OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 12 JUNE 1968[1]

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Mr President,
Members of the Court,

My opinion today concerns disciplinary proceedings which resulted in the removal from his post of the applicant who was an official of the Commission of the European Atomic Energy Community. These, briefly, are the facts which we must take as our point of departure.

The applicant is a citizen of the Netherlands who, having completed his studies at Delft, worked for several years as a 'natuurkundig ingenieur' and as a specialist in electronic data-processing at IBM. On 1 April 1960 he entered the service of the Commission of the EAEC. With effect from 3 July 1961 he was assigned to the Nuclear Research Centre at Ispra, more precisely to the European Scientific Data Processing Centre (CETIS) where he was employed in the capacity of 'project-leader' for a task known as the 'Bird' project, the details of which now no longer concern us. At the end of December

1 — Translated from the German.

1962 budgetary reasons led to the discontinuance of the 'Bird' project and the Directorate of the Nuclear Research Centre had to assign a fresh task to the applicant and his section. Difficulties appear to have arisen with the applicant himself, as he refused to take on the new duties which the Directorate wished to assign to him. This led the Commission on 23 June 1965 to administer a strong rebuke to the applicant and to emphasize the need for him to undertake new activities. In fact, a decision by the Directorate of the Centre of 22 November 1965 conferred new duties on him by transferring him to the library of the Centre. According to the definition of duties which had been drawn up on 6 December 1965, his post in the library was to consist of following publications concerning electronics, control engineering and 'research management', setting up a rapid information service for the members of groups working on research in these various fields, carrying out documentation research and preparing *ad hoc* bibliographies, preparing reports and supplying technical information. It appears, however, that those concerned in the performance of these activities were not satisfied with the applicant. At all events, after making a first complaint on 27 January 1966, the applicant's superior requested the Directorate of the Centre on 17 August 1966 to assign him to a new post. At the same time (cf. decision of 19 August 1966) the Director of the Centre had to reprimand the applicant for his repeated unpunctuality. Finally, there was a long dispute regarding a task which the Director of the Centre requested the applicant to carry out on 23 August 1966. The applicant at first refused to carry out this task and finally merely submitted an 'informal report' on 16 December 1966.

For these reasons the appointing authority believed it necessary to take formal disciplinary action regarding the applicant's conduct in the service. By way of introduction to the disciplinary proceedings, and in accordance with Article 87 of the Staff Regulations of Officials, he was heard on 10 January 1967 by three officials authorized by the Commission for this purpose. The following are the points covered by this hearing: unpunctuality and unjustified absences, failure to return a periodic report and performance of his duties at the library. On 5 April 1967 the Commission formally decided to hold disciplinary proceedings. On 13 April the Commission submitted to the Disciplinary Board its report on the conduct of the applicant which had given rise to complaint. This report sets out and comments upon the points which form the subject of the hearing of the applicant. The Disciplinary Board was set up on 17 April and began its work at the first meeting on 28 April, during which an inquiry was ordered. The applicant subsequently gave evidence on 1 June 1967 and further meetings of the Disciplinary Board took place. During the last meeting, which took place on 21 June, several witnesses were heard and the applicant's lawyer was allowed to make final oral address. On 23 June 1967 the Disciplinary Board transmitted to the Commission its opinion on all the facts of the case. This opinion refers to the applicant's failure to comply with the obligations involved in the performance of his duties at the library, his unjustified absences, his unpunctuality and his failure to return the periodic report. The disciplinary measure proposed consisted of downgrading the applicant with classification in Grade A7, Step 6. A final hearing of the applicant was subsequently to be held, and on 22 June 1967 the Commission entrusted responsibility for its conduct to the Director of the Directorate-General for Administration and Personnel. The applicant was to be heard on 29 June 1967 but in the event the hearing could not take place, as he failed to appear. On 4 July 1967, without having heard the applicant, the Commission decided to penalize his failure to comply with his obligations as set out in the report of the Disciplinary Board, to order that the most serious disciplinary measure be taken, namely removal from his post, and to fix 1 August 1967 as the date of his dismissal. The applicant was informed of this decision by letter of 5 July 1967 from the Directorate-General for Administration and Personnel. It is this decision which forms the subject of the application which I have now to examine. It was received at the Court on 13 October 1967 and in it the applicant claims that the Court should:

1. Declare void and of no effect the proce-

dure followed before the Disciplinary Board, the opinion delivered by the Board on 23 June 1967 and the decision of the Commission of 4 July 1967 removing the applicant from his post;

2. Declare that as from 1 August 1967 he has the right to receive his salary and all the benefits attaching to his position as an official;

3. Order the Commission to pay the sums owing under this head, that is, BF 100 000, subject to his right to vary this sum in the course of the proceedings;

4. Order the Commission to pay the sum of BF 25 000, by way of damages in respect of the material damage suffered, subject to his right to vary this sum in the course of the proceedings;

5. Order the Commission to pay the sum of BF 100 000, by way of damages in respect of the non-material damage, again subject to his right to vary this sum in the course of the proceedings.

In support of these conclusions the applicant has put forward an imposing array of submissions which I shall examine more closely. He refers principally to alleged irregularities in the disciplinary proceedings. Secondly, he questions the correctness of certain findings contained in the disciplinary decision. Finally, he criticizes the fact that certain extenuating circumstances were not taken into consideration.

The Commission has contended that the entire application should be dismissed as unfounded.

Legal consideration

To begin the legal consideration of this case, in which the Commission itself considers no problem of admissibility to exist, it appears appropriate to start with a consideration of the application for annulment. I shall do this in three stages, considering first a group of complaints concerning the procedure, then the observations concerning the accuracy of the Commission's findings and finally the considerations concerning the severity of the disciplinary measure.

A — The application for annulment

I — *Complaints concerning the procedure*

1. Infringement of the second paragraph of Article 4 of Annex IX to the Staff Regulations of Officials

The applicant argues, first, that during the disciplinary proceedings, the right to call witnesses before the Disciplinary Board, conferred on him by virtue of the second paragraph of Article 4 of Annex IX to the Staff Regulations of Officials was infringed. Although he had submitted a list indicating at least eight witnesses by name, only three were heard.

In fact Article 4 of Annex IX to the Staff Regulations of Officials provides both for the institution and the official 'the ... right to call witnesses' ('citer des témoins', 'citare testimoni', 'getuigen oproepen'). We have, however, to consider whether the applicant is correct in his view that the corollary of this right is a binding obligation on the Disciplinary Board to examine the witnesses called, or whether, according to the Commission's view, the Disciplinary Board has the power, in its capacity as the body which conducts the inquiry, to use its discretion to choose which shall be heard, in so far as their examination appears necessary. It is clear that an unequivocal answer to this question cannot be given solely on the basis of the text of the provision referred to. In order to give this answer, therefore, it is necessary to refer to the significance and the role of disciplinary proceedings and also take into account legal codes of practice in national disciplinary matters, that is to say, it is necessary to apply a method of interpretation which has already been employed by the Court on several occasions when deficiencies and uncertainties appear in the Community law.

Both parties have made long statements as to the nature of disciplinary proceedings: the applicant stated that these proceedings are related to criminal proceedings and must therefore largely comply with the formal requirements which a court must observe. The Commission has pointed to the inquisitorial nature of the proceedings which, according to Community law, are implemented by an advisory body within

the context of the administration and with a view to the preparation of a disciplinary decision. If we were called upon to express our views on this point our opinion would be rather closer to that of the applicant, taking into account not only the disciplinary code of practice in force but also the attitude which the Court has adopted in principle in relation to the structure of administrative proceedings. In fact, the Disciplinary Board plays a very important role in the Community's law relating to disciplinary matters. It conducts at the request of the appointing authority inquiries which are intended to obtain a clear picture of disciplinary offences and to ascertain those factors which are of importance for the purpose of determining the severity of the disciplinary measure. It is this body which subsequently proposes the disciplinary measure to be taken and it is on the basis of its opinion that the appointing authority, which holds no inquiry of its own, finally decides which disciplinary measure is appropriate. Bearing these factors in mind, we need scarcely hesitate to say that the duties of the Disciplinary Board closely resemble those of a court of inquiry. If one also bears in mind that our case-law generally tends in favour of the scrupulous conduct of administrative proceedings and that it wishes to see all the necessary guarantees included for the officials concerned (especially as legal protection within the Communities is limited to a single court), and if one realizes the serious effects of the disciplinary measures which may, if necessary, involve removing the official from his post, one is surely forced to accept the view that disciplinary proceedings must, as far as possible, follow those which take place before a court of justice. This does not, however, enable me to give a final verdict on the complaint with which we are presently concerned, because the applicant's argument can only be successful if it can be shown that proceedings akin to court proceedings must necessarily incorportate the very principle postulated by the applicant. I consider doubts may justifiably be entertained on this point.

In order to demonstrate my point of view I shall not undertake a general survey of comparative law on the subject of the disciplinary proceedings which, on certain points, show, considerable differences in the various Member States, but I shall merely refer to German law by acknowledging, following eminent specialists[1], that it is here that the judicial character of disciplinary proceedings is the most marked. Indeed, in its latest version, that of 20 July 1967, the 'Bundesdisziplinarordnung', which also deals with the rules which concern us here, states in paragraph 68 that 'The Bundesdisziplinaranwalt and the official may request a further examination of witnesses and experts and may also request other evidence to be taken', and in paragraph 74, as regards the principal hearing before the 'Bundesdisziplinargericht', it also provides that 'applications for evidence to be taken must be made in accordance with paragraph 68, unless the taking of such evidence is inadmissible or the fact to be proved is obviously of no relevance to the decision or is already proved or can be presumed to be true or unless the means of proof cannot be procured'. This seems, at least at first sight, to provide an important argument in favour of the truth of the applicant's argument. It must not be forgotten, however, that paragraph 68 also provides that 'The evidence must be accompanied by an indication of the facts of which it is desired that evidence be taken', which is clearly intended, as is quite reasonable, to impose a certain limit on the duty to take evidence. In other words, the 'Bundesdisziplinargericht' is only bound to grant applications for evidence to be taken if the applicant gives clear particulars of the facts on which he considers elucidation to be necessary and, let me add immediately, if he also explains the reasons why the fact in question must be regarded as relevant to the disciplinary proceedings. It is clear that this is the only means of avoiding prolonging the disciplinary proceedings in an arbitrary manner and, therefore, of slowing them which does not involve undue restriction on the rights of the person concerned to defend himself.

1 — Cf. Belgian Institute of Administrative Science: L'exercice de la fonction disciplinaire dans les administrations centrales des pays du marché commun, p. 71.

If we now apply to the present case this principle which, let it be noted, is applicable in national law in respect of genuinely *judicial* proceedings and which for this reason may not necessarily apply in all its severity to disciplinary proceedings within the Community, we reach the following conclusions. During the disciplinary proceedings the applicant himself, after having been invited on 8 May 1967 to call witnesses with an indication of the facts on which they were to be examined, addressed a letter on 1 June 1967 to the Chairman of the Disciplinary Board in which, 'subject to subsequent consultation with his Counsel' ('sous réserve d'une consultation ultérieure avec mes défenseurs') he drew up a *provisional* list of witnesses. This list refers to a series of people by name; other witnesses are not indicated by name but the facts of the case enable them to be easily identified. Finally, the list refers in a general way to 'various other persons ... in so far as is necessary or expedient' ('diverses autres personnes ... suivant la nécessité ou l'opportunité'). In addition, for each person, a reference to an attached list of 45 documents (memoranda, letters, reports, notes, complaints, interdepartmental memoranda, periodic reports, integration report and comments thereon) indicates the facts to which their evidence is to refer. Following this, a letter of 13 June informed the applicant that three of the witnesses whom he had called were to be heard. This hearing finally took place during the meeting of the Disciplinary Board on 21 June in the presence of the applicant's lawyer, who subsequently submitted his final oral arguments.

What is the result of all this? First, I have the impression that it is scarcely possible to speak of a precise indication of the facts on which the witnesses were to be heard and an explanation of their importance to the decision, as the applicant forced the Disciplinary Board to form its own opinion on this point from a mass of documents. This certainly does not constitute the correct way in which witnesses should be called and could, at the least, have resulted in the Board's being obliged to reject expressly the application for evidence to be taken; moreover, the applicant did not indicate the connexion between facts which required to be elucidated and the witnesses whom he was calling even during the proceedings before the Court. What is more, there is the fact that in his final oral arguments, the applicant's lawyer did not emphasize the importance of the original application for evidence to be taken, although he believed it necessary to have the inquiry extended by producing various documents. It will no doubt be possible to take this into account by alleging that it is impossible to put forward a complaint during proceedings before a court when it has not been invoked before the Disciplinary Board, because, although this principle exists in civil procedure (cf., for example, paragraph 295 of the 'Zivilprozeßordnung'), in criminal law and in disciplinary codes of practice, a right is only extinguished in particular circumstances (for example, in case of fraud). I do not consider this fact to be of great importance, however, as, in the letter which he sent to the Disciplinary Board on 1 June 1967, the applicant himself reserved the right to hold subsequent consultations with his lawyer and only spoke of a 'provisional list of witnesses'. As, in spite of this and even after notification of the Board's decision of 13 June 1967 to hear only some of the witnesses called, the applicant and his lawyer did not react by repeating their original application, the only interpretation which the Disciplinary Board could make of this attitude is that the applicant was not insisting that the application for evidence to be taken be allowed in full.

Consequently, in view of the course taken by the proceedings which I have described and even applying rigorous criteria, it cannot be maintained that the Disciplinary Board infringed Article 4, Annex IX, and for this reason the first submission must be rejected.

2. Infringement of Article 6 of Annex IX to the Staff Regulations of Officials

Secondly, the applicant considers that in certain respects the inquiry conducted during the disciplinary proceedings failed to comply with the principle that each side must be able to state its case and reply to the case of the other side. In making this statement he is referring to two factors: first, the fact that the Disciplinary Board required documents to be produced which were con-

sidered and summarized by the rapporteur in his absence; secondly, a report made by a member of the Disciplinary Board on the 'Bird' project, for which the applicant had formerly been responsible. This had also taken place in his absence and without any summary appearing in the minutes which were sent to him.

In order to examine this complaint we must consider Article 6 of Annex IX to the Staff Regulations more closely and seek to determine what took place during the disciplinary proceedings.

According to Article 6, the Disciplinary Board may order an inquiry 'in which each side can submit its case and reply to the case of the other side'. Properly understood this provision gives expression to the principle that, in disciplinary proceedings, only the outcome of an inquiry on the subject of which the official concerned has been able to express his opinion may be taken into account, just as in criminal proceedings in which, as you are aware, judgment may only be based on the findings which formed the subject of the oral proceedings.

As regards the request for certain documents to be produced in order to elucidate certain facts, the only meaning which can be given to this principle is that the official concerned must also be aware of the content of the documents and have the right to submit his observations concerning them. On the other hand, our law in disciplinary matters nowhere prescribes that these documents must be read or summarized during a special meeting of the Disciplinary Board and in the presence of the official charged, nor that he must subsequently be given the opportunity to discuss them orally, although in certain cases this may be advisable in order that the facts be carefully elucidated. However, as the applicant in fact received copies of the documents required and as he was able to submit his observations on them, it may be said that in any event the conditions laid down by Article 6 have been fulfilled. All the applicant's demands over and above this virtually amount in fact to a claim to be present when the Disciplinary Board *assesses* the written evidence and *draws conclusions therefrom.* This would amount to participation in the *deliberation*, which is clearly as impossible in disciplinary proceedings as in judicial proceedings.

As regards the other complaint concerning the alleged report on the 'Bird' project made in the absence of the applicant, it is doubtful as the Commission has argued whether this report really constitutes an inquiry within the meaning of Article 6, that is to say, the ascertaining and elucidation of facts relevant to the decision. In my opinion the Commission has amply shown that it acted merely in order to obtain an objective scientific clarification of the *subject* of the 'Bird' report (which the applicant obviously knew, as he had taken part in its preparation) and to provide the members of the Disciplinary Board with the necessary means of comprehension in order to assess this report. It is clear that a measure of this type may be the subject of the purely internal deliberations of the Disciplinary Board. However, to avoid leaving any unfavourable impression, it would perhaps have been better for these explanations also to have been given in the presence of the applicant. However, the fact that this was not done and the applicant was not given the opportunity to make the statements which he considered necessary certainly cannot be regarded as a violation of his right under Article 6, to state his case with regard to the measures of inquiry taken by the Disciplinary Board.

Consequently, contrary to the view held by the applicant, the disciplinary proceedings must be regarded as having taken due account of his right to state his case so that his second complaint concerning the procedure is also unfounded.

3. Infringement of the rights of the defence

The applicant alleges as his third complaint that his lawyer was not allowed sufficient time in which to prepare his oral arguments, in that he had to submit them only three-quarters of an hour after the final examination of the witnesses.

If, as seems to be the case at first sight, this complaint must be assumed to concern only the opportunity to prepare the oral arguments, it is surely amazing. Preparation of the defence in fact begins as soon as the first measure is taken in the disciplinary proceedings, that is, the hearing which is held

by virtue of Article 87 of the Staff Regulations of Officials. It continues after notification of the report which opens the disciplinary proceedings (it was in fact on 24 April, a short time after this notification, that the applicant obtained the assistance of a lawyer). The defence is completed after the various measures of inquiry have been carried out (such as the procuring of certain documents, which took place a considerable time before the last meeting of the Disciplinary Board) and finally all that is required is to take account of the last findings established as the result of the examination of the witnesses, a task for which, in this instance, the applicant's Counsel certainly had sufficient time, in view of the brief nature of the evidence taken. It is often different in criminal matters, that is, the oral arguments are submitted immediately after the examination of the witnesses, even in cases in which the file does not yet contain 'the minutes of this examination. In any case, when a lawyer believes that he has insufficient time avilable, one may expect him to say so in order to safeguard the rights of the defence. However, he did not do so in the present case.

However, on a closer examination of the matter, it may be seen that the applicant's complaint cannot be understood in the sense which I have just described; it in fact refers to the impossibility of putting the oral arguments in *written* form and of submitting this document to the Disciplinary Board for transmission to the appointing authority which is required to take the decision. Some additional observations are necessary on this point.

First, apart from the fact that written observations had not been submitted earlier by the applicant's lawyer, one might point out that if it appeared appropriate or necessary for the purposes of the disciplinary proceedings for the final oral arguments to be recorded in writing, this could be done by means of a tape-recording (which did not occur) or, and this is more important, by the *subsequent delivery* of a written note, a procedure for which the necessary time was available since, after the oral arguments were submitted on 21 June, the Disciplinary Board only delivered its opinion on 23 June and only communicated it to the appointing authority on 26 June. Moreover, in the law of the Community on disciplinary matters, it is not necessary for the final oral arguments submitted to the Disciplinary Board to be recorded in writing, as they are intended for this Board alone and not for the appointing authority. Article 7 of Annex IX clearly indicates that it is on the basis of all the inquiries made and the applicant's defence that the Disciplinary Board must form its views which it communicates to the appointing authority in the form of an opinion. For its part, in drawing up its final decision the appointing authority relies solely on this opinion and on the hearing of the official concerned (at which, in the view of the Commission itself, his lawyer may be present). On the other hand, there is no provision to the effect that the entire disciplinary file shall be submitted to the appointing authority and that this body shall form a judgment after making a complete examination of it, as if it constituted a disciplinary tribunal of second instance.

Consequently, the complaint in which the applicant alleges that the person chosen to assist in his defence had neither the time nor the opportunity in which to prepare his oral arguments properly must fail in its entirety.

4. Infringement of Article 7 of Annex IX to the Staff Regulations of Officials (hearing of the applicant by the appointing authority)

As you are aware, the third paragraph of Article 7 of Annex IX to the Staff Regulations of Officials provides that the official concerned must be heard after the opinion of the Disciplinary Board has been submitted to the appointing authority and before this body comes to its final decision on the disciplinary measure appropriate.

According to the intention of the Commission, as manifested by its decision of 22 June 1967, this hearing was to be conducted by an official appointed for this purpose from the Directorate-General for Administration and Personnel. As soon as this decision was taken, the official in question endeavoured to contact the applicant. After a preliminary failure in his attempt to do so, he succeeded on 27 June 1967. An interview took place, during which the applicant received the disciplinary file, the opinion of the Disciplinary

Board and the minutes of its meetings. In addition, it appears that it was agreed to hold a further meeting on 28 June for the purposes of the hearing. It proved, however, impossible to hold this meeting: after the appointed hour the applicant informed the official by telephone that his lawyer, whose presence he required, was not free. A further appointment was therefore fixed for 29 June at 11 a.m. During this telephone conversation the applicant emphasized that he was suffering from toothache and wished to leave Brussels for Ispra as soon as possible for treatment by his dentist. Indeed, the hearing fixed for 29 June did not take place. Instead of seeing the applicant, the official who was entrusted with the task of conducting the hearing received a letter sent by him on 28 June to explain that he could not appear at the hearing as a result of toothache. No further word was heard from the applicant until a letter sent from Ispra on 2 July 1967 was received at Brussels on 5 July 1967, that is, on the date on which the official responsible for conducting the hearing had already prepared and sent a report on the matter to the Commission, in the light of which, on 4 July, this body decided to impose the contested disciplinary measure on the applicant.

This depiction of the course of the proceedings raises a series of delicate questions. Of course this is not so as regards the objections by means of which the applicant points to the absence of specific implementing provisions (within the meaning of Article 110 of the Staff Regulations of Officials) for the conduct of proceedings at the hearing, in particular of provisions concerning the period prescribed by the summons for the official's attendance and, when the official fails to appear, the possibility of taking a decision without hearing him after he has previously been warned to appear. It might be replied that the procedure for the hearing may be implemented even in the absence of particular provisions, that the applicant was given reasonable notice to attend and that it is obviously possible to take a decision without having heard the official concerned when, without any excluse, he fails to appear.

On the other hand, the applicant might well have difficulties in explaining the position if it were necessary to discover whether he really had an urgent reason preventing his appearance and whether he gave in good time notice of this fact which was *prima facie* credible, as this is the only possible way of detaining a new date for the hearing. As yet, the applicant has not brought irrefutable evidence that he had an urgent reason which prevented him from attending on the date fixed for the hearing, since he merely (and then only when the application was lodged) produced a dental certificate stating that from 6 May 1967 he had been undergoing treatment. In addition, one might also wonder whether the applicant made this excuse within a reasonable time since, apart from the letter addressed on 28 June to the official entrusted with the hearing, his only communication was a letter of 2 July sent from Ispra in which he stated that he was ready to appear at the hearing and which arrived at Brussels after the last meeting during which the Commission was able to issue decisions, for, as we know, its mandate expired on 5 July. If the legality of a delegation of the power to conduct the hearing is accepted, it would be necessary to find that the hearing did not take place as a result of the applicant's conduct which he failed to seek to excuse in good time and with convincing reasons and that consequently there is no procedural defect to justify the annulment of the disciplinary measure in question.

However, this is not the main problem raised by the complaint which I am examining at present. The most important question is whether the Commission actually had the right to delegate power to an official to conduct the hearing provided for in Article 7 of Annex IX or whether it had to conduct it itself. If the Commission does not have such power of delegation then the failure to hear the applicant must be imputed to it alone, since it clearly demonstrated its intention not to conduct the hearing itself and it must be found that there was an infringement of procedure which justifies the annulment of the disciplinary measure in question.

As regards this question, which I consider to be the most important in this case, the text of Article 7 of Annex IX appears to favour the applicant's argument, in par-

ticular when it is compared to Article 87 of the Staff Regulations. Although Article 87 states that 'The official concerned shall be heard before such action is taken', which does not exclude delegation (as was the case in the first hearing of the applicant), the third paragraph of Article 7, on the other hand, uses the following form of words: '*it* [that is, the appointing authority] shall first hear the official concerned', which appears to imply the need for a *direct* hearing. The same applies to the interpretation of the French text of the Staff Regulations which states, on the one hand, in Article 87: 'l'intéressé doit être préalablement entendu'; and on the other hand in Article 7 of Annex IX: 'l'intéressé ayant été entendu par *elle*' (that is to say, the appointing authority). In addition, this interpretation finds support in the *ratio legis* of Article 7. This Article is intended to guarantee that, just as in criminal proceedings, before a disciplinary decision is adopted the person concerned shall have the opportunity to be heard by the authority which is required to make the decision, as it is not impossible for the personal impression, which may be made on this occasion, to exercise an influence on a decision which may be difficult, while this impression could only be transmitted inadequately by a third person. Furthermore, it would be hard to envisage the possibility of a delegation in the context of the system presently in force. As the main stage of the disciplinary proceedings, including the first hearing of the official concerned, is conducted before a body of officials who only play an advisory role, there would be no sense in entrusting the final hearing of the person concerned to an official who would this time be acting *alone*. In this regard the applicant rightly speaks of an illogical 'duplication'.

Finally, it cannot be maintained in opposition to the interpretation which I have so far given that, if the Commission must itself conduct the final hearing of the official concerned in disciplinary proceedings, this represents extra work which it cannot be required to do, having regard to the extent of its other duties. This argument carries little weight in the light of the limited number of serious disciplinary proceedings and in particular the fact that in its capacity as appointing authority (at least as regards Category A) the Commission has reserved to itself the power to take decisions in routine matters under the law relating to its officials which certainly cause more work. However, if the Commission (or other institutions) were really to be regarded as overworked by the implication of the rules of procedure under the law relating to disciplinary matters, the only remedy would lie in the delegation of the power to take the disciplinary measures themselves. As long as this remedy has not been envisaged it is impossible to depart from the principle that the power to take decisions in disciplinary matters and the final hearing of the official concerned are both matters for the same body.

Of course, taking the applicant's conduct into account, the result to which I am led by the abovementioned considerations can scarcely be regarded as satisfactory. However, in the light of the importance of the procedural rule which is at issue, there is no other possibility than to regard the failure to hear the applicant as a serious procedural irregularity which, although it does not lead necessarily to the annulment of the disciplinary proceedings in their entirety, in particular the opinion of the Disciplinary Board, renders it necessary for the disciplinary decision taken by the Commission to be annulled.

II — *Accuracy of certain findings made by the Commission in the disciplinary decision*

In view of this unequivocal result, I need only make a relatively brief consideration of the other submissions put forward in support of the application for annulment.

1. The alleged contradiction between the findings contained in the disciplinary decision and the results of the inquiry conducted during the disciplinary proceedings

This concerns in particular the applicant's complaint that, when the contested decision states that he showed no initiative in the service of the library at Ispra and that he even refused to carry out certain work which was requested of him, this contradicts the statement made by the witness, Mr Eder,

and certain of the documents submitted during the disciplinary proceedings and is therefore incorrect, as his reference to the level of the work requested of him was not a pretext but a perfectly justified protest.

On reading the evidence given by this witness during the disciplinary proceedings we may see immediately that it provides only information regarding a specific task which had been entrusted to the applicant and on the outcome of that task, but that it contains nothing enabling an opinion to be formed as to the initiative shown by the applicant in the library and thus to confirm the alleged contradiction.

As regards the alleged contradiction between the findings contained in the contested decision and the documents involved in the disciplinary proceedings, in particular as regards the refusal of the applicant to carry out the tasks which he had been requested to assume, it must be said that it is impossible to verify this allegation as no precise indication has been given of the documents in question.

Finally, in the absence of detailed and precise information, I am also unable to review the validity of the applicant's observations as regards the level of his duties at the library. Let me merely reply to the applicant's observations that they do not appear to have been submitted as clearly during the disciplinary proceedings themselves, and that in these proceedings reference was only made to *doubts* which might be harboured in this regard. This explains the following recital of the opinion of the Disciplinary Board: 'The *doubt* which may be expressed by an official as regards the level of his post in no way relieves him of the obligation to carry out the work for which he is responsible'.

The submissions which I have just considered, therefore, provide no additional ground on which to annul the decision.

2. Did the applicant previously receive several warnings of which he took no notice?

It is pointed out in the disciplinary decision that, in the assessment of the applicant's conduct, the fact that on several occasions in the past he was reminded in vain of the need to fulfil the obligations of his post had to be regarded as an aggravating circumstance. In the course of the action the applicant observed that this finding is inaccurate, since he in fact received only one warning (that contained in the letter of 23 June 1965 addressed to him by the Directorate-General for Administration and Personnel) before he took up his post at the library at Ispra, that is, at a period which is not involved in the disciplinary proceedings.

On this point also a consideration of the file shows immediately the applicant's point of view is untenable. The report opening the disciplinary proceedings expressly refers to 'serious criticisms' ('graves critiques') to which the applicant's conduct gave rise on several occasions. Furthermore, at least five schedules to this report clearly show that even after his entry into the service of the library and after a first reprimand the applicant was reminded on several occasions of the necessity to comply with the obligations of his post, whether it be a question of unauthorized absences, of respect for office hours or of the return of the 1965 periodic report. These documents also speak of several *oral* warnings addressed to the applicant. It is thus impossible to question the accuracy of the Commission's finding, as we are clearly dealing with warnings which must be taken into consideration not only when they issue directly from the appointing authority, but also when they are found necessary by the immediate superiors of the official concerned.

III — *The degree of severity of the disciplinary measure*

A third and final group of complaints put forward in support of the application for annulment consists of considerations concerning the degree of severity of the disciplinary measure: to use the terms employed by the applicant, they concern the fact that the Commission did not take extenuating circumstances into consideration, although the opinion of the Disciplinary Board did take them into account in order to propose a less severe disciplinary measure than that which was imposed.

On this point I need not spend much time on the question whether, as in criminal law, the law relating to disciplinary matters ac-

knowledges in principle the concept of extenuating circumstances. Since, particularly in disciplinary proceedings *the whole* of the applicant's conduct in the service must, in order to reach a proper decision, be taken into consideration, it is quite possible for good work and other factors to influence the general judgment made of him and lead to the adoption of a less rigorous disciplinary measure than the most severe which might be imposed. This may be regarded (even if it is not strictly accurate) as the consideration of extenuating circumstances. On this point the applicant considers that it is necessary to take into account two factors which were wrongly neglected by the Commission.

1. The express promise which he made to the Disciplinary Board to return the periodic report within the shortest possible time

The failure to return the periodic report is presented in the opinion of the Disciplinary Board as an undisputed fact. On this point the opinion reads as follows: 'However, during the hearing Mr August Van Eick undertook to return this report within the shortest possible time. This incident constitutes evidence of ill will on the part of Mr August Van Eick'.

The applicant considers that, logically, taking account of the word 'however', the opinion should have read not 'ill will', but rather 'good will'. He maintains, therefore, that the opinion of the Disciplinary Board contains a manifest error. It intended to take an extenuating circumstance into account and the Commission wrongly refused to accept it, without giving any reasons for this attitude in its disciplinary decision.

This is, however, reasoning which I can scarcely follow. I do not see how the fact that after several fruitless reminders the applicant finally stated during the disciplinary proceedings that he was prepared to return the periodic report was a fact on the basis of which his behaviour could be assessed more indulgently. The applicant had only stated that he was prepared to carry out an obligation which is of itself binding on any official.

Consequently, even supposing that in this respect the Disciplinary Board genuinely wished to take note of an extenuating circumstance (although the text of its opinion prevents my believing this), the fact that the Commission did not concur in its point of view could not be regarded as an incomprehensible departure or one for which reasons must be given, from the opinion of the Disciplinary Board, especially as the matter did not go beyond a simple promise and, as we have learned, the report has still not been returned.

2. The applicant's disappointment when the 'Bird' project was discontinued

The same applies to the Disciplinary Board's finding that the applicant's conduct must be assessed in the light of the discontinuance of the 'Bird' project to which Mr Van Eick devoted his energies until 1962. This explained a certain disappointment and bitterness on the part of the applicant in the light of which it might be possible to take a more lenient view of his shortcomings. This is another consideration which the Commission did not take up and I consider that on this point also it cannot be criticized.

Essentially, the assessment of an official's conduct made for disciplinary purposes involves value judgments, all the details of which cannot subsequently be reviewed in the course of legal proceedings. The only factor to be verified is whether the assessment appears on the whole to be reasonable, convincing and comprehensible. This appears to be the case here. We must not forget that the 'Bird' project was abandoned in *1962*, while the disciplinary proceedings concerned the applicant's behaviour in *1966*. It is thus perfectly understandable that because of this time factor the Commission refused to regard it as a genuine extenuating circumstance which might justify leniency towards the applicant's subsequent conduct. Moreover, the Commission could not be required to give special reasons for making an assessment which differed from the opinion of the Disciplinary Board. If, as a general rule, our case-law establishes the principle that the reasons for a decision need not refer in detail to the considerations taken into account by an advisory body which is taking part in the preparation of

that decision, there is no reason to apply a different rule as regards disciplinary proceedings.
Consequently, the applicant's observations concerning the degree of severity of the disciplinary measure do not provide any additional ground of form or substance for annulling the disciplinary decision.

B — The claims for the payment of arrears of salary

In heads 2 and 3 of his conclusions the applicant claims the payment of his salary and the other benefits which would have been payable had he remained in his post.
If you accept my opinion and annul the disciplinary decision, that is to say, the decision to remove the applicant from his post, you will also have to uphold the claims for the payment of arrears of salary since, as a result of the annulment of the decision to remove him from his post, the applicant must be regarded as still in the service of the Commission.
However, I consider that the Court should not order the payment of a specific sum as claimed, but should leave the Commission to calculate the details of the arrears of salary.
As regards the question whether it is reasonable for the Court to find that the sum to be calculated must be reduced by the amount of the emoluments which the applicant had received from another employer since his removal from his post, this is doubtful if the evidence provided by the applicant on his application for legal aid is taken into account. I consider, however, that there is nothing to prevent the Court from making this finding, as it did in Cases 80/63 and 110/63 ([1964] E.C.R. 408 and [1965] E.C.R. 669 respectively), which, as you will remember, concerned refusals to integrate the applicant in each case. Furthermore, the Court should order that the sums paid to the applicant on his departure must be deducted, as their payment is not justified if he remains in office.

C — The claims for damages

Finally, I must deal with two heads of conclusions in which the applicant claims that the Commission should be ordered to make good the material and non-material damage caused to him by the disciplinary decision. On this point I can be very brief.

I — *Material damage*

The applicant is claiming the sum of BF 25 000, by way of compensation for the material damage suffered, on the ground that he was required to spend this sum for the purposes of his defence in the disciplinary proceedings.
On this point it must be noted that Article 10 of Annex IX to the Staff Regulations of Officials expressly governs the question which party must bear the costs of disciplinary proceedings. Under this article the official concerned must only bear 'costs incurred on [his] initiative ... in particular fees to a person chosen for his defence from outside the three European Communities' where the disciplinary proceedings result in any of the measures provided for under Article 86(2)(c) to (g) of the Staff Regulations, while in all other cases the logical conclusion must be that it is for the appointing authority to bear the costs of the defence.
Of course, in this instance, annulment of the disciplinary decision removes the penalty which is a condition of the application of Article 10. Nevertheless since, as we have seen, the procedure followed before the Disciplinary Board shows no irregular features and since the opinion of this Board gives rise to no criticisms, the Commission must be expected to come to a fresh disciplinary decision after a proper hearing of the applicant. Consequently, it is only if no disciplinary decision were to be taken or if the applicant only received a warning or a reprimand that it would be necessary to come to a decision on the claims for costs which he submitted. At present, such a decision would be premature.
At the most, one might consider whether it is now possible to acknowledge that the applicant is entitled to compensation for the costs which he was led to incur in order to appear at the hearing fixed in violation of the Staff Regulations, on the grounds that his summons to this hearing constituted a *wrongful act*. It appears, however, that there

is no reason for such compensation to be paid. It is to be supposed that, on that occasion, the applicant was not required to pay any special fees to his lawyer: in fact, as no hearing took place, Mr Van Eick did not require the assistance of his adviser. As regards his travelling expenses it may be supposed that these have already been reimbursed, as a letter addressed to him on 26 June 1967 from the Director of the Research Centre states that 'The journey to Brussels may be declared as a mission'.
For these reasons, the conclusions in which the applicant claims the sum of BF 25 000 by way of compensation for the material damage suffered must be dismissed.

II — *Non-material damage*

The applicant claims the sum of BF 100 000 by way of compensation for the non-material damage suffered.
I consider, however, that this claim is unfounded. Even if it is accepted (and it is a view which may be defended) that the failure to conduct a proper hearing of the applicant constitutes a wrongful act or omission, nevertheless no evidence was brought to show that it is precisely this factor which caused the non-material damage suffered by the applicant. Furthermore, it must not be forgotten that the consequence of the annulment of the contested decision to remove the applicant from his post is that he must be regarded as remaining in the service of the Commission, and this may be considered to offset the non-material damage which he might possibly have suffered.
It is thus clear that his claims for compensation in respect of the non-material damage must be dismissed.

D — Summary

Here then are my conclusions:

The conclusions in which the applicant seeks the annulment of the decision of the Commission of 4 July 1967 removing him from his post are admissible and well-founded. The remainder of the application for annulment must be dismissed as unfounded, to the extent that it concerns the disciplinary proceedings and the opinion delivered by the Disciplinary Board on 23 June 1967.

The Commission must be ordered to pay the applicant the emoluments to which he would have been entitled had he remained in his post after 1 August 1967. If necessary, the arrears to be paid must be reduced by the amount of the net emoluments which he received from his occupation outside the Community after his removal from his post, as well as by the sums paid to him on his dismissal.

The applicant's claim for the sum of BF 25 000 by way of compensation for material damage must be dismissed.

The same applies to his claim for the sum of BF 100 000 by way of compensation for non-material damage.

As the applicant has been partly successful in his application I consider that it is justifiable to order the Commission to pay one half of the costs which he has incurred.