JUDGMENT OF THE COURT (SECOND CHAMBER)
7 JULY 1977 [1]

Pierre Guillot
v Commission of the European Communities

Case 43/74

In Case 43/74

PIERRE GUILLOT, an official of the Commission of the European Communities, represented by Marcel Slusny, Advocate, of Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34/B/IV rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Giorgio Pincherle, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser, Jean Monnet Building, Kirchberg,

defendant,

Application for

1. Annulment of the implied rejection of the applicant's complaint of 26 November 1973,
2. Damages,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: French.

JUDGMENT

Facts and issues

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. At the time of the facts in dispute, the applicant was working, at the EAEC Joint Research Centre at Ispra (hereinafter referred to as 'the Centre'), in the Protection Branch under Mr Malvicini, and he had been given responsibility for observing the internal contamination of the staff by radiation and for calculating the quantities of radio-active substances absorbed.

2. In 1968, as a result of an accident which occurred in the working of the Ispra I reactor, one of its operators was contaminated by inhaling radio-active gases. It was then decided to assign to the applicant the task of carrying out certain experiments with a view to obtaining curves for the retention of xenon gas in the human body.

3. From the first stages of these experiments, the applicant thought he detected a completely unexpected tendency as regards the way in which retention was affected by the quantity of xenon inhaled, namely an isotope separation effect. Mr Malvicini did not share this view and maintained that the results obtained were due to errors. The applicant continued the experiments in question; members of the Biology Branch had become interested in his work and had obtained finance and equipment for him.

4. In April 1971, following various requests by the applicant for authorization to publish his results, Mr Malvicini decided to repeat the retention experiments, but this time dissolving mixtures of radio-active gases in water. The statements of the facts diverge on this point.

5. According to Mr Malvicini, the experiment was carried out on 26 and 27 April 1971, without revealing any isotope separation effect, and it was repeated by the applicant on 28 and 29 and the morning of 30 April.

6. According to the applicant, on 26 and 27 April Mr Malvicini and Mr Dominici set up the measuring apparatus (the equipment used for the experiment having been borrowed from the Environment Section), while the applicant was preparing the bottles containing the mixtures of radio-isotopes.

7. Be that as it may, a first or second series of experiments was thus carried out on 28, 29 and 30 April. It was in two stages: the partial dissolution of the gaseous mixture of radio-isotopes in water on 28 April and the study of the decay in radio-activity on the following night, that is the night of 28 to 29 April, then a further dissolution of the gaseous mixture in water on 29 April and the recording of the decay in radio-activity from 29 to 30 April.

8. The applicant gave Mr Malvicini the results of these experiments, or what he describes as such, and at least some of the spectrometer readings, which seemed to confirm the presence of the phenomenon alleged by the applicant.

9. By a memorandum of 3 May, Mr Malvicini informed the Director General of the Centre of the conclusion of the experiment in the following terms:

'The experiment did not produce the separation effect, in spite of numerous experiments passing bubbles through the water of various bottles. I also checked the manner in which Mr Guillot had taken the measurements which led him to state positively that separation results were observed. The measurements were taken at too high a frequency and therefore were not carried out in a correct manner.'

10. Next day, Mr Malvicini sent the Director-General a note headed 'Falsification of Experimental Results', which was in the following terms:

'Further to my note of 3 May, it is my duty to inform you that, in order to produce evidence of a separation effect, Mr Guillot has falsified the experimental data relating to the last six measurements.

Contrary to the arrangements made, Mr Guillot did not forward the listings from the machine printer but only the data as processed. The printer data did, however, appear on the listing from an Olivetti computer and I was able to recover this listing from the waste-paper basket.

When, in the presence of Mr Dominici, Mr Guillot was asked to explain why the data had been altered, he was most insistent that the data had been obtained direct from the machine and that the printer listings had been forwarded to me. In reply to this statement, I produced the computer listing.

Mr Guillot then fetched the machine listings and justified the alteration of the data by explaining that it had become necessary to make a correction because of a change in the experimental measurement data and that he had been able to fix the 'exact' correction factor without need for further experiment.'

The events consequent upon this letter formed the subject-matter of proceedings between Mr Guillot and the Commission which ended in the judgment of the Court (Second Chamber) of 11 July 1974, [1974] ECR 791.

11. In a memorandum of 7 May 1971, Mr Guillot gave his version of the facts and explained that, for scientific reasons, he had corrected the measurements in all the appropriate ways, and that for the last six measurements, he had had to make a particular correction, made necessary by an accidental tilting of a bottle forming part of the experimental apparatus. In conclusion, he asked that one or more impartial persons competent to judge should be given all the records held by Mr Malvicini, should examine and check all the figures enclosed, together with his mathematical analysis, so as to ascertain whether his interpretation of the results was correct and dispose of the slanderous accusations made by Mr Malvicini. A technical appendix was attached to that memorandum.

12. On 6 July, in a memorandum to Mr Caprioglio, the Director-General of the Centre, Mr Malvicini commented on Mr Guillot's version of the facts. In brief, he persisted in his point of view, but added that, for all the measurements carried out on 29 April after 11.25 a.m., Mr Guillot had simply given him the results, and not the spectrometer recordings themselves, and that he did not see any need to alter the last six test measurements, since those results fitted in well with the previous measurements. That memorandum was not sent to Mr Guillot.

13. At Mr Caprioglio's request, Mr Guillot stated, in a note of 9 July 1971, that he did not remember exactly at what time he had informed Mr Malvicini of the corrections made, but that at all events it had happened on Friday 30 April 1971, that Mr Malvicini had made the accusation of falsifiction against him on Monday 3 May, and that on the afternoon of the same day, he had tried to explain again to Mr Malvicini everything that he had done.

14. On 21 October 1971, Mr Malvicini drew up for the Commission a document headed 'Short description and details of the facts which led Mr Guillot to submit a complaint within the meaning of Article 90 of the Staff Regulations', which contained the following paragraphs:

'Mr Guillot gave me the results of the measurements carried out from the beginning of the experiment (9.45 a.m. on 28 April) to 11.25 a.m. on 29 April, with the recordings from the analyser printer, and only the results of 11 of the 14 measurements carried out from 11.35 a.m. on 29 April to 7.10 a.m. on 30 April.

Next day, 1 May, when I was about to plot the points of the latter measurements on a graph, I noticed that I did not have the recordings from the printer; I went to my office, thinking that I had left them on my table, but they were not there. However, I did find in a waste-paper basket a piece of the roll from an Olivetti computer on which there were the values of the spectra of the last six measurements. Those values did not correspond to the values which Mr Guillot had given me.

When on the morning of Monday 3 May Mr Guillot was questioned by me, he assured me that the data which he had given me were those of the analyser without any correction. When I showed him that I possessed the data inscribed on the roll from the computer, he was unable to give me an explanation and left the building.

Having some suspicions, I retrieved from the waste-paper baskets all the pieces of the recordings from the printer and the computer.

In the afternoon, Mr Guillot came to the Centre and told me that he had made appropriate corrections to the results of the measurements because during the day of 30 April, when he had dismantled the apparatus, he had found the bottle containing the radio-active mixture displaced. In support of his argument he wrote a note, containing serious accusations against me, with an eight-page technical appendix with calculations, tables and graphs, to show that the alteration to the plotting of the last six measurements was a correction made necessary by reason of the tilting of the bottle, in order to bring them into line with the values of 29 April.

I reconstructed piece by piece the printer recordings which I had retrieved, and I found that the data obtained on 29 April from 11.35 a.m. had also been corrected in a 'similarly appropriate' manner, and I realized why Mr Guillot had asked in writing, when he was drawing up the technical appendix, for the list of the spectra in my possession.

15. This document was drawn up at the request of the Director-General of the Centre 'in order to be informed of the different factors and the exact circumstances in which Mr Guillot's work was carried out and consequently with a view to being able to assess Mr Guillot's observations and remarks' (memorandum of the Director-General of 25 January 1972).

16. Mr Guillot did not receive a copy of that note. At some point, the note was put into his personal file without his knowledge.

17. The exchanges between Mr Guillot and his superior continued. At the request of his superior, made on 22 February 1972, Mr Guillot gave to Mr Benco 193 spectra relating to previous experiments. Moreover, in a note of 25 February 1972, he stated, among other things, that the really important results were the first 20, relating to the solutions made on 28 April 1971, and the other 10 on the day of 29 April.

18. By a memorandum of 26 November 1973, Mr Guillot submitted to the Commission a complaint within the

meaning of Article 90 of the Staff Regulations containing *inter alia* the following passages:

'On 15 September 1973, I visited the Registry of the Court of Justice of the European Communities in Luxembourg to consult my personal file, which is there in consequence of the action pending before that Court (53/72).

I became aware for the first time of a note signed by Mr Malvicini, dated 21 October 1971, headed:

'Breve descrizione e precisazioni sui fatti che hanno spinto il Signor Guillot a inoltrare il reclamo ai sensi dell'articolo 90 dello statuto dei funzionari.'

This note makes very serious accusations against me, but I did not receive a copy of it, and it was put into my personal file without my being informed.
(...)

Thus, six months after the events, whereas I had immediately asked Mr Caprioglio for the recordings in Mr Malvicini's possession to be entrusted to someone else, Mr Malvicini accuses me of having suppressed the recordings of 11 measurements (instead of six, as he had stated in May) and of having completely done away with the results of 3 measurements.
(...)

The alleged strips retrieved by Mr Malvicini from the refuse bins are worthless: anybody can easily make up a strip with the figures of his choice; all he has to do is press the keys of the Olivetti computer in the correct sequence to cause the desired results to be printed.'

In conclusion Mr Guillot states:

'Consequently, I request (...) that:
1. these fresh accusations of falsification and deliberate destruction of results should be declared false in writing, with an apology for their having been made and put in my personal file without my being informed;
2. I should be granted material compensation for the damage occasioned by Mr Malvicini's vindictiveness towards me;
3. the recordings of my experiments of dissolving xenon in water should be returned to me, since Mr Malvicini refuses to give them back to me.'

20. Since there was no reply to this complaint, Mr Guillot brought this action against its implied rejection, by an application lodged at the Court on 25 June 1974.

21. By a separate document, lodged at the Court Registry on 13 February 1975, the Commission raised an objection of inadmissibility to all the conclusions in the application.

22. The applicant replied to this objection by a written statement lodged at the Court Registry on 15 March 1975.

23. By an order of 24 September 1975, the Court (Second Chamber) decided to reserve for the final hearing its decision on the objection and to reserve the costs.

24. In view of the judgment of the Court of 11 July 1974 in Case 53/72 [1974] ECR 791, the Commission decided to instruct the Centre d'Études (Study Centre) at Mol, a Belgian organization, to carry out an inquiry into Mr Guillot's experiments. By a letter of 13 December 1974, the Agent of the Commission informed the applicant's lawyer that the Belgian organization wished certain conditions to be observed, namely:
'1. That the assignment should be extended so as to give it the opportunity of carrying out again, quite independently, such experiments as should prove necessary, that is:
— Without any intervention by the parties, but solely on the basis of

the data and the details provided by the Commission; and
– At the Mol Study Centre, with its own equipment;

2. That the aim of the assignment should be solely to seek objective conclusions, that is, to determine whether the 'effects' occur or not; if they do occur, the circumstances in which they do so and the inferences which can be drawn therefrom. In no case would any judgment be made on the honesty or the merits of the experimenter as such;
3. That it should be allowed a period of 6 months.'

25. By a letter of 25 January 1975, the applicant protested against these conditions.

26. On 18 September 1975, by reason of the delay in the conclusion of the external inquiry, the Commission decided to open a parallel internal administrative inquiry and to set up a committee for that purpose which should be 'empowered to collect any information, evidence or proof, to have access to any file or document relevant to the facts relating to Case 53/72, and in particular to question the officials directly concerned'.

27. The report of the inquiry carried out at Mol is dated 19 September 1975. The authors of the report state as follows:

'We have compared the results recorded:
– First in the tables drawn up by Mr Malvicini, on numerical strips from the Olivetti computer and on the numerical strips from the printer of the TMC selector, photocopies of which are included in the file;
– Secondly in the handwritten documents drawn up by Mr Guillot as well as in the tables contained in the report which he sent to Mr Caprioglio.

We make the following findings:
– The results of 28 April (measurements Nos 1 to 20), and those of the night of 28 to 29 April (Nos 21 to 28), are identical in the various documents, and do not give rise to any dispute.
– The results of the first 5 measurements of 29 April (Nos 29 to 33) are also correct.
– The results of the next 3 measurements (Nos 34 to 36) carried out on 29 April between 11.35 and 12.05 *do not appear* in the documents of Mr Guillot, who seems to have set them aside because they did not go in the desired direction!
– The results of the next 5 measurements (Nos 37 to 41), appearing in Mr Guillot's documents have been altered. Whereas the results corresponding to the Y of the ^{133}Xe have been transcribed faithfully, those of the peak which are attributed to the ^{131m}Xe have all been modified, so that the ratio of the $^{133}Xe/^{131m}Xe$ counts becomes smaller (at 3·3371) than the one actually obtained (3·4124), as is proved by the numerical strips from the computer.
– The results of the last 6 measurements were altered on two occasions by Mr Guillot. On the first occasion, in the handwritten document given to Mr Malvicini, the ^{131m}Xe results were divided by the factor 0·9829 (except for measurements Nos 44 and 46 in which the factor is different) whereas the ^{133}Xe results were not altered; on the second occasion, the ^{133}Xe results given in the technical appendix to the memorandum sent to Mr Caprioglio have also been altered.'

28. In their comments on these alterations, the authors of the report further state that the alterations to the last 6 measurements have no effect on the phenomenon sought, but that on the contrary the alterations to the last 5 measurements (Nos 37 to 41) of the day of 29 April and the omission of the 3 previous measurements (Nos 34 to 36) are decisive, 'for without them the phenomenon sought no longer exists'.

29. The report ends with the following general conclusions;

'These experiments were undertaken with the aim of definitively settling the dispute between Mr Guillot and Mr Malvicini.

On the first day, the results seemed to confirm Mr Guillot's arguments; unfortunately, on the second day the situation was reversed and he altered the results of the measurements so as to be able to deduce from them an effect identical to that observed on the first day.

Then, the results of the second night in their turn had to be altered but solely to make them correspond to the last falsified result of the measurements of the second day!

The explanation 'perché il flacone è stato trovato apostato ...' was put forward *a posteriori*, and is a bad explanation, because it in no way justifies the alterations to the measurements taken on the second day or the use of very variable correction factors, instead of a single factor applied to all the measurements.

The only scientifically correct position would have been the absolute rejection of all the measurements which might have been disturbed by the accidental (?) displacement of the bottle and the repetition of the measurements on the following day.

From the scientific point of view, the use of such 'corrected' results so as to produce the desired effect appears as an actual falsification; in this case, in which the experiments were to decide a difference of opinion, this constitutes in addition dishonest behaviour towards the other party involved in the same experiments.

It appears obvious to us that once again Mr Guillot was so thoroughly convinced of the existence of the phenomenon, that he wished to prove it at all costs, and when experiments contradicted him and left him no alternative, he altered their results or kept only those which were favourable to his argument.'

30. The internal committee of inquiry drew up its report on 28 October 1975. This report also finds that the 5 measurements (Nos 37 to 41) carried out on 29 April 1971 between 12.25 p.m. and 4.05 p.m. are the ones which are crucial for proving the phenomenon alleged by Mr Guillot, and it further mentions an interview between the committee of inquiry and Mr Malvicini on 20 October 1975, during which Mr Malvicini is said to have put at the disposal of the members of the committee a record strip from an Olivetti computer.

31. Point 9 of the report dealing with the examination of Mr Guillot is worded as follows:

'Mr Guillot (...) replied on several occasions that the calculations printed on the record strip from the Olivetti computer were not carried out by him. Furthermore he retorts that it is very easy for anybody to reproduce such recordings.

Moreover, it must be noted that Mr Malvicini also submitted to the members of the committee record strips from the TPM multichannel analyser, relating to the measurements in dispute. The members of the committee found that the values given in the record strips from the TPM multichannel analyser and from the Olivetti computer were in complete agreement. Moreover, there was to their knowledge no possibility, bearing in mind the technical resources available at Ispra in 1971, of making up such a record strip artificially.

Consequently, the members of the committee feel compelled to recognize the record strip from the Olivetti computer, submitted by Mr Malvicini, as genuine.'

32. The conclusion of the report is as follows:

'In view of the documents placed at their disposal and the facts which they have been compelled to find, the members of the committee are of the opinion that the alterations to the experimental values and their communication in the form of a report, in which Mr Guillot saw fit to engage, are unacceptable from the scientific and professional point of view, and they consider as justified the severe criticisms to which Mr Guillot has been subjected.'

33. On 3 November 1975, Mr Guillot sent to the chairman of the committee of inquiry a criticism of the procedure which has been followed, particularly in relation to the fact that he had been denied an opportunity to examine the tapes in question, in order to check them.

34. The Commission also added to the file on the case a report from the Mol Study Centre, dated 29 December 1975. That report deals with experiments performed at Mol, similar to those carried out by Mr Guillot and Mr Malvicini in April 1971, and it reaches the conclusion that if 'there is an isotopic effect when the radio-xenons are dissolved, it is very small, much less than the results given by Mr Guillot'. This report, which solely concerns scientific mistakes which Mr Guillot and Mr Malvicini may have made, brought from Mr Guillot a reply which also concerns the scientific aspect.

35. The Commission also lodged a report from the Mol Study Centre, dated 26 April 1976, which is a supplement to the two previous reports by that organization.

36. That report expresses the opinion that the authenticity of the strips in question cannot be doubted. It gives three reasons for this, which it sets forth as follows:

— First, it cannot be maintained that such strips can be made up out of nothing without corresponding to any experiment, by the use of an impulse generator, because such fabrication would demand an enormous amount of work on numerous spectra each comprising 400 results, and the implausibility of the spectra thus obtained would be immediately apparent to an experimenter trained in these techniques of measurement by nuclear spectrometry.
— Secondly, it is also impossible to defend the argument that those tapes come from previous measurements, because the results would never be identical to those in Mr Guillot's report. In fact, those which had not been 'altered' — those relating to the ^{133}Xe — are strictly identical.
— Finally, various annotations on those strips should enable the author to be easily identified.'

37. Attached to this supplementary report as an appendix is a photocopy of the handwritten report drawn up by Mr Guillot during the experiments carried out from 28 to 30 April, which he then sent to Mr Malvicini and on which there appear various typewritten annotations by Mr Malvicini.

38. The Court (Second Chamber) requested the applicant to submit his written observations on this supplementary report, which the applicant did by a written statement of 9 September 1976. The Court also asked the Commission to produce the originals of all the strips and recordings in its possession, relating to the experiments carried out from 28 to 30 April 1971. Furthermore, it asked that the original of Mr Guillot's handwritten report mentioned above should be lodged with it.

II — Conclusions of the parties

In his application originating the proceedings, the *applicant* claims that the Court should:

1. Declare null and void the implied rejection of his complaint of 26 November 1973;
2. Rule that the Commission is to withdraw Mr Malvicini's note of 21 October 1971 from the applicant's personal file;
3. Order the Commission to pay the applicant one million Belgian francs by way of damages, subject to amendment in the course of the proceedings;
4. Order Mr Malvicini to return to the applicant the recordings of his experiments of dissolving xenon in water;
5. Order the Commission to pay the costs.

In its application on a procedural issue, the *Commission* claims that the Court should:
1. Dismiss all, or at least some, of the submissions in support of this application as inadmissible;
2. In so far as all or part of the submissions in support of the application are not declared inadmissible or in any event and in particular for reasons of the proper administration of justice, stay the proceedings until the Commission has lodged the report of the inquiry which has been begun;
3. Consequently, reserve the right of the parties to submit within a period to be fixed by the Court their observations on the application in the main action;
4. Order the applicant to pay the costs.

In reply to this document, the *applicant* contends that the Court should:
1. Dismiss the objection of inadmissibility as unfounded;
2. Alternatively, reserve its decision for the final judgment;
3. Reserve the costs.

In its defence, the *Commission* contends, subject to the foregoing conclusions on inadmissibility, that the Court should:
1. Dismiss the application as unfounded;
2. Order applicant to pay the costs.

In his reply, the *applicant* claims that the Court should:
1. Join Cases 53/72 and 43/74 as being related, at least for the purpose of the oral procedure;
2. Therefore authorize the parties to lodge supplementary pleadings in consequence of the lodging of three new reports by the Commission in Case 53/72;
3. In the alternative, take formal note that the applicant persists in the conclusions contained in the application.

III — Submissions and arguments of the parties

Admissibility

The *Commission* argues that the first submission which the applicant seeks to rely upon — breach of duty under Article 24 of the Staff Regulations — as well as his fourth submission — the return to the applicant of the recordings in question — are inadmissible at this stage. The applicant's second submission, based on the defendant's failure to obey the second and third paragraphs of Article 26 of the Staff Regulations, is inadmissible in so far as it infringes the principle of *res judicata* arising from the judgment of the Court in Case 53/72, and in that it is at least premature. The third submission, directed at obtaining compensation for damage allegedly suffered by the applicant, is also, at this stage, inadmissible or premature.

In his reply, the *applicant* rejects the arguments of the Commission to the effect that the application should be ruled inadmissible.

The substance of the case

The *applicant* claims that he is entitled to assistance and protection from the Commission in accordance with Article 24 of the Staff Regulations of Officials, and that even if he cannot demand that

the Commission should commence disciplinary proceedings against Mr Malvicini, which comes within its discretionary powers, he can at all events demand that the Commission should acknowledge that the accusations levelled against him were completely unfounded and, hence, unjustified. What is more, its refusal of assistance and protection constitutes a wrongful act or omission on its part.

The Commission's inclusion of Mr Malvicini's note of 21 October 1971 in the applicant's personal file is contrary to the second and third paragraphs of Article 26 of the Staff Regulations of Officials, and the fact that it added that note to the file and subsequently produced it in Case 53/72, constitutes a wrongful act or omission on its part.

The systematic refusal of the Commission to put an end to the persecution to which the applicant is subject also constitutes a wrongful act or omission on its part. Furthermore, it was guilty of such a wrongful act or omission in not taking steps to prevent one of its subordinates from persisting in tarnishing the applicant's reputation, and it even adopted his accusations by adding Mr Malvicini's note of 21 October 1971 to the applicant's personal file which was submitted to the Court in Case 53/72. These wrongful acts or omissions have caused damage which may be evaluated, in respect of material and non-material damage combined, at FB 1 000 000, subject to amendment in the course of the proceedings. Moreover, that damage is distinct from the damage which formed the subject-matter of another application in Case 53/72.

As to the recordings in dispute, either they should be added to the applicant's file, in which case there is no reason for their remaining in the hands of Mr Malvicini, or else the results of a piece of work should not be added to the personal file but only the documents relating that piece of scientific work itself, and in that case, there is no reason for the recordings, which are the subject of serious conflict between Mr Malvicini and the applicant, to remain in the hands of Mr Malvicini, who might destroy them, mislay them, alter them and so on.

In its defence, the *Commission* argues that Mr Malvicini's note of 21 October 1971 was submitted to the Court at the hearing on 30 May 1974, in Case 53/72, at the request of the Advocate General, with the agreement of the parties and the administration. Thus the Court did not become aware of it solely because it appeared in Mr Guillot's personal file, but also and especially because it was produced at the hearing. Moreover, the Advocate General would take the matter fully into account in his opinion.

Moreover, it is the defendant's submission that that note does not contain any fresh accusation as against those which gave rise to Case 53/72. The same accusations and the same documents containing those accusations were examined by the Court and gave rise to the judgment in Case 53/72, imposing upon the Commission the obligation of carrying out an inquiry into the existence of evidence justifying those accusations. The Commission has now produced the reports arising from the inquiry, and the conclusions which emerge therefrom prevent the Commission from giving the applicant satisfaction and deprive of its effect his application to benefit from the operation of Article 24 of the Staff Regulations of Officials.

The Commission also acted upon its intention of withdrawing the documents from the file as soon as the file was returned to it by the Court at the end of Case 53/72, as the applicant could moreover have found out if he had consulted his file. The statement to the effect that the complaint of 26 November 1973 concerned in particular the withdrawal of Mr Malvicini's note from the file is incorrect. No such

request was made in the complaint, and therefore there was no reason to send him a reply, inasmuch as the contested documents were withdrawn as soon as possible after the judgment in Case 53/72. The Commission takes the view that the withdrawal of the contested documents constituted an appropriate and justified measure, which gave the applicant satisfaction even before he had made his complaint of 26 November 1973, which comprised only a request for an apology, which moreover there was no reason to provide.

Taking into account the various details supplied to the Court and in particular the reports of the inquiries, the request for the recordings to be added to the file is in open contradiction of the applicant's argument to the effect that, by allowing certain documents to be added to the applicant's file, the Commission was guilty of a wrongful act or omission, as well as with his request for the withdrawal of Mr Malvicini's note of 21 October 1971. In requesting that the recordings should otherwise be returned to him, the applicant fails to observe the institution's property rights over the material which it puts at the disposal of its officials.

In his reply, the *applicant* retorts that the subject-matter of Cases 53/72 and 43/74 is doubtless different, but that the proper administration of justice requires that the two cases should be capable of being dealt with at the same time, which would avoid useless repetition, and even the risk of confusion in the presentation of facts which are distinct but situated in the same historical context.

As regards the recordings, the applicant specifies that those of which he seeks the return concern experiments carried out in 1970 and 1971, before the experiment of 28 April 1971. Those recordings were handed over by the applicant to Mr Benco on 25 February 1972, upon Mr Malvicini's order of 22 February 1972, and they have never been given back to him despite his requests.

The applicant is acting in complete good faith. He states that if he had wished to hide anything from Mr Malvicini, he would not have given him all the record strips, and above all he would not have sent him on 7 May 1971 the technical appendix containing all his measurements, including the corrected measurements, whereas in the face of Mr Malvicini's accusations of 4 April 1971, he could have confined himself, in drawing up his technical appendix, to reproducing, without any conclusions, the data appearing in his handwritten notes.

On the other hand, the applicant emphasizes to the Court that there are three different versions of the facts by Mr Malvicini: the one contained in the memorandum of 4 April 1971, the one contained in his memorandum of 6 July 1971 and a third version of his accusations, contained in the note of 21 October 1971 which is in issue. These versions are in complete disagreement with one another.

He also draws the Court's attention to the fact that Mr Malvicini did not react in any way, on the morning of 30 April 1971, when the applicant gave him the recordings of the measurements carried out from 28 to 29 April, and on doing so fully explained to him the correction carried out for the last recordings, which moreover do not have the least importance for the verification of the theory, since the results of the preceding recordings are amply sufficient. Mr Malvicini made his accusations only on the Tuesday, whereas on the Monday, he had already sent the Director-General of the Centre a note which did not contain any accusation.

Withdrawing the document does not suffice to make good any harm which it has done, namely the particularly serious defamation which it contains. That document appeared in the personal file of the applicant submitted to the Court and it was mentioned in the course of

the hearing in Case 53/72. Thus it has received the publication necessary to constitute defamation and the other party should bear the consequences thereof, since the harm has been done.

The fact that the document was submitted in the course of the hearing in Case 53/72 does not conflict with the applicant's argument, because that which in his view constitutes a wrongful act or omission by the Commission is the inclusion of that document in his personal file, contrary to the provisions of Article 26 of the Staff Regulations and having regard to its defamatory content.

Both the complaint and its content show that the applicant is actually protesting against the fact that that document was added to his file without his being informed, which constitutes an implied reference to Article 26 of the Staff Regulations.

As regards the recordings, the applicant declares that even though there can no longer be any question of his seeking their return to him, since they belong to the institution, he does however have the right to ask that they should not remain in the hands of third parties who have not been agreed upon and that a precise descriptive inventory should be made of them, subject to checking by the applicant, after which the documents should be entrusted either to an agreed third party or to a person appointed by the Court. He needs those documents, at and at all events should be able to have access to them, first for the continuation of his own experimental work, and secondly to be able to reply even more appropriately to the conclusions drawn by Mr Collard's last report.

Concerning the report of the internal administrative committee, the applicant takes the view that it was drawn up with excessive and unjustified haste. The committee confined itself to hearing Mr Malvicini and the applicant, and it made an appraisal essentially on the basis of one of the record strips from the Olivetti computer and one of the strips from the multichannel analyser.

Moreover, the composition of the committee was decided unilaterally. Whereas its investigations were to lead to conclusions putting the applicant's honour in question, the applicant did not benefit from any of the guarantees provided in Article 9 of the Staff Regulations of Officials with regard to the joint composition of the Disciplinary Board, or from those provided in Annex IX to the Staff Regulations.

Furthermore, the internal administrative committee did not have sufficient information, because apart from the documents which it had at its disposal, it did not receive from the Commission the written documents of the parties and the appendices thereto. What is more, it neglected to bring Mr Malvicini and the applicant face to face with each other.

The chairman of the internal administrative committee did not submit to the applicant in order to enable him to examine and identify them and if necessary to take a copy of them, the only documents which ultimately formed the basis for his decision, namely the record strips from the Olivetti computer.

As regards the record strips from the multichannel analyser, the chairman of the committee of inquiry showed the applicant a fragment, with scribbled writing on it, and asked him not to touch it. The applicant was given no opportunity to examine and identify and if necessary to take a copy of the said documents.

The fragment of the record strip which was shown to the applicant from a distance was about 30 cm long, whereas all of the strips for each experiment should have been several metres long. It is quite improper to isolate a fragment, which was moreover not identified.

The applicant submits that in the present case the rights of the defence have been infringed. In Case 80/63, *Robert Degreef* v *Commission of the EEC* [1964] ECR 391, the Court held that the Establishment Board, a consultative board provided for in Article 102 of the 1962 Staff Regulations, was obliged to respect the rights of the defence. It is a sacrosanct principle of respect for the rights of the defence that it is absolutely necessary to disclose the documents to each of the parties, and that principle applies with the same force in these administrative proceedings.

Furthermore, handwriting experts always take great care to obtain the signature of the party whose writing is to be checked upon the text which is alleged to be false as well as upon the documents used for the purposes of comparison, that is, documents written by the accused which are to be used to prove that the document alleged to be false was written by the same person.

As regards the reports by the Belgian organization, Mr Collard, who actually wrote the reports, did not give the applicant a hearing. He reached his conclusion from the same documents as the internal administrative committee, and consequently his expert opinion is open to the same criticisms as may be directed at the report of the said committee.

As to the reports submitted by the other party, the applicant considers them worthless. In view of the lapse of time, for which the Commission is responsible since it did not in May 1971 take the steps necessary to check the facts and thus put an end to the accusations made against the applicant, he takes the view that it will no longer be possible, through measures of inquiry, to determine exactly what happened at the end of April 1971. The Court has already passed a judgment of annulment on the other party's refusal to settle the dispute, and therefore it should now declare that the wrongful act or omission on the part of the Commission is continuing and that that wrongful act or omission is the cause of the damage suffered by the applicant.

In its rejoinder, the *Commission* retorts that if the document of 21 October 1971 had not been submitted, the present situation of the parties would not be altered thereby.

In its submission, the results of the two inquiries, which were carried out independently of one another, are precise, are in agreement, and reach the same conclusions.

Moreover, it emerges from the judgment of the Court that the responsibility for the inquiry, from the point of view both of organization and of the consequences to be drawn from it, rests with the administration in the exercise of its powers and duties.

The Commission does not accept the view that the inquiry to be carried out by the administration must be subject to the rules which, in the Staff Regulations, govern disciplinary proceedings.

Statutory institutions exist in order to function within the sphere of their powers, and to set up a bogus Disciplinary Board in order to carry out the inquiry ordered by the Court would have signified a deliberate wish to dissociate the institution from its powers.

The judgment is extremely clear on the question whether responsibility for the inquiry was that of the administration. It was essential that, in dealing with the matter, the administration should respect the principles which must govern its actions, namely the impartiality and the independence required by the objectivity of the conclusions of the inquiries themselves.

The Court clearly specified the objective to be reached by the inquiry, so that the laying-down of rules of procedure, which

have no place in the carrying out of a definite task, was immaterial.

The principle of respect for the rights of the defence also has no place. Where there is no individual interest to be protected, it is absurd to speak of the defence and of its rights.

The Commission maintains that it has carried out the task imposed on it by the judgment in Case 53/72, which, it contends, enables it at the same time to submit material for its defence which is indispensable for this case to be disposed of to its complete satisfaction.

IV — Oral procedure and measures of inquiry

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

Mr Slusny, for the applicant, and Mr Pincherle, for the Commission, presented oral argument at the hearing on 18 November 1976.

2. At that hearing, it became clear that if the strips from the printer of the TMC multichannel analyser relating to the results taken at 12.25 to 1.20 p.m., 2.15 to 3.10 p.m. and 4.05 p.m. were authentic, as Mr Malvicini, and later the experts from Mol, maintain, the Commission would have been justified in dismissing Mr Guillot's claims.

3. The main argument in favour of the authenticity of the strips, apart from Mr Malvicini's statements, was based upon the fact that, for one of the gases, the Xe^{133} the results in Mr Guillot's report corresponded either exactly or within a few figures to the totals of the figures on the printer strip after deducting the background noise of the equipment.

4. In order to cast doubt upon this coincidence, counsel for the applicant drew the Court's attention to the fact that, on all the printer strips (those which are acknowledged as genuine as well as those alleged to be false), there is in fact a mechanical defect in the units column, so that sometimes it prints nothing and sometimes it only prints the figure partially. By putting either zero or a nine in the place of the illegible figure, divergent results could be obtained. The applicant argues that the results given in Mr Guillot's reports do not fall within the bracket which results from the addition of the figures printed on the strip which is alleged to be false. In order to explain this point of view, counsel for the applicant submitted to the Court during the hearing a graph from which it emerged that the totals of the figures for the measurements taken from 12.25 to 4.05 p.m. for the Xe^{133} gas in no way corresponded to the results given in Mr Guillot's two reports.

5. Mr Slusny was authorized by the Court to submit a short written version of his oral arguments which were to give details of the disagreement between the results given in the report of the experts at Mol and those contained in Mr Guillot's reports and the President of Chamber adjourned the proceedings for a period to allow the Commission to submit its observations in writing on this new fact.

6. In his answer, the Commission's Agent pointed out that in the graph which Mr Slusny had submitted to the Court, the applicant had neglected to deduct the background noise of the equipment, a constant which had to be deducted from the total of the results, as Mr Guillot had done, moreover, for all the preceding measurements which were not alleged to be false. If the background noise is deducted, it emerges that there is perfect agreement between the results given in Mr Guillot's reports and the values on the printer strip from the TMC analyser.

7. At Mr Slusny's request, Mr Guillot was authorized to submit a reply, from which it emerges that the values given by Mr Guillot in his technical appendix were not corrected for background noise.

8. In view of this discrepancy in the statement of the facts and of other discrepancies which became apparent in the course of the written procedure, the Court decided, pursuant to Article 60 of the Rules of Procedure, to order a measure of inquiry to be taken. It decided to hear Mr Guillot as a party and, as witnesses, Mr Benco, Mr Dominici, Mr Collard, one of the experts at Mol, and Mr Malvicini.

9. The applicant and the witnesses gave their evidence at the hearing on 3 March 1977.

10. After hearing the witnesses, the Court adjourned proceedings to allow the applicant to submit any observations on the measures of inquiry. Written observations were lodged on behalf of the applicant on 12 April 1977.

11. The Advocate General delivered his opinion at the hearing on 12 May 1977.

Decision

1 Like the dispute in Case 53/72, which was brought by the same applicant against the Commission and which was decided by the judgment of 11 July 1974 ([1974] ECR 791), the dispute in the present case originated in a series of experiments carried out from 28 to 30 April 1971 by the applicant, a scientific official at the EAEC Joint Research Centre at Ispra (hereinafter referred to as 'the Centre').

2 By those experiments, in which a mixture of radioactive xenon gases and stable xenon gas were dissolved in water, the applicant had been seeking to prove that a theory held by him since 1968 concerning an isotope separation effect was well founded.

3 The applicant informed his immediate superior, Mr Malvicini, of the result and on 4 May 1971 the latter sent the Director-General of the Centre a note headed 'Falsification of Experimental Results', in which he accused the applicant of having altered the results of the last six measurements of the experiments in question in order to produce evidence of a separation effect.

4 By a decision of 14 April 1972, the Commission rejected a complaint submitted by the applicant on 3 January 1972 seeking *inter alia* the withdrawal of the accusations made against him by his immediate superior.

5 The applicant sought annulment of that decision in his application in Case 53/72.

6 In its judgment of 11 July 1974, the Court found that, for its failure to give an express reply on the substance of the applicant's request in its decision of 14 April 1972, the Commission must be regarded as having refused to carry out an inquiry into the truth of the accusations made against the applicant and therefore as having failed in its duty to him.

7 Accordingly, the Court annulled the Commission's decision rejecting the applicant's complaint.

8 In his personal file, which had been lodged at the Court Registry by the defendant in Case 53/72, the applicant discovered a note dated 21 October 1971, which had been drawn up at the request of the Director-General of the Centre, signed by Mr Malvicini and put into his personal file without his knowledge.

9 Headed 'Short description and details of the facts which led Mr Guillot to submit a complaint within the meaning of Article 90 of the Staff Regulations', that document enlarged the scope of the accusation made by Mr Malvicini in the note of 4 May 1971, by stating that the details relating to the last eleven measurements had been altered and by accusing the applicant of having suppressed the results of three other preceding measurements.

10 By a complaint submitted on 26 November 1973 under Article 90 of the Staff Regulations of Officials, the applicant requested the withdrawal of the document from his personal file, the withdrawal of the fresh accusations, compensation for the damage which he alleged that he had suffered and the return of the recordings of his experiments of dissolving xenon in water, which were being held by Mr Malvicini.

11 Since the Commission did not react to that complaint, the applicant brought this action, by an application lodged at the Court on 25 June 1974, in which he claimed:

— The annulment of the implied decision rejecting his complaint, resulting from the Commission's failure to reply;

— The withdrawal of the note of 21 October 1971 from his personal file;

— An order that the Commission should pay FB 1 000 000 by way of damages;

— The return of the recordings of the experiments carried out by him.

Admissibility

12 The Commission raised a series of objections to the effect that all, 'or at least some', of the submissions in support of this application should be dismissed as inadmissible.

13 The grounds of these objections may be summarized as follows:

— Since the inquiry undertaken by the Commission was not finished, the applicant could not plead against the Community lack of assistance in breach of Article 24 of the Staff Regulations;

— The Commission's withdrawal of Mr Malvicini's note of 21 October 1971 from the applicant's personal file had deprived the applicant's submission based on Article 26 of the Staff Regulations of its purpose;

— The third submission, directed to obtaining compensation for damage allegedly suffered by the applicant, was premature, because the Commission had not yet carried out the abovementioned inquiry;

— The recordings in question were the property of the Commission.

14 All those objections go to the substance of the case and cannot therefore be examined in relation to admissibility.

The Substance of the Case

15 By putting Mr Malvicini's note of 21 October 1971 into the applicant's personal file without the latter's knowledge, the Commission failed to comply with Article 26 of the Staff Regulations.

16 However, since the said note has been withdrawn from the file in the meantime, the applicant's claim to obtain precisely that result has lost its purpose.

17 The claim for the return of the recordings relating to the scientific experiments carried out by the applicant must be dismissed.

18 In fact, since they concern experiments carried out in the course of the applicant's work as an official in the service of the Centre, those documents are the property of the Commission.

19 The essential problem to be solved concerns the alleged infringement by the Commission of Article 24 of the Staff Regulations, according to which 'each Community shall assist any official in its service, in particular in proceedings against any person perpetrating ... defamatory acts or utterances ... by reason of his position or duties'.

20 In the judgment of 11 July 1974, the Court held that if serious accusations reflecting on the integrity of an official in carrying out his duties are made by a superior, apart from the duties which fall on the Administration under Article 24 of the Staff Regulations, the principles of justice and of good management place a duty on the Commission to take all necessary steps to establish whether the accusations are justified.

21 After finding that the Commission had not fulfilled that duty with regard to the applicant and accordingly annulling the Commission's refusal to undertake the inquiry which it should have carried out, the Court made it clear that the defendant must fulfil that obligation with the minimum delay by undertaking an inquiry 'to seek evidence as to the truth of the accusations reflecting on the applicant's integrity'.

22 The Commission has added to the case-file reports relating to four inquiries for which it has been responsible in accordance with the judgment in Case 53/72:

— A report dated 19 September 1975 (hereinafter referred to as the 'Boulenger report' after the name of one of its authors), drawn up by the

Belgian Centre d'Études d'Énergie Nucléaire (Nuclear Energy Study Centre) at Mol and dealing with the inquiry carried out by the Study Centre on the applicant's experiments;

— A report dated 28 October 1975 by an internal administrative committee set up by the Director General of the Centre at Ispra;

— A report dated 29 December 1975 drawn up by Mr Collard, a scientific official of the Belgian Study Centre at Mol, dealing with experiments carried out at Mol relating solely to scientific mistakes which might have been made by the applicant and Mr Malvicini in April 1971;

— A supplementary report dated 26 April 1976 drawn up by Mr Boulenger and Mr Collard of the Study Centre at Mol.

23 Thus the point at issue in this case is whether, in the light of the inquiry which the Commission caused to be carried out, the accusations made against the applicant were false, because if they were to prove justified the applicant would not be entitled to seek the assistance of the Commission within the meaning of Article 24 of the Staff Regulations.

24 However, before the results of the inquiries are assessed, mention should be made of the main points upon which Mr Malvicini based his accusations as these points emerge from the case-file, and of the applicant's reaction to those accusations.

25 According to Mr Malvicini's note of 4 May 1971, the applicant falsified the experimental data relating to the last six measurements carried out during the experiment — Nos 42 to 47 according to the numbering applied later — and forwarded to Mr Malvicini, concerning those measurements, not the strips from the automatic printer of the TMC multichannel analyser, but only the data worked out by the applicant himself.

26 In a memorandum of 7 May 1971, supplemented by a technical report and sent to the Director-General of the Centre at Ispra, the applicant set out his version of the facts in dispute.

27 In a memorandum dated 6 July 1971, sent to the Director-General of the Centre, Mr Malvicini commented upon the version of the facts given by the

applicant and confirmed his previous statements, then added that, for all the measurements carried out after 11.25 a.m. on 29 April (that is, from measurement No 34), the applicant had simply given him the results, and not the original recordings of the analyser spectrometer.

28 In the note of 21 October 1971, Mr Malvicini specifically stated that the applicant had given him the results of the measurements carried out from the beginning of the experiment (at 9.45 a.m. on 28 April) to 11.25 a.m. on 29 April with the recordings from the analyser printer, and only the results of eleven of the fourteen measurements carried out from 11.35 a.m. on 29 April to 7.10 a.m. on 30 April (measurements Nos 34 to 47).

29 According to the same note, on 1 May, the day after the end of the experiments in question on 30 April, Mr Malvicini found in a waste-paper basket a piece of the roll from an Olivetti computer on which there were recorded the values of the spectra of the last six measurements, which did not correspond to the values which the applicant had given him.

30 The note further stated that on the morning of Monday 3 May the applicant assured Mr Malvicini that the data which he had given him were those of the analyser without any correction, but when Mr Malvicini showed him the strip from the computer, the applicant was unable to give any explanation.

31 The note continued that in the afternoon of the same day, the applicant admitted the fact that he had applied to the results of the last six measurements corrections made necessary by the accidental tilting of a bottle containing the radioactive mixture.

32 In support of his argument the applicant had written a note, accompanied by a technical appendix.

33 Mr Malvicini ends the said note by stating that after retrieving all the pieces of the recordings of the analyser printer and of the Olivetti computer, and after reconstructing piece by piece the strip recorded by the printer, he had found that the data obtained on 29 April from 11.35 a.m. (namely measurements Nos 34 to 47) had been corrected in a 'similarly appropriate' manner.

34 The applicant admits that he altered the results of his experiments, but only as regards the last six measurements.

35 As regards the experiments carried out by the applicant from 28 to 30 April 1971, the authors of the Boulenger report found that the results of measurements Nos 1 to 33 did not give rise to any dispute.

36 However, the results of measurements Nos 34 to 36, carried out between 11.35 a.m. and 12.05 p.m. on 29 April, did not appear in the documents of the applicant, who — the report states — seemed to have set them aside 'because they did not go in the desired direction'.

37 According to the report the results of the next five measurements (Nos 37 to 41) as well as those of the last six measurements had been altered.

38 In their comments upon these alterations, the authors of the report state that the alterations to the last six measurements have only limited importance in the context of the experiment.

39 On the other hand the authors of the report state that the three measurements (Nos 34 to 36) which the applicant did not mention, and the five following measurements (Nos 37 to 41) — the alteration to which the applicant did not explain — are decisive, for without that omission and that alteration 'the phenomenon sought no longer exists'.

40 The report states that the agreement between the first and the second series of measurements, upon which the applicant relies and which appears necessary in order to prove the existence of the phenomenon in question, could not have existed without the alteration of the results of measurements Nos 37 to 41 and the disappearance of the results of measurements Nos 34 to 36.

41 Furthermore — according to the report — the alleged tilting of a bottle in no way justifies the alterations to the measurements taken on the second day or the use of very variable correction factors, instead of a single factor applied to all the measurements.

42 The authors of the report are of the opinion that, from the scientific point of view, the use of such 'corrected' results so as to produce the desired effect amounts to actual falsification.

43 The report of the internal administrative committee also states that measurements Nos 37 to 41 are crucial for proving the phenomenon alleged by the applicant.

44 According to the report, when examined by that committee, the applicant denied that the calculations printed on the record strip from the Olivetti computer had been carried out by him.

45 Furthermore the applicant stated, according to the report, that it was very easy for anybody to reproduce such recordings.

46 However, the committee of inquiry states that it found that the values given in the analyser record strips relating to the measurements in dispute, which were submitted by Mr Malvicini, and the values appearing on an Olivetti computer record strip which the latter had put at the disposal of the committee, were in complete agreement.

47 According to the committee, there was no possibility, bearing in mind the technical resources available at Ispra in 1971, of making up such a record strip artificially.

48 Consequently, the committee felt compelled to acknowledge the Olivetti computer record strip submitted by Mr Malvicini as genuine.

49 It concluded that the alterations to the experimental values and their communication in the form of a report by the applicant were unacceptable from the scientific and professional point of view, so that the members of the committee consider the severe criticismus addressed to the applicant to be justified.

50 The supplementary report of 29 December 1975 deals with experiments performed at Mol, similar to those carried out by the applicant and Mr Malvicini in April 1971.

51 Since that report, as well as the reply which it provoked from the applicant, concern purely scientific matters, they are irrelevant for the purpose of reaching a decision in this case.

52 In fact, it is not a matter of examining the scientific validity of the disputed experiments, but only of ascertaining whether the accusations of falsification or dishonest conduct are justified.

53 The report by the Study Centre at Mol, dated 26 April 1976, constitutes a supplement to the two previous reports by that organization.

54 Attached to this supplementary report as an appendix is a photocopy of the handwritten report drawn up by the applicant during the experiments carried out from 28 to 30 April 1971 and then sent by him to Mr Malvicini.

55 The authors of the report confirm their opinion that the authenticity of the strips in question as relating to the experiments carried out by the applicant from 28 to 30 April 1971 cannot be doubted.

56 Although the Commission may be criticized for its excessive dilatoriness in carrying out its duty to carry out the inquiry prescribed by the Court in its judgment of 11 July 1974, the applicant has not suffered any damage by reason of that delay, since the outcome of the inquiry is distinctly unfavourable to him.

57 However, the applicant objected *inter alia* that neither the internal administrative committee nor the authors of the Boulenger report respected the rights of the defence.

58 He objected that they proceeded unilaterally without giving him any opportunity to examine, identify and if necessary to take copies of the documents to which their inquiries related and without allowing him to state his case.

59 In particular he stated that they based their views essentially upon one of the strips from the multichannel analyser, the authenticity of which had been challenged by the applicant.

60 In the course of the difficult inquiry which it was responsible for carrying out, it was incumbent upon the defendant to provide the applicant with adequate safeguards.

61 It emerges from a letter dated 15 January 1975 from the Agent of the Commission to the applicant's lawyer that the Commission was prepared to allow the applicant to take part, as appropriate, in the work of the experts.

62 Since the applicant did not avail himself of that opportunity, the fact that in the course of the investigations only one party was heard was due to the applicant himself, and consequently it cannot prevent the Court from assessing the technical reports in the context of all the evidence upon which its final decision must be based.

63 The applicant stated that he altered the last six results of the experiments by introducing correction factors intended to allow for the accidental displacement of a part of the apparatus for the experiment.

64 It is not disputed that he neglected to inform his immediate superior of that alteration of the experimental data when he submitted the result of his experiments, or that the introduction of the correction factors was revealed to Mr Malvicini only following the doubts which Mr Malvicini had expressed with regard to the results submitted by the applicant.

65 This conduct may give rise to doubts from the point of view of scientific method — which would probably have required experiments whose normal course had been disturbed to be repeated — and the applicant's behaviour is certainly open to criticism with regard to the duty of frankness owed by a scientific research worker to his immediate superior.

66 In fact, the applicant was under a duty at once to give his immediate superior complete details of the progress of his experiments, without hiding any factors capable of raising doubts as to the results obtained.

67 That behaviour on the part of the applicant is enough on its own to justify Mr Malvicini's suspicions, which were expressed in the first evaluation given in the note of 4 May 1971 and reiterated subsequently.

68 Furthermore, it became increasingly clear during the Court proceedings that the essential part of the applicant's defence consists in denying the authenticity of the strips from the analyser printer relating to measurements Nos 37 to 41 which Mr Malvicini states that he found in the wastepaper baskets of the Centre at Ispra.

69 If the abovementioned strips were authentic, the results contained in the handwritten note submitted by the applicant to Mr Malvicini must have been falsified, so that the accusations made by the latter against the applicant would be justified.

70 Consequently, the Court should first of all turn its attention to those factors which affect this question, which is fundamental for the outcome of the action.

71 The Commission has emphasized the fact, which is moreover confirmed in the abovementioned reports, that for the xenon-133, one of the two gases analysed in the course of the applicant's experiment, after deduction of the background noise of the apparatus used for the experiment the values recorded on the strips in question correspond within a few figures to the results submitted by the applicant in his report to the Director of the Centre at Ispra.

72 On the other hand it is pointed out that there is no such correspondence for the other gas, the xenon-131.

73 The applicant first alleged that those values related to an experiment other than his own or that they were fakes.

74 According to the Commission and the experts of the Study Centre at Mol, there is only a minute chance of managing with the printer to reproduce for the xenon-133 a result corresponding to that obtained in the course of the applicant's experiment.

75 Moreover on several points the applicant has challenged the statement that the values recorded for the xenon-133 on the strips correspond to the results set out in his report.

76 He has cast doubt upon a figure appearing on the strips in the hundreds column, pointing out that that figure could be read either as a zero or as a nine.

77 However, when those strips are compared with the normal trend of the curve representing the dissolution phenomenon in question, it emerges that the figure adopted by the authors of the Boulenger report is correct and that furthermore it corresponds to the figure indicated first of all by the applicant himself.

78 The applicant accuses the experts consulted by the Commission of having taken advantage of the fact that the difficulty in reading certain figures in the units column, owing to a mechanical defect in the printer, presented them with a number of alternatives in order to give the impression of a divergence between the results on the strip and those given in the applicant's report.

79 However, the experts consistently adopted the mean value 5, in the case of illegible figures.

80 The Commission has shown that if either 1 or 9 (the extreme values) is taken for every illegible figure, so as to obtain extreme results, the data given in the applicant's report of 7 May 1971 still remain within those two limits.

81 The applicant submitted different figures on the basis of this 'bracket' method, but the Commission pointed out that the difference was due to the applicant's having neglected to deduct the constant factor to take account of the 'background noise' of the equipment, a deduction which he had made in his analysis of the data of the experiments.

82 Although, in his observations appended to his lawyer's letter of 6 December 1976, the applicant stated that he had not deducted that factor in his technical appendix of 7 May 1971, this is in open contradiction with the applicant's statements on page 2 of the technical appendix.

83 Finally, in support of the authenticity of the strips, the Commission pointed out certain handwritten annotations on the strips which it alleges were made mostly by the applicant himself.

84 It also drew attention to the fact that the various pieces of strips belonged to the same roll, since the respective margins of those pieces corresponded to one another.

85 Both in the written procedure and in the oral procedure, the applicant denied that he had made the handwritten annotations.

86 In view of the disagreements between the parties over points of fact, the Court decided under Article 60 of the Rules of Procedure to request the applicant to appear in person and to hear four witnesses: Mr Malvicini, Mr Benco, Mr Dominici and Mr Collard.

87 The applicant availed himself of the opportunity of submitting written observations on the hearing of those witnesses.

88 In his testimony, Mr Malvicini gave an entirely satisfactory explanation of the reasons why a period of six months had elapsed between the discovery of the strips and the further accusations of falsification contained in his note of 21 October 1971.

89 The applicant's written observations provided no cause whatever for doubting those reasons, which relate essentially to the difficulties presented by the applicant's absence from his work owing to a stay in hospital and then to periods of holiday.

90 It emerges from the testimony of the witnesses Benco, Dominici and Malvicini that, contrary to the applicant's statement to the effect that no experiment had been performed on 26 and 27 April 1971, such experiments had been carried out by Mr Malvicini and that the applicant had been aware of them.

91 The applicant admitted that he was aware of the 'tests' carried out by Mr Malvicini.

92 In the course of the oral inquiry the applicant asserted that he had prepared the xenon-131 gas and had then mixed it with the xenon-133 from the Study Centre at Mol.

93 On the other hand, in his aforementioned technical appendix he had stated that the previously prepared mixture had been supplied to him by the Study Centre at Mol.

94 That statement is confirmed by the testimony of the witnesses Collard and Dominici.

95 The applicant stated orally that during the morning of Thursday 29 April he had 'bubbled' the gases through the water for approximately one hour, whereas in his written report he had stated that that operation had lasted from 10 to 15 minutes.

96 When asked about this point, he explained that the latter statement was only approximate and was immaterial.

97 However, that explanation is unacceptable, since it had to be known exactly how long that operation had lasted in order to be able to calculate the value of the 'background noise'.

98 In his handwritten report to Mr Malvicini, the applicant stated that, in order to compensate for the disturbing effect of the accidental displacement of a bottle, he had applied a correction factor to the results for the xenon-131, but not to those for the xenon-133.

99 However, in his subsequent report to the Director-General of the Centre at Ispra, he wrote that he had applied the correction factor to both gases, which, as the applicant had to admit in the course of his testimony, would have made the operation in question meaningless.

100 As regards the measurements which he took, the applicant stated that in order to obviate the mechanical defects of the printer relating to the units column he had, in calculating the results of the experiments, replaced the illegible figure sometimes with a 1 and at other times with a 9, but he did not explain why he chose sometimes one method and sometimes the other.

101 However, it emerges from an examination of the undisputed strips and from the figures used by the applicant in his report that he consistently replaced the missing figure with the mean value 5.

102 Finally, during his testimony, the applicant admitted for the first time that certain handwritten annotations on the strips relating to measurements between Nos 37 and 41 might have been written by him.

103 That admission both strengthens the inferences to be drawn from the physical resemblance of the undisputed strips to the disputed ones and weakens the applicant's statement to the effect that the disputed strips related to a different experiment or had even been faked.

104 It follows from these considerations as a whole that the inaccuracies and contradictions which progressively emerged in the applicant's arguments in the course of the proceedings only strengthen Mr Malvicini's essentially consistent version of the facts in dispute, and add weight to the reports submitted by the Commission, and in particular those drawn up by the experts of the Study Centre at Mol and by the administrative committee of inquiry.

105 Thus the Commission has proved to the extent required by law that the applicant's behaviour justified the accusations made against him by his immediate superior both in the note of 4 May 1971 and in that of 21 October 1971.

106 Accordingly, since the Commission has not infringed Article 24 of the Staff Regulations to the detriment of the applicant, his claim for the annulment of the Commission's implied rejection of his complaint of 26 November 1973 must be dismissed as unfounded.

107 Consequently, the applicant's claim for damages for the accusations made against him must be dismissed.

Costs

108 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

109 Nevertheless, under Article 70 of the Rules of Procedure, in actions by staff of the Communities, the institutions shall bear their own costs.

110 Moreover, since the hearing of the witnesses was made necessary by virtue of the disagreements between the parties over certain points of fact, and since the applicant has failed in his submissions, he must pay the costs of hearing the witnesses.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs;

3. Orders the applicant to bear the costs of hearing the witnesses.

Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 7 July 1977.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 12 MAY 1977 [1]

Mr President,
Members of the Court,

1. The present case has close connexions with Case 53/72, which was brought by the same applicant against the Commission and was concluded by the judgment of 11 July 1974 ([1974] ECR 791).

The application in both cases arose as a result of the following facts. By means of

1 — Translated from the Italian.