Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Full Court)

13 January 2010*

(Civil service — Officials — Actions for annulment — No need to adjudicate — Application for compensation — Admissibility — Privileges and immunities — Waiver of immunity from legal proceedings — Confidentiality of the investigations conducted by OLAF — Investigations by IDOC — Access to documents of a medical nature — Access to the personal file — Disciplinary proceedings — Reasonable time)

In Joined Cases F-124/05 and F-96/06,

ACTIONS under Articles 236 EC and 152 EA,

A, former official of the European Commission, residing in Port-Vendres (France), initially represented by B. Cambier and L. Cambier, avocats, and subsequently by B. Cambier, L. Cambier and R. Born, avocats, and subsequently by B. Cambier and A. Paternostre, avocats,

applicant in Case F-124/05,

G, former official of the European Commission, residing in Port-Vendres (France), initially represented by B. Cambier and L. Cambier, avocats, and subsequently by B. Cambier, L. Cambier and R. Born, avocats, and subsequently by B. Cambier and A. Paternostre, avocats,

applicant in Case F-96/06,

v

European Commission, represented by J. Currall and V. Joris, acting as Agents, assisted by D. Waelbroeck, avocat,

defendant,

THE CIVIL SERVICE TRIBUNAL (Full Court),

composed of P. Mahoney (Rapporteur), President, S. Gervasoni, President of the Chamber, H. Kreppel, H. Tagaras and S. Van Raepenbusch, Judges,

Registrar: W. Hakenberg,

having regard to the written procedure and further to the hearing on 1 April 2009,

gives the following

* Language of the case: French.

Judgment

1 By application received at the Registry of the Tribunal on 16 December 2005, registered as Case F-124/05, the applicant seeks in particular annulment of the decision of the Commission of 28 February 2005 rejecting his request of 22 October 2004 for the termination of the disciplinary proceedings brought against him by the decision of 16 December 2004 ('the contested decision' or 'the decision refusing to conclude the disciplinary proceedings') and an order that the Commission pay to him damages and interest.

2 By application received at the Registry of the Tribunal on 10 August 2006 by fax (the original being received on 17 August 2006), registered as Case F-96/06, the same applicant seeks an order that the Commission pay him damages and interest by reason of various wrongful acts that it allegedly committed.

Legal context

I – *Provisions relating to privileges and immunities*

3 Article 12 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 annexed to the Treaty establishing a single Council and a single Commission (Journal Officiel 1967 152, p. 13) ('the Protocol on Privileges and Immunities' or 'the Protocol') states as follows:

'In the territory of each Member State and whatever their nationality, officials and other servants of the Communities shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Communities and, on the other hand, to the jurisdiction of the Court in disputes between the Communities and their officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office;

(b) ...'

4 Under Article 18 of the Protocol on Privileges and Immunities:

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Communities solely in the interests of the Communities.

Each institution of the Communities shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities.'

5 Article 19 of the Protocol on Privileges and Immunities lays down that:

'The institutions of the Communities shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

6 The first sentence of the first paragraph of Article 23 of the Staff Regulations of the European Union repeats that the privileges and immunities enjoyed by officials are accorded solely in the interests of the Communities.

II – *Provisions relating to investigations in connection with the prevention of fraud*

7 Recital 10 of the preamble to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) is in the following terms:

'Whereas these investigations must be conducted in accordance with the Treaty and in particular with the Protocol on the privileges and immunities of the European Communities, while respecting the Staff Regulations ..., and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value; …'

8 Article 8(2) of Regulation No 1073/1999 states that:

'Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.

Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.'

III – *Provisions relating to disciplinary proceedings*

9 Under the fifth paragraph of Article 88 of the Staff Regulations, in the version applicable until 30 April 2004, where an official is prosecuted for the same acts as those which gave rise to the initiation of disciplinary proceedings, a final decision on the administrative situation of the official concerned cannot be taken until a final verdict has been reached by the court hearing the case.

10 Article 25 of Annex IX to the Staff Regulations repeats the provisions of the fifth paragraph of Article 88 of those Regulations in the version applicable until 30 April 2004.

11 Article 1(1) of the Commission Decision of 28 April 2004 on general implementing provisions on the conduct of administrative inquiries and disciplinary procedures ('the GIP on administrative inquiries and disciplinary procedures'), which repeat, in this regard, Commission Decision C(2002) 540 of 19 February 2002, provides for the establishment of an Investigation and Disciplinary Office (IDOC).

12 Article 2(1) and (2) of the GIP on administrative inquiries and disciplinary procedures lays down that:

'1. IDOC shall carry out administrative inquiries. For the purposes of these implementing provisions, "administrative inquiries" shall mean all actions taken by the authorised official to establish the facts and, where necessary, determine whether there has been a failure to comply with the obligations incumbent on Commission officials.

...

2. IDOC may be asked to carry out other inquiries to ascertain certain facts, in particular under Articles 24, 73 and 90 of the Staff Regulations.'

IV – *Provisions on insurance against risks of occupational disease and accident*

13 Under Article 73(1) and (2) of the Staff Regulations:

‘1. An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions of the Communities after consulting the Staff Regulations Committee. ...

2. The benefits payable shall be as follows:

(a) ...

(b) In the event of total permanent invalidity:

Payment to the official of a lump sum equal to eight times his annual basic salary calculated on the basis of the monthly amounts of salary received during the 12 months before the accident.

(c) In the event of partial permanent invalidity:

Payment to the official of a proportion of the sum provided for in subparagraph (b), calculated by reference to the scale laid down in the rules referred to in paragraph 1.

...’

14 On 13 December 2005 the institutions of the Communities adopted common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, which came into effect on 1 January 2006 (‘the Insurance Rules’ or ‘the new Insurance Rules’). Before that date the common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, last amended on 18 July 1997, (‘the old Insurance Rules’) were applicable.

15 Article 30 of the new Insurance Rules lays down the following transitional provisions:

‘The [old Insurance Rules] are hereby repealed.

However, they shall continue to apply to all draft decisions adopted under Article 20(1) before 1 January 2006 ...’

16 Article 2(1) of the new Insurance Rules defines an accident as any sudden occurrence adversely affecting the insured party’s bodily or mental health, the cause or one of the causes of which is external to the victim’s organism. Article 2(1) of the old Insurance Rules defined an accident as any occurrence or external factor of a sudden, violent or abnormal nature adversely affecting an official’s bodily or mental health.

17 Under Article 11(1) of the new Insurance Rules, total or partial permanent invalidity is measured in terms of physical or mental impairments (‘PMI’) as laid down in the European physical and mental disability rating scale for medical purposes, which is annexed to the rules.

18 Article 11(2) of the new Insurance Rules provides that, where an insured party sustains total permanent invalidity as a result of an accident or an occupational disease, the PMI shall be 100% and he/she shall be paid the lump sum provided for in Article 73(2)(b) of the Staff Regulations. Under Article 11(3) of the new Insurance Rules, where an insured party sustains partial permanent invalidity

as a result of an accident or an occupational disease, he/she shall be paid a lump sum provided for in Article 73(2)(b) of the Staff Regulations and determined on the basis of the rates laid down in the European physical and mental disability rating scale.

19 Article 15 of the new Insurance Rules lays down that officials who sustain an accident, or those entitled under them, must report the accident to the administration of the institution to which the insured party belongs. The report of the accident must state particulars on the date and time, the causes and the circumstances of the accident and also the names of witnesses and of any third party which may be liable. A medical certificate is to be annexed, specifying the nature of the injuries and the probable consequences of the accident. The report must be submitted not later than 10 working days following the date on which the accident occurred. This provision essentially repeats Article 16 of the old Insurance Rules.

20 Pursuant to the first sentence of the first subparagraph of Article 16(1) of the new Insurance Rules, officials who request application of those rules on grounds of an occupational disease must submit a statement to the administration of the institution to which they belong within a reasonable period following the onset of the disease or the date on which it is diagnosed for the first time. This provision repeats the first sentence of the first subparagraph of Article 17(1) of the old Insurance Rules.

21 Under Article 16(2) of the new Insurance Rules, the administration is to hold an inquiry in order to obtain all the particulars necessary to determine the nature of the disease, whether it has resulted from the official's occupation and also the circumstances in which it has arisen. This provision repeats the first subparagraph of Article 17(2) of the old Insurance Rules.

22 Article 18 of the new Insurance Rules provides that decisions recognising the accidental cause of an occurrence or recognising the occupational nature of a disease or assessing the degree of permanent invalidity shall be taken by the appointing authority in accordance with the procedure laid down in Article 20 of those rules, on the basis of the findings of the doctor or doctors appointed by the institutions and, where the insured party so requests, after consulting the Medical Committee referred to in Article 22 of those rules. This provision essentially repeats Article 19 of the old Insurance Rules.

23 Article 20 of the new Insurance Rules provides as follows:

'1. Before taking a decision pursuant to Article 18, the appointing authority shall notify the insured party or those entitled under him/her of the draft decision and of the findings of the doctor(s) appointed by the institution. The insured party or those entitled under him/her may request that the full medical report be communicated to them or to a doctor chosen by them.

2. Within a period of 60 days the insured party or those entitled under him/her may request that the Medical Committee provided for in Article 22 deliver its opinion. The request for the matter to be referred to the Medical Committee shall contain the name of the doctor representing the insured party or those entitled under him/her together with a report from that doctor setting out the medical issues disputed in relation to the doctor(s) appointed by the institution for the purposes of applying these rules.

3. Where, on expiry of this period, no request has been made for consultation of the Medical Committee, the appointing authority shall take a decision in accordance with the draft previously supplied.'

24 Under Article 21 of the old Insurance Rules, the official could request that the full medical report be communicated to the doctor of his choosing. However, in contrast to Article 20 of the new Insurance Rules, Article 21 of the old Insurance Rules did not give the official the option of requesting that the medical report be communicated to himself directly.

25 In accordance with Article 22(1) of the new Insurance Rules, which essentially repeats Article 23(1) of the old Insurance Rules as far as the composition of the Medical Committee is concerned:

'1. The Medical Committee shall consist of three doctors:

— one appointed by the insured party or those entitled under him/her;

— one appointed by the appointing authority;

— one appointed by agreement between the first two doctors..

...'

26 Finally, under Article 19(3) of the new Insurance Rules:

'The decision defining the degree of invalidity shall be taken after the insured party's injuries have consolidated. The consequences of the accident or occupational disease shall be considered consolidated where they have stabilised or will diminish only very slowly and in a very limited way. ...

Where it is impossible to define the degree of invalidity after medical treatment is terminated, the findings of the doctor(s) referred to in Article 18 or, where appropriate, the report of the Medical Committee referred to in Article 22 must specify a deadline for reviewing the insured party's case.'

V – *Provisions relating to benefits received in the event of invalidity*

A – *Staff Regulations*

27 Under Article 53 of the Staff Regulations, an official to whom the Invalidity Committee finds that the provisions of Article 78 apply shall automatically be retired on the last day of the month in which the appointing authority recognises his permanent incapacity to perform his duties.

28 Under Article 59(4) of the Staff Regulations, the appointing authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of 3 years.

29 The first paragraph of Article 78 of the Staff Regulations states that:

'An official shall be entitled ... to an invalidity allowance in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his function group.'

30 According to the third paragraph of Article 78 of the Staff Regulations, the invalidity allowance shall be equal to 70% of the official's last basic salary.

31 The fourth paragraph of Article 78 of the Staff Regulations states that the invalidity allowance shall be subject to contributions to the pension scheme, calculated on the basis of that allowance.

32 Pursuant to the fifth paragraph of Article 78 of the Staff Regulations, where the invalidity arises from an occupational disease, contributions to the pension scheme to which the allowance is subject shall be paid in full from the budget of the institution.

33 Under Article 13(1) of Annex VIII to the Staff Regulations:

'Subject to the provisions of Article 1(1), an official aged less than sixty-five years who at any time during the period in which he is acquiring pension rights is recognised by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his service with the Communities, shall be entitled, for so long as such incapacity persists, to invalidity allowance as provided in Article 78 of the Staff Regulations.'

B – *The version of the Staff Regulations applicable until 30 April 2004*

34 Article 53 of the Staff Regulations, in the version applicable until 30 April 2004, is identical to Article 53 of the Staff Regulations.

35 The first paragraph of Article 78 of the Staff Regulations, in the version applicable until 30 April 2004, reads as follows:

'An official shall be entitled ... to an invalidity pension in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket.'

36 Pursuant to the second paragraph of Article 78 of the Staff Regulations, in the version applicable until 30 April 2004, where the invalidity arises from an occupational disease, the invalidity pension shall be 70% of the basic salary of the official.

37 Under the third paragraph of Article 78 of the Staff Regulations, in the version applicable until 30 April 2004, where the invalidity is due to a cause other than those referred to in the second paragraph of that article, the invalidity pension shall be equal to the retirement pension to which the official would have been entitled at the age of 65 years if he had remained in the service until that age.

VI – *Provisions relating to the personal file*

38 Under Article 26 of the Staff Regulations:

'The personal file of an official shall contain:

(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;

(b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.

The communication of any document to an official shall be evidenced by his signing it or, failing that, shall be effected by registered letter to the last address communicated by the official.

...

There shall be only one personal file for each official.

An official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them.

The personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium. It shall, however, be forwarded to the Court of Justice [of the European Union] if an action concerning the official is brought.'

39 Article 26a of the Staff Regulations is worded as follows:

'Officials shall have the right to acquaint themselves with their medical files, in accordance with arrangements to be laid down by the institutions.'

VII – *Provisions relating to public access to documents*

40 Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) lays down that:

'The institutions shall refuse access to a document where disclosure would undermine the protection of:

— …

— the purpose of inspections, investigations and audits,

– unless there is an overriding public interest in disclosure.'

Facts of the case

41 The applicant is a former official in grade AD 15. He entered the service of the Commission in 1979 and occupied various posts within that institution.

42 From 21 December 1995 to July 1997 the applicant was Chef de cabinet of Mrs Cresson, a Member of the Commission, succeeding Mr Lamoureux in that post.

43 As the present dispute stems from certain events that occurred within the cabinet of Mrs Cresson during that period, it is necessary to review them briefly.

I – *The context of the 'Cresson affair'*

44 Mrs Cresson was a Member of the Commission from 24 January 1995 to 8 September 1999. The President of the Commission at that time was Mr Santer. Mrs Cresson's portfolio comprised: science, research and development, human resources, education, training and youth, together with the Joint Research Centre (JRC).

45 When Mrs Cresson took up office, her cabinet was already in place. However, Mrs Cresson expressed a wish to appoint one of her close acquaintances, Mr Berthelot, as her 'personal adviser'. Because he was 66 years old at the relevant time, Mr Berthelot could not be appointed as a member of temporary staff in order to serve as a member of a Commissioner's cabinet. Moreover, Mr Lamoureux, who was Mrs Cresson's Chef de cabinet, had advised her that, having regard to Mr Berthelot's age, he saw no possibility of the latter being employed by the Commission. Mrs Cresson, who nevertheless wished to engage Mr Berthelot as a personal adviser, then asked the administration to consider how it might be possible to appoint him. Mr Berthelot was finally engaged as a visiting scientist with the Research Directorate-General (DG) from 1 September 1995, for an initial period of six months. That period was then extended until the end of February 1997. Under an anti-accumulation rule, Mr Berthelot's

monthly allowance as a visiting scientist was reduced from April 1996, in order to take account of a pension which was paid to him in France. Shortly after that reduction was made, 13 mission orders, for the period from 23 May to 21 June 1996, were drawn up by Mrs Cresson's cabinet, in Mr Berthelot's name, for payment to him of a sum of approximately EUR 6 900. As from 1 September 1996, Mr Berthelot's position was reclassified, as a result of which he was moved from Group II to Group I as a visiting scientist. His monthly allowance, which was then of the order of EUR 4 500, was increased by approximately EUR 1 000. On the expiry of his contract with DG Research on 1 March 1997, Mr Berthelot was offered another visiting scientist's contract, with the JRC, for a period of one year expiring at the end of February 1998.

46 After allegations had been made by Members of the European Parliament that Mrs Cresson was guilty of favouritism in appointing and favouring two of her acquaintances, several inquiries were carried out by various bodies.

47 A Committee of Independent Experts, created on 27 January 1999 under the auspices of the Parliament and the Commission, was instructed to prepare an initial report, in order to establish to what extent the Commission, as a body, or one or more of its Members individually bore responsibility for the recent examples of fraud, mismanagement or nepotism raised in Parliamentary discussions. In its report submitted on 15 March 1999, the Committee concluded as regards Mr Berthelot that there was a clear case of favouritism.

48 On 16 March 1999 the Commission resigned collectively, but remained in office until 8 September of that year.

49 On 20 July 1999 OLAF opened an internal investigation into Mr Berthelot's conditions of employment as a visiting scientist with the Commission. OLAF completed its report on 23 November 1999. The report concluded that 'as [some] reports and ... mission orders drawn up or declared under the signature of Mr René Berthelot could be characterised as forgeries, it [was] necessary to transmit [the said] report … to the competent judicial authorities, pursuant to Article 10 of Regulation No 1073/99'.

50 OLAF's report was transmitted to the Director-General of DG Personnel and Administration with a view to the possible initiation of disciplinary proceedings and to the public prosecutor of the court of Brussels (Belgium). It led to a number of disciplinary proceedings being initiated in respect of officials of the Commission and members of its staff and to proceedings for the recovery of the amounts that had been wrongly paid to Mr Berthelot. At that stage, no disciplinary proceedings were initiated in respect of the applicant.

51 DG Personnel and Administration, and then IDOC, after its creation by Commission Decision C(2002) 540 of 19 February 2002, undertook two additional investigations in relation to Mr Berthelot, one in respect of the role of DG Research, and the other with regard to the involvement of the JRC. IDOC submitted an additional administrative investigation report on Mr Berthelot's period of employment as a visiting scientist with DG Research and the JRC. The IDOC report concluded that 'on the basis of all the information and statements gathered during the additional investigations that were prescribed, the Ariadne's thread that appear[ed] to underlie Mr Berthelot's employment with the Commission [was] to all appearances the need to pay him for the direct assistance which Mrs Cresson wished to receive from him as personal adviser'.

52 On 21 January 2003 the College of Commissioners decided to send Mrs Cresson a statement of the complaints against her in the context of the possible institution of proceedings under Article 213(2) EC and Article 126(2) EA.

53 On 18 March 2003 Mr V, the investigating magistrate at the Tribunal de Première Instance de Bruxelles (Court of First Instance, Brussels) (Belgium), charged Mrs Cresson, Mr Berthelot and eight Commission officials and members of its staff, including the applicant, with forgery, fraud or unlawful conflict of interest. The Commission sued for damages in those criminal proceedings in Belgium on 11 September 2003.

54 By order of 30 June 2004 the Chambre du Conseil of the Tribunal de Première Instance de Bruxelles, taking judicial note of the oral submissions of the public prosecutor and having regard to the grounds set out in his written submissions of 3 February 2004, declared that there was no ground to refer the case to the criminal court for trial. In particular, the order stated that the investigation-file left no room for doubt that forgery and fraud charges could be laid, but that there was nothing that pointed with certainty to any one of the defendants in the case.

55 On 7 October 2004 the Commission brought an action in which it requested the Court of Justice to declare that there was conduct amounting to favouritism or, at least, gross negligence constituting a breach by Mrs Cresson of the obligations laid down under Article 213 EC and Article 126 EA and, consequently, to order that Mrs Cresson be deprived in whole or in part of her entitlement to a pension or other benefits in its stead.

56 By judgment of 11 July 2006 in Case C-432/04 *Commission* v *Cresson* ECR I-6387 ('*Commission* v *Cresson*'), the Court of Justice held that Mrs Cresson had acted in breach of the obligations arising from her office as a Member of the Commission in relation to the appointment of Mr Berthelot and as regards the terms under which he worked. With regard to the Commission's request that Mrs Cresson be deprived of her entitlement to a pension, the Court considered that the finding of breach constituted, of itself, an appropriate penalty and that it was therefore appropriate not to impose a penalty on her.

II – *Facts regarding the applicant*

57 The applicant was Mrs Cresson's Chef de cabinet from 21 December 1995 to July 1997. In December 1996 he was appointed principal adviser to DG Research, a post for which he had applied. He wished to leave Mrs Cresson's cabinet because of the tensions that had existed between them since May 1996. However, his actual departure from the cabinet did not take place until July 1997, as it was not until then that Mrs Cresson would accept his resignation, for lack of a candidate selected to replace him.

58 On 15 September 1999 the applicant was interviewed formally in the context of the OLAF investigation. On 17 November 1999 he was notified that an investigation concerning him had been opened. He was interviewed formally on 19 November 1999. The OLAF report of 23 November 1999 mentioned, with regard to him, that in the light of partially concordant statements by officials it was probable that a meeting had been held in his office during which there was allegedly discussion of the possibility of reclassifying Mr Berthelot to Group I of visiting scientists (paragraph 4.2.2 of the OLAF report). No disciplinary proceedings were instituted against the applicant as a result of the OLAF report.

59 On 27 December 2000 Radio Télévision Belge Francophone (French-language Belgian radio and television, RTBF) broadcast the popular television programme 'Au nom de la loi' ('In the name of the law'), one item of which dealt with the 'Cresson affair'. During a short section of the programme the applicant's name was mentioned and a shot was broadcast that was described in the commentary accompanying the images of the programme as being the minutes of OLAF's interview with the applicant.

60 In a memorandum of 7 February 2001 DG Personnel and Administration advised the applicant of the Commission's decision to waive his immunity following a request to do so addressed to the President of the Commission on 18 December 2000 by Mr V, an investigating magistrate at the Tribunal de Première Instance de Bruxelles.

61 The IDOC report of 22 February 2002 stated, with regard to the applicant, that examination of the evidence in the inquiry gave grounds for believing that a meeting, at which the possibility of reclassifying Mr Berthelot to Group I of visiting scientists had been discussed, had taken place in the applicant's office between 21 and 29 November 1996 (paragraph 4.4 of the IDOC report).

62 On 18 March 2003 (see paragraph 53 above) the applicant was charged as the author or co-author, first, of forgery of documents, in particular for having drawn up or caused to be drawn up 13 mission orders and 13 mission expense accounts by having placed or caused to be placed on each of them statements that did not reflect reality and, secondly, of fraud in relation to the reimbursement of the mission expenses referred to in the abovementioned charge. The applicant received the letter from the investigating magistrate notifying him of the charge against him on 7 April 2003.

63 As a result of this indictment, the applicant suffered a nervous breakdown necessitating several absences from work.

64 On 25 July 2003 the applicant sent an 'accident report/statement of occupational disease' to the Commission. That statement, which was accompanied by a report from the applicant's doctor, contained no explicit allegation of psychological harassment against the institution.

65 On 31 July 2003 the Commission acknowledged receipt of the applicant's statement of 25 July 2003 and informed him that an inquiry would be carried out to ascertain the nature and cause of his condition.

66 In September 2003, one week after the applicant had returned to work from sick leave, the research programme for which he was responsible was allegedly 'frozen' at the request of DG Personnel and Administration. This incident caused the applicant to take further absence from work, which continued until the beginning of January 2004.

67 On 16 January 2004 the Director General of DG Research allegedly informed the applicant orally that the appointing authority intended to retire him in the interests of the service pursuant to Article 50 of the Staff Regulations. That information was allegedly confirmed to the applicant on 20 January 2004 by the Chef de cabinet of the Member of the Commission responsible for scientific research, but it was never put into effect. As a result of that announcement, a recurrence of the applicant's breakdown was diagnosed, causing the applicant to cease work again from 22 January 2004 until the end of 2004.

68 By decision of 16 January 2004 the Member of the Commission responsible for personnel and administration and hence for investigations and disciplinary matters, Mr Kinnock, acting as appointing authority, instituted disciplinary proceedings against the applicant and suspended those proceedings pursuant to the fifth paragraph of Article 88 of the Staff Regulations, in the version applicable until 30 April 2004, until the final judgment had been handed down by the Belgian criminal court. That decision indicated that, as well as being indicted, the applicant was accused of having played an active role, as Mrs Cresson's Chef de cabinet, in the reclassification of Mr Berthelot to Group I of visiting scientists with DG Research, which was deemed to be unlawful, and also in the appointment of Mr Berthelot as a visiting scientist with the JRC, which was also deemed to be unlawful.

69 The public prosecutor's written submissions of 3 February 2004 (see paragraph 54 above) contained the following comments on the charge of forgery against the applicant:

'Although the [applicant] was [Mrs]Cresson's Chef de cabinet, no statement implicates him either explicitly or implicitly; no material fact, such as a memorandum or a signature, makes it possible to establish that he was involved in the facts; he himself adduced evidence of the fraudulent nature of the mission orders by stating that the second defendant (Berthelot) arrived in Brussels on Tuesdays in the company of Mrs Cresson and in her vehicle, and left on Thursdays for Châtellerault (France), whereas those days precisely matched the dates of the missions but in the reverse order ...'

70 The written submissions of the public prosecutor conclude by stating that no blame attached to the applicant as far as the charges of forgery and fraud were concerned.

71 By letter of 25 May 2004 the Head of the Commission's Unit 'Medical Service (Brussels)' informed the applicant that, in view of his days of absence on health grounds, he intended to ask the appointing authority to commence invalidity proceedings in his regard and asked him if he had any objections.

72 By letter of 23 June 2004, the applicant replied that he did not oppose the opening of such proceedings provided they were based solely on the fifth paragraph of Article 78 of the Staff Regulations, relating in particular to a situation in which invalidity is the result of an occupational disease.

73 On 29 June 2004, the Head of the Unit 'Medical Service (Brussels)' replied to the applicant that he had taken note of his letter of 23 June. He also wrote that he wished to point out that it was not possible to pre-empt the conclusions of the Invalidity Committee, particularly with regard to the occupational origin of the invalidity, but that the Invalidity Committee would consider that aspect.

74 On 13 July 2004, following the decision of 30 June 2004 of the Belgian criminal court not to proceed to trial on the charges against the applicant and the other defendants (see paragraph 54 above), the Commission wrote to the applicant in the following terms:

'As you know, the disciplinary proceedings against you have been suspended pending a decision by the College [of Commissioners] on the case of Mrs Cresson.

...

As soon as [the order of the Belgian criminal court] is no longer subject to appeal and has been studied by the Legal Service, all of the issues regarding Mrs Cresson will be submitted to the College [of Commissioners] for decision. Immediately thereafter the other files, including yours, will be re-examined in the light of the decision taken and resubmitted to the appointing authority.'

75 By decision of 20 July 2004, which took immediate effect, the appointing authority reassigned the applicant to the newly created post of 'principal adviser on economic issues' to the Director-General of DG Research ('the reassignment measure'). The first paragraph of that decision referred to the implementation of the policy of mobility of senior staff and the interests of the service.

76 On 14 October 2004 the applicant submitted a complaint to the appointing authority contesting the reassignment measure. The appointing authority rejected that complaint by decision of 15 March 2005. The applicant did not bring judicial proceedings against that decision.

77 On 22 October 2004 the applicant submitted a request under Article 90(1) of the Staff Regulations for the termination of the disciplinary proceedings brought against him. In support of his request he cited in particular the decision of the Belgian criminal court not to proceed to trial.

78 On 25 October 2004 the applicant submitted to the Commission a new 'report of a work-related accident and/or statement of occupational disease' in which he maintained that the nervous breakdown from which he was suffering was the result of the combination of measures taken by the Commission in his regard, which he claimed demonstrated a desire to harm him and to harass him psychologically.

79 The Invalidity Committee delivered its conclusions on 29 October 2004, which found that the applicant had sustained a permanent invalidity which was assessed as total and which rendered him incapable of performing the duties corresponding to a post in his career bracket. They also stated that the Invalidity Committee took no view, at that stage, as to a possible link between the applicant's acknowledged invalidity and his occupational activity, 'until relevant information [became] available from the relevant authorities'.

80 By decision of the appointing authority of 8 November 2004 with effect from 30 November following, the applicant was automatically retired on the basis of Article 53 of the Staff Regulations and granted an invalidity allowance in accordance with the provisions of the third paragraph of Article 78 of those regulations.

81 On 25 November 2004 the Commission acknowledged receipt of the applicant's letter of 25 October 2004 and stated that the procedure commenced in July 2003 under Article 73 of the Staff Regulations was almost concluded. The Commission also informed the applicant that, in view of his allegations of psychological harassment, the application for recognition that his disease was occupational in origin had to be passed to IDOC, the only body apart from OLAF authorised to conduct administrative investigations.

82 On 24 December 2004 the applicant wrote to the Commission asking it to reconsider its decision to have an investigation carried out by IDOC. In support of his request he relied, first, on the fact that such an investigation would only further prolong a procedure that had already been under way for almost two years and, secondly, on that office's lack of impartiality. In that letter he also asked the Commission to state, first, whether a complaint could be lodged against such a decision under Article 90(2) of the Staff Regulations and, secondly, whether the Commission had definitively excluded the possibility that he had sustained a work-related accident.

83 By letter of 4 February 2005 the Commission replied that the decision to pass the applicant's file to IDOC was not open to appeal and that the criticism about the impartiality of that office could not be upheld. The Commission also pointed out to the applicant that he had not submitted an accident report, since in his statement of 25 July 2003 he had expressly referred to Article 17 of the old Insurance Rules (relating to a statement of occupational disease) and not to Article 16 of those rules (relating to an accident report).

84 By decision of 28 February 2005 the appointing authority rejected the applicant's request of 22 October 2004 for the disciplinary proceedings against him to be terminated. It justified the decision on the grounds that the disciplinary and criminal proceedings were mutually distinct and that therefore the fact that the Belgian criminal proceedings had not proceeded to trial did not mean that the disciplinary proceedings had to be terminated. It also stated that the disciplinary proceedings against the applicant would have to remain suspended because of the link between them and the action brought against Mrs Cresson in the Court of Justice on 7 October 2004. In particular, the continued suspension of the disciplinary proceedings against the applicant was justified as follows:

'Any decision as to the merits of your case, whether relating to a possible termination or a possible resumption, would not be without effect on the proceedings against Mrs Cresson before the Court of Justice and could therefore be regarded as an attempt to exert inappropriate influence.

While taking account of the fact that [the proceedings pending before the Court of Justice against Mrs Cresson] are not of a criminal nature, it is nevertheless necessary to apply the case-law on the reasons for suspending disciplinary proceedings in the event of a criminal prosecution, Article 25 of Annex IX to the Staff Regulations (... [fifth paragraph of] Article 88 of the Staff Regulations[, in the version applicable until 30 April 2004]). The [Court of First Instance] has ruled in this regard that the purpose of that Article is, inter alia, to ensure that "the official concerned will not be placed at a greater disadvantage in the criminal proceedings than if such a decision had not been taken by the administrative authority ..." (Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC [I-A-129 and] II-343 ...).'

85 By letter of 25 March 2005 the applicant submitted a third 'report of work-related accident/statement of occupational disease'.

86 By letter of 12 May 2005 the Commission notified the applicant that his new statement, which contained no change of substance, would simply be placed in his file. That letter also stated that on 16 March 2005 IDOC had sent to the Sickness and Accident Insurance Unit of the Office for the Administration and Payment of Individual Entitlements (PMO) a 'contribution' making it possible to close the investigation opened under Article 17 of the old Insurance Rules ('the IDOC contribution').

87 By letter of 19 May 2005 the applicant requested that this IDOC contribution be communicated to him.

88 On 20 May 2005 the applicant lodged a complaint against the decision refusing to terminate the disciplinary proceedings in response to his request.

89 By letter of 9 June 2005 the Head of the Sickness and Accident Insurance Unit of the PMO refused to transmit to the applicant a copy of the IDOC contribution to the investigation opened under Article 17 of the old Insurance Rules. He cited two reasons to justify this refusal 'pending a further decision'. First, the contribution in question was a preparatory measure that had to be available to the doctor appointed by the institution without the risk that its disclosure could prejudice the conclusion of the report he had been asked to write. Secondly, the exception mentioned in the third indent of Article 4(2) of Regulation No 1049/2001, which permits the institutions to refuse access to a document where disclosure could undermine the protection of the purpose of inspections, investigations and audits, applied.

90 By letter dated 29 June 2005 the applicant submitted an application to the appointing authority, on 4 July 2005, for compensation for all the damage he had allegedly suffered owing to the various wrongful acts said to have been committed by the Commission.

91 The complaint of 20 May 2005 was rejected by decision of the appointing authority of 26 September 2005.

92 The request of 29 June 2005 was rejected by decision of the appointing authority of 10 November 2005. On 23 January 2006 the applicant lodged a complaint, dated 19 January 2006, against the latter decision. That complaint was rejected by implied decision, pursuant to the second subparagraph of Article 90(2) of the Staff Regulations.

93 On 16 December 2005, in response to the decision of 26 September 2005 dismissing his complaint of 20 May 2005 (see paragraphs 88 and 91 above), the applicant brought the action registered as Case F-124/05.

94 The judgment in *Commission* v *Cresson* was delivered on 11 July 2006.

95 On 10 August 2006, in response to the implied decision rejecting his complaint of 19 January 2006 (see paragraph 92 above), the applicant brought the action registered as Case F-96/06.

96 On 16 October 2006 the Vice-President of the Commission, Mr Kallas, notified the applicant that, following careful examination of the judgment in *Commission* v *Cresson*, he had decided to terminate the disciplinary proceedings against him.

97 On 16 March 2007, the Commission notified to the applicant a draft decision refusing to recognise the occupational origin of his disease, on the basis of the opinion adopted by the doctor appointed by the institution.

98 On 3 May 2007 the applicant requested the formation of the Medical Committee provided for in Article 22 of the Insurance Rules.

99 On 5 December 2007 the Medical Committee submitted its report, in which it unanimously recognised the occupational origin of the applicant's disease. The conclusions of the Medical Committee's report were couched in the following terms:

'1. Following the psychological shock he suffered on [7 April] 2003 in the course of his professional duties, [the applicant] was in a state of total temporary inability to work, from 10 April 2003 until at least 31 August 2003.

2. Subsequently, [the applicant] attempted two brief resumptions of work, but without success, from which he relapsed into bouts of total temporary incapacity which are patently linked to the initial pathological process.

3. At the time of the conclusion of this medical assessment, [the applicant] is still in a state of total temporary incapacity and his situation does not appear consolidable.

4. [The applicant] should be re-examined in about two years' time, at the request of the more prompt party.

...'

100 Furthermore, the section of the Medical Committee's report entitled 'discussion' stated the following, inter alia:

'In these conditions, the Medical Committee unanimously considers that [the applicant's] psychological condition must be regarded as still evolving and that his condition is therefore not consolidable at the present time.

In view of these factors, the Medical Committee unanimously considers it justified that [the applicant] be recognised as 66% incapacitated as from [18 March] 2003.'

101 On 28 March 2008 the Head of the Sickness and Accident Insurance Unit of the PMO sent the applicant a letter in which he indicated that, in the light of the report of the Medical Committee of 5 December 2007, he was able to recognise the occupational origin of his disease. The Medical Committee's report of 5 December 2007 was attached to the letter.

102 On 8 April 2008 the applicant wrote to the Head of the Sickness and Accident Insurance Unit of the PMO asking him to decide without delay on the implementation of Article 73(2)(b) of the Staff Regulations.

103 On 28 April 2008 the Head of the Sickness and Accident Insurance Unit of the PMO replied to the applicant that, since the report of the Medical Committee of 5 December 2007 stated that his condition was not yet 'consolidable' and that he should be re-examined after about two years, he could not make a decision at that stage on the application of Article 73(2)(b) of the Staff Regulations.

104 On 9 June 2008 the Invalidity Committee met again and, in the light of the Medical Committee's report of 5 December 2007, concluded that the applicant's invalidity had been caused by a disease of an occupational nature.

105 By decision of 16 June 2008 annulling and replacing the decision of 8 November 2004 the appointing authority, in the light of the conclusions of the Invalidity Committee of 9 June 2008, granted the applicant an invalidity allowance fixed in accordance with the provisions of the fifth paragraph of Article 78 of the Staff Regulations with effect from the date on which he became an invalid, that is to say 30 November 2004.

106 On 18 February 2009 the applicant brought a third action before the Tribunal, registered as Case F-12/09, *A* v *Commission*, in which he seeks, inter alia, first annulment of the decision of the Commission of 28 April 2008 refusing to rule on Article 73(2)(b) of the Staff Regulations, and secondly compensation for the damage allegedly caused to him by a series of wrongful acts said to have been committed by the Commission in the conduct of the procedure for recognising the occupational origin of his disease.

Procedure

I – *Case F-124/05 before its joinder with Case F-96/06*

107 By a separate document lodged at the Registry of the Tribunal on 12 April 2006, the Commission raised a plea of inadmissibility against the action under Article 114(1) of the Rules of Procedure of the Court of First Instance of the European Communities, applicable *mutatis mutandis* to the Tribunal pursuant to Article 3(4) of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7) pending the entry into force of the latter's Rules of Procedure.

108 By a document received at the Registry of the Tribunal on 12 May 2006 by fax (the original being received on 18 May 2006), the applicant submitted observations on the plea of inadmissibility.

109 By order of 29 June 2006, the Tribunal reserved its decision on the objection of inadmissibility for the final judgment on the basis of the first subparagraph of Article 114(4) of the Rules of Procedure of the Court of First Instance.

110 Following the decision to terminate the disciplinary proceedings against the applicant, the Commission, by a separate document received at the Registry of the Tribunal on 18 October 2006 by fax (the original being received on 19 October 2006), lodged a request for a ruling that there was no need to adjudicate on the action, in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance.

111 By a document received at the Registry of the Tribunal on 2 November 2006 by fax (the original being received on 6 November 2006), the applicant submitted observations on the request for a ruling that there was no need to adjudicate on the action.

112 By order of 22 November 2006 the Tribunal reserved for the final judgment its decision on the request for a ruling that there was no need to adjudicate on the action, in accordance with the first subparagraph of Article 114(4) of the Rules of Procedure of the Court of First Instance.

113 The Commission submitted its defence on 8 January 2007 by fax (the original being lodged on 11 January 2007).

114 By order of 27 March 2007 the Tribunal stayed the proceedings at the joint request of the parties until the procedure initiated by the applicant under Article 73 of the Staff Regulations had been completed or, at the latest, until 30 June 2007, on the basis of Article 77(c) of the Rules of Procedure of the Court of First Instance. By orders of 24 July 2007 and 26 October 2007 the proceedings were again stayed on the same basis at the joint request of the parties until the procedure initiated by the applicant under Article 73 of the Staff Regulations had been completed or, at the latest, until 31 October 2007 and 1 March 2008 respectively.

115 By way of measures of organisation of procedure, the Tribunal requested the parties to reply to written questions and to produce certain documents. The parties complied with the Tribunal's requests within the prescribed periods.

116 On 9 July 2008 the Tribunal decided to refer the case to the full court.

II – *Case F-96/06 before its joinder with Case F-124/05*

117 The Commission submitted its defence on 20 November 2006 by fax (the original being lodged on 22 November 2006).

118 By order of 27 March 2007 the Tribunal stayed the proceedings at the joint request of the parties until the procedure initiated by the applicant under Article 73 of the Staff Regulations had been completed or, at the latest, until 30 June 2007, on the basis of Article 77(c) of the Rules of Procedure of the Court of First Instance. By orders of 24 July 2007 and 26 October 2007 the proceedings were again stayed on the same basis at the joint request of the parties until the procedure initiated by the applicant under Article 73 of the Staff Regulations had been completed or, at the latest, until 31 October 2007 and 1 March 2008 respectively.

119 By way of measures of organisation of procedure, the Tribunal requested the parties to reply to written questions and to produce certain documents. The parties complied with the Tribunal's requests within the prescribed periods.

120 On 9 July 2008 the Tribunal decided to refer the case to the full court.

III – *Joined Cases F-124/05 and F-96/06*

121 By order of the President of the Tribunal of 22 January 2009 Cases F-124/05 and F-96/06 were joined for the purposes of the oral procedure and for the final judgment in accordance with Article 46 of the Rules of Procedure.

122 By way of measures of organisation of procedure, the Tribunal requested the parties to reply to written questions and to produce certain documents. The parties complied with the Tribunal's requests within the prescribed periods.

Forms of order sought

I – *Case F-124/05*

123 The applicant claims that the Tribunal should:

— annul the decision refusing to terminate the disciplinary proceedings;

— annul the Commission's decision of 26 September 2005 dismissing his complaint of 20 May 2005;

— rule that his request of 22 October 2004 is admissible and well founded;

— declare that the Commission is liable for the wrongful acts that it has committed by adopting the decision refusing to terminate the disciplinary proceedings and the decision of 26 September 2005;

— order the Commission to pay him and his family the sum of EUR 3 163 602;

— order that pursuant to Article 17(4) of the Instructions to the Registrar of the Court of First Instance of 3 May 1994 his identity be omitted from all publications relating to the present dispute;

— order the Commission to pay the costs.

124 The Commission contends that the Tribunal should:

— declare that it is not necessary to rule on the action;

— in the alternative, dismiss the action as inadmissible;

— in the further alternative, declare the application unfounded;

— make an appropriate order as to costs, in the alternative reserve the costs to the judgment in the action registered as Case F-96/06.

II – *Case F-96/06*

125 The applicant claims that the Tribunal should:

— declare that the Commission is liable for the wrongful acts that it has committed;

— order the Commission to pay him and his family the sum of EUR 3 163 602;

— order that pursuant to Article 17(4) of the Instructions to the Registrar of the Court of First Instance of 3 May 1994 his identity be omitted from all publications relating to the present dispute;

— order the Commission to pay the costs.

126 The Commission contends that the Tribunal should:

— declare the action partially inadmissible or, in any case, unfounded;

— make an appropriate order as to costs.

Law

I – *Case F-124/05*

127 It is necessary first to examine the Commission's request for a ruling that there is no need to adjudicate.

A – *Arguments of the parties*

128 The Commission employs two arguments as the basis of its request for a ruling that there is no need to adjudicate on the action. First, according to the Commission, the applicant no longer has an interest in seeking annulment of the decision refusing to terminate the disciplinary proceedings, as the appointing authority's decision of 16 October 2006 had terminated those proceedings following the judgment in *Commission* v *Cresson*. Secondly, the Commission asserts that the claim for damages made in Case F-124/05 is essentially identical to that submitted in Case F-96/06.

129 The applicant states that he does not dispute the fact that the action had become devoid of purpose as regards the request for annulment of the decision refusing to terminate the disciplinary proceedings. However, he considers that his claim for damages remains entirely relevant. He holds that, since Case F-124/05 was brought before Case F-96/06, the Tribunal should first deliver judgment on the first action and then take account of its decision in the second.

B – *Findings of the Tribunal*

130 The purpose of the applicant's request of 22 October 2004 was to seek the termination of the disciplinary proceedings against him. By decision of 16 October 2006 the appointing authority terminated those proceedings. That decision therefore granted to the applicant the outcome that he sought.

131 Moreover, the applicant himself acknowledges that the forms of order for annulment became devoid of purpose as a result of the Commission's decision to terminate the disciplinary proceedings against him. That acknowledgement may be construed as abandonment of those forms of order by the applicant.

132 It follows from the foregoing that there is no longer any need to rule on the claims for annulment.

133 By contrast, the claims for damages in the application continue to have a purpose.

134 It is to be noted, firstly, that the eighth head of claim in the action registered as Case F-96/06 refers back to all of the pleas raised in the action registered as Case F-124/05, and, secondly, that the forms of order sought in Case F-96/06 are identical to the claims for damages made in the action registered as Case F-124/05.

135 In accordance with established case-law (Joined Cases 58/72 and 75/72 *Perinciolo* v *Council* [1973] ECR 511, paragraphs 3 to 5; Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9; Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; and Order of the Civil Service Tribunal of 19 September 2006 in Case F-22/06 *Vienne and Others* v *Parliament* [2006] ECR-SC I-A-1-101 and II-A-1-377, paragraph 12), where an action has the same parties, subject-matter and submissions as an action brought previously, it must be dismissed as inadmissible.

136 However, notwithstanding that the action in Case F-124/05 was registered before the action in Case F-96/06, and having regard to the joinder of Cases F-124/05 and F-96/06 for the purposes of the oral procedure and the final judgment, the Tribunal considers it more appropriate, in the interest of proper administration of justice, to examine the applicant's claims for damages not in the context of the action registered as Case F-124/05 but in that of the action registered as Case F-96/06.

137 Accordingly, it is appropriate to accept in its entirety the Commission's request for a ruling that there is no need to adjudicate on the action.

II – *Case F-96/06*

A – *Admissibility*

1. Arguments of the parties

138 At the hearing the Commission maintained that the action for damages was premature and hence inadmissible by reason of the applicant's application for the recognition of the occupational nature of his disease. The Commission relies on the judgment in Case T-300/97 *Latino* v *Commission* [1999] ECR-SC I-A-259 and II-1263, paragraphs 94 and 95, in which it was held that the application from an official for compensation for non-material damage resulting from his occupational disease was premature, since it was not possible, when the action was brought, to assess the appropriate nature of the compensation to which the applicant was entitled under the Staff Regulations. The Commission emphasises that, in the present case, the report of the Medical Committee stated that it was not possible to ascertain the applicant's invalidity rate until his state of health had consolidated and that his case should be re-examined approximately two years later. According to the Commission, before knowing the outcome of that re-examination it was impossible to know the amount that the applicant could obtain under Article 73(2) of the Staff Regulations. That information was essential for the Tribunal to determine whether the compensation obtained by the applicant under that provision constituted sufficient redress for the harm he had suffered.

139 The applicant replies that it was not necessary for the Medical Committee to determine an invalidity rate in order for the appointing authority to reach its decision under Article 73(2) of the Staff Regulations. Under Article 11(2) of the new Insurance Rules, where an insured party sustains total permanent invalidity as a result of an accident or an occupational disease, the PMI is 100% and the lump sum provided for in Article 73(2)(b) of the Staff Regulations is paid to the person concerned. On 29 October 2004 the Invalidity Committee determined that the applicant had sustained a total permanent invalidity.

140 The applicant also points out that in Case T-57/99 *Nardone* v *Commission* [2008] ECR-SC I-A-2-83 a II-A-2-505 the Court of First Instance held that the rule established in *Latino* v *Commission* that any damages and interest for fault on the part of the administration is merely in addition to the scheme governed by the Staff Regulations and comes into play only if it can be established that the amounts obtained under that scheme are inadequate, is not automatically applicable. He considers that the solution established by the judgment in *Nardone* v *Commission*, should be applied in his case since the unjustified prolongation of the procedure initiated under Article 73 of the Staff Regulations perpetuated the uncertainty in which he has lived for years and prevented the consolidation of his state of health. According to the applicant, the Commission refuses to compensate him until his state of health has consolidated. The applicant considers that the Commission has thus locked him into a 'vicious circle', an 'infernal spiral', which only the Tribunal can break by ordering the institution to compensate him immediately.

141 In reply to that argument, the Commission submits that the exceptional circumstances which gave rise to the judgment in *Nardone* v *Commission*, are not present in the case at issue.

2. Findings of the Tribunal

142 The Tribunal would observe at the outset that in its statement of defence in Case F-96/06 the Commission did not claim that the application was inadmissible because it was premature, but raised this argument only in its statement of defence in Case F-124/05, where it stated that this argument also applied to the application in Case 96/06, and then in a letter of 25 February 2008 produced in response to a measure of organisation of procedure adopted by the Tribunal with regard to the two cases, and finally at the joint hearing for the two cases.

143 The fact that the Commission failed to raise this plea of inadmissibility in its statement of defence in Case F-96/06 does not prevent the Tribunal from considering it, since the conditions for admissibility of an action under Articles 90 and 91 of the Staff Regulations are a matter of public policy (Joined Cases T-90/07 P and T-99/07 P *Belgium and Commission* v *Genette* [2008] ECR II-3859, paragraph 87 and the case-law cited). Moreover, in the present case account must also be taken of the joinder of the two cases (see, to that effect, Joined Cases 26/79 and 86/79 *Forges de Thy-Marcinelle et Monceau* v *Commission* [1980] ECR 1083, paragraph 4) and the fact that the parties were able to debate this question in an adversarial procedure at the joint hearing held for the two cases.

144 In the present case, the heads of damage raised by the applicant are not all based on harm to his health, such that it cannot be considered a priori that full reparation can be made for them in the context of the procedure for the recognition of the occupational origin of his disease. Some of the applicant's grievances relate to circumstances liable to cause non-material damage to an official even if no occupational disease is present.

145 In particular, the numerous infringements of the rights of the defence of which the applicant complains are liable to have caused him non-material damage distinct from harm to his health, and which can therefore not be made good by payment of the lump sum for which Article 73 of the Staff Regulations provides.

146 The applicant also seeks in particular compensation for non-material damage allegedly caused by the excessive duration of the disciplinary proceedings against him.

147 It must be noted in this regard that all disciplinary proceedings place the official concerned in a situation of uncertainty about his professional future, inevitably causing him some degree of stress and anxiety. If that uncertainty persists for an inordinate period, the intensity of the stress and anxiety caused to the official goes beyond the level of what may be considered justifiable. Hence, the excessive duration of disciplinary proceedings is to be taken as giving rise to a presumption that the person concerned has suffered non-material damage.

148 It is common ground that, when faced with serious uncertainty of this kind lasting beyond a reasonable period, individuals are liable to react in different ways, depending, for example, on any psychological fragility. The consequences of the unreasonable duration of disciplinary proceedings may therefore be mental suffering or, in the most severe cases, the occurrence of a veritable mental illness or the aggravation of an existing mental disorder.

149 Hence, with particular regard to the non-material damage liable to be caused by excessively long disciplinary proceedings, it is necessary to distinguish between on the one hand the non-material damage caused to any official or member of staff, irrespective of any illness, and on the other hand

the harm that may have been caused by mental illness — or the aggravation of such an illness — as a consequence of the excessive length of those proceedings (see, by analogy, Case F-23/05 *Giraudy* v *Commission* [2007] ECR-SC I-A-1-121 and II-A-1-657, paragraphs 197 to 202).

150 For that reason, a claim for compensation for the first type of damage is admissible irrespective of the state of any procedure also commenced by the official under Article 73 of the Staff Regulations.

151 On the other hand, as settled in the case-law, an official's claim for compensation for the material damage and non-material harm caused to him by an occupational disease is not generally admissible until the procedure commenced under Article 73 of the Staff Regulations has been concluded.

152 It must be noted in this regard that the scheme established pursuant to Article 73 of the Staff Regulations provides for lump-sum compensation in case of accident or occupational disease, without there being any need for the person concerned to prove any fault on the part of the institution. Moreover, the case-law makes clear that it is only in circumstances where the staff insurance scheme does not permit appropriate compensation for the injury suffered that the official is entitled to seek additional compensation (Joined Cases 169/83 and 136/84 *Leussink* v *Commission* [1986] ECR 2801, paragraph 13; Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 22; Case T-165/95 *Lucaccioni* v *Commission* [1998] ECR-SC I-A-203 and II-627, paragraph 71; and *Latino* v *Commission*, paragraph 94).

153 Consequently, an action by which an official sought compensation for the damage which he claimed to have suffered as a result of his occupational disease and which he had lodged before the procedure commenced under Article 73 of the Staff Regulations had been concluded was held to be premature, since it was not possible, at the stage at which the legal proceedings were brought, to assess the appropriate compensation to which the official was entitled under the staff insurance scheme (*Latino* v *Commission*, paragraphs 94 and 95).

154 However, in a recent judgment the Court of First Instance ruled that it could not automatically be deduced from the fact that the medical procedure had not been concluded that an action for damages and interest on account of a wrongful act committed by the institution was premature (see, to that effect, *Nardone* v *Commission*, paragraph 56). That judgment states that, although it is normally quicker and less costly for an official to establish, where applicable, that he is entitled to lump-sum compensation under Article 73 of the Staff Regulations than it is to establish that the conditions are met for invoking the non-contractual liability of the Community, that is not always the case (*Nardone* v *Commission*, paragraph 56). It was for reasons of economy of procedure, a principle which requires a balancing of the various factors involved in each case, that in the judgment in *Latino* v *Commission*, the Court of First Instance had made the admissibility of an action for compensation under the general law subject to exhaustion of the remedy enabling compensation under Article 73 of the Staff Regulations (*Nardone* v *Commission*, paragraph 56).

155 It may be stated in this regard that, as far as the determination and assessment of damage resulting from an occupational disease is concerned, the procedure provided for under Article 73 of the Staff Regulations is to be considered the *lex specialis* in relation to the general law on non-contractual liability (see, to that effect, *Giraudy* v *Commission*, paragraphs 193 to 196).

156 In most cases, a medical report is required in order to establish a causal link between working conditions and the claimed prejudice and to assess the prejudice itself, so that it would make no sense, and indeed may even be impossible, for the Community courts to determine the causal link and the prejudice before the procedure commenced under Article 73 of the Staff Regulations had been concluded.

157 That is the position in the present case, so that the solution set out in *Nardone* v *Commission*, cannot be applied.

158 That solution was dictated by a concern for procedural economy in 'the exceptional circumstances which characterise[d that] case' (*Nardone* v *Commission*, paragraph 57). In that case, a medical report had not been necessary to assess the non-material damage suffered by Mr Nardone as a result of his having worked in a dust-laden and unhealthy environment (see, to that effect, *Nardone* v *Commission*, paragraphs 98 to 123).

159 In the present case, however, a medical report is necessary to determine the extent of the physical and mental damage that may be attributed to the conditions attaching to the performance of the applicant's professional duties.

160 Furthermore, it appears that the procedure commenced by the applicant under Article 73 of the Staff Regulations is not far from its conclusion, as the Commission pointed out at the hearing. Indeed, the Medical Committee's report of 5 December 2007 states that the applicant should be re-examined after about two years, at the request of the more prompt party.

161 In addition, it is to be recalled that the second subparagraph of Article 19(3) of the Insurance Rules provides that where it is impossible to define the degree of invalidity after medical treatment is terminated, the report of the Medical Committee must specify a deadline for reviewing the insured party's case. This provision must be interpreted restrictively. If the Medical Committee were able repeatedly to defer the deadline for reviewing the insured party's case, some insured parties would never be paid the lump sum provided for in Article 73 of the Staff Regulations during their lifetime. Moreover, a broad interpretation of that provision would disregard the concept of consolidation as defined in Article 19(3) of the Insurance Rules, under which the consequences of the accident or occupational disease are considered consolidated where they have stabilised or will diminish only very slowly and in a very limited way. The concept of consolidation therefore does not preclude all change in the patient's condition but implies stabilisation or very slow change.

162 It follows from all of the foregoing that in the present case the principle of economy of procedure requires that the special procedure under Article 73 of the Staff Regulations be concluded.

163 Hence, without it being necessary to rule on the applicant's complaints directed against the conduct of the procedure commenced under Article 73 of the Staff Regulations, including the allegation of failure to apply Article 11(2) of the new Insurance Rules, as set out in paragraphs 139 of this judgment, the applicant's claim for compensation for the damage resulting from the occupational disease from which he is suffering must be considered premature and hence falls to be dismissed as inadmissible. In contrast, the applicant's claim for damages for the non-material harm that is independent of his disease must be declared admissible.

B – *Merits*

164 The applicant maintains that the Commission committed numerous wrongful acts that bore testimony to psychological harassment of him. These various acts caused the onset and subsequent recurrences of the nervous breakdown he suffered, which he claims was the reason for his retirement on the ground of invalidity. He submits that as a result he suffered material damage represented by the difference between his salary as an official and his invalidity allowance and also non-material harm, which was particularly grave.

165 In his originating application the applicant sought the appointment of an expert to quantify the material and non-material damage he had suffered. At the hearing the applicant made no further mention of this claim and provided an updated assessment of the damage, which he quantified at EUR 3 163 602. That must be construed as abandonment of the applicant's claim for the appointment of an expert.

166 In accordance with settled case-law, in a claim for damages and interest brought by an official the Community can be held liable for damages only if a number of conditions are satisfied: the illegality of the allegedly wrongful act committed by the institutions, actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered (Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 52 and the case-law cited, and Case T-12/08 P *M* v *EMEA* [2009] ECR I-B-1-31 and II-B-1-159, paragraph 98).

167 It is necessary to examine first whether the Commission acted wrongfully in such a way as to incur liability.

1. The alleged wrongful acts committed by the Commission

168 In support of his action for damages, the applicant puts forward eight pleas in law. His allegations are essentially:

— that the Commission unjustifiably implicated him in the 'Berthelot affair' (first plea);

— that various deficiencies and infringements of the rights of the defence vitiated the administrative inquiries (second plea);

— that the principle of confidentiality of OLAF investigations was breached (third plea);

— that the waiver of his immunity from legal proceedings was illegal (fourth plea);

— that the decision to reassign him was unlawful (fifth plea);

— that unlawful acts vitiated the procedure for recognising the occupational origin of his disease (sixth plea);

— that the opinion delivered by the Invalidity Committee on 29 October 2004 was unlawful (seventh plea);

— that the institution and continuation of disciplinary proceedings against him was unlawful (eighth plea).

a) The first plea, alleging the unjustified implication of the applicant in the 'Berthelot affair'

Arguments of the parties

169 In his first plea the applicant objects to his implication in the 'Berthelot affair', which in his view was totally unjustified. By considering him, without any evidence, to be the leading instigator of the 'Berthelot affair', 'by making such serious and totally unfounded accusations against [him], by concealing from the Belgian judicial authorities the essential observations [he had made], by maintaining [those accusations] for so long without making the least effort to investigate in order to attempt to verify them and, moreover, by instituting disciplinary proceedings against [him]', the Commission allegedly failed in its duty to have regard for the interests of officials and to provide assistance, infringed the principle of sound administration, frustrated the applicant's legitimate expectations, and infringed the 10th recital of Regulation No 1073/1999, which establishes the principle that the conclusions of an investigation by OLAF may be based solely on elements which have evidential value.

170 In its decision of 10 November 2005 rejecting the applicant's request, the appointing authority took the view that the arguments adduced by the applicant in his first plea related to the merits of the disciplinary proceedings.

171 In reply, the applicant asserted in his application that this plea went much further than the eighth plea of the action, which deals with the unlawfulness of the disciplinary proceedings.

Findings of the Tribunal

172 In so far as the arguments adduced in this plea are closely linked to the eighth plea, in which the applicant challenges the decision instituting disciplinary proceedings against him, those arguments will be examined in the context of that plea.

173 In so far as this plea can be construed as objecting to the fact that the investigations by OLAF and IDOC related to the applicant, it must be pointed out that an institution enjoys a wide margin of discretion with regard to the opening and conduct of administrative investigations, subject to there being reasonable suspicion of the commission of a disciplinary offence.

174 In the present case the applicant was Chef de cabinet of Mrs Cresson, a Member of the Commission, at the time of the unlawful reclassification of Mr Berthelot's salary scale and his equally unlawful appointment with the JRC. Furthermore, testimony by certain officials and members of staff implicated the applicant. In particular, Mrs T., an assistant with the JRC, asserted that she had sent to the applicant, at his express request, a note on the feasibility of reclassifying Mr Berthelot and possibly appointing him as a visiting scientist with the JRC.

175 It was therefore legitimate for OLAF and IDOC to investigate in the course of their inquiries whether the applicant, as Chef de cabinet, had played a role in the unlawful acts that had been discovered and, if so, what that role was.

176 Given that some facts in the 'Berthelot affair' were likely to arouse reasonable suspicion attaching to the applicant, the plea must be dismissed in so far as it concerns the opening and conduct of investigations into the applicant's conduct.

b) The second plea, alleging that various deficiencies and infringements of the rights of the defence vitiated the administrative inquiries.

Arguments of the parties

177 The second plea is composed of two limbs. In the first limb the applicant submits that various deficiencies and infringements of the rights of the defence vitiated the conduct of the administrative inquiries. In the second limb he alleges lack of impartiality on the part of the authorities conducting the administrative inquiries.

178 In the first limb of the plea the applicant adduces the following arguments.

179 In the first place, the applicant claims that he was 'thrust into centre stage', whereas other persons involved in the reclassification of Mr Berthelot's salary scale and his appointment with the JRC were not implicated.

180 In the second place, some of the offers of evidence that the applicant claims to have made did not arouse the least interest on the part of the authorities carrying out the investigations. Firstly, according to the applicant, OLAF refused the diary that the applicant proposed to transmit to it. Secondly, the Commission, OLAF and IDOC did not seek to check the reply from Mr L., Director of

the Directorate for Personnel and Administration at DG Research, to the question why the entry of three officials to the Breydel Building in Brussels for a meeting that was supposedly held in November 1996 had not be recorded in the register for that purpose. Thirdly, according to the applicant, the inquiry team never questioned Mrs M., who was in charge of the secretariat of the Chef de cabinet at the time of the disputed events. Fourthly, the applicant claims that no account was taken of contradictions and differences between the various testimonies.

181 In the third place, the applicant maintains that his right to a fair hearing had been infringed by the authorisation allegedly granted to a team of journalists from RTBF to enter the premises of OLAF and to film confidential documents implicating him directly for broadcast during the popular television programme 'Au nom de la loi' on 27 December 2000.

182 In the fourth place, according to the applicant, a memorandum dated 18 March 2002 containing his observations was not attached to the report of 22 February 2002 on the additional administrative investigation.

183 In the second limb of the plea the applicant complains in particular about the attitude of the person in charge of the investigation, Mrs D., alleging firstly that she failed to include the report on the interview with him in a memorandum of 27 March 2001, secondly that in a letter sent to Mrs Cresson on 23 November 2001 she presented as proven a number of facts that were compromising for him, and thirdly that she failed to include his memorandum of 18 March 2002 in the report of 22 February 2002 on the additional administrative investigation.

184 The Commission points out first that the principle of equal treatment of officials cannot be construed as meaning that an official subject to a penalty for having contravened the Staff Regulations should, in order to obtain exemption from the penalising measure taken against him, be entitled to rely on the fact that another official who had contravened those regulations had not been subject to any penalty. According to the Commission, that principle was all the more applicable in the present case, as the applicant had not been subject to any penalty.

185 Secondly, the Commission disputes the applicant's assertion that the facts he had adduced had not been taken into account. The terms in which the investigation reports were couched were hypothetical and not affirmative, and each divergence between the statements of the various officials questioned was mentioned.

186 The Commission points out, thirdly, that the applicant's memorandum of 18 March 2002 essentially repeated the assertions made in his statement of 12 September 2001, which was attached to the IDOC investigation report. Hence, according to the Commission, the draft report sent to the applicant for comment did not need to be amended in the light of that memorandum, since the information it contained had already been taken into account when the report was drafted.

187 With regard to the second limb of the plea, the Commission replies that, in the memorandum of 23 November 2001 to Mrs Cresson, Mrs D. was not expressing an opinion but reporting testimony. In the submission of the Commission, there was therefore no lack of impartiality in that memorandum. As regards the applicant's memorandum of 18 March 2002, the Commission refers to its arguments set out in connection with the first limb of the plea.

Findings of the Tribunal

188 With regard first to the argument that other persons involved in the reclassification of Mr Berthelot's salary scale and his appointment with the JRC had not been implicated, it is important to note that an institution enjoys a wide margin of discretion with regard to the opening and conduct of administrative investigations, subject to there being reasonable suspicion of the commission of a disciplinary offence (see paragraph 173 above).

189 In the light first of this wide margin of discretion and secondly the existence of factors likely to arouse reasonable suspicion regarding the applicant (see paragraph 176 above), the latter's argument that some officials were not the subject of administrative investigations is not such as to establish the deficiencies or the violations of the rights of the defence alleged in the first limb of the plea.

190 Secondly, with regard to the applicant's argument that some evidence that he had offered had not been taken into account by the authorities carrying out the investigations, the applicant has not demonstrated that the authorities concerned failed to examine evidence he had allegedly presented and to include it in the file.

191 Thirdly, as regards the applicant's argument that the memorandum of 18 March 2002 had not been incorporated into the report on the additional administrative investigation by IDOC, it has to be pointed out that that memorandum did not provide any new facts by comparison with the applicant's testimony annexed to the report in question. Moreover, the right of an official to comment on facts concerning him does not mean that the investigators are obliged to amend the conclusions of a report on the basis of the requests made by the official who has been interviewed.

192 Fourthly and lastly, the applicant's arguments based on the lack of impartiality of the authorities conducting the investigations must be dismissed. Firstly, the fact that the person in charge of the investigation, Mrs D., did not attach the minutes of the interview with the applicant to her memorandum of 27 March 2001 does not establish a lack of impartiality, since the minutes in question were appended to the final IDOC report. Secondly, as the Commission rightly points out, it is incorrect to claim that, in her letter of 23 November 2001 to Mrs Cresson, Mrs D. presented as proven a number of facts that were compromising for the applicant: in fact, in that letter Mrs D. merely asked the former Member of the Commission for clarification, in particular regarding the testimony of Mrs T., an assistant with the JRC. Thirdly, with regard to the argument that the memorandum of 18 March 2002 had not been incorporated into the report on the additional administrative investigation carried out by IDOC, as has been stated above, the right of an official to comment on facts concerning him does not mean that the investigators are obliged to amend the conclusions of a report on the basis of the requests made by the official who has been interviewed.

193 The argument relating to the authorisation allegedly granted by the Commission to a team of journalists from RTBF to film a confidential document concerning the applicant will be examined in the context of the third plea, alleging breach of the principle of the confidentiality of OLAF investigations, in which the same facts are adduced.

194 Hence, except with regard to the latter argument, assessment of which is reserved until examination of the third plea, the infringements of the rights of the defence of which the applicant complains in the second plea are unfounded.

c) The third plea, alleging breach of the principle of confidentiality of OLAF investigations

Arguments of the parties

195 The third plea alleges breach of the principle of confidentiality of OLAF investigations. The applicant maintains that OLAF and/or the Commission allowed the RTBF, during the course of the year 2000, to enter OLAF's premises, to gain knowledge of strictly confidential documents concerning him and to film some of them. As a result, he claims that the minutes of OLAF's interview with him, which are classified as 'secret', were broadcast in the popular television programme 'Au nom de la loi' on 27 December 2000, thus implicating him publicly.

196 Moreover, according to the applicant, the Commission breached its duty to assist him by failing to take the least initiative to find the persons responsible for the broadcast of this document and to restore his integrity.

197 The Commission disputes the admissibility of this plea on the ground that it was raised by the applicant in his complaint of 14 October 2004 against the reassignment measure. It states that that complaint was rejected by the appointing authority in a decision of 15 March 2005, against which the applicant did not appeal within the time-limit laid down in Article 91 of the Staff Regulations.

198 In the alternative, the Commission considers this plea to be unfounded and denies having allowed the RTBF to gain knowledge of documents concerning the applicant.

199 The Commission states firstly that, in accordance with the general objective of diffusing information to the public and its communications strategy, OLAF provides general images of its premises to the audiovisual media in the form of picture libraries and allows the media to film general images within its premises, without access to documents or sensitive areas.

200 The Commission states secondly that the minutes of OLAF's interview with the applicant were passed to the Belgian judicial authorities and that, to the extent that they were addressed to bodies outside the Commission, it cannot be concluded that the Commission gave RTBF journalists access to that document.

201 Hence, the Commission denies any connection between the general images of OLAF's premises and the shot of the confidential document in question. It regrets that leaks occurred, but denies responsibility for such leaks and emphasises that the burden of proof lies with the applicant.

202 As regards the alleged breach of its duty to provide assistance, it points out that it did not receive a request from the applicant under Article 24 of the Staff Regulations.

Findings of the Tribunal

– Admissibility of the plea

203 It is true that the broadcast of confidential documents during the television programme of 27 December 2000 was raised in the applicant's complaint of 14 October 2004, which was rejected by a decision of the appointing authority against which the applicant did not appeal under Article 91 of the Staff Regulations. In one sentence of that complaint the applicant referred to the broadcast of allegedly confidential documents concerning him during the programme 'Au nom de la loi' in order to illustrate 'the numerous acts of harassment' which he claimed to have suffered in connection with the 'Cresson affair', the reassignment measure affecting him being but one aspect of this.

204 However, the sole subject-matter of that complaint was a request for withdrawal of the reassignment measure. It contained no claim for compensation in respect of wrongful acts allegedly committed by the Commission.

205 An official is at liberty to rely on the same plea, the same argument or the same fact in support of several complaints which are legally distinct as regards their subject-matter (see, by analogy, Case T-253/06 P *Chassagne* v *Commission* [2008] ECR I-B-1-43 and II-B-1-295, paragraph 149).

206 Consequently, the Commission's plea of inadmissibility must be dismissed.

– The merits of the plea

207 In order to examine whether this plea is well founded, it is first necessary to render a brief account of the contentious passage of the programme 'Au nom de la loi'.

208 During a short section of the programme the applicant's name was mentioned and a shot was broadcast that was described in the commentary accompanying the programme's images as being the minutes of OLAF's interview with the applicant.

209 The applicant's name was mentioned in connection with the interview with Mr H., manager of the company H. Mr H. related that he went uninvited to Mrs Cresson's cabinet to request that the cabinet take over payment of the rent on the apartment occupied by Mr Berthelot, which until then had been paid by the company H. He then explained that he was surprised to discover that the holder of the post of Chef de cabinet had changed and that the new Chef de cabinet, namely the applicant, sent him packing without more ado, asking him what he meant by this joke. There followed images of OLAF's premises, then a brief shot of a document that was illegible on the screen, described by the journalist as being the minutes of OLAF's interview with the applicant, and commented upon by the journalist as follows:

'A report on an OLAF investigation contains the notes on the interview with [the applicant]. It confirms that Mr Berthelot came to Mrs Cresson's secretariat once or twice accompanied by Mr H.'

210 The programme then addresses another aspect of the affair.

211 Hence, during the programme at issue the applicant's name and an extract of the minutes of OLAF's interview with him were mentioned briefly and incidentally, without the applicant being personally implicated.

212 Although the applicant was not personally implicated, it is nevertheless regrettable that a document presented in the commentary accompanying the programme's images as being the minutes of OLAF's interview with him was broadcast during the programme in question.

213 According to the case-law, it is for the applicant, in an action for damages, to establish that the conditions on which the European Union incurs non-contractual liability are satisfied. The strict application of that rule may be mitigated, however, where a harmful event may have been the result of a number of different causes and where the Community institution has adduced no evidence enabling it to be established to which of those causes the event was imputable, although it was best placed to provide evidence in that respect, so that the uncertainty which remains must be construed against it (see, to that effect, Case T-48/05 *Franchet and Byk* v *Commission* [2008] ECR II-1585, paragraphs 182 and 183).

214 However, in the present case it cannot be considered that the Commission was best placed to provide evidence enabling the cause of the leak to be established. Consequently, the uncertainty as to the source of that leak cannot be construed against it.

215 Indeed, as the Commission rightly maintains, the Commission itself and OLAF were not the only bodies in possession of the minutes of OLAF's interview with the applicant, since they had been passed to the Belgian national authorities with a view to possible prosecution.

216 Furthermore, the Commission states that, in accordance with the general objective of diffusing information to the public and its communications strategy, OLAF provides general images of its premises to the audiovisual media in the form of picture libraries and allows the media to film general

images within its premises. Hence, no connection can be established between the images of OLAF's premises and the shot of the document described in the programme as being the minutes of the interview with the applicant.

217 As regards the complaint that the Commission breached its duty to provide assistance, it must be noted that the applicant did not apply for assistance under Article 24 of the Staff Regulations. Moreover, in the absence of exceptional circumstances it was not incumbent on the Commission to provide assistance spontaneously to the applicant. Only exceptional circumstances may oblige the institution to provide specific assistance not in response to a request from the individual concerned but on its own initiative (Case 229/84 *Sommerlatte* v *Commission* [1986] ECR 1805, paragraph 20, and Order of the Civil Service Tribunal of 31 May 2006 in Case F-91/05 *Frankin and Others* v *Commission* [2006] ECR-SC I-A-1-25 and II-A-1-83, paragraphs 23 and 24).

218 The complaint alleging that the institution breached its duty to provide assistance must therefore be rejected.

219 It follows from all of the foregoing that the third plea must be dismissed as unfounded.

d) The fourth plea, alleging that the waiver of the applicant's immunity from legal proceedings was unlawful

Arguments of the parties

220 In this plea the applicant submits that the decision by which he was notified on 7 February 2001 that his immunity from legal proceedings had been waived was unlawful.

221 The applicant maintains that the decision to waive an official's immunity is a serious measure and that he should therefore have been heard before it was adopted, as in the case of Mr W., Director General of DG Industry.

222 The applicant also points out that the decision to waive his immunity from legal proceedings, which was addressed to the Belgian investigating magistrate, had not been communicated to him and he was therefore not placed in a position to establish whether a sufficient statement of reasons had been provided.

223 Lastly, the applicant considers that the decision to waive his immunity from legal proceedings was discriminatory and constituted a misuse of powers in that the immunity of certain other persons had been upheld despite their implication in the 'Berthelot affair'.

224 The Commission replies that the institutions have a duty to cooperate with the criminal courts and that in the present case no interest of the Communities justified refusing to waive the applicant's immunity from legal proceedings.

225 The Commission considers that an official does not have to be heard before a decision to waive his immunity from legal proceedings is taken since he enjoys the rights of the defence as part of the criminal proceedings liable to be brought against him as a result of that measure. It maintains that, even supposing that the applicant's assertion as to the prior hearing of the Director General of DG Industry is correct, that case did not create a precedent such as to oblige the institution systematically to hear the official concerned before acceding to a request from a criminal authority to waive immunity. In the submission of the Commission, the institution enjoys a discretion in that regard.

Findings of the Tribunal

226 It is established case-law that an official who fails to contest, within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, a decision of the appointing authority adversely affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages (Case 401/85 *Schina* v *Commission* [1987] ECR 3911, paragraph 9, and Case T-156/89 *Valverde Mordt* v *Court of Justice* [1991] ECR II-407, paragraph 144).

227 Since the applicant did not contest, within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, the measure waiving his immunity from legal proceedings and of which he was notified by a letter dated 7 February 2001 from DG Personnel and Administration, it is necessary to examine the nature of that measure in order to establish whether it constituted an act adversely affecting the official or conduct not entailing a decision.

228 This question must be examined by the Tribunal of its own motion, as it relates to compliance with the pre-contentious procedure and the time-limits for bringing actions.

229 Only measures the legal effects of which are binding on and capable of affecting the interests of an official by bringing about a distinct change in his legal position constitute measures that adversely affect the person concerned (Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 23).

230 It has been held that although the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities, the fact remains that those privileges and immunities have been expressly accorded to the officials and other staff of institutions of the Communities. The fact that the privileges and immunities have been provided in the public interest of the Communities justifies the power given to the institutions to waive the immunity where appropriate, but does not mean that those privileges and immunities are granted to the Communities and not directly to their officials and other staff. Therefore the Protocol confers an individual right on the persons concerned (see Case T-345/05 *Mote* v *Parliament* [2008] ECR II-2849, paragraphs 27 and 28).

231 The immunity from legal proceedings provided for by Article 12 of the Protocol on Privileges and Immunities protects officials and members of staff from prosecution by the authorities of the Member States for acts performed in their official capacity. Hence, a decision to waive the immunity of an official or member of staff alters his legal situation, simply because it removes that protection, re-establishing his status as a person who is subject to the general law of the Member States and thus laying him open, without the necessity for any intermediary rule, to measures, inter alia those ordering detention and the bringing of legal proceedings, imposed by the general law (see, by analogy, *Mote* v *Parliament*, paragraph 34).

232 The discretion left to the national authorities, following the waiver of immunity, as regards the resumption or discontinuance of proceedings brought against an official or member of staff has no bearing on the fact that his legal situation is directly affected, since the effects attached to the decision to waive immunity are restricted to the removal of the protection he enjoyed on account of his status as an official or member of staff, which does not involve any additional implementing measure (see, by analogy, *Mote* v *Parliament*, paragraph 35).

233 It follows from the foregoing that the Commission's decision waiving the applicant's immunity from legal proceedings constituted an act adversely affecting him.

234 However, as the applicant did not contest that decision within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, he is no longer permitted to rely on its alleged unlawfulness in an action for damages.

235 The fourth plea must therefore be rejected as inadmissible.

e) The fifth plea, alleging that the decision to reassign the applicant was unlawful

Arguments of the parties

236 In the submission of the applicant, the reassignment measure lacked an adequate statement of reasons, was in contravention of the interest of the service and constituted a disguised disciplinary measure.

237 The Commission disputes the admissibility of this plea. It contends that the reassignment measure was the subject of a complaint on 14 October 2004, which was rejected by decision of the appointing authority of 15 March 2005. Furthermore, it states that the applicant did not bring judicial proceedings against that decision within the time-limit laid down in Article 91 of the Staff Regulations.

238 The Commission argues, in the alternative, that the reassignment measure was based on the interest of the service and points to the wide margin of discretion that the institutions enjoy in the organisation of their departments.

Findings of the Tribunal

239 As stated in connection with the fourth plea, an official who fails to contest, within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, a decision of the appointing authority adversely affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages.

240 In the present case the applicant lodged, on 19 October 2004, a complaint dated 14 October 2004 under Article 90 of the Staff Regulations against the reassignment measure affecting him, but did not bring legal proceedings under Article 91 of those regulations following the appointing authority's decision of 15 March 2005 rejecting his complaint.

241 It follows that the applicant cannot rely on the alleged unlawfulness of the reassignment measure in the present action for damages.

242 The fifth plea must therefore be rejected as inadmissible.

f) The sixth plea, alleging irregularities that vitiated the procedure initiated under Article 73 of the Staff Regulations

243 This plea is composed of two limbs. The first limb is directed against the decision to exclude the possibility that the applicant may have suffered a work-related accident and the second against the decision to ask IDOC to carry out an additional investigation.

244 In addition, in letters to the Tribunal and at the hearing the applicant alleged various irregularities vitiating the procedure conducted under Article 73 of the Staff Regulations. In particular, he complained of the 'vicious circle', the 'infernal spiral', into which the Commission had locked him: he maintained, firstly, that the unjustified prolongation of the procedure commenced under Article 73 of the Staff Regulations perpetuated the uncertainty in which he had lived for years and prevented the consolidation of his state of health and, secondly, that the Commission refused to compensate him until his state of health had consolidated.

245 It should be recalled that whereas the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, which are applicable *mutatis mutandis*, provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the proceedings, a submission or argument which may be regarded as amplifying a plea made previously must be considered admissible (Case C-412/05 P *Alcon* v *OHIM* [2007] ECR I-3569, paragraph 38).

246 In the present case, the applicant's additional grievances are not based on matters of fact or of law which came to light in the course of the proceedings; and, in so far as they were raised only in the context of the question whether a claim for compensation for damage associated with an occupational disease was inadmissible on the ground that it was premature, they cannot be regarded as amplifying the two limbs of the sixth plea or of other pleas made previously.

247 Moreover, on 18 February 2009 the applicant brought a third action before the Tribunal, registered as Case F-12/09, in which he seeks, inter alia, annulment of the decision of the Commission of 28 April 2008 refusing to rule on the application of Article 73(2)(b) of the Staff Regulations and compensation for the damage allegedly caused to him by a series of wrongful acts committed by the Commission in the conduct of the procedure for recognising the occupational origin of his disease, including the unjustified prolongation of that procedure.

248 The abovementioned grievances must therefore be rejected as inadmissible in the present action, with the consequence that the Tribunal must examine only the two limbs of the plea raised in the application.

The first limb of the plea, alleging the unjustified exclusion of the possibility of a work-related accident

– Arguments of the parties

249 The applicant maintains that in his first statement dated 25 July 2003 and then systematically throughout the procedure he asserted that he was suffering from an occupational disease and/or had sustained a work-related accident. In his view, the Commission had not examined the possibility that he had sustained a work-related accident.

250 The Commission replies that, in the light of the circumstances of the case and the statements of the applicant himself, it rightly set in motion a procedure for the recognition of an occupational disease and not of an accident.

– Findings of the Tribunal

251 Article 2 of the old Insurance Rules, which were applicable when the applicant's statements were submitted, defines an accident as any occurrence or external factor of a sudden, violent or abnormal nature adversely affecting an official's bodily or mental health.

252 Under Article 16 of the old Insurance Rules, an official who sustains an accident, or those entitled under him, must report the accident to the administration of the institution to which the insured party belongs. The report of the accident must state particulars on the date and time, the causes and the circumstances of the accident and also the names of witnesses and of any third party which may be liable. A medical certificate must be annexed, specifying the nature of the injuries and the probable consequences of the accident. The report must be submitted not later than 10 working days following the date on which the accident occurred.

253 Pursuant to the first sentence of the first subparagraph of Article 17(1) of the old Insurance Rules, an official who requests application of these rules on grounds of an occupational disease must submit a statement to the administration within a reasonable period following the onset of the disease or the date on which it was diagnosed for the first time.

254 On 25 July 2003 the applicant sent a letter to the Commission in which he reported that was suffering from major depressive disorder, the subject of which was worded as follows: 'Accident report/Statement of occupational disease (Article 17 of [the old Insurance Rules])'.

255 On 25 October 2004 the applicant sent the Commission a new statement, according to which he was suffering from major depressive disorder as a result of the psychological harassment to which he had allegedly been subjected. The subject line of that letter was worded as follows: '... Recognition of my state of health as an occupational disease and/or work-related accident – Implications for the initiation of the procedures provided for in Articles 73 and 78 of the Staff Regulations ...'.

256 Although the applicant's statement of 25 July 2003 mentioned both the concepts of accident and occupational disease, it referred expressly to Article 17 of the old Insurance Rules on the procedure for recognising the occupational nature of a disease, and not to Article 16 of those regulations on the recognition of the accidental nature of an occurrence. The statement in question reported the depression from which he was suffering, that is to say a disease.

257 Similarly, although the subject line of the applicant's statement of 25 October 2004 mentioned both the concepts of accident and occupational disease, it again referred to the depression from which he was suffering.

258 Hence, in the light of the applicant's own statements, the Commission was entitled to consider that those statements related not to recognition of the accidental nature of an occurrence but to recognition of the occupational origin of his disease, and consequently to set in motion the procedure for recognition of the occupational origin of that disorder.

259 The first limb of the plea must therefore be dismissed as unfounded.

The second limb of the plea, alleging irregularities in the procedure at IDOC

– The alleged unlawful nature of the referral to IDOC

260 The applicant maintains that the decision to refer his case to IDOC was unlawful, whether it was adopted on the basis of Article 2(1) of the GIP on administrative inquiries and disciplinary procedures or on that of paragraph 2 of that Article. In the first hypothesis, the applicant considers that an investigation to determine whether there had been a failure to comply with the obligations incumbent on Commission officials served no purpose for determining, from a medical point of view, whether the disease from which he was suffering was occupational in origin. In the second hypothesis, he claims that the facts which he alleges to demonstrate that he had suffered psychological harassment were indisputable and did not necessitate an additional investigation.

261 The Commission notes that the decision to refer the case to IDOC was based on Article 2(2) of the GIP on administrative inquiries and disciplinary procedures following the allegations of psychological harassment made by the applicant in his letter of 25 October 2004. The Commission maintains that, in the context of the procedure commenced under Article 73 of the Staff Regulations for recognising the occupational origin of the applicant's disease, it was necessary to verify whether there had been wrongful conduct on the part of the institution.

262 Under Article 2(2) of the GIP on administrative inquiries and disciplinary procedures IDOC may be asked to carry out other inquiries, in particular in connection with Article 73 of the Staff Regulations.

263 As established in the case-law, the purpose of an administrative inquiry conducted in connection with Article 73 of the Staff Regulations is to obtain, in an objective manner, all the particulars necessary to determine whether a disease has resulted from an official's occupation and the circumstances in which it arose. In a case in which the working conditions of the official concerned are central to concerns about the occupational origin of his illness, the inquiry must include a thorough and objective analysis of his working conditions as well as of his illness as such (Case T-48/01 *Vainker* v *Parliament* [2004] ECR-SC I-A-51 and II-197, paragraph 129).

264 In the present case, to begin with, the procedure for recognising the occupational origin of the applicant's nervous breakdown was set in motion on 31 July 2003 under Article 73 of the Staff Regulations following the statement submitted by the applicant on 25 July of that year; and, as a second development, on 25 October 2004 the applicant sent the Commission a new statement claiming that his nervous breakdown had been caused by the psychological harassment to which he had allegedly been subjected.

265 The institution was therefore entitled to carry out an exhaustive inquiry both of the illness from which he was suffering and of his working conditions.

266 Consequently, following receipt of the applicant's letter of 25 October 2004, the Commission was entitled to ask IDOC to carry out an administrative inquiry into the conditions in which the applicant performed his duties in order to determine whether he had in fact been subjected to psychological harassment.

267 The applicant's argument must therefore be dismissed as unfounded.

– The alleged lack of impartiality of IDOC

268 The applicant submits that IDOC lacks the necessary impartiality and independence to carry out an administrative inquiry, as some persons working there were allegedly the authors of acts which he perceived as psychological harassment.

269 The Commission replies that the occurrences and the persons responsible cannot be clearly identified from the applicant's allegations.

270 The Tribunal considers that the plea based on the lack of impartiality of IDOC must be dismissed as unfounded for lack of sufficiently precise indications from the applicant as to the persons who had allegedly compromised the impartiality of that office. It must be stated in this regard that the fact that the applicant disagreed with the conclusions of a report produced by IDOC is not of itself sufficient to establish a lack of impartiality on the part of that office.

– The refusal to communicate the IDOC contribution to the applicant

271 The applicant complains that the appointing authority made use of the IDOC contribution dated 16 March 2005 but that the communication of that document to him was refused by letter of 9 June 2005.

272 The Commission replies that the refusal to communicate the IDOC contribution to the applicant was justified on two grounds. Firstly, in the context of the procedure laid down in the Insurance Rules, the contribution in question was a preparatory measure that should be available to the doctor appointed by the institution without the risk that its disclosure could prejudice the conclusion of the medical report.

Secondly, according to the Commission, the exception mentioned in the third indent of Article 4(2) of Regulation No 1049/2001 permits the institutions to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits.

273 To the extent that it may be relevant, the Tribunal notes at the outset that the argument based on the refusal to communicate the IDOC contribution of 16 March 2005 must be dismissed as inadmissible if that argument is considered to bring into question the lawfulness of the decision taken on 9 June 2005 by the Head of the Sickness and Accident Insurance Unit of the PMO refusing to communicate that contribution to the applicant, a decision which constitutes an act adversely affecting the person concerned. As stated in connection with the fourth plea, an official who fails to contest, within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, a decision adversely affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages.

274 However, in the present case the applicant complains that the Commission persistently held that it could refuse him access to this document, even though it was using it against him. This argument must therefore be examined as challenging the lawfulness of conduct on the part of the administration. It is therefore admissible in support of the claim for damages.

275 Article 26 of the Staff Regulations provides for the creation of a personal file for each official containing all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct, together with any comments by the official on such documents. Documents may not be used or cited by the institution against an official unless they were communicated to him before they were filed. As established in the case-law, the purpose of those provisions is to guarantee the official's right to defend himself (see Case 88/71 *Brasseur* v *Parliament* [1972] ECR 499, paragraph 11; Case 140/86 *Strack* v *Commission* [1987] ECR 3939, paragraph 7; and C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraphs 20 and 21).

276 As regards access to documents of a medical nature in the context of a procedure for recognition of an occupational disease, the Insurance Rules established a special procedure for the full medical report on which the decision which the appointing authority proposes to take is based to be transmitted to a doctor appointed by the official, if the official so requests and after notification of the proposed decision as provided for in Article 21 of the Insurance Rules, and for recourse to a medical committee of which that doctor is a member (see *Strack* v *Commission*, paragraph 9, and *Vidrányi* v *Commission*, paragraph 22).

277 Respect for the official's rights requires that he be granted a means of access to documents of a medical nature (see *Strack* v *Commission*, paragraph 10). That possibility afforded to the official must, however, be reconciled with the requirements of medical confidentiality which make every doctor the judge of whether he can inform the persons whom he is treating or examining of the nature of the illnesses from which they may be suffering (*Strack* v *Commission*, paragraph 11 and the case-law cited). By providing for indirect access to documents of a medical nature through the interposition of a medical examiner appointed by the official, the Insurance Rules reconcile the rights of the official with the requirements of medical confidentiality (*Strack* v *Commission*, paragraph 12, and *Vainker* v *Parliament*, paragraph 137).

278 As stated in the case-law, respect for the official's rights requires that he be granted a means of access not only to documents of a medical nature but also to the factual findings on which the decision to be adopted under Article 73 of the Staff Regulations is based (see *Strack* v *Commission*, paragraph 10). Hence, documents relating to the findings of fact concerning an incident at work which may serve as a basis for the procedure for the recognition of the existence of an accident at work or an occupational disease within the meaning of the Insurance Rules must also be recognised as being of a medical nature (*Strack* v *Commission*, paragraph 13; Case T-154/89 *Vidrányi* v *Commission* [1990] ECR II-445, paragraph 33; and *Vainker* v *Parliament*, paragraph 136).

279 In this context the Court of First Instance has observed that it is indispensable that the full medical report, which the official may ask to be communicated to the doctor of his choice and which must be communicated to the members of the Medical Committee provided for by the Insurance Rules, should include any report drawn up following the administrative inquiry. Thus, if he has submitted the appropriate request, the official can, through a doctor chosen by him, decide his position regarding the findings contained in the report drawn up following the inquiry and assess whether it is appropriate to request that the Medical Committee give its opinion (Case T-154/89 *Vidrányi* v *Commission*, paragraphs 34 and 35).

280 Moreover, the fact that certain documents are of a medical nature does not mean that such documents may not, in an appropriate case, affect the official's administrative status. If that is the case then those documents must appear in the personal file of the person concerned (see *Strack* v *Commission*, paragraph 13, and Case T-154/89 *Vidrányi* v *Commission*, paragraphs 36).

281 Hence, in the first place, the file which serves as a basis for the doctor appointed by the institution or the Medical Committee to appraise the occupational nature of a disease is of a medical nature and, accordingly, may be consulted only indirectly through the interposition of a doctor appointed by the official; and, in the second place, factors of an administrative nature which may appear in that file and have an influence on the administrative status of the official must also appear in the personal file where, pursuant to Article 26 of the Staff Regulations, the official may consult them directly (see Case C-283/90 P, *Vidrányi* v *Commission*, paragraph 24).

282 All the documents submitted to the doctor appointed by the institution or to the Medical Committee thus come within the scheme for which the Insurance Rules provide. It is necessary to place some of them in the official's personal file, making it possible for him to acquaint himself with them, only where those documents are used for the appraisal or alteration of the official's administrative status by the administration to which he belongs (see Case C-283/90 P, *Vidrányi* v *Commission*, paragraph 25).

283 In the present case, it must be noted that when the applicant, by letter of 19 May 2005, asked for the IDOC contribution to be communicated to him, the Commission had not yet notified him of the proposed decision with regard to his request for recognition of an occupational disease. Notification was not served on the applicant until 16 March 2007. Before that date the IDOC contribution could therefore be regarded as a preparatory measure for the purposes of the Insurance Rules.

284 Nevertheless, in its decision of 10 November 2005 rejecting the applicant's claim for damages the appointing authority used the IDOC contribution in support of its arguments for rejecting the claim.

285 In that decision of 10 November 2005 the appointing authority states that 'on 16 March 2005 IDOC in fact concluded that none of the [applicant's] claims in support of these allegations objectively displays the abusive nature which he attributes to them and which is one of the fundamental characteristics of psychological harassment as defined in Article 12a of the Staff Regulations'; and that 'the decisions taken in his regard were taken in the interest of the institutions and within a strictly legislative framework'.

286 To the extent that the appointing authority uses the IDOC contribution in the adoption of a measure adversely affecting the applicant, it can be considered that this contribution constituted a document affecting the administrative status of the person concerned within the meaning of Article 26 of the Staff Regulations.

287 The applicant was therefore entitled to have access to the IDOC contribution on the basis of Article 26 of the Staff Regulations (see, to that effect, *Strack* v *Commission*, paragraph 13; Case C-283/90 P, *Vidrányi* v *Commission*, paragraphs 24 and 25; and Case T-154/89 *Vidrányi* v *Commission*, paragraph 36).

288 Consequently, the Commission infringed Article 26 of the Staff Regulations by refusing to communicate the IDOC contribution to the applicant, even though that contribution related to his administrative status, as borne out by the Commission's decision of 10 November 2005.

289 That conclusion is not invalidated by the arguments relied upon by the Commission to the effect, firstly, that the IDOC contribution was a preparatory measure in the context of the medical procedure and, secondly, that the exception mentioned in the third indent of Article 4(2) of Regulation No 1049/2001, which permits the institutions to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, should apply.

290 As regards the Commission's first argument, in so far as the Commission chose to use the IDOC contribution outside the framework of the medical procedure in order to adopt a decision affecting the applicant's administrative status, it cannot rely on the preparatory nature of that contribution in the framework of the medical procedure.

291 With regard to the argument based on the protection of the purpose of inspections, investigations and audits, it is clear from the very title of Regulation No 1049/2001 that the scope of that Regulation relates to public access to European Parliament, Council and Commission documents.

292 The rights of an official or other staff member who requests communication of a document affecting his administrative status are not the same as those of a member of the public requesting access to the documents of an institution.

293 Indeed, the rights of officials and other staff members derive from the special provisions of Article 26 of the Staff Regulations, which place specific obligations on the institutions in order to guarantee the rights of the defence of the person concerned, as has been stated in the case-law. Officials therefore enjoy a special right, based on Article 26 of the Staff Regulations.

294 Moreover, a request from an official is liable, where applicable, to fall within the scope of special provisions regarding the civil service dealing with access to specific types of document, such as documents of a medical nature.

295 It follows from the foregoing that the exception mentioned in the third indent of Article 4(2) of Regulation No 1049/2001, on which the Commission relies, does not prevent the application of the provisions laid down in Article 26 of the Staff Regulations. Hence, that exception did not authorise the Commission to refuse to communicate the IDOC contribution to the applicant.

296 The Commission therefore committed a wrongful act by declining to grant the applicant access to the IDOC contribution, despite the fact that that document affected his administrative status.

g) The seventh plea, alleging that the opinion of the Invalidity Committee of 29 October 2004 was unlawful

Arguments of the parties

297 In this plea the applicant disputes the legality of the opinion delivered by the Invalidity Committee on 29 October 2004. He considers that the Invalidity Committee should have expressed an opinion on the possible relationship between the invalidity which it had ascertained in his regard and the conditions for the performance of his professional duties.

298 According to the applicant, the Commission contravened Article 78 of the Staff Regulations by making the conduct of the procedure referred to in that provision subject to the conclusion of the procedure laid down in Article 73 of the Staff Regulations. The applicant points out that in his letter of 23 June

2004 he had requested a finding, in accordance with the fifth paragraph of Article 78, that his invalidity had its origin in the performance of his duties. The applicant relies on the judgment in Case T-165/89 *Plug* v *Commission* [1992] ECR II-367 in support of his argument.

299 The Commission contends that the Invalidity Committee exercises its powers in such a way that it has at its disposal the results of the investigation carried out under Article 73 of the Staff Regulations when it rules on the link between an official's invalidity and his professional duties. According to the Commission, the work of the Invalidity Committee is therefore organised in two stages. In the first stage the Invalidity Committee confines itself to ruling on the invalidity of the person concerned. It then adjourns until it has received the information obtained by the investigation carried out under Article 73 of the Staff Regulations. In the second stage it reconvenes and rules on the link between the circumstances of the official's professional activity and his invalidity. The Commission contends that the Court of First Instance endorsed this conduct of the procedure in Case T-165/95 *Lucaccioni* v *Commission*.

300 The Commission contends that the manner in which the procedure was organised did not deprive the applicant of the invalidity allowance provided for under the third paragraph of Article 78 of the Staff Regulations pending the outcome of the procedure followed under Article 73 of those Regulations. According to the Commission, the only question left pending concerned the benefits under the fifth paragraph of Article 78 of the Staff Regulations, in particular the payment of contributions to the pension scheme by the institution. In its written pleadings the Commission pointed out that if the applicant's invalidity were recognised as being occupational in origin, he would be granted the benefit of the fifth paragraph of Article 78 of the Staff Regulations retroactively from the date of the decision to retire him on grounds of invalidity. Following the decision of 28 March 2008 recognising the occupational cause of the applicant's illness, the Commission notified to the Tribunal, by way of measures of organisation of procedure, the decision of 16 June 2008 annulling and replacing the decision of 8 November 2004, by which the appointing authority, in the light of the conclusions of the Invalidity Committee of 9 June 2008, granted the applicant an invalidity allowance fixed in accordance with the provisions of the fifth paragraph of Article 78 of the Staff Regulations with effect from the date on which he became an invalid, that is to say 30 November 2004.

Findings of the Tribunal

301 As stated in connection with the fourth plea, an official who fails to contest, within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, a decision of the appointing authority adversely affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages.

302 Hence, since the applicant did not lodge a complaint against the decision of the appointing authority of 8 November 2004 by which he was retired and granted an invalidity allowance fixed in accordance with the provisions of the third paragraph of Article 78 of the Staff Regulations and not in accordance with the fifth paragraph of that Article, he cannot rely on the alleged unlawfulness of that decision in the present action for damages.

303 In this plea the applicant does not, however, contest the lawfulness of the appointing authority's decision of 8 November 2004, but simply criticises the opinion of the Invalidity Committee delivered on 29 October 2004 in that it expressed no view as to a possible link between the applicant's acknowledged invalidity and his occupational activity, having regard to the investigation that had already been opened on the basis of Article 73 of the Staff Regulations.

304 It is therefore necessary to examine whether, in the present plea alleging that the opinion of the Invalidity Committee was unlawful, the applicant is seeking to circumvent the inadmissibility of the plea alleging that the appointing authority's decision of 8 November 2004 was unlawful, given the absence of a complaint and legal proceedings brought against that decision.

305 That question, which relates to compliance with the pre-contentious procedure and the time-limits for instituting proceedings, must be raised by the Tribunal of its own motion.

306 According to the case-law, the opinion delivered by the Invalidity Committee must be considered to be a preparatory act forming part of the procedure for compulsory retirement (Case T-196/95 *H* v *Commission* [1997] ECR-SC I-A-133 and II-403, paragraph 48, and Order of 15 November 2006 in Case T-115/05 *Jiménez Martínez* v *Commission* [2006] ECR-SC I-A-2-269 and II-A-2-1409, paragraphs 29 and 30).

307 Although it cannot be excluded that a preparatory measure causes harm to an official regardless of the final decision for which that measure prepares, in the present case the applicant does not maintain that the opinion of the Invalidity Committee caused him damage distinct from that which may have been caused to him by the decision taken on the basis of that opinion, that is to say the appointing authority's decision of 8 November 2004.

308 The applicant claims that the opinion of the Invalidity Committee was unlawful in that the Committee did not rule on the cause of his invalidity, pending information from the investigation commenced under Article 73 of the Staff Regulations.

309 However, it is the appointing authority's decision of 8 November 2004 which, by retiring the applicant and granting him an invalidity allowance on the basis of the third paragraph of Article 78 of the Staff Regulations and not on that of the fifth paragraph of Article 78 of those Regulations, potentially caused harm to the applicant.

310 Since the plea alleging that the opinion of the Invalidity Committee was unlawful is directed against a preparatory measure and since the applicant has not explained how that measure caused him harm distinct from that of the final decision, and given that, in any event, he did not apply for annulment of the decision of 8 November 2004 or bring an action for damages within the time-limits laid down for contesting the consequences of that decision, the plea must be rejected as inadmissible.

h) The eighth plea, alleging that the initiation and continuation of disciplinary proceedings against the applicant was unlawful

Preliminary observation

311 In this plea the applicant finds fault with the fact that disciplinary proceedings against him were instituted and continued, whereas according to him the evidence that formed the basis of those proceedings had never been proven. This plea refers to all of the grounds of claim set out in the action in Case F-124/05.

312 According to the case-law, the reference in an application to an application lodged by the applicant in another case does not have the effect of incorporating the pleas raised in the other case into the application (see Case T-424/04 *Angelidis* v *Parliament* [2006] ECR-SC I-A-2-323 and II-A-2-1649, paragraph 42).

313 It is therefore necessary at the outset to examine whether the plea, in so far as it consists of a reference to all of the grounds of claim set out in the action in Case F-124/05, is admissible in relation to the requirements laid down in Article 21 of the Statute of the Court of Justice and Article 44(1) of the Rules of Procedure of the Court of First Instance, which were applicable *mutatis mutandis* to the Tribunal at the time when the application was lodged.

314 The purpose of Article 44(1) of the Rules of Procedure of the Court of First Instance is to enable the judge to rule on the grounds of claim with sufficient accuracy.

315 That provision must not, however, be interpreted in such a way that it would impose a formalistic approach on the parties that would only render cumbersome the judicial proceedings (see, by analogy, Case T-318/01 *Othman* v *Council and Commission* [2009] ECR II-1627, paragraph 57).

316 In the particular circumstances of the case, given the complexity of Cases F-124/05 and F-96/06, the purpose of the reference made by the applicant is to enable him to avoid repeating, in the application registered as Case F-96/06, the pleadings of around 30 pages already contained in the application registered as Case F-124/05 and providing again the annexes running to several hundreds of pages that accompanied the latter application.

317 Furthermore, Cases F-124/05 and F-96/06 have been joined, by order of the President of the Tribunal of 22 January 2009.

318 In these circumstances, the fact that the eighth plea consists of a reference to all of the grounds of claim set out in the action in Case F-124/05 does not render that plea inadmissible.

319 In the remainder of this judgment the six grounds of claim of the application in Case F-124/05 will be examined below by being each considered to be a limb of the eighth plea of the present action. The limbs of the grounds of claim of the action in Case F-124/05 will be examined as sub-limbs of the limbs of the eighth plea of the present action.

320 Moreover, the first plea of the application in Case F-124/05 based on the appointing authority's refusal to draw inferences from the decision of the Belgian judicial authorities that there were no grounds for referring the criminal case against him to the criminal court for trial, in spite of the link which the appointing authority itself had allegedly established between the criminal proceedings and the disciplinary proceedings, and the second plea of that application, alleging infringement of the authority of *res judicata* with respect to the abovementioned decision not to refer the case to the criminal court for trial, must be examined together, since they both deal with the consequences of the decision of the Belgian judicial authorities for the disciplinary proceedings.

The first and second limbs of the plea, alleging disregard of the consequences of the decision of the Belgian judicial authorities that there were no grounds for referring the criminal case against the applicant to the criminal court for trial.

– Arguments of the parties

321 The applicant maintains that the disciplinary proceedings against him were set in motion exclusively on account of the criminal proceedings brought by the Belgian authorities. In his opinion, this is clear from the decision of the appointing authority to commence disciplinary proceedings against him, taken on 16 January 2004, which unambiguously links the disciplinary proceedings to the criminal proceedings. He asserts that the facts underlying the criminal charges and those on which the disciplinary proceedings were based are identical and differ only as regards their characterisation as criminal or disciplinary. Moreover, in the submission of the applicant, the concurrence of the two proceedings leaves no doubt as to the close link between them. Hence, he contends that the disciplinary proceedings should have been terminated, thereby drawing the consequences from the final decision not to refer the case for trial delivered on 30 June 2004 by the Belgian criminal court, which declared that the facts on which the charges were based were not proven. According to the applicant, to decide otherwise is to disregard the authority of *res judicata* with respect to the said decision and the sovereignty of the Member States.

322 The Commission replies that the applicant's arguments are not substantiated by the facts in so far as the decision to initiate disciplinary proceedings explicitly states that, in addition to the criminal charges, the complaints against the person concerned were based on the report of 22 February 2002

on the additional administrative investigations carried out by IDOC. It points out that the Belgian criminal court had jurisdiction to rule only on the charges under the Belgian Criminal Code and that, in the disciplinary characterisation of the facts, the appointing authority is not bound by the characterisation undertaken by the criminal court under other provisions. In any event, according to the Commission, the pleas alleging infringement of the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial and infringement of the authority of *res judicata* are inoperative in the present case in the absence of a final disciplinary decision.

– Findings of the Tribunal

323 As stated in the case-law of the Court of First Instance, the fifth paragraph of Article 88 of the Staff Regulations, in the version applicable until 30 April 2004, which became Article 25 of Annex IX to the Staff Regulations, has a twofold rationale. Firstly, that Article is intended to ensure that the position of the official in question is not affected in any criminal proceedings instituted against him on the basis of facts which are also the subject-matter of disciplinary proceedings within his institution. Secondly, suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings makes it possible to take into consideration, in those disciplinary proceedings, the findings of fact made by the criminal court when its verdict has become final. Indeed, Article 25 of Annex IX to the Staff Regulations establishes the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial, a rule which is justified, in particular, by the fact that the national criminal courts have greater investigative powers than the appointing authority. Consequently, where the same facts may constitute both a criminal offence and a breach of the official's obligations under the Staff Regulations, the administration is bound by the findings of fact made by the criminal court in the criminal proceedings. Once that court has established the existence of the facts in the case, the administration can then undertake their legal characterisation in the light of the concept of a disciplinary offence, ascertaining, in particular, whether they constitute breaches of obligations under the Staff Regulations (Case T-307/01 *François* v *Commission* [2004] ECR II-1669, paragraph 75).

324 In the present case it is clear from the statement of reasons for the decision refusing to terminate the disciplinary proceedings that the institution of disciplinary proceedings against the applicant was not based solely on the criminal charges brought in Belgium for forgery and fraud in connection with the mission orders and expense accounts of Mr Berthelot, but were also based on the active role the applicant had allegedly played in the unlawful reclassification of Mr Berthelot and his equally unlawful appointment with the JRC.

325 The public prosecutor's written submissions indicated that no statement referred either explicitly or implicitly to the applicant, that no material fact made it possible to establish that he was involved in the facts and that he himself had adduced evidence of the fraudulent nature of the mission orders. The decision not to refer the case for trial, which referred to the public prosecutor's written submissions, found that on the basis of the investigation-file there was no doubt that charges of forgery and fraud were in order, but that there was no evidence that pointed with certainty to one of the accused in the case.

326 Hence, the decision not to refer the case for trial only prevented the disciplinary authorities from holding the applicant accountable on charges of forgery and fraud such as those punishable under the Belgian Criminal Code as regards the drafting of Mr Berthelot's mission orders and expense accounts. It did not prevent the disciplinary authority from accusing the applicant of disciplinary offences associated with the reclassification of Mr Berthelot's salary scale and his appointment with the JRC.

327 Hence, the first two limbs of the eighth plea must be dismissed as being without legal foundation.

The third limb of the plea, alleging an unjustified link between the disciplinary proceedings against the applicant and the proceedings against the former Member of the Commission

– Arguments of the parties

328 At the outset, the applicant claims that the decision refusing to terminate the disciplinary proceedings was unlawful in that it upheld the suspension of those proceedings by wrongly linking that suspension to the outcome of the proceedings then pending against Mrs Cresson in the Court of Justice.

329 In particular, the applicant contests the analogy with Article 25 of Annex IX to the Staff Regulations which the appointing authority drew in order to justify the contested decision, and observes that the judgment in *Tzoanos* v *Commission*, is of no relevance whatsoever to the present case since that judgment related to a situation in which an official was facing two sets of proceedings, one criminal and the other disciplinary, whereas in the present case there were two sets of proceedings involving two different persons. He complains of the contradictory reasoning of the appointing authority, in that the latter states that the purpose of Article 25 of Annex IX to the Staff Regulations is to ensure that the official concerned will not be placed at a greater disadvantage by taking a disciplinary decision before the conclusion of the criminal proceedings, whereas in fact the contested decision penalised him instead of protecting his interests.

330 Lastly, the applicant criticises the incomprehensible nature of the statement of reasons for the contested decision, in that it states that 'any decision as to the merits of your case, whether relating to a possible termination or a possible resumption, would not be without effect on the proceedings against Mrs Cresson in the Court of Justice and could therefore be regarded as an attempt to exert inappropriate influence'. The applicant observes that he does not understand who might be influenced: the appointing authority itself, the Court of Justice, the Tribunal? In his view, by putting forward this argument the appointing authority breached its obligation to provide a statement of reasons as laid down in Article 25(2) of the Staff Regulations, thereby tainting the contested decision with illegality.

331 The Commission replies to the applicant's arguments essentially by contending that there is no provision requiring the appointing authority to suspend proceedings, but that it would not be reasonable to take action against an official before judgment had been given on the case of the person in whose interest he had apparently acted. It adds that in its view the decision to suspend proceedings did not harm the applicant's interests, which on the contrary were protected by the said decision. According to the Commission, the proof lay in the fact that, as the Court of Justice did not impose a penalty on the former Member of the Commission, the defendant institution had decided to terminate the disciplinary proceedings against the applicant.

– Findings of the Tribunal

332 Firstly, in the submission of the applicant, the incoherence of the statement of grounds for the decision refusing to terminate the disciplinary proceedings vitiates that decision in the light of the requirement to state the reasons for decisions, as laid down in Article 25 of the Staff Regulations; secondly, he claims that that decision errs in law.

333 The first point to note is that the reasoning given must allow the Union courts to exercise their review of the legality of the contested decision and provide the person concerned with sufficient information to know whether the decision in question is well founded or whether it is vitiated by a defect which enables its legality to be challenged (Case T-372/00 *Campolargo* v *Commission* [2002] ECR-SC I-A-49 and II-223, paragraph 49, and Case T-406/04 *Bonnet* v *Court of Justice* [2006] ECR-SC I-A-2-213 and II-A-2-1097, paragraph 67).

334 The main argument adduced by the applicant to justify his request for the termination of the disciplinary proceedings brought against him is the delivery of the decision of the Belgian criminal court not to proceed to trial.

335 The decision refusing to terminate the disciplinary proceedings states that the disciplinary and criminal proceedings are mutually distinct. It maintains that the Tribunal de Première Instance de Bruxelles had characterised the facts only in relation to Belgian criminal law, and not in relation to the Commission's complaints based on Community obligations. Consequently, the outcome of the Belgian legal proceedings had no influence on the disciplinary proceedings and the fact that the Belgian criminal proceedings did not proceed to trial did not mean that the disciplinary proceedings had to be terminated.

336 It follows from the foregoing that the contested decision provides sufficient information for the applicant to assess whether the reasons for rejecting his request for termination of the disciplinary proceedings were well founded and for the Tribunal to exercise its review.

337 Moreover, regardless of the response to the applicant's request for the disciplinary proceedings to be terminated, the contested decision states that the disciplinary proceedings against the applicant would have to remain suspended.

338 The appointing authority justified the maintenance of that suspension by reason of the link between the disciplinary proceedings against the applicant and the action brought against Mrs Cresson in the Court of Justice.

339 Such reasoning, despite the admittedly imprecise reference to an 'attempt to exert inappropriate influence', provides sufficient information for the applicant to assess whether the reasons for maintaining the suspension of the disciplinary proceedings were well founded and for the Tribunal to exercise its review.

340 The plea alleging that the statement of reasons for the contested decision is inadequate must therefore be dismissed as unfounded.

341 As regards the plea alleging an error in law, although there is no provision that would have required the appointing authority to suspend the disciplinary proceedings pending judgment in *Commission* v *Cresson*, the applicant's case was linked to that of Mrs Cresson in that he had been her Chef de cabinet during the period in which some of the frauds of which she was accused had been committed, and that link was a circumstance that it was legitimate for the Commission to take into account.

342 Hence, leaving aside the fact that such a suspension had the effect of prolonging the disciplinary proceedings, the decision not to take action against the official until the case of the former Member of the Commission had been resolved appears of itself to be legitimate and reasonable.

343 It follows from all of the foregoing that the third limb of the eighth plea must be dismissed as unfounded.

The fourth limb of the plea, alleging that there was insufficient evidence to justify the institution of disciplinary proceedings

– Arguments of the parties

344 The applicant maintains that disciplinary proceedings had been instituted against him, despite the fact that the evidence justifying them '[had] never been proven and [had] even been declared to be unfounded [in the order delivered by the Tribunal de Première Instance de Bruxelles]'.

345 The Commission considers that a decision to institute disciplinary proceedings may constitute a wrongful act only in the exceptional hypothesis of an intention to harm, that is to say in a situation in which, at the time when the decision was taken, there was no evidence against the person concerned. According to the Commission, that was not so in the present case, as the applicant was the subject of serious accusations as to his implication in grave irregularities.

– Findings of the Tribunal

346 This limb of the plea alleges that the decision to institute disciplinary proceedings was unlawful.

347 It is clear from arguments of the parties that they disagree about the scope of the discretion that an institution has with regard to the decision to institute disciplinary proceedings and, consequently, the intensity of the judicial review of the legality of such a decision.

348 In the submission of the applicant, the decision to institute disciplinary proceedings was unlawful, since the complaints on the basis of which the proceedings had been instituted had not been proven, an argument which amounts to saying that the Tribunal must carry out a normal judicial review of that decision. According to the Commission, by contrast, such a decision could constitute an unlawful act only in the exceptional hypothesis of an intention to harm, this being an argument to the effect that the review by the judicature should be confined to the misuse of powers.

349 It is therefore necessary, firstly, to clarify the scope of the discretion that the appointing authority has when it decides to bring disciplinary proceedings and the consequent intensity of the judicial review, before examining, secondly, whether in the present case the decision by which the Commission instituted disciplinary proceedings against the applicant was vitiated by illegality.

350 Before coming to these questions, it is necessary to make two preliminary remarks.

351 First, the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7). Any information which came to light in the course of the disciplinary proceedings after adoption of the decision to institute those proceedings cannot affect the legality of that decision, given that the very purpose of the investigation was to determine whether the initial suspicions were warranted (see, by analogy, *Giraudy* v *Commission*, paragraph 145).

352 Secondly, the fact that the disciplinary proceedings have been terminated without a disciplinary measure being taken against the official in question cannot prevent the Tribunal from carrying out a review of the legality of the decision to bring disciplinary proceedings against the person concerned.

353 Indeed, there would be a risk of arbitrariness if it were accepted that the appointing authority has absolute and unlimited powers to bring disciplinary proceedings against an official and then to terminate them without adopting disciplinary measures, without the official involved having the possibility, at the appropriate time, of contesting the decision to institute the proceedings in the absence of any penalty against which he could bring an action.

354 There must therefore be a legal limitation on the discretion of the appointing authority when it decides to institute disciplinary proceedings, and that limitation must be subject to review by the courts.

355 In any case, the Commission's submissions are not directed against such reasoning. In fact, the Commission is not arguing that the decision to bring disciplinary proceedings should be subject to no judicial review whatsoever, but that such review should be limited to the hypothesis of misuse of powers.

356 By virtue of Article 86(1) of the Staff Regulations, in the version applicable until 30 April 2004, under which the decision to institute disciplinary proceedings against the applicant was taken, any failure by an official to comply with his obligations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.

357 The corollary of the choice of the term 'liable' in the wording of this provision is that if an official fails to comply with one of his obligations he is not systematically and compulsorily subject to penalties, but simply susceptible of being disciplined.

358 Hence, the version of Article 86(1) of the Staff Regulations that was applicable until 30 April 2004 necessarily implies that the appointing authority has wide discretion, as regards both the appropriateness of instituting disciplinary proceedings and the choice of a possible disciplinary measure at the conclusion of those proceedings.

359 As the Court of First Instance has stated, the purpose of a decision instituting disciplinary proceedings against an official is to enable the appointing authority to examine the accuracy and gravity of the facts alleged against the official concerned and to hear him in that regard in order to form an opinion, firstly, as to whether it is appropriate either to terminate the proceedings without further action or to adopt a disciplinary measure against the official and, secondly, where relevant, as to whether or not it is necessary to send him before the Disciplinary Board, in accordance with the procedure laid down in Annex IX to the Staff Regulations (Case T-166/02 *Pessoa e Costa* v *Commission* [2003] ECR-SC I-A-89 and II-471, paragraph 36, and Case T-203/03 *Rasmussen* v *Commission* [2005] ECR-SC I-A-279 and II-1287, paragraph 41).

360 Hence, given the object and purpose of disciplinary proceedings, as stated in the case-law of the Court of First Instance, it is not necessary, contrary to the applicant's contention, that the conduct alleged against him be 'proven' for the initiation of disciplinary proceedings to be valid. The purpose of disciplinary proceedings is precisely to elucidate the conduct alleged against the person concerned.

361 Hence, the applicant's argument that disciplinary proceedings against him had been instituted and maintained, despite the fact that the evidence justifying them had never been 'proven', cannot succeed.

362 At the other end of the spectrum, it is necessary to examine the Commission's argument that the decision to institute disciplinary proceedings against an official would be unlawful only in the exceptional event of misuse of powers.

363 According to settled case-law, the concept of misuse of powers has a very precise meaning and encompasses the use by an administrative authority of its powers for a purpose other than that for which they were conferred upon it. A decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the purpose of achieving ends other than those stated (Case T-118/95 *Anacoreta Correia* v *Commission* [1996] ECR-SC I-A-283 and II-835, paragraph 25, and Joined Cases T-112/96 and T-115/96 *Séché* v *Commission* [1999] ECR-SC I-A-115 and II-623, paragraph 139).

364 The misuse of powers is thus an instance of particularly grave unlawfulness.

365 There would remain a risk of arbitrariness if the possible situations in which a decision instituting disciplinary proceedings against an official was unlawful were confined to those involving a misuse of powers. Serious negligence on the part of the appointing authority in this regard would not be open to censure.

366 In the light of all of the foregoing and in order to protect the rights of the official concerned, the appointing authority must be considered to exercise its powers unlawfully not only if a misuse of powers is proven but also in the absence of sufficiently precise and relevant evidence suggesting that the person concerned has committed a disciplinary offence (see, to that effect, *Franchet and Byk* v *Commission*, paragraph 352).

367 Given that the appointing authority has a wide discretion and the limitations that should be placed on it, judicial review must be limited to ascertaining that the evidence taken into consideration by the administration when instituting disciplinary proceedings was properly established, that there has been no manifest error in the assessment of the facts and that there has been no misuse of powers (see, by analogy with regard to disciplinary measures, Case T-273/94 *N* v *Commission* [1997] ECR-SC I-A-97 and II-289, paragraph 125, and Case T-203/98 *Tzikis* v *Commission* [2000] ECR-SC I-A-91 and II-393, paragraph 50).

368 In the present case the OLAF and IDOC reports did not exclude the possibility that the applicant had been involved in the unlawful reclassification of Mr Berthelot's salary scale.

369 The OLAF report of 23 November 1999 mentions, on the basis of partially concordant statements by officials, the probability that a meeting was held in the applicant's office during which there may have been discussion of the possibility of reclassifying Mr Berthelot to Group I of visiting scientists. The IDOC report of 22 February 2002 states that analysis of the evidence suggests that such a meeting did indeed take place between 21 and 29 November 1996.

370 There is therefore sufficiently serious evidence indicating that the applicant was actively involved at least in the reclassification of Mr Berthelot's salary scale, which was assumed to be unlawful when the decision was taken to institute disciplinary proceedings against the applicant, even though there was no written trace to corroborate the statements of various officials and even though the applicant disputes the truthfulness of some testimony. Hence, the decision to institute disciplinary proceedings against the applicant was based on sufficiently precise and relevant information.

371 In those circumstances, the appointing authority did not overstep the limits on its discretion by instituting disciplinary proceedings against the applicant.

372 It follows from the foregoing that the fourth limb of the eighth plea must be rejected as unfounded.

The fifth branch of the plea, alleging breach of the duty to have due regard to the welfare of officials, the duty to provide assistance and the principle of legitimate expectations

– Arguments of the parties

373 The applicant complains that the Commission instituted and maintained disciplinary proceedings 'which were conducted in a partial manner and during which the appointing authority did not do all in its power to understand the precise unfolding of the facts'. In so doing, according to the applicant, the Commission breached its duty to have due regard to the welfare of officials, its duty to provide assistance and the principle of legitimate expectations. In support of this plea the applicant points to the many deficiencies and infringements of the rights of the defence which allegedly vitiated the various administrative investigations and totally discredited the disciplinary proceedings instituted on those bases.

374 The Commission denies that it breached its duties to have due regard to the welfare of officials and to provide assistance. It points out, first, that in the light of serious evidence suggesting that an official has infringed his obligations under the Staff Regulations, the duty to have due regard to the welfare of

officials cannot in any event prevent the appointing authority from instituting disciplinary proceedings against him and, secondly, that the institution cannot be criticised for having taken all the measures necessary to ascertain whether the accusations against the applicant were founded or not.

– Findings of the Tribunal

375 It is necessary to examine whether, by instituting and maintaining disciplinary proceedings against the applicant, the Commission breached its duty to have due regard to the welfare of officials, its duty to provide assistance and the principle of legitimate expectations.

376 First, it is settled case-law that the duty to have regard for the interests of officials reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between a public authority and public servants. That duty implies in particular that when the appointing authority takes a decision concerning the position of an official, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned (Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245, paragraph 27, and *Séché* v *Commission*, paragraph 147).

377 The requirements of the duty to have due regard to the welfare of officials cannot be interpreted as of themselves preventing the appointing authority from bringing disciplinary proceedings against an official. Such a decision is taken primarily in the interest that the institution has in uncovering and, where necessary, penalising breaches of an official's obligations under the Staff Regulations.

378 Hence, the Commission cannot be held to have committed any breach of its duty to have regard for the interests of its officials simply by instituting disciplinary proceedings against the applicant.

379 The applicant's other challenges relating to the institution and maintenance of disciplinary proceedings against him have either been rejected in the context of the other limbs of the eighth plea or, in the case of the particular complaint alleging that the duration of those proceedings was unreasonable, will be examined below.

380 Secondly, as established in settled case-law, the duty to provide assistance laid down in Article 24 of the Staff Regulations is concerned with the defence of officials against acts of third parties and of colleagues or hierarchical superiors in their personal capacity and not against acts of the institutions themselves, the review of which falls under other provisions of the Staff Regulations (Case T-45/91 *Mc Avoy* v *Parliament* [1993] ECR II-83, paragraph 60, and Case T-44/93 *Saby* v *Commission* [1995] ECR-SC I-A-175 and II-541, paragraph 54).

381 However, OLAF, DG Personnel and Administration and IDOC, whose investigations the applicant impugns, cannot be held to be third parties in relation to the institution. Moreover, the applicant does not adduce any shred of evidence of acts by colleagues or hierarchical superiors that would have justified assistance by the institution.

382 Consequently, the breach of the duty to provide assistance raised by the applicant is unfounded.

383 Thirdly, it is settled case-law that although the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation in which it appears that the administration has led him to entertain reasonable expectations, an official may not plead a breach of that principle unless the administration has given him precise assurances (Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 26, and *Séché* v *Commission*, paragraph 160).

384 In the present case the administration did not give the applicant any precise assurance on which he could rely. Hence, the Commission cannot be criticised for breaching the principle of legitimate expectations.

385 It follows from the foregoing that the fifth limb of the plea must be rejected as unfounded.

The sixth limb of the plea, alleging breach by the disciplinary authority of its duty to act within a reasonable time

– Arguments of the parties

386 The applicant maintains that the reasonable time within which the appointing authority should have taken a decision was exceeded. He relies on the judgment in *François* v *Commission*, where it was held that even in the absence of a limitation period, disciplinary authorities are under an obligation to ensure that proceedings intended to result in a disciplinary measure are initiated within a reasonable time. In the present case he points out that the facts at issue date from the years 1995-1997 and that the administration had been aware of facts and conduct liable to constitute breaches of the obligations under the Staff Regulations since the submission of the OLAF report in November 1999 or, at the latest, since 2002. He notes that the appointing authority did not institute disciplinary proceedings against him until 16 January 2004. According to the applicant, once the Belgian criminal court had delivered the decision not to proceed to trial on 30 June 2004, the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial was no longer applicable and yet no further investigation was carried out in the context of the disciplinary proceedings. In his submission, the principle that requires the appointing authority to take a decision within a reasonable period had therefore been breached.

387 According to the Commission, the facts of the case were highly singular. The 'Berthelot affair' was part of wider investigations carried out in order to establish to what extent the Commission, as a body, or some of its Members individually bore responsibility for fraud, mismanagement or nepotism. The Commission contends that investigations of such scope could not have been carried out in the time normally applicable to disciplinary proceedings. A total of three administrative investigations had been conducted and criminal proceedings had been brought, which in the view of the Commission demonstrated the complexity of the facts involved.

388 The Commission also considers that the lawful periods of suspension of the disciplinary proceedings should not be taken into account when examining the duration of the disciplinary proceedings, in so far as the duration of the proceedings before a court is outside the control of the institution.

389 Lastly, the Commission states that the argument based on the excessive duration of the proceedings raised by Mrs Cresson in the case which led to the judgment in *Commission* v *Cresson* was rejected in paragraphs 90 to 92 of that judgment.

– Findings of the Tribunal

390 It follows from the principle of sound administration that disciplinary authorities are under an obligation to conduct disciplinary proceedings with due diligence and to ensure that each procedural step is taken within a reasonable time following the previous step (*François* v *Commission*, paragraph 47, and Case F-40/05 *Andreasen* v *Commission* [2007] ECR-SC I-A-1-337 and II-A-1-1859, paragraph 194 and the case-law cited, which is the subject of an appeal pending before the General Court of the European Union registered as Case T-17/08 P).

391 That duty to act diligently and to observe the reasonable time requirement is also essential with regard to the institution of disciplinary proceedings, in particular in circumstances where and from the time when the administration becomes aware of facts and conduct which are liable to constitute breaches of an official's obligations under the Staff Regulations. Even in the absence of a limitation period,

disciplinary authorities are under an obligation to ensure that proceedings liable to result in a disciplinary measure are instituted within a reasonable period (*François* v *Commission*, paragraph 48 and the case-law cited).

392 The unreasonable duration of disciplinary proceedings may be the result both of the conduct of prior administrative investigations and of the disciplinary proceedings themselves. The period to be taken into account in order to ascertain whether the duration of disciplinary proceedings is reasonable is not solely that commencing on the date of the decision to institute those proceedings. The question whether the disciplinary proceedings, once commenced, have been conducted with due diligence will be influenced by the length of the period between the occurrence of the alleged disciplinary offence and the decision to institute disciplinary proceedings.

393 The reasonableness of the duration of the proceedings must be assessed in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 29 and the case-law cited).

394 No specific factor is decisive. Each must be examined separately and then their cumulative effect evaluated. Some instances of delay attributable to the appointing authority may not appear unreasonable in isolation but are unreasonable when considered together. The requirements of procedural diligence do not, however, go further than those compatible with the principle of sound administration.

395 Where decisions taken by the appointing authority have caused proceedings to exceed the period that would normally be considered reasonable, it is for that authority to prove the existence of special circumstances of such a nature as to justify that delay (see, by analogy, with regard to the writing of periodic staff assessments, Case 207/81 *Ditterich* v *Commission*, [1983] ECR 1359, paragraph 26).

396 In the light of these principles, it is necessary to determine whether the disciplinary proceedings were conducted within a reasonable time. That means first rehearsing the main events that led to the initiation of proceedings and the main stages thereof before examining, secondly, whether the objectively established duration may be considered reasonable.

397 In the decision of 16 January 2004 instituting disciplinary proceedings against the applicant it was alleged that he had played an active role in the reclassification of Mr Berthelot's salary scale and in his appointment with the JRC.

398 Mr Berthelot's position was reclassified with effect from 1 September 1996 and he was offered a visiting scientist's contract with the JRC with effect from 1 March 1997. The decision to institute disciplinary proceedings was therefore taken more than seven years after the facts of which the applicant was accused. Without a doubt, that delay is of itself abnormally long for disciplinary action against an official.

399 OLAF concluded the report on its investigation into Mr Berthelot's conditions of employment as a visiting scientist with the Commission on 23 November 1999 and IDOC completed its report on the additional administrative investigation into Mr Berthelot's period of work as a visiting scientist with DG Research on 22 February 2002. No additional investigation was carried out between the submission of the latter report and the institution of disciplinary proceedings. The decision to initiate disciplinary proceedings against the applicant was therefore taken almost two years after the report on the last administrative investigation. This delay is also abnormally long in the context of disciplinary proceedings against an official.

400 After the submission of the last investigation report, the only event that can be considered relevant to the disciplinary proceedings is the indictment of the applicant by the Belgian criminal authorities on 18 March 2003. Nevertheless, 10 months elapsed between that event and the institution of disciplinary proceedings, which again is abnormally long.

401 By decision of the appointing authority of 16 January 2004 disciplinary proceedings were instituted and immediately suspended, under the fifth paragraph of Article 88 of the Staff Regulations, in the version applicable until 30 April 2004, which provides that where the official is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case. After the decision not to proceed to trial had been handed down by the Belgian criminal court on 30 June 2004, the Commission notified the applicant by letter of 13 July 2004 that the disciplinary proceedings against him had been suspended pending a decision by the College of Commissioners on the case of Mrs Cresson.

402 The disciplinary proceedings were finally terminated by decision of 16 October 2006, in other words almost 10 years after the impugned conduct.

403 It is then necessary to examine, secondly, whether the Commission had adduced any evidence that a duration that is objectively so long, and prima facie excessive, may nevertheless be treated as reasonable in the particular circumstances of the case.

404 It is important to observe at the outset that in the case that led to the judgment in *Commission* v *Cresson*, Mrs Cresson had raised a similar argument to that put forward by the applicant in the present case. She had submitted that the institution of a disciplinary procedure by means of a statement of the complaints against her on 21 January 2003, that is to say more than seven years after the facts relied on by the Commission, was unacceptable, having regard in particular to the existence of various reports relating to the impugned conduct, which had been available for a considerable time, and to the lack of complexity of the case (see *Commission* v *Cresson*, paragraph 78).

405 The Court rejected that argument, holding that since Article 213(2) EC had never been used to institute a procedure against a Member of the Commission on the ground of her conduct during her term of office, the institution was entitled to believe it necessary to display particular vigilance.

406 Although, as the Court found, the Commission could legitimately consider it necessary to display particular vigilance in bringing proceedings against Mrs Cresson, that fact is not such as to have the necessary consequence of absolving the institution from its obligation to conduct any disciplinary proceedings against the applicant within a reasonable time.

407 It is true that the applicant's case was linked to that of Mrs Cresson to the extent that the applicant was her Chef de cabinet during the period in which some of the frauds of which she was accused were committed. As the Tribunal has already stated in connection with the third limb of this plea (see paragraphs 341 and 342 above), that link was a circumstance that it was legitimate for the Commission to take into account.

408 However, there existed decisive differences between the two cases, differences which prevented the defendant from applying the decisions taken with regard to the former Member of the Commission to the applicant automatically and without distinction.

409 Firstly, the applicant, as an official, was in a different regulatory situation from Mrs Cresson. As a Member of the Commission who was the subject of a political appointment for a term of office of limited duration, Mrs Cresson was politically responsible for her actions and those of the persons who had acted on her behalf and on her instructions and she was subject to the special procedure laid down in Articles 213 EC and 216 EA. She had resigned from her post more than three years before proceedings based on the said Articles were instituted against her. The applicant, by contrast, as an

official, was subject under the Staff Regulations to a duty of loyalty towards the European Communities and was expected to pursue his career at the Commission. It is difficult to expect an official to continue to work normally and maintain the loyalty to the Communities required by the Staff Regulations if, for years, his conduct within the service is the subject of successive investigations and he thus has the threat of disciplinary proceedings hanging over him.

410 Secondly, although for a period he was Mrs Cresson's Chef de cabinet, the applicant was chronologically on the periphery of the events at the origin of the accusations against Mrs Cresson. When he was appointed Chef de cabinet to Mrs Cresson on 21 December 1995, the unlawful appointment of Mr Berthelot had already taken place, since the latter had enjoyed the status of visiting scientist with DG Research since 1 September of that year.

411 It is true that the accusation against the applicant was that he was involved in the reclassification of Mr Berthelot's salary scale and the latter's unlawful appointment with the JRC, but the fact that Mr Berthelot had already been appointed to serve Mrs Cresson when the applicant arrived in her cabinet indicated that whatever role the applicant may have played in the unlawful acts could not have been that of a catalyst and was, at most, ancillary. At the hearing the Commission itself observed that 'to say that [the applicant] was the main instigator of the entire affair is false'.

412 These significant differences between the situation of the former Member of the Commission and that of the applicant are decisive considerations when it comes to assessing whether the abnormally long and, at first sight, excessive duration of these proceedings (see paragraphs 398 to 402 above) may nevertheless be characterised as reasonable.

413 Undoubtedly, underlying the specific accusations against the applicant is the same important general interest, that is to say public confidence in the sound functioning of the European institutions at the highest level and in there being no peddling of influence or concealment of such trafficking. In that regard, the applicant's case at the disciplinary level was not the result of an isolated incident but formed part of a more general pattern which, because of the problems that it revealed, had implications that went far beyond his personal situation.

414 However, in the specific circumstances of the case, balancing all of the factors portrayed above, in particular the decisive differences between the case of the applicant and that of the former Member of the Commission, and without disregarding the wider public interest involved, it must be found that the Commission has failed to show that the abnormal length both of the period preceding the initiation of disciplinary proceedings and of the proceedings themselves could nevertheless be regarded as reasonable.

415 It follows from all of the foregoing that the Commission committed wrongful acts, firstly by refusing to communicate the IDOC contribution to the applicant and secondly by instituting and maintaining disciplinary proceedings in breach of its duty of diligence.

2. Damages and the causal link

416 In the first place, the Commission's refusal to communicate the IDOC contribution to the applicant may be considered to have caused him non-material damage as a result of the feeling that he had to contend with an opaque attitude regarding a document that was essential to the exercise of his rights of the defence (see, for non-material damage caused by infringement of the rights of the defence, Case F-51/07 *Bui Van* v *Commission* [2008] ECR-SC I-A-1-289 and II-A-1-1533, paragraphs 93 and 94, which is the subject of an appeal to the General Court of the European Union registered as Case T-491/08 P).

417 In the light of the circumstances of the case, the Tribunal, assessing the damage suffered *ex aequo et bono*, considers that an award of EUR 5 000 constitutes adequate compensation to the applicant.

418 In the second place, the breach by the institution of its duty to act within a reasonable time as regards the institution and conduct of disciplinary proceedings placed the applicant in a state of prolonged uncertainty, which constitutes non-material damage that must be compensated. Given that, first, the decision to institute disciplinary proceedings was adopted more than 7 years after the conduct of which the applicant was accused and, secondly, that once the proceedings had been instituted they continued for almost 3 years, so that in total a period of almost 10 years elapsed between the alleged conduct and the termination of the disciplinary proceedings, it is necessary to set the compensation of the applicant *ex aequo et bono* at EUR 25 000.

419 It follows from all of the foregoing that the Commission must be ordered to pay to the applicant the sum of EUR 30 000 in compensation for the non-material damage inflicted on him by the wrongful acts which it committed.

Costs

420 Under Article 122 of the Rules of Procedure, the provisions of Title 2, Chapter 8, of those rules relating to costs apply only to cases brought before the Tribunal from the date on which those rules enter into force, that is to say 1 November 2007. The relevant provisions of the Rules of Procedure of the Court of First Instance on the subject continue to apply *mutatis mutandis* to cases pending before the Tribunal before that date.

421 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88 of those rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

422 Moreover, pursuant to Article 87(3) of the Rules of Procedure of the Court of First Instance, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Tribunal may order that the costs be shared or that each party bear its own costs.

423 Finally, under Article 87(6) of the Rules of Procedure of the Court of First Instance, where a case does not proceed to judgment, the costs are to be in the discretion of the Tribunal.

424 The Tribunal observes that the claims for annulment registered as Case F-124/05 became devoid of purpose following the decision of 16 October 2006 terminating the disciplinary proceedings against the applicant, a decision by which the defendant granted the person concerned the outcome that he sought by means of those claims in the action.

425 By contrast, as regards the claims for damages in the actions registered as Cases F-124/05 and F-96/06, it is to be noted that only two of the many wrongful acts alleged by the applicant have been held to be established and that the applicant has been awarded damages and interest of a far lower amount than he sought.

426 In the light of all of the foregoing, the Tribunal considers that it will make an equitable assessment of the case in ruling that the Commission is to bear its own costs and half of the applicant's costs. The applicant shall bear half of his own costs.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Full Court)

hereby orders:

1. **There is no further need to adjudicate on the forms of order sought by the applicant in the application registered as Case F-124/05 *A* v *Commission.***

2. **The European Commission is ordered to pay to the applicant the sum of EUR 30 000 in compensation for the non-material damage he suffered.**

3. **The European Commission is ordered to bear its own costs and half of the applicant's costs relating to the applications registered as Cases F-124/05 *A* v *Commission* and F-96/06 *G* v *Commission.***

4. **The applicant is ordered to bear half of his costs relating to the actions registered as Cases F-124/05 *A* v *Commission* and F-96/06 *G* v *Commission.***

Mahoney Gervasoni

Kreppel Tagaras Van Raepenbusch

Delivered in open court in Luxembourg on 13 January 2010.

W. Hakenberg
Registrar

P. Mahoney
President

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The text of the present decision and the texts of the decisions of the Courts of the European Union cited in it are available on the internet site www.curia.europa.eu