OPINION OF ADVOCATE GENERAL ELMER

delivered on 15 July 1997 *

Introduction

1. In the present appeal the Council of the European Union has requested the Court to set aside the judgment delivered by the Court of First Instance of the European Communities (hereinafter 'Court of First Instance') on 26 June 1996 in Case T-91/95 *Lieve de Nil and Christiane Impens* v *Council* [1] by which the Court of First Instance annulled the Council's decisions rejecting their requests for compensation for material and non-material damage caused by the Council's failure to take sufficient measures to comply with the judgment of the Court of First Instance of 11 February 1993 [2] (hereinafter the '*Raiola-Denti* judgment'). Lieve de Nil and Christiane Impens claim that the Court should dismiss the appeal.

Facts

2. In its judgment the Court of First Instance established the facts of the case as follows:

'1 On 26 October 1990 the Council published Notice of Internal Competition B/228 in Staff Communication No 100/90 for the purpose of filling 15 administrative assistant posts in Grade B 5 by enabling Grade C 1 officials to obtain "upgrading" of their posts to that grade ... The notice stated that, having regard to the nature of the competition in question, no reserve list would be drawn up, since the number of successful candidates was not to exceed the 15 posts to be upgraded from Grade C to Grade B for 1990.

2 [Lieve de Nil and Christiane Impens], who were at the time Council officials in Grade C 1, were admitted to take part in the tests for the competition by individual notification dated 4 December 1990. The selection board did not include their names on the list of candidates who had been successful in that competition and on 13 April 1991 they brought, with seven other persons concerned, an action for the annulment of the decisions of the selection board ... [In the *Raiola-Denti* judgment] the Court held that the tests were not conducted in accordance with Competition Notice B/228 because the selection board failed to comply with the notice and rendered nugatory the language test specified. The Court consequently annulled "the steps taken following the decisions admitting candidates to the tests in Internal Competition B/228 ...".

3 Following [the *Raiola-Denti* judgment], which had acquired the force of *res judicata*,

* Original language: Danish.

1 — [1996] ECR-SC II-959.

2 — Case T-22/91 *Raiola-Denti and Others* v *Council* [1993] ECR II-69.

the Council decided, first, to maintain the decisions reclassifying the 15 candidates who had been successful in Competition B/228 with effect from 1 January 1991 and, secondly, to publish on 1 September 1993 a notice of Internal Competition B/228a open to candidates who had been admitted to take part in the tests for Competition B/228 by individual notification dated 4 December 1990 for the purpose of filling six administrative assistant posts in Grade B 5 by way of the upgrading of Grade C 1 posts. The nature and marking of the tests for Competition B/228a were identical to those for Competition B/228. The officials concerned were requested to confirm in writing by 15 November 1993 that they would be taking part in Competition B/228a ...

4 [Lieve de Nil and Christiane Impens] confirmed within the prescribed period that they would be taking part in Competition B/228a and, after the tests had taken place, were placed on the list of successful candidates. Their posts were reclassified to Grade B 5 with effect from 1 January 1994.

5 [Lieve de Nil and Christiane Impens] considered, however, that despite that reclassification the Council could not be considered to have taken the steps necessary to make good the damage caused by the refusal of the selection board in Competition B/228 to place them on the list of successful candidates, inasmuch as that refusal had deprived them of reclassification with effect from 1 January 1991.

6 On 9 February 1994 [Lieve de Nil and Christiane Impens] therefore submitted a request ... for compensation for damage suffered as a result of the irregular decision of the selection board in Competition B/228. They requested the appointing authority to "declare that the series of faults committed by the selection board in Competition B/228 had been the cause of both material and non-material damage". They requested the appointing authority to pay them BFR 500 000 each by way of compensation for material and non-material damage ...

7 That request was rejected by implication ... and then by express rejection decision notified to [Lieve de Nil and Christiane Impens] by memoranda of 15 June 1994 from the Director for Staff and Administration.

8 On 6 September 1994 [Lieve de Nil and Christiane Impens] submitted a complaint against the decision rejecting their request ...

9 On 4 January 1994 the appointing authority took an express decision to reject the complaint.'

Proceedings before the Court of First Instance

3. By application lodged at the Registry of the Court of First Instance on 29 March 1995 Lieve de Nil and Christiane Impens brought an action before that Court for the annulment of the Council's decision.

4. In its judgment the Court of First Instance held that:

'34 ... in order to comply with the obligation laid down in Article 176 of the Treaty, it is for the institution which adopted the act annulled by the Community judicature to determine the measures required to implement the judgment annulling the act in the exercise of the discretion which it has for that purpose, complying with both the operative part and the grounds of the judgment which it is required to implement and with the provisions of Community law ...

35 Inasmuch is it is required, in order to implement a judgment, to comply with Community law, the institution concerned must ensure that it complies with the principle of equal treatment of officials and the principle that officials are entitled to reasonable career prospects, which are applicable in matters relating to the Community civil service

...

36 In the present case, where the Council determined the nature and the content of the measures adopted to implement [the *Raiola-Denti* judgment] it was required to comply with those two principles ...

...

38 In refusing to reclassify [Lieve de Nil and Christiane Impens] retroactively from 1 January 1991 like the successful candidates in Competition B/228, the Council caused them to lose their chances of earlier promotion ... to Grade B 4 and then of earlier promotion to Grade B 3, and of seeing their careers develop in the same conditions as the careers of the candidates who had been successful in competition B/228. As [Lieve de Nil and Christiane Impens] point out, without being contradicted by the Council, 11 of the 15 candidates who were successful in Competition B/228, who were reclassified in 1991, had already been promoted to Grade B 3 by 1 January 1996, including three who, in 1996, were eligible for promotion to Grade B 2; while the remaining four successful candidates had by that time been promoted to Grade B 4, including three who, in 1996, were eligible for promotion to Grade B 3. In answer to a written question from the Court of First Instance, the Council acknowledged that if [Lieve de Nil and Christiane Impens] had been reclassified in Grade B 5 in January 1991 they could themselves ... have been eligible for promotion to Grade B 4 in July 1991 and to Grade B 3 on 1 July 1993, by which date their net remuneration would have exceeded the remuneration then actually received by them.

39 [Lieve de Nil and Christiane Impens] therefore suffered a distortion in the prospects for the development of their careers as compared with those of the successful candidates in Competition B/228 ... Once Competition B/228a had been organised ... the Council could have provided that reclassification of the successful candidates would take effect on the same date as the reclassification of the successful candidates in Competition B/228. Since it did not provide for that solution in advance, once it had received [Lieve de Nil's and Christiane Impens'] requests to that effect, it should have withdrawn the reclassification decisions until 1 January 1994 in order to proceed, with a view to equal treatment, to reconstitute the careers of the persons concerned ...

41 First, the retroactivity requested did not relate to hypothetical success on the part of [Lieve de Nil and Christiane Impens] in Competition B/228 and their consequent inclusion on the list of successful candidates relating to that competition, but to the effects that would attach to their actual success in Competition B/228a ...

42 Secondly, the two competitions were not separate entities. [The *Raiola-Denti* judgment] only annulled the steps taken following the decisions to admit [Lieve de Nil and Christiane Impens] to Competition B/228. It follows that that competition ... remained open and the applications admitted ... remained in abeyance before the appointing authority ... Consequently, when it organised Competition B/228a, the Council in reality merely re-opened the procedures in Competition B/228 solely as regards those candidates who had not been included on the list of successful candidates drawn up following the previous tests ... The candidates who were successful in the tests organised on the basis of Notices B/228 and B/228a must therefore be regarded as the successful candidates in a single competition. The Council was therefore required to ensure that the candidates who were successful in the tests conducted on the basis of Notice B/228a received the same treatment as those who had been successful in the tests conducted on the basis of Notice B/228 by conferring on the reclassification of the former the same effects as that of the latter.

...

44 It follows that the refusal by the Council to adopt the measures which would have enabled it to place [Lieve de Nil and Christiane Impens] on an equal footing with their colleagues ... [therefore] infringed Article 176 of the Treaty.

45 Consequently, the Council is liable to pay compensation for the damage actually suffered following that breach.

...

47 [Lieve de Nil and Christiane Impens] have ... established the existence of a right to compensation for the damage suffered as a result of the fact that they were not reclassi-

fied in Category B at the same time as the candidates who were successful in Competition B/228, inasmuch as, although they would not have been entitled to promotion after their reclassification, they have, at all events, lost the opportunity of seeing their careers develop in the future in a manner comparable to the careers of the candidates who were successful in Competition B/228 ...

48 [Lieve de Nil and Christiane Impens] claim in addition to have suffered non-material damage that they evaluate at 1 symbolic ecu.

...

50 The Court of First Instance considers that the non-material damage actually suffered by [Lieve de Nil and Christiane Impens] is that linked to the state of prolonged uncertainty in which they found themselves as regards the development of their careers ... the specific circumstances of the case were marked by significant irregularities in the way the tests organised on the basis of Notice B/228 were conducted, by a serious impairment of [Lieve de Nil's and Christiane Impens'] entitlement to see the tests conducted properly and by the fact that the Council's refusal to put them on an equal footing with their colleagues ...took place at a date when they had already been successful in the tests organised on the basis of Notice B/228a.

51 The Court of First Instance evaluates the combined material and non-material damage suffered by [Lieve de Nil and Christiane Impens] *ex aequo et bono* at BFR 500 000 ... The Council must therefore be ordered to pay that amount to [Lieve de Nil and Christiane Impens].'

Observations

5. In support of its claim that the judgment should be set aside the Council has put forward six different pleas in law.

The Council's first plea in law

6. In the context of its first plea in law the Council considers that the Court of First Instance found fault with it for having failed to take sufficient measures to comply with the *Raiola-Denti* judgment, since, in the exercise of its discretion, the Council had decided to organise a new competition and to reclassify the candidates with effect from 1 January 1994. In the Council's view the Court of First Instance thereby misdirected itself as to the scope of Article 176 of the EC Treaty as determined in *Detti* v *Court of*

Justice, [3] *Commission* v *Albani* [4] and *Parliament* v *Meskens*. [5] The Council also considers that the Court of First Instance contradicts itself where, on the one hand, it states that it is not for itself to determine the measures required to implement a judgment and, on the other hand, it lists the measures which the Council might have taken. As a result, the case-law establishing the institution's discretion as regards the choice of measures is deprived of all practical effect.

7. Lieve de Nil and Christiane Impens contend that, on the contrary, the Court of First Instance, by its judgment, did not infringe Article 176 of the Treaty or the case-law cited above, since it follows from that case-law that the competent institution is required to make full reparation for the damage sustained and that the Court of First Instance is entitled to review *a posteriori* whether, within the framework of its discretion, the institution has chosen sufficiently effective measures to implement a judgment.

8. The first paragraph of Article 176 of the Treaty provides as follows:

'The institution whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice.'

9. The Court of First Instance and the Court of Justice have consistently held that: [6]

'[A]rticle 176 provides for the sharing of powers between the judicial authority and the administrative authority, according to which it is for the institution that issued the act annulled to determine what measures are required to comply with a judgment annulling a decision ...

In exercising that power of appraisal, the administrative authority must observe the provisions of community law as well as the operative part and the grounds of the judgment with which it is required to comply ...'

10. Moreover, the Court of Justice held in *Parliament* v *Meskens*, cited above, that: [7]

'... Article 176 of the EC Treaty requires not only that the administration take the neces-

3 — Case 144/82 [1983] ECR 2421.
4 — Case C-242/90 P [1993] ECR I-3839.
5 — Case C-412/92 P [1994] ECR I-3757.

6 — See, for example, Case T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335.
7 — Judgment cited in footnote 5, paragraphs 24, 25 and 26.

sary measures to comply with the judgment of the Court but that it make good further damage which may be caused by the unlawful measure which has been annulled ... Thus Article 176 of the Treaty does not make compensation for the damage dependent on the existence of a new fault distinct from the original unlawful measure which has been annulled, but provides for compensation for the damage which results from that measure and which continues after its annulment and for compliance by the administration with the judgment whereby it was annulled.

In this case the Court of First Instance established the Parliament's fault, which consisted in the refusal to allow Mrs Meskens to take part in Competition No B/164 ... It remained therefore to be ascertained whether the damage caused by that measure continued after it had been annulled.

That is what the Court of First Instance proceeded to do in the judgment under appeal, in which it decided that the non-material damage caused by the unlawful measure had not been removed because the Parliament had done nothing to eliminate the consequences of that measure.'

11. In the light of those considerations, I agree with the Council that the institutions have, when the Court of First Instance has delivered a judgment annulling an act, a discretion to decide what measures must be adopted to comply with the judgment. The Court of First Instance may, however, in subsequent proceedings, verify whether the institution, in the exercise of that discretion, has chosen sufficiently effective measures to comply with the judgment in question. Such review does not have the effect of rendering the institutions' discretion illusory. Provided that they choose measures which are sufficiently effective to ensure compliance with the judgment, the institutions are free to determine the measures which they consider most appropriate in the specific case.

12. The fact that the Court of First Instance indicates in paragraph 39 of the judgment the measures which the Council might have taken to comply with the judgment satisfactorily does not in any way affect the discretion which the institutions initially have, since the Court is merely providing examples of the measures which the institution might have taken.

13. As regards the choice of measure taken in order to comply with a judgment, this Court held in *Detti* v *Court of Justice*, which concerned irregularities in a general competition organised for the purpose of drawing up a reserve list, that:

'... 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]

In *Commission* v *Albani and Others*, the Court, after repeating the above passage, went on to say:

'That principle is based on the need to reconcile the interests of the candidates put at a disadvantage by an irregularity committed in the course of a competition and the interests of the other candidates. The Court is required to take account not only of the need to restore the rights of the candidates who have been adversely affected but also of the legitimate expectations of the candidates already selected.' [9]

14. It follows from the foregoing, first, that the institution is required to make good any damage which the candidates in a competition may have suffered as a result of the unlawful act. In order to do so it must seek a solution which also takes account of the other candidates. The judgment does not in any way affect the candidates in competition B/228, however, since there is no question of the Court of First Instance having required the Council to invalidate the result of the competition in its entirety and annul the reclassifications effected following that competition. The Court of First Instance merely states in its judgment that Lieve de Nil and Christiane Impens should have had the same rights as the other candidates. In my view the judgment of the Court of First Instance does not thereby have the effect of overturning the case-law on the scope of Article 176 of the Treaty.

15. The Council's first plea in law must therefore be rejected.

The Council's second plea in law

16. By its second plea the Council claims that in paragraph 42 of its judgment the Court of First Instance wrongly presumed that Competitions B/228 and B/228a constituted a single competition rather than two separate competitions.

In that regard, the Council contends that the legitimate expectations of the 15 persons who were successful in Competition B/228 would not be protected if the view taken by the Court of First Instance that Competition B/228 remained open for almost two years were to be shared. Furthermore, it follows from Article 30 of the Staff Regulations that the appointing authority is to appoint a selection board for each competition, which is precisely what the Council did in the present case.

8 — Judgment cited in footnote 3, paragraph 33.
9 — Judgment cited in footnote 4, paragraph 14.

17. Lieve de Nil and Christiane Impens contend that whether Competitions B/228 and B/228a constitute one undivided competition or two separate competitions is a question of fact on which, pursuant to Article 51 of the EC Statute of the Court of Justice, no appeal lies.

18. The first paragraph of Article 51 of the EC Statute of the Court of Justice provides:

'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.'

19. In paragraph 42 of its judgment the Court of First Instance held that Competitions B/228 and B/228a were not separate competitions but formed one undivided competition. By its second plea in law the Council is in reality asking the Court to undertake a new assessment of a fact, since it is in fact arguing that there were two separate competitions. It follows, however, from Article 51 of the EC Statute of the Court of Justice that an appeal to the Court of Justice is to be limited to points of law. Consequently, in an appeal the Court of Justice cannot rule on a question of fact, but must accept that fact in the form in which it was established in the judgment delivered by the Court of First Instance. [10]

20. For those reasons, I do not consider it necessary to examine the merits of the Council's second plea.

The Council's third plea in law

21. By its third plea in law the Council claims that it is contrary to the principle of equality of treatment to reclassify the applications who were successful in Completion B/228a on the same date as those who were successful in Competition B/228, since they were successful in a new competition with new questions, assessed by different persons.

Furthermore, the six reclassifications which followed Competition B/228a were authorised, as regards five posts, in the 1991 Budget and, as regards one post, in the 1993 Budget. It was therefore possible to reclassify only five out of the six persons who

10 — See, for example, order of 20 March 1991 in Case C-115/90 P *Turner* v *Commission* [1991] ECR I-1423; Case C-378/90 P *Pitrone* v *Commission* [1992] ECR I-2375; and order of 26 September 1994 in Case C-26/94 P *Mrs X* v *Commission* [1994] ECR I-4379.

were successful in Competition B/228a with effect from 1 January 1991, which would also be contrary to the principle of equality of treatment.

22. Lieve de Nil and Christiane Impens contend in that regard that Competition B/228 was annulled on the ground of irregularities. The damage which they suffered could only be made good in full if they were placed in the same position as they would have been in the absence of irregularities.

23. The first part of the Council's third plea is again based on the hypothesis that Competitions B/228 and B/228a constituted two separate competitions. As stated above, the Court of First Instance found definitively that they constituted one undivided competition. It is not therefore contrary to the principle of equality of treatment to treat those who were successful in Competition B/228a in the same way as those who were successful in Competition B/228. In the light of the finding of the Court of First Instance that they formed a single competition, it would be contrary to the principle of equality of treatment not to treat the two groups in the same way.

24. The second part of this plea refers to the fact that, for budgetary reasons, it was possible to reclassify only five of the six persons who were successful in Competition B/228a with effect from 1 January 1991, which would also be contrary to the principle of equal treatment.

25. As stated above, it follows from case-law that the institutions are required to make good in full any damage suffered by their officials as a result of an irregular act. In that regard, budgetary problems cannot relieve the institutions of that obligation. In the present case, therefore, the Council should have endeavoured to find some means consistent with its budget of reclassifying the six persons who were successful in Competition B/228a with effect from 12 January 1991 or should have compensated the person or persons not reclassified on that date.

26. I therefore consider that the Council's third plea must be rejected.

The Council's fourth plea in law

27. By its fourth plea in law the Council claims that the Court of First Instance infringed Article 45(2) of the Staff Regulations, which provides that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition, by requiring that Lieve de Nil and Christiane Impens be reclassified with effect from 1 January 1991, since they were not successful in Competition B/228.

28. Lieve de Nil and Christiane Impens contend in that regard that this plea is again based on the argument that Competitions B/228 and B/228a were two separate compe-

titions. As stated in the context of the second plea, that question cannot be the subject of an appeal.

29. It follows from Article 45(2) that an official may be transferred from one service to another or promoted from one category to another only on the basis of a competition. As pointed out above, the Court of First Instance held that the candidates who were successful in Competition B/228 and those successful in Competition B/228a were to be regarded as having been successful in a single competition. No appeal can lie against that finding of fact. Accordingly, there has been no infringement of Article 45(2) of the Staff Regulations, since the very ground on which Lieve de Nil and Christiane Impens demand to be reclassified with effect from 1 January 1991 is that they were successful in Competition B/228-B/228a.

30. The Council's fourth plea must therefore be rejected.

The Council's fifth plea in law

31. By its fifth plea in law the Council claims that in paragraph 38 of its judgment the Court of First Instance committed an error of law by considering the situation of fact as it existed at the date of the judgment instead of examining the situation at the date on which the application was lodged.

The Council refers to the fact that Lieve de Nil and Christiane Impens stated in their application the number of persons promoted in December 1994 out of the 15 who had been successful in Competition B/228 and who had been reclassified on 1 January 1991. The judgment, on the other hand, is based on the information provided during the proceedings, relating to the situation existing in January 1996. It follows from Article 48(2) of the Rules of Procedure, however, that the introduction of new pleas in law in the course of proceedings is prohibited, unless those pleas are based on matters of law or of fact which came to light in the course of the procedure.

32. Lieve de Nil and Christiane Impens contend, on the other hand, that the Council had raised no objection to this information during the proceedings before the Court of First Instance. It therefore constitutes a new plea in law which cannot be introduced for the first time at the appeal stage. In the alternative, they submit that the information relating to the situation at 1 January 1996 of the 15 persons who had been successful in Competition B/228 constitutes information designed to enable the Court of First Instance to assess the extent of the damage sustained. That information cannot therefore be regarded as a new plea.

33. Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure. If a party were able to introduce before the Court of Justice, for the first time, a plea which he had not previously introduced before the Court of First Instance, that would amount to allowing such a party to bring before the Court of Justice a dispute whose scope was wider than that of the dispute submitted to the Court of First Instance. At the appeal stage, the jurisdiction of the Court of Justice to rule on the judgment at first instance is therefore limited to the pleas examined in that judgment. [11]

34. The Council concedes that it failed to raise an objection in respect of the abovementioned information in the course of the proceedings before the Court of First Instance. The Council's plea alleging that the Court of First Instance has committed an error in law by considering the situation of fact existing at the date of the judgment instead of examining the situation as existing at the date when the application was lodged therefore constitutes a new plea which cannot be introduced for the first time at the appeal stage.

35. For that reason the merits of the Council's fifth plea cannot be examined.

11 — See, in particular, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981.

The Council's sixth plea in law

36. By its sixth plea in law the Council claims, first, that an institution can be held liable, according to the case-law, only on three conditions, namely the illegality of the conduct for which it is criticised, actual damage and the existence of a causal link between the conduct and the damage sustained. The first condition, relating to the illegality of the conduct for which an institution is criticised, is not satisfied, however, since the Council did not act illegally when adopting the decisions in question, which were intended to give effect to the *Raiola-Denti* judgment. The Council further claims that the sum of BFR 500 000 which the Court of First Instance awarded to each of the parties by way of compensation for material and non-material damage is manifestly disproportionate to the amounts previously awarded by the Court of Justice and the Court of First Instance. In that regard, the Council has provided details of the amounts previously awarded to officials or candidates in competitions.

37. As regards the first part of this plea in law, Lieve de Nil and Christiane Impens contend that the question as to whether the conditions giving rise to the obligation to make reparation are satisfied involves an objective assessment of the facts on the part of the Court of First Instance which cannot form the subject of an appeal. As regards the extent of the compensation awarded, Lieve de Nil and Christiane Impens maintain that the Court of Justice has no jurisdiction, in the context of an appeal, to determine whether the compensation awarded by the Court of First Instance to the persons concerned is commensurate with the damage sustained.

38. As regards the first part of this plea in law, the Court of Justice has held, in relation to the question of the assessment of the facts, that: [12]

'[The] Court of First Instance thus has exclusive jurisdiction to find the facts ... The Court of First Instance has also exclusive jurisdiction to assess those facts ... On the other hand, when the Court of First Instance has found or assessed facts, the Court of Justice has jurisdiction to exercise the review required of it by Article 168a of the EC Treaty provided that the Court of First Instance has defined their legal nature and determined the legal consequences. In the present case that applies to the assessment by the Court of First Instance that the slowness of the preparatory procedure constituted a fault ...'.

39. In paragraph 44 of its judgment the Court of First Instance, after establishing the facts of the case, held that the refusal of the Council to adopt the measures which would have enabled it to place Lieve de Nil and Christiane Impens on an equal footing with their colleagues constituted a breach of Article 176 of the Treaty, in other words a fault. The Court of Justice has jurisdiction, on the basis of the facts established by the Court of First Instance, to review the inferences in law drawn by the Court of First Instance. It is therefore necessary to examine the merits of this part of the plea in law.

40. The Court of First Instance considered that the first condition giving rise to liability, namely the illegality of the conduct for which the institution was criticised, was satisfied, since it found that the Council had acted illegally by failing to reclassify Lieve de Nil and Christiane Impens on 1 January 1991. In drawing that legal conclusion, the Court of First Instance did not in my view commit a fault, since it is apparent from the case-file [13] that as a result of the Council's conduct Lieve de Nil and Christiane Impens suffered discrimination as compared with the officials who had successfully taken part in Competition B/228.

41. This part of the Council's sixth plea in law must therefore be rejected.

42. The second part of the sixth plea in law concerns the amount which the Council was ordered to pay by way of compensation for material and non-material damage, since the Council claims that there has been a breach of the principle of proportionality.

43. The Court of Justice has held [14] that:

'... it is for the Court of First Instance alone to assess, within the confines of the claim, the method and extent of compensation for the damage'.

44. It follows that the Court of Justice has no jurisdiction, in the context of an appeal,

12 — See, in particular, *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 11.

13 — See paragraph 39 of the judgment.

14 — See, in particular, *Commission* v *Brazzelli Lualdi and Others*, cited in footnote 11, paragraph 81.

to substitute its own assessment of the extent of the loss for the assessment of the Court of First Instance. The determination of the extent of a loss is thus a finding of fact and the Court of Justice cannot rule on that point in an appeal. It also follows from the case-law cited above that the compensation must remain within the bounds of the claim and that it is for the Court of First Instance to determine the method and extent of the compensation of the damage. In my view the Court of Justice must have jurisdiction to verify whether the Court of First Instance has awarded compensation within the confines of the claim and whether its judgment discloses with sufficient clarity the basis on which the amount of compensation was calculated.

45. In that regard, the Court of Justice held in a judgment of 20 February 1997 [15] that:

'... the fact that a statement of reasons is lacking or inadequate, hindering that review of legality, constitutes a matter of public interest which may, and even must, be raised by the Community Court of its own motion ...'.

46. In the present case the Court of First Instance found in its judgment that Lieve de Nil and Christiane Impens suffered both material and non-material damage as a result of the Council's illegal conduct. When fixing the amount of the compensation, however, it failed to distinguish between the compensation for material damage and the compensation for non-material damage, since it merely indicated a global sum by way of compensation.

47. The judgment contains no other calculations of the damage actually suffered by Lieve de Nil and Christiane Impens in respect of which the Council, according to paragraph 45, is required to pay compensation. After referring in paragraph 48 to the claim for compensation for non-material damage of 1 ecu and after establishing, in paragraph 50, that Lieve de Nil and Christiane Impens did in fact suffer non-material damage, the Court of First Instance, in paragraph 51, evaluated the combined compensation at BFR 500 000 each. By way of grounds, it states quite laconically that 'the combined material and non-material damage suffered by each of the applicants will be evaluated *ex aequo et bono* at BFR 500 000'.

48. To my mind those reasons are quite inadequate. Lack of any indication in the judgment as to the precise means used for computing the amount of compensation for material damage makes it impossible to understand how the Court of First Instance arrived at that amount and whether, in doing so, it exercised its discretion in the light of available economic information relating to the loss suffered by them through not having been promoted at the relevant time, or whether that amount was not the expression of the calculation of a loss suffered but was instead fixed as a kind of 'punitive damages' which include compensation for non-material damage in excess of the amount claimed (1 ecu). A further consequence of

15 — Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24.

the inadequate reasoning is that the Court of Justice is not in a position to appraise the plea put forward by the Council alleging that the award of BFR 500 000 constituted a breach of the principle of proportionality.

49. In my opinion the Court of First Instance should have made a clearer distinction in its judgment between an amount designed to make good the material damage and an amount designed to make good the non-material damage before assessing and evaluating those types of damage separately. As regards the material damage, it should not have confined itself to stating that Lieve de Nil and Christiane Impens 'have ... lost the opportunity of seeing their careers develop in the future in a manner comparable to the careers of the candidates who were successful in Competition B/228 ...', [16] but should have stated precisely how it had calculated the amount of compensation on the basis of the information specifying the damage suffered by the persons concerned by reason of the fact that they had not been reclassified on 1 January 1991 and the fact that they had not been promoted at the same time as those who had originally been successful in Competition B/228, in comparison with the advantage arising from the present payment.

50. In my view it must be found, in the light of the foregoing considerations, that the judgment does not contain an adequate statement of reasons as regards the fixing of compensation. Accordingly, pursuant to Article 54(1) of the EC Statute of the Court of Justice, the judgment should be set aside on this point and referred back to the Court of First Instance for judgment. The costs should be reserved.

Conclusion

51. For the foregoing reasons, I propose that the Court should:

(1) set aside the judgment of the Court of First Instance of 26 June 1996 in Case T-91/95 *Lieve de Nil and Christiane Impens* v *Council* in so far as it orders the Council of the European Union to pay Lieve de Nil and Christiane Impens compensation of BFR 500 000 each;

(2) refer the case back to the Court of First Instance for judgment on the question of the material and non-material damage and that of the amount of compensation;

(3) reserve the costs.

16 — See paragraph 47 of the judgment.