases 341/85, 251, 258, 262 and 266/86, and 232/87 brought by Mr van der Stijl were lodged at the Court Registry on 15 November 1985, 29 September, 15, 20 and 29 October 1986 and 30 July 1987 respectively.

The application for interim measures lodged by Mr van der Stijl at the same time as the application in Case 341/85 was dismissed by an order of the President of the Second Chamber of the Court on 5 December 1985.

By orders of 22 April 1986, 18 March and 28 October 1987 the Second Chamber of the Court granted Mr Math leave to intervene in the abovementioned cases in support of the defendant's submissions.

In Cases 251, 258, 262 and 266/86, by documents lodged on 24 October, 14 and 24 November 1986 in accordance with Article 91 of the Rules of Procedure, the Commission raised objections of inadmissibility on the ground that, as from 1 September 1986, that is to say, before the cases were brought before the Court, Mr van der Stijl was no longer an official and therefore had no interest in bringing an action. By orders of 25 June 1987 the Court (Second Chamber) dismissed the objections of inadmissibility raised by the Commission.

The applications in Cases 259/86 and 222/87 brought by Mr Cullington were lodged at the Court Registry on 15 October 1986 and 16 July 1987 respectively.

By orders of 18 March and 28 October 1987 the Second Chamber granted Mr Math leave to intervene in the two

abovementioned cases in support of the defendant.

7. By orders of 25 June and 23 September 1987 the Second Chamber decided to join the cases for the purposes of the written procedure, the oral procedure and the judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Second Chamber decided to open the oral procedure without any preparatory inquiry. The Commission was, however, requested to produce certain documents before the Court.

II — Conclusions of the parties

1. *Conclusions of the applicants*

In Case 341/85, Mr van der Stijl claims that the Court should:

(i) primarily:

annul the Commission's decision of 16 October 1985 to engage Mr Math as a member of the temporary staff for a period of two years from 28 September 1983, extended until 31 December 1985, to occupy the post of head of division,

order the Commission to pay the applicant damages of ECU 2 000;

(ii) in the alternative:

order the Commission to pay the applicant damages to be fixed *ex aequo et bono*;

(iii) in either event, order the defendant to pay the costs or, in the further alternative, should the application for annulment be dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 251/86 Mr van der Stijl claims that the Court should:

(i) annul the Commission's decision to maintain Mr Math in post as Head of Division after 7 October 1985;

(ii) annul the Commission's decision of 18 December 1985 renewing Mr Math's engagement as a member of the temporary staff;

(iii) order the Commission to pay him damages to be fixed *ex aequo et bono* having regard to the damages already claimed;

(iv) order the Commission to pay the costs or, in the alternative, in the event that the claims for annulment are dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 258/86, Mr van der Stijl claims that the Court should:

(i) annul the decision of the selection board in Competition COM/A/477 to admit Mr Math to the tests and the subsequent decision to include his name on the list of suitable candidates;

(ii) order the Commission to pay the costs or, in the alternative, in the event that the claim for annulment should be dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 259/86 the conclusions of the applicant, Mr Cullington, are identical to those of the applicant in Case 258/86.

In Case 262/86 Mr van der Stijl claims that the Court should:

(i) annul the decision of the selection board in Competition COM/A/477 not to place his name on the list of suitable candidates;

(ii) order the Commission to pay the costs or, in the alternative, in the event that the application for annulment is dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 266/86 Mr van der Stijl claims that Court should:

(i) annul Notice of Open Competition No COM/A/477;

(ii) annul the implied decision rejecting his request of 21 October 1985 regarding his candidature for the post in question;

(iii) order the Commission to pay him damages to be fixed *ex aequo et bono* having regard to the damages already claimed;

(iv) order the Commission to pay the costs or, in the alternative, in the event that his claims are dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 222/87 Mr Cullington claims that the Court should:

(i) annul the decision appointing Mr Math to the post of Head of Division and the rejection of his candidature arising out of that decision;

(ii) order the Commission to pay him damages to be fixed *ex aequo et bono*;

(iii) order the Commission to pay the costs or, in the alternative, in the event that the claim for annulment is dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

In Case 232/87 Mr van der Stijl claims that the Court should:

(i) primarily:

annul the decision appointing Mr Math,

order the Commission to pay him damages to be fixed *ex aequo et bono*, having regard to the damages already claimed;

(ii) in the alternative:

in the event that the claim annulment is dismissed, order the defendant to pay him the damages referred to above;

(iii) in either case, order the defendant to pay the costs or, in the further alternative, in the event that the claims for annulment or for damages are dismissed, order the defendant to pay the costs pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure.

2. *Conclusions of the Commission*

The Commission contends that the Court should:

(i) dismiss all the actions, specifically Case 341/85 as inadmissible and unfounded and Case 259/85 as inadmissible and, in the alternative, unfounded;

(ii) order as it sees fit in respect of costs.

III — Submissions and arguments of the parties

1. *The legality of the decision to maintain Mr Math in post as Head of Division after 7 October 1985 (Case 251/86)*

The applicant, Mr van der Stijl, points out that Article 176 of the EEC Treaty imposes an obligation on an institution from which an annulled measure emanated to take the measures required to give effect to the Court's judgment and that a declaration of annulment is effective *ex tunc*. Following the Court's judgment of 7 October 1985, Mr Math was no longer entitled to act as Head of Division.

Nevertheless, despite the Court's judgment, Mr Math continued to act as Head of Division not only within the Commission, but also outside the institution. Only after the applicant drew the attention of the director of the Euratom Safeguards Directorate to the irregularity of that situation did the latter suspend the power of signature delegated to Mr Math.

The applicant considers that, by failing to take any steps to give immediate effect to the judgment of the Court, the Commission has blatantly infringed Article 176 of the EEC Treaty.

The Commission does not dispute that it was under an obligation to take the necessary steps to comply with the Court's judgment. The first step it was decided to take was thus the decision of 16 October 1985 appointing Mr Math a member of the temporary staff so as to ensure continuity in the service and to regularize Mr Math's administrative position.

2. *The legality of the decision of 16 October 1985 to engage Mr Math as a member of the temporary staff from 28 September 1983 (Case 341/85)*

Admissibility

The Commission contends that the application is inadmissible. The decision at issue concerns the engagement of Mr Math until 31 December 1985. After that date the decision did not have legal effects and was not such as could be annulled by the Court. The application thus became devoid of purpose and Mr van der Stijl would not appear to have any legitimate interest in having that decision annulled. In particular, the applicant was not entitled, by reason of the annulment of the decision, to claim payment of a differential allowance as provided for in Article 7(2) of the Staff Regulations.

The applicant, Mr van der Stijl, maintains that an action loses its purpose during the course of legal proceedings only if the defendant meets the applicant's claims. Given the procedural time-limits laid down in the Staff Regulations, the Commission's argument would amount to precluding actions against any decision which is limited in time.

Furthermore, Mr van der Stijl considers that when the action was brought on 16 May 1986 it had a purpose and he had an interest in bringing proceedings, since the decision affected his legal situation and this was equally the case after 31 December 1985. By a decision of 28 November 1983 he had been called upon to act as interim Head of Division until the post had been definitively filled or until 31 March 1984 at the latest. If Mr Math's engagement as a member of the temporary staff were annulled, Mr van der Stijl should retroactively be regarded as having continued to act as interim Head of Division and thus be entitled to the differential allowance. The decision at issue to engage Mr Math was also extended by a further decision which was still operative when the action was brought and the legality of that extension depended primarily on the legality of the decision at issue.

Substance

The applicant, Mr van der Stijl, makes six submissions challenging the lawfulness of the decision at issue.

In his *first submission* he maintains that the decision consitutes an infringement of Article 176 of the EEC Treaty.

Compliance with the Court's judgment of 7 October 1985 meant that Mr Math's first appointment from 28 September 1983 had no effect. It was contrary to Article 176 of the EEC Treaty to re-create, as did the decision, by means of another procedure a factual situation the irregularity of which had been established. The annulment of Mr Math's first appointment came about because Article 29 (1) of the Staff Regulations had been disregarded and if proper effect had been given to the judgment that provision should have been applied.

The decision to engage Mr Math as a member of the temporary staff could not be justified by the wish to ensure continuity in the service. In the first place, such a wish could not explain why there was a need to make the decision retroactive to 28 September 1983, the date on which Mr Math entered the service of the Commission. Secondly, the decision was

unnecessary, since under Article 26 of the Commission's internal rules of procedure the place of any senior official is automatically taken by the longest-serving subordinate official, and in the event of equal length of service, by the official who is the senior by age and grade (Official Journal, English Special Edition, Second Series, VII Institutional Questions, p. 9).

Finally, since the decision took effect from 28 September 1983, the interest of the service required that the question be examined whether Mr Math, an outsider, was the most suitable person to act as Head of Division at that point in time. The two years' experience which Mr Math acquired in an irregular manner should not have been taken into account. It is significant that at that date the applicant had deputized for the holder of the post in question and then acted as interim Head of Division for a considerable period in a perfectly regular manner.

In his *second submission* Mr van der Stijl claims that the decision constitutes a misuse of procedure and at the same time a misuse of powers.

It is clear that in adopting the decision at issue the Commission was attempting, in particular by making the decision retroactive, to re-establish in Mr Math's favour an administrative situation which had been found to be irregular in the judgment of 7 October 1985.

Such retroactive regularization could not have been justified by the interests of the service. The 'fonctionnaire de fait' theory rendered it unnecessary since administrative measures taken by Mr Math prior to the judgment annulling his appointment could not be challenged. It was also unnecessary as regards the protection of Mr Math's financial interests, since his salary and pension rights relating to the period during which he worked for the Commission were not open to challenge either.

The reason for the decision, which was later extended, could only have been to ensure that Mr Math acquired seniority and continuous experience which could be taken into consideration in the subsequent recruitment procedure and to keep him in post until his definitive appointment could be arranged.

A contract of engagement as a member of the temporary staff may not be used with a view to such retroactive regularization, since the purpose of the contract is to establish a contractual relationship in the future.

In his *third submission* Mr van der Stijl claims that the procedure followed was irregular.

A contract of engagement as a member of the temporary staff is a legal act by which two parties express an agreement to create obligations of a specific duration. It is legally absurd to establish retroactively, as does the decision at issue, a contractual relationship at a time when that contractual relationship is considered to have already come to an end.

The decision to give Mr Math's engagement retroactive effect is such as to affect Mr van der Stijl adversely. That decision interferes with his interim appointment and his candidature and affects his interest in not seeing his years of service which have been served in a proper fashion weighed against years which have been served irregularly by Mr Math.

In a *fourth submission* Mr van der Stijl claims that the decision infringes Article 29 (1) of the Staff Regulations.

The priority given to filling posts internally as laid down in the Staff Regulations would be illusory if the appointing authority could retroactively attribute a vacant post to a member of the temporary staff before even examining the internal candidature of the applicant.

In a *fifth submission* Mr van der Stijl claims that the decision constitutes an infringement of Article 12 (2) (e) of the Conditions of Employment of Other Servants of the European Communities.

According to that provision, a member of the temporary staff may be engaged only on condition that he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties.

As Mr van der Stijl pointed out in Case 128/84, when Mr Math was first engaged on 28 September 1983, he only had knowledge, according to his curriculum vitae, of 'spoken' English, which could not be considered to be satisfactory knowledge of another language of the Communities.

In his *sixth submission* Mr van der Stijl claims that the decision also infringes Article 12 (1) of the Conditions of Employment of Other Servants of the European Communities.

Under that provision the engagement of temporary staff is to be directed to securing for the institution the services of persons in particular of the highest standard of ability, recruited on the broadest possible geographical basis.

As Mr van der Stijl pointed out in Case 128/84, when Mr Math was first engaged, he did not have the specific knowledge required by the notice of vacancy for the post in question. Mr Math had had no experience in the area of nuclear safeguards.

Furthermore, Mr Math's recruitment took place without any comparative examination being undertaken and on that ground alone infringed the abovementioned provision. Since the appointment was a re-run of Mr Math's first appointment, in principle the appointing authority could only have taken account of the candidates put forward by the French authorities and thus the geographical basis was extremely narrow.

In respect of Mr van der Stijl's *first submission*, the Commission contends that the decision at issue does not infringe Article 176 of the EEC Treaty. Compliance with the judgment of 7 October 1985 meant that Mr Math's appointment as an official was of no effect. The abovementioned judgment annulled the initial procedure for filling the post from the time when recourse was had to Article 29 (2) of the Staff Regulations and by the decisions in issue the Commission had resumed the procedure at the point where it had thus been halted. The decision adopted on 18 December 1985 to organize an open competition was the conclusion of that procedure.

The Commission has wide discretion in the organization of a service before a procedure for definitively filling a vacant post can be

completed. The Commission considered that it could not resort to a replacement or an interim posting. It was entitled to place Mr Math at the head of the division, as a member of the temporary staff, since, having acted as Head of Division for more than two years, he was the most suitable person to act in that post.

The Commission had not sought to re-create, by another procedure, a factual situation regarded as irregular, but rather to ensure the continuity of the service and to regularize Mr Math's personal administrative situation.

As far as Mr van der Stijl's *second submission* is concerned, the Commission contends that it did not try, by a misuse of procedure, to favour Mr Math. As regards the grounds of the decisions in issue, the applicant is indulging in pure conjecture, unsupported by any evidence. The very fact that an open competition was organized demonstrates that Mr van der Stijl's complaint is unfounded.

As regards Mr van der Stijl's *third submission*, the Commission denies that the procedure whereby Mr Math was engaged as a member of the temporary staff was unlawful because of its retroactive effect. The decision of 16 October 1985 was intended to regularize an unforeseeable factual situation and the contract engaging Mr Math as a member of the temporary staff could not but have had retroactive effect if it was to ensure that he would not suffer any loss, in particular of financial rights, as a result of his appointment being annulled.

The Commission fails to see how that retroactivity harms the applicant.

With regard to Mr van der Stijl's *fourth submission*, the Commission considers that the appointing authority is entitled to engage temporarily a member of the temporary staff in order to fill a permanent post which has fallen vacant and that it does not thereby infringe Article 29 (1) of the Staff Regulations. In that connection wide discretion is vested in the appointing authority. The Commission was under no obligation to re-examine Mr van der Stijl's candidature before engaging any other person as a member of the temporary staff for the post in question.

As far as Mr van der Stijl's *fifth and sixth submissions* are concerned, the Commission points out that Mr Math has all the knowledge of languages and specific knowledge required by the Conditions of Employment of Other Servants of the European Communities and by the notice of vacancy for the post in question and that the applicant's allegations to the contrary are unsupported by any evidence.

Mr Math, the intervener, points out in respect of Mr van der Stijl's *first submission* that the decision at issue would infringe Article 176 of the EEC Treaty only if the Commission had confined itself to merely reproducing the previous decision which had been declared void. The decisions were, however, not identical, since their subject-matter was different. The decision declared void concerned the appointment of an official under the Staff Regulations, but the decision at issue concerned a contract to engage a member of the temporary staff in accordance with the Conditions of Employment of Other Servants of the European Communities.

With regard to Mr van der Stijl's *second submission*, Mr Math contends that a misuse of procedure or power cannot affect the validity of a decision unless the objective pursued is contrary to the public interest or the interest of the service and the wrongful objective is the sole objective pursued.

The Commission adopted the decision at issue exclusively in the interests of the service and no member of the Commission or high-ranking official in the institution intervened for the purpose of securing the appointment or engagement of the intervener.

Mr Math, the intervener, emphasizes that before his first appointment he had made no approaches to the Commission, where he knew no one, in order to secure the post in question. He learned that the post was vacant only through the External Relations Department of the French Atomic Energy Commission and his appointment took place after the usual interviews. No motive extraneous to the interests of the service underlay his first appointment and the same was true of the decision to engage him as a member of the temporary staff.

3. *The legality of the decision of 18 December 1985 to extend Mr Math's engagement to 30 June 1986 (Case 251/86)*

The applicant, Mr van der Stijl, claims that that decision prolongs and reinforces the irregularities which vitiated the first decision to engage Mr Math.

Thus, when the Commission was on the point of extending Mr Math's engagement, a request concerning Mr van der Stijl's candidature was submitted to the Commission to which the Commission failed to reply before taking a fresh decision to engage Mr Math, thus again infringing Article 29 (1) of the Staff Regulations.

In addition to those same irregularities, the decision to extend Mr Math's engagement constitutes a manifest infringement of the second paragraph of Article 8 of the Conditions of Employment of Other Servants of the European Communities.

According to the abovementioned provision, temporary staff may be engaged to fill temporarily a permanent post included in the list of posts for an institution for not more than two years and their contracts may be renewed not more than once for a maximum period of one year.

The initial decision of 16 October had already fixed the duration of the engagement at the maximum period of two years and renewed it, for the only time possible, for a supplementary period from 29 September to 31 December 1985. The engagement could not be further extended.

The Commission is mistaken when asserting that it is possible to extend the initial engagement for a maximum period of one year, the total duration of the engagement not being permitted to exceed three years. That assertion is correct only in the case of a single extension.

The Commission contends that the length of Mr Math's engagement did not exceed the limits laid down in the second paragraph of Article 8 of the Conditions of Employment of Other Servants.

The Commission considers that that provision limits the length of an engagement to two years, which may be extended by a maximum of one year, making a total of three years. Mr Math's engagement did not exceed three years. Mr van der Stijl's interpretation is too restrictive.

4. *The legality of Notice of Competition COM/A/477 (Case 266/86)*

The applicant, Mr van der Stijl, puts forward two submissions challenging the legality of the notice of competition.

In his *first submission* Mr van der Stijl claims that the notice of competition constitutes an infringement of Article 29 (1) of the Staff Regulations.

In accordance with the abovementioned provision, the competition procedure should only be followed after the appointing authority has first considered the possibilities of promotion.

Mr van der Stijl argues that the Commission did not first consider those possibilities before deciding, on 18 December 1985, to organize an open competition. The applications from internal candidates submitted in response to Notice of Vacancy COM/963/83 were all rejected. Those decisions of rejection became definitive, with the exception of the rejection of Mr van der Stijl's candidature, which was annulled by the judgment of 7 October 1985. No new vacancy notice appeared which could have brought forth fresh candidatures. There was thus only one candidature to be considered, which was the applicant's. If that candidature was indeed considered, it is strange that he was not officially informed of its rejection although he had submitted a specific request in that connection.

In a *second submission* Mr van der Stijl claims that the notice of competition was unlawful because it was different from the vacancy notice.

In that regard Mr van der Stijl observes that, according to the case-law of the Court (see the judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099), in the procedure for filling a post the notice of vacancy constitutes the main act determining the nature of the post to be filled and the qualifications required. The notice of competition is only a means of putting the procedure into effect and is necessarily bound by the notice of vacancy as regards the qualifications required for the post to be filled. In particular, the notice of competition may not formulate requirements which are less strict than those in the notice of vacancy. That would not only allow for the recruitment of candidates who were unsuitable for the post declared vacant, but would also constitute discrimination with regard to promotable or transferable officials whose candidatures could only be examined if they satisfied the stricter requirements in the notice of vacancy. If the appointing authority considers that those aforesaid requirements are too strict for the needs of the service, it should withdraw the notice of vacancy and replace it with an amended notice.

Mr van der Stijl then points out that Notice of Vacancy No COM/963/83 stated that the following qualifications were required:

'(1) knowledge to university standard, evidenced by a degree or equivalent professional experience,

(2) thorough knowledge of the nuclear production cycle and the management of nuclear material,

(3) knowledge in the field of nuclear safeguards,

(4) proven ability to manage a substantial administrative unit,

(5) thorough knowledge relevant to the nature of the post.'

The qualifications required by Notice of Open Competition COM/A/477, however, were the following:

'By the closing date for the submission of applications, candidates must:

(a) have completed a course of university education and obtained a degree . . . ;

(b) have at least 15 years' experience since leaving university, at least several years of which must be relevant to the duties described at I; they must also have a thorough knowledge of the nuclear cycle and of the management of nuclear materials, a knowledge of safeguards, and the proven ability to manage a large administrative unit;

(c) (knowledge of languages).'

Mr van der Stijl points out that as regards experience, the extremely strict requirement in the notice of vacancy of 'thorough knowledge relevant to the nature of the post' is, in the notice of competition, replaced by the less strict and very vague requirement of 'at least 15 years' experience since leaving university, at least several years of which must be relevant to the duties' as described in the notice of competition.

The applicant considers that 'knowledge relevant to the nature of the post' is something completely different from 'experience relevant to the duties described' and that experience 'at least several years of which' (must be relevant to the duties described), that is to say, experience of more than one year, is clearly less exacting than 'thorough knowledge' (relevant to the nature of the post).

In that context it is significant that in Case 128/84 Mr van der Stijl had observed that Mr Math's previous experience, which was purely in the field of physical safeguards, did not meet the requirements of the vacancy notice in that respect, since it could not be considered to be 'relevant' to the nature of the post. However, the possibility of that experience satisfying the requirements of the notice of competition could not be excluded.

Finally, Mr van der Stijl emphasizes that, as regards the qualifications of the candidates, the notice of competition repeated the terms of the notice of vacancy, except, precisely, as far as professional experience was concerned. The applicant considers that the terms used in the notice of vacancy are perfectly comprehensible, even for people outside the institution, and disputes that the difference in wording can be explained by the desire to make the notice of competition more comprehensible for the public, as the Commission claims.

As regards Mr Van der Stijl's *first submission*, the Commission contends that the provisions of Article 29 (1) of the Staff Regulations were complied with.

The Commission refers to the information communicated to the applicant on 25 July 1986 in reply to his complaint, namely that at its meeting of 18 December 1985 the Commission reconsidered the candidatures submitted at the stage mentioned in Article 29 (1) (a) of the Staff Regulations, including the applicant's, and then decided not to fill the vacant post by promotion and not to organize an internal competition under Article 29 (1) (b). In view of the lack of candidatures pursuant to Article 29 (1) (c) the Commission then adopted the decision to organize an open competition.

Thus consideration of the possibilities of promotion did in fact take place.

As far as Mr van der Stijl's *second submission* is concerned, the Commission considers that by dwelling on slight differences in wording between the notice of vacancy and the notice of competition, the applicant is splitting hairs.

The difference in wording as regards the experience required was purely a linguistic change which was made so as to make the notice of competition more comprehensible for people outside the institution to whom the notice was also addressed. There was no significant difference between the two wordings, especially when the fact that candidates had to have both thorough knowledge of the nuclear cycle and a knowledge of safeguards is taken into account.

5. *The legality of the decisions of the selection board in Competition COM/A/477 to admit Mr Math to the tests and to include his name on the list of suitable candidates (Cases 258 and 259/86)*

Admissibility

The Commission contends that the action brought by Mr Cullington (Case 259/86) is inadmissible.

The decisions at issue do not constitute acts adversely affecting Mr Cullington because he was also included on the list of suitable candidates. The fact that another candidate was also included on the list of suitable candidates does not cause him any harm.

Decisions of a selection board are measures preparatory to an appointment decision so that their illegality may only be pleaded in an application challenging the appointment decision (see, as far as lists of suitable candidates are concerned, the judgments of the Court of 14 December 1965 in Case 21/65 *Morina* v *Parliament* [1965] ECR 1017 and of 6 February 1986 in Case 143/84 *Vlachou* v *Court of Auditors* [1986] ECR 459).

Decisions of a selection board concerning admission to a competition may be challenged directly before the Court of Justice, but only by candidates who were not admitted.

The applicant, Mr Cullington, emphasizes that the action is directed against the decision to admit Mr Math to the tests in the competition, the decision to include Mr Math's name on the list of suitable candidates being only a consequence thereof.

Such a decision constitutes a measure producing legal effects which are separable

from the final decision of assignment to a post. That is confirmed by the fact that the candidates who are not admitted to a competition are, in any event, entitled to challenge a negative decision concerning them.

A decision concerning admission to a competition should not be considered to be purely preparatory. If that were the case, whatever its content it ought, objectively, to be preparatory.

A decision to admit a candidate to a competition who does not satisfy the conditions of admission is an act adversely affecting an applicant, even though that applicant is included on the list of suitable candidates, since such admission extends the selection board's choice and thus affects the applicant's right to have his merits objectively assessed.

Substance

The applicants, Messrs van der Stijl and Cullington, put forward three submissions challenging the legality of the decisions of the selection board concerning Mr Math.

In their *first submission* they claim that those decisions are in breach of the notice of competition, since Mr Math did not satisfy the conditions laid down therein in respect of experience and the age-limit.

As regards experience, the applicants consider, in the first place, that it was not reasonable for the selection board to take into consideration the experience acquired by Mr Math as Head of Division.

For the period from 28 September 1983 to 7 October 1985 the judgment delivered on the latter date annulled retroactively Mr Math's appointment and in consequence he is deemed never to have been an official. That means that he cannot lay claim to that period as experience.

From the period from 7 to 16 October 1985, that reasoning is valid *a fortiori* since Mr Math occupied the post in question in the absence of any appointment or legal basis.

The decision of 16 October 1985 to engage Mr Math retroactively as a member of the temporary staff could not affect those two periods. Such regularization could only be 'passive', that is to say, it could relate to the validity of administrative measures, in the interests of the public, or it could, in the official's interests, relate to his financial rights. Regularization could not be 'active' in nature, allowing the official to lay claim to the period regularized as experience.

For the period after 16 October 1985 the experience acquired by Mr Math should not have been taken into consideration either, since, according to the Commission, his engagement as a member of the temporary staff and the extension of that engagement was not for the purpose of maintaining him in post until the planned competition and allowing him to take part in the competition as the temporary holder of the post. The Commission thus acknowledges that Mr Math's candidature was to be treated as an external candidature.

It cannot be argued, as the Commission seeks to do, that the experience to be taken

into account is that resulting from a factual rather than legal situation, since the question is not whether Mr Math had acquired *de facto* practical experience but whether the selection board could take that experience into account when examining whether the requirements of the competition were satisfied.

In the second place, as far as concerns the experience acquired by Mr Math before he entered the service of the Commission, the applicants emphasize that that experience should necessarily be assessed in the light of the stricter requirement of the vacancy notice, that is to say 'thorough knowledge relevant to the nature of the post', since the notice of competition could not legally lay down conditions that were less strict than those in the vacancy notice.

Mr Math's previous experience could not have been considered relevant to the nature of the post. According to his curriculum vitae, Mr Math had been an official of the French Atomic Energy Commission since 1968, assigned first to its scientific directorate and then, since 1977, to the department for the safeguard of nuclear materials. His responsibilities were exclusively concerned with physical safeguards for nuclear installations and transport and his experience was thus gained purely in the field of physical protection. That field has nothing to do with the field of nuclear safeguards dealt with in Chapter VII of the EAEC Treaty under which the Commission is charged with ensuring in particular that fissile materials are not diverted from their declared intended uses and that the obligations assumed by the Community relating to supply and safeguards are complied with.

As far as the age-limit is concerned, the applicants point out that the conditions in the notice of competition in that respect were the following:

'Candidates must have been born after 22 March 1936.

The age-limit does not apply to candidates who, on any date between publication of this Official Journal and 22 April 1986, will have been serving continuously as an official or other servant of the European Communities for at least one year.

The age-limit will be raised:

(a) . . .

(b) for candidates who have performed compulsory military service . . . In this case the age-limit is raised by the length of service performed . . .

. . .

Requests for the age-limit to be raised will not be considered unless accompanied by supporting documents, namely:

. . .

in the case of (b):

a certificate issued by the appropriate military or other authorities, stating the dates when the candidate began and completed compulsory service.'

Mr Math was born on 30 November 1935.

He could not take advantage of the provision excluding the age-limit for candidates who, between 22 March and 22 April 1986, would have been serving continuously as officials or other servants of the Communities for at least one year. As was the case with respect to experience, the selection board should not have taken into consideration the period from 28 September 1983 to 22 March 1986 as a period of work as an official or as a servant of the Communities.

Even if it were accepted that the selection board could take into consideration the period served by Mr Math as a result of his retroactive engagement, the second paragraph of Article 8 of the Conditions of Employment of Other Servants indisputably excludes a second extension of such an engagement so that Mr Math's contract had in any event came to an end on 31 December 1985. Thus, he could not legally be regarded as an official or servant of the Communities between 22 March and 22 April 1986.

It is not possible to maintain, as the Commission seeks to do, that the complaint is devoid of purpose since Mr Math can also claim that the derogation from the age-limit laid down for compulsory military service should be applied, even though he did not submit the relevant attestation with his application. That argument would only be valid if it was actually on the basis of the military service performed by Mr Math that the selection board decided to derogate from the age-limit. The selection board could only have based such a decision on a request by the applicant accompanied by the attestation required by the notice of competition.

In their *second submission* the applicants claim that the decision of the selection board to admit Mr Math is contrary to the principle of equal treatment.

By admitting Mr Math to the competition the selection board put him on an equal footing with applicants in respect of whom there was no doubt that the requirements of the notice of competition were satisfied. Thus objectively different situations had been treated in the same way without any objective justification.

In their *third submission* the applicants claim that there has been a misuse of procedure.

It is obvious that ever since the judgment of 7 October 1985 was delivered the Commission's primary if not exclusive objective has been to appoint Mr Math to the post in question, using a recruitment procedure that was ostensibly regular in form.

In agreeing to allow Mr Math to take part in the competition although he did not fulfil the conditions in the notice of competition, the selection board participated in the misuse of procedure.

As far as the applicants' *first submission* is concerned, the Commission contends that Mr Math fulfilled the conditions laid down in the notice of competition both in respect of experience acquired and in respect of the age-limit.

With regard, first, to Mr Math's experience, the Commission points out that, although the judgment of the Court of 7 October 1985 annulled Mr Math's appointment, nevertheless, during the period in question Mr Math had validly acted as Head of Division and acquired appropriate experience. The Court's judgment could not have any effect on that experience, as a factual rather than a legal situation was involved.

That reasoning applies *a fortiori* to the experience acquired by Mr Math after 16 October 1985 since a factual situation was involved which, in addition, corresponded to a legal situation provided for in the Conditions of Employment of Other Servants. Since it was not the Commission's intention to favour Mr Math in the definitive procedure for filling the post by engaging him as a member of the temporary staff, the applicants may not conclude that the experience actually acquired by Mr Math should not have been taken into consideration.

As regards the experience acquired by Mr Math before he took up his duties, the Commission maintains that that experience was perfectly adequate and taken on its own would have entitled Mr Math to be admitted to the competition.

The field of safeguards and the field of physical protection, in which Mr Math's experience was gained in his country, are very similar. Physical protection is the responsibility of national authorities and its purpose is to protect fissile materials from diversion by individuals. Safeguards are the responsibility of multinational or international authorities and their purpose is to prevent the risk of diversion of fissile materials by those using them or by States. The technical methods used in both fields are very similar and the 'tools of the trade' are, to a large extent, the same.

Next, as regards the age-limit, the Commission contends that the applicants' complaint in this connection is devoid of purpose. Mr Math had, in fact, served 18 months' military service and hence was entitled to take advantage of the derogation from the age-limit laid down for periods of compulsory military service.

The Commission points out that it is irrelevant how the selection board concluded that the condition in respect of age was fulfilled since what matters is that the decision of the selection board complied with the notice of competition.

As far as the *second and third submissions* are concerned, the Commission believes that they only repeat the first submission.

The intervener, Mr Math, points out in connection with the applicants' *first submission* and his experience prior to taking up his duties with the Commission, that he had 25 years experience since leaving university, which was mainly in connection with the techniques used to safeguard fissile materials. Those techniques, which involved the audit of fissile materials, their supervision and physical inspection and the inspection of installations, are the same as those used for safeguards. Work experience in the field of physical protection is very close to that in the field of safeguards, the only difference between the two types of work lying in their objectives, the first at national level, the second at international level. The applicants' argument amounts in effect to excluding any candidate from outside the Commission.

6. The legality of the decision of the selection board in Competition COM/A/477 not to include the applicant's name in the list of suitable candidates (Case 262/86)

The applicant, Mr van der Stijl, puts forward three submissions challenging the legality of that decision.

In his *first submission* Mr van der Stijl claims that the reasoning of the decision is non-existent or at least inadequate and in any event not consistent with the notice of competition.

Mr van der Stijl points out that the only reason given in the notification of the decision was the reference to the 'profil très particulier du poste vacant' (very specific nature of the vacant post) to which he was not suited.

The applicant considers that that reference to a 'profil particulier', which did not appear either in the notice of vacancy or the notice of competition, is merely an exaggerated description of the post of Head of Division. The decision thus lacks a statement of reasons because it confines itself to stating that the selection board did not consider that it had to place him on the list of suitable candidates for the post in question.

Even if it were accepted that that reference can be regarded as a statement of reasons and that the successful candidates had to meet the 'profil particulier', the statement of reasons is nevertheless inadequate. The decision ought to have defined the 'profil particulier' and given precise reasons why Mr van der Stijl was not suited to it. That statement of grounds was, furthermore, not sufficiently related to the person concerned, since another candidate in the competition had received a communication of the selection board's negative decision couched in identical terms.

Mr van der Stijl points out that the failure of the decision to state the grounds on which it is based is confirmed by the lack of any reference to the only criterion laid down in the notice of competition, namely the marking from 0 to 20, the pass mark being 10.

Finally, even if it were accepted that the reasoning was sufficient, the reason given was unlawful because there was no reference to it in the notice of vacancy or the notice of competition. The two notices were standard in content: the notice of competition stated that the purpose of the interview with the selection board was to assess the candidate's general knowledge and suitability for the duties of Head of Division. The selection board seems to have considered that they were filling a post of Head of Division having a 'profil particulier', which is mentioned nowhere in the notice of competition and is an improper condition which should not have played a part in the test laid down for the competition.

In his *second submission* the applicant, Mr van der Stijl, claims that the conduct of the oral test did not conform to the notice of competition.

The selection board made hardly any effort to assess Mr van der Stijl's knowledge and suitability and his interview for the most part concerned his activities on the Staff Committee and within professional bodies. Not even knowledge of languages was tested, since the interview was carried out almost completely in French.

Finally, in his *third submission*, Mr van der Stijl claims that the decision of the selection board constitutes a misuse of procedure.

That vitiating factor results from the necessary connection between that decision and the series of decisions adopted by the Commission with the aim of re-establishing the situation annulled by the judgment of 7 October 1985.

The Commission contends, with regard to Mr van der Stijl's *first submission* concerning the statement of reasons on which the

decision was based, that the requirement concerning the 'profil très particulier' is contained by implication in the notice of competition.

The fact that the post was quite special was clear not only from the description in the notice of competition of the work of the division in question, work which the successful candidate would have to direct and organize, but also from the knowledge and experience required of candidates.

The Commission also argues that any fuller statement of reasons might have harmed Mr van der Stijl who, at the time, was still an official.

With regard to Mr van der Stijl's *second submission*, concerning the conduct of the oral tests, the Commission points out that it is for the selection board alone to decide how to determine the suitability of candidates.

That complaint is, moreover, unfounded, and in that respect the Court may not substitute its opinion for that of the selection board.

Finally, as far as Mr van der Stijl's *third submission* is concerned, the Commission considers that the alleged misuse of procedure with regard to the applicant merely constitutes an assertion which is unsupported by any evidence.

7. The legality of the decision appointing Mr Math (Cases 222 and 232/87)

The two applicants, Mr van der Stijl and Mr Cullington, put forward three submissions challenging the legality of the reappointment of Mr Math. Mr Cullington adds a fourth submission.

In their *first submission* the applicants claim that Mr Math's second appointment constitutes a blatant infringement of Article 176 of the EEC Treaty.

The applicants point out that the effect of the Court's judgment of 7 October 1985 was that the Commission ought to have held an external competition in 1983 instead of unlawfully applying the special recruitment procedure provided for in Article 29 (2) of the Staff Regulations. Proper compliance with the judgment would have meant the Commission using the regular recruitment procedure and disregarding any factor arising from the first, irregular, procedure.

Mr Math's reappointment was the result of that recruitment procedure and it is obvious that the Commission intervened actively in that procedure for the purpose of favouring Mr Math. Thus, the Commission offered Mr Math a contract as a member of the temporary staff with retroactive effect, extended that contract illegally in order to allow him to participate in the competition that was being arranged, reformulated the necessary qualifications that were initially required for the post in question in order to enable him to satisfy the requirements, admitted him to the competition although he did not meet the requirements lawfully laid down, even as regards the age-limit, and connived to ensure that the experience that Mr Math had acquired irregularly was weighed against the applicants' experience.

The surprising result was that, less than a year after the annulment of his appointment, Mr Math was again appointed to the same post which he had never actually left.

In their *second submission* the applicants claim that Mr Math's appointment is vitiated by a misuse of powers because that appointment could not have taken place without a series of misuses of procedure which protected and favoured him.

The applicants consider that the abovementioned decisions whereby the Commission intervened and set in motion the new recruitment procedure constitute misuses of procedure whose only purpose was to permit Mr Math to take part in the procedure that was being organized and to provide him with the ideal qualifications for the post in question.

In their *third submission* the applicants claim that the decision appointing Mr Math was illegal because it was based on a series of earlier decisions which were themselves illegal.

In that connection the applicants refer to the applications concerning those previous decisions.

In his *fourth submission* Mr Cullington claims that the third paragraph of Article 25 of the Staff Regulations, according to which appointment decisions are to be posted up at once, has been infringed.

Mr Math's reappointment was not posted up, nor was it publicized at all. That lack of transparency reveals the dubious legal grounds on which the Commission sought to base its conduct. Mr Cullington was thus not informed that he had not been successful until several months after Mr Math's appointment and then only because he asked.

The Commission contends, in respect of the applicants' *first submission*, that it did not actively support Mr Math when giving effect to the judgment of 7 October 1985 and during the procedure for definitively filling the post in question.

The Commission categorically denies the applicants' allegations to the contrary which are unsupported by any evidence.

As far as the applicants' *second submission* is concerned, the Commission considers that none of the decisions it took following the judgment of 7 October 1985 constitutes a misuse of procedure.

The decision to organize an open competition was in complete conformity with the grounds of the judgment. The fact that the same person was appointed as the result of that recruitment procedure could not constitute misuse of procedure because the annulment of Mr Math's first appointment had nothing to do with his ability to occupy the post in question.

With regard to the applicants' *third submission*, the Commission contends that none of the earlier decisions to which the applicants make reference is illegal and refers to its observations in the preceding applications.

Finally, as regards Mr Cullington's *fourth submission*, the Commission states that the alleged failure to comply with the third paragraph of Article 25 of the Staff Regulations may not be relied on by Mr Cullington because it does not affect his rights or legitimate interests. It could therefore have no effect on Mr Math's appointment.

Moreover, the appointment had been announced in *Staff Courier* No 478 in October 1986 (p. 51), the *Staff Courier* being posted up in the Commission's premises. The Staff Regulations do not specify the form in which appointments should be posted up and thus the duty to post up appointments should be considered to have been complied with.

8. *The legality of the implied decision to reject Mr van der Stijl's request for a decision in respect of his first candidature (Case 266/86)*

The applicant, Mr van der Stijl, puts forward three submissions challenging the legality of that decision.

In his *first submission*, Mr van der Stijl claims that the Commission's refusal to take a decision in respect of his initial candidature constitutes an infringement of Article 176 of the EEC Treaty.

Mr van der Stijl recalls that the judgment of 7 October 1985 not only annulled Mr Math's first appointment but also the rejection of the applicant's candidature. Compliance with the judgment meant that Mr van der Stijl's candidature ought to have been re-examined.

It is, however, clear that Mr van der Stijl's candidature was never re-examined, even though he took the precaution of introducing an express request to that effect. Since the request was for a decision, within the time-limits laid down in the Staff Regulations, the implied rejection of that request amounts to a refusal to take a decision and, in consequence, refusal to comply with the judgment of 7 October 1985.

If the Commission had, as it claims, taken a decision on Mr van der Stijl's candidature by 18 December 1985, the failure to communicate such a decision to the applicant is an infringement of the second paragraph of Article 25 of the Staff Regulations, according to which any decision relating to a specific individual must at once be communicated in writing to the official concerned.

In his *second submission* the applicant claims that the implied rejection of his request constitutes an infringement of Article 29 (1) of the Staff Regulations.

Mr van der Stijl considers that the Commission could not lawfully decide, on 18 December 1985, to organize an open competition without first having considered in particular the possibilities of promotion, and thus his candidature.

Mr van der Stijl maintains that the Commission did not carry out such an examination and refers to his arguments challenging the legality of Notice of Competition COM/A/477.

In his *third submission* Mr van der Stijl claims that the refusal to take a decision constitutes a breach of the principles of good administration.

The applicant draws attention to the blatant discrepancy between the Commission's conduct towards a properly appointed official and its conduct towards Mr Math, in respect of whom the Commission has made its supportive attitude manifest.

The Commission claims that Mr van der Stijl's complaints lack any foundation and

recalls that during its meeting of 18 December 1985 the Commission re-examined the candidatures submitted during the stage referred to in Article 29 (1) of the Staff Regulations — including Mr van der Stijl's — and at that same meeting decided not to fill the post in question by promotion but to organize an open competition.

9. *The applications for damages (Cases 341/85, 251 and 266/86, 222 and 232/87)*

For the non-material damage suffered, Mr van der Stijl claims compensation in the actions brought by him directed against the maintenance of Mr Math in post, the decisions to engage Mr Math retroactively and to extend that engagement, Notice of Competition COM/A/477, the rejection of his request in respect of his first candidature and, finally, the appointment of Mr Math.

Mr van der Stijl recalls that he did previously apply for compensation in Case 128/84 and that the Court, in its judgment of 7 October 1985, had considered that the declarations of nullity constituted adequate reparation in themselves for any non-material damage that the applicant might have suffered (paragraph 26 of the judgment).

The acts undertaken amount not only to a negation of the declarations of nullity but also to the negation of the part of the judgment concerning compensation for non-material damage. They were vital links in the chain of events which allowed the Commission within a short space of time to re-create the situation declared void in the judgment of 7 October 1985.

Mr van der Stijl considers, in the context of compliance with the earlier judgment, the Commission's wrongful conduct giving rise to liability towards him is obvious.

The non-material damage for which compensation is claimed is the same as in the previous case, aggravated by the fact that, although he was successful in that case, the part of the judgment which was in his favour has been rendered nugatory by the Commission's actions.

In his action directed against Mr Math's reappointment, Mr Cullington claims compensation for the non-material damage which he suffered.

Mr Cullington considers that the decision adopted constitutes a wrongful administrative act in his regard for which the Commission is liable. When, by means of a series of irregular decisions, the Commission arranges for a person to be appointed whose first appointment was declared void, it infringes the principles of good administration, equal treatment and the duty to have regard to the interests of its officials.

The non-material damage which the applicant suffered is the damage caused both to his professional career and to his private life.

The Commission contends that since the decisions being challenged by the applicants were perfectly lawful, there can no question of making good any damage.

G. F. Mancini
Judge-Rapporteur