OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 23 March 1993 *

Mr President,
Members of the Court,

1. On 7 August 1990 the Commission appealed to the Court of Justice against the judgment delivered on 12 July 1990 by the Third Chamber of the Court of First Instance (hereinafter 'the Court of First Instance') in Case T-35/89 *Albani and Others* v *Commission* [1] (hereinafter 'the contested judgment').

Background

2. The facts underlying the action in which the Court of First Instance delivered the contested judgment have been set out in detail before. [2] In the course of the second written test in open competition COM/A/482, [3] the candidates had to draft a text of a maximum of 800 words. Any texts exceeding that limit would not be marked. After the test, the selection board instructed the markers not to mark manuscripts which exceeded 1 200 words in length.

On the basis of that change in the conditions for the second written test, Mr Albani and other unsuccessful candidates brought an action against the decisions of the selection board by application lodged at the Registry of the Court of Justice on 25 May 1988. By order of 15 November 1989, the Court referred the case to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities. Before the Court of First Instance, the Commission stated that only five candidates had benefited from the contested instruction given to the markers and they did not appear on the list of suitable candidates for the competition drawn up on 26 May 1988. However, the Commission was unable to give the Court proof to that effect since it emerged that all the files concerned had disappeared.

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

3. By application lodged at the Registry of the Court of Justice on 7 August 1990, the Commission brought the appeal to which this Opinion relates. By a series of orders dated 15 November 1990, the Court granted leave to a large number of parties to intervene in support of the orders sought by the Commission pursuant to Article 123 of the Rules of Procedure. [4]

* Original language: Dutch.

1 — [1990] ECR II-395

2 — In the contested judgment itself and in the Report for the Hearing in these appeal proceedings.

3 — The competition notice was published on 12 February 1987, OJ 1987 C 34, p. 15.

4 — See the orders of the Court of Justice in Case 242/90-P in which *Allen and Others, Anchia and Others, André and Others, Buggenhout and Others, Fédération de la Fonction Publique Européenne (FPPE)* and *Zubizarreta and Others* were granted leave to intervene.

The defendants are the applicants in the proceedings before the Court of First Instance and the Union Syndicale Bruxelles, which intervened at first instance.

4. Convinced that the contested judgment required it to dismiss the officials who had already been appointed on the basis of the open competition, the Commission applied to the Court of Justice for an interim measure suspending the operation of that judgment. By an order of 27 November 1991, the President of the Court of Justice held that 'pending the decision of the Court of Justice on the appeal, the Commission is not obliged to cancel the appointments made prior to the date of the judgment of the Court of First Instance'. [5] As the request for suspension had thus become devoid of purpose, the President dismissed it.

5. On 3 and 8 October 1990 a number of successful candidates in the competition who had not yet been appointed initiated third-party proceedings before the Court of First Instance against the contested judgment. Pending a decision on those proceedings, the proceedings before the Court of Justice were stayed. [6] By its orders of 26 March 1992, the Court of First Instance dismissed the third-party applications as inadmissible, [7] whereupon the present appeal proceedings resumed their normal course.

5 — Order of the President of the Court of Justice in Case C-242/90 P-R [1990] ECR I-4329, paragraph 24.

6 — Order of the President of the Court of Justice of 6 February 1991.

7 — According to the Court of First Instance, the applicants had not adequately demonstrated that they had been unable to intervene at the commencement of the proceedings at first instance. Order of the Court of First Instance in Case T-35/89 TO1 *Zubizarreta and Others* v *Albani* [1992] ECR II-1599. Order of the Court of First Instance in Case T-35/89 TO2 *Buggenhout and Others* v *Albani* [1992] ECR I-1600.

6. The Commission acquiesces in the decision of the Court of First Instance annulling the decision of the selection board in competition COM/A/482 which changed the criteria for marking the second written test. However, it seeks the annulment of the contested judgment in so far as it annulled all the acts of the competition procedure as from the marking of the second written test without limiting the consequences of the annulment to reinstatement of the applicant's rights. It relies in that connection on the general principles of legal certainty, protection of legitimate expectations and proportionality and the settled case-law of both the Court of Justice and the Court of First Instance. It adds that the contested judgment is also inadequate as regards the statement of its grounds.

Breach of the general principles of legal certainty, protection of legitimate expectations and proportionality and failure adequately to balance the interests involved

7. The contested judgment states in particular:

(paragraph 43) 'A failure to observe the limit of 800 words, if substantial, constitutes an irregularity of such a kind as to vitiate both the contested decision of the Selection Board regarding the marking of the test and the rest of the procedure'.

(paragraph 44) 'However, in an open competition based on qualifications and tests consisting of a number of stages, an irregularity in an intermediate stage is a ground for the annulment of the contested decision only if it distorts the outcome of the competition. ...'

(paragraph 51) The defendant 'has not substantiated its principal contention that only five candidates slightly exceeded the limit of 800 words and that those five are not on the list of successful candidates.'

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

(paragraph 53) 'Consequently the applicants' submissions must be upheld and the marking of the second written test in Competition COM/A/482 and the subsequent acts in the procedure must be annulled. ...'.

8. According to settled case-law of the Court of Justice, in staff cases an irregularity in a competition organized for the purpose of constituting a reserve does *not* automatically bring about cancellation of the entire results of the competition. On the other hand, that irregularity must be followed by fair reinstatement of the rights of the parties which it has placed at a disadvantage. [8]

That case-law is applicable even where, by reason of circumstances attributable to a Community institution organizing an open competition, it is impossible for the Community judicature to define with precision the impact that a given irregularity had on the subsequent conduct and outcome of a competition. That is the conclusion that follows from *Detti*. [9]

9. In *Detti*, the action before the Court of Justice was brought by a candidate in a competition for which tests were organized in both Brussels and Luxembourg. It subsequently emerged that the tests were not the same in Brussels and Luxembourg, so that it was necessary to adopt offsetting measures. When questioned by the Court, the administration was unable to indicate the specific criteria that had been applied in the marking. The Court then held that '[i]n those circumstances, [it] cannot check whether objective criteria were applied or, in particular, whether the candidates were treated equally'. In contrast to the approach taken by the Court of First Instance in the contested judgment, the Court of Justice did not infer from this that the whole competition should be annulled. On the contrary, it held that:

'Since the competition in question was an open competition for the purpose of constituting a reserve for future recruitment, the applicant's rights will be adequately protected if the board and the appointing authority reconsider their decisions and seek a just solution in her case ... It will not be necessary to call in question the entire results of the competition or to annul the appointments which have been made as a result thereof'.

8 — See Case 31/75 *Costacurta* v *Commission* [1975] ECR 1563, paragraph 17; Joined Cases 4/78, 19/78 and 28/78 *Salerno and Others* v *Commission* [1978] ECR 2403, paragraph 35; Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613, paragraph 25; Case 255/78 *Heirwegh* v *Commission* [1979] ECR 2323, paragraph 15; Case 67/81 *Ruske* v *Commission* [1982] ECR 661, paragraph 13; Case 16/81 *Alaimo* v *Commission* [1982] ECR 1559, paragraph 15. See also the Opinion of Advocate General Rozès in Case 225/82 *Verzyck* v *Commission* [1983] ECR 1991, 2010.

9 — Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, paragraph 33.

In a judgment which it delivered after the contested judgment, the Court of First Instance too adopted that point of view. [10] Still later, it again stated in a judgment of 5 December 1990:

'It would, moreover, be contrary to the principle of sound administration for a procedural irregularity concerning only one official to result in the calling into question of the promotions of all the officials on the list'. [11]

10. The case-law just cited is based on the need to find a solution which strikes a balance between the interests of the candidates placed at a disadvantage by an irregularity committed in a competition and the interests of the other candidates. [12] This need to deal carefully with the various interests involved is a general principle of sound administration, and in this case good judicial practice, which is upheld by Community law. That principle requires the Court not only to make efforts, for reasons of legal certainty, to ensure fair reinstatement of the rights of the aggrieved candidates but also to take account of the legitimate expectations of the candidates already selected and/or appointed. [13] That means that in this case, in seeking a solution in relation to an irregular recruitment procedure, the Court must weigh two types of damage against each other: the actual damage suffered by the aggrieved candidates, which must be fairly redressed, and the potential damage that the other candidates would suffer as a result of the measures envisaged to secure such redress.

11. The obligation carefully to seek a balance between the various interests involved and weigh the real and potential damage is clear from the case-law of the Court of Justice in staff cases. Thus, in *Oberthür*, [14] the Court of Justice held:

'It is apparent from the foregoing that the Commission had been guilty of a wrongful act or omission in putting or leaving the applicant in a less favourable position than the other officials eligible for promotion. Accordingly, the procedure for promotion to Grade B 2 for 1978 was irregular as regards the applicant.' (paragraph 11).

10 — Joined Cases T-32/89 and T-39/89 *Marcopoulos* v *Court of Justice* [1990] ECR II-281, paragraph 44.

11 — Case T-82/89 *Marcato* v *Commission* [1990] ECR II-735, paragraph 51.

12 — Other interests may also deserve protection, such as the interest of a service (and of its users) or the need to ensure continuity of a public service. See the judgment in Case 24/78 *Martin* v *Commission* [1979] ECR 603, paragraph 10. For another example in which it was necessary to achieve a balance between various interests in a staff case, see Case 130/75 *Prais* v *Council* [1976] ECR 1589, paragraph 15.

13 — The Court refers to a principle of legal certainty by which the confidence of persons concerned deserves protection — Case 1/73 *Westzucker* v *Einfuhr-und Vorratsstelle Zucker* [1973] ECR 723, paragraph 13. Regarding the application of those principles in proceedings for annulment brought by officials see Case 289/81 *Mavridis* v *Parliament* [1983] ECR 1731, paragraph 21; Case 124/87 *Gritzmann-Martignoni* v *Commission* [1988] ECR 3491, paragraph 18; Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, paragraph 40; Case T-45/91 *McAvoy* v *Parliament* [1993] ECR II-83, paragraph 56.

14 — Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743. That judgment was followed by the Court of First Instance in *Marcato*, paragraph 51.

From this the Court inferred:

'annulment of the promotions of the 40 officials who have in fact been promoted to Grade B 2 would constitute an excessive penalty for the irregularity committed ...' (paragraph 13).

The Court also took account of the interests of the aggrieved official by holding that compensation to be determined *ex aequo et bono* 'constitutes in the present case the form of compensation which best meets both the applicant's interests and the requirements of the department' (paragraph 14). [15]

12. In its abovementioned judgment in *Martin* v *Commission*, the Court undertook a similar examination of the interests involved but on that occasion came to the opposite conclusion. [16] In that judgment, which also concerned an action for annulment of a decision of a competition selection board, the Court annulled the contested decision 'and the subsequent procedure in the competition and the appointments made as a result thereof'. It was the particular nature of that case that prompted the Court to decide to make such a drastic annulment rather than take the less radical course of reinstating the rights of the aggrieved candidates. The dispute concerned a competition in which only two candidates had been admitted to the written tests. After determining that the subject-matter of the test has been chosen in such a manner that one of the candidates was placed at a substantial advantage, the Court decided to annul both the decision of the selection board not to admit the disadvantaged candidate to the oral tests and the subsequent procedure in the competition and the appointment made following it. There is no reason to be surprised at the course taken by the Court since in that case there was no need to take account of any legitimate expectations on the part of a large number of other candidates.

13. That case-law prompts me to think that in the contested judgment the Court of First Instance did not adopt a solution which struck a balance between the interests involved. It annulled a competition procedure which led to the selection of 67 suitable candidates and the appointment of at least 38 of them on the ground that the procedure was vitiated by irregularities which undermined the rights of 4 aggrieved candidates, namely the applicants at first instance. In my view, it is apparent from the passages from the contested judgment cited earlier (point 7) that in declaring the annulment the Court of First Instance was somewhat one-sided in its concern to reinstate the rights of the applicants, without taking any account of the legal situation of the other parties concerned. It is possible that it allowed itself to be guided in its decision by the fact that the Commission had lost the copies of the tests and could not therefore prove its statements. However, that factor does not in itself justify the imposition of the drastic penalty of annulment opted for by the Court of First Instance in the contested judgment where it has not been shown that, having regard to all the interests involved in the dispute, that penalty was strictly necessary for the disadvantaged candidates to have their rights equitably reinstated.

15 — See also the Opinion of Advocate General Warner in Case 86/77 *Ditterich* v *Commission* [1978] ECR 1855, at 1875: 'Assuming that the validity of the list was an essential ingredient of the validity of those promotions, its annulment could cause to officials whose names were on it hardship disproportionate in the aggregate to the wrong suffered by the applicant'.

16 — See footnote 12.

14. I therefore conclude that the contested judgment gives rise to a breach of a general principle of Community law, namely the principle which requires that care be taken to balance the interests involved, since, as regards the acts done in competition COM/A/482, the Court of First Instance did not seek a solution balancing the various interests involved and, in particular, because it did not examine the question whether, in order to ensure fair reinstatement of the applicants' rights, the penalty called for was in fact annulment — which, moreover, was ill defined (see point 17 et seq. below), with all its attendant effects for the other candidates.

Insufficient statement of the grounds on which the contested judgment was based

15. The Commission also states, in rather general terms, that the contested judgment does not contain an adequate statement of the grounds on which it is based. It seems to me, from the appeal submissions, that the Commission wishes in particular to draw the attention of this Court to two alleged lacunae in the statement of grounds. First, the contested judgment departed from settled case-law without giving reasons (see point 16 below) and, secondly, the Court of First Instance did not indicate in sufficient detail what acts done in connection with competition COM/A/482 were annulled (see points 17 to 24 below).

16. I have already shown (in points 8 and 9) that the contested judgment departs from the settled case-law of both the Court of Justice and the Court of First Instance. However, the Court of First Instance did not anywhere give the reason for which it distanced itself from that case-law, even though such an explanation was called for. [17] I do not consider however that the contested judgment is vitiated by an inadequacy of reasoning on that point. The Court of First Instance is not bound at all by case-law and is not therefore obliged to provide explanation when it decides to depart from it.

17. On the other hand, I back the Commission's statement that the contested judgment is subject to lacunae and that the statement of grounds does not clearly and precisely indicate which acts in the procedure are annulled in the operative part.

18. As I stated earlier, in addition to the decision of the selection board concerning marking of the second written test, the contested judgment also annuls 'the subsequent acts in the competition procedure'. The parties disagree totally as to which acts the Court of First Instance intended to refer to.

19. According to the Commission, the judgment also annuls the list of suitable candidates *and* the appointments made on the basis of that list. [18] In that regard it appears to rely on the case-law of the Court of Justice to the effect that 'when the Court annuls a decision, the author of that decision is under an obligation to *revoke* or at least not to apply a subsequent decision which simply confirms the first one' (emphasis added). [19]

17 — The case-law in question was not even mentioned in the contested judgment, which makes no reference whatsoever to the case-law of the Court of Justice or the Court of First Instance.

18 — The Commission appears to adhere to that view even after the order of the President of the Court of Justice in the proceedings for interim relief. See paragraph 4 of its observations on the statements in intervention.

19 — Joined Cases 45/70 and 49/70 *Bode* v *Commission* [1971] ECR 465, paragraph 12.

The Union Syndicale Bruxelles also considers that the judgment entails annulment both of the list of suitable candidates and of the appointments made in the meantime, but relies on other reasons for that view. It submits that any other interpretation of the contested judgment would not adequately reinstate the rights of the applicants at first instance. [20]

20. The officials already appointed consider that the judgment may affect the list of suitable candidates but certainly does not affect the appointments already made. [21] They base their view primarily on Annex III to the Staff Regulations. Pursuant to Article 5 of that annex, the competition procedure, as provided for in Annex III to the Staff Regulations, ends with the drawing up of the list of suitable candidates and the forwarding thereof to the appointing authority. The appointment of candidates therefore does not form part of the annulled competition procedure. [22]

The officials already appointed also refer to the reopening of the procedure in competition COM/A/482 decided on by the Commission following delivery of the contested judgment by the Court of First Instance. [23]

The 'successful candidates at the original competition who have already been appointed to posts as officials' were not admitted to the reopened competition. In the event of their appointments also being annulled, that would mean, according to the officials already appointed, that the principle of equal treatment was not observed in the reopening of the competition. [24]

A number of the officials already established also invoke the principle of appointment for life and the principle of the protection of career rights enjoyed by officials of the European Communities. [25]

21. The successful candidates in competition COM/A/482 who have not yet been appointed state for their part that the contested judgment either annulled both the list of suitable candidates and the appointments already made or annulled neither. Any 'dissociation' of the list of suitable candidates and the appointments and therefore the creation of a distinction between the successful candidates already appointed and the successful candidates not yet appointed would be entirely arbitrary. Such dissociation and distinction would be rendered even more arbitrary by the fact that the procedure for the establishment of certain successful candidates who have not yet been appointed was already at a very advanced stage when the Court of First Instance delivered the contested judgment. If the Court of First Instance had wished to draw such a distinction, it should at least have given its reasons for doing so — but it did not. [26]

22. The President of the Court of Justice stated as follows in his order in response to the application for interim measures: [27]

20 — Written observations, paragraph 20.

21 — See the written observations of the interveners André and Others and Allen and Others, paragraphs 11 and 12. The observations lodged by Anchia and Others are less explicit.

22 — See Case 257/83 *Williams* v *Court of Auditors* [1984] ECR 3547, paragraph 10: 'the decision appointing ... concluded the competition procedure'.

23 — Commission Notice 91/C 197/08 reopening competition COM/A/482, OJ 1991 C 197, p. 14.

24 — Written observations of the interveners Anchia and Others, paragraphs 9 and 10.

25 — Written observations of the interveners Anchia and Others, paragraph 11. According to the Fédération de la Fonction Publique Européenne (FFPE), those principles are embodied in Article 1 of the Staff Regulations: written observations of the FFPE, p. 4.

26 — See the written observations of the interveners Zubizarreta and Others and Buggenhout and Others (paragraphs 27, 63 and 64).

27 — See footnote 5.

(paragraph 21) 'It should be pointed out at this stage that neither the proceedings before the Court of First Instance nor the operative part of its judgment were or are directed at the appointments which have already been made as a result of the competition in dispute'.

(paragraph 22) 'The competition procedure, as laid down in Annex III to the Staff Regulations, is completed by the drawing up of a list of suitable candidates and the forwarding of that list to the appointing authority, together with the reasoned report of the selection board. The annulment by the Court of First Instance of the subsequent acts in the competition procedure can therefore, apart from the annulment of the decision by the selection board concerning the marking of the second written test, entail *at most* only the annulment of the list of suitable candidates'.

(paragraph 24) 'For those reasons it must be held that, *pending the decision of the Court of Justice on the appeal*, the Commission is not obliged to cancel the appointments made prior to the date of the judgment by the Court of First Instance' (emphasis added).

23. It will be apparent from the foregoing that the annulment deriving from the contested judgment is open to several very divergent interpretations (since the judgment may have annulled the list of suitable candidates and the appointments made on the basis of it, or only the list or neither the list nor the appointments). The only conclusion which I think can be drawn is that the judgment lacks clarity. There is nothing anywhere in the judgment to show that, in addition to the decision of the selection board concerning marking of the second written test, the Court of First Instance intended, or did not intend, also to annul the list of suitable candidates drawn up on conclusion of the competition. As indicated in the grounds of the interim-measures order just cited, the operative part of the judgment could not be directed at appointments already made following the competition in dispute. [28] However, even on this point the contested judgment is anything but explicit.

24. Pursuant to the first paragraph of Article 176 of the EEC Treaty, a Community institution, in this case the Commission, is required to take the necessary measures to comply with the judgment declaring an act void. On the other hand, the Community judicature cannot itself order that institution to take specific implementation measures. [29] However, that does not mean — precisely in order to enable the institution concerned to take the necessary measures — that the Court must not unequivocally indicate which specific measures it is annulling.

By not indicating which 'subsequent acts in the competition procedure' were annulled by its judgment, the Court of First Instance also prevents the Court of Justice from verifying, pursuant to Article 51 of the Statute of the Court of Justice, whether the contested judgment has infringed Community law. However, the Court of Justice has also held on several occasion in staff cases that 'the statement of the reasons on which a decision adversely affecting an official is based must

28 — In the opposite case, the Court of First Instance's judgment would have given more relief than was asked for since the action before it did not relate to the appointments.

29 — *Verzyzk* v *Commission*, cited above, paragraph 19.

enable the Court to review the legality thereof'. [30] That principle appears to me to be fully applicable to the judgments of the Court of First Instance which, in the same way as the appointment decisions, are also subject to review by the Court of Justice, albeit in a different way.

25. I conclude that by failing to indicate clearly which acts done by the Commission in relation to competition COM/A/482 it intended its judgment to annul, the Court of First Instance did not give an adequate statement of the grounds on which its judgment was based.

Conclusion

26. Where an appeal is well founded, the Court of Justice may, pursuant to Article 54 of the Statute of the Court of Justice, either give final judgment in the matter or refer the case back to the Court of Justice for judgment.

Since, if they are upheld by the Court of Justice, the pleas for annulment which I have accepted as well founded are liable to involve an assessment of matters of fact, I propose that the Court of Justice refer the case back to the Court of First Instance.

27. In view of what I have just said, I suggest that the Court of Justice give judgment in the following terms:

(1) The judgment of the Court of First Instance in Case T-35/89 *Albani and Others* v *Commission* is annulled on the grounds that that judgment:

— annuls acts done by the Commission in connection with competition COM/A/482 without considering whether, having regard to the interests of the other candidates, such annulment is strictly necessary to ensure fair reinstatement of the rights of the aggrieved candidates; and/or

— does not indicate clearly which acts done by the Commission in connection with competition COM/A/482 are annulled.

(2) The case is referred back to the Court of First Instance.

30 — Case 18/83 *Morina* v *Parliament* [1983] ECR 4051, paragraph 11. See also, much earlier, Case 62/65 *Serio* v *Commission of the EAEC* [1966] ECR 813, 826.