OPINION OF ADVOCATE GENERAL LENZ
delivered on 10 November 1993 *

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* Original language: German.

Mr President,
Members of the Court,

A — Introduction

1. In this case the Court of Justice is called upon to decide upon an appeal brought by the former official Henri de Compte (the applicant at first instance, hereinafter referred to as 'the applicant') against a judgment delivered by the Court of First Instance on 17 October 1991 (Case T-26/89). [1]

2. Until his transfer on 30 April 1982, the applicant was an accounting officer in the service of the Parliament (the defendant and respondent to the appeal, hereinafter referred to as 'the defendant'). In September 1982 irregularities of which the applicant was accused in the course of his ostensible responsibility for the members' cash office were referred for the first time to a disciplinary board. However, the proceedings were cancelled by the appointing authority by reason of a procedural error. After the completion of fresh proceedings the defendant in March 1984 imposed the disciplinary measure of removal from post which, upon complaint from the applicant, was commuted on 24 May 1984 to a more lenient penalty, namely downgrading to Grade A 7, Step 6. That measure was declared void by the Court of Justice by judgment in Case 141/84, delivered on 20 June 1985, [2] on the ground that witnesses had been examined in the absence of the accused or his legal representative. The defendant informed the applicant on 9 December 1986 of its intention to reopen the proceedings against him and after the applicant had again been heard (second paragraph of Article 87 of the Staff Regulations) and after a formal reopening of the disciplinary proceedings on 24 June 1987 the defendant, by decision of 18 January 1988 imposed the disciplinary measure of downgrading the applicant from Grade A 3, Step 8, to Grade A 7, Step 6.

3. That decision was based on a series of irregularities of which the applicant was accused in the course of the administration of a bank account of the Members' cash office. The facts regarding the administration of this bank account are uncontested on many points. They are set out in paragraphs 39 to 54 of the judgment under appeal, to which I refer.

4. The complaints upheld against the applicant include the following:

— opening an interest-bearing account with the Midland Bank, London, on 21 July 1980, and depositing therein a sum of UK £400 000 at 16% without prior authorization, accounting entries or entries regarding interest in the Parliament's accounts for 1980 and 1981;

— encashment without specific and valid justification on 4 September and

1 — [1991] ECR II-781.
2 — *De Compte* v *European Parliament* [1985] ECR 1951.

11 November 1981 of two cheques drawn on the Midland Bank for UK £17 189.15 and UK £35 176.98, which were paid by the Sogenal Bank (Société Générale Alsacienne de Banque) in Luxembourg in the form of BFR 2 700 000, DM 30 000 and FF 100 000; failure to record those operations in the Parliament's accounts during the 1981 financial year; registering them in the accounts on 28 February 1982 (six months late) on the accounts form in the Parliament's members' cash office in the total amount of BFR 4 136 125, although the withdrawal had been made in a number of currencies;

— failure to comply with the accounting officer's duty to effect expenditure only on production of proper supporting documentation and to ensure the safeguarding of the Parliament's assets. The absence of proper supporting documentation related to a discrepancy between the physical assets of the Parliament's members' cash office and the general accounts amounting to BFR 4 100 000, appearing after the entry of the BFR 4 136 125 arising from the encashment of the two cheques drawn on the Midland Bank.

5. The applicant's action against that decision, which was based on grounds concerning 'formal' and 'substantial' legality, was dismissed by the Court of First Instance in the judgment at issue. In this appeal the applicant repeats twelve of the pleas in law which he originally put forward and takes the view that the Court of First Instance, in rejecting them, failed to comply with Community law.

6. In the following discussion I shall deal as far as necessary with further details of the facts, the previous history and the relevant legal provisions. For the remainder I refer to the report of the Judge-Rapporteur. I shall deal with the individual grounds of appeal, hereinafter referred to as 'pleas', in the order chosen by the parties in their pleadings in accordance with the judgment at issue.

B — Discussion

Expiry of the limitation period

7. The applicant claimed before the Court of First Instance that the disciplinary proceedings which led to the contested decision were initiated after the expiration of the limitation period laid down by Article 72 of the Financial Regulation, which provides: 'Each institution shall be allowed a period of two years from the date when the account for revenue and expenditure is submitted to take a decision on the final discharge to be given to accounting officers for the transactions relating thereto'.

8. He claims that once that period has expired the discharge is granted by implication, that is, the accounting officer is released from his responsibility for the formal regularity of the accounts. Disciplinary proceedings involving merely formal complaints must therefore also be brought within two years (from 31 May of the year following the

financial year concerned) if they are to avoid being time-barred. In this case the proceedings were initiated only on 24 June 1987, which he claims is out of time not only in relation to the 1981 financial year (expiry on 31 May 1984) but in relation to 1982 as well (expiry on 31 May 1985). The applicant claimed that the disciplinary proceedings brought on 24 June 1987 could not be regarded as the reopening of earlier disciplinary proceedings.

9. The Court of First Instance pointed out first that the Staff Regulations in the relevant provisions (Articles 86 to 89 and Annex IX) had not prescribed any limitation period with regard to the initiation of disciplinary proceedings, whereas a limitation period must be laid down in advance by the legislature so as to fulfil its purpose of guaranteeing legal certainty. [3]

10. In the second place the Court of First Instance refers to the principle that disciplinary measures are independent of other administrative proceedings. In this connection it refers to the Order of the President of the Third Chamber of the Court of Justice in Case 141/84R, [4] where a distinction was made between the grant of final discharge under Article 72 of the Financial Regulation and the disciplinary proceedings. The alleged implied final discharge after a period of two years could not be a bar to disciplinary proceedings against the applicant.

11. Finally the Court of First Instance takes the view that even if the applicant's argument were to be accepted, the plea of limitation would still have to be rejected. The disciplinary proceedings were brought before 31 May 1984, or to be more exact on 13 April 1983 when the President of the Parliament referred to the disciplinary board the report on the complaints against the applicant. The proceedings led to the decision of 24 May 1984, which the Court of Justice subsequently declared void. The reopening of the disciplinary proceedings on 24 June 1987 on the basis of that report could not be regarded as a new reference to the competent authorities but must be regarded as the resumption of the proceedings from the point at which the procedural error established by the Court of Justice had occurred.

12. The applicant is challenging before the Court of Justice all three of the findings of the Court of First Instance to which I have referred. Let us deal first with the applicant's objections to the first two findings, concerning the relationship between the disciplinary proceedings and the proceedings for the grant of a final discharge within the meaning of Article 72 of the Financial Regulation.

13. The applicant repeats his arguments at first instance and expresses the opinion that the view of the Court of First Instance in this respect is wrong in principle. With regard to the question of a limitation period for the initiation of disciplinary proceedings

3 — In this connection the Court of First Instance refers to the judgment of the Court of Justice in Case 41/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661.

4 — *De Compte* v *Parliament* [1984] ECR 2575. By that Order the operation of the first disciplinary measure — of 24 May 1984 — was suspended until judgment in the main action.

it is necessary to take into account the scope of provisions other than those of the Staff Regulations, namely those relating to the subject-matter in question.

14. In my view these arguments put forward by the applicant cannot be accepted. To begin with, the premiss of the Court of First Instance to the effect that the Staff Regulations prescribe no exact period for the introduction of disciplinary proceedings is correct. The fact that the draftsmen of the Staff Regulations did not intend to lay down any such period may be seen from the fact that in Article 7 of Annex IX they laid down certain time-limits [5] in the interests of the speedy *progress* of proceedings once they have been started, but that there is no reference to a time-limit for their *initiation*.

15. As regards the time-limit laid down in Article 72 of the Financial Regulation, its clear wording shows that it relates to *final discharge*. To regard it at the same time as a time-limit for the *initiation of disciplinary proceedings* is in my view obviously wrong. In the first place it is conceivable that by reason of sharp practices on the part of the accounting officer or third parties it will be impossible to trace any irregularities in examining the question of the final discharge, but that they are only discovered (long) afterwards. That shows that the date of the initiation of the disciplinary proceedings depends on the circumstances of the individual case and cannot be subject to any fixed time-limit. In this connection it is significant that the applicant relates the validity of the time-limit he postulates exclusively to a case in which the disciplinary proceedings involve 'merely formal complaints'. [6] However, the question whether there is a strict and precise period of limitation must be judged according to objective criteria and cannot depend on the fortuitous circumstances of an individual case.

16. Then it must be stated, in agreement with the Court of First Instance, that the procedure for final discharge and that for disciplinary proceedings serve different purposes:

'Disciplinary proceedings are designed to safeguard the internal order of the public service. On the other hand, the delivery of a final discharge, as provided for under Article 72 of the Financial Regulation, is designed to verify officially the accuracy and propriety of the accounts and, more generally, their presentation and auditing, in order that an end may be put to the uncertainty regarding the liability of the accounting officer concerned for a given financial year.' [7]

17. It follows from this distinction that the relevant responsibility within the institution cannot be the same: for final discharge under Article 72 it is the institution itself which is responsible, whilst for the initiation of the disciplinary proceedings it is the authority determined under Article 2 of the Staff Regulations. Furthermore it is in accordance with this distinction that the aforementioned

5 — With regard to their nature, see paragraph 88 of the contested judgment and paragraph 53 below.

6 — See paragraph 60 of the contested judgment.

7 — Paragraph 69 of the grounds of the contested judgment.

provision was adopted under Article 209 of the EEC Treaty (now the EC Treaty) and the corresponding provisions of the other Treaties according to a procedure differing in essential points from the procedure envisaged by Article 24 of the Merger Treaty [8] for the adoption of the provisions of the Staff Regulations.

18. From the foregoing considerations it follows that the initiation of disciplinary proceedings cannot be subject to the same requirements of time as the final discharge even when questions of the merely formal regularity of the accounts are involved. The requirements of the legal certainty which is meant to be provided by the decision on final discharge under Article 72 of the Financial Regulation are the justification for the time-limit laid down in that article. On the other hand, for the preservation of the internal order of the public service it may be appropriate to start the disciplinary proceedings only when the decision under Article 72 has been taken and the responsibilities have thus been made clear. Such a procedure may moreover result for the official not only in disadvantages (in the form of a longer period of uncertainty) but also in advantages (in the form of the non-initiation of the disciplinary proceedings), if the final discharge is fully granted.

19. It follows from all these considerations that a disciplinary decision is not illegal solely because the proceedings were not commenced within the period laid down in Article 72 of the Financial Regulation.

20. In addition the applicant thinks that the Court of First Instance wrongly concluded from the fact that the two procedures are independent of one another that the alleged implied discharge after the expiration of a period of two years is no bar to disciplinary proceedings against the applicant. He states that the discharge has a minimum implication, namely to release the accounting officer from responsibility for the regularity of the accounts.

21. That argument is unsound. In so far as the applicant means it simply as a repetition — in a different form — of his assertion that the disciplinary proceedings must be initiated within the period laid down in Article 72 of the Financial Regulation, this argument must be rejected on the grounds already mentioned.

22. It is true that the applicant might also have meant that as, in the *decision regarding discharge* itself, the time-limit in Article 72 of the Financial Regulation had not been observed, he was discharged by implication, and disciplinary proceedings could therefore no longer be taken against him. That argument too must be rejected. In the first place it does not support the plea in question, according to which the disciplinary proceedings were commenced after the alleged limitation period had expired. Secondly the decision about the principle and scope of his discharge for the financial year 1981 was taken at the latest by the decision of 10 April 1984 [9] and thus within the time-limit laid down by the said Article 72. The incontestable overstepping of the time-limit for the 1982 financial year [10] did not in any

8 — Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities.

9 — See paragraph 30 below and footnote 15.

10 — See paragraph 33 below and footnote 20.

event have the effect that the applicant was deemed to have been discharged. To ascribe the effect of discharge to the fact that the time-limit was not observed is in my view not legally tenable. The Financial Regulation does not envisage such an effect. But without a provision in that sense it cannot be assumed that there will be such an effect. That would mean a considerable encroachment upon the institution's prerogative to examine the regularity of the work of the accounting officer and thus to guarantee the correct management of Community resources. Moreover, this case shows that the decision on discharge may take an extremely long time precisely when the question of irregularities has arisen. The applicant's argument about implied discharge might therefore result in the granting (fictionally) of such a discharge in the very cases in which there might be a special reason for refusing it.

23. That argument put forward by the applicant must therefore also be rejected.

24. Finally the applicant's complaints at the finding of the Court of First Instance that the disciplinary proceedings which led to the decision at issue were initiated on 13 April 1983 also fall short of the mark. The applicant here relies on the fact that after the judgment of the Court of Justice in Case 141/84, delivered on 20 June 1985, declaring the President's decision void, he was heard again in accordance with the second paragraph of Article 87. The disciplinary proceedings therefore were not, he thinks, contrary to the view of the Court of First Instance, resumed at the stage at which the procedural error established by the Court of Justice occurred, but at the initial stage, so that these were *new proceedings*.

25. That argument must be rejected. According to case-law the declaration that a disciplinary measure is void on grounds of a procedural error as a rule puts the procedure back to the stage at which the procedural error occurred. [11] The appointing authority may resume the proceedings as from that point until the final decision.

26. Of course it cannot in theory be ruled out that the appointing authority may in an individual case take the judgment of the Court as a reason for discontinuing the original proceedings and starting fresh ones. [12] But the answer to the question which of the two methods the appointing authority has chosen in a specific case lies in an *appreciation of the facts*, or more precisely of how it acts following the judgment declaring the proceedings void. In this case the Court of First Instance was guided decisively by the fact that the appointing authority had referred to the disciplinary board (which had committed the procedural irregularity established in the Court's judgment of 20 June 1985) the same report as on 13 April 1983.

27. It follows that by the argument we are now considering the applicant is contesting an appreciation of the facts by the Court of First Instance without either calling in question the legal criteria on the basis of which

11 — Judgments in Case 403/85 *F.* v *Commission* [1987] ECR 645 at paragraph 2; and in Case 13/69 *Van Eick* v *Commission* [1970] ECR 3, at paragraphs 8, 9 and 10; as regards the procedural error at issue at that time, cf. the judgment in Case 35/67 *Van Eick* v *Commission* [1968] ECR 329 at p. 342 et seq.

12 — That is the way in which the appointing authority proceeded in this case in cancelling on 14 January 1983 the proceedings which had been initiated on 30 September 1982.

the Court arrived at its appreciation or pleading other legal defects. However, an appeal against judgments of the Court of First Instance, which is restricted to matters of law, [13] cannot be based on such an argument. [14]

28. The applicant's criticism concerning the findings as to the date of the opening of the disciplinary proceedings therefore also fails.

29. The plea with regard to the expiry of the limitation period must therefore in any event be rejected.

The grant of the final discharge for the 1981 financial year

30. In his application the applicant relied on the fact that in a decision of 10 April 1984 [15] he had been granted a final discharge for the 1981 financial year. In the preamble to that decision the European Parliament had regard to the fact that:

'... all relevant information, including the letter of 6 June 1983, will be taken into account for the purposes of the 1982 discharge'. [16]

According to the operative part of the decision the Parliament 'grants the final discharge to the accounting officer of Parliament in respect of the 1981 financial year'.

31. In the applicant's opinion that decision by itself renders the disciplinary proceedings, which concerned exclusively charges regarding the formal regularity of the accounts, inadmissible and void.

32. In addition the applicant claimed in the application that it was immaterial that the discharge for the 1982 financial year had been granted him with a reservation concerning the very point at issue in this matter, namely the question of the BFR 4 million. [17] In that respect he referred principally to the fact that that question had been dealt with by the discharge effect of the decision to grant a discharge for 1981, or alternatively that he had been discharged for the financial year 1982, or in the further alternative that

13 — See Article 168a of the E(E)C Treaty and Article 51 of the Statute on the Court of Justice of the E(E)C, as well as the parallel provisions relating to the other two Communities.

14 — Judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339 at paragraph 12.

15 — OJ 1984 C 127, p. 43.

16 — That was a letter from the President of the Parliament asking the Chairman of the Committee on Budgetary Control, with reference to the complaints made in the disciplinary proceedings, to defer the decision on the final discharge of the accounting officer for 1981: see Recital G. in the preamble to the decision of 10 April 1984 and paragraph 13 of the contested judgment.

17 — See the second and third indents of paragraph 4 above.

on his transfer on 30 April 1982 and his replacement by a new accounting officer there had been no rendering of accounts so that the appointing authority itself had made it impossible to establish for the financial year 1982 what was within his sphere of responsibility and what within that of his successor. [18]

33. In his reply the applicant also went into detail with regard to the Parliament's decisions of 18 May 1983 [19] and 11 July 1986. [20] The first dealt with the 1981 financial year and contained the final discharge of the President and the statement that it was necessary to postpone 'final discharge to the accounting officer to enable the Committee on Budgetary Control to effect certain work'. The decision of 11 July 1986 related to the 1982 financial year. In it the Parliament granted final discharge to its President and authorized him 'to grant discharge to its accounting officers ... excluding therefrom the sum of ECU 91 263 and the matters relating thereto described in the letter from the President of the Court of Auditors dated 7 November 1985 and the accompanying advice of the Court of Auditors'. [21] In the applicant's opinion:

the discharge to the President (cf. the decision of 18 May 1983 for the year 1981 and that of 11 July 1986 for the year 1982) implies at the same time the discharge of the accounting officer;

the final discharge cannot be partial (cf. the decision of 10 April 1984 for the year 1981 and that of 11 July 1986 for the year 1982);

the validity of a decision granting final discharge cannot be restricted by a recital in the preamble to the decision (cf. the decision of 10 April 1984 for the year 1981).

34. The Court of First Instance [22] observed first that the disciplinary proceedings were independent of the final discharge procedure. Consequently even if the decisions of 18 May 1983 and 10 April 1984 had contained a final discharge, either expressly or by implication, for the 1981 financial year, that could not preclude the institution of disciplinary proceedings against the applicant, particularly since those proceedings were instituted on 13 April 1983, [23] that is, prior to the decisions in question. The Court of First Instance then examined both the said decisions. It rejected, by reference to the wording of the decision, [24] the applicant's view that the discharge to the President in the decision of 18 May 1983 automatically implied a discharge for the accounting officer. With regard to the decision of 10 April 1984 it declared that its meaning was to be deduced by reference to the preamble, [25] according to which the Parliament

18 — Paragraph 73 of the contested judgment.

19 — OJ 1983 C 161, p. 98.

20 — OJ 1986 C 227, p. 154.

21 — In that opinion, provided at the request of the President of the Parliament, the Court of Auditors found that the accounting officer and the administrator of advance funds were liable for the deficit established for the 1982 financial year; see paragraphs 19 and 20 of the contested judgment.

22 — With regard to this paragraph, see paragraphs 79, 80 and 81 of the contested judgment.

23 — On that date a report about the contested complaints against the applicant was referred to the disciplinary board following the cancellation of the proceedings instituted in September 1982: see paragraph 2 above and paragraph 8 of the contested judgment.

24 — Paragraph 33 above.

25 — Paragraph 30 above.

had reserved to itself the right to comment, in the context of the discharge for 1982, on the points at issue. Finally the relevant financial year was not 1981 but 1982, since in 1981 no accounting entries had been made, whether relating to payment or recovery, in respect of the sum of BFR 4 136 125, [26] so that it was impossible, in checking operations at the end of that financial year, to determine whether there had been a surplus or a deficit. For the *1982* financial year, however, the authority to the President to grant a discharge to the accounting officers had been made subject to an express reservation. [27]

35. The applicant's criticism of these findings may be divided into three parts. First he repeats his argument with regard to the significance of the discharge decision for the disciplinary proceedings [28] and claims that those proceedings, now at issue, contrary to the statement of the Court of First Instance, had been instituted not on 13 April 1983 but only on 9 December 1986. [29] Secondly he thinks that the Court of First Instance did not answer his arguments concerning the significance of the discharge to the President, to the impossibility of a partial discharge and to the point that the purport of a discharge results only from the operative part of the decision. Thirdly, the Court of First Instance did not consider his argument that the appointing authority, for lack of a rendering of accounts on 30 April 1982, had made it impossible for itself to define his liability for the 1982 financial year as against that of his successor. The rejection of the plea in question by the Court of First Instance is therefore unlawful as the Court gave no reasons, or mistaken ones.

36. In this respect it should be observed that in paragraphs 80 and 81 of the contested judgment, the Court of First Instance came to the conclusion, on the basis of the wording of the decisions of 18 May 1983, 10 April 1984 and 11 July 1986, that the applicant received a final discharge neither for 1981 nor for 1982. In particular it found that the applicant's discharge for the financial year 1981 was made subject to a reservation according to which the complaints made in the disciplinary proceedings would be considered in the context of the discharge for 1982. The Court of First Instance found that there had been a similar reservation for the 1982 financial year, namely with regard to the authorization to the President to grant the accounting officers a discharge.

37. Those considerations would have been sufficient for a rejection of the applicant's ground of complaint now under consideration. I shall now show that they answer the applicant's pleas, so that there can be no objection to the rejection of this ground of complaint.

38. Contrary to the applicant's view, the Court of First Instance has complied with its *duty to provide a proper statement of reasons.* [30] It has actually given a satisfactory reply to the arguments put forward in the application.

39. First the question raised therein as to whether a discharge was granted to the applicant for 1981 and 1982, relates, as such, only to the *interpretation* of the relevant

26 — See the second and third indents to paragraph 4 above.
27 — See paragraph 33 above.
28 — Paragraph 20 above.
29 — See paragraph 2 above.
30 — See the judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339 at paragraph 29.

decisions. The applicant's argument in the application did not on the other hand give any reason to inquire whether these decisions were *permissible* in the form in which they were issued. In particular the Court of First Instance did not need to inquire whether the discharge could be issued in partial form and whether it could be refused to the accounting officer for the periods and amounts for which the President had received a discharge. The Court of First Instance was therefore entitled under Article 42(2) of the Rules of Procedure of the Court of Justice, which were at that time applicable by analogy, to leave out of account the grounds of complaint contained in the *reply*, in which these questions were raised. If the applicant had wished to raise these or other questions of law on this subject, which is marked by both difficult and complicated legal problems, on which there are few rules [31] and for which institutional practice has not so far been discussed in the case-law, he should have specified them clearly in his application.

40. Nor do I find in the contested judgment any failure to specify the reasons on which it is based as regards the argument in the application relating to the lack of a rendering of accounts on 30 April 1982. [32] In fact that argument does not concern the discharge of the applicant (for 1982) but the question whether the infringements alleged against him are *proved*. At no time did the applicant claim that this lack had the same effect as a discharge (which would at least have been, legally speaking, highly questionable). However, the question whether the applicant's liability could be proved (if necessary without the rendering of accounts which was in his view essential), was raised by him in a separate plea which the Court of First Instance examined in detail. [33] In the present connection the Court therefore rightly took into account only the arguments by which the applicant claims he was granted an express final discharge for the 1981 and 1982 financial years. [34]

41. It is in any event correct that the application raised the question of whether the purport of the decision of 10 April 1984 should be determined by taking its preamble into account. However, the Court of First Instance did deal with this in paragraph 80 of the judgment, even though only very briefly for lack of arguments substantiated by the applicant.

42. As therefore no objection can be found to the views of the Court of First Instance with regard to the duty to state reasons, the applicant's pleas of substance must now be considered briefly. As regards the Court's findings examined here, the applicant (apart from the argument already considered with regard to the absence of a rendering of accounts on 30 April 1982) simply repeats the arguments set out in the reply at first instance. In so far as those pleas had to be left out of account by the Court of First Instance as new pleas not contained in the application, [35] they cannot, under Rules 113(2) and 116(1) of the Rules of Procedure of the Court of Justice, be put forward by way of an appeal either. [36] All that remains therefore is to examine the applicant's argu-

31 — Neither the Financial Regulation (footnote 53) nor Regulation No 75/375 (footnote 54) directly clarifies these questions.

32 — Paragraph 30 above.

33 — Cf. paragraph 185 et seq. of the contested judgment; see also paragraph 189.

34 — See paragraph 78 of the contested judgment.

35 — Paragraph 39 above.

36 — See the judgment in Case C-18/91 P *V.* v *Parliament* [1992] ECR I-3997 at paragraph 21.

ment that the purport of the discharge granted (by the decision of 10 April 1984) was to be determined only by taking the operative part of the decision into account.

43. For form's sake let me refer to the fact that that argument, correctly understood, does not relate to the interpretation which the Court of First Instance, *as judge of the facts*, gave to the text of the decision in question. Instead the applicant is asserting a rule of law according to which reference may be made only to the operative part for the purposes of such interpretation.

44. However, he did not specify that rule. Nor is it possible to find any such provision in written Community law. In fact from the *nature* of a decision granting final discharge it may be deduced that the extent of the discharge must emerge *clearly and unequivocally* from the decision, in which respect it is surely possible to take into account whether the relevant passage is contained in the operative part or in the preamble to the decision. However, there is nothing to show that the Court of First Instance, in interpreting the contested decision of 10 April 1984 by reference to its preamble, ignored the requirement of clarity.

45. For all the foregoing reasons this plea must be rejected.

Infringement of the principle that proceedings must be brought within a reasonable period

46. *I.* In view of the applicant's pleas that the disciplinary proceedings had been instituted or continued, or both, subject to unreasonable delay, the Court of First Instance considered the various stages of the proceedings. First it excluded from his calculation 'the time spent by the applicant in preparing his defence before the Court of Justice'. [37] On the basis of this premiss it came to the conclusion that the question whether a reasonable time-limit had been observed could be raised on two occasions. The first concerned the period of eight months in which the first disciplinary board was considering the case (from 2 June 1983 to 10 February 1984); the second concerned the period of 18 months which elapsed between delivery of the judgment of the Court of Justice declaring his downgrading void and the despatch of the letter from the President of the Parliament requesting the applicant to give his observations in pursuance of the second paragraph of Article 87 of the Staff Regulations (from 20 June 1985 to 9 December 1986). [38]

47. *II. 1.* The applicant first claims that the disciplinary proceedings, which in any case concerned events which had taken place prior to his transfer on 30 April 1982, were instituted only on 24 June 1987, that is, more than five years later. That was therefore far in excess of any reasonable period.

48. Here it is sufficient to refer to my views with regard to the first plea, namely that the

37 — Paragraph 89 of the contested judgment.
38 — See previous footnote.

disciplinary proceedings, according to the findings of the Court of First Instance, which the applicant was unable to find any legal grounds for contesting, had begun on 13 April 1983. That argument of the applicant must therefore be rejected.

49. 2. The applicant's second argument concerns the fact that the Court of First Instance excluded from its calculation 'the time spent by the applicant in preparing his defence before the Court of Justice'.

50. First it must be noted that the Court of First Instance obviously took into account the time between the disciplinary decision in its final form of 24 May 1984 and the judgment of 20 June 1985 by which the Court of Justice declared the decision void. The applicant's view is that in order to avoid infringing the principle of the protection of the rights of the defence the Court of First Instance ought not to have excluded this period from its calculation. In any event, in order to observe that principle it ought to have taken into account the fact that that action was shown to be justified. The findings of the Court of First Instance, the applicant claims, made him, as it were, responsible for the delay due to circumstances for which the defendant was to blame. Moreover the arguments of the Court of First Instance were contradictory because on the one hand in this matter it left out of account the question whether the action brought by the applicant was justified or unjustified, but on the other hand it had regard to the circumstances justifying on behalf of the appointing authority the period which elapsed between the judgment of 20 June 1985 and the statement of 9 December 1986. [39]

39 — See paragraph 2 above.

51. This argument raises the question whether the Court of First Instance ought to have taken into account this time taken for the legal proceedings in Case 141/84 with a view to a possible declaration that the contested disciplinary proceedings were void on the ground that they had not been brought within a reasonable period.

52. My view is that it should not. Article 7 of Annex IX to the Staff Regulations shows that the time-limits applicable to disciplinary proceedings relate to the *intervals* between specified individual *steps* in the proceedings and not the total duration of the proceedings. That relates to the fact that the individual steps all have a significance of their own. In accordance with that approach the Court of First Instance regarded the disciplinary authorities as required to proceed in such a way that each procedural step is taken within a reasonable period following the previous step. [40] If, in the event of a formal error, as here, a judgment of the Community Court declaring the proceedings void takes them back to a stage before they were initiated, the time-limit for the relevant stage in the proceedings must necessarily start to run afresh. [41]

53. Moreover the applicant bases his argument on the view of the Court of First Instance to the effect that failure to meet a reasonable time-limit 'may not only render the institution liable, but may also result in the measure adopted after the expiry of the period being declared void'. [42] So far as I am

40 — Paragraph 88 of the contested judgment.

41 — See in this connection the unambiguous judgment in Case 13/69 *Van Eick* (footnote 11 above).

42 — Paragraph 88 of the contested judgment.

aware such a view has not yet been approved by the Court of Justice, which on the contrary has always emphasized that failure to observe the time-limits prescribed in Article 7 of Annex IX to the Staff Regulations does not render any measures adopted after their expiry void but may (only) render the institution liable for any damage caused to those concerned. [43] It is not necessary for me to form any view on the general approach of the Court of First Instance in this respect, but I can state that in any event the duration of disputes before the courts such as are at issue here cannot be taken into account in calculating time-limits for the purposes of any declaration of nullity. Otherwise any procedural error which might have been established could lead not only to a judgment declaring that the decision affected by it was void, but to a similar declaration with regard to a later decision arrived at after the first judgment but not actually affected by the error.

54. All that does not alter the fact that an infringement of procedural rules, as for example the principle of protection of the rights of the defence, may constitute a wrongful act or omission which under normal conditions may involve the liability of the institution. The disadvantages which may have arisen as a result of the delay in the disciplinary proceedings arising from the litigation before the Community Court are thus appropriately taken into account.

55. Accordingly the applicant's argument must be rejected.

56. *3.* The applicant's third argument relates to the periods considered in detail by the Court of First Instance, namely from 2 June 1983 to 10 February 1984 (in which the first disciplinary board was at work) and from 20 June 1985 to 9 December 1986 (between the judgment of the Court of Justice in Case 141/84 and the communication to the applicant about the intention to reopen the disciplinary procedure).

57. *(a)* With regard to the first of these two periods the applicant claims that the Court of First Instance chose the wrong starting date. It ought to have gone back to 30 September 1982 when the matter was referred to the first Disciplinary Board.

58. That view cannot be accepted. The disciplinary proceedings instituted on 30 September 1982 were cancelled by the appointing authority itself on 14 January 1983. The periods considered by the Court of First Instance therefore do indeed fall within the new proceedings. The fact that the cancellation was the result of a procedural error cannot — contrary to what the applicant apparently thinks — lead to regarding the two separate sets of proceedings as a single one. Otherwise the measure at issue could be declared void as a result of the original procedural irregularity, which is precisely what the authority wished to prevent when it cancelled the original proceedings and instituted fresh ones.

59. It should further be noted that the consideration of the period in question relates to

43 — Judgment in *Van Eick* (footnote 11) at paragraph 7; judgment in Case 228/83 *F.* v *Commission* [1985] ECR 275, paragraph 30.

the time-limit referred to in the first paragraph of Article 7 of Annex IX to the Staff Regulations so that the Court of First Instance rightly regarded the *dies a quo* as 2 June 1983, on which date the (first) disciplinary board started work in the new proceedings.

60. *(b)* The applicant also takes the view that the Court of First Instance wrongly regarded 9 December 1986 as the end of the second period. In doing so, he claims, the Court was making a choice inconsistent with the date it selected to mark the beginning of the first period, which the Court took as the date of the first meeting of the disciplinary board, whereas it selected the date on which the President's intention to reopen the proceedings was communicated to the applicant as marking the end of the second period — instead of being guided by the date of reference to the second disciplinary board (24 June 1987) or that board's first meeting (9 July 1987).

61. This argument does not convince me either. As I have said, the first period concerns the work of the first disciplinary board, so that it had to be considered on the basis of the time-limit laid down in the first paragraph of Article 7 of Annex IX to the Staff Regulations. The second period does not correspond to any of the provisions of that article with regard to time-limits. In view of the rule set out in paragraph 88 of its judgment, the Court of First Instance apparently regarded it as necessary not only to apply the provisions of that article with regard to time-limits but also to check whether the appointing authority had resumed the proceedings speedily enough after the Court of Justice had declared the original disciplinary proceedings void. In this light it is impossible to criticize the choice of the final date of the second period.

62. *4.* With his last argument in this connection the applicant refers to his reply at first instance, in which he claimed that the defendant had admitted more time had elapsed than was reasonable. In the contested disciplinary decision the defendant had followed the recommendations of the disciplinary board which, for its part, had regarded as an extenuating circumstance the fact that an excessive period had elapsed between the communication by the appointing authority of the facts complained of and the conclusion of the disciplinary proceedings. As the contested judgment did not go into that point, the applicant claims that the statement of the reasons on which it was based is insufficient.

63. I do not regard that plea as sound. The Court of First Instance considered whether the measure at issue *could be declared void* and in this connection — within the context of the proceedings in question — examined whether a reasonable time-limit had been observed with regard to the *individual steps* which led to that measure. On the other hand the disciplinary board and the appointing authority *in fixing the disciplinary measure* considered the *total* period which had elapsed between the 'communication by the appointing authority of the facts complained of' [44] and the conclusion of the disciplinary proceedings.

64. It is therefore sufficiently clear from the judgment that the Court of First Instance wished to consider a different question from the disciplinary authorities and in doing so to apply a different criterion.

44 — That apparently refers to the letter of 30 September 1982 at the beginning of the first disciplinary proceedings, as the disciplinary board mentions in the same connection the 'conclusion of the successive disciplinary proceedings'.

65. *III.* The foregoing considerations with regard to that plea indicate that it should be rejected in its entirety.

The approval of the minutes after the reasoned opinion had been issued

66. The applicant pleaded at first instance that the reasoned opinion of the disciplinary board of 27 November 1987 was formally defective because the minutes of the meeting on 26 November 1987 bore the date of 30 November 1987, that is to say, after the reasoned opinion had been issued. The Court of First Instance rejected that argument. It referred first to the meeting for which minutes were drawn up (the morning of 26 November 1987) and the subsequent meeting *in camera* (the afternoon of that day and Friday 27 November 1987) and to the fact that the minutes were approved on Monday 30 November 1987 and communicated to the applicant (paragraph 113 of the contested judgment).

67. In that connection the Court of First Instance states (paragraph 114 of the contested judgment):

'In those circumstances, it must be held that the objection that the reasoned opinion is procedurally defective on the ground that the minutes were approved after the conclusion of the proceedings before the disciplinary board is unfounded. The legality of the reasoned opinion cannot be placed in question simply because the minutes of the meeting of 26 November 1987 were approved at a later date. Although the first paragraph of Article 9 of Annex IX provides that "the secretary shall keep minutes of meetings of disciplinary boards", it in no way requires that minutes must be signed immediately after the meeting of the board in order for them to be valid.'

68. The applicant now complains that the Court of First Instance did not answer his plea that the minutes had been signed at a time when the proceedings *were no longer before the disciplinary board*: after issuing the reasoned opinion the disciplinary board's duties were at an end. In this respect therefore the judgment fails to state the reasons on which it is based.

69. This argument must be decisively rejected. First, an examination of the file of the proceedings at first instance shows that the applicant's arguments related solely to the fact that he was unable to put forward observations on the minutes before the reasoned opinion was issued (which amounts to saying that he had been denied an opportunity to defend himself). [45] The Court of First Instance answered the argument as so understood by examining the meaning of the documents on the file. In addition the Court expressly showed in paragraphs 129 and 130 of the contested judgment that the rights of the defence were not impaired. The applicant has neither contested the answer which the Court gave to the argument which he *actually* put forward in this connection, nor has he repeated in the appeal the plea of failure

45 — The defendant also reacted in this sense: see paragraph 112 of the contested judgment.

to observe the rights of the defence which gave rise to the considerations put forward by the Court of First Instance in paragraphs 129 and 130 of the contested judgment, but on the contrary has expressly withdrawn it. [46] The applicant did not claim at first instance that the issue of the reasoned opinion was a formal bar to the disciplinary board's drawing up minutes later. If therefore the Court had not dealt with this point, the applicant would not in any event have been able to complain.

70. Secondly, a survey of the arguments of the Court of First Instance shows that it would have regarded the procedure of the disciplinary board as irregular *only* if the applicant's defence had been restricted.

71. The applicant's complaint put forward in this plea, to the effect that the statement of reasons was defective, therefore appears to be in any case unfounded.

The failure to produce certain documents [47]

72. The Court of First Instance dealt with this plea from two aspects. One concerned production of documents which are not specified in greater detail. The Court confirmed a claim for the production of all matters relevant to the disciplinary decision but rejected a claim for the production of the complete file. It did, however, state that the appointing authority and the chairman of the disciplinary board had allowed access to the entire file and the opportunity to request the production of documents corresponding to the stage of examination of the file by the disciplinary board. In the circumstances the Court took the view 'that the applicant has failed to prove that his allegation, to the effect that the administration unjustifiably refused to communicate certain documents to him, is properly founded'. [48] The applicant has not challenged this conclusion in the appeal.

73. The second aspect concerned the applicant's access to the defendant's accounts. On this, paragraph 125 of the contested judgment states:

'The applicant added in his reply that the problem of identifying the documents would never have arisen if he had not been refused free access to the accounts from the date of his transfer on 30 April 1982. In so far as this argument must be interpreted as a new plea in law, it must be declared inadmissible, as the defendant has quite correctly argued, under Article 42(2) of the Rules of Procedure of the Court of Justice. To the extent to which it ought to be regarded as a development of a plea explicitly or implicitly set out

46 — Paragraph 46 of the appeal.

47 — This plea was at first instance part of a (more comprehensive) complaint by which the applicant claimed 'infringement of the rights of the defence': see the title to paragraph 116 of the contested judgment.

48 — End of paragraph 124 of the contested judgment.

earlier in the application, it suffices to hold, without its being necessary to consider whether the administration is obliged to grant free access to its archives to officials who are the subject of disciplinary proceedings, that the documents on the file show that the administration in this case did indeed initially grant the applicant access to its archives (see point 66 of the Disciplinary Board's first reasoned opinion of 10 February 1984).'

74. To this the applicant repeats the argument contained in his reply at first instance. In his view the answer of the Court of First Instance to his arguments is 'legally unsatisfactory'. In view of the special fact that the alleged loss did not relate to a specific item of expenditure but a total amount, the duty of communication cannot be understood in the usual sense but necessarily means free access to the accounts. To provide a sound justification for rejecting this plea the Court ought to have stated why in this case access in the sense understood by the applicant was unnecessary or why the Court was of the opinion that access had been granted (which, moreover, was not the case).

75. In my view this argument cannot be accepted and must therefore be rejected. It is not even clear in what exact point the applicant regards the Court's reasoning as wrong. Moreover in his appeal he can neither put forward complaints which the Court rejected as out of time, nor can he call in question as such the Court's finding of fact, made on the basis of the file, that 'the administration did indeed initially grant the applicant access to its archives'.

The reverse entry of 25 August 1982 relating to the amount of BFR 4 136 125

76. This plea relates to the communication of the original of the said reverse entry. The applicant claimed before the Court of First Instance that the only document at his disposal until shortly before the termination of the last disciplinary proceedings had been a document not signed by the accounting officer. The original, which he had received only a few days before the termination of those disciplinary proceedings, differed from that document in a number of respects. The reverse entry, however, was a 'vital document' in so far as once such an entry has been made 'the loss is beyond doubt'.

77. The Parliament referred to the fact that the applicant himself had requested on 30 March 1982 that a correction be made in respect of the loss of an approximately equivalent amount. Moreover the document merely noted and registered in the accounts the existence of a loss in the accounting and is quite irrelevant when it comes to establishing proof of that loss. The Parliament questioned the relevance, for the resolution of the case, of the different typeface in the two documents.

78. In that connection the Court of First Instance declared (paragraph 143 of the contested judgment):

'In the light of the explanations provided by the parties, the Court takes the view that the applicant has failed to demonstrate how the communication on 25 August 1982 of the original document recording the reverse entry, shortly before the termination of the disciplinary proceedings, could have constituted an infringement of the rights of the defence of such seriousness as to vitiate those proceedings. It should also be noted that that document was made available to the applicant on 19 November 1987 and that he consequently had the opportunity to submit any comments in the definitive statement of defence which he addressed to the disciplinary board on 24 November 1987. The Court is in those circumstances unable to identify any infringement of the applicant's rights of defence attributable to a delay in communicating the original of the document in question.'

79. In this respect the applicant repeats his argument at first instance and is of the opinion that the Court first of all found that there had been an infringement of the rights of the defence, but that it had not explained why this infringement was not 'of such seriousness' as to vitiate the proceedings. In this connection he refers to the significance which in his view is to be attached to the reverse entry. [49] On the other hand, he says, the Court stated, in contradiction to that finding, that there had been no infringements of the applicant's rights of defence, since after receiving the document on 19 November 1987 he had the opportunity to submit any comments thereon in the definitive statement of defence which he addressed to the disciplinary board on 24 November 1987. The period of five days which elapsed between those two dates was however insufficient in such a complicated matter. It was not possible to 'analyse thoroughly' the document produced 'at the last minute'.

80. As a result the applicant's view is that the Court of First Instance did not sufficiently state the reasons on which this rejection of his plea was based.

81. In examining these arguments it must first be pointed out that the applicant's claim at first instance raised two questions. The first related to the applicant's exact interest in receiving the original document; the second, to be examined in the light of the first question, was whether the period of five days was sufficient to allow him to produce a proper defence.

82. As regards first of all the question of the applicant's exact interest in receiving the original, it must be noted, on the basis of the applicant's arguments, that he was apparently not concerned with the date on which he had knowledge of the *entry itself*. Instead he was concerned to examine the original

49 — Paragraph 76 above.

and to compare it with the document in his possession. The considerations contained in the reply at first instance, which he quoted in the appeal and in which the possible reasons for discrepancies between the two documents are considered, are to the same effect.

83. It therefore appears that the possibility of effecting a check raised by the applicant could only have been of significance for his defence if the complaints made against him had been based on the outward form of the document or possible differences between it and other documents. However, that is obviously not the case. The nub and essence of the dispute between the applicant and the appointing authority are, as the Parliament rightly observed, the causes of the discrepancy between the cash balance and the amount shown in the documentation traced. [50] How otherwise could it be explained that, in order to substantiate what he claimed as the causes of this state of affairs, the applicant demanded free access to the defendant's accounts? [51]

84. On the other hand the applicant neither denied that this deficit had been established by the defendant nor that the reverse entry at issue was made as a result of that.

85. In these circumstances the Court of First Instance concluded from the 'explanations given by the parties ... that the applicant has failed to demonstrate how the communication on 25 August 1982 of the original document recording the reverse entry, shortly before the termination of the disciplinary proceedings, could have constituted an infringement of the rights of the defence of such seriousness at to vitiate those proceedings'.

86. Here, in my view, the Court of First Instance expressed itself more cautiously than necessary, so that its reasoning may have lost some of its persuasive force. However, I cannot find therein any defect in its statement of reasons.

87. Still less can the Court of First Instance be criticized, in view of the background mentioned, for any defect of reasoning as regards the five-day delay. If strictly speaking the production of the document in question was not even necessary, then the brevity of the period cannot represent an infringement of the rights of the defence either. Accordingly, in so far as the Court of First Instance 'also noted', in support of its conclusion, that the document was made available on 19 November 1987, that cannot constitute a defect but on the contrary appropriate assiduity.

88. On all those grounds the applicant's plea concerning the reverse entry of 25 August 1982 must be rejected.

50 — Cf. paragraph 197 of the contested judgment and paragraphs 144 to 148 below.

51 — Paragraph 73 et seq. above.

The opening of an interest-bearing account with the Midland Bank

89. *I.* The Court of First Instance prefaced its observations on this aspect with the following comment: [52]

'The applicant makes the preliminary point that this allegation relates to the recital in the decision stating that "Mr de Compte's decision to alter the banking arrangements fixed by common consent between the Parliament and the Midland Bank, in the case where he had not been asked to do so and in excess of his powers amounts to ... a failure to comply with the obligations incumbent on an accounting officer."'

90. *II.* Without denying that the administrator of advance funds, Mr Offermann, and his assistant had opened the account in question contrary to the provisions of the Financial Regulation [53] and the measures of implementation [54] applicable at the material time and had paid in a sum of UK £400 000, and that he was aware of these transactions, the applicant, at first instance, essentially insisted that the administrator of advance funds was solely responsible. For the same reason he had regarded the measure adopted against him as unlawful as no disciplinary measure had been adopted against the administrator of advance funds. Finally he challenged the contention made in the Parliament's defence that he had kept the existence of the account hidden from his superiors. He now takes these three points up again in his appeal. I shall deal with them in order.

91. *III. 1.* As regards the division of responsibility between the applicant as accounting officer and the administrator of advance funds, the Court of First Instance pointed out that 'the respective powers and responsibilities of the accounting officer and the administrator of advance funds are defined in particular, so far as the administration of advance funds is concerned, by the third paragraph of Article 17 and by Articles 20, 49, 63 and 70 of the Financial Regulation, in addition to Articles 46 to 54 of the measures of implementation in force at the time of the matters in dispute'. [55] After considering those provisions, the Court of First Instance came to the following conclusion (paragraph 168 of the contested judgment):

'It follows from this division of responsibilities between the accounting officer and the administrator of advance funds that it is the latter who is primarily responsible for the administration of the advance funds office and that he may be discharged from that responsibility only if he has received contrary instructions from the accounting officer. On the other hand, the accounting

52 — In accordance with the content of the application, as I have been able to check.

53 — Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1).

54 — Commission Regulation No 75/375 of 30 June 1975 on measures of implementation of certain provisions of the Financial Regulation of 25 April 1973 (OJ 1975 L 170, p. 1).

55 — Paragraph 167 of the contested judgment.

officer is jointly responsible if, once informed of possible irregularities, he fails to take appropriate measures or refrains from carrying out ordinary or extraordinary checks on the accounts of the advance funds office.'

92. The Court of First Instance applied those principles to this case and found that the applicant, having been informed at the outset that the disputed account had been opened, was jointly responsible for all the irregularities which occurred as a result.

93. The applicant repeats the argument which he put forward at first instance, stating that the matter concerned an account of the advance funds office for which the accounting officer as such was not responsible. [56] Thus the opening of this account depended not on a decision of the applicant but on that of the administrator of advance funds and his assistant.

94. The applicant has not explained on what exact ground he regards the contested conclusion of the Court of First Instance as incorrect. In any event it must be stated that there can be no doubt about his joint responsibility for the events concerning the opening of the account.

95. As I have said, the applicant does not deny that the opening of the account for the purpose of depositing UK £400 000 and without, moreover, the assent of the officers responsible for budgetary matters constituted an irregularity. Nor does the applicant deny that that operation ought to have been entered in the accounts and accordingly was required to be brought to his notice in pursuance of Articles 51 and 53 of the measures of implementation. In the circumstances it is irrelevant that in this case (in accordance with the third paragraph of Article 20 and Article 49 of the Financial Regulation in conjunction with Article 46 et seq. of the measures of implementation) the administration within an advance payments office of the funds at issue had been assigned to an administrator of advance funds. Nor is it relevant that the administrator himself (together with his assistant) had arranged by letter for the opening of the account and the payment, since the liability of the accounting officer under Article 70 of the Financial Regulation is not discharged by such an arrangement. On the contrary, the setting up of an advance payments office gives rise — quite logically — to what one might term a 'supervisory responsibility' on the part of the accounting officer. In fact under Article 53 of the measures of implementation he is required to check the existence of the funds and the accounts of the administrators of advance funds by unannounced inspections. In addition under Article 54 of those provisions he must communicate the result of his scrutiny to the financial controller and the authorizing officer. These duties would be pointless if the accounting officer were not at the same time required to prevent imminent irregularities or, if the administrator of advance funds has already committed them, to report them as soon as they have come to his notice to the authorizing officer and the financial controller so that the appropriate measures may be taken. It follows that in the event of irregularities committed by the administrator of advance funds which come

56 — Paragraph 153 of the contested judgment and paragraph 56 of the appeal.

to the accounting officer's notice and which the latter, as here, allows to take place without taking action, the accounting officer is just as responsible as if he himself and not the administrator of advance funds had committed the irregularity.

96. The Court of First Instance therefore applied the relevant financial provisions correctly with regard to the joint responsibility of the applicant, so that this argument to the contrary must be rejected.

97. 2. As regards the importance to be attributed, in the disciplinary proceedings at issue, to the conclusions drawn in the disciplinary proceedings against the administrator of advance funds, the Court of First Instance stated as follows:

'The fact that no sanction was imposed on the administrator of advance funds at the conclusion of the disciplinary proceedings brought against him cannot in any way affect the legality of the disciplinary measure imposed on the applicant in view of the fact that each set of proceedings is distinct and separate. It should in this regard be pointed out that the opinions delivered by the disciplinary board in the two sets of proceedings agree in respect of the determination of the facts. The opinions differ only with regard to the assessment of those recorded facts. In the case of the proceedings brought against Mr Offermann, the disciplinary authorities took the view that the responsibility for his actions devolved on his hierarchical superior, that is to say, the applicant, whereas the disciplinary board in the proceedings instituted against the applicant reached the conclusion that the applicant and Mr Offermann were both responsible (point 222 of the reasoned opinion). In any event, even if the decision taken by the appointing authority against the administrator of advance funds was unlawful, the applicant may not rely, in support of his claim, on an unlawful act committed in favour of another (see the judgment of the Court of Justice in Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2229)'.

98. Against this the applicant claims first of all that the Court of First Instance wrongly relied on the principle that the independenceof the disciplinary proceedings excluded any comparison of the conclusions reached in the two parallel sets of proceedings.

99. Secondly the applicant thinks that the Court of First Instance wrongly assumed that the absence of disciplinary measures against the administrator of advance funds was due only to the fact that the disciplinary authorities in those proceedings laid the responsibility for the events at issue upon the applicant. In his reply at first instance the applicant had in fact mentioned other grounds which, he claims, led the disciplinary board in the proceedings against Mr Offermann to propose no disciplinary measure: [57]

— he (Mr Offermann) thought he was acting rightly;

57 — See p. 34 (top) of the appeal.

— the transaction was never hidden (because the documents concerning this account had always been in the Midland Bank file and still were; this file is available to all persons authorized to inspect it and so to all Mr Offermann's superiors);

— in accordance with banking practice he must be given the benefit of the doubt;

— in any event there was neither an intentional infringement nor serious negligence.

100. The Court of First Instance, the applicant claims, did not take account of these grounds, which apply to him on the basis of the same considerations, so that the statement of reasons in the judgment shows a clear error of fact or in any case is insufficient.

101. Thirdly the applicant states that the Court of First Instance applied the principle that no-one may rely on an unlawful act committed in favour of another. However, the Court should not have done so without indicating in what respect the decision taken with regard to a third party (the administrator of advance funds) was unlawful. In fact the question of the legality or illegality of the act with regard to the administrator of advance funds has nothing to do with the case; it is rather a question of considerations taken into account in favour of the administrator of advance funds but which were not taken into account in his (the applicant's) favour. [58]

102. With regard to all these arguments it should be pointed out first of all that in this connection the question is whether the applicant is objectively responsible for the irregularities with regard to the opening of the account.

103. This question may be appraised according to precise provisions. Their aim, that of ensuring clear responsibilities in such a sensitive sphere as the administration of Community funds, excludes any discretion, in their application, on the part of the Community institutions.

104. It follows on the one hand that the compatibility or incompatibility of the conclusions reached in the two sets of proceedings, in so far as they concern the objective responsibility of the persons concerned, is irrelevant. [59] The conclusion of the Court of First Instance that 'even if the decision taken by the appointing authority against the administrator of advance funds was unlawful, the applicant may not rely, in support of his claim, on an unlawful act committed in favour of another' is therefore decisive and

58 — See paragraphs 99 and 100 above.

59 — It may be noticed incidentally that in the Offermann proceedings the appointing authority rejected the view that the administrator of advance funds was not to be held responsible. It refrained from imposing a disciplinary measure solely because it did not regard such a measure as appropriate: see Annex 18 to the application and paragraph 8 of the judgment in Case T-129/89 *Offermann* v *Parliament* [1991] ECR II-855.

correct. In view of this principle, which has recently been confirmed, [60] it is not obvious why, as the applicant thinks, the Court was called upon to identify precisely any illegality in favour of the administrator of advance funds, since it is clear that in any event the action taken with regard to the applicant on the point at issue here was lawful. [61]

105. On the other hand it should be stated that the aspects of absence of guilty knowledge [62] or absence of negligence [63] have nothing to do with the objective responsibility of the accounting officer, which is the only matter at issue in this connection. These aspects concern the subjective conditions of the disciplinary proceedings. The applicant put forward a special plea with regard to those conditions, which the Court of First Instance examined in paragraph 206 et seq. of its judgment and which the applicant now pursues further in the appeal. [64]

106. The fact taken into account by the disciplinary board in the Offermann case (hereinafter referred to as 'the Offermann board') that the relevant correspondence with the Midland Bank was kept in the bank file cannot call the applicant's responsibility in question either. In view of his supervisory duty the applicant, even if he could not prevent the transaction, was at least required under Articles 53 and 54 of the measures of implementation to report them without delay to the authorizing officer and the financial controller.

107. In this respect also therefore the applicant's argument fails.

108. The applicant's argument based on the conclusions of the Offermann board must therefore be rejected in its entirety.

109. *3.* A final group of the arguments put forward in the context of this plea relates to the conclusions of the Court of First Instance with regard to 'the allegation that the applicant decided not to disclose the existence of this account to his hierarchical superiors'. [65]

110. The Court first stated that the arguments of the parties on this question were *not relevant to the issue*: whatever the replies might be they could not

'in any event have the result of releasing the applicant from his liability, which lies essentially in the fact that he failed within a reasonable time to record the transactions in

60 — See the judgment in Case C-313/90 *CIRFS* v *Commission* [1993] ECR I-1125 at paragraph 45.

61 — Cf. the judgment in Joined Cases 260/85 and 106/86 *TEC* v *Council* [1988] ECR 5855 at paragraph 18.

62 — Paragraph 99 above, first indent.

63 — *Op. cit.*, third and fourth indents.

64 — See paragraphs 173 to 178 below.

65 — Paragraph 171 of the contested judgment.

question in his capacity as accounting officer of the institution'. [66]

111. The applicant thinks the Court could not have denied the relevance of this question without previously going into his argument put forward in the reply to the effect that the appointing authority's complaint with regard to the *absence of an accounting entry* could not have been based on Article 63 of the Financial Regulation and Articles 50 and 51 of the measures of implementation; the first such article concerned only accounting in general and Articles 50 and 51 governed the duties of the administrator of advance funds, which the applicant accordingly could not have infringed.

112. That argument is mistaken. It is true that I cannot agree with the Court of First Instance in denying the relevance of this question because the applicant's liability 'lies essentially in the fact that he failed within a reasonable time to record the transactions in question in his capacity as accounting officer of the institution'. The applicant was not contesting the findings of the decision at issue with regard to the absence of an accounting entry but the recital stating that: 'Mr de Compte's decision to alter the banking arrangements fixed by common consent between the Parliament and the Midland Bank, in the case where he had not been asked to do so and in excess of his powers amounts to ... a failure to comply with the obligations incumbent on an accounting officer'. [67] However, the Court finally took up, in paragraph 172, the question of 'failure to disclose' the existence of the new account so that the judgment cannot in any event be quashed on the sole ground that the Court first denied the relevance of this question. What is more, by pleading in his reply the erroneous application of the aforesaid articles on the keeping of accounts, the applicant introduced a new plea in law which the Court of First Instance, under Article 42(2) of the Rules of Procedure of the Court of Justice (which were applicable by analogy), was not required to consider.

113. Finally the applicant challenges the finding of the Court of First Instance in paragraph 172 of the contested judgment, that:

'the documents on the file do not in any way suggest that either the authorizing officer or the financial controller was aware that the disputed bank account had been opened. On the contrary (as pointed out by the disciplinary board at points 146 to 154 of its reasoned opinion of 27 November 1987), two documents on the file raise the presumption that those two hierarchical superiors of the applicant knew nothing of the interest-bearing account with the Midland Bank. The two documents in question are a note of 5 June 1981 from the applicant to Mr Paludan-Müller, then Director of Finances and authorizing officer, and a note

66 — See the previous footnote.

67 — Paragraph 152 of the contested judgment.

of 22 January 1982 to the applicant from Mr Etien, who at that time was the financial controller.'

114. In connection with that finding and to state reasons for it, the Court examined both the said documents.

115. The applicant thinks, first, that the Court omitted, without giving any reason, to consider the factors to which the Offermann board had referred for accepting that the existence of the account had not been concealed: the file for the Midland Bank had been available to everyone who was entitled to consult it.

116. That argument cannot be accepted. As the Court of First Instance correctly stated, [68] once the accounting officer was informed of irregularities he was required, on his own initiative, to inform the appropriate officers of the Parliament so that the necessary measures might be taken.

117. With regard to that criterion it is not significant that the correspondence in question was deposited in the Midland Bank file, but the Court was certainly entitled to accept that the fact that the authorizing officer and the financial controller remained in ignorance (long after the account was opened) confirms the applicant's breach of duty.

118. Next the applicant refers to his argument in the reply at first instance as regards the question of informing Mr Paludan-Müller as authorizing officer. It is stated there that, as is shown by his order of February 1982 to collect the interest due on the account at issue, Mr Paludan-Müller had at any rate already been informed of the account at that time and not only in March 1982, as was stated in the disciplinary board's reasoned opinion. The applicant states that actually, however, he had informed him orally of the existence of the account in December 1980 shortly after he took up duty.

119. As regards the first point it is sufficient to note that the letters examined by the Court of First Instance are dated 5 June 1981 and 22 January 1982. The applicant's argument that Mr Paludan-Müller had in any case been informed in February rather than March 1982 can therefore by no means affect the conclusions of the Court of First Instance even if it could be taken into account in the appeal.

120. As regards the second point concerning the alleged conversation in December 1980, it must be stressed that by this argument the applicant is calling in question a finding of fact by the Court of First Instance, but cannot claim that its finding was based on an incorrect legal criterion or that the Court otherwise made an error of law.

68 — Paragraph 168 of the contested judgment and paragraph 95 above.

121. These arguments too must therefore be rejected.

The failure to comply with the obligation to administer payment credits in a proper manner

122. *I. 1.* The Court of First Instance defined the subject-matter of this plea in paragraphs 174 and 175 of the contested judgment as follows:

'Before setting out his arguments on the complaint concerning the encashment of the two cheques drawn on the Midland Bank, the applicant quotes the relevant passage from the contested decision, which states that "... by cashing those two cheques without specific and valid justification, ... by failing to ensure that a record was kept of the payment made into the Luxembourg cash office in the 'accounting forms for cash extracts', ... by failing to record immediately in the accounts the encashment of those cheques, Mr de Compte has failed in his duty to administer payment credits in a proper manner ...".

The applicant interprets this complaint as meaning that he is being blamed only for having failed immediately to make the entries necessitated by the encashment of the two cheques referred to above.'

123. In so far as the applicant denied responsibility for the belated entry in the accounts by referring to the poor general organization of the Parliament's financial departments, the Court stated in paragraph 181 of its judgment

'that the applicant is wrong in restricting the scope of the complaint upheld against him to the "non-immediate entry in the accounts" of the two cheques. The disciplinary decision also accuses him of having cashed those two cheques without specific and valid justification and with having failed to record the withdrawal on the "accounting forms for cash extracts" of the Parliament's cash office in Luxembourg in the three currencies in which that withdrawal had been made.'

124. *2.* The applicant's first criticism relates to this point. [69] He states that — after referring to the relevant complaint according to the decision at issue — he quoted in his application, expressly as the first response to this complaint, certain extracts from the Saby report of 21 March 1983 which had served as the basis for the final discharge for the financial year 1981. The answer to the complaint regarding the absence of a precise and valid reason for the encashment of the two cheques is to be found in those extracts. The statement of the reasons on which the contested judgment is based is therefore incorrect or at least insufficient because it should have stated in what respect the reason given (in the Saby report) was not valid. The reason the applicant did not revert to that part of the complaint in his reply was that that was a matter for the defence.

69 — See paragraph 70 of the appeal.

125. After considering the application, my view is that this argument is unfounded. It appears clearly from paragraphs 64, 65 and 66 of the application that the applicant intended *only* to go into the question of the *late accounting entry*. It appears equally clearly from their context that the quotation from the Saby report was intended only to rebut that specific complaint. Moreover the quotation consists of a connected extract of four close-lined written pages in which only such passages are underlined as illustrate the difficult working conditions by which the applicant seeks to justify the delay in making the accounting entries. The sections on which the applicant now relies and which are supposed to show the 'valid reason' for the encashment of the two cheques are, on the other hand, not underlined at all.

126. Moreover in paragraph 65 of his appeal the applicant contradicts the argument under consideration here, to the effect that the Court wrongly failed to consider his arguments on the question of a 'valid reason'. There he states that this plea concerns 'exclusively the delay in entering the two cheques at issue in the accounts'.

127. In any event the Court of First Instance did give appropriate consideration to this plea, so that the criticism directed against it must be rejected.

128. *II.* In addition the applicant disputes the Court's answer to his argument that the six months' delay in entering in the accounts the encashment of the two cheques was to be ascribed to the poor organization of the Parliament's financial departments and their lack of staff and material resources, factors which were recognized in the disciplinary decision — contrary to the claim now under consideration — as extenuating circumstances. The Court of First Instance stated in this connection (paragraph 182 of the judgment):

'the fact that the disciplinary decision took into account, as constituting extenuating circumstances, the poor organization of the Parliament's financial departments at the time of the disputed events and the inadequacy of the staff and material resources at that time cannot be regarded as inconsistent with the affirmation of the obligation on the applicant to administer the credit payments in a proper manner. The circumstances relied on by the applicant and taken into consideration by the disciplinary authorities also cannot amount to justification for the purposes of the present complaint against the applicant in so far as the delay established in the recording of the two cheques in question was accompanied by a catalogue of other failings at the time of their encashment. The Court also takes the view that the applicant's senior position in the financial division precludes him from relying on material difficulties which may have existed at a particular time in order to secure release from all liability.'

129. The applicant challenges all three of the conclusions thus drawn, that is, concerning

the question of a contradiction in the disciplinary decision, the further failings with regard to the encashment of the cheques and the applicant's 'senior position'.

130. On the question of other failings, which in my view is the decisive one, he states that the Court of First Instance ought to have specified what failings were involved. In so far as the Court is concerned with the alleged absence of precise and valid reasons for the encashment of the cheques, he claims to have already answered that complaint.

131. I cannot agree with that argument. In paragraph 181 of its judgment, to which I have already referred, the Court, before going into the question of the poor organization of the financial departments, expressly noted 'at the outset' that the applicant *'is wrong* in restricting the scope of the complaint upheld against him to the "non-immediate entry in the accounts" of the two cheques'. [70] It then listed fully all the additional complaints, which in its view had not been contested, relating to the encashment of the cheques. From the arrangements of the Court's conclusions it therefore emerged sufficiently clearly what it meant by referring to a catalogue 'of other failings' and that the delayed accounting entry was part of the context of these failings and thus could not be ascribed, or at any rate not be wholly ascribed, to shortcomings in the organization and material resources of the European Parliament's departments. Since, as I have shown, the Court of First Instance rightly considered that the applicant's arguments were limited to the complaints of late entry in the accounts, so that the complaints regarding the other failings were not challenged, this criticism by the applicant must be rejected in its entirety.

132. With regard to the contradiction in the disciplinary decision the applicant repeats his argument in the reply at first instance in which he raised the question whether the delay was not the direct and unavoidable consequence of the poor organization and material resources of the European Parliament's departments. The Court of First Instance 'could not therefore in justice come to the conclusion' [71] that there was no contradiction between the recognition of these factors as extenuating circumstances and the complaint of failure to comply with the obligation to administer payment credits in a proper manner.

133. In reply to that it must be stated that the Court of First Instance, as I have explained, regarded the lateness of the entry in the accounts as part of a series of irregularities and so did not accept the applicant's reliance on the aforementioned circumstances. The complaint relating to this delay must therefore in any case be regarded as well founded. Even if, contrary to the Court's view, the disciplinary decision were contradictory, that could at most call that decision in question only in so far as the appointing authority recognized the existence of extenuating circumstances for the

70 — My emphasis.

71 — First subparagraph of paragraph 72 of the appeal.

applicant. In any event it would be impossible to find fault with the contested judgment in rejecting the applicant's argument against the complaint as to the belated accounting entry. Moreover this argument of the applicant fails to take into consideration the fact that the recognition of the said factors as extenuating circumstances relates to all complaints and it is not at first sight clear to what extent and for what exact reasons the appointing authority thought they ought to be taken into account in the applicant's favour with regard to the individual complaints.

134. Finally the applicant criticizes the Court's view that his senior position within the financial departments precluded him from relying on the aforesaid material difficulties to secure release from all liability. That view is, he states, incompatible with the fact that proceedings were not instituted against other officials with still higher positions, although complaints had been made against them too, specifically in the special report of the Court of Auditors. [72]

135. In that connection it is sufficient to note that that expression of opinion by the Court was not essential for the rejection of the applicant's argument and that in any event the fact that other officials were erroneously regarded as not being liable could not be taken into account in favour of the applicant.

136. *III.* The applicant also challenges the thinking of the Court of First Instance with regard to his argument regarding the exclusive responsibility of the administrator of advance funds. In that respect the Court had been referring to his claims with regard to the complaint concerning the opening of an interest-bearing account with the Midland Bank, which the applicant had contested with the same argument. [73] The Court added:

'that the applicant was much more extensively implicated in the failures surrounding the encashment of the two cheques than in those which related to the opening of the account'. [74]

137. In his criticism of these views the applicant refers to his arguments against the part of the judgment already mentioned, dealing with the opening of the interest-bearing account with the Midland Bank. [75] I too can therefore in principle refer to my remarks on this aspect. [76] It should be added that it is a matter of an omission in the book-keeping which, under Articles 51 and 53 of the measures of implementation, was subject to the supervision of the applicant, so that he was required to make sure that an entry was made in the accounts at the proper time, if necessary by means of appropriate instructions to the administrator of advance funds.

72 — See paragraph 13 of the contested judgment; OJ 1982 C 202, p. 1.

73 — Paragraph 153 et seq. and in particular paragraphs 167, 168 and 169 of the contested judgment.

74 — Paragraph 183 of the contested judgment.

75 — Paragraph 93 above.

76 — Paragraphs 94, 95 and 96 above.

138. Contrary to the applicant's views the Court was not required to explain the extent to which his involvement in the shortcomings might be significant for the responsibility of the administrator of advance funds. Since the applicant would have been responsible even if not he but the administrator of advance funds, with his knowledge, had given the order for the encashment of the cheques, his responsibility was all the clearer in view of his personal intervention.

139. As a result this plea must be rejected in its entirety.

The failure to comply with the obligation to effect expenditure only on presentation of proper supporting documents and to keep such documents in a safe place

140. *I.* This complaint relates to the absence of proper supporting documents for an amount equal to the exchange value of the two aforementioned cheques (BFR 4 136 125). [77] In this connection the Court examined two questions which it extracted from the parties' arguments.

141. *II. 1.* The first question was

'whether it has been sufficiently established for legal purposes that the deficit of approximately BFR 4 100 000 recorded in the members' cash office and which lacks supporting documentation is due to the entry noting the encashment, for an overall amount expressed in Belgian francs, of two cheques drawn on the Midland Bank'. [78]

142. In this connection the Court of First Instance first summarized the relevant content of the contested decision (paragraph 196), the reasoned opinion of the disciplinary board (paragraph 197) and the findings of the Court of Auditors (paragraphs 198 and 199). [79] It then stated that it shared the view of the appointing authority and declared

'that the contested decision was quite properly entitled to consider as established that the absence of supporting documents was connected in this case to the encashment of the two cheques drawn on the Midland Bank'. [80]

143. In the alternative, the Court takes the view that even if one were to accept the applicant's argument that this deficit had

77 — Cf. last indent of paragraph 4 above.

78 — Paragraph 195 of the contested judgment.

79 — Memorandum of 29 October 1981; special report of 6 July 1982; opinion of 7 November 1985.

80 — Paragraph 201 of the contested judgment.

nothing to do with the encashment of the two cheques, the conclusion to be drawn would still be the same, given that the applicant was unable throughout the disciplinary proceedings to identify the supporting documents for an amount of BFR 4 121 573, which the applicant admitted in a note to the President that he had failed to enter in the accounts. [81]

144. Here the applicant first claims [82] that the question is wrongly formulated by the Court of First Instance because as a preliminary it takes as a fact precisely what was to be proved, namely the existence in the members' cash office of an established deficit for which there were no supporting documents. The question so formulated, on which the Court's subsequent thinking was necessarily based, was exclusively as to whether the facts previously regarded as established (deficit amounting to BFR 4.1 million; absence of supporting documents) was caused by the encashment of the two cheques. The formulation was also contradictory, he adds, as the Court had previously stated (at the end of paragraph 192 of the judgment) that according to the defendant's own argument the complaint against the applicant was 'that he had kept no supporting documents, but not that he had covered the deficit by means of the two cheques'.

145. This argument will not stand up to examination. As regards first the question of the *supporting documents* for the sum at issue, or more precisely for expenditure equal to the exchange value of the two cheques, it is common ground that it has not so far been possible to discover them. In his appeal [83] the applicant still claims that the figures would balance if the supporting documents could only be 'recovered'.

146. With regard to the *deficit* at issue, it should be stated that the Court of First Instance, whilst not expressing any view as to the existence or whereabouts of the supporting documents or money, used the concept of the deficit to distinguish between the supporting documents so far discovered and the cash balance. In paragraph 197 the Court summarized the conflicting theories with which the disciplinary board was faced as follows (paragraph 197 of the judgment):

'The first explained the *difference between the cash office and the general accounts* by connecting it with the encashment of the two ... cheques; the second rejected this connection and expressed the view that the *deficit* represented the end result of a series of accounting errors'. [84]

147. Accordingly the Court of First Instance spoke, in the previously-quoted paragraph 201 of its judgment, of an 'absence of supporting documents' connected to the encashment of the two cheques drawn on the Midland Bank.

81 — Paragraph 202 of the contested judgment.
82 — For what follows see paragraph 76 of the appeal.
83 — Page 45, first subparagraph.
84 — My emphasis.

148. These forms of wording show, on the one hand, that the criticism that the Court had in advance assumed a deficit (understood as the complete absence of supporting documents) is unfounded. On the other hand they illustrate the error of logic on which the applicant's argument rests. The Court's examination as to whether there was a 'connection' between the absence of the supporting documents and the encashment of the cheques was intended to establish whether there was a 'deficit' in that sense. Such a connection — alleged by the appointing authority and contested by the applicant — might have consisted in the fact 'that the late registration of the entry relating to the encashment of the two cheques revealed a deficit ... corresponding to the total amount of those cheques'. [85] That means that the absence of the supporting documents concerned expenditure not entered in the accounts, but covered by the cash proceeds of the cheques (still in 1981). This 'connection' and thus in the last resort the 'deficit' was the subject and not the assumption of the Court's assessment of the evidence.

149. Nor is there any validity in the applicant's argument that the Court's approach contradicts the defendant's argument, namely that the complaint against him is that he kept no supporting documents, not that he covered the deficit by means of the two cheques. The complaint against the applicant is indeed that there are no supporting documents, [86] but in circumstances which might be significant for assessing the seriousness of the shortcoming.

150. The applicant next puts forward a series of objections [87] to the findings on which, as the Court of First Instance observes in paragraph 196 of its judgment, the appointing authority relied as 'reasons for the conclusion reached in its disciplinary decision'.

151. However, these objections must be rejected out of hand, as they are not directed against the contested judgment but against the disciplinary decision.

152. The applicant further contests the finding of the Court of First Instance that there is a connection between the absence of supporting documentation and the encashment of the two cheques. He thinks that in its assessment the Court failed to consider certain factors (which are detailed in the appeal). As these arguments relate to a finding of fact by the Court and are not based on an infringement of the rights of the defence, they can at first sight be considered only from the point of view of a defective statement of reasons. [88] Certainly some thought might be given to the question whether the independence of the Court of First Instance, as so understood, in deciding as to the facts, is limited where the rules of logic have obviously been infringed. However that may be, the applicant's objections could not be accepted from either point of view, as I shall briefly show.

85 — The appointing authority's conclusion according to paragraph 200 of the contested judgment.

86 — See subparagraph (c) of paragraph 37 of the contested judgment.

87 — Paragraph 77 of the appeal.

88 — With regard to the principle of the duty to provide a statement of the reasons on which decisions are based, see the judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] I-4339, at paragraph 29 (already referred to in footnote 9).

153. First the applicant refers again to the Parliament's argument, already mentioned, that the complaint against him is (only) that he did not keep any supporting documents. He thinks that by this argument the defendant itself denied the existence of the connection at issue. However, as I have shown, that is not correct.

154. Secondly, in the applicant's opinion the Court of First Instance has overlooked the fact that in point of time the decision granting final discharge for 1982 [89] was issued after the opinions of the Court of Auditors. In view of that decision the Court could not, he thinks, start from the idea that the cause of the deficit was explained. Here he relies on the one hand on the preamble to the decision, to the effect that 'no unequivocal explanation is so far available of the difference between the cash in hand and the sums in the accounts'. On the other hand the applicant relies on the fact that that decision did not distinguish between the discharge for him and that for the accounting officer who succeeded him during that year (on 1 May).

155. As regards these two aspects it is, in my view, sufficient to quote *in full* the text of Recital A to the preamble, from which the quotation set out by the applicant is taken:

'Whereas the difference between the cash in hand and the sums in the accounts (at that time shown in the Parliament's accounting documents as an amount of BFR 4 136 125) was *established before 30 April 1952 and whereas it may be traced back direct to the two cheques drawn on the account with the Midland Bank on 4 September 1981 and 1 November 1981* and whereas no unequivocal explanation is so far available for that difference'. [90]

156. I think no more need be said on this point.

157. Apart from the arguments, thus refuted, by which the applicant has contested, as such, the conclusion of the Court of First Instance, he finally claims that was unable to adduce proof of an error in the contested decision (on the point dealt with here), as he did not have free access to the accounts and his application for the appointment of a committee of experts was refused. The Court's finding that he had not succeeded in adducing this proof was therefore an infringement of the rights of the defence.

158. With regard to this argument I refer to the relevant passages from this Opinion: I have already dealt with the plea concerning access to the accounts; [91] as regards the Court's refusal to appoint a committee of experts [92] the applicant has put forward a separate plea which I shall consider later. [93]

89 — Footnote 20 above.

90 — My emphasis.

91 — Paragraphs 73, 74 and 75 above.

92 — Paragraph 224 et seq. of the contested judgment.

93 — Paragraph 202 et seq. below.

159. The foregoing considerations show that all the applicant's objections have not succeeded in invalidating the finding of the Court of First Instance to the effect that, as the appointing authority concluded, there was a connection between the absence of supporting documents and the encashment of the two cheques. Accordingly the applicant's arguments against the alternative approach in which the Court assumed the applicant's contrary argument to be correct, no longer needs to be examined.

160. As a result the applicant's criticism of the Court's thinking on the problem of the aforesaid connection must be entirely rejected.

161. *2.* The second question extracted by the Court of First Instance from the arguments put forward by the parties as to the absence of supporting documents was as follows:

'whether, in connection with an advance fund, the obligation and the corresponding responsibility to effect expenditure only on presentation of proper supporting documents and to retain those documents devolve on the administrator of advance funds or on the accounting officer'. [94]

162. In this connection the Court of First Instance stated as follows (paragraphs 203 and 204):

'With regard to the second question, as to whether the obligation and consequently the responsibility to retain supporting documents relating to the encashment of the two cheques rested in this case on the applicant or on the administrator of advance funds, reference should be made to Articles 20 and 70(1) and (2) of the Financial Regulation and Articles 50 to 53 of the measures of implementation. Those provisions made it clear that the responsibility for the production and retention of supporting documents for advance funds rests in the first instance on the administrator of advance funds. The accounting officer, who is required to check the accounts of the advance fund and to issue instructions to the administrator of advance funds, becomes jointly responsible from the moment at which he fails to issue appropriate instructions for the retention of the supporting documents.

As has already been made clear in this case, the applicant was personally involved in the encashment of the two cheques in view of the fact that he himself provided the signature and, according to his own statements, himself placed the cash, provided in three separate currencies, in the Parliament's safe in Luxembourg. In those circumstances, the disciplinary decision was perfectly correct in taking the view that the applicant had been gravely negligent in failing to take proper care of the Parliament's assets.'

163. In the applicant's opinion these views show a failure of reasoning. His criticism falls into three parts.

94 — Paragraph 195 of the contested judgment.

164. First he states that in the above paragraph 203 the Court of First Instance wrongly spoke of a responsibility 'to retain supporting documents relating to the encashment of the two cheques'. He observes that the supporting documents, the absence of which was the subject of the complaint made in the disciplinary decision at issue here, concerned the *expenditure* of the exchange value of these cheques. However, this undeniable inaccuracy represents merely a drafting error, as is clear from a comparison of the wording at issue with the wording in paragraph 195 of the judgment, the latter of which shows that the Court had correctly understood the problem. In these circumstances it is impossible to speak of a defective statement of reasons such as might justify quashing the judgment. [95]

165. Secondly the applicant claims that the Court of First Instance first laid down the principle that the accounting officer must give the administrator of advance funds appropriate instructions for the keeping of supporting documents, but it did not state in what respect the applicant had failed in that duty. Such a failing cannot in any case be deduced from the fact that the applicant played a part in the encashment of the two cheques.

166. That analysis is correct as far as the question of a failure to comply with the duty to give instructions is concerned. In this connection it must also be admitted that the introductory words of paragraph 204 might at first sight give the impression that the Court regarded the applicant's personal participation in the encashment of the two cheques as an important factor concerning the possible failure to comply with the said duty. If the Court had expressly intended to make such a view the sole basis of its solution, it would have had to specify it in greater detail, particularly as the administrator of advance funds (as the possible addressee of the instructions) was apparently not involved in the encashment of the cheques.

167. However, an attentive reading of paragraph 204 shows that the Court set it out as an additional reason for the applicant's responsibility even though the wording distinguishes it only slightly from the duty of instruction. This reasoning, which agrees with the argument of the defendant at first instance, [96] is based essentially on the fact that the applicant was personally involved in the encashment of the two cheques. That part of the applicant's arguments which is still to be dealt with shows that the applicant also understood that. In these circumstances the judgment ought not to be quashed solely because of the Court's views with regard to the duty to give instructions. Instead, it is appropriate to examine the arguments contained in the appeal against the aforesaid additional reasoning of the Court.

168. In this connection the applicant thinks — and here we come to the third part of his

95 — For a comparable case with regard to a drafting error in a regulation, see the judgment in Case C-27/90 *SITPA* [1991] ECR I-133 at paragraph 13.

96 — See paragraph 193 of the contested judgment.

criticism — that taking part in the encashment of the cheques has nothing to do with the duty to take proper care of the Parliament's assets, as the supporting documents for this encashment were available. In the alternative, the applicant's participation is without significance in this regard because the signature and the deposit in the safe do not necessarily point to a failure to comply with that duty.

169. In my view these arguments do not hold good because in that part of the judgment now at issue the Court of First Instance is making, even though very briefly, an assumption according to which, in the event of doubt, it is to be assumed that the accounting officer, who has personally received the cash office funds in cash (against cheques signed by himself) offsetting expenditure not covered by relevant supporting documents, has himself effected or procured that expenditure. That assumption — introduced here for lack of evidence to the contrary — lies within the realm of fact and is therefore essentially excluded from review by the Court of Justice. In any event the applicant cannot be heard to say that such a conclusion is not inevitable.

170. Since, according to the findings of the Court of First Instance, the supporting documents are wholly lacking (that is, in the case most favourable to the applicant, they have been lost after they were issued), the Court has assumed, in accordance with the second subparagraph of Article 70(1), that the applicant and not the administrator of advance funds was responsible.

171. It follows from the foregoing that the arguments against the considerations on which the Court of First Instance has dealt with this division of responsibility (admittedly not with outstanding clarity) must be rejected.

Infringement of Article 86(1) of the Staff Regulations and of Articles 70(1) and 71 of the Financial Regulation, the failure to comply with the principles of equal treatment, equity and the impartial administration of justice, and the misuse of powers

172. The argument at first instance with regard to this plea fell, according to the findings of the Court of First Instance, into three parts.

173. In the first place the applicant had claimed that the decision infringed Article 86 of the Staff Regulations and Articles 70(1) and 71 of the Financial Regulation because the conduct of the applicant to which the complaint related showed *no serious negligence*. The Court of First Instance, on the other hand, had taken the view that serious negligence had indeed occurred. It added that the irregularities surrounding the opening of the account at issue, the failure to

enter or the late entry relating to the encashment of the two cheques and the failure to comply with the obligation to effect expenditure only upon presentation of proper supporting documents and to ensure their retention constituted negligence on the part of the applicant which was all the more serious inasmuch as he, as the accounting officer, held the most senior position in the accounts administration of the institution.

174. In so far as the applicant, in disputing that finding, claims that the complaints made against him are unjustified, I may refer to the relevant considerations in this Opinion.

175. Similarly the argument, that according to the previous findings of the Court of First Instance, the applicant's duty within a cash office is not to do the 'accounting' ('gestion de la comptabilité'), but that of supervising and giving instructions, is not acceptable either. The failure to comply with the latter duty must be treated as an infringement, committed by the accounting officer himself, of material provisions of the Financial Regulation, that is, as though he himself were administering the funds and the accounts of a payments office. [97] Moreover in this case the applicant personally committed at least part of the infringements of these provisions, in particular the encashment of the cheques.

176. The further argument that in addition to the applicant the financial controller also had a duty of supervising and giving instructions belongs to the problem of equal treatment, which the applicant has also raised in this connection and which I shall shortly examine.

177. Finally the applicant thinks that the Court of First Instance did not reply to his argument based on the poor general organization and unsatisfactory material resources of the Parliament's financial departments. In my view the Court had no need to go into that point, since in so far as the applicant had claimed that there was a specific link between these circumstances and the irregularities established, it had already rejected this argument. [98] It did not therefore need to revert to the matter here.

178. The applicant's arguments on the question of serious negligence cannot therefore be accepted.

179. Secondly he had claimed infringement of the principles of equal treatment, equity and distributive justice on the ground that he had been the only person against whom the disciplinary measures had been taken, whilst the administrator of advance funds, the authorizing officer and the financial controller were not penalized.

180. In this connection the Court of First Instance had referred to its conclusions in which, in response to the applicant's argu-

97 — See paragraph 95 above.

98 — See paragraph 182 of the contested judgment and paragraph 131 above.

ments, it had described his responsibility in comparison with that of the administrator of advance funds, [99] the authorizing officer and the financial controller. [100] The Court stated that the difference between the decisions taken at the conclusion of the disciplinary proceedings brought against the administrator of advance funds and against the accounting officer could not have any bearing on this case in the light of the principle that every set of disciplinary proceedings is independent, compliance with which must be reconciled with the principles of equal treatment, equity and distributive justice relied on by the applicant.

181. In the applicant's view the Court of First Instance is overlooking the fact that the divergence between the two decisions is not the only thing: there have in addition been no disciplinary proceedings against other people who may be responsible, including in particular the financial controller. In this respect the applicant refers to the special report of the Court of Auditors in 1982. [101] Moreover the decision as to whether to institute proceedings and as to any penalties on their conclusion is a matter for the appointing authority. The applicant raises the question how, in view of that, the principles relied upon in the application at first instance and treatment which is diametrically opposed to them might be reconciled.

182. Here it must be stated to begin with that in this connection, in contrast to the position with regard to the applicant's objective responsibility for operations relating to the cash office, [102] the question is not that of the assessment of the applicant's conduct as being in accordance with or contrary to his duty. It is rather whether the appointing authority has used its discretion correctly with regard to the initiation of the disciplinary proceedings and, upon their conclusion, with regard to its decision on the principle and scope of the penalty.

183. In this respect the applicant's arguments raise the question whether there has been compliance with the principle of equal treatment, in accordance with which, *inter alia*, comparable situations must be similarly treated.

184. From this point of view this plea could only be successful if it were clear from the judgment that other persons in a situation comparable to that of the applicant had been differently treated (better than he), or if the applicant had made it clear that the Court had wrongly disregarded his statements on this point. However, that is not the case.

185. In this case it should be stated that according to the uncontested statement of the defendant [103] it was not found that any

99 — Paragraphs 167 to 170, 183 and 203 and 204.
100 — Paragraphs 171 and 172 of the contested judgment.
101 — OJ 1982 C 202, p. 1.
102 — See paragraph 102 et seq. above.
103 — See paragraph 193 of the contested judgment.

responsibility for the consequences of the encashment of the cheques rested upon the *administrator of advance funds*, whose position is therefore — at least in this respect — different from that of the applicant.

186. As regards the *authorizing officer*, the applicant has not put forward any arguments in this respect from which it might be concluded that the Court of First Instance (or the appointing authority) failed to observe the principle of equality of treatment.

187. The comparison in the appeal of the applicant's treatment with that of the *financial controller* is new, since it was not in the original application. If the applicant's argument on this point were to be understood as meaning that the Court of First Instance disregarded relevant statements by the applicant, that could not be accepted. Moreover it may be noted that in the appeal the applicant relies only on the special report of the Court of Auditors. It is true that therein the Court of Auditors criticizes the conduct of the financial controller, but only in relation to a given procedure applied in accounting for the expenses, reimbursements and allowances paid by the members' cash office. That has nothing to do with the complaints at issue in this case.

188. The applicant's arguments based on general principles must therefore also be rejected, and it is not necessary to refer to the 'independence of the disciplinary proceedings' emphasized by the Court of First Instance.

189. Finally the applicant regarded the disciplinary decision as a misuse of powers because he was penalized for infringements of form as if they had been confirmed complaints of substance. The Court rejected that argument. It declared, in accordance with the definition of misuse of powers recognized in the consistent case-law of the Court of Justice, that the applicant failed to provide relevant proof to justify the conclusion that, by instituting disciplinary proceedings against him, the appointing authority was pursuing an objective other than that of safeguarding the internal order of the European public service. The fact that the applicant was downgraded for formal irregularities does not suffice to establish that the administration, as he contended, brought proceedings against him with the sole purpose of offering him up as a sacrificial victim. [104]

190. The applicant acknowledges that the assessment of the relevant evidence is a matter for the Court, and he leaves it to the judgment of the Court of Justice to decide whether the Court of First Instance, regard being had to the applicant's arguments, has not overstepped the limits of its power of assessment.

104 — Paragraph 214 of the contested judgment.

191. As the applicant does not make it clear in what respect the Court of First Instance is alleged to have exceeded its powers, this argument too, and accordingly the whole of this plea, must be rejected.

Breach of the principle of proportionality

192. The Court of First Instance also rejected the applicant's argument that there was an obvious disproportion between the importance of the complaints made against him and the severity of the disciplinary measure adopted against him. The Court first referred to the fact that it could not substitute its own judgment for that of the appointing authority except in the case of a manifest error or misuse of powers. Moreover there is no fixed relationship between the disciplinary measures provided for in Articles 86 to 89 of the Staff Regulations and the various types of failures by officials to comply with their obligations. The determination of the penalty to be imposed in each individual case must however be based on a comprehensive appraisal of all the particular facts and the aggravating or mitigating circumstances peculiar to the case.

193. On this correct basis, uncontested by the applicant in his appeal, the Court of First Instance referred *inter alia* to the serious nature of the applicant's failings and to the fact that as the accounting officer he had been primarily responsible, according to the provisions of the Financial Regulation, for the proper functioning of the accounting division.

194. The applicant now expresses the opinion that the Court did not reply to his arguments to the effect that the infringements complained of were of a formal nature and that in addition it had been recognized that in addition there were extenuating circumstances. That amounts to a complaint that the Court did not provide a sufficient statement of its reasons for rejecting his arguments.

195. In my view, however, the answer to the applicant's arguments at first instance is to be found in the Court's reference to the serious nature of the infringements established.

196. That applies, first of all, to the view of the 'formal nature' of the infringements. It is obvious that infringements of formal provisions of the Financial Regulation, which are meant to ensure proper administration and to safeguard Community assets, may also be described according to the circumstances as serious infringements, that is, as seriously prejudicing the Community's interests. That depends upon the precise purpose of the rule infringed, the amounts in question and the situation in which the infringement in question occurs. It is impossible therefore to question the Court's answer.

197. As regards the aspect of extenuating circumstances, it must be admitted that such circumstances are normally taken into account in the severity of the penalty imposed. But the 'basic penalty' (according to the disciplinary decision in this case, that was removal from post), which may if appropriate be mitigated in view of such circumstances, depends on the seriousness of

the infringement. The Court of First Instance therefore replied to the applicant's argument with another and comparatively more essential factor for determination of the penalty. I cannot, in that respect either, detect any defect of reasoning, particularly as the Court had only to consider whether the appointing authority had committed a *manifest* error.

198. In addition the applicant thinks it is incorrect, in so far as the Court of First Instance relied upon it, that the applicant as accounting officer of the institution was primarily responsible for the proper functioning of the accounting division. That contradicts what the Court had declared elsewhere (namely in paragraph 203 of the contested judgment) with regard to the administrator of advance funds.

199. With regard to this argument it must be stated that under Articles 20 and 70 of the Financial Regulation a special responsibility is assigned to the accounting officer, corresponding to an important position emphasized by the Treaties (see subparagraph (c) of Article 209 of the E(E)C Treaty and the corresponding provisions of the other Treaties. There can be no legal objection if these factors are taken into account in the fixing of penalties as was done by the appointing authority in the disciplinary decision and the Court of First Instance in its judicial review. That is independent of whether the accounting officer has (personally) infringed substantive provisions of the Financial Regulation or has failed to comply with his duty of supervision towards the administrator of advance funds, which also corresponds to the special position of the accounting officer.

200. If in a particular case (in this case with regard to the opening of the account) the administrator of advance funds may be responsible together with the accounting officer (namely if the former has infringed the relevant substantive provisions and the latter his duty of supervision), that does not prevent the special situation of the accounting officer from being taken into consideration as against him in the fixing of the penalty. Contrary to what the applicant appears to think, there is no contradiction between the responsibility on this point of the administrator of advance funds as the person actually taking the action and the special position of the accounting officer.

201. These arguments by the applicant must accordingly be rejected.

The submissions concerning the appointment of a committee of experts

202. These submissions, according to the findings of the Court of First Instance, sought an expert opinion with regard to the question whether the complaint regarding the absence of supporting documents for a sum amounting to BFR 4.1 million was well founded. The Court did not regard the production of evidence thus requested as serving a useful function and therefore refused it, regard being had, *inter alia*, to 'all the documents on the file, as analysed in the course of the Court's examination of the charge based on the failure to present supporting documents (see paragraphs 195 to 202 above)'. [105]

105 — Paragraph 228 of the contested judgment.

The Court was thereby calling attention, as the applicant correctly observes, to the fact that the Court had already convinced itself on the basis of its assessment of the facts that the disciplinary decision rightly made the complaint at issue.

203. On this point the applicant refers only to his arguments to the effect that the Court wrongly regarded the complaint as well founded.

204. Here my view is that the Court was entitled to refuse the application on the ground to which it referred. The relevant facts had already been investigated on several occasions by the Court of Auditors which, as between the parties, was an independent body. The Court based its assessment *inter alia* on the findings of the Court of Auditors.

205. As the applicant did not advance any grounds for thinking that the committee of experts could discover new facts, there can be no objection to the Court's refusal.

206. In this connection the applicant repeats that after his transfer he could not make the necessary investigations. However, the Court rejected that argument, which was based on an infringement of the rights of the defence and these proceedings have produced no grounds for establishing that that rejection offended against Community law.

207. Finally the applicant refers once more to the fact that at the time of his transfer there was no rendering of accounts. However, he has not even asserted that the absence of a rendering of accounts called in question the probative force of the documents relied upon by the Court. Quite apart from the question how far such an assertion could in any event be tested on appeal, that argument is therefore unsound.

208. This plea too, relating to the applicant's request for the provision of evidence, and the final plea in this appeal, must therefore be rejected.

C — Conclusion

209. On the basis of all the foregoing considerations I propose that the Court of Justice should:

— dismiss the appeal;

— order the applicant to pay the costs in pursuance of Article 122 of the Rules of Procedure.