OPINION OF ADVOCATE GENERAL ALBER

delivered on 9 March 1999 *

1. In the present appeal, an official who has been removed from his post (hereinafter 'the appellant' or 'Mr Tzoanos') is requesting the Court to set aside the judgment of the Court of First Instance [1] dismissing his application for annulment of the Commission's decision removing him from his post.

2. The appellant is the former head of Unit 3 'Tourism' in Directorate A 'Business development and improvement of the business environment' of the Directorate-General for Enterprise Policy, Distributive Trades, Tourism and Cooperatives (DG XXIII) (Unit XXIII.A.3). By decision of 22 June 1995 the appointing authority, namely the Commission, decided to impose the disciplinary measure recommended by the Disciplinary Board, that is to say removal from post without withdrawal of entitlement to retirement pension.

3. The complaints made against the appellant were as follows:

first, that he '[had] exercised and continue[d] to exercise unauthorised activities'; second, that he had 'failed to observe his duty of discretion in that, without informing his superiors, he [had] had his residence at the same address as that of an outside firm which regularly participated in projects funded or to be funded by the Commission and [had] publicly criticised a national body involved in the field of tourism'; third, that he had 'provided services to the Commission in the field of his professional activities on behalf of persons or bodies outside the institution in such a way as to have compromised his independence in the performance of his duties as Head of Unit within the Commission'; fourth, that he had 'prepared for persons or bodies outside the institution documents ultimately destined either for the Commission, and contrary to its interests, or for outside partners in projects funded by the Community'; and fifth, that he had 'committed administrative irregularities and been guilty of budgetary and financial mismanagement in the perfor-

* Original language: German.

1 — Judgment of 19 March 1998 in Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC II-343.

mance of his duties as head of the "Tourism" Unit'. [2]

4. On 3 August 1994 the appellant was suspended from his post and an amount equal to half of his basic salary was withheld. Since no final decision had been taken within the prescribed period, his full salary was reinstated on 4 December 1994, although he continued to be suspended, and the sums withheld from his salary were repaid to him.

5. Following the close of the proceedings before the Disciplinary Board, the appointing authority decided on 22 June 1995 to remove the appellant from his post without loss of entitlement to a retirement pension, with effect from 1 August 1995. The decision was taken pursuant to Article 86(2)(f) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations' — any articles cited without a particular reference are also from those Regulations).

6. The appellant lodged a complaint against the decision of the appointing authority; that complaint was expressly rejected by decision of 19 February 1996. On 17 May 1996 the applicant brought an action, which was dismissed by judgment of 19 March 1998.

7. In that judgment the Court of First Instance concluded, *inter alia*, that there had been no need to suspend the disciplinary proceedings pursuant to the fifth paragraph of Article 88 of the Staff Regulations pending the close of the criminal proceedings against the appellant (or the applicant, as he then was), as he had requested. The Court of First Instance further held that the administrative irregularities and budgetary and financial mismanagement related to matters falling within the appellant's responsibilities and, finally, that he could not claim that he did not have access to certain documents necessary for his defence.

8. On 19 May 1998 the appellant appealed against that judgment; he claimed, *inter alia*, that the Court of First Instance had misinterpreted the fifth paragraph of Article 88 of the Staff Regulations and held him responsible for irregularities relating to matters which were outside the scope of his duties. He further claimed, as he had already done at first instance, that there had been a breach of his rights of defence, since the statement of reasons for the complaints made against him was inadequate. He also pleaded a breach of the principle of equality of arms, on the ground that he had not had access to documents which would have confirmed his claims.

2 — Abstract of the judgment in Case T-74/96 [1998] ECR-SC I-A-129, 130.

9. The applicant therefore claims that the Court of Justice should:

(1) set aside the contested judgment;

(2) itself adjudicate on the dispute and allow his initial application, in the following terms:

(a) annul the Commission's decision of 22 June 1995 removing the appellant from his post without loss of entitlement to a retirement pension and the decision of 19 February 1996 expressly rejecting his complaint of 21 September 1995 against the contested decision;

(b) order the Commission to bear the costs of both sets of proceedings.

10. The Commission contends that the appeal is unfounded, and in fact inadmissible on two points. Nor, in its view, can the findings of the Court of First Instance concerning the applicant's duties be called in question in an appeal. Furthermore, in point 23, pages 17 and 18, on the adequacy of the rights of defence, the appeal merely reiterates the complaints already raised in the proceedings before the Court of First Instance, which also renders the appeal inadmissible.

11. The Commission therefore contends that the Court should:

(1) dismiss the appeal

(a) as inadmissible, as regards the second ground of appeal, in that it seeks to call in question the findings of the Court of First Instance concerning the subject-matter and scope of the tasks which had been assigned to the applicant and, as regards the third ground, in that point 23, pages 17 and 18, of the appeal relates to arguments already raised;

(b) in any event, as unfounded in its entirety;

(2) order the appellant to bear the costs of the appeal proceedings.

Relevant legal provisions

12. The most significant provision for the purposes of the present proceedings is Article 88 of the Staff Regulations, which reads:

'Where an allegation of serious misconduct is made against an official ... [the appointing] authority may order that he be suspended forthwith' (first paragraph).

... (second paragraph)

'A final decision shall be taken within four months ... Where no decision has been taken by the end of four months, the official shall again receive his full remuneration' (third paragraph).

'Where no disciplinary action has been taken in respect of an official ... or if no final decision has been taken within the period specified in the preceding paragraph, the official concerned shall be entitled to reimbursement of the amount of remuneration withheld' (fourth paragraph).

'Where, however, 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' (fifth paragraph).

Grounds of appeal

13. The appellant bases his appeal (rather sweepingly, in part) on the breach of a whole range of provisions and principles. He refers in that regard, in particular, to Articles 33 and 46 of the EC Statute of the Court of Justice, which provide that judgments are to state the reasons on which they are based. He also refers to Articles 12, 13, 14 and 17, to the first and second paragraphs of Article 21 and to Article 25 of the Staff Regulations, which all come under Title II, 'Rights and obligations of officials'. The remaining provisions to which he refers, namely the second paragraph of Article 87 and the fifth paragraph of Article 88 of the Staff Regulations and Articles 1, 2 and 3, the second paragraph of Article 7 and Article 11 of Annex IX to the Staff Regulations, relate respectively to disciplinary measures and to disciplinary proceedings. The appellant also relies on the general principles of Community law, and in particular the principle of observance of the rights of the defence, the right to an *inter partes* procedure and an impartial judge (and also Article 6 of the Convention on Human Rights), the principle of legal certainty, the principle of good faith, the protection of legitimate expectations, the duty to have regard for the welfare of officials and also the principle that every administrative act must be based on legally permissible grounds, that is, on grounds which are relevant and not vitiated by errors or law or

of fact. I shall confine my examination to the points which are further elaborated by the appellant.

14. The appellant sets out three grounds of appeal in detail. In the first, he criticises what he considers the misinterpretation and misapplication of the fifth paragraph of Article 88 of the Staff Regulations; in the second, he criticises the incorrect conclusions of the Court of First Instance, especially as regards his duties and responsibilities; and in the third he criticises the breach of the principles of *inter partes* proceedings, equality of arms and the obligation to state reasons.

First ground of appeal

15. In the context of this ground of appeal, the complaints which the appellant formulates may essentially be summarised in four points. The first concerns the meaning and the associated protective function of the obligation laid down in the fifth paragraph of Article 88, which provides that the appointing authority is to await the decision in the criminal proceedings before definitively resolving the official's legal situation. The second point concerns the question whether the disciplinary proceedings and the prosecution must be simultaneous. The third point consists of a number of questions relating to the interpretation of 'those same acts'. The fourth point concerns the question as to what is to be understood by the term 'prosecuted'.

16. In the interests of procedural economy, I propose to examine the second and fourth points first.

Point 2 of the first ground of appeal: the date of the disciplinary proceedings and the prosecution

17. It is common ground that the appellant was the subject of formal criminal proceedings, at least after the contested decision was adopted on 22 June 1995.

— Arguments of the parties

18. The appellant contends that because he was the subject of criminal proceedings a final decision should not have been taken until those proceedings had been concluded and that, accordingly, the contested judgment should be set aside and the appointing authority's decision set aside.

19. He maintains that it would be to restrict the scope of the fifth paragraph of Article 88 and to add to its content to assume that the criminal proceedings must already be pending *during* the disciplinary proceedings. The wording of the Staff Regulations merely provides that the criminal proceedings must be initiated against the official; there is no further requirement that the two sets of proceedings be concurrent.

20. An official who is removed from his post would be deprived of all his rights, even if it emerged during the criminal proceedings that in reality the acts in respect of which a disciplinary measure had been imposed were not established. Where the Staff Regulations refer to a 'final decision [being] taken' [3] they refer to a general concept [legal situation], which the appointing authority can also determine after it has taken a decision. Thus any previous measure can only be of a provisional nature and the legal situation must be reviewed and the decision withdrawn if appropriate.

21. The Commission maintains that the Staff Regulations make quite clear that the prosecution and the disciplinary proceedings must take place simultaneously. It would amount to supplementing the text of the fifth paragraph of Article 88 to claim, as the appellant does, that the appointing authority is required every time to re-examine the legal situation of officials on whom it has imposed disciplinary measures if they are subsequently prosecuted in respect of the same acts. That would be quite contrary to the principles of sound administration and legal certainty.

22. If an official is prosecuted after the disciplinary proceedings have been closed and it is found that in reality the facts with which the official is charged are not established, in other words if new facts come to light, the official may apply for the disciplinary proceedings to be reopened pursuant to Article 11 of Annex IX to the Staff Regulations. [4]

— Assessment

23. The appellant's view cannot be upheld. If the possibility of subsequent criminal proceedings were also taken into consideration it would never be possible to know when a disciplinary decision was adopted whether it was final or merely provisional, which, as the Commission correctly states, is inconsistent with the principle of legal certainty.

3 — In the German version 'so und seine rechstellung erst dann endgülting geregelt' (literally 'only then will his legal situation be settled').

4 — Article 11 provides: 'Where there are new facts which are supported by relevant evidence, disciplinary proceedings may be reopened by the appointing authority on its own initiative or on application by the official concerned'.

24. The overall coherence of Article 88 also suggests a different interpretation from that indicated by the appellant. The fifth paragraph does not state 'if criminal proceedings are undertaken' but '[w]here, however, the official is prosecuted'. That provision must be placed in the context of the third and fourth paragraphs. It thus follows that the prosecution must have been commenced within the period of four months provided for in the third paragraph or, where that period has elapsed, in the course of the disciplinary proceedings, because otherwise the final decision could not be stayed pursuant to the fifth paragraph. That correlation between the paragraphs confirms the necessity for both sets of proceedings to be simultaneous. That also follows from the concept of a 'final' decision marking the end of the 'provisional' suspension from duties. A final decision imposing a disciplinary measure cannot retroactively become a mere provisional measure as a result of a prosecution which is not commenced until after the decision has been taken.

— *Point 4 of the first ground of appeal: the concept of 'prosecution'*

— Arguments of the parties

25. The appellant maintains that in the contested judgment the Court of First Instance interpreted 'prosecuted' in the fifth paragraph of Article 88 of the Staff Regulations too restrictively. It is clear from the case-file that criminal inquiries were already proceeding even before the decision removing him from his post was adopted. There is nothing to suggest that 'prosecuted' must necessarily be taken to mean that proceedings are pending before a criminal court. Rather, a prosecution is initiated as soon as inquiries are commenced.

26. The Commission contends that a distinction must be drawn between mere criminal inquiries and a prosecution. The inquiries do not set the prosecution in motion but are made purely with a view to gathering information. It is frequently the case that criminal inquiries are not followed by a prosecution.

— Assessment

27. 'Strafverfahren' (prosecuted) does not prima facie indicate whether criminal proceedings are meant. [5] However, if reference is made to the similar provisions in the second paragraph of Article 7 of Annex IX to the Staff Regulations, it will be seen that in that context they apply only in the event of the official being '*strafgerichtlich* ver-

5 — The French version is no clearer: it refers to 'poursuites pénales'.

folgt' ('*criminal proceedings*' [before a court]).[6] It may be concluded from these differing terms that the concept of 'strafverfahren' in the fifth paragraph of Article 88 must be given a broader interpretation and encompasses, in addition to purely criminal proceedings, measures of inquiry. If the fifth paragraph of Article 88 is placed in its overall context, however, it is clear that, as regards the objective, there is no difference between that provision and the second paragraph of Article 7 of Annex IX. It would make no sense to have a different rule in the same Staff Regulations. The fifth paragraph of Article 88 provides that in the event of such proceedings a final decision is to be taken only 'after *a final verdict has been reached by the court hearing the case*'.[7] It follows clearly from 'final verdict' that here, too, only court proceedings can be meant, since inquiries or investigations lead only, where appropriate, to the initiation of a prosecution, not to a verdict.

28. As the Court of First Instance observes at paragraph 36 (citing a letter of 31 May 1995 from the applicant's representative) and paragraph 37 of the judgment, no formal criminal proceedings had (yet) been initiated against the applicant on the date on which the appointing authority adopted the contested decision. The wording of paragraph 31 of the judgment does not present an obstacle to that conclusion, since it sets out the views of the parties, not those of the Court of First Instance; in that regard, only paragraphs 36 and 37, where the Court of First Instance establishes that no criminal proceedings had been initiated against the applicant on the date on which the contested decision was adopted, are decisive.

29. The conditions laid down in the fifth paragraph of Article 88 are therefore not satisfied, since even the fact that criminal proceedings were subsequently initiated does not alter the situation, as I have demonstrated above. The appointing authority and the Court of First Instance therefore did not misinterpret the fifth paragraph of Article 88 and, accordingly, there is no further need to examine the other complaints put forward in the context of the first ground of appeal.

30. Although no formal criminal proceedings had yet been initiated on the date on which the disciplinary decision was adopted — which is the only material date —, the Court of First Instance took the view that it would only adjudicate subsequently on the substance of the pleas if the applicant could prove that his situation might have been affected in any (subsequent) criminal proceedings. In that regard, the Court assessed the consideration of protection underlying the fifth paragraph of Article 88 of the Staff Regulations. It is for that reason that the other points of the first ground of appeal will also be examined here.

6 — Emphasis added. The French version uses the expression 'poursuite devant un tribunal répressif'.

7 — Emphasis added. The French version is worded as follows: '... qu'après que la décision rendue par la juridiction saisie est devenue définitive'.

— *Point 1 of the first ground of appeal: Misinterpretation of the consideration of protection underlying the fifth paragraph of Article 88 of the Staff Regulations*

— Arguments of the parties

31. The appellant criticises the findings of the Court of First Instance in paragraph 34 of the judgment. The Court stated:

'... the official concerned [must] not be placed at a greater disadvantage in the criminal proceedings than if such a decision had not been taken by the administrative authority and, where appropriate, if a decision had not been taken by the administrative court, in this case the Court of First Instance... The *raison d'être* of the fifth paragraph of Article 88 of the Staff Regulations corresponds to the concern to ensure that the position of the official concerned is not affected in any criminal proceedings brought against him in respect of matters which also form the subject of disciplinary proceedings within his institution'. [8]

32. The appellant maintains that the wording of the fifth paragraph of Article 88 does not allow of such a restrictive interpretation. The purpose of those provisions is to ensure that the administrative authority which is required, where necessary, to adopt a disciplinary decision is fully aware of the facts alleged against the official which are also the subject-matter of criminal proceedings. As the Court of First Instance itself observes, that rule is justified, in particular, by the difference in the scope of the controls 'exercised by the administrative authorities and courts, on the one hand, and the criminal authorities and courts, on the other, since the latter normally have greater powers of control than the former'. [9]

33. The appellant argues that in order to prevent any error in disciplinary proceedings, the Staff Regulations provide that the competent authorities are to wait until the criminal court has delivered a final verdict on the substance of the case, so that those authorities will, where necessary, be able to make a more precise and more appropriate assessment of the facts alleged against the official. That is all the more true, according to the appellant, because the imposition of a disciplinary measure would not have the effect of aggravating an official's situation before the criminal courts. Disciplinary measures can be imposed in respect of facts which are irrelevant for the purposes of criminal law and cannot therefore form the subject of criminal proceedings.

34. The appellant submits more detailed observations in that regard, but there is no need to consider them, since it is clear from

8 — Abstract of the judgment in Case T-74/96 (cited in footnote 2), at I-A-132.

9 — Abstract of the judgment in Case T-74/96 (cited in footnote 2), at I-A-132.

the wording of the fifth paragraph of Article 88 that the disciplinary proceedings and the criminal proceedings must relate to the same facts. That is also the Commission's argument.

35. The Commission further contends that even if the fifth paragraph of Article 88 were to be interpreted in the manner advocated by the appellant that argument would be irrelevant in the present case. As the Court of First Instance observed, the evidence before it showed that on the date on which the contested disciplinary decision was adopted no criminal proceedings for the purpose of the fifth paragraph of Article 88 had been initiated against the applicant. Accordingly, those provisions are not applicable at all here.

— Assessment

36. I must agree with the Court of First Instance that the true *ratio* of the protection conferred by the fifth paragraph of Article 88 is to ensure that the official is not placed at a disadvantage in the criminal proceedings. The aim of the fifth paragraph of Article 88 is not primarily to enable certain facts to be established by a criminal court as the basis for disciplinary proceedings. Furthermore, the official concerned would have an interest in such findings equal to that of the appointing authority.

37. If the appellant's submission were followed that would mean that the disciplinary authority could rely on complete and accurate facts only when any pending criminal proceedings had been concluded. The inference is that in purely disciplinary proceedings the facts can never be sufficiently established. That conclusion cannot be accepted. Although a criminal court enjoys more extensive powers of investigation than the Disciplinary Board, the possibility of carrying out inquiries referred to in Annex IX to the Staff Regulations shows that the power of investigation is sufficiently wide to enable the facts to be established in disciplinary proceedings with sufficient precision for a decision imposing a disciplinary measure to be taken.

38. If the criminal proceedings should none the less reach a different conclusion, Article 11 of Annex IX to the Staff Regulations provides that the disciplinary proceedings may be reopened, so that the official's rights are not affected in that regard either.

39. A further consideration is that an authority can normally have no interest itself in staying disciplinary proceedings for a long period. Experience shows that criminal proceedings may last a considerable time before all possible remedies are exhausted. That might mean, for example, that an official would receive his full salary for the duration of the criminal proceedings if no disciplinary decision were taken within the four-month period prescribed

in the third and fourth paragraphs of Article 88.

— *Point 3 of the first ground of appeal: establishment of the same facts*

— Arguments of the parties

40. In the light of all those circumstances, it is clear that the real meaning and purpose of the fifth paragraph of Article 88 is that an official must not be placed at a disadvantage in criminal proceedings. It is also reasonable, therefore, that the person seeking a stay of the disciplinary proceedings should be expected to provide appropriate facts and reasons. In that regard, the conclusion which the Court of First Instance reaches in paragraph 38 of the judgment is also well founded. That paragraph reads:

'In so far as the applicant was at that time the subject of inquiries liable to lead to criminal proceedings, however, he should be allowed, in accordance with the *ratio legis* of the fifth paragraph of Article 88 of the Staff Regulations, to show specifically that a final decision on his case was capable of affecting his position in any subsequent criminal proceedings to which the inquiry being carried out at the same time as the disciplinary proceedings might lead and which related to the same matters. It is *therefore* incumbent on the applicant to identify those matters precisely and to state the reasons for which a decision taken by the appointing authority in respect of each of those matters was such as to affect his position in any subsequent criminal proceedings'. [10]

41. The appellant claims that the Court of First Instance incorrectly considers that he must identify the matters forming the basis of both sets of proceedings.

42. He contends that he is not required to 'state the reasons for which a decision taken by the appointing authority in respect of each of those matters was such as to affect his position in any subsequent criminal proceedings' [11] (here the appellant is referring to paragraphs 38 and 41 of the contested judgment). He contends that it is sufficient that the matters forming the subject-matter of the criminal proceedings and the disciplinary proceedings are shown to be the same and that there is no need to provide further details.

43. The appellant claims that since he had no access to the file at that stage of the criminal proceedings, if it were necessary to follow the reasoning of the Court of First Instance, the fifth paragraph of Article 88 would in the majority of cases, if not systematically, be inoperative.

10 — Abstract of the judgment in Case T-74/96 (cited in footnote 2), at I-A-133 (empasis added).

11 — Abstract of the judgment in Case T-74/96 (cited in footnote 2), at I-A-133.

44. Finally, the appellant alleges, with reference to paragraph 41 of the judgment, that the Court of First Instance also infringed the fifth paragraph of Article 88 by requiring that the official concerned provide evidence that he was entitled to *believe* that a decision taken by the appointing authority would be likely to affect his situation for the purpose of the criminal proceedings. Disciplinary proceedings cannot be supported by hypotheses. The proceedings should therefore have been suspended until a 'verdict' had been delivered. Moreover, the appointing authority itself was sufficiently aware of the facts, as a result of having lifted the appellant's immunity.

45. As regards the appellant's access to the criminal file, the Commission claims that it is clear from the documents annexed to his answers to the questions put by the Court of First Instance that he was fully informed of the facts alleged against him.

46. The Commission further observes that since the purpose of the fifth paragraph of Article 88 is not to affect the official's position in criminal proceedings, it is logical that the administration cannot be satisfied with mere assertions on the part of the official but that it should expect him to specify what the facts giving rise to both sets of proceedings consist of and to explain why a decision by the appointing authority in respect of those facts could affect his position in the criminal proceedings.

47. Finally, the Commission contends that the official's assertion that the fifth paragraph of Article 88 cannot be supported by mere hypotheses is based on a misreading of the relevant passage in the judgment. At paragraph 41 the Court of First Instance observed that it was for the official to set out the reasons for which he considered that a decision taken by the appointing authority could in his view affect his position. The hypothetical aspect therefore relates not to the facts but to the consequences which a decision by the appointing authority might have on the official in the context of the criminal proceedings.

— Assessment

48. It follows from paragraph 35 of the judgment that it is only where criminal proceedings have actually been initiated that the Court of First Instance expects more specific information on the concept of the 'same acts'. Paragraph 35 expressly states:

'... It is only where such criminal proceedings have been initiated that the matters to which they relate can be identified and compared with the matters in respect of which the disciplinary proceedings have been instituted so that it can be determined whether they are the same'. [12]

12 — Abstract of the judgment in Case T-74/96 (cited in footnote 2), at I-A-133.

49. The Court of First Instance concluded at paragraph 37 that the appointing authority had not infringed the fifth paragraph of Article 88.

50. It is not for the purposes of the disciplinary proceedings that the Court of First Instance expects more specific information on the applicant's part, but solely for the purposes of and in the context of the concurrent criminal proceedings: this clearly follows from paragraph 40 of the judgment, since it is evident that the Court of First Instance was prepared, in the applicant's interest, to postpone its judgment in this case. It was therefore not a question of staying the disciplinary proceedings but of reserving a decision on the legality of the measure imposed by the appointing authority until a subsequent date. However, Mr Tzoanos did not provide the specific information requested by the Court of First Instance.

51. Considering that the criminal proceedings in Belgium had been pending, as the Court of First Instance states, since 4 January 1996,[13] but that Mr Tzoanos only provided written answers to the questions put by the Court in September 1997 (the hearing did not take place until November 1997), it is difficult to see why even at the end of 1997 Mr Tzoanos still had no information about the criminal proceedings initiated against him.

13 — Judgment in Case T-74/96, cited in footnote 1, paragraphs 36 and 41.

52. Nor can the Court of First Instance be criticised for having required a person whose situation it did not wish to affect in criminal proceedings, so that it was prepared to adjourn the proceedings or, where appropriate, deliver judgment at a later date, to indicate the facts on which both proceedings were based. In that regard, it is also pointless to claim that the appointing authority was aware of the facts after it lifted the applicant's immunity, since only the Court's knowledge matters in the latter case.

53. The appellant therefore did not submit that criminal proceedings had been initiated in respect of the same matters as the disciplinary proceedings. Nor did he submit that a prior (judicial) finding as to the legality of the disciplinary measure could have affected his position in those criminal proceedings.

54. It follows from all the foregoing that the fifth paragraph of Article 88 was neither misapplied by the appointing authority nor incorrectly interpreted in law by the

Court of First Instance. The first ground of appeal must therefore be rejected in its entirety.

55. It should be pointed out once again that for the purpose of assessing the legality of the disciplinary decision the only relevant circumstances are those obtaining on the date on which the decision was adopted. Since no formal criminal proceedings had been initiated on 22 June 1995, there was no need for the appointing authority to postpone a definitive decision on Mr Tzoanos's situation to a later date. It is apparent from the papers before the Court — and in particular from paragraphs 36 and 41 of the judgment — that Mr Tzoanos was informed on 4 January 1996 that criminal proceedings had been initiated. Admittedly, a decision on his complaint was taken on 19 February 1996, that is to say, subsequently; it is clear from the case-file, however, that the appointing authority had by then still not been informed of the essential details of those proceedings. Those details were not even known on the day of the hearing before the Court of First Instance, on 13 November 1997. As a general rule the complaint is filed by the appointing authority, which is then naturally aware of the same facts. In the present case, only Mr Tzoanos was aware of those matters and it was also incumbent on him to provide the details, since he wished to have the disciplinary proceedings stayed pursuant to the fifth paragraph of Article 88. The Court of First Instance was not required to go so far in considering whether the same facts formed the subject-matter of criminal proceedings at the time when the disciplinary proceedings were pending before it. There was no need for it to stay the proceedings or to reserve judgment. That is also confirmed by the rule in Article 185 of the EC Treaty that actions brought before the Community judicature are not to have suspensory effect. Even if the foregoing considerations are not followed, however, it follows from the examination of the reasoning of the Court of First Instance in relation to the first plea in law that it did not err in law.

Second ground of appeal (the findings of the Court of First Instance concerning Mr Tzoanos's duties and responsibilities)

Arguments of the parties

56. Mr Tzoanos maintains that the Court of First Instance relied in its judgment on flawed reasoning and did not draw the proper factual or legal inferences from the documents before it. He refers in that regard to paragraph 203 of the judgment, where the Court of First Instance states that in the present proceedings the Commission did not base his responsibility for the budgetary and financial monitoring of a project on his capacity as authorising officer for payments. The Court of First Instance concludes that Mr Tzoanos cannot escape all responsibility in that field by disputing that he acted in that capacity. The responsibility attributed to him nevertheless relates specifically to the powers of authorising officer for payments. Since he did not order payments, however, he could not assume any kind of responsibility in that field. Mr Tzoanos refers in that regard to the decision expressly rejecting his complaint, where the Commission incorrectly describes him as authorising officer for payments. The Commission therefore based its complaint on his having acted in that capacity. It was for the Court of First Instance to draw the consequences from the fact that he had not acted in that capacity. Only misconduct coming within the scope of his responsibility could be attributed to him. The Commission, however ascribed to him, as Head of Unit XXIII.A.3, responsibility for breaches which in reality were attributable to the Director-General.

57. The Commission contends, on the other hand, that the way in which the appellant refers to the judgment gives a false impression, since he picks out just one particular passage from the entire argument. The findings of the Court of First Instance are not based on a finding that the Commission did not found the applicant's responsibility on his capacity as authorising officer for payments. The Court of First Instance stated, independently of the question concerning the duties of authorising officer for payments, that in his capacity as head of that unit Mr Tzoanos was under an obligation to check the validity of requests for payment, so that he was personally responsible where a payment proved to be unjustified. The Commission also points out that the existence of that obligation is a finding of fact by the Court of First Instance and is therefore not open to challenge.

58. Furthermore, the Commission only (incorrectly) described Mr Tzoanos as authorising officer for payments in one document, the decision rejecting his complaint. Elsewhere he is consistently referred to as Head of Unit.

Assessment

59. This ground of appeal, too, must fail. As may be seen from the judgment, the Court of First Instance did not merely ascertain whether Mr Tzoanos was to be held responsible *qua* authorising officer for payments, but first considered (from paragraph 187) what tasks had been entrusted to him. It then determined the extent of the responsibilities which the Commission had ascribed to him in the contested disciplinary decision. It proceeded to examine in detail Mr Tzoanos's arguments in relation to the responsibilities imputed to him by the Commission in connection with the monitoring of the budgetary and financial aspects of the projects. At paragraph 202 of the judgment it reached the conclusion that the Unit had been entrusted with certain tasks which also encompassed budgetary and financial monitoring. The Court of First Instance further held that those tasks were not properly carried out and that in any event the misconduct established fell within the responsibilities of the official in charge of the Unit, at the very least because he had not shown that he did everything to carry out those tasks. The Court of First Instance concluded that Mr Tzoanos could not claim that the fact that he had not authorised payments exempted him from any responsibility. Only after carrying out this detailed examination, which cannot be faulted, did the Court of First Instance also observe that in the present proceedings the Commission did not base the applicant's responsibility on his capacity as authorising officer for payments.

60. In thus reaching the conclusion that the misconduct referred to fell within the appellant's responsibilities, irrespective of whether he was the authorising officer for payments, the Court of First Instance made a finding of fact which cannot be reviewed in an appeal. The second ground of appeal is therefore inadmissible in so far as it seeks

to challenge the findings of fact of the Court of First Instance relating to a matter for which the appellant was responsible. That point may be left there, however, since the second ground of appeal is in any event unfounded, since the Court of First Instance none the less drew the necessary and proper conclusions from the fact that Mr Tzoanos was not authorising officer for payments, because it based its decision on the actual, and not merely formal, responsibilities which he exercised within the Unit.

Third ground of appeal (the principles of inter partes *proceedings, equality of arms and the obligation to state relevant reasons)*

First complaint

— Arguments of the parties

61. Mr Tzoanos considers that the judgment should also be set aside on the ground that the principles of *inter partes* proceedings and equality of arms were not applied. The Court of First Instance was wrong to state at paragraph 329 of the judgment that Mr Tzoanos had had access to the file which was available to the Disciplinary Board when it delivered its opinion and to the appointing authority when it adopted the decision. It was also untrue that he had been able to acquaint himself with all the facts on which the decision was based.

62. The Commission did indeed file certain documents when requested to do so by the Court of First Instance but did not include the majority of the budgetary and financial documents. The appellant might possibly have found in other documents evidence to support his defence and his arguments. It follows from *Solvay* v *Commission* that the rights of the defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, 'which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence'. [14]

63. In that regard, the Commission asserts that the Court of First Instance found in the present case that the applicant had admitted having had access to the same documents as were available to the Disciplinary Board and the appointing authority. That point, moreover, does not appear to have been challenged in those proceedings. It is impossible to see, therefore, how the Court of First Instance misapplied the principle of equality of arms.

14 — As expressly stated in Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 83.

64. As regards the other documents whose production Mr Tzoanos had requested, the Commission points out that neither the Disciplinary Board nor the appointing authority had carried out a selection of the documents.

65. The Commission maintains that it follows from the *Solvay* judgment that it is necessary to determine and consider in each case whether the non-disclosure of certain documents may have influenced the proceedings and the content of the decision to the applicant's disadvantage. The Court of First Instance also considered those matters in the present case and reached the conclusion that the right of access to other documents could not influence the findings made, since they were based on documents to which the appellant also had had access. That is a finding of fact by the Court of First Instance which cannot be challenged on appeal.

— Assessment

66. It should be pointed out, first, that at paragraph 329 of the judgment the Court of First Instance states that the applicant had not responded at the hearing to the Commission's submission to the effect that he had access during the disciplinary proceedings to the file which had also been available to the Disciplinary Board and the appointing authority. The Court of First Instance concluded that the principle of equality of arms had been observed and that Mr Tzoanos had been able to acquaint himself with all the documents on which the decision was based. He had also had sufficient time to submit his observations on those documents. The Court of First Instance then ascertained whether other findings would have been established if the applicant had had access to documents other than those communicated to him during the course of the disciplinary proceedings. The Court of First Instance observed that in those circumstances it would be necessary to accept that there had been a breach of the rights of the defence if the documents which the applicant sought had shown that he had no responsibility for budgetary or financial matters. However, only documents in existence, that is to say communicated, were sufficient for the Court of First Instance to find, without erring in law, that the applicant was responsible. None of the documents not communicated to the appellant would therefore have enabled him to deny responsibility. For that reason, too, no error in the judgment can be established.

Second complaint

67. The appellant then claims, in the context of the third ground of appeal, that the complaints against him were not clearly formulated or reasoned. Since he himself states that he also relied on that complaint in part during the disciplinary proceedings and before the Court of First Instance, that argument must be dismissed as inadmissible on appeal.

Third complaint

— Arguments of the parties

68. The appellant criticises the Court of First Instance for having substituted itself for the Commission and having, in respect of certain projects, itself formulated the allegations against him which the Commission had not precisely formulated.

— Assessment

69. That argument must be rejected as unfounded. As regards the first project — IFTO — the Court of First Instance refers at paragraph 266 of the judgment to the report of DG XX, in the absence of further information in the contested decision. That report, to which the decision refers, contains two specific allegations relating to the applicant.

70. As regards the second project — IERAD — the Court of First Instance states at paragraph 278 that in the absence of further information in the contested decision it was necessary to consider the report of DG XX to which the decision refers. It is apparent from that report that the allegations made are specifically attributable to the appellant, although he is not referred to by name. The Court of First Instance then states that in the light of that information, the terms of the decision expressly rejecting the complaint and the applicant's responses, four specific allegations against him can be identified.

71. The Court of First Instance goes on to state that the Commission specified the allegations in its decision expressly rejecting the complaint.

72. Also, as regards the third project — BDG — the Court of First Instance states that it can be inferred from the report of DG XX, to which the disciplinary decision refers, that the irregularities attributable to Mr Tzoanos are two in number. They are then specified. The Court of First Instance then demonstrates in detail that those allegations can in fact be formulated against the applicant.

73. It was not, therefore, the Court of First Instance that specified the allegations against Mr Tzoanos, since those allegations were set out in the reports referred to, on which the appointing authority's decision was based. It follows from the foregoing, therefore, that the Court of First Instance did not err in law in the context of this complaint. Accordingly, the third ground of appeal must also be rejected in its entirety.

Costs

74. Under Article 122 of the Rules of Procedure of the Court of Justice, the Court is to make a decision as to costs where the appeal is unfounded. Since the appellant has been unsuccessful in this case, he must be ordered to pay the costs pursuant to the first subparagraph of Article 69(2) of the Rules of Procedure.

Conclusion

75. On those grounds, I consider that the Court should:

(1) Dismiss the appeal;

(2) Order the appellant to pay the costs of the appeal.